

THE IMPRISONER'S DILEMMA: THE POLITICAL ECONOMY OF  
PROPORTIONATE PUNISHMENT

by

Daniel J. D'Amico  
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## Dedication

This dissertation is dedicated to all of my friends and family who have believed in my potential and my abilities. Their support has been invaluable to the accomplishment of my goals. I owe them everything. Thank you all and I love you.

## Acknowledgments

It was Walter Block who first inspired and encouraged me to pursue a graduate degree in economics, thus it is only appropriate that I should thank him first. Walter will never be able to know how truly grateful I am for having been bitten by his infectious enthusiasm for the subject of economics.

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Despite only now obtaining my doctoral degree I think I assumed the unsavory aspects of the typical absent-minded professor a long time ago. With this in mind, I never would have completed my graduate school or dissertation without people like Peter Lipsey and Mary Jackson.

Some like to say that there are no bad students, only bad teachers. I'm not sure if I fully believe this but I do believe that there are no good students without good teachers. William Barnett, Kirsten Daniels, Russell Roberts, Bryan Caplan, Richard Wagner, Mario Rizzo, Gordon Tullock, Dan Klein, and David Levy all deserve a great nod of thanks from me.

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## Abstract

### THE IMPRISONER'S DILEMMA: THE POLITICAL ECONOMY OF PROPORTIONATE PUNISHMENT

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What punishment theorists have termed “proportionality”- where the response to crime is well-suited to the crime itself - I frame as a problem of economic coordination. Providing criminal justice proportionately is a task of social coordination that must confront both knowledge and incentive problems simultaneously. This dissertation begins by surveying the potential for cross-disciplinary work in the economic-sociology of criminal punishment. Next I analyze today's criminal punishment system on two margins: it's ability to overcome Hayekian knowledge problems and its ability to avoid Public Choice-styled rent-seeking and capture. I conclude that centrally-planned criminal justice institutions are ineffective at solving knowledge and incentive problems to produce proportionate punishments. I argue that markets tend to promote proportionate allocations of goods and services in similar fashions as the term proportionality is used by criminal

justice theorists. In this sense there is good reason to believe that market provided criminal justice services would better satisfy the ends of proportionality compared to central-planning.

## 1 Introduction

*[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*

--James Madison, *Federalist Number 51* (p.337).

In economics and game theory the most common heuristic used to describe the challenges of social cooperation is not coincidentally entitled the “prisoner's dilemma.” As Adam Smith (1762, p.563) explained, each person is confronted with the most fundamental choice to either truck, barter and exchange or rape, pillage and plunder. The prisoner's dilemma explains that often times individuals are so attracted by the short term

returns of robbing, stealing and harming one another that they may forgo the long-term higher rewards of mutually beneficial exchange. As Madison's insight in the opening quotation explains, the major task of institutional design is to simultaneously promote mutual exchange by suppressing coercion. It just so happens that the task of suppressing coercion so often entails coercion itself.

The prisoner's dilemma is so called because it is so obvious that traditional punishments under the criminal law are influential upon the incentives and behaviors of the individuals over whom they govern. As the story goes, the prisoners in the prisoner's dilemma game are isolated and given the opportunity to defect against one another for personal gain, or cooperate with one another for a higher social benefit. The outcome of the game is that each prisoner is inclined to defect against the other even though, were they to cooperate, they would be better off. If they only had some form of second stage game, some institutional arrangement or commitment device then they could tie their hands from defection and ensure their own betterment. The prisoner's dilemma is also a metaphor for social cooperation and criminal justice. There are short term rewards for robbing and hustling but they detract from the long term rewards of exchange and production. The criminal justice system as an institution is aimed at changing the costs and benefits of criminal behavior. If punishments are levied in such a way that the short term rewards of crime are no longer attractive then crime is deterred. Economists are interested in institutions as the rules of the game and their enforcements, in so far as different institutional arrangements - different rules - engender different social outcomes. Change the rules, change the outcomes.

Who is to calculate and levy such punishments? Who is to design the ideal set of

criminal justice institutions? Do they have the necessary ability to calculate and determine the optimal intentions, techniques and rates of punishment? Are they inclined to discover this information and subscribe to its implications? As the title of this dissertation implies, I intend to treat the prisoner - the central planner - the government itself - as no different from the traditional agents that economists so often analyze. I entertain the possibility that state authorities are no better informed or incentivized than the ordinary individuals within society and are also - like the ordinary citizen - tempted by the rewards of defection.

In a perfect world there would be no crimes and no need for punishments. A society of angels would need no rules nor enforcements. A society of men however is plagued by conflict and crime therefore it needs both rules and enforcements. If a society of men were governed by God - all knowing and all caring - the rules would be enforced perfectly. The real amounts of punishment imposed upon criminals would perfectly reflect the opinions of justice as they existed in the hearts and minds of the people. Criminals would get their due, victims would feel vindicated and ordinary people would feel safe and secure knowing that God controlled the criminal justice system, doled-out perfectly-designed punishments and the system worked well.

Obviously, reality is not a society of angels nor a society of men governed by God. In the real world men are governed by other men - imperfect and infallible. The real criminal justice system produces disproportionate punishments. Punishment levels are commonly perceived as excessive and unsustainable. And equality before the law, is inferred absent when one looks at the differences between race, age, gender, and other socio-demographic groups within the criminal justice system. Real punishments are

imperfect because those who create, interpret, and enforce the rules are not God. Yet it is a bizarre irony that today's most popular criminal justice theories -those theories which supposedly justify, legitimize, guide, organize, and motivate the criminal justice system - begin from the premises that the state authority is the necessary and sufficient purveyor of criminal punishments. I argue that this starting point of criminal justice theory - the assumed role of the state - relies first upon the assumption that the state is all knowing with regard to how to produce proportionate punishments. Secondly, traditional criminal punishment theory relies upon the assumption that the state is all caring - benevolent - with regard to the publics' interests and preferences for proportionate punishment.

The most recent trend in punishment theory calls for adherence to the principle of proportionality - a punishment should be well-fitted to the crime and like crimes should be treated alike. I accept the proportionality principle as intuitively appealing and theoretically sound, but the question remains, what institutional framework best produces proportionality?

In Chapter 2. I begin this dissertation by drawing attention to the dominant trends of sociology and economics that are responsible for preserving the assumed role of the state in providing criminal punishment. Economics and sociology have for a long time sat in opposition to one another. Sociologists sought to understand the essence and operations of punishment institutions, while economists tried to optimize the allocation and production of punishments. Naturally these perspectives were hostile to one another, but today each field has taken significant strides towards a common ground. Sociology and economics have both begun to look at the important role that institutions have on influencing the outcomes of social and economic processes. I present a framework of



reciprocally embedded institutional influence to help explain significant historical changes in punishment paradigms over the last half century. A theory of criminal punishment aimed at producing proportionate results must be informed by realistic assumptions as to imperfect knowledge and impure incentives just as a theory of political action (the polity) must be informed of the underlying influences of the economy and society. The reverse influence also holds. Otherwise policy aimed at proportionality will suffer from unintended consequences and inefficiencies.

I go on in separate chapters to argue that a centrally-planned criminal justice system is incapable of achieving proportionate punishment because of its inability to deal with problems associated with dispersed knowledge and non-benevolent incentives. In Chapter 3. I argue that knowledge problems inhibit a central-authority, even one guided by benevolent intentions, from knowing how to provide punishments in quality and quantities that best produce proportionate outcomes. A central-planner can never possess the full scope of knowledge required to achieve proportionate punishments because such knowledge is often dispersed throughout society in the minds of several different people. No single mind has access to the subjective, dispersed, and partial estimations of knowledge that hold the information of how much punishment should be produced, who it should be applied to, what type of punishment it should be, or how it should be allocated. Even if a central-planner fully embraced the insights of the proportionality principle on philosophical grounds, he would still lack the knowledge of how to produce real proportionate punishments in practice.

In Chapter 4. I argue that central-planners lack the incentives and constitutional restraints to avoid bureaucratic inefficiencies that result in disproportionate punishments.

If a central authority knew what decision making process - rules or discretion - could achieve proportionality he would still lack the incentives to follow such processes. In theory, the long and variable lags associated with punishment policy give good cause for rule-based sentencing rather than discretion-based sentencing. Rules provide stable long-run expectations about the future level of crime and therefore promote investments in long-run production processes for security and deterrence technologies. But the government-monopoly over the criminal justice system lacks a credible commitment to obey rule-based criminal sentencing guidelines once they are in place. In the face of incomplete and non-credible rules, various agents in the criminal justice hierarchy wield de facto discretion over the outcomes of criminal sentences. The state that is strong enough to bind its own hands is simultaneously strong enough to break those binds. The state is incapable of producing ideally proportionate punishment in so far as it is ineffective at producing self-enforcing constraints and competitive checks and balances.

Proportionate punishment can only be achieved in so far as criminal justice institutions are arranged to simultaneously minimize knowledge problems and ensure that planners do not seek their own interests at the expense of the social welfare. Popular philosophies concerning the proportionality of punishment are subject to paradigmatic changes because they cannot practically solve the problems created by the current empirical realities of unprecedented incarceration. The polity and economy are in a condition of tension to one another. Without an overhaul of the assumed state-only institutional provisions of criminal justice in general and punishment services specifically, proportionality philosophies are not likely to retain their popular foothold in penal theory.

I take the ends of proportionality as given and ask the critical question whether centrally-planned institutions are ever capable of knowing or discovering the preferred techniques of proportionality or if they ever confront the incentives to produce proportionality. These theoretical exercises of assuming imperfect knowledge and imperfect incentives are not incompatible but are instead complimentary to each other. The incentive problems explained in Chapter 4. are not an essential critique against the knowledge problems explained in Chapter 3. The crucial knowledge regarding the ins and outs of the criminal justice system is suppressed when market-based decision-making processes are replaced by politics. Decisions must still be made according to some selection mechanism, the political process then erupts incentive incompatibilities. The logical inconsistency between the ends of proportionality and the means of central-planning is the fundamental problem that upholds the emergence of socially preferable outcomes in criminal justice. Low crime, low costs, proportionality and equality before the law are replaced by high crime, high-costs, dis-proportionality and disparity.

For a philosophy of punishment to be theoretically sound and practically feasible it must begin from less romantic and more realistic assumptions. The alternative fields of knowledge-based Austrian economics and Public Choice economics hold particular insights useful not only to critiquing the existing institutions of criminal justice but also for creating a foundational micro theory of market-based criminal punishment. A market-based reform movement aimed at solving the problems of the criminal justice system is far off, but discussions surrounding transition economies, comparative economic systems and economic development give a reliable blueprint to begin making initial reform suggestions. Criminal justice reform must define the initial tendencies (knowledge and

incentives) of individuals within society. How do they perceive and act according to the criminal law and criminal punishment policies. Successful criminal justice reform must also well-define the intended end state of an efficient and preferred criminal justice system - proportionality and equality before the law are one possible example. Realistic descriptions of human behavior combined with achievable end goals allow for the discovery, understanding and implementation of particular strategies to promote criminal justice reform. Finally, as is true with any change in political policy, they must be cognizant of the current status quo and strategically begin recommendations from thereon. If reform policies invoke the same processes of knowledge suppression and incentive incompatibilities then they will only delay the effects of reform and exaggerate the harms.

This dissertation will hopefully be a first step to constructing and implementing criminal-justice reform from a logical and philosophically consistent approach. A policy regime of criminal punishment that is informed of the challenges that imperfect knowledge and impure incentives play in the criminal justice process, will be more likely to promote social coordination, peace, prosperity and security from the costs of criminal behavior. Though my intentions are not necessarily the elimination or deterrence of crime, it seems reasonable to assume that the establishment of a criminal justice system that is more internally consistent, responsive to social preferences, and informed by realistic assumptions will in turn also be more technologically efficient at responding to crime.

## 2 Correcting Correctional Institutions: An Economic Sociology of Criminal Punishment

*In all cases a punishment appears equitable in the eyes of the rest of mankind when it is such that the spectator would concur with the offended person in exacting it. The revenge of the injured which prompts him to retaliate the injury on the offender is the real source of the punishment of crimes. That which... other writers commonly allege as the original measure of punishments, viz the consideration of the public good, will not sufficiently account for the constitution of punishments.*

--Adam Smith, *Lectures on Jurisprudence* ([1762] 1978, p.104)

### 2.1 Introduction

Criminal punishment has been one of the most interesting yet puzzling topics of social science for centuries. More recently, since the late 1960s the topic has been a shared research agenda between two major branches of social science - sociology and economics. During this shared history the separate disciplines have not found a significant common ground. The divide between sociologists and economists was more appropriate in past decades because of methodological conflicts and divergent topics of interest, but this tension is no longer as appropriate as it once was. Recently, each discipline has expressed value for research that pays attention to the role of institutions. Institutions are defined as the rules of the game and their enforcement, they are

simultaneously economic, political and social constructions. While the broad fields of sociology and economics have taken account of institutions and their importance, these insights have not yet trickled down as applied studies of criminal punishment. In other words, new institutional economics is popular but few institutional explanations of the economics of criminal punishment are yet available. Institutional sociology is also popular, but relatively few institutional sociologies of criminal punishment have been done. This chapter is in part an attempt to draw attention to these voids and in part an attempt to begin laying out a research program that may hope to fill them in.

The current puzzle facing those concerned with criminal punishment is today's prison crises. The United States incarcerates the greatest number of inmates on net and per capita than any other country around the world and throughout history. Table 2.1 shows the incarceration rates of the twenty countries with the highest prison populations in the world today.

**Table 2.1 Cross-country prison populations<sup>1</sup>**

Country	Prison population rate per 100,000 capita		Net prison population rate		# of institutions	Prison Capacity	Occupancy Level
	2005	1999	2005	1999			
1 United States	750	505	2245189	1295150	5069	2061235	1.07
2 Russia	628	487	889598	722636	1051	955096	0.86
3 Belarus	426	327	41538	33641	32	43400	1.36
4 Georgia	401		18138		17	15040	1.21
5 Puerto Rico	356	314	14239	11238	50	16964	0.88
6 Ukraine	345	248	160046	129500	182	160555	1.01
7 South Africa	335	282	159961	111798	237	114549	1.4
8 Estonia	333	306	4463	4778	7	4366	1.02
9 Singapore	309	196	13611	5413	15	13876	1.08
10 Latvia	292	314	6676	8340	15	9166	0.79
11 TaiwanPR	281	200	64279	41654	86		
12 Chile	262	155	43723	20989	149	27191	1.55
13 Moldova (Rep)	247	276	8876	10258	18	12650	0.71
14 Poland	236	153	89805	58619	213	75129	1.19
15 Lithuania	235	250	7983	9175	15	9444	0.85
16 Israel	209	201	13909	10144	24	14123	0.99
17 Azerbaijan	202		16969		52	22420	0.76
18 Mexico	198	98	216290	85712	451	158927	1.34
19 Uruguay	193		6947		27	4540	1.46
20 Czech Rep.	186	123	19145	12730	35	19225	0.99

<sup>1</sup>Data taken from Walmsley (1999 and 2006).

On the one hand it is argued that this trend is in part responsible for recent declines in crime rates. Some writers had predicted an upsurge of criminal severity for the 1990s (DiIulio, 1996) but instead crime tapered off. Getting tough on crime seemed to work - in part at least. John Donohue and Steven Levitt (2001) hold that increased incarceration is partly to explain for the recent marginal drop in crime, but Levitt consents (ibid., 1996) that increased prison populations and prison overcrowding can have a hardening effect on inmates and can drive up the crime rate instead of down. The recent marginal drop in crime along with the extreme increase in incarceration presents a puzzle for social scientists. For example, seemingly unrelated social phenomena - the legalization of abortion - continues to hold statistically significant correlation with the decline of crime in the 1990s (Donohue and Levitt 2001).<sup>2</sup> Though obviously related to one another the trends of crime, criminal policy, and punishment still appear partly anomalous to one another.

Alfred Blumstein and Allen Beck (1999) argue that US criminal policy has gotten disproportionately more punitive. While the average prison sentence and likelihood of arrest (about 50%) have remained relatively constant since the 1980s, the likelihood of being convicted and incarcerated once arrested has doubled in recent years (from 13 to 28%). Thus it appears to many that “[d]espite a sharp national decline in crime. American criminal justice has become crueler and less caring than it has been at any other time in our modern history (Loury, 2007).” In addition to these society-wide discrepancies, Glaeser and Sacerdote (2000) show empirics that the punishment levels of individual cases are significantly explained by the race and demographic characteristics of their

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<sup>2</sup> Foote and Goetz (2008), Joyce (2004) and Lott (2007) are skeptical of the abortion thesis. Donohue and Levitt (2004) have in part responded.

victims.

This is the crux of the philosophical debate surrounding proportionate punishment. From a macro perspective: does the rate of punishment in America correspond to the rate of crime? From a micro perspective: in individual cases do the punishments fit the crimes? Are like cases and criminals being treated alike? I take as given that a punishment should be well-fitted to the crime, and that separate individuals should be treated equally before the law.<sup>3</sup> But how are proportionate punishments to be produced in society? What institutions promote, produce, and protect proportionality? By themselves, neither discipline - sociology nor economics - has been able to explain why current institutions fail to achieve proportionality (why do the anomalies amidst crime and punishment trends persist) or how can they be changed so as to bring about an era of proportionate sentencing?

“Sociological analysis strives not for prediction but understanding, and this understanding is achieved by tracing all social phenomenon back to the purposes and plans of the actors whose actions resulted in the phenomena to begin with (Boettke and Storr, 2002, p.162).” Sociologists attempt to explain how punishment institutions operate and what role they play in society,<sup>4</sup> but sociology lacks a full understanding of economic processes. To a sociologist, an individual's perception of how legitimate a criminal punishment is or is not is directly influenced or even pre-determined by economic structures. The majority of crime is committed and experienced by the poorer members of

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<sup>3</sup>Beccaria (1764) and Bentham (1843) were among the first to describe proportionality standards from a perspective of social science. More recently Frankel (1972), Davis (1983), Bedau (1984), von Hirsch (1991), von Hirsch and Jareborg (1991), Ashworth (2000), Duff (2001), Ryberg (2004) and von Hirsch and Ashworth (2005) have explained and argued in favor of proportionate sentencing.

<sup>4</sup>As examples of this deterministic-type of punishment sociology see: Shearins and Stenning (1985), Cohen and Scull (1985), Lowman (1987), Garland and Young (1989), and Harris and Webb (1987).



society. Wealthy citizens hold the influential power upon the political process, and maintain the status quo forms and degrees of criminal punishment. Loic Wacquant (2002a, p.382) when commenting about the modern lack of prison ethnography referred to Piven and Cloward (1973) in agreement that the U.S. in recent years has replaced social-welfare methods to regulate poverty with a “carceral-assistential continuum... and a hyperactive criminal-justice apparatus (Wacquant, 2002b).” Garland (2001) believes these policy changes have changed the ways in which society views and talks about crime. With this deterministic view of criminal punishment, sociologists fail to explain the major elements of criminal punishment as a social phenomena - the social changes of criminal punishment over time. Significant changes have occurred regarding the dominant paradigms of criminal punishment, without significant changes in the wealth or power structures of society - or more puzzling, amidst a continual economic growth and prosperity enjoyed by all classes in society. Sociologists should be at a loss. What explains the internal workings of economic structures? Where do they come from, how do they operate, can they be changed?

Economists use the framework of rational choice in order to operationalize the process of personal decision making. An individual chooses to maximize his benefits while minimizing his costs. Criminals act so as to maximize the benefits of their crimes while minimizing the costs of punishments. State enforcement agencies, attempt to maximize the deterrence of criminal actions while minimizing the costs of imposing legal punishments. But economists often fail to recognize that choices take place within a context of social and political institutions. If those institutions change, then the outcomes of rational choices performed within them are also likely to change. Institutions engender

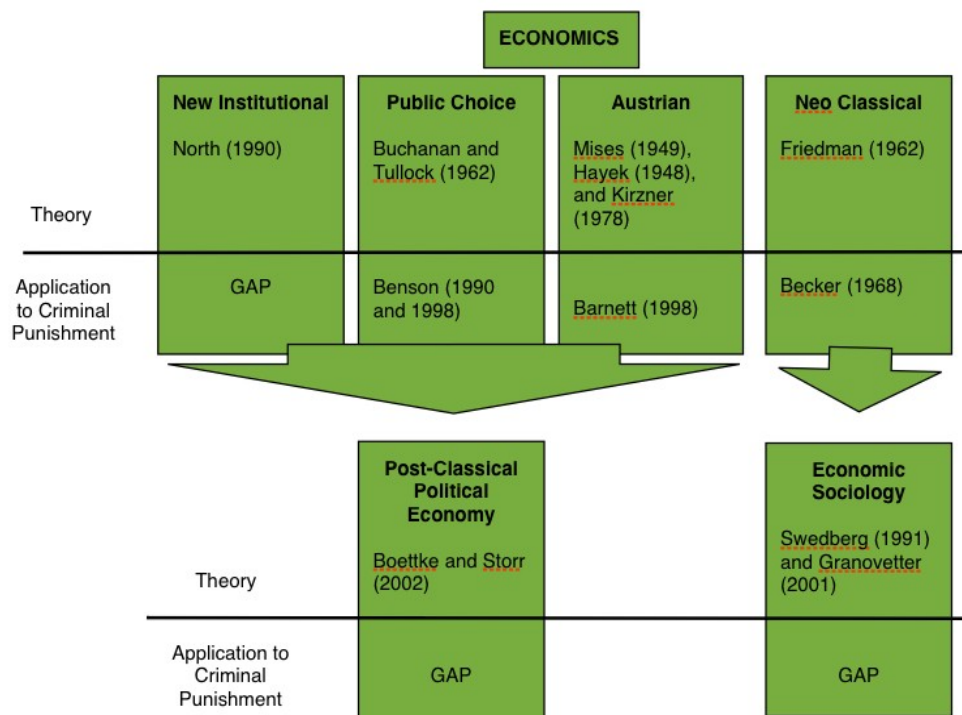
outcomes; change the rules - change the outcomes. The pure economist much like the pure sociologist cannot explain the major social changes regarding criminal punishment through history. Rational criminals, and rational policy makers should coordinate upon an optimal level of crime and maintain an equilibrium output. To an economist changes in those equilibriums must come as exogenous shocks to the system. Yet changes have occurred without obvious exogenous shocks.

To understand a fuller scope of real human behavior, a social scientist needs 1) a theory of individual decision making a la rational choice, 2) a theory of institutional development and operation a la new institutionalism and sociology, and finally a theory of interaction between institutions and individual choice – 3) a theory of embeddedness that bridges the gap between the two earlier perspectives. Cross-disciplinary research between sociology and economics or more eloquently “economic-sociology”<sup>5</sup> could - to borrow a common term from economics - “arbitrage” a profitable opportunity in the social science of punishment. Economic sociology attempts to retain the value of each discipline while avoiding their shortcomings - actors pursue rational choice embedded within a context of influential institutions. This paper hopes to describe the current complimentary aspects between economics and sociology on the topic of criminal punishment. By presenting some critical turning points in sociology's and economics' respective histories of thought, I attempt to pinpoint which trends hold the most explanatory power. Finally I wish to lay out some needed areas for applied research.

