Proportionality in Crime Control and Criminal Justice

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The Principle of Proportionality: Tracing its Historical Evolution*

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I. Introductory Remarks on the Factors Influencing the Principle's Evolution

The working hypothesis for this chapter is that we can distinguish between *two forms of the principle of proportionality* in the field of criminal law and punishment: strict and broad proportionality. *'Strict' proportionality* is the symmetry between (a) the gravity of the crime and/or the criminal's culpability or guilt and (b) the severity of the sanction. *'Broad' proportionality*, by contrast, comprises, apart from the gravity of the crime and/or the culpability of the criminal, several additional, individual criteria, ie, the circumstances of the crime, the specific characteristics of the criminal (for example, a criminal record) and the preventive aims which a sanction must achieve. However, broad proportionality does not necessarily lead to a milder punishment due to mitigating factors; it may also result in a harsher punishment, for example for a repeat offender or due to aggravating factors.

Our focus here is to examine the different *factors that may influence* the evolution of the principle of proportionality and, consequently, result in the emergence of strict or broad forms of the principle. The aim of this chapter is therefore not merely to present the historical evolution of the proportionality concept but also to evaluate, by integrating the historical information into a more general context, the influence of particular factors on the above-mentioned two forms of the principle. In other words, the aim is to examine the reasons why there are certain periods in history where the principle takes a strict form of retribution, even of retaliation (*lex talionis*: 'an eye for an eye'), while at other times it is more individualised and incorporates the full spectrum of facts.

*This chapter benefited from the comments of two outstanding colleagues: Antony Duff and Georgios Giannoulis.

Against this backdrop, the main factors influencing the evolution of the principle of proportionality are the opposite pairs of (a) liberalism versus authoritarianism and (b) realism versus idealism, especially in its later form of utilitarianism versus retributivism. More precisely:

Liberalism answers the question of to what extent the members of a given society respect human freedom, human dignity and human rights. At the opposite end is *authoritarianism*: in societies and countries where the individual human value is considered unimportant – as in the case of authoritarian and totalitarian regimes – the principle of proportionality has a very limited role to play, if any. The punishments these regimes impose can be particularly cruel, not only for their opponents but also for individuals whose actions merely fail to match the regime's ideology and '*Weltanschauung*' (*cf* Orwell's '1984'). By contrast, it is a characteristic of modern liberalism that after the end of the Second World War, in the then prevailing spirit of social justice,[1] a plethora of transnational and national legal orders adopted not only various human rights declarations and conventions but specifically also the principle of proportionality.[2] Moreover, concrete criteria were adopted for testing proportionality in relation to the limits of public power; the most well-known being necessity, suitability and proportionality *stricto sensu*.[3] Consequently, after 1945 the principle was gradually consolidated in its 'broad' sense and also permeated by a humanitarian spirit in favour of the offender.

Apart from the antipodes of liberalism versus authoritarianism, which bear, to a certain degree, on the field of politics, there is another pair of factors

[1] *cf* N Courakis and T Gavrielides, 'Beyond Restorative Justice. Social Justice as a New Objective for Criminal Justice' in T Gavrielides (ed), *Routledge International Handbook of Restorative Justice* (London, Routledge, 2019) 43–55, 46.

[2] Today, the principle of proportionality is present in almost every legal order. It is remarkable how this principle manages to draw the approaches of the civil law and the common law systems closer together. At the European level, this is largely due to the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union. *cf* Art 49(3) of the European Union Charter of Fundamental Rights: 'The severity of penalties must not be disproportionate to the criminal offence', which is considered as embodying a binding rule of primary European law, see M Böse, 'The Principle of Proportionality and the Protection of Legal Interests' (2011) 1 *European Criminal Law Review* 35–41, 35. Furthermore, in Art 5(4) of the Treaty of European Union we may find some sort of definition of the principle's function at EU level: 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. See also, at a more general level, I Porat and M Cohen-Eliya, *Proportionality and Constitutional Culture* (Cambridge, Cambridge University Press, 2013) 3; N Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London, Kluwer Law International, 1996) 191–94; L Bachmaier Winter, 'The Role of the Proportionality Principle in Cross-Border Investigations Involving Fundamental Rights' in S Ruggeri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings* (Berlin, Springer, 2013) 85–110.

