Public Affairs Quarterly
Volume 36, Number 1, January 2022

PROPORTIONALITY-PRESERVING POLYCENTRICITY

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The dominant justifications for criminal punishment are typically committed to proportionality with a bias towards leniency. Over-punishment is more troubling than under-punishment. In practice, proportionality depends on the institutional framework governing criminal justice practices. Recent social scientific research has generated important insights about the relationship between institutions and punitive outcomes that are relevant for these dominant punishment philosophies. We survey this evidence alongside a framework that explains why more centralized and hierarchically managed institutions are associated with harsher punishments than more polycentric institutions. Centralized criminal justice institutions thus face a greater justificatory burden than polycentric systems.

I. Introduction

Theories of punishment that aim to justify harsh treatment of criminals typically include some proviso about the fittingness[1] of punishment.[2] "Let the punishment fit the crime." Such statements indicate there should be a positive relationship between the severity of the crime and the severity of the punishment. If a punishment causes a deprivation that is substantially more severe than the moral wrongness of the crime, then the punishment is *not* justified, even if it meets every other criterion imposed by a correct theory of punishment. We call this the *Proportionality Proviso*.[3]

Just as theories of punishment typically include some commitment to proportionality, they usually include a bias toward leniency.[4] We may be allowed to punish *less* severely than what is justified, but we cross into unjustified territory when we punish too severely. Hence, the Proportionality Proviso usually includes a *Lenient Tilt*. Insufficiently severe punishments may be morally troubling, but they are *ceteris paribus* less troubling than overly severe punishments. We take this Proviso with its Tilt as a starting point since it is a shared commitment among most popular competing punishment theories.

Rather than inquiring into the right way to justify punishments, this essay examines the justification of punishment institutions.[5] Institutions are systems of formal and informal rules and their enforcement mechanisms.[6] The institutions most relevant to criminal punishments include but are not necessarily limited to those systems governing legislative processes, the policing regime for detecting crimes, the judicial process for assuring legal equality, and the punitive apparatus for administering sentences. Our argument is *not* that these institutions solely *determine* punishment outcomes; a variety of other factors (such as normative commitments) can affect them as well. But institutions matter: they play an important role in mediating and filtering practices and outcomes.

Just as individual acts of punishment require justification, so, too, does the institutional framework that generates punitive outcomes. Systems of punishment that predictably violate the Proportionality Proviso—especially those that also lean toward more severe punishments—are unjustified if other systems are feasible and the consequences of switching are not too onerous. Identifying institutions that can reliably satisfy the Proportionality Proviso requires institutional analysis.[7] Nearly all US states have undergone reforms aimed at proportionality, with mixed results,[8] suggesting that getting punishments right can be quite difficult.

Our argument is that polycentric criminal justice institutions are more likely to discover and implement punishments that satisfy the Proportionality Proviso with a Lenient Tilt. Criminal justice institutions are polycentric when independent jurisdictions compete for citizens by offering different bundles of legislation, policing, trial, and punishment practices. Centralized institutions, by contrast, have less capacity for correcting errors of disproportionality and tend to impose more severe penalties. Figure 1 summarizes our understanding of the relationship between institutional polycentricity and the proportionality of punishments that such institutions tend to produce.

This essay proceeds as follows. First, we argue that the three main theories justifying punishment all have good reason to support the Proportionality Proviso with a Lenient Tilt. Second, we argue that punishment practices that reliably satisfy the Proportionality Proviso do so by successfully coping with a *Punishment Knowledge Problem*. There is a knowledge problem of getting the punishments right in criminal justice (read as satisfying the Proportionality Proviso with Lenient Tilt) that closely parallels the knowledge problem of getting the prices right in economic activity. Third, polycentric institutions tend to better cope with the Punishment Knowledge Problem. Centralized punishment institutions, since they have fewer nodes of informational detection and decision-making authority, are

prone to committing errors that go uncorrected, thus increasing the likelihood of violating the Proportionality Proviso. Moreover, since they disperse the costs of severity, such regimes tend to punish more severely than polycentric systems, increasing the likelihood of violating the Lenient Tilt. We outline a spectrum of institutional possibilities ranging from most polycentric to most centralized. Our argument is not that centralization is never warranted or that only certain institutions are justified, but rather that (a) more centralized systems have a higher justificatory burden, and (b) that the Leniency Tilt entails a Polycentric Tilt in institutional evaluation and design.

II. Why Fittingness?

Fittingness is a common thread through most popular theories of punishment.[9] Our claim here is not that all theories share equally strong reasons for proportionality, or an equal bias toward leniency. All we seek to establish is that popular theories of punishment all include the Proportionality Proviso with a Lenient Tilt.[10]

Retributivism offers desert as a reason for punishment.[11] Punishment is justified because the criminal, by harming others or violating an important rule, deserves harsh treatment. Retributivists conceptualize punishment as restoring a balance between rights-holding individuals disrupted by criminal acts. Committing a more harmful crime thus alters the sort or severity of treatment that an individual is owed.[12] Desert is rarely a binary. Murder is typically more severe than battery, even though both violate individual rights. If crimes can vary in severity, then the harsh treatment should vary as well. If the criminal is treated in an extremely harsh manner for a minor offense, the severity of the punishment over and above what is deserved is unjustified precisely because the punishment has created a new imbalance of undeserved suffering.[13]

The retributivist justification for punishment entails a *permission* to punish rather than a strict *obligation* to punish. In some situations, it may be desirable to impose a *less* severe punishment than what is justified. Criminals may have acted in desperate circumstances or may perform good deeds searching for redemption. Authorities may have scarce resources, forcing them to economize within some set of legitimate punishments. Governments may need funds to provide more essential services like national defense or local security. Such reasons for leniency are fairly commonplace. Punishments that are too severe are unjustified, while punishments that are too lenient may be permissible. This is not to say that any degree or form of leniency is justified—only that over-punishment and under-punishment are not symmetric harms.