In recent years the new sub-field, economic-sociology, has emerged with reasonable success but little to no applied work has been done on the focused topic of

<sup>5</sup>As examples of the recent sub-discipline of economic-sociology see: Granovetter (2001), Swedberg (1990, 1991 and 1998), and Boettke and Storr (2002) all of whom position themselves as extensions of Max Weber's (1922, 1947, 1999) progressive research program.

criminal punishment. Austrian economics, Public Choice economics, and New Institutional economics have gone completely unnoticed by sociologists of punishment and only briefly investigated by economists of crime and punishment. Figure 2.1. is a simplified representation of the current literature and the gaps held within.



**Figure 2.1 A visual representation of the existing literature and the unexplored opportunities therein**

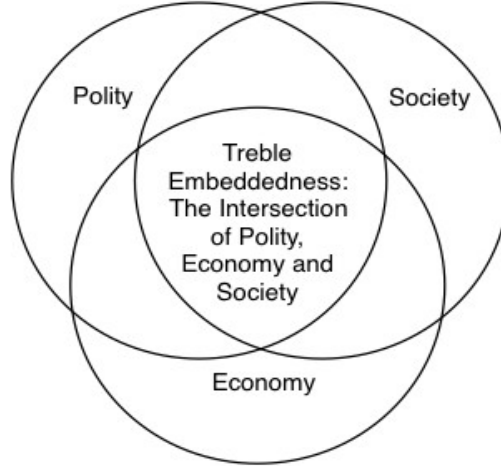
While writers like Mark Granvoetter (2001) and Richard Swedberg (1991) have attempted to forge a bridge between neoclassical economics on the one hand and sociology on the other, I share the belief argued by Boettke and Storr (2002) that it is the

less recognized, Austrian-inspired traditions that stand as the rightful heirs to Weberian social science. “To Weber, concrete human action is intelligible to the sociologist because of the subjective meaning that actors themselves place on their behaviors (Boettke and Storr, 2002, p.162).” Individuals / economic actors are related to one another, they exist within a social context and contribute to that social context. Weber referred to this blend of methodological individualism with the term *meaning*. Meaning is the framework within which the actor defines what sorts of things he will perceive as costs and what sorts of things he will perceive as benefits. Then he evaluates the magnitudes that such costs and benefits hold and finally the optimally preferred course of action. Weber understood that apparently anomalous or irrational behavior from an outsider's perspective, once understood from within the actor's frame of reference was more often than not intelligible as rational and purposive.

Weber's notion of meaning resolves or at least avoids the age old nature v. nurture debate. A decision is context specific enough so that it is protected from being described as irrational. All behavior is rational within an appropriately defined and recognized context. It just so happens that this context is defined and created - influenced by the processes of decision making that one endures. How much should people be punished? People should be punished the optimal amount to minimize costs and promote the ends of punishment. What are these costs and what are these benefits, what are their optimal levels - who decides? A political agent is at least no better at defining these terms for the sake of social policy than is any other individual. A political actor must make decisions while confronted with imperfect knowledge and imperfect incentives. There is no realm of political decision-making immune to the influences of the economy and society, and

vice versa.

Social changes concerning criminal punishment have occurred in three related spheres. First, the social perceptions and the philosophies of criminal punishment - different punishment paradigms have erupted and displaced each other over time. Second, the policies and politics of criminal punishment - criminal sentencing codes - have changed over time. And third, the empirical records or economic realities of criminal punishment - crime rates and punishment trends - have generally risen over time. I argue that these social changes are best understood as a result of tensions that occur between the spheres of institutional influence: society, polity and economy. In other words Boettke and Storr's (2002) description of reciprocal embeddedness best explains the long history of thought concerning criminal punishment. The flow of influential forces which exists between the cultural and philosophical society, the legislative polity, and the commercial economy are multi-directional rather than uni-directional. Figure 2.2. is a visual representation of this insight.



**Figure 2.2. The Weberian conception of embeddedness<sup>6</sup>**

Society does not *determine* the economy; the economy does not *determine* society. Society may *bear influence* upon the economy, and the economy may *bear influence* upon society, but each perception is incomplete without the other. Weber insisted that we consider both economically relevant and economically conditioned phenomena. The social world can only be understood as a continual process of mutual influence between the society, the polity and the economy. Criminal justice policies which fail to take account of such embeddedness inevitably fall short of their stated goals and intentions. Thus a fuller description of institutional embeddedness focused upon assessing criminal punishment as a social phenomena will help to produce more logically consistent criminal justice policies.

Through the processes of choice, exchange, conflict and resolution, social phenomena emerge. When the three spheres of social reality are in tension with one

<sup>6</sup>This graphic was taken directly from Boettke and Storr (2002, p.177) as it appears in the original text it runs with the following sub-heading: “[t]he society the polity and the economy are elevated, if you will, to the same level of prominence, and dual and treble notions of embeddedness are conceived of and utilized.”

another, social changes and paradigmatic shifts erupt. When these spheres are in line with one another, stable equilibriums persist. The history of thought surrounding criminal punishment can be thought of as a useful case study to lend support to the Boettke and Storr (2002) theory of reciprocal embeddedness.

Social scientists need a framework to understand the meanings behind human action. Individuals choose their most highly valued end - subjectively perceived - according to constraints whether he be a law abiding citizen, a criminal, or a political authority aiming to punish proportionately. Each realm of institutional influence - the polity, the society or the economy - is constrained by the real co-existence of the other realms. Policy cannot be perpetuated without regard to social acceptance or economic feasibility. A paradigm of retributive incarceration cannot continue ad infinitum without confronting the facts that social legitimacy of incarceration levels are changing and the financial abilities to construct and manage prisons are running dry. Assuming particular ends for the criminal justice system carries several potentially distinct sets of consequences – some intended some unintended.

The remainder of this paper is organized as follows. Section 2.2. offers a brief history of thought concerned with punishment sociology. This narrative demonstrates the process where tensions amidst the related spheres of society, polity and economy result in particular changes within each sphere of influence. Section 2.3. describes the obvious historical tension between punishment sociology and the neoclassical economics of crime and punishment. The hyper-rational assumptions behind economic models stood in contrast to the sociological way of thinking regarding criminal punishment. Section 2.4. explains the recent rise of economic sociology within the broader field of economics.

Economic sociology sits at a unique position to lend applicable insights to the topic of criminal punishment. Both economics and sociology have taken significant steps towards recognizing the role of institutional embeddedness in the area of criminal punishment. Economic agents with imperfect knowledge and imperfect incentives act within a social and political world. The Boettke Storr (2002) method gives a fuller description of the feasible ends (proportionality) for criminal punishment institutions and the viability of particular means (the current criminal justice system) to achieve those ends. To answer the question: how can proportionate punishment be produced, I turn to the methods of political economy and transitional policy reform suggested by Boettke and Storr. Section 2.5. offers some concluding remarks.

## **2.2 The Sociology of Criminal Punishment: a History of Thought**

By the terms punishment and sociology, I mean as David Garland (1990) has written, “that body of thought which explores the relations between punishment and society, its purpose being to understand legal punishment as a social phenomenon and thus trace its role in social life (ibid., p.1).” The sociology of punishment in this view is a broad swath of research generally focused on explaining and understanding the social phenomenon of criminal punishment. Punishment philosophers, criminal justice scholars, criminologists, penologists, and political scientists who all research criminal punishment are included under the title of sociology and considered punishment-sociologists.

The earliest investigations of criminal punishment, as examples of formal social science began during the 1930s and were predominantly investigations of existing social



orders.<sup>7</sup> These investigations were descriptions of the processes found within criminal communities. Social scientists were trying to understand crime and punishment by looking at the relationships within criminal communities - how did criminals interact with one another? Though quasi-self-contained these microcosms of social order were also situated within society at large, thus they naturally invoked the secondary question, how do criminals interact with legitimate citizens? By means of this embeddedness more interactive questions could be posed. What is the rationale of punishment, and is it effective within these contexts? Some doubted whether these investigations bore fruit at the time (DiIulio, 1987), but a more charitable interpretation would at least accredit this first phase of sociology as cognizant to the challenges of embeddedness.

At the same time, the rehabilitation paradigm of punishment dominated public opinion and philosophical debates. As far back as the late 1700s punishment philosophers were in common agreement concerning the alleged moral benefits of rehabilitation and the alleged moral consequences of retributivist punishments. Rehabilitation was argued for from a consequentialist perspective. Criminals were thought to be diseased and in turn curable. The role of punishment was to improve the ill effects of crime, to transform the criminal into a productive member of society. The assumed output of rehabilitation practices were presented as their argumentative strength - their normative justification.<sup>8</sup> The later retributive paradigm was in contrast supported on deontological grounds. Criminals are awarded punishments because they deserve to suffer.<sup>9</sup>

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<sup>7</sup>As examples of the prison sociology research popular between the 1930s and 1950s see Reimer (1937), Clemmer (1958), Schrag (1944), Cloward (1960), Sykes (1958) and Irwin and Cressey (1963).

<sup>8</sup>Duff (2004) surveys the consequentialist perspective and references Wootton (1963) and Menninger (1968) who support therapeutic alternatives to incarceration. Smart (1973) and Bagaric and Amarasekara (2000) argue that allegedly unjust punishments are justified if they “really produce the best consequences.”

<sup>9</sup>For descriptions and explanations of the retributivist punishment paradigm see Mundle (1969), Davis (1972), Kleining, (1973), Singer (1979), Duff (1986) and McLeod (2003).

The retributive paradigm has recently displaced the rehabilitation paradigm as the dominant punishment practice, popular social opinion and the allegedly superior philosophy of punishment, but it is not without critique or complaint.<sup>10</sup> The most recent empirical trends of crime and punishment, the unparalleled rates of incarceration and social costs of imprisonment have forced theorists to again update and adjust their theoretical positions. Retributivism constrained by the proportionality principle is now the theoretically dominant position but with almost no or at least very few practical success stories (Tonry, 1991). Social science appears ill equipped to resolve the particular debate between rehabilitation and retribution. Instead social science is better equipped to understand the underlying forces and social processes that bring about revolutions in thinking and practice.

By the 1960s, social scientists concerned with criminal punishment were under pressure to couch their work in terms of practical relevance and political applications - perhaps prematurely. The social work of the 1930s had yet to produce theory that encapsulated the full depth of criminal behavior let alone a plan for political response. The qualities and characteristics of crime and criminals were changing shape. Impatient and under-satisfied, the discipline changed course to a more evaluative role. The punishment practices of rehabilitation had changed shape from the late 1700s and taken many different forms. In the late 1700s physical punishments like whipping or complete isolation were common rehabilitation techniques, but by the mid 20<sup>th</sup> century such practices were more visible to the general public and therefore less acceptable and less

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<sup>10</sup>Ryberg (2004, pp.3-5), Griset (1991), Hudson (1987), von Hirsch et al. (1987), von Hirsch (1993), Wasik and Pease (1987) and Tonry and Hatlestad (1997) all describe the rise of proportionality as a response to real punishment practices and unrestrained criminal sentences that struck against the intuitive moral implications of retributivism. Their narratives all support an ordered historical transition from rehabilitation to retribution to proportionality.

politically viable. Sociologists of the 1960s found research topics by evaluating the successes and failures of different punishment types. How did inmates respond to being isolated from one another? How did criminals respond to corporal lashings? How did criminals respond to dietary changes?<sup>11</sup> The findings of these studies or lack thereof fed back into the public's perception of punishment and therefore the political palatability of punishment practices. Through the 1960s the rehabilitation paradigm with its consequentialist justifications was well solidified as a political reality, but its particular shape and techniques were significantly different from the methods of old. Calls for rehabilitation were now often psychological therapies, work training programs, counseling, and or medications.

During the 1960s and 1970s the field of sociology experienced tremendous growth and rapid change. A variety of rehabilitation techniques had been tried and several had been evaluated, yet at the same time punishment techniques were dominated by imprisonment. For the remainder of the 1960s and 1970s sociologists critically re-examined the prison and alternatives to incarceration.<sup>12</sup> In earlier times imprisonment was an assumed mean to achieve rehabilitation. Theorists still convinced in the efficacy of rehabilitation as a proximate mean for the greater end of social welfare, insisted upon a justification for imprisonment. Is imprisonment a more proximate mean to achieve the later stage mean of rehabilitation, or as many theorists were convinced was there a retributive essence tied to the practice of incarceration? The debate was thrust open to discuss the benefits and consequences of punishment as an end in and of itself.

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<sup>11</sup>As examples of the punishment sociology styles coming out during the 1960s and 1970s see Glaser (1964), Wilkins (1969), and Irwin (1970).

<sup>12</sup>As examples of sociologists re-examining the role of the prison see Melossi and Paravin (1979), Rusche and Kirchheimer (1939), Jankovic (1977), Melossi (1985), and Cressey (1955).

Irwin (1988) lays out the four stages that have taken place in the sociology of the prison: explorations of prison social orders, evaluations of rehabilitation, critical reexaminations of the prison, and responses to the present crisis in prisons. He describes that finally the field of sociology has experienced yet another shift away from examining the prison and proposing prison alternatives. Instead today, amidst the new retribution-updated-by-proportionality punishment paradigm research is more likely to assume the functional role of the prison as given and attempt to modify and or construct management techniques from within the existing institutional structure. Incarceration is a given end and the means of management are up for debate. The undeniable prison crisis is motivating the majority of research coming out today. American prisons hold more inmates for less serious crimes at higher social costs than any other country around the world today and throughout history. While philosophers have responded to the tensions caused by punishment's empirical trends with the caveat of proportionality, sociologists are now debating between proposed prison management techniques.<sup>13</sup> Radically changing the face of punishment in America seems an impossible task but maybe improvements can take place on the margin.

The most pressing question within this history of thought is to understand why the paradigm shift from rehabilitation to retribution took place, and secondly why the shift from retribution to restrained-retribution is underway. As I have explained earlier, rehabilitation was the dominant perspective as early as the late 1700s and up until the late 1970s. But what happened in the late 1970s to drive such a radical change so that the opposing perspective - retributivism - is now significantly more dominant in theory and

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<sup>13</sup>See Johnson (1987) and DiIulio (1987).

practice?

The most common explanation for the change from rehabilitation to retribution is typically referred to as the “nothing works” movement. From the 1930s through the 1970s sociology progressed as I explained above, and the rehabilitation paradigm was commonly accepted by the society and the polity, but there was simultaneously occurring a rising trend of crime rates, criminal severity (crimes committed were getting harsher), recidivism (released criminals were re-committing crimes at an increasing rate), and social costs to operating the criminal justice system. While incarceration was getting more and more expensive, Robert Martinson's (1974) empirical assessment argued that monies spent in the criminal justice system were not only spent in vein but perhaps detrimental to their stated ends. Prisons did not rehabilitate according to their apparent effects upon recidivism (do released criminals re-commit crimes more or less than before the initial arrest).

Just before the “nothing works” movement emerged, Gary Becker (1968) modeled criminal behavior as a rational calculus. In its most extreme implication, Becker's theory implied that criminals were rationally calculative profit maximizers, but in its more moderate and perhaps more accurate interpretation, Becker explained that criminals were responsive to incentives. When the costs of crime change so do the instances of crimes. Empirically observed (if only marginally)<sup>14</sup> criminal rationality helped usher in the normative argument that criminals can and should be held responsible for their decisions. The just-desert theory of punishment was close at hand.

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<sup>14</sup> Ehrlich (1972, 1975, 1981, and 1982) thoroughly attempted to illustrate the empirical deterrent effects of changing punishment severities. See also Ehrlich and Mark (1977), Bar-Gill and Havel (2001), Cloninger (1975), Benson, Kim and Rasmussen (1994), Kessler and Levitt (1999), and Benson and Mast (2001).

Quickly after Martinson's publication came Michel Foucault (1975) who's central argument was with regard to the interests and intentions that lay behind the practices of punishment and social law-enforcement institutions. Foucault challenged the common belief that the criminal justice system and its constituent parts are in place for the benefit of social welfare. He argued that incarceration was more often the expressed interests of ruling elites. Punishment institutions did more to preserve power structures than they did to protect and serve. While the society and polity had long been coordinated with one another upon the rehabilitation paradigm and its punishment techniques, the empirical realities were invoking economic incentives for individuals to usher in social change towards retribution.

To take Becker's hypothesis to heart, the economic and rational decisions of criminals are contextualized within the societal and political norms of the time. During the rehabilitation paradigm, criminals perceived the costs of crime to include the practices of rehabilitation punishments. As Becker would say, they optimized their level of criminal behavior according to a set of perceived (given) budget constraints. What the model does not take into account is that over time this supposed optimal level of crime bore influence upon the preferences and sensibilities of society. If they judged this level of crime to be too high or too low then they could impose increases or decreases to the level of punishment. these new levels of law enforcement can change the perceived budget constraints of crime, therefor changing the optimal level of crime, changing the social satisfaction of responses to crime, so on and so forth.

Amidst the facts that “nothing works” to fix criminal behavior, or at least amidst

the perception that nothing works,<sup>15</sup> rehabilitation was no longer politically viable. The 1980s saw a radical shift in social attitudes towards punishment, and the formal policies of punishment. But the story was not over, criminal agents again chose their optimal amounts of crime amidst a new social and political climate, and their choices again bore influence upon the society and the polity. While several economists have empirically supported Becker's model of rational criminal behavior by exposing the deterrent effects of particular punishment policies (see footnote 14), it seems that the social perception of these policies are far less nuanced. People and citizens may not detect results that require advanced econometric regressions to see. Ehrlich's work demonstrates empirically that harsher punishments do deter criminal behavior *on the margin*, but that is not necessarily to say that those margins are the relevant margins that people really use to judge crime and punishment as legitimate. Even though retribution may be working, people in society may be frustrated and disappointed with the magnitude of its effects. Crime rates appear to be marginally declining without a proportionate alleviation of retributive punishments. The question of political viability is again ambiguous, thus the rise of attention in the philosophical literature to the principle of proportionality.

### **2.3 Sociologists versus Economists, a Hostile Confrontation**

“Rational choice sociology in the tradition of Gary Becker and James Coleman offers a bridge between economics and sociology, but not one that leads to a correction of either the institutional or behavioral deficiencies that economic sociologists have sought to address (Boettke and Storr, 2002, p.163).” Becker's rational choice framework for

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<sup>15</sup>Martinson (1974) first coined the “nothing works” phrase when empirically investigating the effects of prison rehabilitation programs as a preview to Litpon et al. (1975). The “nothing works” theory has been challenged but its influence on opinion at the time was dominant. Sechrest et al. (1979), Ryberg (2004, p.3), and Bedau (2005) all echo this historical narrative.

crime and punishment presupposes what techniques of punishment effect the costs of crime - incarceration and capital punishment are common examples.<sup>16</sup> In application, the economist who seeks to explain real criminal behavior must assume that punishments are perceived by criminals as higher costs to crime. Therefore it is reasonable to predict that marginally harsher punishments should marginally deter criminal behavior.

But what if increases in the severity of punishment are not perceived as increased costs to crime or that marginal decreases in certain types of criminal behavior are not perceived by society as real decreases in the general crime rate? In economics, demand curves represent the relationship between price and quantity in the minds eye of the buyer. How much of a good or service will an agent buy at a given array of prices? Demand curves slope downward; at higher prices buyers consume less of a given good. At higher prices criminals commit less crime. But how much less? The elasticity of demand refers to the change in quantity consumed at a given change in price. A demand curve is said to be highly elastic when it is flat relative to other demand curves. A relatively small change in price is associated with a relatively large change in quantity. The opposite is true for an inelastic demand curve. A relatively large change in price is associated with a relatively small change in quantity (Friedman, 1962). When there is no observable change in crime rates despite changes in costs (changes in the severity of punishment) criminals may be operating according to an inelastic demand for crime. Such is often assumed to be the case with regard to illegal drugs.<sup>17</sup> Drug addicts likely have inelastic demands for the substances that they are addicted to, marginally increasing the penalties against buying, possessing or consuming addictive drugs may have an

<sup>16</sup>On the deterrent effects of capital punishment see Ehrlich (1975, 1977, 1979), Passell and Taylor (1977), Ehrlich and Gibbons (1977), Dezhbakhsh, Rubin and Shepherd (2003).

<sup>17</sup>See Sollars et al. (1994) and Becker, Gorssman and Murphy (2004).



insignificant effect upon their choices to consume them.

Hyper-rational economic analysis had little common ground with the established field of sociology also concerned with criminal punishment at the time. During the 1960s and 1970s sociologists were criticizing the dominant role of incarceration as a punishment technique. Sociologists interpreted the economic way of thinking about punishment as an attempt to increase the efficiency of the punishment techniques that they were being so critical of. Sociologists were skeptical of the morality and effectiveness of punishment by incarceration, while economists were willing to take the intentions of deterrence and the means of incarceration as given, if only to solve optimization questions. How much to incarcerate, how much to punish, and how many more prisons to build? At the end of the day the applicability of the Beckerian models rested upon a knowledge and foresight of the demand elasticity for crime - an admittedly subjective and unknowable topic. Thus economists had little to say about how demand elasticities for crime or criminal behavior were constructed, influenced, or changed.

Today, there are a few economists moving away from the Beckerian tradition by relaxing some of the assumptions behind the neoclassical model. Bruce Benson (1990 and 1998) for one has focused upon the incentive problems faced by centralized state-control over the criminal justice system. There is no reason to believe that the interests of a state bureaucracy will be held in line to promote the social welfare. It could be the case that governments instead wish to maximize their power, authority, budgets and possibilities for re-election beyond the ends of securing the persons and property of the general public. If the task at hand is to maximize the deterrence of crime at the minimal cost, governments face adverse incentives to solving this question. Avio (2003) surveys

Nardulli (1984) Gierts and Nardulli (1985), Benson and Wollan (1989) and Benson (1990 and 1994) who explain that harsher than optimal sentences often result from these incentives. Judges use state and federal prison resources to appear tough on crime to local electorates; in effect concentrating the benefits and dispersing the costs of punishment.

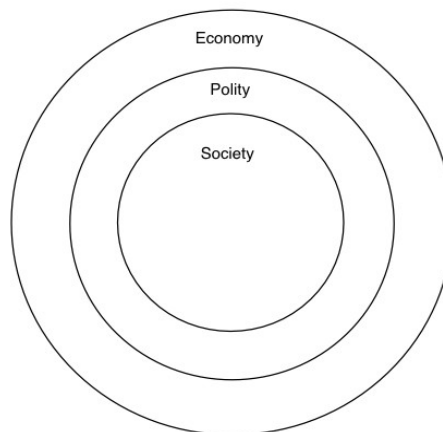
Randy Barnett (1998) has outlined several knowledge problems associated with providing justice in society. Producing justice is foremost a matter of allocating, calculating and innovating effective uses of real resources - land, labor and capital. Thus providing justice is still a question of knowing who, what, where and when to produce - information that cannot be gathered or held in one central decision making authority. The incentives, information and innovations of economic processes at play in the real world of criminal punishment often go unaccounted for in traditional economic models of criminal punishment, because these models rely upon a third-party state-enforcement agency to actually dole out punishments and punishment resources. There is no discovery of more efficient punishment techniques in the Beckerian framework.