[3] *cf* R Alexy, 'Constitutional Rights and Proportionality' (2014) 22 *Revus – Journal for Constitutional Theory and Philosophy of Law* 51–65, 52–54; F Urbina, 'A Critique of Proportionality' (2012) 57 *American Journal of Jurisprudence* 49. The forms of the proportionality principle mentioned here originate in administrative and constitutional law but have been equally adopted in other legal areas, among them criminal law. On the interactive correlations between these areas of the law, *cf* P Asp, 'Two Notions of Proportionality' in N Kimmo (ed), *Festschrift in Honour of Raimo Lahti* (Helsinki, Publications of the Faculty of Law – University of Helsinki, 2007) 207–19.

with a philosophical background influencing the evolution of the principle of proportionality, namely idealism versus realism, which often takes the form of retributivism versus utilitarianism.[4] *Idealism* prioritises ideas like 'justice', which must be served at all costs, even at the expense of practical considerations. This position is typified by the opinion of the German philosopher Immanuel Kant, which holds that a criminal must not be punished for reasons of intimidation (for in that case human value would be instrumentalised in the service of an aim), but 'for the sole reason that he has committed a crime' (*weil er verbrochen hat*), thereby removing from his person and/or from his material goods the protection previously afforded to him by society.[5] Similarly for Hegel, who holds that the elimination of the crime and the restoration of the law violated by the crime can only be achieved by offending the will that has realised the crime, ie, by inflicting punishment on the offender.[6] From the point of view of Kantian idealism, the nature of proportionality is definitely 'strict', amounting to retribution, whereby the death penalty for murderers becomes the rule.

At the other end of the scale, after the beginning of the seventeenth century intellectuals like Grotius, Montesquieu, Beccaria and Bentham manifested, in a spirit of *realism*, a strong concern for reforming the penal systems of their time, making them more rational and efficient, mainly by taking measures for preventing crime in the future.[7] From this realistic and utilitarian point of view, the principle of proportionality acquired a primary role in the penal system and in some cases (Bentham) even assumed a 'broad' character materially different from the strict notion of retribution. In a way, the opposition between idealism and realism may also take the form of a confrontation between the deontological approach, focusing on moral considerations, and the consequentialist approach, focusing on the supposed effects of punishment.[8]

It is noteworthy that the contrast between retributivism and utilitarianism had already been highlighted in antiquity in the form of a corresponding polarity between the retrospective and the prospective approaches, when Plato in his dialogue '*Protagoras*' (324 b) stated two basic aims of punishment: the one looking to the past and emphasising punishment for the evildoer 'for the reason that he has done wrong' (here the aim of punishment is *retrospective* based on retribution

[4] Some authors talk in this context about a 'fight' between retributivism and utilitarianism, with which the late history of proportionality is inseparably linked, see A von Hirsch, 'Neoclassicism, Proportionality, and the Rationale for Punishment: Thoughts on the Scandinavian Debate' (1983) 29(1) *Crime & Delinquency* 52–70.

[5] I Kant, 'Metaphysik der Sitten, Rechtslehre II, Teil I, Abschnitt E (1798)' in W Weischedel (ed), *Kant Werke, Bd 7* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1975) 309–499, 453.

[6] G W F Hegel, 'Grundlinien der Philosophie des Rechts (1821), §§99, 100' in H Reichelt (ed) (Frankfurt am Main, Ullstein, 1972) 95–97.

[7] According to N Lacey, 'The Metaphor of Proportionality' (2016) 43(1) *Journal of Law and Society* 27–44, 31, traces of proportionality may be found in the works of Montesquieu – and in all principal founders of the political projects of the Enlightenment and its long aftermath.