Communicative theories focus on the message that harsh treatment sends to criminals.[14] Just as desert anchors claims of fittingness for retributive theories, the notion of moral expression grounds the communicative understanding of proportionality.[15] A common thread running through communicative theories is

that there is a moral community within which any judicial system operates. Some crimes are more disruptive to that community than others. By fitting the severity of punishment to the severity of the crime, authorities send a clear signal about the values they seek to enshrine in the law, how those values relate to each other, and the extent to which the crime warrants condemnation. Doling out punishments along a continuum is more likely to enhance a moral community than enshrining a strict dichotomy between criminals and non-criminals.[16]

The concept of a moral community likewise underwrites a Lenient Tilt. Many communicative theorists would include reconciliation among the goals of punishments. By sending a clear and fair signal about the seriousness of a crime, the punishing authority extends an opportunity for the criminal to demonstrate remorse, make amends, and be readmitted as a community member.[17] Errors of overly severe punishments may provoke feelings of resentment or persecution that can work against this goal. There is a wealth of social scientific evidence documenting how excessive punishments may increase the probability of future criminal activity, providing empirical support that over-punishing is more problematic for the maintenance of community than under-punishing.[18]

Consequentialist theories focus on instrumental reasons for punishing.[19] As such, they do not offer a principled commitment to fittingness or leniency. Punishments are judged by their ability to deter criminal activity. Nonetheless, there is a compelling consequentialist case for matching the severity of a punishment to the crime.[20] If criminals confront the same penalty for committing a less severe crime that they face for a more severe crime, they are on the margin, likely to choose to perform the more severe crime. If both robbery and murder carry the death penalty, it is safer to murder one's victims to keep them from testifying.[21]

The unintended consequences driven by this potency effect[22] give authorities good reason to make punishments proportionate to crimes. They likewise commend a bias toward leniency since it is overly severe punishments that inspire more severe crimes. Another good reason to err on the side of lenient punishments is the cost of enforcing rules. Whether through plea bargaining or other means, authorities have a better chance of successfully enforcing laws if there is some buy-in from potential criminals. This is not to say that all consequentialist defenses will err toward leniency—it *is* possible to under-punish—but only that, as a matter of general principle, the harms of leniency are smaller than the harms of severity.

III. Fittingness as a Knowledge Problem

The problem of "getting the punishment right" is analogous in important respects to the economic problem of "getting the price right." Philosophers and social scientists as diverse as Jeremy Bentham,[23] John Rawls,[24] Michael Davis,[25] Andrew von Hirsch,[26] and Gary Becker[27] have leaned on this analogy or, more formally,

utilized price theoretic models to derive standards of proportionality. We argue that this metaphor is more than skin-deep, and finding proportionate punishments confronts challenges similar to finding "correct" prices.

Whereas a fitting punishment matches the severity of treatment to the severity of crime in accordance to the Proportionality Proviso with Lenient Tilt, a "correct" price balances the quantities demanded and supplied of goods or services throughout a market economy. Individuals purchase units until the market price exceeds their perceived benefit. Hence, correct prices reflect the patterns of relative scarcity in society: how much is available compared to how much people want. When such prices obtain, individuals' expectations are mutually consistent. When prices are "wrong," it means that some individuals' expectations will be disappointed.[28] Either buyers will go unsatisfied amidst a shortage, or sellers will suffer losses due to insufficient sales. What matters for institutional design is not an enumeration of the properties of correct prices, but an understanding of the conditions that allow for *more* correct prices to emerge.

Market institutions tend to bring prices into alignment with relative scarcities when two conditions hold.[29] First, there is an open process of contestation whereby newcomers can challenge existing practices. Economists identify such *contestability* as a key aspect of markets that generate economic order.[30] Prices can be wrong. Indeed, at any given time, some prices are certainly wrong, either due to previous entrepreneurial errors or to changing conditions of supply and demand. Incorrect prices reflect imperfect knowledge on the part of market participants. To correct such discrepancies, the relevant knowledge about relative scarcities must be discovered, and those who discover it must be free to act on it. Alternative buyers can bid prices up amidst scarcity, or alternative sellers can bid prices down amidst abundance. Such actions move prices toward their correct, market-clearing value.

The second condition for correct prices to emerge is that costs and benefits must be borne by decision makers. If individuals are insulated from the effects of their choices, they may not have an incentive to set prices that reflect the knowledge and values of others. Well-functioning market institutions not only generate knowledge through contestation, but they also *align incentives* to act on that knowledge and correct detected errors. For markets to work well, institutions must mitigate a host of potential failures, including externalities, moral hazards, and asymmetric information.[31]

We are not concerned here with how often these two conditions, contestability and incentive alignment, hold in real market contexts. But when they do, the market process acts as a discovery procedure. In such circumstances, market institutions generate tight feedback between entrepreneurial conjectures and the realities of economic activity, leading to prices that tend toward being more correct. Economic actors without access to such a process cannot effectively cope with knowledge problems.[32] If they have access to prices at all, those prices do

not reflect the dispersed knowledge of economic actors and thus do not approximate relative scarcities. They may also confront an incentive problem by being rewarded for pursuing goals that do not correspond with increasing coordination of economic activity.

Ideal punishments are like competitive equilibrium prices, balancing a range of competing values with the unfortunate necessity of punishing some activities with harsh treatment. But a theory of ideal punishments is no substitute for a set of institutions that allow for more fitting punishment practices to emerge, just as a theory of ideal prices is not a substitute for effective market institutions.[33]

As noted above, many punishment theorists already accept that there is an important analogy between market prices and punitive severity. One might object that we are stretching this analogy too far by supposing that a knowledge problem afflicts criminal justice as it does economic activity. We do not mean to imply that the two problems are identical in scale or scope, especially not when it comes to the normative evaluation of criminal or punitive severity. The Proportionality Proviso only calls for a rough fit between crimes and punishments, whereas economic coordination requires more precise alignment of quantities supplied and demanded. However, there are several reasons the analogy between prices and punishments is substantive rather than merely suggestive.