These less-traditional economists are less concerned about what the particular costs and benefits of crime are and how to optimize them. Instead they are concerned with understanding the actual shortcomings of the current criminal justice system. They indirectly allude to a need for knowing the costs and benefits actually perceived by the real actors within the models. Real actors do not possess perfect knowledge nor perfectly benevolent incentives. When current sociologists and economists discuss criminal punishment they largely speak past one another, because the problems of imperfect knowledge and imperfect incentives are under-recognized in each discipline. By introducing and drawing further attention to knowledge and incentive problems a cross-

disciplinary discussion and research agenda can begin (Ikeda, 2003).

## 2.4 A New Economic Sociology of Criminal Punishment

When they explain individual actions and choices, sociologists and economists rely upon different visions concerning the structure of social influence or embeddedness. Sociologists, interested in punishment early inspired by Durkheim (1964 and 1973) and first popularized by Foucault (1975), took a Marxist view that society was nested within social structures. Power held within polities and economies determined the actions of social behavior. Figure 2.3. is a visual representation of this insight.



**Figure 2.3. The Marxist vision of single-embeddedness**

Crime, as a social phenomenon, was a direct product of these power structures. For example, Foucault (1977) writes, “[t]he general form of an apparatus intended to render individuals docile and useful, by means of precise work upon their bodies, indicated the

prison institution, before the law ever defined it as the penalty *par excellence* (ibid., p.231, italics in original).” What Foucault is alluding to in this passage and its surrounding text is his claim that there exists a realm of social structures - economic forces - which hold the primary impetus for the creation of the prison as the sole form of punishment in society. Specialization, codification and observation - essential components to the technology of incarceration were originated and inevitably set in motion before legal institutions had the chance to formalize incarcerations politically. The fact that individuals were being specialized, codified, and observed in factories and military organizations determined the inevitable adoption of these same techniques for the task of punishment. Garland (1990) says of Foucault's perspective “one can discern a tendency to subsume the analysis of punishment within a skeptical 'sociology of control' in which the main concern is to reveal the ways in which punishments embody or enhance the regulatory power of the state and social institutions (ibid., p.3).”

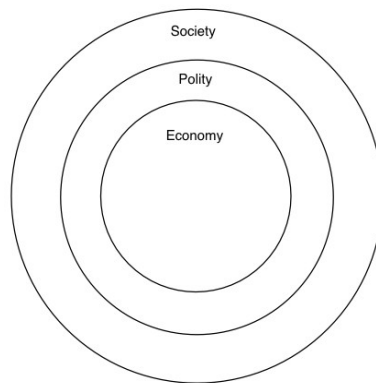
The deterministic flow of influence has been relaxed or perhaps weakened by other sociologists. In David Rothman's (1971) history of the creation and spread of American punitive institutions, he accepts Foucault's Marxian flow of influence but allows for a degree of free will and choice within social life. Rothman retained the Marxist structure of embeddedness but eliminated Foucault's bold verbiage of determinism. As Irwin (1988, p.332) describes it, Rothman was the more moderate social historian motivated by a curiosity for historical fact rather than a drive to understand power relationships.”<sup>18</sup> Sociology has weakened and relaxed the deterministic flow of influence from the economy to the society. Economics influences politics and both

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<sup>18</sup>Garland (1999) also refers to Ignatieff (1985) who was critical of Foucault's vision of punishment as an exclusive form of social control.

influence social life, but social life is not necessarily determined by the former.

At first, neoclassical economists generally ignored concerns over embedded influence. The model of rational choice was a construction made of allegedly universal principles. In order to be politically relevant, Becker's (1968) model of crime and punishment required strong assumptions as to the completeness of institutions and the way that they were perceived by criminal agents. If prisons are how we punish, and punishment is how we raise the costs of crime, then more punishment translates into more costs to crime and in effect less crime. Neoclassical economists had to take the institutional structure of society as given - property rights, a rule of law, a standard form of third party enforcement and effective state sponsored punishments - were all assumed to be given. To account for embeddedness, neoclassical economists reversed the flow of influence from the Marxist view. Economics exists within an institutional context of politics, and further within an institutional context of society. Figure 2.4. is a visual representation of this social structure.



**Figure 2.4. Single-embeddedness<sup>19</sup>**

<sup>19</sup>This graphic was taken directly from Boettke and Storr (2002, p.169) as it appears in the original text it runs with the following sub-heading: “[t]he configuration envisioned by Granovetter and others in which economic life is always located within 'concrete ongoing social relations'; it is always society that

Economic behavior, rational behavior, profit maximization, and optimization occur within a context of static and assumed institutions. Criminals select their optimal rates of crime within a static institutional framework of, arrest rates, conviction probabilities, prison sentences, capital punishments etc. But what if criminals do not necessarily perceive marginal changes of punishment policy as being more costly? There is no room for innovation, discovery or opportunity within the pure rational choice model of criminal punishment. There is no process by which an alternative institution with potentially large-scale efficiency advancements can be envisioned, invested in, tried nor succeeded. Reversing the flow of influence gave economists the ability to understand the processes of rational decision making that were previously illusive to sociologists but still suffered from similar shortcomings as the Marxian notion of embeddedness; they were excessively deterministic and unidirectional.

Neoclassical adjustments have made accommodations in a similar fashion as was Rothman's to Foucault's weakening of the Marxist flow of influence. For example behavioral economists lay out several examples of psychological and behavioral biases that help to explain why purely efficient solutions are not always achieved in the market place<sup>20</sup> If purely rational choice is not observed always and everywhere, it can still be said to possess explanatory power to describe some underlying and perhaps universally applicable principles. Criminal behavior may not be completely explained by rational choice, but it does appear to respond to incentives. In the creation of the new sub-discipline of economic sociology Boettke and Storr (2002) have described Granovetter's (1985) and other economic sociologists' descriptions of embeddedness as a similar

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influences and constrains economic behavior.”

<sup>20</sup>As examples of behavioral economics see: Kahneman and Tversky (1979) and Thaler (1994).

weakening with regard to the flow of influence. For Granovetter all economic actions are embedded within networks of social relations - they are interpersonal expressions. For the related fields of economic-sociology and new institutional economics it is a large step in the right direction to recognize that social forces like culture and ideology bear influence upon the economic process.

But I agree with Boettke and Storr (2002) in criticizing this field for not going far enough in recognizing the more accurate structure of reciprocal embeddedness. Flows of influence are multi-directional. Society and polity influence the economy which in turn re-influence the polity and society, so on and so forth. Refer again to Figure 2.2. A vision of politics which does not account for the systematic economic forces of knowledge and incentives is short-sighted. Just as is any similar description of economics that overlooks the institutional influences of societal cultures or political processes. And finally any vision of culture and society which overlooks the influences that market economies and political identities have upon them is similarly incomplete.

Today there is a growing body of research, one may want to call it interdisciplinary because its pieces do not fit neatly within the established disciplinary titles. Sociologists such as Diego Gambetta (1993) who investigated the Sicilian Mafia, Marek Kaminski (2004) Polish prison inmates, Sudhir Venkatesh (2006 and 2008) America's urban poor and gang communities, and Peter Moskos (2008) Baltimore urban police officers, are almost repeating the 1930's-style sociology by stepping inside of criminal microcosms. What they have observed are intensely rational and strategic processes of commercial exchange and the spontaneous creations of rules and rule following behavior. When viewed together much of their insights illuminate the

shortcomings of the traditional fields. Venkatesh's findings in particular imply that social policy constructed from a perspective that adheres to the traditional frameworks will be short-sighted and ineffective. In detail, he offers the reports and attitudes of community members trapped within a social process unexplained and unfix-able by traditional sociology or economics. Ignorant to the underlying structure of informal society the state imposes prohibition - drugs, gambling, loan sharking, etc. Activities are regulated or down-right outlawed. These behaviors get pushed underground and adopt a culture where talent in the illicit trades is rewarded. With time the underground economy is entrenched throughout the local economy making further policy reforms of the top-down criminal justice system ever more difficult. There is an ever present informal structure of society that formal policy must be placed upon. There is a meaningful distinction between law and legislation (Hayek, 1973, p.35-54). When these are in a state of conflicting tension to one another they develop a schism between the de jure and the de facto rules of social engagement. Updating the models of social science to include imperfect knowledge and imperfect incentives are in part an attempt to inform policy measures of the tacit, informal, and de facto realities of the social world.

In Boettke and Storr's (2002) description of a new “post-classical political economy” they point to several examples of current applied research that seems inherently motivated and guided by a recognition of their reciprocally embedded framework. First Emily Chamlee-Wright's (1997, 2002, and 2005) descriptions of female entrepreneurs in Zimbabwe and Ghana tell a full story of reciprocal embeddedness. The cultural norm of bride-prices developed amidst a particular set of economic conditions. In turn this established cultural norm has feedback upon the economic realities of local



towns by inhibiting economic development through female entrepreneurship. The level of economic growth is upheld and re-affirms the prominence of the bride-price as a social norm. Boettke's (2001) work on the transition of the Soviet Union tells a similarly full-cycle narrative. In the context of political prohibitions, Russian traders took to the black market where cultural trends of deception, secrecy, and stealth erupted. These norms then had a real effect upon the economic capital structure of goods and services. These trends did not just wash away once reforms were said to be in place. Instead the economic and political reforms were less effective because they were imposed upon a cultural environment accustomed to practices ill-suited to economic growth. Lastly Storr's (2004) description of pirate culture in the Bahamian economy shares the same narrative structure. Bahamians aggrandize the myth and cultural identity of “pirates” who essentially cheat, steal, and evade accountability. This identity in turn has consequential effects upon the size and scope of the economy which in turn re-enforces the prominence of the pirate cultural identity.

For other economic sociologists the one-stage impacts of social influence would complete a meaningful narrative as implied by their theoretical frameworks. Female entrepreneurs would be discouraged by cultural norms, Russian reform would be difficult because of a culture of secrecy, and Bahamian growth would be upheld by pirate myths - end of stories. These unidirectional stories do not give as useful advice for the construction of political reform as does the Boettke and Storr (2002) method. Policy advice in the uni-directional world is to get the institutions right, or the incentives, or the prices right. The real problem being that those institutions, incentives, and prices are subject to change in unforeseen and unexpected ways.

To be in search of an economic-sociology of criminal punishment is to be in search of a similarly complete narrative of social change and institutional influence regarding criminal punishment. We must recognize that policies which fail to account for knowledge and incentives may in turn sow the seeds of their own ineffectiveness. Imagine a political territory decided to increase the degree of punishments for all forms of criminal violations. Assume that these policies invoked feelings of hostility and resentment amongst certain social groups within society. These frustrated agents in turn lost respect for the formal legal system and in turn proceeded to support and grant approbation for individuals who broke or ignored the criminal laws. This in turn reinvigorates the call for harsher punishments and in turn reinvigorates the tension and hostility between the social groups and the formal criminal law. These are the exact conditions described by sociologists like Gambetta, Kaminski, Venkatesh, and Moskos. The actors in their narratives do not perceive the police or the formal criminal justice system as a source of resolution or justice. Instead they are skeptical of the formal justice system and rely upon the very network of so-called criminal agents to satisfy their needs of property protection and punitive enforcements.

The question that remains is how to move from a situation as described above to one where the overarching institutions match well with the needs and preferences of the people within the system. Policies must be framed in such a way that they are cognizant of the way people perceive the costs, benefits and incentive structures that are created by the constructed institutional rule system. To progress towards a theory of transitional political economy geared to create proportionate punishment, those policy changes must be cognizant of the way actors within the system perceive the costs and benefits of

criminal behavior. This may be a difficult pill to swallow. For so long have the institutions of criminal punishment - police, courts and prisons - been the assumed role of state authority and monopoly. But that is not to say that the solution is without hope, it is no coincidence that the example of political economy chosen by Ludwig von Mises (1949) when first trying to grasp the role of meaning and perception in interpreting social phenomena invoked the very role of state-sponsored punishment. “The hangman, not the state, executes the criminal. It is the meaning of those concerned that discerns in the hangman's action an action of the state (ibid., p.42).”

Social scientists must be willing to at least entertain the possibility that state monopolies fail as useful means to achieve the stated ends of proportionate punishment. In further research I entertain the hypotheses that the state lacks the critical knowledge of subjective, varied, and incomplete preferences of the citizenry with regard to proportionate punishment (D'Amico, unpublished a). Bringing the outcomes of the criminal justice system to be in line with the preferences held within the hearts and minds of the citizenry is a task of social cooperation and coordination. Governments lack the ability to tap into society's real preferences for punishment and thus they miscalculate what proportionate sentences are or should be. Central-planners cannot calculate the market rates for proportionate punishments in individual cases because they lack the preemptive market prices for the constituent inputs of criminal justice - police, courts and prisons. At the macro-level these mis-calculations result in generally perceived disparities and dis-proportionalities with regard to the levels of criminal punishment in society. I go further in a separate argument to demonstrate that state monopolies over criminal justice services further lack the incentives to usher in proportionality reform policies (D'Amico,

unpublished b). It can be argued that rule-based rather than discretionary-based criminal sentencing is a better decision making structure to secure proportionate outcomes because of the long and variable lags associated with the life cycles of criminal sentencing policies. Between the time when a policy is needed until it actually takes effect, political processes invoke several types of incentives detrimental to the intentions of the original policy. Thus stable rules provide citizens with reliable expectations about the future of punishment policies, giving them the opportunity to allocate private security resources efficiently. Unfortunately by their nature as supreme authorities over the interpretations of rule-based criminal justice policies, governments lack any credible commitment to stick to the rules once they are in place. Moments of crises such as political and ideological revolutions, natural catastrophes, and post-war-time scenarios may provide the only massive one-time shifts in incentives and institutions that allow for unique and innovate methods of constraining state authority from its pervasive role within the decision making processes of producing criminal punishments.

Together these thought experiments expose a logical inconsistency between the means of central-planning on the one hand and the ends of proportionality on the other. The social phenomenon of criminal justice by definition is a societal dilemma which is to say it involves a degree of collective action and or policy response. The question is what type of policy, what framework of understanding for policy guidance can best inform social scientists expectations regarding criminal behavior and social perceptions of punishment legitimacy? I argue that all policy suggestions must take account of economic knowledge and incentive processes for fear of falling short of their intentions.

## 2.5 Conclusions

The applied research agenda of an economic-sociology of criminal punishment is far from underway but a clear road map may be available, or at least a rough sketch. We have pin-pointed that the roles of knowledge and incentives are critically lacking in the existing literature and should be more thoroughly accounted for. Once in hand, this more dynamic understanding of market processes within the realm of criminal punishment can help to bring sound understanding and causal explanations to the long term trends of crime and punishment in the United States.

### 3 The Use of Knowledge in Proportionate Punishment

*Our knowledge is in proportion to the number of our ideas. The more complex these are, the greater is the variety of positions in which they may be considered. Every man hath his own particular point of view, and, at different times, sees the same objects in very different lights. The spirit of the laws will then be the result of the good or bad logic of the judge; and this will depend on his good or bad digestion, on the violence of his passions, on the rank or condition of the accused, or on his connections with the judge, and on all those little circumstances which change the appearance of objects in the fluctuating mind of man.*

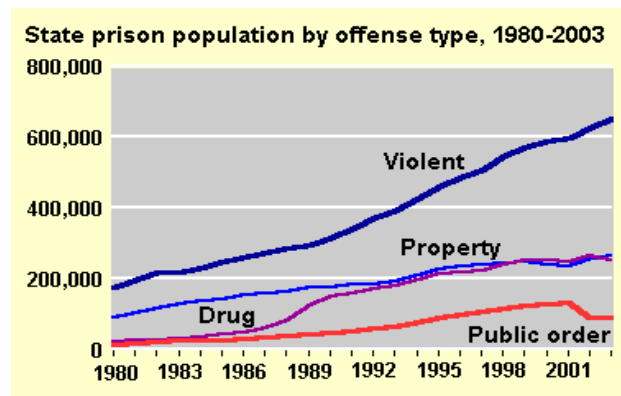
--Cesare Beccaria-Bonesana, *Of Crimes and Punishments* (1764, p.8)

#### 3.1 Introduction

The philosophical debate over criminal punishment is divided between advocates of rehabilitation and advocates of retribution. Different punishment practices are predominantly supported by different philosophical arguments, each with its own strength and weakness. Consequentialists are concerned with how society responds to crime because of real effects upon safety, security and the general welfare. An overly harsh criminal justice system can harm innocent people at the hands of the state while a too

lenient system leaves innocent victims vulnerable to crime.<sup>21</sup> The alternative and recently dominant perspective relies upon a deontological justification - criminals deserve to be punished.<sup>22</sup> America's criminal justice system in practice is an interaction between the two perspectives. Society neither has a completely retributive nor a completely rehabilitative system, instead both consequential and deontological justifications are employed when convenient. Most recently, commentators have begun to express concerns over the tension that apparently exists between theory and practice in the criminal justice system.

As Figure 3.1. demonstrates the number of criminal offenses has increased significantly with the development of the war on drugs and significantly contributed to a general increase in prison populations.



**Figure 3.1. State prison population by offense type, 1980 - 2003<sup>23</sup>**

<sup>21</sup>Duff (2004) surveys the consequentialist perspective and references Wooton (1963) and Menninger (1968) who support therapeutic alternatives to incarceration. Smart (1973) and Bagaric and Amarasekara (2000) argue that allegedly unjust punishments are justified if they “really produce the best consequences.”

<sup>22</sup>See Mundle (1969), Davis (1972), Kleining, (1973), Singer (1979), Duff (1986) and McLeod (2003) for explanation and support of the deontological perspective.

<sup>23</sup>This graph was created from data found in Chaiken (2000) and Harrison and Beck (2006).

Before the 1980s drug crime comprised a near zero amount of the prison population whereas today it makes up over a third. Today prison populations in the U.S. are at an all time high compared to other countries and throughout history. Refer back to Table 2.1. that presents the prison populations of the top countries around the world in recent years.

While some scholars attribute the prison population increases to higher crime rates, others have argued that the recent drop in crime without a prison population leveling indicates a higher degree of punitive sentencing. Alfred Blumstein and Allen Beck (1999) for example, explain that though the statistics appear to show that the average prison sentence has gotten shorter, it is applied disproportionately more frequently. With lower crime rates, and similar probabilities of being arrested (roughly 50% between 1980 and 2001), the probability of being convicted has risen dramatically in recent years, from 13 to 28% (Loury, 2007). Concerns over apparent race, gender and other forms of socio-economic disparity have also been raised. Table 3.1. presents the break down of prison populations by race and gender over time.



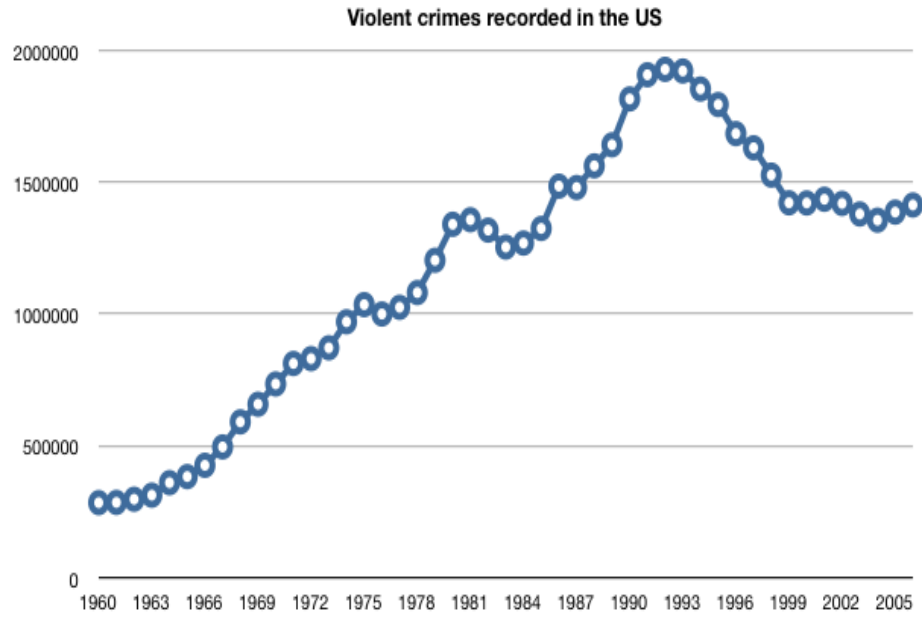
**Table 3.1. Number of sentenced prisoners under State or Federal jurisdiction by sex and race, 1980 - 2006<sup>24</sup>**

Number of sentenced prisoners under State or Federal jurisdiction, by sex and race

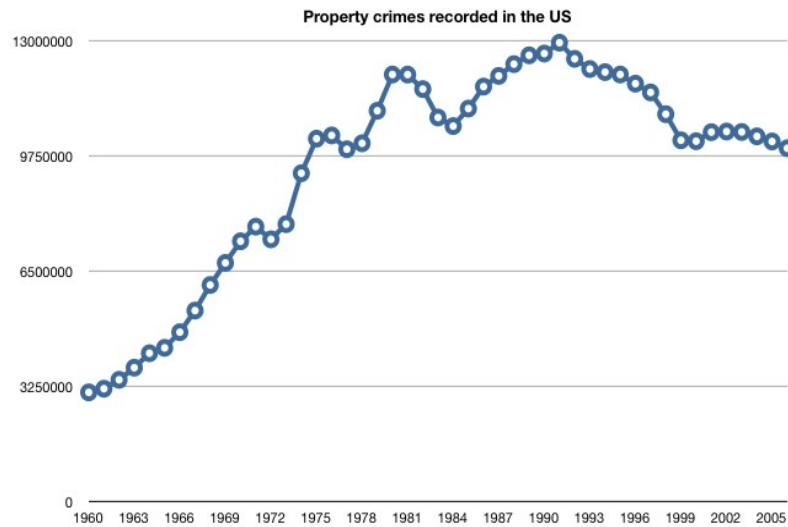
Year	Total	Male		Female	
		White	Black	White	Black
1980	315974	159500	140600	5900	6300
1985	480568	242700	210500	10800	10200
1986	522084	258900	232000	12400	11800
1987	560812	277200	249700	13700	12600
1988	603732	292200	274300	15500	14200
1989	680907	322100	313700	18400	18300
1990	739980	346700	344300	20000	20100
1991	789610	363600	372200	20900	22200
1992	846277	387600	401200	22100	23700
1993	932266	418900	445400	25200	27900
1994	1016691	452700	489200	28300	30700
1995	1085363	493700	510900	31700	31000
1996	1138984	510900	528200	33800	33900
1997	1195498	541700	548900	36300	35500
1999	1222799	403700	558700	27100	38300
2000	1237469	436500	572900	34500	37400
2001	1259481	449200	585800	36200	36400
2002	1291326	436800	586700	35400	36000
2003	1316495	454300	586300	39100	35000
2004	1337700	449300	551300	42500	32100
2005	1362500	459700	547200	45800	29900
2006	1502200	478000	534200	49100	28600

Along the while, crime rates have generally increased, with recent marginal declines, and the costs of the criminal justice system have steadily climbed. Figure 3.2. shows the general rise but recent marginal decline of violent crime. Figure 3.3. shows the same for property crimes in the U.S. Figure 3.4. shows the rate of expenditure growth amidst the separate functions of the criminal justice system.