[8] *cf* A von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime & Justice* 55–98, 57.

for what happened in the past), and the other looking to the future and taking into account 'that the man who is punished, and he who sees him punished, may be deterred from doing wrong again' (here the aim of punishment is *prospective* and contemplates some future benefits for the criminal and society).[9]

The above-mentioned two main pairs of influencing factors on the evolution of the principle of proportionality evidently *do not necessarily coincide* and must be examined at different and autonomous levels. Realism in particular, especially in the form of utilitarianism, has little to do with liberalism. In fact, it was developed during the time of Beccaria, not so much out of humanitarian concern for the liberties of criminal offenders but rather to ensure the efficiency and preventive effect of punishment. Indeed, the proportionality of punishments in relation to the gravity of crimes was mainly considered – in the modern sense of ordinal proportionality – a means for evaluating different crimes and punishing them accordingly. In the spirit of the philosophers who suggested this idea, such as Montesquieu and Beccaria, a criminal would prefer stealing to robbing, provided the punishment for theft is lighter than that for robbery.[10] As Jean-Paul Marat, the French revolutionary leader, pointed out,

> a strict punishment for an insignificant breach of law does not simply entail damage to the validity of the respective authority. It is also a multiplication of crimes; it is to push the evil-doers to the extremities. What could then restrain them? Whatever they do, they have nothing more to fear.[11]

At the same time, idealism, especially in the form of retribution, has nothing to do with authoritarianism. Kant and Hegel are listed among the liberal thinkers of the Enlightenment. Even nowadays, when the idea of 'just deserts' (retributivism) increases the current of retribution, no one would suggest that this idea is devoid of concern for human dignity and human liberties – on the contrary.

II. The Seven Stages Marking the Evolution of the Principle

Based on these pairs of factors influencing the evolution of the proportionality principle in the field of criminal law and punishment, it is evident that

[9] On the distinction between prospective and retrospective proportionality, *cf* for example, A von Hirsch, 'Ein grundrechtliches Verbot exzessiver Strafen? – Versuch einer Begründung' in U Neumann and F Herzog (eds), *Festschrift für Winfried Hassemer* (Heidelberg, CF Müller Verlag, 2010) 373–82, 377; G Giannoulis, *Studien zur Strafzumessung* (Tübingen, Mohr Siebeck, 2014) 44. In a way, this distinction between backward- and forward-looking approaches is prevalent in the scientific debate even today, with retributivism in its various forms exemplifying the former, while utilitarianism is the most familiar example of the latter (though it might be better to talk more generally of 'consequentialism').

[10] *cf* Montesquieu, *De l'esprit des lois* (Paris, Garnier Frères, 1927 [1748]) at VI and XVI, and C Beccaria, *On Crimes and Punishments* (Milan, 1764) at XXVII (Of the Mildness of Punishments), available at: www.laits.utexas.edu/poltheory/beccaria/delitti/index.html.

[11] J-P Marat, *Plan de législation criminelle. Introduction, notes, postface de Daniel Hamiche* (Paris, Aubier Montaigne, 1974) 70.

from antiquity and until the eighteenth century there are no significant examples of 'broad' proportionality at the legislative level and its implementation by the courts. Due also to the non-liberal regimes in many societies of that period, *retaliation* (*lex talionis*) is the rule. However, at the *theoretical level*, leading philosophers or religious leaders of that period, who certainly did not adopt the principle of *lex talionis*, expressed interesting, temperate and lenient ideas. Among them Socrates,[12] Cicero,[13] Seneca[14] and Jesus Christ.[15] Saint Paul,[16] Saint Augustine[17] and Saint Thomas Aquinas,[18] as heads of the Christian religion, all stressed the *importance of moderation* (argument of 'ratio', ie, rate, proportion, measure and the Greek axiom of *μηδέν ἄγαν*, meaning 'never too much')[19] and of 'lenient' proportionality in dealing with others, friends or enemies, and therefore also with criminals. In a sense, this approach could be considered as having laid the foundation for the modern principle of proportionality.

A main precursor of the principle of proportionality is undoubtedly Aristotle. The Greek philosopher examines this issue in the Fifth Book of *Nicomachean Ethics*, where he meticulously analyses the essence of 'justice'. There, he perceives proportionality as a constituent element of justice in both its Aristotelian forms,

[12] As Socrates declared in Plato's *Gorgias* (380 BC), 'it is better to suffer injustice than to commit it'.