First, in practice, severity is not a single variable. Crimes can harm victims in a multitude of ways. Punishments can vary just as much.[34] The primary metric of punitive severity in most advanced countries is time incarcerated. But even the severity of a prison sentence varies according to a range of factors, including the physical conditions of the prison, the privileges of inmates, and the behaviors of other prisoners. Comparing years behind bars to the trauma of an assault may be like comparing apples and oranges.[35] While an individual may be able to imagine a price they would pay to avoid being victimized and relate it to a price willingly paid to avoid punishment if they were a criminal, unexpected victimization entails an experience unparalleled by imagined prices.[36] This problem of commensurability is analogous to the problem of relative scarcity that economic agents confront. But without money prices providing a measure of willingness to pay, there is ample room in such thought experiments for cheap talk and preference falsification.

Second, fittingness involves balancing the moral and instrumental demands of a wide range of parties. There is the harm to victims, which may include friends and family, as well as those directly affected by a crime. Some theories emphasize harm to the community at large, and most theories acknowledge varying levels of criminal culpability. Culpability is a function of diverse circumstances. These problems again strongly parallel those of economic agents, who confront competing preferences and expectations. Residual claimancy and private property rights usually provide incentives to solve these problems through honest rather than strategic expressions of preferences.[37] Moreover, harm often entails a loss of

wealth, and the punishment of criminals involves the expenditure of productive resources. Whenever this is the case, criminal justice both parallels economic activity, and overlaps with it.[38]

Third, harms and culpability are contextual. They cannot be ascertained *a priori* but require knowledge of time and place. Crimes can be grouped into abstract classifications based on their general propensity to harm, but the actual harm inflicted varies widely based on the social context of the crime, the circumstances of the victim, and the details of how it was committed.[39] In ancient societies, the theft of a horse could ruin a household. Consequently, duties regarding others' horses were very stringent, and punishments could be very severe.[40] In a modern economy, horse theft would only represent the loss of a valuable but not crucial asset. Stealing $100 from a poor man imposes more harm than stealing $100 from a billionaire.[41] Not all physical assaults are equally vicious. Breaking the leg of a professional athlete may impose more dire consequences than breaking the leg of a financial accountant. Again, the analogy here to economic processes is strong: the knowledge relevant for economic coordination is as much transitory and local as it is scientific and universal, if not more so. Local knowledge matters as much as moral principles, in achieving punitive fit.

Proportionality theorists offer loose ordinal scales of criminal harms and anchor them to similarly gauged menus of punitive severity. Such matching schemes will vary from one environment to another. Different communities will gauge the harms of particular crimes and the benefits of particular punishments differently,[42] even as the relative rankings of crime types tend to be roughly consistent across a variety of social environments.[43]

Finally, punishment outcomes also depend on how punishment practices are structured. Legislation, police procedures, the organization of courts, rules of evidence, the provision of forensic services, and the industrial organization of prisons all influence the real levels of punitive severity in society. Philosophers typically focus on the normative justification(s) of punishment assuming that the punished is guilty and that the punisher is well intended, but whether this holds in reality—and whether we can reliably say it does—depends on a host of logistic factors.[44] Aligning these factors into a system that produces (or at least systematically tends toward) just and proportionate outcomes relies on the utilization of dispersed knowledge just as economic coordination does.

Our argument is not to advocate a "market for punishment" that utilizes money prices, exchange relationships, or entrepreneurial freedom of entry to solve these problems,[45] though some scholars have gone that route.[46] Rather, our goal is to highlight the knowledge problem confronting criminal justice authorities that seek to impose fitting, justified punishments. Absent a common denominator, without a mechanism for expressing the true level of harm caused by crimes and punishments, and without a reliable way of utilizing local knowledge, evaluations of severity can only be valid in a very rough sense. The combination of these

factors limits the ability of a theory of punishment to generate actual fittingness. Sound institutions are needed to close the gap between theory and practice.

IV. Polycentric vs. Centralized Punishment Institutions

Punishment institutions take a staggering range of forms. Any analysis of institutional possibilities necessarily highlights some features of institutions at the expense of others. Our taxonomy focuses on two features of market institutions that enable actors to cope with knowledge problems: contestability and internalization of costs and benefits. Punitive institutions likewise cope with knowledge problems to the extent that they embody these features.

Many components of a legal system can affect contestability and incentive compatibility. One underexplored component is the extent to which legal institutions exhibit *polycentricity*. Polycentric governance arrangements are those in which independent jurisdictions can offer different policies.[47] Authority in such a system is fragmented and concurrent rather than centralized in an overarching body. Individual jurisdictions have latitude in designing and implementing rules, policies, and bundles of services; and they compete with one another for "customers" or citizens who select more desirable baskets of provisions.

To the extent that jurisdictions are independent and competitive—which will depend in part on the cost of switching jurisdictions—policy providers confront both contestability and internalized costs and benefits. Polycentric systems achieve internalization primarily through entry and exit. Jurisdictions that offer appealing governance attract individuals and organizations, providing revenue in the form of user fees and taxes, as well as other social benefits such as increased cultural and economic activity. Competition for these benefits spurs experimentation and learning, enabling providers to discover better policy bundles, copy successful models, and respond to local and changing conditions.[48]

Political scientists and economists have documented the capacity for polycentric systems to generate social learning in spheres as diverse as police protection, local public goods, natural resource management, and the administration of foreign aid.[49] Polycentricity is often a least-bad option for coping with the *demand revelation problem* that confronts public goods provision. What public goods should be provided, by what means, and to what extent? Such questions are fraught with the possibility of error, so experimentation and competition are just as important for public goods as for ordinary goods traded in markets. More centralized systems, by contrast, have less capacity for detecting and correcting errors. The costs of bad policies are dispersed among a wider population, allowing them to persist even if they are large in aggregate. Centralization also stifles experimentation, offering fewer opportunities to observe the effects of alternative policies. Concentrating authority can lead to homogenization of policies, impeding adaptation to

local conditions, and it makes altering policies over time more costly. As Nobel economist Elinor Ostrom notes,

> when there is only a single governing authority, policymakers have to experiment simultaneously with all of the common-pool resources within their jurisdiction with each policy change. And, once a major change has been made and implemented, further changes will not be made rapidly. The process of experimentation will usually be slow, and information about results may be contradictory and difficult to interpret. Thus, an experiment that is based on erroneous data about one key structural variable or one false assumption about how actors will react can lead to a very large disaster.[50]

These general insights about polycentric vs. centralized systems, we argue, are likewise true of punishment institutions. Specifically, polycentric systems tend to generate punishments that satisfy the Proportionality Proviso with a Lenient Tilt more reliably than do centralized systems. Conversely, as centralization increases, the odds that disproportionate systems of punishment will remain unchallenged increase. We take it as given that all sorts of punishment institutions will involve some errors of disproportionality. What makes polycentric and centralized systems different is their relative capacity for detecting and correcting such errors.