<sup>24</sup>Data taken from Beck and Gilliard (1995), Mumola and Beck (1997), Gilliard and Beck (1998), Beck and Mumola (1999), Beck (2000), Beck and Harrison (2001), Harrison and Beck (2002), Harrison and Beck (2003), Harrison and Beck (2004), Harrison and Beck (2005), Harrison and Beck (2006), and Sabol, Coulture and Harrison (2007).



**Figure 3.2. Violent crimes recored in the United States, 1960 – 2005<sup>25</sup>**



**Figure 3.3. Property crimes recorded in the United States, 1960-2005<sup>26</sup>**

<sup>25</sup>Data taken from the United States Uniform Crime Report 1960-2006.

<sup>26</sup>Data taken from the United States Uniform Crime Report 1960-2006.

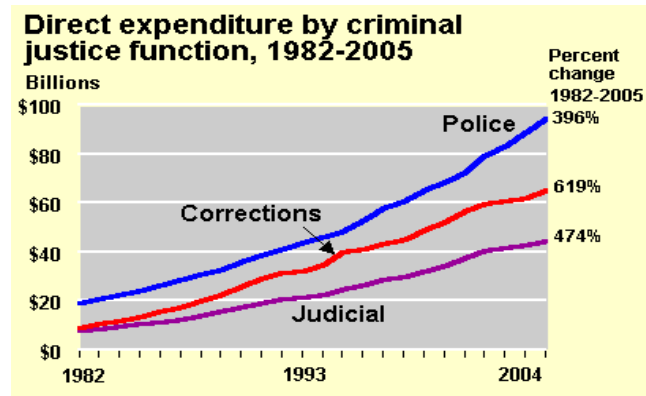
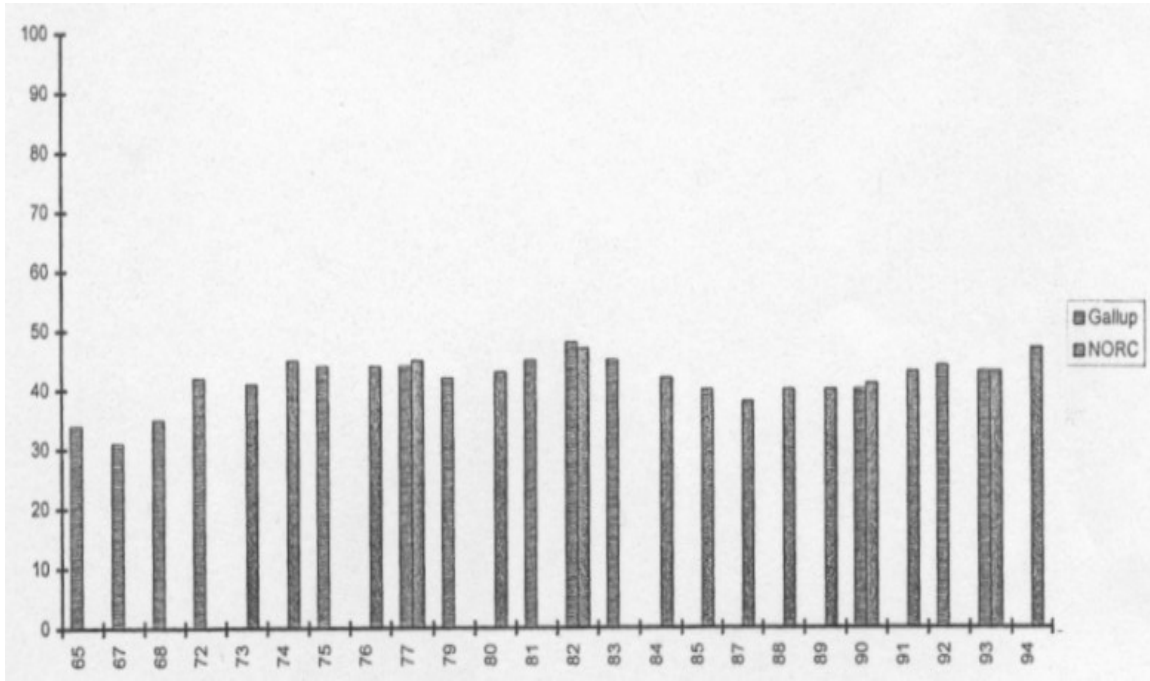


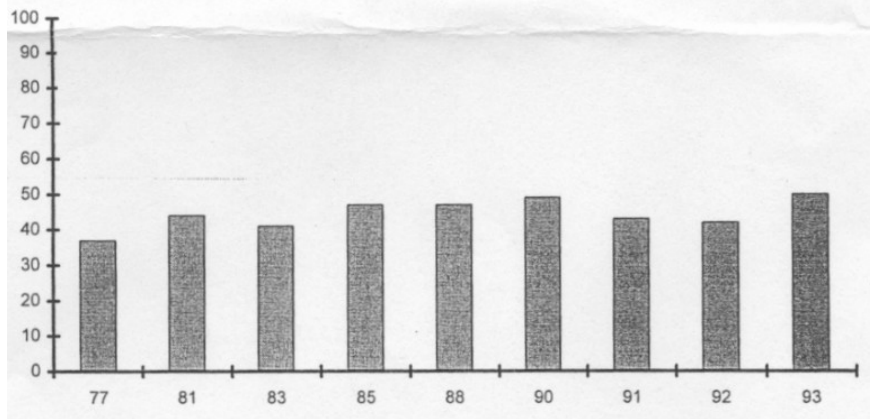
Figure 3.4. Direct expenditure by criminal justice function, 1982-2005<sup>27</sup>

Also the social perceptions of the criminal justice system are static and unrevealing at the aggregate level but when broken down demographically, minority populations hold the majority of negative opinions regarding police, courts and prisons (Flanagan and Longmire, 1996). Figure 3.5. graphs survey results of American's reporting their fears to walk alone at night over time. Figure 3.6. graphs survey results when Americans are asked about the honesty and ethical standards of police officers. Figure 3.7. graphs American's general agreement that too little money is spent on criminal justice efforts.

<sup>27</sup>This graph is reproduced from data found in Bauer and Owens (2004).

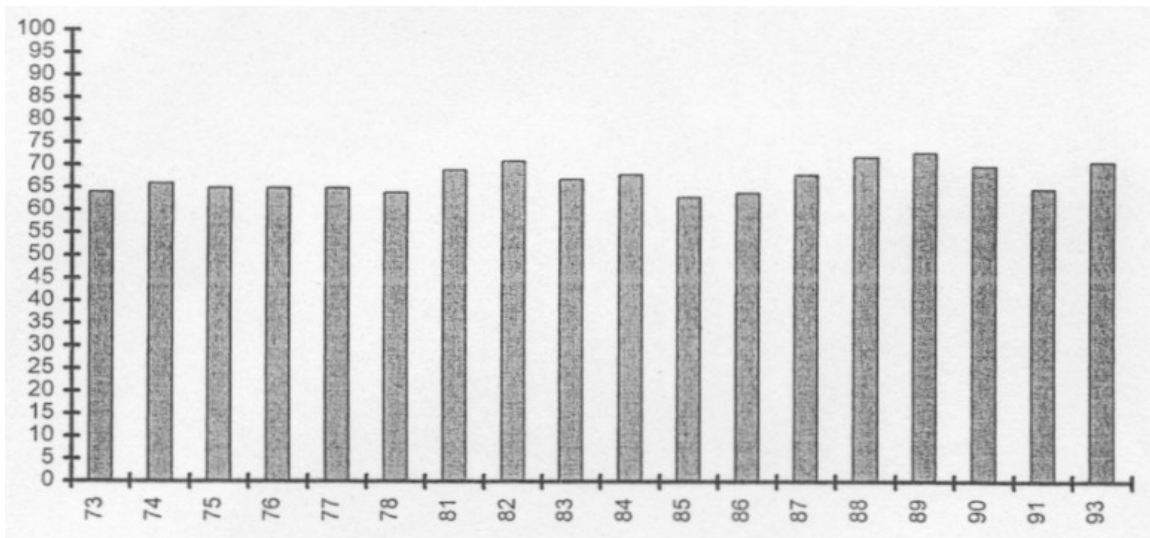


**Figure 3.5. American's fear of walking alone at night within a mile of home, Gallup Polls and National Opinion Research Center surveys, selected years, 1965-1994<sup>28</sup>**



**Figure 3.6. Americans responding that the honesty and ethical standards of police officers are very high or high, Gallup Polls, 1977-1993**

<sup>28</sup>This graph is reprinted from Flanagan (1996, p.11).



**Figure 3.7. Americans agreeing that too little money is spent to halt the rising crime rate, National Opinion Research Center Surveys, 1973-1993**

I do not intend to explain the full scope of these empirical trends, instead I present them as evidence of a general tension between philosophy, politics and economics within the criminal justice system. Such tensions have driven social changes regarding crime and punishment through history and today's empirical conditions are again putting stress upon the dominant deontological-retributive theory of crime and punishment. The retribution paradigm is being updated and constrained by the proportionality principle.<sup>29</sup> The proportionality principle holds that a punishment should fit the crime. It is a standard to evaluate the legitimate magnitudes of criminal sentencing, but a serious gap still remains between theory and practice.

<sup>29</sup>Beccaria (1764) and Bentham (1843) were among the first to describe proportionality standards. More recently Frankel (1972), Davis (1983), Bedau (1984), von Hirsch (1991), von Hirsch and Jareborg (1991), Ashworth (2000), Duff (2001), Ryberg (2004) and von Hirsch and Ashworth (2005) have explained and argued in favor of proportionate sentencing.

From an empirical perspective the sheer size of the American criminal justice system is considered disproportionate and an inevitable consequence of the predominant retributive perspective. The more subtle implication of proportionality - equality before the law or like crimes should be punished alike - is also lacking in practice. Punishments are unequally applied across socio-economic groups. The outcomes of today's criminal justice system intuitively appear disproportionate to theorists and citizens alike, but proportionality theory admits an inability to objectively determine whether real punishment practices are or are not proportionate. If crime increases then should not incarcerations, if crime is disproportioned along racial lines, then should not incarcerations? The intuitive relationships between real world conditions, and political responses do not hold to be so clean. Instead crime, incarceration, punishment techniques, amounts, etc. all fluctuate at various rates in the short and long runs. Society lacks a meaningful framework to digest the facts of crime and punishment. What works, what does not, what is affordable, what is not, what is allowable, what is not, what is just?

The proportionality principle was meant to constrain the unyielding momentum of government sponsored punishment, but it lacks a methodology to bring theory into practice, or to update existing practices in accordance to sound theory. Hugo Adam Bedau (2005) points out this tension when he writes, “no alternative approach shows any signs of supplementing the just deserts sentencing philosophy - no matter how preposterous in practice the claim that a given punitive sentence is justly deserved may be (ibid., p.3).” Without a unique theoretical framework the proportionality principle, like its theoretical predecessors - rehabilitation and retribution - will likely be swayed by empirical trends and political influence rather than sound theory, the standards of justice,

or the will of the people. I argue that the central feature of criminal justice philosophies that drives the gap between theory and practice, is their beginning assumptions of omniscient and benevolent central-planners. This chapter attempts to update the assumptions of omniscience in criminal justice philosophy. I seek resolution to a traditionally philosophical debate by introducing economic theory equipped to promote social coordination despite imperfect and incomplete knowledge.

The fundamental problem of providing proportionate punishment is one of social and economic coordination, much like any other allocation of resources. As F.A. Hayek (1945) wrote, “[t]he economic problem of society is... not merely a problem of how to allocate 'given' resources... It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only those individuals know (ibid., p.519-520).” The question at hand is: how to produce proportionate punishments according to the tastes and preferences of society amidst costs and constraints? What must first be understood is that the “tastes and preferences of society” are unknown to any individual planner. When crime takes place there are justice demanders - individuals who want to secure their rights, investigate the facts of the crime, bring the criminal to trial, and impose punishment. On the other side of the market are justice suppliers - individuals who offer resources and expertise to provide justice services: policemen, judges and correctional managers. Knowledge is problematic on both sides of the market for justice. Demanders need a forum to express their preferences for justice and suppliers need to be alerted to profit potential when offering justice services.

In traditional markets for ordinary goods and services, individuals reveal their

subjective preferences in proportionate amounts when buying and selling. Prices communicate the relevant knowledge of how individuals value scarce resources. They signal to suppliers, how much, where, when and of what kind of products or services are demanded. Without markets to provide criminal justice services, law enforcement institutions do not know the social preferences for crime and punishment the way that ordinary suppliers know what customers want. Suppliers of traditional market goods rely on the price system to reveal consumer demands. Proportionate provision of consumer goods is achieved when the preferences of demanders are matched by the devoted resources of suppliers in quality, quantity, time and place. Neither too much nor too little, thus is the heart of proportionality.

A centrally-planned criminal justice system suffers from social discord in ways that markets systematically avoid and resolve. Markets solve knowledge problems and promote social coordination better than centralized political processes. Market processes are unambiguously conflict avoiding, the same cannot be said for politics. Market-provided services may not perfectly match social preferences nor ever achieve ideal proportionality, but theory implies that when customers are dissatisfied with the given allocation of resources, profits can invoke new techniques for delivering service. For the purposes of this argument I assume that the moral, ethical, metaphysical or whatever philosophical arguments in favor of the proportionality principle are sound. I ask whether politics or markets are better equipped to produce proportionality? I find that political production of criminal justice services lack the crucial mechanisms to detect the knowledge needed to allocate resources proportionately - prices. If markets were allowed to produce criminal justice services, there is no reason that the allocation of resources



would not be characterized as proportionate and socially representative. In a competitive market for criminal justice, undesired disproportionate punishments could at least be replaced by preferable more-proportionate ones. Markets are better at producing equilibrium or proportionate allocations of goods and services compared to political systems. Thus markets should be better at producing proportionate levels of punishment compared to central planning.

Henry Hazlitt (1998), Israel Kirzner (1998) and Leland Yeager (2002) have all similarly argued that, though imperfect, social coordination may be the best approximation of an objective social welfare standard. Thorough-going subjectivism rules out the conclusion that market processes are always and everywhere social welfare increasing. There may be no universal or ethical claim to favor markets over politics, but there are methods to still construct a positive ethical social science. Through comparative analysis it can be demonstrated that market processes promote social coordination and mutual satisfaction among their participants in ways that political processes cannot mimic. In other words, market processes allow for unsatisfied individuals to rearrange resources at the margin. They promote distributions of resources that seek out and eliminate existing conflicts, and avoid continual conflicts in the future. The empirical trends of crime and punishment have oscillated for centuries without a consistent theoretical framework. At various points, tensions between philosophical paradigms, political policies, and empirical crime rates have forced social changes in each area. The traditional debate over the correct criminal justice paradigm is in need of a framework that systematically promotes social cooperation or at least detects and responds to social discord.

It is not because of theoretical inconsistencies or a lack of philosophically dedicated research that proportionality principles have not been accepted or applied.<sup>30</sup> Instead it is the assumptions behind proportionality theories that maintain a gap between theory and practice. Proportionate philosophies like all dominant punishment paradigms assume government is the sole legitimate provider of criminal justice services. They imply that the margins of criminal severity and punitive harshness are or can be appropriately defined by the state. And they rely upon the political process and or philosophical discourse to correct error and update the criminal justice system towards proportionality, efficiency and social satisfaction. In reality, none of these assumptions hold. In fact, centrally-planned criminal justice services inhibit the expression, detection, and response to social preferences for proportionate punishment. Lacking the knowledge of social preferences over crime and punishment makes designing and applying proportionate punishments difficult if not impossible.

As Barnett has phrased it “[t]he United States today delivers law and order in the same socialist manner that the USSR delivered food and shoes - and with comparable results (Benson, 1998).” The criminal justice debate stands at a similar theoretical juncture as the socialist calculation debate did in the early to mid twentieth century. Mises (1920 and 1951) and Hayek (1935) argued that socialism was impossible without market prices for the factors of production. The central-planner does not possess

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<sup>30</sup>One gets the impression that philosophers believe more writing and research will influence criminal justice policy towards proportionality. Von Hirsch (1991, p.580) writes, “expressive theories of deserved punishment best explain why punishments should be commensurate with the gravity of offenses. I have also suggested how the expressive view can give us some insight into how proportionality of sanctions should be assessed. Penal policy ultimately involves ethical choices. One can understand that policy best by thinking about the underlying ethical theory.” Frankel (1972, p.20) writes, “there is need for a serious, carefully planned and organized course of initial study, perhaps for a month or so, devoted to this area, and largely to problems of sentencing. There should be reading, lecturing, and discussion about the fundamental questions of philosophy and penology. Prisons should be visited and studied.”

contextual prices of goods and services valued against one another. The knowledge revealed through these prices is crucial if he is expected to invest in production lines that are proportionately matched to the preferences and demands of the consumer society. Proportionate criminal sentences are an output produced from complimentary institutional inputs (police, courts, and prisons). Without market prices for the factors of producing criminal justice, ideal proportionate punishment is impossible. Even if central-planners accept the insights of proportionality and implement sentencing guidelines drafted by philosophers, punishments would still not meet ideal proportionality standards because they would lack local, contextual and dispersed knowledge that does not exist without individuals making real decisions according to scarcity constraints. The centrally-planned criminal justice system lacks a feedback mechanism to adjust itself in the face of changing empirical crime rates and changing social preferences. When crime exists and a significant portion of the population demands institutional changes, the central-planner without market prices, has no way to decide whether to produce more police, courts, prisons, or whatever to respond to crime proportionately, let alone of what type. The proportionate distribution of the earlier factors of production in part determine whether the final output of proportionate punishment is possible.

The remainder of this paper is organized as follows. Section 3.2 surveys the philosophical literature devoted to proportional punishment. Proportionality emerged as a necessary constraint on the application of retributive punishment practices. In their political and practical applications, proportionality standards have yet to live up to their theoretical counterparts. The American criminal justice system leaves a gap in meeting philosophers' and the general publics' preferences for proportionality. That gap represents

discord that could be responded to by markets. Section 3.3 provides argument and evidence of the current criminal justice system's failing to solve knowledge problems and provide proportionate criminal sentences. Section 3.4 gives arguments for why a market-driven criminal justice system could better solve knowledge problems and provide proportionate punishments compared to the current-centralized system. Section 3.5 offers concluding remarks.

### 3.2 The Proportionality Principle

While punishment has been a point of interest amongst philosophers for centuries, consensus on the matter has changed over time. The topic was brought into the realm of public policy in the late 1700s by Jeremy Bentham (1785) and other utilitarians who sought to increase the public good by lowering the social harms of crime economically - at the lowest possible cost. Utilitarians and early penologists wanted to rehabilitate criminals, change them into productive members of society. Until the 1970s philosophers doubted that the alternative to rehabilitation, retributivism, held any moral merit.<sup>31</sup> But the empirical, and political realities of the 1970s put stress on the consequentialist justifications and rehabilitation practices that were in place at the time. Crime rates and recidivism were both rising; rehabilitation was costly and apparently ineffective. Society began to perceive the criminal justice system, and its philosophical justifications with a “nothing works” attitude.<sup>32</sup> By the mid 1980s philosophical perspectives on crime shifted

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<sup>31</sup>Some writers in the 1960s supported retributivism inspired by Kant (1790) and Hegel (1820) but they were the minority. See Armstrong (1961) and Gross (1984).

<sup>32</sup>Avio (2003, p.27) surveys Martinson (1974) who first coined the “nothing works” phrase when empirically investigating the effects of prison rehabilitation programs as a preview to Litpon et al. (1975).

to embrace recidivism and deontologically-supported, desert-theories of punishment.<sup>33</sup> While rehabilitationists used the state to reform criminals, retributionists saw the state as a protector, punisher, and when needed, an executioner. The two punishment approaches both rely on the use of incarceration and imprisonment, but they imply different distributions of prison space and other punishment resources. For example, dealing with crowded prison facilities under a rehabilitative paradigm may require parole releases and or alternative correctional techniques such as psycho-therapy, while a retribution standard would call for more prisons to be constructed. The different institutional perspectives will determine different policy actions on the margin.

Today the deontological justifications for imposing penalties on criminals are generally accepted but constrained. Once again, the commonly accepted philosophy of punishment is being updated because of social tensions regarding the outputs of the criminal justice system. Today, more aspects of civic life are deemed criminal, criminals are subject to higher incarceration rates, and there are significantly more people in prison than in the past. Commentators are blaming the retributive philosophy as a theoretical and moral failure. U.S. federal and state governments have not only accepted their punitive duties they have become the largest punishers in world history. Retributive theories alone do not provide a practical blueprint for allocating punishment in the correct amount. The administration of criminal justice cannot be given free reign to levy penalties in any magnitude upon any criminal offense, thus proportionality has emerged as a standard to theoretically determine the proper amount of punishment.<sup>34</sup> “[T]he [proportionality]

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The “nothing works” theory has been challenged but its influence on opinion at the time was dominant. Sechrest et al. (1979), Ryberg (2004, p.3), and Bedau (2005) all echo this historical narrative.

<sup>33</sup>Mundle (1969), Davis (1972), and Kleinig (1973) represent the key moral arguments in favor of desert inspired retributive justice.

<sup>34</sup>Ryberg (2004, pp.3-5), Griset (1991), Hudson (1987), von Hirsch et al. (1987), von Hirsch (1993),

principle has the form of a *deontological constraint* (Ryberg, 2004, p.13).” Where the desert theory of retributive punishment has explained *why criminals should be punished*, the proportionality standard is a framework to understand *how much criminals should be punished* (von Hirsch, 1991). Similar to its preceding criminal justice philosophies, proportionality is confined to the theoretical realm, it is subject to change imposed by the economic, social and political realities that it is couched within.<sup>35</sup>

The proportionality principle holds that a punishment should be well-fitted to the crime,<sup>36</sup> with two central aspects. (1) The *ordinal proportionality* of a punishment refers to its magnitude in relation to other crimes and punishments. One ordinal ranking scheme represents the severity of crimes and another must represent the harshness of punishments. For example, murder is a more severe crime than theft, and death is a harsher punishment than fines - the separate ranking scales would essentially be two complete lists, one of all possible crimes and one of all punishments. (2) *Cardinal proportionality* is maintained when the link between the two ordinal scales are well-matched. If petty theft was punished by a death sentence, one would still say that the

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Wasik and Pease (1987), and Tonry and Hatlestad (1997) all describe the rise of proportionality as a response to real punishment practices and unrestrained criminal sentences that struck against the intuitive moral implications of retributivism.

<sup>35</sup>Bentham (1962) once wrote that the term proportionality was more “oracular than instructive.” Ryberg (2004) does not believe “proportionalism is in the end the position that should bring philosophy to the front-line of penal practice.”