[13] Cicero in his book *On Obligations* (*De Officiis*), 44 BC, I, XI, explains that 'there is a limit to retribution and to punishment; or rather, I am inclined to think, it is sufficient that the aggressor should be brought to repeat his wrong-doing, in order that he may not repeat the offence and that others may be deterred from doing wrong' (*cf* also ibid I, XI, 34: 'we must resort to force only in case we may not avail ourselves of discussion').

[14] It is interesting to remember here how Seneca argues with rational reasoning about clemency of punishments in his essay 'Of Clemency' (*De Clementia*), 55–56 AD, I, XXII: 'It is conducive, however, to good morals in a state, that punishment should seldom be inflicted: for where there is a multitude of sinners men become familiar with sin, shame is less felt when shared with a number of fellow-criminals, and severe sentences, if frequently pronounced, lose the influence which constitutes their chief power as remedial measures'.

[15] Jesus Christ had the courage to reject openly the mosaic axiom of retaliation ('an eye for an eye') and to proclaim instead the command: 'Offer no resistance to one who is evil. When someone strikes you on [your] right cheek, turn the other one to him as well' (Matthew 5:25).

[16] Saint Paul, *Second Letter to Timothy* (Epistles, II Timothy 2:24): 'And the servant of the Lord must not strive; but be gentle unto all men, apt to teach, patient'.

[17] In a letter to Boniface in AD 418, Saint Augustine stated with regard to Christians who go to war the following: 'Let the manner of your life be adorned by chastity, sobriety, and moderation' (Letter 189, para 7), available at: newadvent.org/fathers/1102189.htm. Besides, Saint Augustine in his *City of God*, XIX, 7, correlates moderation with just wars and explains that 'it is the wrongdoing of the opposing party which compels the wise man to wage just war', available at: newadvent.org/fathers/120119.htm.

[18] Saint Thomas Aquinas referred to the idea of moderation in the context of self-defence. In his monumental work *Summa Theologiae* (II, II, Question 64.7) he explains that force, when used in self-defence, must not be excessive (the same must also apply to self-defence among states – ibid Question 40.1): 'Wherefore if a man, in self-defence, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defence will be lawful, because according to the jurists [*Cap. Significasti, De Homicid. volunt. vel casual.], "it is lawful to repel force by force, provided one does not exceed the limits of a blameless defence."'; available at: www.ccel.org/a/aquinas/summa/SS/SS064.html.

[19] *cf* A E Ienilieieva, *Basic Approaches to the History of the Principle of Proportionality* (Simferopol, Taurida National V I. Vernadsky University, 2013) 12ff, available at: academia.edu/9262757.

ie, commutative and distributive justice:[20] in *commutative or corrective justice*, the main objective is for the *civil judge* to restore in correct proportions the balance of gains and losses (damage), which is upset when, for example, a thief illegally obtains another's property (*arithmetic proportionality*).[21] This procedure applies to contracts or torts and does not take into consideration the qualities of the two parties, who are regarded as equal. In *distributive justice* what matters is the legislative distribution of benefits and burdens according to the qualities of the persons involved, who are therefore considered of different value (*geometric proportionality*).[22] As a consequence of the latter, we could say that the legislator must articulate criminal sentencing rules by using as a starting point the idea that punishment must be inflicted in proportion to the nature of the crime and the personal characteristics of the criminal ('broad' proportionality). Yet, Aristotle does not actually draw this conclusion. On the contrary, he insists on the importance of the Pythagorean idea of retaliation ('proportionate reciprocity')[23] as the limit up to which a retributive response to crime could be extended. However, in a different work, the *Magna Moralia* (Great Ethics), which some scholars attribute to Aristotle, the rule of proportionality is even more strictly defined. This treatise suggests that it is not fair, if somebody cuts out the eye of another person, merely to gouge the eye of the offender in return but that the latter has to suffer more than this if proportionality is to be maintained.[24] In any event, this isolated rigid approach should be taken with a grain of salt, bearing in mind that Aristotle particularly appreciates the *notion of equity* (*epieikeia*) as a means to correct the inclemencies of a strict law.[25]