Most obviously, polycentrically organized jurisdictions can experiment with different rules and legal procedures shaping punishment outcomes. This process, though messy, allows for errors of disproportionality to be detected. In the absence of omniscient planners, such experimentation is the best we can hope for when it comes to coping with knowledge problems. Experimentation with different criminal justice policies also allows jurisdictions to adapt punishment practices to local economic and environmental conditions, allowing for a tighter fit between the severity of crimes and punishments.

Centralized systems, by comparison, have less capacity for detecting and correcting errors of disproportionality. If the punishment levels are wrong, there is less experimentation to find more fitting punishments, since criminal justice practices are less contestable. Centralized systems can only engage in serial experimentation, not in concurrent or independent experimentation, which are more conducive to generating social learning.[51] There is also less scope for adapting punishment practices to local conditions: a crime wave in some locations may spark an increase in severity tactics that is disproportionate for other areas in the same jurisdiction.[52]

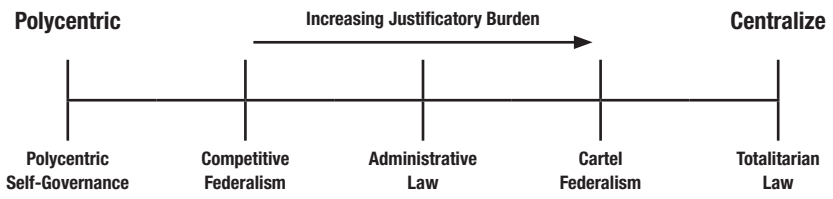
Polycentricity also provides incentives to get punishments right. As noted, disproportionate punishments may create incentives for increased criminal behavior. Overly lenient punishments fail to deter crime, while excessive punishments create perverse incentives to commit more severe crimes. Insofar as policy makers want to attract individuals and organizations to their jurisdictions, they have an incentive to balance these considerations. And jurisdictions that cannot rely on

outside funds are fiscally constrained from erecting a gargantuan punishment apparatus, providing a bulwark against excessive punitivity. These instrumental considerations give reason to think that even self-interested individuals in a polycentric system will place pressure on policy makers to develop proportionate systems. If some citizens, driven by expressive or retributive concerns, have a more principled commitment to finding fitting punishments, these incentives may be strengthened.

Centralization, on the other hand, creates incentives to enact punishments that are not only disproportionate, but also overly severe. Centralized political structures concentrate the benefits of harsh punishments to politicians (who get votes), bureaucrats (who get funding), and special interest groups (who supply resources to politicians and bureaucrats), while dispersing costs on the federal citizenry and criminal defendants.[53] This creates a tendency to grow the organizational apparatus of criminal justice rather than produce a just system of crime prevention and punishment. Criminal justice professionals benefit directly from over-criminalization, which draws more individuals into the system and leverages incarceration to keep them there.[54] These incentives lead to more militarized police, prosecution offices with more technologically equipped forensics teams, the construction of more prisons, and larger criminal justice labor forces. As criminal justice becomes centralized, these costs become more widely dispersed, undermining the fiscal constraints confronted by smaller jurisdictions. Larger jurisdictions also make it costlier to reform policies, muting the voices of those motivated by concerns of proportionality.

V. Institutional Possibilities and Justified Punishments

Polycentricity is a matter of degree, not an either/or quality of institutions. Jurisdictions vary in size, level of independence, and ease of entry and exit. Figure 2 presents an array of institutional alternatives, from most polycentric to least. We do not aim to be exhaustive: one could locate any number of other historical examples or hypothetical alternatives between or overlapping with those we identify. Rather, our primary aim is to illustrate the veracity of our institutional analysis: as systems become more centralized, they (a) increasingly struggle with the Punishment Knowledge Problem and (b) increasingly err in the direction of severity rather than leniency.



Our aim is not to establish some cutoff beyond which further centralization is unjustified. Rather, we argue that more centralized institutional frameworks bear a higher justificatory burden. Centralized criminal justice institutions tend to incentivize punishment practices that are more severe, and are less likely to correct errors of disproportionality. They are thus more likely to violate the Proportionality Proviso with a Leniency Tilt. A strong burden of proof thus rests on those who would advocate further centralization.

There is no simple metric for punitive severity at the individual level because crimes and punishments take a wide variety of forms. While objective and reliable measures of overall punitive severity do not exist at the cross-country level,[55] recent research has produced some stylized facts consistent with our arguments in favor of more polycentric systems.[56] These studies also weaken some leading rival explanations for the disturbing trends in mass incarceration. Rapid growth in inmate populations in recent decades has been a *global* phenomenon that cannot be fully attributed to changes in crime, cultural differences, economic policies, modernity, racial tensions, or policy baskets such as drug prohibition.[57] Most importantly for our case, nations with similar political and economic institutions have similar punishment practices and imprisonment outcomes.[58] Countries with a legacy of socialist law have higher prison population rates and apply the death penalty more frequently. Common law countries are next, followed by civil law countries.[59]

Any convincing account of punishment institutions needs to account for these stylized facts. Our taxonomy of institutions resolves the apparent tensions between the stylized facts—socialist and common law countries tend to punish more than civil law countries—as well as fitting into our account of polycentricity. After briefly defining the characteristics of the endpoints, we offer a detailed analysis of each of the middle three categories, since they encapsulate most contemporary forms of criminal justice.