<sup>36</sup>Proportionality is usually applied narrowly to punishment and criminal sentences. I argue that proportionality has a broader application throughout all criminal justice services (police, courts, and prisons). Corrections are not the only realm of criminal justice provision that is punitive. All criminal justice services impose unwanted costs upon criminals. Criminals would rather not be handcuffed, detained, brought to trial, or sentenced. The methods and techniques of arrest can also be held to proportionality standards. What techniques are excessive and what are too lenient for police to use when they arrest suspects? Furthermore the level of imposed punishment that is performed in society is related to the allocation of resources in the earlier services of criminal justice. If millions of dollars are given to police departments in order to make drug arrests, and much less is paid to enforce other crimes than a similar bias will likely work its way into correctional institutions as well. These questions share the same structure as the question of providing proportional punishment in corrections but there is not sufficient space to address them in this article.

punishment was disproportionate, even if relative crimes were punished with ordinally proportionate punishments - a marginally worse theft was punished with a marginal amount of increased torture and then death. The ordinal evaluation scales of crime and punishment must be internally consistent, and when fitted together, they must produce “reasonable” punishment magnitudes.<sup>37</sup>

For philosophers, constructing proportionate punishments consists of three related steps. First, there needs to be a ranking system to evaluate the severity of crimes. The relevant margins to judge a crime's severity must be defined and accepted, then crimes get ordinally ranked according to those margins. Next, a similar ranking system must be developed for punishment. The set of legitimate and available punishment techniques must be clearly defined, and then those punishments also ordinally ranked by harshness. Each of the two ordinal lists must be internally consistent. More severe crimes and punishments must be allotted to the more severe sides of each spectrum. Once the crime and punishment scales are constructed, they are matched or “anchored” (von Hirsch, 1991, pp.576-578) to one another to establish a cardinal exchange rate where crimes invoke specific punishments in specific quantities.

The value scale for criminal severity is often developed first because harm and culpability are the accepted margins for determining criminality.<sup>38</sup> Punishments can be geared to respond to the level of harm caused by a crime. The more harm a crime causes, the harsher the punishment.

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<sup>37</sup>The application of the terms “cardinal” and “ordinal” to the severities of crime and punishment was coined by von Hirsch (1991 and 1993, ch. 2) and they have been accepted as “standard” throughout the field (Ryberg, 2004, p.13 n. 10).

<sup>38</sup>See von Hirsch (1991, p.556). Von Hirsch and Jareborg (1991) admit that their process does not apply to crimes without a victim. “Davis seems to regard this as a disadvantage of the theory [(Davis, 1983)]; I consider it an advantage. Where there is doubt that conduct is reprehensible, the appropriate response is decriminalization (von Hirsch, 1991, p.579).”

Von Hirsch and Jareborg (1991) have offered one outline for “gauging criminal harm.” They seek to define the level of harm stemming from a “standard” form of crime - burglary in general instead of a specific case of burglary. They describe an average victim, an average criminal and an average offense to calculate the standard penalty for standard crimes that impose harm upon the “living standard”<sup>39</sup> of victims. For them, dealing with unique cases is a matter of describing the differences between the unique and the standard case, then calculating the proportionate difference to be added or subtracted from the standard punishment. They loosely fit the ordinal value scales of crime and punishment together by grouping categories within the larger body of criminal acts.<sup>40</sup> So long as the typical burglary is anchored to a standard punishment there may be disproportionality among individual cases of burglary, but radically disproportionate punishments across types of crimes are avoided. One will not be put to death for a petty crime so long as petty crimes are clearly distinguished from severe murders.

Davis (1983) presents another outline for specifying proportional punishments. His system takes a different sequential order from von Hirsch and Jareborg's (1991), but the general structure where ordinal rankings for crime and punishment are listed, then fit together as cardinal exchange rates, is the same. Davis calls his a “retributive theory of proportionality” where punishments are “foreordained (and so long as they are not too frightful), the potential criminal can treat each penalty as the *price of the corresponding forbidden act* (ibid., *italics are mine*, p.731).” He uses a hypothetical marginal value to determine the ordinal rankings for the severities of crime. “The least crime is the one a rational person would prefer to risk (all else equal) given a choice between risking it and

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<sup>39</sup>They borrow this concept from Sen (1987, pp.20-38).

<sup>40</sup>Bedau (1984) has also argued for a “classification-based sentencing” system.



risking any other of that type; the next least is the one a rational person would prefer to risk given a choice between it and any other of that type except the least; and so on (ibid., p.739).” The same marginal ranking process is used to construct an ordinal list of punishments. He proposes an imagined “administered market” where criminals bid on government-issued licenses to commit crimes. When a judge uses this hypothetical construct, the price that a criminal would be willing to pay for his license, in theory, reflects the amount of exploited advantage he took from his victims (ibid., p.743), therefore that price serves as a good measure to base a proportionate penalty.

These different proportionality schemes suffer from the same practical flaw - a lack of *real* market prices, and an inability to coordinate dispersed knowledge. For philosophers, implementing proportionality standards is a technological problem (Primoratz, 1984). A more logically accurate method of ordinal ranking schemes, in the hands of philosophers, judges, or central-planners, will yield more proportionate criminal sentences. In order for a proportionality standard to be implemented, planners imagine hypothetical markets, estimate imagined prices, and use those prices to construct and dole out real punishments.

Philosophers are correct in so far as they recognize that prices reveal knowledge about the subjective values that buyers and sellers attribute to goods and services, but on another level, these proposals commit a fundamental misunderstanding of prices and the market process. As was explained by Mises (1920) in the socialist calculation debate, a central-planner cannot calculate his optimal production process without market prices for the factors of production. Hayek (1945) points out that the market prices for capital goods in conjunction with the market prices for consumer goods serve as signals - guideposts of

knowledge - to alert suppliers to the opportunities of profit and loss. Gaining profits and avoiding losses is what drives the market process to efficiently allocate goods and resources. From here the socialist calculation debate took an interesting turn. The socialists (Langa 1936 and 1937, and formalized later in Leontief 1951) consented the importance of the price system, but still believed that it could be overcome by relying upon existing prices and making production decisions in a socialist economy as if they were in a market. Hayek (1940) responded by explaining that markets are dynamic rather than static systems. In other words, given, assumed or imaginary prices are not market prices at all. They do not convey the full scope of knowledge because they are not the combined results of several interacting agents subject to real constraints. No individual mind has complete and accurate insight into the subjective preferences of another individual, let alone an entire society governed by criminal law. Only through real participation and the continual confrontation with hard budget constraints<sup>41</sup> (scarcity, competition, and opportunity costs), do market prices get infused with preference revealing knowledge. Competition and exchange are influential forces upon prices, without them prices are just hypothetical numbers assigned to objects and actions. True market prices cannot be imagined and informative at the same time, prices are residual outcomes of buying and selling, performed by real people, expressing unique contextual preferences.

After one recognizes how prices are derived on the market, it becomes obvious that the step by step approach to constructing proportionate punishments, where the

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<sup>41</sup>Kornai (1986 and 1998) developed the terms “hard” and “soft” budget constraints to explain the shortages and inefficiencies of production in the Soviet Union and other socialist countries. Shortages do not imply that a given good or service is not being produced altogether, but it does signal that demand is exceeding supply and the production function is not updating.

margins of quality are defined before crimes and punishments are ordinally ranked, is perhaps backwards. Only after an individual buys or sells, can his ordinal preferences and margins of quality, be perceived by another. By competing with other suppliers, innovators offer new services to attract customers, they make educated guesses about the future preferences of potential customers. Without witnessing the prices that buyers pay for consumable goods and services, suppliers are ignorant of how to provide service profitably or optimally - proportionately.

Von Hirsch and Jareborg's (1991) technique of ranking crime and punishments perhaps suffers a greater misunderstanding than Davis's (1983) marginal method. Their ranking schemes are admittedly subjective and based on singular standards of criminal severity and punitive harshness. For them, *harm done to the victim* defines the extent of criminal severity. While harm is probably an essential feature of crime, it is not a sufficient margin to design a functional punishment scheme. Different individuals may evaluate the costs and benefits of crime and punishment according to different margins. As Ryberg (2004, p.62) explains, “there is no clear answer as to how different crimes, each affecting more than one interest dimension, should be ranked in relation to one another.” Who defines harm? There are several different types of harm, perhaps infinite ways that victims can perceive and evaluate the harm that they have suffered from a crime, how will they be ranked?

In proportionality proposals, once the two ordinal value scales are arranged they must be fit together to develop an exchange rate between crimes and punishments. The consistent fitting between the ordinal value scales is the more complex implication of the proportionality principle. “Like cases should be treated alike (Galligan, 1981, p.165).”

The crudest method would be to link the most severe crime with the harshest punishment and follow each list down, or start from the bottom with the same procedure. This method falls short when there is not a similar degree of specificity for both crime and punishment. If there are a million different types of crimes, but only two available punishments, then complete proportionality is nearly impossible.

Davis (1983, p.741) explains that the task of linking the ordinal scales must be informed by “local reasons... [that] may include the likely educational effect of suffering what one has made others suffer, the satisfaction of resentment likely from such exact mirroring of the wrong, the unpopularity of certain penalties with certain social classes, and so on.” Von Hirsch and Jareborg (1991) admit that their system would allow for variation across different societies who use different anchoring schemes (ibid., p.114). Deterrence arguments also support the ability to manipulate punitive magnitudes based on the local conditions of crime, punishment and law enforcement. When enforcement techniques are imperfect, criminals might rationally prefer committing crime over legitimate employment because the likelihood of suffering punishment is low (Becker, 1968). Shifting the penalty scale so that harsher penalties are applied to lesser crimes increases the expected costs of punishment and lowers the expected rewards of crime.<sup>42</sup>

Since the 1970s nearly every state has at least experimented or attempted to implement some form of institution dedicated to assuring proportionality (Tonry, 1991). Sentencing commissions are committees specifically designed to develop standards of severity and lists of mitigating variables for which judges should consider basing criminal sentences upon. The next extension of sentencing commissions has been the construction

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<sup>42</sup>On the justification of deterrent punishments see Nozick (1974, pp.59-63). Ehrlich (1972) investigates the theoretical and empirical deterrent effects of criminal law enforcement.

and adoption of formalized criminal sentencing grids. Table 3.2. is a recreation of Minnesota's sentencing grid. Table 3.3. recreates Washington's sentencing grid.

**Table 3.2. Minnesota's criminal sentencing grid<sup>43</sup>**

Minnesota sentencing grid		Criminal History Score						
		0	1	2	3	4	5	6 or more
1	Unauthorized use of motor vehicle Possession of marijuana	N	N	N	N	N	N	19 18-20
2	Theft-related crimes (\$250-\$2500) Aggravated forgery (\$250-\$2500)	N	N	N	N	N	N	21 20-22
3	Theft crimes (\$250-\$2500)	N	N	N	N	19 18-20	22 21-23	25 24-26
4	Nonresidential burglary Theft crimes (over \$2500)	N	N	N	N	25 24-26	32 30-34	41 37-45
5	Residential burglary Simple robbery	N	N	N	30 29-31	38 36-40	46 43-49	54 50-58
6	Criminal sexual conduct, 2 <sup>nd</sup> degree	N	N	N	34 33-35	44 42-46	54 50-58	65 60-70
7	Aggravated robbery	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
8	Criminal sexual conduct, 1 <sup>st</sup> degree Assault, 1 <sup>st</sup> degree	43 41-45	54 50-58	65 60-70	76 71-81	95 89-101	113 106-120	132 124-140
9	Murder, 3 <sup>rd</sup> degree Murder, 2 <sup>nd</sup> degree (felony murder)	105 102-108	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
10	Murder, 2 <sup>nd</sup> degree (with intent)	120 116-124	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

**Note:** "N" denotes a presumption of a nonimprisonment sentence.

<sup>43</sup>This table is recreated from von Hirsch et al. (1987, p.179).

**Table 3.3. Washington's criminal sentencing grid<sup>44</sup>**

Washington sentencing grid									
Offender Score									
seriousness									
Score	0	1	2	3	4	5	6	7	8
14	Life Sentence without Parole/Death Penalty								
13	23y 4m	24y 4m	25y 4m	26y 4m	27y 4m	28y 4m	30y 4m	32y 10m	36y
	240-320	250-333	261-347	271-361	281-374	291-388	312-416	338-450	370-493
12	12y	13y	14y	15y	16y	17y	19y	21y	25y
	123-164	134-178	144-192	154-205	165-219	175-233	195-260	216-288	257-342
11	6y	6y 9m	7y 6m	8y 3m	9y	9y 9m	12y 6m	13y 6m	15y 6m
	62-82	69-92	77-102	85-113	93-123	100-133	129-171	139-185	159-212
10	5y	5y 6m	6y	6y 6m	7y	7y 6m	9y 6m	10y 6m	12y 6m
	51-68	57-75	62-82	67-89	72-96	77-102	98-130	108-144	129-171
9	3y	3y 6m	4y	4y 6m	5y	5y 6m	7y 6m	8y 6m	10y 6m
	31-41	36-48	41-54	46-61	51-68	57-75	77-102	87-116	108-144
8	2y	2y 6m	3y	3y 6m	4y	4y 6m	6y 6m	7y 6m	8y 6m
	21-27	26-34	31-41	36-48	41-54	46-61	67-89	77-102	87-116
7	18m	2y	2y 6m	3y	3y 6m	4y	5y 6m	6y 6m	7y 6m
	15-20	21-27	26-34	31-41	36-48	41-54	57-75	67-89	77-102
6	13m	18m	2y	2y 6m	3y	3y 6m	4y 6m	5y 6m	6y 6m
	12+-14	15-20	21-27	26-34	31-41	36-48	46-61	57-75	67-89
5	9m	13m	15m	18m	2y 2m	3y 2m	4y	5y	6y
	6-12	12+-14	13-17	15-20	22-29	33-43	41-54	51-68	62-82
4	6m	9m	13m	15m	18m	2y 2m	3y 2m	4y 2m	5y 2m
	3-9	6-12	12+-14	13-17	15-20	22-29	33-43	43-57	53-70
3	2m	5m	8m	11m	14m	20m	2y 2m	3y 2m	4y 2m
	1-3	3-8	4-12	9-12	12+-16	17-20	22-29	33-43	43-57
2	0-90	4m	6m	8m	13m	16m	20m	2y 2m	3y 2m
	Days	2-6	3-9	4-12	12+-14	14-18	17-22	22-29	33-34
1	0-60	0-90	3m	4m	5m	8m	13m	16m	20m
	Days	Days	2-5	2-6	3-8	4-12	12+-14	14-18	17-22

Though they have minor differences, the general structure of most sentencing grids are the same. Grids are similar in so far as they attempt to formally represent the theoretical contents of the proportionality principle explained thus far. “One axis... is usually a crime seriousness scale, which ranks all offenses subject to the guidelines in order of relative seriousness; the second is an axis that arrays criminal histories (Bogan, 1990, p.471).”

Sentencing grids are used to determine the severity of the crime according to several combined variables and are supposed to allow a judge or commission to *unambiguously, objectively or indiscriminately* assign a prison length or other form of punishment.

Unambiguous compared to what? The formation of sentencing grids still requires real decisions and the selections of some real standards of judgment. Who selects those

<sup>44</sup>This table is recreated from von Hirsch et al. (1987, p.183).

standards and how does he know them to be representative of social preferences? How else is the selection between one sentencing grid and another sentencing grid to be described as anything but an *arbitrary* selection process?

It is no coincidence that these sentencing grids bear a remarkable similarity to the input-output economic tables first developed by Wassily Leontief, noted advocate of socialized economic production. Table 3.4 is a recreation of one such input-output table.

**Table 3.4 A sample input-output model<sup>45</sup>**

Industry Producing	Industry Consuming							...	Total
	Agriculture	Food & beverages	Textiles	Apparel	Lumber & wood	Furniture & fixtures	Paper & allied products		
Agriculture	10.86	15.70	2.16	0.02	0.19		0.01		44.26
Food & beverages	2.38	5.75	0.06	0.01			0.03		40.30
Textiles	0.06		1.30	3.88		0.29	0.04		9.84
Apparel	0.04	0.20		1.96		0.01	0.02		13.32
Lumber & wood	0.15	0.10	0.02		1.09	0.39	0.27		6.00
Furniture & fixtures			0.01			0.01	0.01		2.89
Paper & allied products		0.52	0.08	0.02		0.02	2.60		7.90
...									
Total Outlays	44.26	4.03	9.84	13.32	6.00	2.89	7.90		

Demonstrating the similarities between criminal sentencing grids and traditional input-output models is to show that sentencing grids suffer from the same logical inconsistencies as did Leontief's models in the socialist calculation debates. They are static and short-sighted as to the realistic market processes that underlay the way individuals perceive the criminal justice system. The margins of criminal severity and the margins of criminal history that are used to define the axis of criminal sentencing grids

<sup>45</sup>Source: Based on Wassily Leontief's analysis of Bureau of Labor Statistics data, 1947 (Leontief, 1986).

must be selected and defined by one person rather than many which is demonstrated by the variety amongst current sentencing grids. In order for such sentencing grids to not fall victim to knowledge problems they must exist within a competitive process of trial and error so that good grids could displace bad. No such selection process exists yet.

The general framework that philosophers use to create theoretical values of proportionality is akin to a real evaluation process that individuals use when they exchange goods and services in markets. It is not the process of designing ordinal scales and linking them together that is flawed, instead the assumptions that these tasks can be achieved by central-planners is the major error of proportional punishment schemes. It is assumed that a philosopher or central-planner can and should define the essential features of crime and punishment, yet it is likely the case that no single individual is capable of making such definitions without conflicting with the interests and perceptions of others. This could explain why the vast majority of sentencing guidelines have failed (Tonry, 1991). The linking process between the two scales rests on a similar assumption that the decision maker has full insight into the contextual specificity that his local community demands. In reality, the true content of these definitions and evaluative standards is dispersed and not contained in any single mind.

The weaknesses of proportionality theory can be strengthened if philosophers recognize the knowledge revealing quality of market processes. Coordinating dispersed and subjective evaluations is what markets achieve when given the opportunity to function. The extent to which the current criminal justice system has been unable to produce punishments that meet proportionality standards is the extent to which knowledge is suppressed by central-planning. Markets are not permitted to freely



function in the various provisions of criminal justice, prices do not signal preferences for crime and punishment, nor do they communicate specific cardinal magnitudes to tell justice suppliers how to provide proportionate punishment. Without the revealed social preferences for crime and punishment, pitted against hard budget constraints of engaged market behavior, no individual knows what the appropriate margins of evaluating crime and punishment are - critical starting points for any theory of proportionate punishment.

Lastly, outlines of proportionate punishment overlook the fact that the separate institutions of criminal justice influence the relative costs and benefits of producing punishment. If there are vast amounts of wealth invested in police to enforce drug prohibition, but only a small amount dedicated to enforcing property and violent crime, that heterogeneity will likely carry into the allocations of punishments. There will be more drug-offender inmates compared to attackers and thieves, regardless of the popularity of proportionality theory, or its specific moral evaluations that drug crime is less harmful than violent attacks or theft. The key intention behind proportionality theory is to determine whether punishment outcomes are just and proportionate, but in practical terms proportionality theory cannot offer judgment nor response. Even if the criminal-justice-planner accepts proportionality, and rejects the status quo, he has no insight about how to invest across the different components of criminal justice in order to produce proportionate punishments. Should more or less money be spent on police, courts, or prisons in order to achieve proportionality? Should inmates be released or held longer? And so forth. Without market prices for the goods and services that come together in order to produce proportionate punishment, the central-planner can neither detect disproportionate outcomes, calculate proportionate sentences, nor re-allocate resources to

bring about proportionality.

### **3.3 Central-Planning Inhibits Coordination in the Criminal Justice System**

Philosophers and casual observers alike frequently refer to the new amounts of criminal codes, the magnitude of criminal sentences, overcrowded prisons, the rate of new prison constructions, and the record high expenditures on law enforcement, as evidence that punishment in the United States is disproportionate. The United States incarcerates more criminals than any other country today, throughout history, and at an unprecedented cost. I do not mean to present these empirics as definitive evidence of disproportionality though several theorists have treated them as such. I only wish to draw reference to the hard facts behind what others have termed the modern “prison crisis” as it is the driving force behind much of the desire to update criminal justice ethics, practice, and policy.

The costs of criminal justice are also on the rise. In 2005, U.S. local governments spent over \$100 billion, up 396% since 1982. State governments spent over \$60 billion, up 510%, and the federal government over \$35 billion up 730% (Bureau of Justice Statistics, 2007). At the very least, it can be argued that the current levels of punishment in the US are not universalizable for other countries, nor feasible to continue in the future at similar trends - a philosophical and moral red flag. Robert Higgs (2005) has sarcastically commented, “if the total incarcerated population were to continue to grow by 7.3% annually, it would double approximately every ten years... Hence, in the decade of the 2080s, within the lifetime of many people already born, the prison population

would overtake the total population (ibid., p.96).”

Ironically writers have pointed to both retribution and rehabilitation paradigms as responsible for this trend during their respective times of dominance. Frankel (1972, p.29) complained that indeterminate sentences, as part of the rehabilitative ideal, lead to increased sentences and prison populations. More recently, several writers blame retributive perspectives or the neoclassical punishment theory (retribution updated by proportionality) as the driving force behind increased punishments.<sup>46</sup> Zimring (1976) wrote, “asking legislators to develop fine-tuned sentencing standards offers an irresistible opportunity for political posturing and pandering to get-tough sentiments.” Yet many proportionality theorists think of the principle as a solution rather than a cause. Von Hirsch (1994) and von Hirsch and Ashworth (2005) defend the proportionality standard against these accusations. Most of this debate stems from disagreement over which policies are, and which policies are not, proper examples of applied proportionality.<sup>47</sup> This disagreement exposes a unique perspective on the criminal justice debate: economic practicality, though often ignored, holds influence upon the criminal justice system. Furthermore it reveals a serious lacking of proportionality theory to objectively determine if a given punishment technique, quantity or magnitude is or is not proportionate. While there is disagreement over how pervasive proportionality theories have been applied, it seems more generally agreed (intuitively rather than theoretically) that the outcomes of

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<sup>46</sup>Braithwaite and Pettit (1990), Christie (1993), Tonry (1996), and Garland (2001)

<sup>47</sup>Frankel (1972) is willing to refer to “the Model Penal Code,... the Federal Criminal Code (1971), the Model Sentencing Act (1963),... and the Minimum Standards for Criminal Justice (1968)” as experiments in proportionality. Christie (1993) points to the United States Sentencing Commission's grid as an applied tool of proportionality. And Gilchrist (1979) surveys near dozens of Supreme Court cases dating back to 1910 that hold the air of proportionality. Von Hirsch (1994) and in his broader body of work admits a much more narrow sample of cases as applied proportionality, cases he argues have been successful at decreasing the level of punishment.

the criminal justice system today are not proportionate.

The current criminal justice system fails at producing proportionate punishment not because proportionality theory has been ignored or undervalued, instead there are more structural impediments. Philosophical theories test their soundness according to logical consistency and moral justifications, but they all assume that the state is the rightful provider of criminal justice without investigating the incentives and processes of decision-making that work against the practical requirements of proportionality. To the extent that philosophers have recently begun to rely upon quasi-market-prices to reveal the subjective elements of crime and harm, they have assumed the state to possess a degree of knowledge that it does not have and cannot obtain.

In America's current criminal justice system, punishments are determined by central-planning. Voters elect political representatives (mayors, governors, presidents, etc), who then appoint officials (judges, sentencing commissioners, and prison wardens), who then dole out punishments and other criminal justice services (or they use government funds to contract-out).<sup>48</sup> The election process is meant to represent the preferences of the citizenry. As a feedback mechanism, elections occur periodically and voters either renew their support for incumbents or vote them out of office.<sup>49</sup> Aside from political inefficiencies such as the infrequency of political elections, rationally ignorant voters, and the incentives of politicians to appeal to the median voter,<sup>50</sup> expand

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<sup>48</sup>In some states judges and county sheriffs are appointed by direct election, but this does not have a significant effect on the central structure of decision making in the overall provision of criminal justice.