In the following, we will outline the seven most important stages of the proportionality principle's evolution in the history of criminal law starting with the roots of the principle and continuing with the consolidation of the principle in modern times. We examine these stages through the prism of the above-mentioned pairs of determining factors. The evolutionary stages obviously involve different societies with different mentalities and degrees of socio-economic development. Hence, the stages presented here constitute only a *typical model* of how they *could* evolve under normal conditions over the course of time, from archaic communities to contemporary complex societies; however, the presentation of the last four stages focuses particularly on the penal history of the Western world.

[20] *cf* E Engle, 'The General Principle of Proportionality and Aristotle' in L Huppes-Cluysenaer and N Coelho (eds), *Aristotle and The Philosophy of Law: Theory, Practice and Justice* (Dordrecht, Springer, 2013) 265–76, 268. See also E Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10 *Dartmouth Law Journal* 1.

[21] Aristotle, 'Nicomachean Ethics' Book V.3, 1131 b 25ff, 272–73, in the edition of the Loeb Classical Library with a translation by H Rackham (Cambridge MA, Harvard University Press, 1968).

[22] ibid Book V.2, 1131 a 10ff, 266–67ff.

[23] ibid Book V.5, 1132 b 32ff, 280–81.

[24] Aristotle, *Magna Moralia*, Book I, ch 33 'Justice' 1194 a 30ff, available at: ia800503.us.archive.org/35/items/magnamoralia00arisuoft/magnamoralia00arisuoft.pdf.

[25] Aristotle (n 21) Book V.10, 1137 b 31ff.

III. Roots of the Principle

A. Archaic Communities

The first stage of evolution refers to archaic communities. During this period certain *serious offences* directed against the community as such and/or its political and religious leaders or deities (high treason, desertion, sacrilege, etc; hence crimes which may be called 'public') are met with *harsh punishments*. By contrast, *offences against the life, corporal integrity, honour or property of another person* are usually considered a matter between the parties themselves which is addressed in a spirit of *revenge* by the entire family group (clan) of the victim. The revenge could last for years and, initially, had no limits – only later did it acquire elements of *retaliation* (*'an eye for an eye'*) according to a primitive form of 'strict' proportionality based on the damage caused. Yet, in place of killing members of the opponent's family, the victim or his family could accept compensation in goods from the other party, calculated on a scale proportionate to the offence. Such acts of reconciliation could even extend to contracting a marriage between members of the two rival families. It should be pointed out that the custom of revenge, known as 'blood feud' or 'vendetta',[26] still resonated until recently in various isolated communities of Corsica, Sardinia, Southern Italy, Southern Greece, Northern Albania and elsewhere.

The principle of retaliation ('an eye for an eye') as a kind of 'strict' and measured proportionality involving private persons is further reflected in certain *archaic legal texts*, such as the Babylonian *Code of Hammurabi* (circa 1760 BC),[27] the *Pentateuch* of the Jews (circa sixth century BC)[28] and the Roman codification *Lex Duodecim tabularum* (Law of Twelve Tablets, circa 450 BC).[29]

[26] *cf* lexical entry 'feud' in en.wikipedia.org/wiki/Feud.

[27] It is interesting that retributive penalties are differentiated in this Code on the basis of the social status of offender and offended. For example, according to Art 196, 'if a seignior has destroyed the eye of a member of the aristocracy, they shall destroy his eye', while according to Art 198, 'if he [=a seignior] has destroyed the eye of a commoner, he shall pay one mina of silver'; J B Pritchard (ed), *The Ancient Near East. An Anthology of Texts and Pictures* (Princeton NJ, Princeton University Press, 1958) 161.

[28] Retaliation ('an eye for an eye') is mentioned more specifically in Exodus, 21:23ff, in Leviticus, 24:21 and in Deuteronomy, 19:21. According to M Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment' (2008) 28(1) *Oxford Journal of Legal Studies* 57–71, 60, 'the original meaning of "an eye for an eye" in the Pentateuch related to monetary compensation for the injured eye, rather than infliction of an identical (or even similar) injury on the wrongdoer'.