The Endpoints: Polycentric Self-Governance vs. Totalitarian Law

Systems of polycentric self-governance define one extreme on our spectrum, since they characteristically lack central authorities. In her Nobel address, Elinor Ostrom calls on social scientists to study polycentrically organized systems "beyond markets and states."[60] She identifies such as "self-governing" because end users—those utilizing a resource or citizens involved in the co-production of public safety—play a crucial role in developing and maintaining institutions. Examples of self-governing criminal justice systems include some premodern legal systems,[61] protections against fraud and theft within international trade networks,[62] and most of the resolution of cybercrime.[63] Self-governing systems express commitments to proportionality across a variety of different social contexts, sometimes including explicit menus of punishments for offenses.[64] Despite wide variation in punishments, these menus exhibit ordinal consistency at an abstract level across

different times, places, and cultural contexts: intentional harms are treated more severely than accidents, petty thefts are punished less than grand larceny, and assault is less punished than murder. Citizens embedded within such systems, because they bear the costs of punishment directly, also tend to accept relatively lenient outcomes and tend to coordinate conflict resolutions and restitution-based norms. In such settings, individuals who are owed financial damages typically settle for cents on the dollar. The predictability of modest returns outweighs the uncertainty of full compensation or additional damages.[65]

On the opposite end of the spectrum, totalitarian regimes like the Soviet Union are well known for horrific punitive tactics. Many are wary of including totalitarian cases in comparative studies of punishment, as their institutions seem directed toward social control rather than the preservation of law and order. However, it is precisely the goal of social control that makes a centralized law enforcement apparatus useful, and such systems have a strong tendency to be captured by those who desire such control.[66] The result is a complete abandonment of any dedication to proportionality or leniency. When counting forced conscriptions, forced labor, and internment, it is estimated that over 4 million people were imprisoned in the Gulag system.[67] Similarly, more than 3.5 million Germans were forced into concentration camps between 1933 and 1945.[68] The material conditions within such institutions ranged from starvation to corporal beatings and mass executions.[69] Today, nations with a legacy of socialism have the highest average incarceration rates, imprisoning 239 more inmates per 100,000 citizens than other countries.[70]

Competitive Federalism

Competitive federalism has two key features. First, jurisdictions have independent criminal justice systems. Some rules and practices may be fixed at a federal level, but smaller units have freedom to determine punishments for crimes *and* the responsibility of bearing the costs of those punishment practices. Second, individuals can move freely from one jurisdiction to another so that policy making is carried out in a competitive fashion.[71] These competing jurisdictions are more centralized than fully polycentric systems.

Examples of competitive federalism include the early United States from its initial settlement until the New Deal, and contemporary Switzerland's system of cantons—districts that are each responsible for the provision of criminal justice therein. In both systems, different jurisdictions operate under an overarching system of constitutional law. Local authorities are constrained by practical fiscal matters, giving them an incentive to balance the need for criminal punishment with costs.[72] In these systems, reliance on local provision also helps promote networks of social capital that improve public service provision, including criminal justice.[73]

The early United States hosted a diverse sample of punishment norms and magnitudes in conjunction with its diverse jurisdictional landscape. Local communities

were responsible for crafting criminal legislation, financing and managing police forces, staffing courts and juries, constructing jails, and calculating and administering punishments.[74] Commentators made note of both the effectiveness of these punishments and their leniency when compared to other legal systems.[75] Beaumont and Tocqueville attributed these outcomes to the decentralized political structure of the early United States and expressed doubt such could be replicated in more centralized France.[76] Research has similarly revealed that local wardens identified inmates for early release who had lesser likelihood of recidivism.[77]

Switzerland is a federal republic comprised of twenty-six separate cantons and unified by a common constitution. Adopted in 1848 and modeled after the US Constitution, the document prohibits arbitrary arrests, detentions, and excessive force. "Police duties are primarily a responsibility of the individual cantons, which have their own police forces that are under effective civilian control. The National Police Authority has a coordinating role and relies on the cantons for actual law enforcement. . . . All courts of first instance are local or cantonal courts,"[78] with the Supreme Court the ultimate source of appeals. An independent judiciary is responsible for keeping fair trials. Swiss cantons are also fiscally independent, responsible for covering the costs of their own policies.[79] As result, Switzerland has an extremely low incarceration rate (32 per 100,000 citizens) and low crime rates.[80]

Administrative Jurisdictions

Administrative law differs from competitive federalism in that criminal justice practices are codified and funded by the central state, but carried out on the local level. Judges have room for discretion in what laws they choose to enforce as well as in sentencing, but jurisdictions do not compete by offering formally distinct bundles of public services and taxation schemes.

The clearest example of administrative law is the French system. Napoleon aimed to submit local magistrates to royal authority through codified legislations and punitive sanctions.[81] Individual citizens and victims play a substantially lesser role under the inquisitorial civil law process.[82] But while laws and punishments under the civil law are more codified by national authority, judges possess a greater veto power via discretionary responsibilities to press or dismiss charges. If the nature of an offense fits the formal definition of larceny, but the degree of harm caused by the crime is perceived as mild relative to the sentence, agents throughout the justice process can dismiss with reference to the substantive justice of the case.[83] Judges are appointed for life, protecting this wide discretion.

While codified punishments have been associated with heightened sentencing and prison growth in the United States and other common law nations, civil law countries have partially avoided penal largess. Competitive bureaucratic interest groups "diverted" fiscal, material, and labor resources from penal avenues and toward other public services.[84] Consequently, countries with French civil legal origins have 143 fewer inmates per 100,000 citizens than nations under common law.[85]

Cartel Federalism

Common law is typically thought to be more decentralized than civil law. But in reality, some common law countries today have *more* centralized criminal justice systems than civil law countries. This is explained by the emergence of *cartel federalism* around the middle of the twentieth century.[86] Cartel federalism maintains the *de facto* trappings of competitive federalism, but it detracts from *both* local funding *and* local control over government policies, including punishment practices. This centralization is achieved by direct federal funding of certain functions or by making funding conditional on local governments altering policies to match federal goals. These factors give central governments more control over punishment than under administrative systems, allowing jurisdictions to act as a cartel rather than compete.