<sup>49</sup>Wittman (1989) is perhaps the biggest defender of efficient democracy. Caplan (2007) perhaps his greatest opponent.

<sup>50</sup>Public Choice economists refer to this tendency as the median voter theorem. Where candidates appear to the most popular common denominator of policy agenda and essentially appear identical in real policy advocacy despite representing ideologically different constituencies. See Black (1948), Downs (1957), and Congleton (2002).

bureaucratic authority, and rent-seeking,<sup>51</sup> the fundamental flaw in the provision of criminal sentences is the inability to coordinate partial, tacit, and potentially erroneous knowledge. The political provision of punishment lacks hard budget constraints on the decisions of demanders and suppliers. Without constantly buying and selling according to property rights, prices, profits, and losses, social preferences for crime and punishment are not completely revealed nor responded to. Social coordination requires perpetually constant action and updating to discover new opportunities and eliminate existing errors, but the political process is slow moving and limited. Today's criminal justice system produces non-proportionate sentences to the extent that Public Choice incentives are exploited in the areas where central-planning is used as a decision-making process instead of markets. Such centralization suppresses the critical knowledge needed to inform the production process of punishment and achieve proportionate outcomes.

Centrally-planned punishment suffers from knowledge problems in all three stages of producing proportionality. Because of the state's monopoly on prosecuting criminal offenders and the fact that state-imposed criminal sentences take priority over civil claims, victims lack a forum to express their perceived values for the harms caused by crime. Without the preferences of victims being revealed by purchasing criminal justice services, punishment quantities and types are at best determined arbitrarily - relatively arbitrary compared to the revealed preferences of buying and selling. Second, the majority of resources used when responding to crime are subsidized or completely state-provided. Measuring the costs of crime in a setting where costs are disbursed across

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<sup>51</sup>Tullock (1967, 2005), Buchanan and Tullock (1962), Buchanan et al. (1980), and Rowley et al. (1988) have elaborated on the economics of rent-seeking and capture. The "Tullock rectangle" is an illustration that helps explain how profits off of rent-seeking get bid down to zero by being held as an opportunity against all profitable endeavors. If the effort put into the political process could yield a larger reward on the market than there is no incentive to participate in politics.

society is more difficult than if prices were paid by those who gained the concentrated rewards of criminal justice. These subsidies crowd-out and distort the prices and product types in the remaining markets for these goods and services that can be used to promote criminal justice. Without these markets the rankings of criminal severity inferred by judges are also relatively arbitrary. How can one calculate the costs of crime without knowing the prices that criminal justice services cost? Finally, victims do not have the ability to influence or inform the type or quantity of punishment. They lack the opportunity to bargain criminal sentences directly with offenders. Without methods to reveal victims' and criminals' preferences over the ordinal harshness of punishments, their ranking scales suffer the same arbitrariness as the rankings for criminal severity. Because judges lack the knowledge of social values for crime and punishment, there is no method for constructing exchange rates between the two value scales. Wide varieties of criminal sentences get applied for similar crimes, and similar punishments get applied to different criminal actions. As outlined by philosophers, proportionality requires knowledge of criminal severity, punitive harshness, and cultural evaluations between the two. Central-planning impedes knowledge in all three stages of constructing proportionate punishments. The current system produces systematically disproportionate results.

When discussing how central-planning impedes the price system and suppresses the knowledge of social preferences regarding crime and punishment, the results of central-planning decisions made without such knowledge were characterized as arbitrary, but arbitrary is actually a best case scenario. Decisions regarding the production of criminal justice must be made somehow, according to some standard. The selection process among the many available margins has predictable and systematic outcomes.

Decisions become a great opportunity for the expression of political interests. Politicians seek to appear tough on crime, to award construction and maintenance contracts to friends and allies, to get re-elected, and preserve the level of authority endowed in their position. One could account for the current largess of the criminal justice system in America by describing the incentives for rent-seeking and capture within the system, but such analysis does not explain why disparity exists initially. Politically entrepreneurial opportunities erupt where market opportunities are suppressed. Central-planning's inability to solve knowledge problems assures that its response will be fundamentally disproportionate, while the incentives of central-planning assure that its outcomes will be disproportionately large.

The current criminal justice system produces disproportionate punishments in three empirical areas. (1) The level of punishment by incarceration is excessively high. This is not necessarily because of any philosophical influence, instead it is a direct result of bureaucratic incentives created when decision-making processes are centralized rather than left to competitive markets. (2) There is an observed inequality in the application of criminal justice across different groups of people - blacks are in jail more than whites, poor more than wealthy, young more than old, etc. These outcomes stem from incentives created in the institutional structure of criminal justice. Often times they are unintended consequences. Refining philosophical debates cannot accommodate or plan around the unforeseen, by definition. (3) The ordinal severity of crimes as it is defined in real terms by arrests, charges and incarcerations for types of crimes, is not in-line with proposals envisioned by most proportionality advocates. In other words the state more strongly enforces some crimes, for example the selling and consumption of drugs, than their

conceptualized ordinal ranking would require. Even if proportionality was accepted across the board, there would be no incentive to discover alternative methods of law creation and enforcements - bureaucratic incentives could still dominate because knowledge would still be so suppressed. Philosophical proposals alone can only define narrowly envisioned ordinal rankings of crime and punishment, but they cannot be sure that they are ideal nor do they possess a method of implementing them.

Philosophers explain the rise in incarceration levels from the moral justifications behind punishment, without resolve, but the history of crime and punishment implies that political and economic incentives are also influential upon crime and crime policies. The current largess, and continual growth of prison populations are consequences of the incentives that central-planners face. Without market processes to allocate criminal justice resources, central-authority decision-makers must make decisions some how. At best their decisions could be arbitrary, but these individuals are guided by their own incentives to be re-elected (Niskanen, 1971 and Williamson, 1964). To the extent that local citizens perceive value from imposing punishments upon criminals, prison space may be overused as a common pool resource. Local authorities try to appear tough on crime while dispersing the costs of punishment onto a larger tax base.<sup>52</sup>

The proportionality principle demands equality before the law. Like crimes should be treated alike, regardless of differences between the individuals who commit them. More often than not the current criminal justice system is described as unequal, especially with regard to race. Most theories, try to explain these outcomes by one of two perspectives on crime, one where blacks commit more crime, and are rightly incarcerated

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<sup>52</sup>Avio (2003, p.16) surveys Nardulli (1984), Giertz and Nardulli (1985), Benson and Wollan (1989), and Benson (1990 and 1994).



more, or one where the criminal justice system is explicitly biased. But the third, under-recognized, economic perspective, explains that blacks and whites may face different costs and benefits to committing crime, and those costs and benefits are influenced by the institutional structure of the criminal justice system. The question is, are those incentives and influences equal in application? Probably not, and proportionality theory alone has no means to accommodate for the structural and natural heterogeneity of individuals.

Finally, the enforcement of criminal law under central-planning creates an ordinal ranking of criminal severity in real terms that does not seem to match the preferences of proportionality philosophers nor the preferences of society. Von Hirsch (1991) explicitly confines criminality to harm-doing and concludes that victim-less crimes should often be decriminalized. “Drug prosecutions have comprised an increasing proportion of the Federal criminal caseload - from 21% of defendants during 1982 to 35% during 2004 (Sedgwick, 2006).” The percentage of prison inmates charged with drug-related crime has similarly risen from 6.4% in 1980 to 20.1% in 2003 (Chaiken, 2000 and Harrison and Beck, 2006). Do these empirics reflect the severity of drug crime or the harm that it causes? “By two to one, Americans describe drug abuse as a medical problem that should be handled mainly through counseling and treatment (63%) rather than a serious crime that should be handled mainly by the courts and prison system (31%) (Hart, 2002).” Proportionality theory alone has no ability to guide the content of criminality aside from central-planning, and it is central-planning that has created the current allocation of criminal enforcement.

To the extent that the current criminal justice system fails according to its philosophical motivations, and would continue to fail if guided by different philosophical

standards, is a result of the system's centralized structure and assumed adherence to state monopoly. By assuming the state's role as the appropriate provider of criminal justice services, philosophical motivations negate their own practical applications because they implicitly rely upon the ability of central-planners to have complete knowledge about society's preferences for criminal justice and knowledge of the logistical methods to satisfy those preferences. Allowing markets to provide the complimentary services of criminal justice would promote, but not necessarily achieve, optimal allocation of those services. Market provision would unambiguously perform better than central-planning at matching the provision of criminal justice with social preferences for criminal justice because knowledge would be revealed and responded to through price signals that the current system lacks. In this sense, a market is better equipped to produce proportionate punishment compared to a centralized state. While perfect and ideal criminal justice services may never be achieved, there would be motivations and incentives for individuals to improve criminal justice services according to the standards of quality defined and revealed by society on the margin.

### **3.4 Markets Could Achieve Proportionality Better Than Politics**

A criminal justice system provided by free markets would better solve knowledge problems and achieve proportionality in punishment compared to the current centrally-planned system. Markets naturally mimic the processes of ordinal ranking and cardinal matching that are considered necessary prerequisites for proportionality. When law enforcement services such as police, courts and prisons are provided on the free-market

the defining qualities of criminal law and criminal severity emerge from the bottom up. The continual process of buying and selling pits the production of criminal justice and punishment services against hard-budget constraints. The allocation of punishment resources on the market reflects the tastes and preferences of society as they are revealed through the price system. Resources flow to their most highly valued use, and entrepreneurs are constantly alerted to new profit opportunities when they arise. Markets are self-correcting. The techniques, qualities and quantities of punishment are proportionate to the tastes and preferences held in the minds and hearts of society.

Imagine a world without state-provided criminal justice institutions. When crime occurs, individuals must purchase criminal justice services.<sup>53</sup> The first decision for a victim to make is whether or not to seek justice at all. For a victim to invest in criminal justice services, the market price must be less than the perceived utility he would gain from the service. For example, say my car has been stolen. My first decision would be, should I hire someone to investigate the crime? If I perceive the utility from the thief being detected, brought to trial, and punished (all discounted by the probability of success) to be greater than the utility I would have gained from spending the costs (including opportunity costs) on something else, then I will purchase some amount of service from the available market. I can hire a firm who investigates crimes, captures criminals, holds trials, and imposes punishments upon the criminal - or some alternative basket of these services or similar substitutes. The value I assign to the output of one such basket must be higher than its price in order for me to purchase it.

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<sup>53</sup>In the free market, it is not necessary for citizens to wait until they are victimized before purchasing criminal justice services. Insurance markets, or continual contracts for ex-ante security can influence the costs and benefits of crime. Compared to centralized provision, which deters the additional purchases of private security, the incentives and actions invoked in the market when purchases are made before or after crime takes place are the same.

The criminal justice process is barely underway but there is already a wealth of knowledge conveyed to help promote proportionality. First, certain crimes are menial and not worth the high costs of enforcement. As a crude categorization of criminal severity, the market has separated severe from menial crimes at a given market price. If the market price were to change, then so would the sets of crimes worthy and unworthy of enforcement. Higher prices of law enforcement would mean more crimes go ignored and lower prices would cause more crimes to get investigated. Prices communicate the relevant opportunity costs of spending an additional marginal amount on criminal justice services.

Second, the market has instigated entrepreneurship to guide resources to their most highly valued uses. The supplier of criminal justice services must afford expenses in order to bring his service into the market. He will only offer his services if their market price exceeds the costs of his inputs. In the case of criminal justice, input costs are often police salaries, special training, uniforms, weapons, courts, judicial salaries, prison construction, so on and so forth. Given constant market prices for these inputs, suppliers will offer their services to those customers who are willing to pay the highest price for the final products of criminal justice, thus maximizing the difference between revenues and expenses.

When deciding to purchase criminal justice services in response to the theft of my car, I notice that the market price for these services has risen. Say for example there is a shortage of trained and knowledgeable criminal detectives. I must economize on my purchases. I either have to afford less of all other goods, purchase less units of criminal justice or seek substitute goods and services to meet my needs. With higher input costs

(the price of detectives) output prices also rise. At the higher price, criminal justice firms face a lower quantity of demand from buyers. Suppliers are therefore encouraged to experiment with new service bundles that are less reliant upon high priced investigators. It may be that my immediate reaction to a higher price is to drop out of the market altogether, to ignore the theft of my car, to not purchase any criminal justice services. Thus the incentive to discover new and improved methods of delivering criminal justice services is omnipresent. In other words, the motives faced by suppliers in the market with the price increase is essentially the same as the motives faced in the market without the shock. With the shock, suppliers try to regain their previous profit levels and customer base, an identical process to the one which is constantly underway without the shock - suppliers constantly try to appeal to new customer bases. Suppliers who discover an arrangement of inputs to produce and price criminal justice services so that fewer people ignore crimes and in turn buy more criminal justice services stand to make profits over their competitors.

Who will be willing to pay the highest prices for criminal justice services?

Primarily those customers with low opportunity costs of spending - extremely wealthy people who can easily afford criminal justice services. At first this seems unfair or even unjust, but wealthier citizens buying up criminal justice services, regardless of their need, may actually be a good thing to ensure proportionality. If criminals are rational agents, and attempt to maximize the benefits of crime, then securing the most valuable areas of wealth could serve as an effective deterrent against crime more generally. Also, when criminal justice suppliers witness high prices for final products and low prices for factor inputs, those profits attract new entry into the market. If the rate of profit in the criminal

justice industry is higher than in other markets then new, financial, physical and human capital resources flow into criminal justice and away from other industries. This drives down the market price for criminal justice services and makes them more affordable for less-wealthy, more-needy purchasers. All the while the amount, quality and type of resources that get allocated to the production of criminal justice and punishment proportionality represent the aggregated preferences of demanders throughout the economy. Demanders are constantly evaluating whether the resources used to produce criminal justice services are indeed their best use.

Individuals with greater needs are those who perceive a higher utility from criminal justice services given the costs of crime. Their high willingness to pay for criminal justice services is driven by their high perceived costs of crime and their high perceived utility for responding to crime. Their high demand translates into high prices in the market for criminal justice. These high prices reveal more knowledge than just where crime takes place. When the provision of criminal justice services is provided on the market, the actions of suppliers are aimed at discovering and satisfying consumer preferences. The goal of the criminal justice entrepreneur is to satisfy customers (better than competitors) at the lowest cost and maximum profit. His incentives are naturally aligned to discover real deterrents to crime, real abilities to solve crime, real techniques to win criminal cases, and real methods of punishment that satisfy customer preferences for justice and fairness. If he does not, then his competitors, eager to subsume his profits will discover these opportunities instead.

Markets allocate resources to their most-needed geographic location and customer-base, they also allocate resources according to preferred quality standards. Until

now there has been little discussion as to what type of criminal justice service is most likely to be purchased. What types of services are likely to be valued by victims? What types of services are most likely to be offered by criminal justice suppliers looking to maximize profits and minimize expenditures? Upon what types of crimes will such punishment services be imposed? What type of punishment am I likely to call for being imposed upon the criminal who stole my car? Customers purchasing criminal justice services in general and punishment services in particular are going to pay for those services that offer them the highest degree of utility at the lowest possible cost. Would I want the thief to return my car, to pay a fine, a fine to whom, should he be incarcerated, paroled? What does justice demand?

A market for criminal justice services does not guarantee the absence of injustice. If a theorist believes that capital punishment or incarceration are always and everywhere unjust, then market-provided services may be unsatisfactory to their philosophical or moral positions, but so may the outcomes of current central-planning. The purpose of this paper is to interpret the outcomes of social arrangements according to the standard of proportionality. Can a free-market in punishments maintain ordinal proportionality as to the severity of punishments that get imposed upon criminals? How do these outcomes compare to the predictable outcomes of a centrally-planned system? I argue yes, markets produce proportionate punishments, and more so than centrally-planned punishment institutions. In a market-driven punishment system the most severe forms of punishment get reserved to the most severe forms of crime as a consequence of the naturally occurring incentives of suppliers and demanders, criminals and victims.

When markets provide punishment, the most severe punishments as perceived by

criminals are those which impose the largest costs. As such they also induce the largest willingness to pay in order to evade punishment by accused criminals. Evading punishments can take the form of physical efforts such as fleeing detectives. It can take the form of investing in high priced legal teams to avoid conviction at trial, or criminals may evade what they perceive to be excessive punishments by counter-suing against their accusers. The higher the penalty imposed upon the original crime the more evasion that gets induced by criminals. The more evasion a criminal invests in, the less certain are the utility gains expected by victims, and the more susceptible a victim becomes to counter suits and costly liabilities. Thus severe punishments as perceived by criminals are endured for only the most severe crimes as perceived by victims.

Until now the criminal and his subjective evaluations have mostly been overlooked. At first thought, it seems appealing to ignore the criminal - who cares what he thinks, he is a criminal? But his subjective evaluations of the costs and benefits of crime influence the rate of criminal behavior and the structure of the criminal justice system. His actions reveal crucial knowledge that when understood properly can induce efficient responses, and thus diminish the net costs of crime.

On the market, the costliness of law enforcement (detecting, catching, and punishing criminals) would be driven by the real costs endured by suppliers in providing service. Most of these costs are imposed by the criminal. When he travels long distances, is extremely stealth, or uses advanced technologies to evade capture, he signals his perceived values for succeeding in crime and his perceived costs in being punished. The higher the value of criminal success, and the lower the probability of actually being detected, caught, or punished, the more willing the criminal is to invest in resources,



talents, and energy that make his detection more difficult. The criminal has a real ability to increase the costs of law enforcement that is likely to be reverse incentivized.

The criminal who stole my car faces the decision to evade capture or turn himself in. If he turns himself in, and returns the car, the costs of law enforcement for the case and therefore the harm done by his crime are maintained at a low level. If he evades he faces the probability that he will succeed and the inverse probability that he will be captured. In the case that he is captured he raises the costs to being captured and therefore the harm done by his crime. He can expect to be awarded a higher punishment as a result of this higher cost, because the increased harm has induced an increased investment from the victim or the supplier of criminal justice (assuming they did not give up, in which case he would succeed with the crime). The cost of his investment for evading law enforcement has to be lower than his expected cost of enduring punishment when he chooses to invest, but if he has fair knowledge of the increased liability he is inclined to avoid increasing the harms caused by his crimes.

Once a criminal has been detected, arrested, and tried, what would his criminal sentence be on the free-market? Purchasers of criminal justice would be willing to pay to administer punishments so long as the benefits exceeded the costs. The market holds a potential for entrepreneurial discovery and innovation that the centrally-planned system lacks. What influences the perceived costs and benefits of demanders in the market for criminal justice? Firms are motivated to satisfy consumer preferences to the best of their ability at the highest price. Services that better satisfy customer preferences, customers are willing to pay higher prices for. Firms that have more efficiently standardized production functions of imposing criminal punishment will be able to yield higher profits

on the market by maximizing the difference between their low input prices and high product sales. One major potential cost that private firms providing criminal punishment would face, that current state-providers do not, is the potential for error and liability of falsely imposed punishments.

A suspected criminal will be willing to pay to defer a punishment so long as the market price of deferment is less than his perceived utility of avoiding the punishment. This willingness to pay invokes entrepreneurial incentives for firms to discover methods of administering criminal justice in ways that maximize their own profits according to the ability to really effect the perceived utilities of customers. In other words, when firms provide a service that really effects the ability of innocent people to avoid the costs of crime preemptively, they can earn profits as a function of the market price for punishments. When the perceived benefits of crime outweigh the costs of overcoming security technologies crime will still persist. The remaining level of crime will determine a victim's willingness to pay for ex-post criminal justice services.

Justice firms are inclined to discover methods of awarding utility to customers while minimizing the potential liability of falsely imposed punishments. This would likely be a varied basket across the market for criminal justice services. Firms would employ various techniques such as refined investigation strategies to assure accurate arrests, and precisely honed criminal punishments that avoid broad liabilities. These incentives have caused some theorists to predict that criminal punishments on the free-market would most likely take the form of financial penalties rather than physical punishments or confinement. Monetary restitutions paid from criminals to victims simultaneously provide real utility to criminal victims, while avoiding the backward

immobility and imposed costs of physical punishments. Redistributing falsely imposed financial sentences is easier to correct for error than is retrying and calculating a new liability as a result of an imposed incarceration, physical punishment, or death penalty.

Compare these market incentives to those at play under central-planning. In order for the allocation of criminal justice resources - punishment quantities and punishment qualities - to reflect the tastes and preferences of citizens, voters must elect officials who will express their views in the political world. Obviously elections are infrequent and rough estimators compared to buying and selling on the market. As a result the technologies of criminal justice and the methods of punishment are more often considered a standard package to be provided according to governmental budget constraints. They are rarely arenas for entrepreneurial discovery and innovation. It is generally taken for granted that the existing system of police, courts, and prisons are structured as they must be. The remaining questions for policy debate concern whether to increase or decrease the magnitudes of these existing techniques given the tax base of the corresponding government. As was previously explained, theory implies that the government leaders are most inclined to expand their budgets and authorities.

On the market, over time as several individuals level criminal accusations against one another at the market rate, a recognizable code of criminal law may develop. Firms providing the services of criminal justice seek standardized reliable production processes in order to lower costs and more effectively maintain long term contracts for their capital inputs. This standardization process could mimic the categorization of crimes alluded to by advocates of proportionality. Criminal investigations and arrests can be priced according to several variables: geographic travel, the violent nature of the crime, or the

difficulty that the investigator faces in solving the case.

### 3.5 Conclusions

This paper has responded to the philosophical debate over criminal punishment. The philosophical community has recently embraced proportionality as a meaningful standard to evaluate the legitimate magnitudes of punishment. As a theoretical exercise I accept proportionality as the appropriate end of a criminal justice system, and agree with theorists who have attempted to use pricing mechanisms to overcome the problems of subjectivism in providing proportionality. Hypothetical prices do not have the same knowledge revealing qualities as real market prices. Without market prices to signal the preferences of where, when, how much and of what type, the central-provision of criminal punishments is arbitrary or biased. If philosophers are to resolve the practical dilemmas of proportionate punishment they must return to their beginning assumptions that criminal justice is and must be provided by a central-authority.

What form should criminal sentences take: prison, rehabilitation, or restitution? What should the amount of a criminal sentence be? On what actions, should criminal sentences be imposed? What services will best deter crime and correct the harm that crime causes? The philosophical literature has drafted several proposals to address these questions explicitly, this paper is no such proposal. These questions must be understood as problems of social coordination, the question at hand is more fundamentally: what decision making process can discover new answers, systematically promote answers that reflect the diverse preferences of society, and avoid conflict? Markets are processes of

trial and error that avoid and eliminate conflicting plans in favor of plans that promote social coordination.

At various points throughout this essay it may have come across that I was advocating for a radically free-market approach to criminal justice. I admit that this is one potential implication of this investigation, but it is not the only conclusion. For example this comparative analysis could be interpreted as a reductio against the feasibility of the proportionality principle. In this vein the analysis presented thus far is meant to be purely positive. The particular end is given in accordance with some preliminary assumptions. I have demonstrated that the core assumption of government sponsored criminal justice institutions inhibits the real provision of proportionate punishments. Whether this is a critique of those governmental institutions or a critique of the stated end of proportionality is still open to the reader. To analytically describe a thorough solution to criminal justice provision would require similar investigations concerning several alternative ends such as deterrence, rehabilitation, retribution, restitution etc. Based upon the initial descriptions of the social coordinative qualities of market processes my first inclinations would be that markets perform better than traditionally recognized at achieving several of these alternative ends. In other words, markets tend to be robust and adaptive mechanisms at responding to the changing tastes and preferences of heterogeneous social groups.

## 4 Criminal Sentencing by Rules rather than Discretion and the Problems of Credible Commitments

*[W]e see the fate of a delinquent changed many times in passing through the different courts of judicature, and his life and liberty victims to the false ideas or ill humor of the judge, who mistakes the vague result of his own confused reasoning for the just interpretation of the laws. We see the same crimes punished in a different manner at different times in the same tribunals, the consequence of not having consulted the constant and invariable voice of the laws, but the erring instability of arbitrary interpretation.*

--Cesare Beccaria-Bonesana, *Of Crimes and Punishments* (1764, p.8-9)

### 4.1 Introduction

The recent supreme court case, *Kimbrough v. the United States* brought significant attention to the unequal sentencing trends that have been occurring in the criminal justice system in past decades. The difference between crack and powdered cocaine is marginal to insignificant at the chemical level, but their differences in the court room have been quite substantial. “[A] drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine (Ginsburg, 2007, p.1).” In effect, poorer drug dealers, more often African Americans, trafficking cheaper crack-cocaine were subject to higher criminal sentences than their wealthier powdered cocaine, more often Caucasian, counterpart traffickers. The ruling held that the disparity between criminal sentences for the two substances was so great as to warrant appeals.

Aside from particular concerns over unequal drug enforcement, this case also brought attention to the broader dis-proportionality of criminal sentencing in America. It seems apparent to the general public, social commentators, punishment philosophers and legal scholars that punishments in America do not fit their associated crimes and criminals are not always treated equally before the law. Refer again to Table 3.1. that presents prison population data broken down by race and gender over time. What is causing the alleged excessiveness of punishment? What is causing inequalities in criminal sentencing? In the same week as *Kimbrough v. the United States*, *Gall v. the United States* was also decided, another case where the supreme court returned discretionary power to federal judges when they decide criminal sentences. The issues of both cases were to determine whether federal judges had the ability to ignore the U.S. criminal sentencing guidelines. In each case the judge had preferred a lesser sentence to the one suggested by the formal rule system. These supreme court rulings solidified the power of federal judges to rely more heavily upon their own discretion. As a result several thousand inmates were retroactively granted an appeals process whereby judges could recalibrate the prison sentences previously awarded. Large populations of current inmates now face a potential release from prison.

These cases and their rulings are part and parcel of a more fundamental problem facing America's criminal justice system today. The deeper issue at hand is how should decisions be made to best achieve the intentions of the criminal justice system. As in the current debates, this paper will take the intention of proportionate punishment - where punishments are well fitted to their crimes and equality before the law is upheld<sup>54</sup> - as the

<sup>54</sup>Beccaria (1764) and Bentham (1843) were among the first to describe proportionality standards. More recently Frankel (1972), Davis (1983), Bedau (1984), von Hirsch (1991), von Hirsch and Jareborg (1991), Ashworth (2000), Duff (2001), Ryberg (2004) and von Hirsch and Ashworth (2005) have explained and

given intention of the criminal justice system. What are the best means to obtain such ends, how should criminal sentences be determined to best assure proportionality - by rules or by discretion?

By drawing from a similar debate within economics concerning monetary policy, I argue in favor of rule-based criminal justice policy - in theory. In practice the task is far more difficult than the traditional debates lead one to believe. Criminal sentencing shares the same logistical problems as monetary policy, they both suffer from long and variable lags. Thus politics by rules promotes a more stable and predictable outcome in the long run. But is politicking by rules a viable reform strategy given the incentives of a centrally-planned criminal justice system? I argue that central-authorities hold no credible commitment to abide by the rules they place upon themselves. Truly effective criminal justice policy, truly proportionate criminal sentences are more a function of self-enforcing constitutional constraints placed upon governments than they are a product of either rule-based policies or discretionary policies. Thus commentators should be far less concerned with solving the rules v. discretion debate and far more concerned with recognizing the imperfections within the political process. So long as the realm of politics is the assumed starting point of criminal justice reform, such reforms will continue to be plagued by incentive problems inherent to the political process.

As the recent supreme court cases show, current political trends are moving towards discretion over rules. I argue that even if there was common agreement and absolute certainty that rules were preferred to discretion (or discretion was preferred to rules), then the criminal justice system would still suffer from failures to produce

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argued in favor of proportionate sentencing.



proportionate criminal sentences. These failures would be the result of the incentive structures promoted and created by the political process. Political reforms are imperfect, they occur through time and they invoke incentives and subsequent political actions unforeseen at their outset. Current debates that focus upon the merits and consequences of discretion or rule-based criminal sentencing fail to recognize the more pervasive aspects of the political process. Political actors, like market actors, suffer from imperfect knowledge and are often guided by their own self-interests rather than the public welfare. This paper is an investigation of the latter failing, it is an analysis of the incentive problems of a centrally-controlled criminal justice system endowed with the responsibility of producing proportionate punishments.

Whatever the process by which criminal sentencing is produced, rules or discretion, the question at hand is: are the incentives of actors compatible with doing what needs to be done? If discretion leads to proportionality is the government inclined to stick with discretion? If rules lead to proportionality, is the government inclined to follow the rules? First there exists good reasons to support rules rather than discretion to secure proportionate criminal punishments despite the current popularity of the discretionary perspective. Second, governments lack the ability to constrain their own interests or to credibly commit to real criminal justice reform even if the preferable results of those reforms are assumed as given. In other words, settling the rules v. discretion debate does not assure proportionality. The incentive hurdles that plague the achievement of proportionate punishments are an essential feature of the political process. Reformers should commit themselves to fundamental change in the structure of the polity's relationship to the criminal justice system in order to better achieve proportionality.

A similar debate between rules and discretion took place amongst economists with regard to monetary policy. Some writers were concerned that the tendencies of the market economy were subtle and subject to change quickly without foresight, they concluded that policy makers should be awarded a fair amount of discretion in order to manipulate economic output adaptively and progressively. On the opposite side, Monetarists as they came to be called, claimed that the logistical nature of monetary policy was better suited to policy by rules rather than discretion. The effects of monetary policies have long and variable lags which make long-term planning more difficult under discretionary policies, and potentially invoke political interests contrary to the ends of the original policies.

James Buchanan (1983) followed up the Monetarist insight with a pessimistic claim about the likely success of even the most well-formulated monetary rules. Governments are unique entities in so far as they both define what the rules are, and they are simultaneously entrusted to enforce those rules. Rules concerning public policy are in effect rules over governmental power. Since governments themselves are left the responsibility to enforce the rules they lack a real credible commitment to following them. Monetary policies by rules were preferred because they promoted predictable stability - certainty in the minds' eyes of economic investors - but the government's lack of reliability to keep to the rules was actually more uncertain than the rhetoric of rules made it out to be. Economic agents within the system did not trust the word of the government to enforce and stick to the rules. The allegedly stable monetary policies did not invoke the stable economic investments one would expect to result from a stable rule regime because the rules were not so stable after all.

Criminal sentencing policies also suffer from long and variable lags. The passage

of time during the political process of criminal justice reform creates problems for planners to foresee future changes and it allows for opposing political interests to organize and change the rules. If the original task of securing proportionality is known well and supported, then these eruptions of political incentives will sway the tide of political reform off-track, away from proportionality in systematic ways. Thus in pure theory I would also support rules over discretion as a means to produce proportionate criminal sentences for the same reasons that Monetarists supported rules rather than discretion in monetary policy - they both suffer from long and variable lags. In theory stable and reliable rules would anchor the system of political decision making so as to give actors stable expectations about future criminal sentencing policies, and to avoid problems of private interest rent-seeking at the cost of social welfare. Criminals, victims, security-entrepreneurs, and attorneys could all make long-term strategic plans to allocate criminal justice resources effectively and proportionately thus promoting proportionate punishments.

Today, U.S. federal courts are in transition from a rule-based criminal sentencing regime towards a more discretionary sentencing regime. Thus criminal sentencing policy much like all governmental policy reforms suffers a self-enforcement paradox. From the early 1980s until recent months, rules were in place to dictate what was and what was not acceptable punishment levels. With predictable rules, criminal actors should have been able to update their expectations regarding the costs and benefits of criminal behavior. With stable rules victims should have been able to update their expectations regarding long term levels of crime. A significant disparity of punishments should not have been observed, and politicians should not have been lured to over or under-enforce criminal

sentences as a consequence of rent-seeking and private interest behavior. Yet there was disparity and rent-seeking. Now the rules are being abandoned because there was no reason for actors within the system to believe that the rules would be in place for the long haul and there was no credible commitment on the part of the government not to deviate from the rules. Do governments have the ability to bind their hands sufficiently to usher in criminal justice reform - to ensure proportionate punishments? I argue they do not.

The remainder of this paper is organized as follows. Section 4.2. will survey the rules versus discretion literature among the notable monetary economists, its application to transitional economic reform and finally its relevance to the case at hand of criminal sentencing. Section 4.3. will offer evidence and explanation that criminal justice policy much like monetary policy suffers from long and variable time lags. In theory, rule-based criminal sentencing policy should be a better assurance of proportionality compared to discretionary sentencing. Section 4.4. will explain the problems of credible commitment faced in reforming the criminal justice system. Central-planning lacks the necessary conditions for overcoming incentive problems to produce proportionate punishments. Proportionality is a function of self-enforcing constitutional constraints upon government authority. Only moments of exogenous shock, such as crises in ideology, social thought, political opinion, natural disasters or political revolutions erupt moments of opportunity for constitutional contracting. Moments of crises offer a unique opportunity to investigate radically alternative structures of providing criminal justice that may be better equipped to produce proportionality. Section 4.5. offers some concluding remarks.

## **4.2 Rules versus Discretion**

The initial intention of the rules v. discretion debate in monetary policy was to

develop a theory by which to set the optimal amount of money in the economy. Money is the lifeblood of the economy, it is literally one half of all exchanges. Changes in the money supply have the ability to ripple incentives and influence throughout the entire economy. Thus the money supply is one of the most critical institutions of the economy. In the social world, criminal punishments are believed to hold similar effects. Changes in the harshness of penalties for various crimes are intended to influence the rational calculus of criminals and would be criminals throughout separate jurisdiction.

Simmons (1936) was the first economist to describe the decision set for government policy between rules and discretion though he used the term *authority* instead of rules. The economic debate between the two perspectives lasted throughout the 1960s and late into the 1970s with regard to monetary policy. By increasing or decreasing the money supply, central-planners could in turn control the interest rate, therefore control investment, and therefore control the output of the economy. They could turn up production in times of recession, cool off production in times of opulence, avoid depressions and maintain short run stability (Lerner 1944). The argument for discretion was straight forward. Theorists wanted to empower policy makers with the tools they needed to make specific changes in the economy. Internal debates within the discretionary camp were concerned with whether elected politicians (Simmons 1936) or an independent monetary authority should hold the discretionary power (Modigliani 1977).

On the other side of the debate Milton Friedman (1948) launched an entire breed of monetary economists in favor of low-level and stable monetary growth - a predictable rule-based policy regime. The crux of Friedman's argument for rules over discretion was

supported by the empirical fact that long and variable lags existed in the production, implementation and effects of monetary policy. While it was true that discretionary monetary policy could manipulate economic output in the short run, such adjustments were costly in terms of long-run economic stability. Without stable expectations investors were more uncertain about the long-run future and thus hesitant to invest in longer more roundabout production processes. While discretionary policy appeared to bring about short run stability and prosperity, Friedman argued that its long run effects were choking off higher rates of potential economic growth.

In order for a monetary policy to be effective, regardless of its intended purpose, it must run its course amidst a real political world fraught with interests and incentives. Policies do not carry through with their effects instantaneously nor perfectly, instead they often invoke counter interests and unintended consequences. For Friedman there were three aspects of monetary policy that created long and variable time lags. First there exists a lag between the real need for a policy response on the one hand and the recognition or discovery of that need on the other hand. Second, between the recognition of a need for policy, the design of that policy and the final application of the policy time must pass. Third, time passes between a policy's inception and its actual effects.

The most obvious problem associated with the passage of time during the political process is that conditions may change by the end of the process, this increases the likelihood that the policy will be ineffective in its formulation. Second, these lags give opposing political interests time to organize and re-influence the political system away from the needed policy reform. Centrally-planned policies that do not account for time lags are likely to be ineffective. But even if they were designed perfectly, they still face a

probability that they will not be accepted by the political process. Buchanan (1983) saw these endemic problems of the political process. His critique of the rules v. discretion debate - though he was in general agreement that rules were preferable in theory (Brennan and Buchanan, 1985) - emphasized the importance of binding constraints and credible commitments on the part of ruling authorities. Even with stable rules rather than discretionary policy, governments have little incentive to comply with the rules and they have great opportunities and incentives to break and or re-define the rules to suit their interests.

Such insights have had more applicability than within the confined realms of monetary policy debates. The claims of these arguments hold explanatory power for nearly all policy discussions because the general incentive structure of government authority and the production of reform policies are the same in all contexts. Peter Boettke (1993) has applied these insights to explain why allegedly market reforms were unsuccessful in the former Soviet Union. The so-called market reforms of Perestroika were not market liberalizations at all but rather examples of captured political interests and rent-seeking. Economic planning is a static solution to a dynamic problem. Mario Rizzo (1980) has explained that legal reforms suffers a similar oversight. Law is in a state of flux much like the market, to not account for this factor of dynamism leads to error and policy failure. And most recently Christopher Coyne (2008) has applied the insights that adverse incentives produce serious obstacles in producing functional policy to guide post-war reconstruction. I argue that the current events and recent debates surrounding *Kimbrough v. the United States* and proportionate punishments are essentially these same debates with regard to the topic of criminal punishment policy. How should criminal

sentencing be determined to best promote proportionality, by rules or by discretion? The debate and applicable insights are the same - while rules are theoretically superior to ensuring stable and proportionate outcomes from the criminal justice system, governments lack a credible commitment to produce and stick with successful rules.

The criminal sentencing debate between rules and discretion has a long asymmetric history. Criminal sentencing has been commonly perceived as excessive and disproportionate for several decades. At different times both rule-based and discretion-based sentencing policies have each been blamed for the level of disproportionate sentencing in America. Frankel (1972, p.29) complained that “indeterminate sentences,” or discretionary power held by judges in the sentencing process as part of the rehabilitation ideal, lead to increased sentence lengths and a vast rise in prison populations. More recently several writers blame the neoclassical punishment paradigm (retributivism updated by the proportionality principle) with its mandatory minimum sentences and formal sentencing guidelines and sentencing grids as the driving force behind increased incarceration rates.<sup>55</sup> Each side blames the other and fails to recognize the more fundamental similarities between their proposals. Both reforms rest upon a central-planning apparatus, the state, to create and implement their paradigmatic shifts. Just as the writers surveyed above have applied the insights of political economy to a wide range of reform examples, I argue that it is this shared feature of centralization that has sealed the fate of criminal sentencing reform to be unsuccessful at achieving proportionate punishment in the past. The history of the criminal justice debates even parallel the sequencing and argumentative types experienced in the political economy

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<sup>55</sup>See Braithwaite and Pettit (1990), Christie (1993), Tonry (1996) and Garland (2001).



debates.

In their earliest inceptions American colonies practiced the British system of determined sentences. Every crime carried a specific penalty set by law. Still early in colonial times federal and local judges were given nearly complete discretion. They were free to set punishments anywhere within a broad range of legal practices. During this time the rehabilitation paradigm was widespread. It was believed that discretionary punishment could help fit specific punishments to specific criminals with the best hopes of successful rehabilitation (Hirsch, 1992, p.8-40 and Rothman, 1990, p.49). It was not a revolutionary concept that punishment was about incentives. Changing punishments changes the incentives and hopefully changes the behaviors of criminals in society. Bentham (1843) and Beccaria (1764), political economists, were amongst the first to point out the influential effect of punitive controls upon criminal behavior. Criminologists believed crime to be a disease and in turn their role was to find a cure. Thus the debates at this time paralleled the monetary debates in that they accepted the role of discretion but questioned who should hold it - criminologist and psychologist experts or politicians more responsive to the will of the people (Comment, 1950 and Wright, 1999).

The first shift away from discretion came late with the adoption of parole boards and probation agencies. This innovation was not necessarily intended to cut away at judicial discretion but these groups could release a prisoner early from his sentence or change the type of penalty he endured, thus they had a de-facto control over the types and degrees of criminal punishment. Later the shift towards rules and away from discretion was more explicitly motivated. The extreme amount of judicial discretion was cause for concern to some - “terrifying and intolerable for a society that professes devotion to the

rule of law (Frankel, 1973, p.8)” Judges could use their positions of power in the sentencing process for their own private interests. If the judge believed in rehabilitation then criminals would be imposed a rehabilitative sentence, regardless of the actual effects of rehabilitation. It also seems obvious that judges were at least capable to express their private interests in potentially prejudicial ways. If a judge was biased against African Americans there was little to stop him from ruling as such.

In addition to potentially being biased in favor of the private interests of criminal judges sentencing by discretion has been more recently criticized as lacking a significantly influential deterrent effect. Becker (1968) was the first economist to formalize the criminal decision making process. Criminals seek to maximize profits and minimize costs - punishments being an obvious cost. At higher costs and higher punishments one expects criminals to commit less crime (Ehrlich, 1972). But much of the subsequent literature has in fact demonstrated that criminals are more actually deterred by an increase in the probability of punishment rather than an increase in the severity of punishment. In other words the likelihood of actually being captured may be so great in comparison to even an extremely harsh punishment that marginal changes in those punishment degrees are not influential upon the decisions that the criminal makes. Similar to Friedman's insight that investors do better with long term stable expectations, criminals are more deterred by long-term stable expectations of efficient law enforcement (Block and Lind 1975a and 1975b, Posner 1981, and Benson 1998).

From the 1970s through the 1990s American criminal sentencing shifted away from discretion and towards rule-based sentencing guidelines. Criminal sentencing by rules rather discretion was an attempt to protect the criminal justice system from private

interest judges and the disparity that they were alleged to produce. Sentencing grids are an attempt to make the sentencing process objective, predictable, and secure from private interest exploitation by local judges. Sentencing grids are meant to maintain proportionality of punishments and equality before the law. Refer again to Table 3.2. and 3.3. which use indexes of criminal history and a scale of severity regarding the recent violation to calculate criminal sentences. Together these axes produce a formal and narrow sentencing range that judges are meant to stay within unless they have a strong reason for straying outside of the boundaries. There was no widespread opposition to the initial adoption of sentencing guidelines and sentencing grids because previous paradigms had failed to produce significant and tangible empirical effects upon crime rates (Martinson, 1974). But since their inceptions, sentencing guidelines have received widespread criticism, only marginal success rates and they have even been accused of exaggerating rather than alleviating sentencing disparity in America.<sup>56</sup> Sentencing guidelines are interpreted to operate like mandatory minimum sentences, whereas judges may often prefer a lower sentence than that dictated by the grid, their costs of defecting from the guidelines are inhibitive. Commentators infer that sentences are higher than they otherwise would be without the grids and guidelines.

The recent supreme court cases have re-awarded discretionary power to federal judges in criminal cases. As Susan Klein (2005) has put it “[f]ederal judicial discretion in criminal sentencing has come full circle over the last 200 years (ibid., p.1).” This most recent shift has been argued for as a means to promote proportionality. It is now generally

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<sup>56</sup>Klein and Steiker (2002) survey Thomson (1962), Nagel and Hagan (1982), Seidman and Zeisel (1975), Cook (1973), Wilkins et al. (1991), Nagel (1991), Hofer, et al. (1999), and Clancey et al. (1981) who all support sentencing guidelines as a response to disparity originating from judicial discretion. See also Campbell (1991) and Breyer (1988).

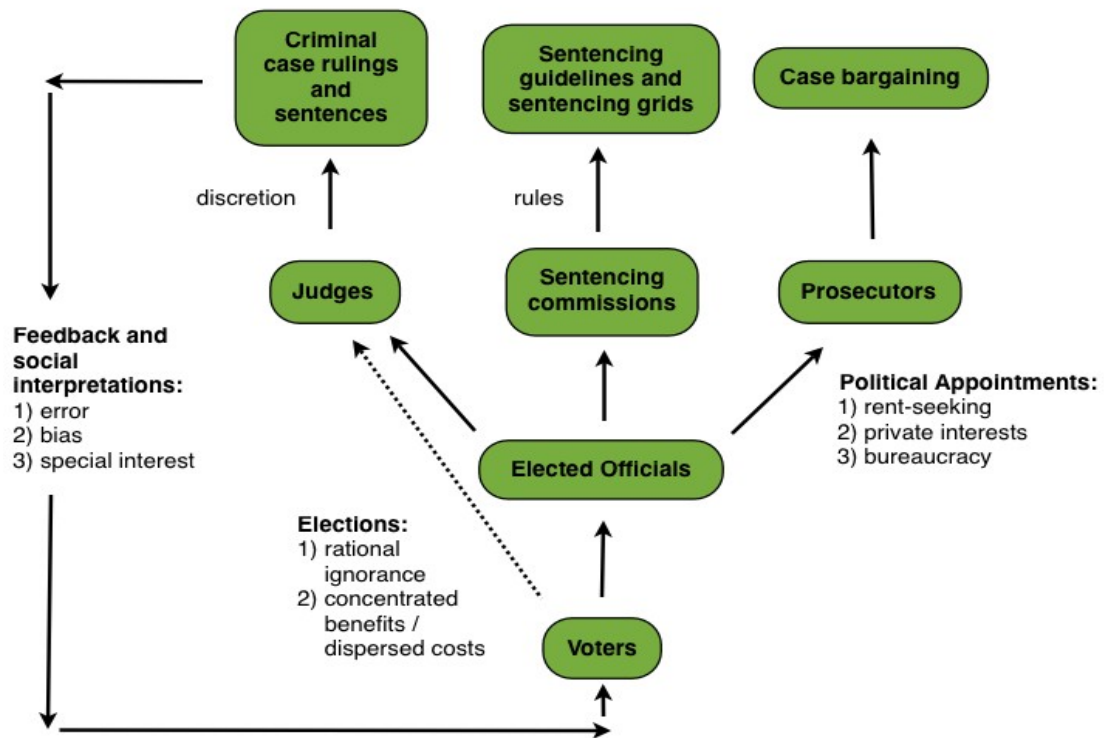
believed that discretionary criminal sentencing produces proportionate sentences better than rule-based sentencing guidelines. I argue against this popular opinion. It is not because of the merits of discriminatory sentencing or a lacking in the theoretical content of rule-based sentencing that has led to the recent failures of sentencing guidelines. Instead it is because these reforms are left in the hands of the government to be engineered, implemented, and carried out that they have not been successful. The state lacks a credible commitment to stick to the rules which it sets in place with regard to criminal sentences. The lack of such credible commitments is recognized and accepted by agents within society - criminals, victims, prosecutors, security entrepreneurs etc. Rules set by unreliable governments are not interpreted as credible commitments to agents in society. They do not update their behaviors, and therefore no elimination or modification of disproportionate criminal sentencing was observed under rule-based sentences.