The best example of cartel federalism is the contemporary United States. The New Deal effectively inverted the power dynamics between the various levels of government. Whereas local jurisdictions possessed early primary authority, federal authority via regulatory interventions and public spending grew to dominate state policy throughout the twentieth century.[87] This broader trend carried over to criminal justice practices. Incentives of decision makers across states were reshaped by newly crafted national legislations and criminal prohibitions such as the crime omnibus bill, the war on drugs, efforts to professionalize police forces, direct federal enforcement of some crimes, and financial incentives like civil asset forfeiture. This caused lawmakers to expand criminalization, grow bureaucracies, implement harsher sentencing guidelines, and support prison industrialization. Voters and local policy makers were encouraged to localize the benefits of increased criminal justice resources while dispersing costs to the general electorate.[88] The once-decentralized network of criminal legal jurisdictions became less competitively restrained from punitive excess and instead was cartelized. Differences in punishment practices have faded, and states do not bear the full costs of their chosen severity, thus muting the benefits of competition.

At first glance, the United States seems to be a punishment outlier, including its use of the death penalty, mandatory minimums, prosecution rates, and overcrowded prisons, leading the developed world in net prison inmates and per capita rate. But other common law countries such as the United Kingdom (135 inmates per 100,000 citizens) have seen similar trends of increased centralization of law enforcement over the twentieth century; they also have larger prison populations compared to the global median (103 inmates per 100,000 citizens) and especially larger than the median incarceration rate within civil law nations (93 inmates per 100,000 citizens).[89]

That this increased severity is due to federal centralization and not to the common law itself is best illustrated by the case of Louisiana. Having been originally founded by France, Louisiana's system relies upon the Napoleonic code.

Legislation, regulation, and tort procedures are all more like a civil law system in Louisiana than in any of the other forty-nine states.[90] As in cross-country comparisons of legal origins, Louisiana's economic performance lags behind other American states. On top of the state's poor economy, national policies to enforce immigration restrictions and drug prohibition foment a higher rate of violent crime. And just like other states, Louisiana's law enforcement apparatus has largely been co-opted by the policies of the federal government. According to our framework, Louisiana has the worst of both worlds: local civil law with cartel federalism layered on top. So it is no surprise that Louisiana currently has the highest per capita incarceration rate on earth (816 inmates per 100,000 capita).[91]

VI. Replies to Objections

Backdoor Consequentialism

One potential objection to our position is that while it purports to be relevant to retributivist and expressivist positions, it relies on strictly consequentialist considerations. We have focused on the comparative effects of different legal systems rather than on their intrinsic value. But our approach should not be confused with the claim that institutions should *only* be evaluated according to consequences. For example, institutions constituted by wrong practices can be judged *prima facie* wrong before examining their effects. We do not deny this. For example, we agree that hanging an innocent is unjustified even if it produces deterrence. Our point is more narrow: insofar as someone accepts the Proportionality Proviso with a Lenient Tilt as a standard for judging punishment practices, the justificatory burden will increase as the criminal justice system becomes more centralized, since centralization tends to increase punitive severity. Other normative considerations may in fact meet that justificatory burden.

More generally, the backdoor consequentialism objection confuses the relationship between normative philosophy and social scientific analysis. There is an important distinction between the philosophical articulation of an ideal and the evaluation of which institutions best map onto that ideal. Normative considerations are necessary for developing judgments about what standards are appropriate for institutional evaluation. However, whether a system will tend to live up to that ideal is largely a social scientific question that cannot be answered with pure philosophical analysis. Economists and political scientists frequently utilize consequentialist moral standards such as economic efficiency to evaluate institutions. But this is a distinct enterprise from simply explaining or predicting the foreseeable consequences of different institutions, which is relevant for most normative frameworks. For example, a Lockean approach to natural rights leaves open the question of whether common or civil law systems tend to better

secure those rights. Similarly, the Rawlsian Difference Principle leaves open what institutions actually maximize the well-being of the least advantaged.

Two versions of this objection could dispense with institutional analysis as we have utilized it. First, one might claim the general tendencies of institutions do not matter. As long as there is some possibility that a centralized system, if properly designed, could avoid over-punishing, it could still be permissibly endorsed.[92] Second, one might claim that *only* constitutive or expressive features of institutions are relevant for evaluating their merits. *All* that matters is whether the practices that constitute an institutional framework, or the ideals that framework expresses, are normatively justified. As long as a system is justified "on paper," it does not matter what punishments it actually produces. We do not attempt to answer these objections here because they are far afield from the ideas of most thinkers and are, frankly, deeply implausible. If a normative ideal is sufficient to be an appropriate standard for evaluating institutions, it would be strange not to ask what institutions reliably produce outcomes consistent with it. As noted, such outcomes need to be weighed against other normative dimensions of institutions, but should enter into any sensible weighting.

Inequality before the Law

Another objection is that a decentralized system of criminal punishment runs counter to the principle of equality before the law. Since punishment practices are likely to vary from one jurisdiction to another, neither criminals nor victims could expect uniform treatment across a polity. While the principle of isonomia is a legitimate criterion for evaluating legal systems, there are two problems with this objection.

First, as with other moral principles, isonomia is an ideal to which various legal systems can be compared, not a mechanical input into institutional design. Different systems will achieve legal equality to varying degrees and on different margins, and it is largely a social scientific question as to how well they realize this ideal. As we have documented, current centralized systems come with a wide array of disparities. Across nations, times, and cultures, the specifically punitive role of state law enforcement has fallen disproportionately upon poor minorities. The current US criminal justice system is very centralized, and exhibits wide disparities in almost all stages across margins of age, race, gender, and socioeconomic status.[93]

Second, as David Schmidtz argues, when it comes to institutional design, the avoidance of gross injustice should take priority over the realization of abstract ideals.[94] Centralized legal systems in practice fail to achieve any admirable sort of equality. Consider the racial disparities in punishment in the United States since the federal government became heavily involved, or the punitive terrors associated with socialistic regimes. Compared with these alternatives, polycentric systems are better at realizing equality even if they do so imperfectly.[95]

Why Not Democratic Oversight?