#### **4.3 The Long and Variable Lags of Criminal Sentencing Policy**

The empirical record of crime and punishment in America is an unpleasant truth to look at. Aside from a relatively minor fall in violent crime during the 1990s (Lott and Mustard 1997 and Levitt 2001), the long history of crime trends, the probability of convictions, total prison populations, the number of correctional institutions, the social costs of crime, and criminal sentencing disparity across race, gender, age, and income have all experienced long lagging growths. When viewed more closely crime rates oscillate greatly compared to the approval ratings reported by citizens for the separate portions of the criminal justice system (Flanagan and Longmire, 1996). It seems that the general public is relatively unresponsive to real changes in the criminal justice system.

Criminal justice policies themselves are variable, they change day by day amidst a slue of supreme court rulings, criminal policy acts, sentencing commission decisions, local legislative changes, law enforcement policy shifts, and internal parole board statutes. The explanation behind the co-existing static rate of social approval along with rising but oscillating crime rates is not found within the numbers themselves but rather within the structure of decision making that lays behind the creation of criminal justice policies. The long and variable lags of criminal justice policy erupt from many of the same structural features as Friedman alluded to with regard to monetary policy. First there exists a lag between the real need for a policy response on the one hand and the recognition or discovery of that need on the other hand. Second, between the recognition of a need for policy, the design of that policy and the final application of that policy, time must pass. Third, time passes between a policy's inception and its actual effects.

The criminal justice system is organized as a vertical hierarchy of decision making. This decision making arrangement inevitably carries with it lags and delays in implementing policy reform. Figure 4.1. is a visual diagram of the flow of decision making and feedback at play in the criminal justice system.



**Figure 4.1. The structure of decision making within the criminal justice system.**

The separate portions of the hierarchy were established to maintain proportionality in punishment and resolve disparity, but as I will demonstrate, the process has several obstacles to making decisions effective at reaching this stated end. At the base of the hierarchy, is the general public represented by voters. Voters participate in elections and choose political officials who they infer to be most in line with their political interests. The dotted-line between voters and judges is meant to indicate that some states select judges by independent voting whereas other states select judges by political appointment.

In the case of proportionate punishment voters would have to exert an explicit preference for a candidate concerned with proportionality compared to alternative

political issues and make that preference clearly known. This is an unlikely scenario, first because criminal sentencing issues are often second seat political concerns next to unemployment, economic welfare, health care, foreign policy etc. Secondly, the election process suffers from rationally ignorant voters and political coalitions. Voters have little incentive to be informed about political issues because they bear a direct cost significantly higher than their actual influence upon the election (Congleton, 2002). Groups of individuals who face a lower cost to solving collective action problems because of cultural homogeneity, labor union interests, etc. are guided by the incentives to reap concentrated benefits for their particular coalitions while dispersing the costs of those political benefits across the entire citizenry (Wagner, 1989). Thus a motivated political activist concerned with promoting proportionate punishment would have to compete for coalition members amongst notably more popular political issues. Elections do not necessarily communicate a clear preference signal for proportionate sentencing. If anything the political process reveals a status quo bias, because the costs of implementing political reform are inhibiting to the creation of minimal winning coalitions to implement social change (Buchanan and Tullock, 1962).

At the next level of the decision making hierarchy, elected officials appoint decision makers in several separate but related fields of criminal sentencing. This is represented in Figure 4.1. by the three arrows stemming from elected officials towards judges, sentencing commissions and prosecutors. Different states rely upon different arrangements to structure their local criminal justice systems and the federal criminal court system has its own structure as well. In some states judges and sentencing commissions co-exist, which is to say judges reign over the trials of cases while

commissions set formal rules that determine narrow possible ranges for judges to assign criminal sentences within. States without sentencing commissions and their related guidelines award a greater role of discretion to judges compared to commission-governed states. Hence the diagram labels the decision making arrow from judges to case rulings as “discretion,” and the decision making arrow from sentencing commissions to guidelines and sentencing grids as “rules.” Prosecutors are another set of key decision makers when it comes to criminal sentencing. Through bargaining before and during the trial process prosecutors effect the real outcomes of criminal sentences. Though prosecutors are not necessarily awarded a de jure level of discretionary authority, they do carry a significant level of de facto power to bias judges sentencing decisions upwards or to circumvent the formal rule systems of sentencing guidelines with mitigating evidence - also biasing the level of criminal sentences upwards.

The process of political appointments allows for further time lags and systematic tendencies that derail decision making away from proportionality. As I have explained earlier, proportionality is typically a minor area of political interest compared to alternative policy topics. If elected officials are self-interested to the point that they are concerned for their own re-election, they will appeal to the median voter and the issues that he values most. Once in authority an official has the opportunity and the incentives to maximize the budgets of his particular bureaucracy (Tullock 1965 p.120 -220 and Niskanen 1971). He is also inclined and capable to make appointments of individuals who suit his private interests regardless of the social welfare. Officials competing for such appointments are willing to expend resources up until and including the amount of rent that they would receive if they secured the contested appointment (Tullock, 1967).



Available resources within the provision of criminal sentences get allocated so as not to represent the true tastes and preferences of society with regards to proportionate punishment - some are wasted as expended efforts to curry political favor, some are wasted as bureaucratic inefficiency, and some are captured for private interests.

Finally the actual decision making of each of the three appointed official types takes time and erupts further systematic political interests at odds with proportionality. Actual cases can take several years from the initial application of criminal charges through the trial process, verdict, appeals and finally sentencing. Sentencing commissions have been known to take several years in order to formally be developed, meet with one another, agree upon a system of sentencing guidelines or sentencing grids, draft those proposals and finally implement them into stable policy. In fact the majority of states that have attempted to create sentencing grids out of sentencing commissions have failed to do so even after several years of deliberation (Tonry, 1991). These long lags allow for opportunism and rent-seeking much like the process of political appointments in so far as they have been observed to bias the sentencing process upwards. As Zimring (1976) has noted “asking legislators to develop fine-tuned sentencing standards offers an irresistible opportunity for political posturing and pandering to get-tough sentiments.” Lastly prosecutors use bargaining power to influence the actual outcomes of criminal sentences. As rational maximizing agents, prosecutors seek to maximize their convictions and strategically offer high initial sentencing requests in order to induce plea-bargaining.

Notice that there is no significant difference between the incentives invoked under discretionary judicial sentencing compared to rule-based sentencing by commission guidelines. In both cases the actual results must be re-interpreted as feedback perceived

by the voting public. The public can either accept the outputs of the criminal justice process or they can perceive a problem and express their own dissatisfaction. In the case of the latter, individuals face significant costs to organize and express their refined political opinions. This process itself carries its own lag and systematic effects against proportionality.

These long and variable time lags suggest that rule-based criminal sentencing rather than discretionary criminal sentencing would be preferable in order to assure proportionate punishments. The time delays associated with criminal sentencing policies imply a bias that they will be either ineffective, or if effective unaccepted. By selecting stable and generally applicable rules, citizens, criminals, security entrepreneurs and even political agents would have a better estimation of future criminal sentencing policies and could therefore invest in long term production plans and allocations of criminal justice resources to ensure that the level of criminal punishments reflected societal preferences as revealed by the market prices of those resources. Unfortunately so long as governments are the sole providers and enforcers of criminal justice policy they face no self-enforcing constraint from breaking the allegedly established rules.

#### **4.4 Why Sentencing Commissions are Failing**

Once Becker's (1968) model of rational criminal behavior had been developed, it was more formally understood that criminal agents respond to incentives. Increased levels of punishment perceived as increased costs to crime should carry with them lower crime rates (Ehrlich, 1972). But without universally observable decreases in criminal

behavior, economists were left to hypothesize that the demand curves for crime were relatively inelastic - relatively not responsive to price changes in the costs of crime. Instead it has been argued that criminals are more responsive to changes in the real probabilities associated with being detected, arrested and subjected to criminal punishments (Block and Lind 1975a and 1975b, Posner 1981, and Benson 1998). The likelihood of getting caught and changes in the probabilities of getting caught are more influential incentives upon the behavior of criminals than are changes in the level or degree of punishment. The structure of the criminal justice system as explained in Section 4.3. shows that criminal justice policy changes have long and variable lags. Whether policy changes are framed as adjustments to the degree of punishment or are changes in the efficiencies of law enforcement (changes in the probability of punishment), both carry long delays between the time when they are recognized to be needed on the one hand and the time that they actually take effect on the other hand. Discretionary policy lowers the costs to political actors changing the policy mix mid-way through the process. These time lags inhibit long-term independent planning to invest and innovate new solutions to the problems of crime.

With stable expectations about the future levels and amounts of criminal punishments, innocent citizen investors and security entrepreneurs can interpret long-term levels of crime rates to gain some reliable vision of what the elasticity of demand for particular crimes are likely to be. With an insight into how much criminals are willing to persist in committing certain crimes amidst a given level of punitive harshness, individuals can invest in additional resources and services needed to secure their persons and property at the remaining levels of crime. Such private investments in turn also serve

as a deterrent against crime by lessening the rewards to crime and lessening the probability of criminal success. An automobile with a car-alarm is presumably more difficult to steal and obtain criminal value from than one without such a device. A world where all cars have alarms is a world with less car theft and in turn less need for intense punishments against the crime of stealing cars. Private investments in security devices in the long-run should lessen a society's dependence upon publicly provided punishments as a source of deterrence. Punishments in the long-run should require less severity in order to maintain similar levels of real deterrence. This has not been the empirical case to date.

Benson (1998) has noted vast increases in profits and the number of firms within the private security industry, likewise Lott (1998) has taken note of rising private gun-ownership trends. But amidst the booming private security industry, punishment types, punishment applications, and disparity across races, genders, ages and income levels have persisted and or grown in the U.S. With the rise of the private security industry, society should be able to maintain a stable level of deterrence without resorting to harsher penalties but instead we have seen rises in both, with only marginal decreases in crime rates. Rather than maintaining a credible commitment to preserve proportionate punishment, government is guided by political incentives and systematic forces to increase punitive severity and drift away from proportionality. Long-term production plans aimed to innovate alternative techniques of security and protection go unexplored. Subsidized punishments in the public sphere crowd out private investments. Despite its booming success relative to other industries, the private security sphere is smaller than it otherwise would be without such large amounts of government subsidy into the criminal justice system.

Discretion-based criminal sentencing is more popular than rule-based sentencing amongst scholars, commentators and writers at the moment. Coming away from an era of rule-based criminal sentencing without effective results leads one naturally to the only perceived counter-factual scenario. If rules do not work, discretion must be the answer. Assume that we know full-well that discretion-based criminal sentencing works best (or at least better than rule-based sentencing) to produce proportionate punishments. Amidst a formal policy regime of discretionary-sentencing, political incentives and opportunities are aligned so that political actors will seek to formalize the decision-making process to avoid rent-seeking, private interests, and prejudicial decision-making - of a certain type. Prejudicial discretionary sentences, presuppose prejudice against someone and some group in particular. This group faces a lower relative cost to collective political action aimed against the current policy regime. A formally-supported, discretion-based sentencing regime sows the seeds of its own demise, it invokes, promotes and allows for the opportunities and incentives for political agents to usher in a system of rule-based sentencing. This is what in part took place legislatively between the 1970s and 1990s during the rise of rule-based sentencing guidelines and sentencing grids.

The U.S. Sentencing Commission was first created with the passage of the Sentencing Reform Act of 1984, thus began criminal sentencing by rules rather than discretion at the federal level. Sentencing by rules was continually re-affirmed in several subsequent federal and state supreme court cases that dealt closely with issues concerning gun use during a crime (U.S. v. Jones 1999, and Harris v. U.S. 2002), racially motivated crimes (Apprendi v. New Jersey, 2000), and drug quantity logistics (Mistretta v. U.S., 1989). Together these cases reaffirmed the constitutionality of the sentencing commission

and the sentencing reform act. *McMillan v. Pennsylvania* (1986) opened the door for state based mandatory minimum sentences and later *Blakely v. Washington* (2004) supported a victim's rights to a jury's decision and against judicial discretion in the process of criminal sentencing. These cases repeatedly expressed concerns regarding the ability to maintain equality before the law amidst judicial discretion. Supreme court hearings and official legislations sought objective measures of criminal severity and a method to standardize the sentencing process in order to rule out political concerns over sentencing disparity.

I have argued that despite the current popularity of discretion-based criminal sentencing, there is good reason to support rules over discretion. The long and variable time lags associated with criminal sentencing policy make it so that discretionary changes cloud the information relied upon by long-term decision makers. For argument's sake, assume that we know with full certainty that rule-based criminal sentencing is superior to discretion-based criminal sentencing. Rule-based criminal sentencing will result in more proportionate outcomes compared to discretion-based sentencing. Unfortunately rule-based criminal sentences would still fail to achieve ideal proportionate criminal sentences because much like discretionary sentencing they face a gauntlet of political processes that systematically erupt incentives and opportunities for private interests, rent-seeking and deviations from the rules to promote disproportionate sentences. Government always has the opportunity and the incentives to break the rules and in turn express its own discretion despite lacking any formal authority for discretion. In real history it is no surprise that this is exactly what has occurred in the most recent trends away from rule-based sentences back towards discretionary sentences.

During the original transition from discretionary sentencing to rule-based sentencing there were obvious political concerns being raised as to the potential for discretion to lead to private interest exploitations. Discretionary sentences were often interpreted as discriminatory sentences, they naturally invoked coalitions with a vested interest to induce change in the political process towards rule-based sentences. As the recent supreme court cases represent the shift is coming full circle - back to discretion and away from rule-based sentencing which is to say that the so-called rules of sentencing grids and sentencing guidelines were far less rule-like than their titles implied. Prosecuting attorneys - a separate appendage of government authority but an appendage nonetheless - held a significant level of de facto control over the real outcomes of criminal sentencing levels. Prosecuting attorneys aim for certainty and high numbers of prosecutions to advance their personal careers. As a strategic response to the predictability of criminal sentencing grids they can decide whether to invoke certain elements of evidential processes in the court room to ratchet up several charges and multiply criminal sentences beyond the ranges stipulated in any particular sentencing grid cell. The way evidence is interpreted in the court room gave prosecutors the de facto discretion under sentencing grids. If a fact of quantity or magnitude raises the penalty outside of the initial cell it in effect becomes another case. Deciding to pursue these alternative options is the choice of the prosecutor whose interests are in line to produce the maximum number of convictions. Using these options in the trial process allows prosecutors to raise the de facto total sentence lengths in order to induce a higher level of guilty pleas in the pre-trial phase (Klein, 2005). What is more is that there is no current alternative to public criminal prosecutors. Governments possess the sole right to

prosecute against criminal offenses, so there is no check or balance of power to cap the levels of strategic sentencing lengths that prosecutors put forward.<sup>57</sup>

The structure of the criminal justice system allows for, accommodates and induces incentives and opportunities for the capture of rents by private interests. Rulings and resources must be allocated somehow and thus they are almost inevitably captured. Reform efforts that focus upon shifting the channels of decision making amidst actors within the same political structure do not necessarily change the outcomes of that political process. The task at hand is to constrain the expression of private interests amidst political actors. How does society bind the hands of the government sufficiently so that the government does not and cannot in turn break those binds. Only radical changes in the structure of decision making and the authority it holds have significant effects upon the outcomes of criminal justice policy. Unfortunately such changes rarely if ever originate from within the political process itself. Other instances of political economy reform have occurred as a result of times of crises. Wars, ideological revolutions or natural disasters radically alter large sets of bargaining costs and collective actions thus they hold an opportunity to re-frame the structure of political authority. They are what Buchanan has called *constitutional moments* (Buchanan and Tullock, 1962), times when general constraints can be placed upon government and the perceived proper role of government can be restricted.

Some commentators have referred to the recent all time high levels of

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<sup>57</sup>Easterbrook (1983) argues in favor of discretion within the criminal justice system believing it to mimic market processes and the setting of criminal sentences as prices. For him, rules governing the application of discretion act as price controls with similar inefficient and unintended consequences. But he also admits that there are portions of the criminal justice system – especially prosecutors – who hold an absolute monopoly over their particular services thus eliminating the necessary competitive process for prices to emerge and function. Friedman (1993, p.3) finds the monopolized role of the prosecutor to be a historically unique aspect of the U.S. criminal justice system.



incarceration within the United States, the growing sense of disparity, and the raising costs of maintaining such a large criminal justice system as setting the stage for an inevitable crises. What that crises will particularly look like or if it is inevitable at all are up for debate. The preliminary question being, for how long can these trends persist and if such a crisis does occur, will a restructuring of political authority in the criminal justice system be on the table for debate?

#### **4.5 Conclusions**

In an earlier paper I explained that central-planners lack the critical knowledge to define and determine the relevant margins of criminal severity and punitive harshness necessary to calculate proportionate punishments. Optimal punishments cannot be calculated without constituent market prices for the factor inputs of the criminal justice system - police, courts, prisons etc. (D'Amico, unpublished a). These knowledge problems are at the very heart of the debate concerning rules versus discretion. The fact of the matter is that it is indeed a debate. No one knows for certain whether rule-based-sentencing or discretionary sentencing will better assure proportionate punishments. The centrally-controlled criminal justice system lacks a process of knowledge-discovery and error-correction in the maintenance and design of criminal sentences. This knowledge problem is antecedent to the incentive problems discussed within this chapter. This chapter argues in favor of rule-based sentencing because of the logistic nature of criminal policies being plagued by long and variable time lags. If the particular debate between rules and discretion were solved with absolute certainty, the political process would still

suffer from incentives and opportunities that pulled the system away from proportionality.

Only moments of exogenous shock, such as crises in ideology, social thought, political opinion, budgetary scarcity, natural disaster or political revolutions erupt moments of opportunity for constitutional contracting. During such moments, reformers should commit themselves to fundamental change in the structure of the polity's relationship to the criminal justice system in order to better achieve proportionality.

## 5 Conclusions

I began this investigation by exposing the current failings of sociology and economics to fully account for the divergent trends within crime and punishment. By performing a new strategy of analysis through the methods of political economy I have shown that current punishment policy is plagued by both knowledge and incentive problems. Which is to say that the world of politics does not exist outside of a context of economic and social reality. The social, political and economic worlds are all continually bearing influence upon one another. In short, the current administration of criminal justice fails in so far as politics displaces economics as a decision making strategy for producing criminal punishments.

At several points throughout this dissertation I have made comparisons between the current centrally-planned criminal justice system and an alternative, hypothetical, market-based criminal justice system. I have argued that today's criminal justice system fails in its ability to coordinate the required knowledge necessary to produce proportionate punishments and suffers from the creation of systemic incentives for political decision makers to derail punishments away from proportionate outcomes. On both of these margins there are sound theoretical reasons to believe that markets could outperform state-control. Markets harness the relevant knowledge of society to allocate resources in quality and quantity throughout the economy proportionately and one would

expect much the same in the provision of criminal punishments. Furthermore through the central feature of competition, market-based firms providing criminal punishments may be held in a balance of power scenario regarding their credible commitment to utilize rule-based decision standards for criminal sentences.

As discussed in the conclusion to Chapter 3 - Section 3.5. this analysis could imply a call for ushering in a market-based criminal justice system, but it need not hold such implication. In stead the same analysis could be restrained as a reductio against the feasibility of proportionality theory given an assumed role of the state in the provision of criminal punishments. In other words, this dissertation has in different methods exposed a logical incompatibility between the means of state-controlled criminal justice on the one hand and the ends of proportionate punishment on the other. One or the other, unfortunately society cannot have its cake and eat it too.

If the former implication is to be entertained - policy reform should be focused to usher in a market-based criminal justice system - then a major question of concern remains, how to get from here to there. How is criminal justice reform to be produced so as to promote proportionate outcomes? In keeping with the insights from the market-based reform literature the question could be framed as such: will shock therapy in the criminal justice system produce proportionate punishments? As development economists have noticed, shock therapy has experienced mixed results and been rewarded with mixed reviews. Much like the political incentives created amidst rule-based reform strategies shock therapy is a best attempt to avoid the counter cyclical trends of policy change. The short term outcomes of shock therapy have made it a harsh pill to swallow. In its immediate effects, shock therapy often resulted in higher prices for essential goods

and services and thus was most harshly felt amongst the poor. But over time prices fell and quality rose. In the end, shock therapy of third world countries often resulted in unprecedented rates of economic development and eventually sustainable growth. Could such be the case in the criminal justice system?

It seems reasonable to expect similar results for criminal justice reform. If shock therapy were implemented there would be higher prices for the services of criminal justice and applied punishments in the short run. Unfortunately such prices would likely be felt more harshly by poorer citizens, but as the incentives of the market fell into place we would expect resources of criminal justice to flow in their most urgently needed directions. Thus the relevant comparison should be between the long-term welfare positions of each scenario rather than the short. Where the current criminal justice system suffers from a status quo bias, if anything is inclined to exaggerate disparity problems, the market at least promotes the potential for improvement over time. As Lott (1987) has framed it, this question resembles something like, “should the wealthy be allowed to buy justice?” As was mentioned in Chapter 3, allowing those most capable of affording criminal justice services to buy up those resources, could have a longer-term, beneficial effect upon proportionate punishment levels in the aggregate. A rising tide raises all ships. The question which remains is if the current prison crises will in fact be a sufficient crises to usher in the potential for radical market reform. I am doubtful, but only time will tell.

While there is too much uncertainty regarding the magnitude of the current or potentially up and coming prison crisis - who knows if it will be crises enough - there is reason to be optimistic with regard to the potential for applied shock therapy to reform America's criminal justice system when it may be finally tried. Specifically I am referring

to the fact that shock therapy attempts have most often been applied across entire nations and cultures of people, pervading their effects throughout every aspect of their lives. The application that I am referring to is much more constrained and less alien to its context. America is in great part a market-based society, its members do not lack any cultural familiarity with property rights or the exchange process, nor do they possess any particular cultural identity in contrast to such processes. Adjusting the criminal justice system towards market reforms in hopes of obtaining proportionality should not have radical consequences upon the remaining functional levels of the market-economy. The stakes are relatively low compared to other applications of shock therapy.

In the meanwhile if constitutional contracting were to develop in isolated areas of the criminal justice system, market-based advocates should take what they can get. Reformers should commit themselves to fundamental changes in the structure of the polity's relationship to the criminal justice system in order to better achieve proportionality. For example entertaining thought experiments as to the relationship between the civil and criminal legal systems could be a good first step. What if all current codes of property crime were in effect decriminalized but remained available for civil suit? One would expect the market to operate as it has been explained above.

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## Curriculum Vitae

Daniel J. D'Amico was born on August 31, 1982 in Demarest, New Jersey, and is an American citizen. He graduated from Pope John Paul II High School in Boca Raton, Florida in 2000. He received his Bachelors of Business Administration from Loyola University New Orleans with double majors in economics and marketing while completing an honors thesis. He immediately entered George Mason University's Ph.D. program in economics thereafter. He received a Masters of Arts in Economics from George Mason University in 2006. Upon completing his Ph.D. at George Mason University he will begin a tenure track appointment as assistant professor of economics at Loyola University New Orleans.