The final objection we consider is that democratic oversight could rein in the problem of excessive punishment as well or better than polycentricity. Polycentric systems lean on exit options to impose discipline on decision makers and to facilitate social learning. An alternative approach would rely on voice to shape incentives, and epistemic feedback to correct errors and rein in excessive punitivity. This approach might be preferred by those who place priority on reflexivity or who have a broader normative commitment to democratic deliberation across various institutional and policy domains.[96] This objection likewise fails for several reasons.

First, democratic procedures are insufficient for overcoming knowledge problems. Measured voter opinions regarding crime and criminal justice veer far from empirical reality. Voters tend to systematically overestimate the incidences and severities of crimes in their neighborhoods, and underestimate the penalties for a variety of offenses. Voters report high approval for police, courts, and the criminal justice system writ large, along with general support for increased budgets, all independent of changes in real crime and punishment trends.

Second, voter preferences are not a check on punitive severity, as voters often celebrate "tough on crime" measures. In experiments, humans are rather vengeful punishers against opponents unless given proper incentives for cooperation.[97] Regarding criminal punishments, voters tend to approve policy suggestions for increased severity. Increases in punitive preferences appear to be linked to growth trends in prison population rates.[98]

An objector might attempt to counter on the grounds that they rely on evidence from existing, insufficiently deliberative systems. But there are good reasons to think that policy discussions become more deliberative by becoming more local. To the extent that this is true, attempts to utilize voice may be complements rather than substitutes to the use of exit. Our argument only entails that a system of small, democratic legal jurisdictions bears a lower justificatory burden than a centralized democratic legal system.

VII. Conclusion

We have argued that the institutional organization of punishment practices exerts a profound influence on the likelihood that actual punishments meet the standards of proportionality. This result should interest normative theorists of punishment who adhere to retributive, expressive, or consequentialist approaches. We have also presented evidence that the polycentric organization of legal institutions is more likely to deliver on proportionality, and as institutions become more centralized, they are more likely to err in the direction of overly severe punishments. Though there may be offsetting reasons to favor top-down approaches to criminal justice, more centralized punishment institutions bear a higher justificatory burden.

We have focused on the relationship between criminal justice jurisdictions, but have not addressed other aspects of legal institutions that may be more or less polycentric, such as distinctions between adversarial and inquisitorial systems, the use of civil vs. criminal law to deal with offenders, or finer distinctions between common and civil law systems. Any of these may be fruitful avenues of exploration to paint a fuller picture of how legal institutions affect punishment outcomes.

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NOTES

1. We use "fittingness" and "proportionality" synonymously throughout.

2. Berman, *Law and Revolution*.

3. See Quong ("Proportionality, Liability") for a recent contribution to proportionality theory.

4. Blackstone's formulation is perhaps the most renowned: "The law holds it better that ten guilty persons escape, than that one innocent party suffer" (Blackstone, *Commentaries*, Book IV, chap. 27).

5. Though some have argued that criminal punishments are in fact not justified or justifiable (Boonin, *Problem of Punishment*; Swan, "Legal Punishment"), obviously our analysis begins from some minimal presumption that criminal punishment can in fact be justified.

6. North, *Institutions, Institutional Change*.

7. Rawls, *Theory of Justice*, 57.

8. Marvell, "Sentencing Guidelines"; Marvell and Moody, "Specification Problems."

9. It is unclear whether restitution is a substitute for punishment or a form of punishment itself. Nonetheless, the arguments for proportionate restitution could mirror those presented here for any of the three theories we examine. See Barnett ("Restitution") and Sayre-McCord ("Criminal Justice"). See Ryberg (*Ethics of Proportionate Punishment*); Hirsch and Ashworth, (*Proportionate Sentencing*).

10. The case for a Proportionality Proviso becomes even stronger if (a) the correct punishment theory is a blend of different theories, since each offers independent reasons for it; or (b) the correct way to justify political institutions is through a public reason framework, in which the Proviso would be a firm part of the overlapping consensus from different theories of punishment. On the latter, see Rawls (*Political Liberalism*) and Van Schoelandt ("Justification, Coercion").

11. Mundle, "Punishment and Desert"; Kleinig, *Punishment and Desert*; Davis, "How to Make"; Moore, *Placing Blame*; Murphy, "Legal Moralism"; Hanna, "Retributivism Revisited."

12. Sher, *Desert*.

13. Hirsch, "Proportionality in the Philosophy."

14. Some use the term "expressionist," while others use the phrase "moral education." These terms are synonymous for our purposes (see also Feinberg, "Expressive Function"; Greiff, "Deliberative Democracy"; Wringe, "Rethinking Expressive Theories"). See Bennett (*Apology Ritual*); Markel ("Are Shaming Punishments").

15. Tasioulas, "Punishment and Repentance."

16. Hirsch, *Censure and Sanctions*.

17. Morris, "Paternalistic Theory."

18. Overly harsh punishments may make reconciliation less likely (Chen and Shapiro, "Do Harsher Prison"; Drago, Galbiati, and Vertova, "Prison Conditions"). Communities with more members sent to prison suffer unique economic and social challenges (Carson, "Prisoners in 2013"). Larger prisons breed gang activity with coercive reach beyond prison walls (Skarbek, *Social Order*). Imprisonment is also associated with psychological disorders (Looman and Carl, *Country Called Prison*, 75).

19. Smart, "Outline of a System"; Bagaric and Amarasekara, "Errors of Retributivism."

20.

> The analogy with the price system suggests an answer to the question of how utilitarian considerations insure that punishment is proportional to the offense. . . . If utilitarian considerations are followed, penalties will be proportional to offenses in this sense: the order of offenses according to seriousness can be paired off with the order of penalties according to severity. Also, the absolute level of penalties will be as low as possible. This follows from the assumption that people are rational (i.e., that they are able to take into account the "prices" the state puts on actions), the utilitarian rule that a penal system should provide a motive for preferring the less serious offense, and the principle that punishment as such is an evil. (Rawls, "Two Concepts," 12–13n14)

21. "If the punishment is the same for simple theft, as for theft and murder, you give the thieves a motive for committing murder" (Bentham, *Rationale of Punishment*, 36).

22. Detotto, McCannon, and Vannini, "Evidence of Marginal Deterrence."

23. Bentham, *Rationale of Punishment*.

24. Rawls, "Two Concepts of Rules."

25. Davis, "How to Make the Punishment."

26. Hirsch, *Censure and Sanctions*.

27. Becker, "Crime and Punishment."

28. Hayek, "Economics and Knowledge."

29. Early work on the epistemic function of market prices was a hallmark of the Austrian school of economics (see Hayek, "Use of Knowledge"; Mises, "Economic Calculation"). More recently, the role of market prices has been more commonly recognized as necessary for economic calculation throughout mainstream theory (see Mankiw, *Principles of Economics*, 83; or any standard micro textbook). Even some socialist-leaning political philosophers have admitted to the necessary role of market prices for economic develop-

ment (see Roemer, *Future for Socialism*; Heath, *Economics Without Illusions*; Carens, *Equality, Moral Incentives*).

30. Kirzner, "Entrepreneurial Discovery"; Baumol, Panzar, and Willig, *Contestable Markets*.

31. Pennington, *Robust Political Economy*, 15–49.

32. Lavoie, *National Economic Planning*.

33. Boettke, *Political Economy*, 28.

34. Murtagh, "Is Corporally Punishing."

35. Hayes, "Penal Impact."

36. Kolber, "Subjective Experience"; "Experiential Future."

37. Kuran, *Private Truths, Public Lies*.

38. D'Amico, "Knowledge Problems."

39. "The same nominal punishment is not, for different individuals, the same real punishment. Let the punishment in question be a fine: the sum that would not be felt by a rich man, would be ruin to a poor one" (Bentham, *Rationale of Punishment*, 37).

40. Maitland and Pollock, *History of English Law*, 61; Berman, *Law and Revolution*, 136.

41. Smith, *Lectures on Justice*, 104; Beccaria, '*On Crimes and Punishments,*' 8–9.

42. Bedau, "Thinking of the Death Penalty"; Hirsch and Jareborg, "Gauging Criminal Harm."

43. Sellin and Wolfgang, *Measure of Delinquency*.

44. McDermott, "Duty to Punish."

45. Dorfman and Harel, "Case against Privatization."

46. Friedman, *Machinery of Freedom*; Barnett, "Restitution."

47. McGinnis, *Polycentric Governance*.

48. Aligica and Tarko, "Polycentricity"; Ostrom, "Markets and States."

49. Boettke, Lemke, and Palagashvili, "Polycentricity, Self-Governance"; Gibson, "In Pursuit of Better"; Ostrom, *Governing the Commons*.

50. Ostrom, *Understanding Institutional Diversity*, 284.

51. Lessig, *Remix: Making Art*.

52. Balko, *Rise of the Warrior Cop*.

53. Avio, "Economics of Prisons."

54. Larkin, "Public Choice Theory."

55. Soares, "Development, Crime and Punishment."

56. Pease, "Cross-National Imprisonment Rates."

57. Sutton, "Political Economy of Imprisonment."

58. Cavadino and Dignan, *Penal Systems*, 3–30.

59. D'Amico and Williamson, "Do Legal Origins."

60. Ostrom, "Markets and States."

61. D'Amico, "Knowledge Problems."

62. Benson, "Spontaneous Evolution"; Greif, Milgrom, and Weingast, "Coordination, Commitment."

63. Benson, "Spontaneous Evolution."

64. Friedman, "Private Creation."

65. Posner, *Economics of Justice*, 192–203.

66. Kornai, *Socialist System*.

67. Zemskov, "Gulag (istoriko-sociologiceskii aspekt)."

68. Mitchell, *Hitler's Nazi State*.

69. Applebaum, *Gulag: A History*.

70. D'Amico and Williamson, "Do Legal Origins," 602.

71. Weingast, "Economic Role."

72. Tiebout, "Pure Theory."

73. Anderson and Hill, *Not So Wild, Wild West*.

74. Hirsch, *Rise of the Penitentiary*.

75. Whitman, "What Happened."

76. Beaumont,Tocqueville, and Lieber, *On the Penitentiary System*, 99.

77. Bodenhorn, "Prison Crowding, Recidivism."

78. US Department of State, "1999 Country Reports."

79. Dafflon and Toth, "Fiscal Federalism in Switzerland"; Adamovich and Hosp, "Fiscal Federalism for Emerging Economies."

80. See United Nations Office on Drugs and Crime (UNODC) website: http://www.unodc.org; Sattar and Killias, "Death of Offenders."

81. La Porta, Lopez-de-Silanes, and Shleifer, "Economic Consequences."

82. Merryman and Perez-Perdomo, *Civil Law Tradition*; Borricand, *World Factbook*.

83. Stuntz, *Collapse of American Criminal Justice*, 74–85; Murakawa, *First Civil Right*, 143–47.

84. Roché, "Criminal Justice Policy."

85. D'Amico and Williamson, "Do Legal Origins."

86. Greve, *Upside-Down Constitution*.

87. Shleifer, *Failure of Judges*.

88. Nardulli, "Misalignment of Penal Responsibilities"; Giertz and Nardulli, "Prison Overcrowding."

89. See UNODC website: http://www.unodc.org.

90. Parise, "Private Law."

91. Carson, "Prisoners in 2013."

92. One might ground this view in a strong version of historicism that denies the general features of institutions. This would be a social scientific objection rather than normative, and one regarded as implausible by most social scientists.

93. Moore, *Political Roots*.

94. Schmidtz, "Nonideal Theory"; Sussman, "What's Wrong with Torture?"

95. Objections to polycentric institutions within a polity apply equally across polities. As long as there are multiple countries in the world, there will be disparity in punishments.

96. Knight and Johnson, *Priority of Democracy*; Hafer and Landa, "Deliberation as Self-Discovery."

97. Axelrod, *Evolution of Cooperation*.

98. Enns, "Public's Increasing Punitiveness."

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