[29] Two typical retributive examples from the Table VIII (Torts or Delicts) of this Roman codification in the form of 'mirror punishments' [=meaning a precise reflection of the crime] are the following: No 2: 'If anyone has broken another's limb there shall be retaliation in kind unless he compounds for compensation with him'; No 10: 'Whoever destroys by burning a building or a stock of grain placed beside a house ... shall be bound, scourged, burned to death, provided that knowingly and conscious he has committed the crime; but if this deed is by accident, that is, by negligence, either he shall repair the damage or if he is unable he shall be corporally punished more lightly' (available at: avalon.law.yale.edu/ancient/twelve_tables.asp).

It appears also in Aesop's *Fables*, where retaliation is common practice, within specific limits.[30]

B. The System of Compensations

The system of compensations (second stage) starts to preponderate with the emerging importance of commercial transactions. The penal response is now bifurcated: *offences against private persons*, such as murder, manslaughter, bodily harm, rape and theft are valued and *paid for in cash* or *in kind* proportionate to the damage caused (interestingly enough, a part of the money goes to the chief or the community and the rest to the victim). By contrast, serious *public offences* continue to be *harshly punished* during this stage, as before. This duality of penal responses is observed, for example, in a law enacted by *Salian Francs*, a group of Germanic peoples, in around 500 AD.[31] Generally speaking, during the first two stages of evolution, proportionality equals pure retaliation or compensation as far as private offences go but is ignored regarding serious public offences, which are addressed with particular harshness.

C. State Sovereignty and the Absence of Proportionality in Punishment

The third stage of evolution is marked by the decline of autonomous communities and the corresponding strengthening of the authoritarian state. All private offences are considered disturbances of the peace and serenity in the surrounding region and are therefore treated as public offences. This evolution, which is henceforth connected with cruel punishments for every kind of offence, private or public, typically occurs in legal orders related to the Roman Empire,[32] the reign

[30] A kind of retaliation in these fables is certainly demonstrated in the case of the fox, who served his guest, the stork, broth on a marble slab; as a result, the stork remained hungry. In return, and in a kind of retribution, the stork, after inviting the fox to dinner, served crumbles of food in a narrow-mouthed jug; this time it was the fox who could not eat anything at all. *cf* the text of the fable in L Gibbs, *Aesop's Fables* (New York, Oxford University Press, 2002) 81ff; see also: mythfolklore.net/aesopica/oxford/156.htm. At a more general level about retaliation in Ancient Greece, *cf* C Gill, N Postlethwaite and R Seaford (eds), *Reciprocity in Ancient Greece* (Oxford, Oxford University Press, 1998) especially 213–14.

[31] There are two characteristic provisions of this Salic Law (*Lex Salica*) on murder. In title XLI ('concerning the murder of free men'): 'If any one shall have killed a free Frank, or a barbarian living under the Salic law, and it have been proved on him, he shall be sentenced to 8.000 denars'. In title LXII ('concerning wergild'): 'If any one's father have been killed, the sons shall have half the compounding money (*wergild*); and the other half the nearest relatives, as well on the mother's as on the father's side, shall divide among themselves' (available at: avalon.law.yale.edu/medieval/salic.asp).

[32] For example, the distinction between public offences (*crimina*) and private offences (*delicta*) was abolished during the period of the Roman Empire, as manifested in the two last books of the Justinian Pandects (*Digesta*), which are traditionally called '*libri terribiles*' (terrible books) exactly because the

of the German Emperor Charles V and his *Constitutio Criminalis Carolina*[33] and also during the French '*ancien régime*' until its fall in 1789. A typical example of the role of criminal law during this period can be found in a French Edict of 1534 stating that 'punishments are enacted in order to provoke fear, terror and to set an example to all subjects of the state' (*Les peines sont edictées pour donner crainte, terreur et exemple à tous*).[34]

In a way, the mission of punishments at that time, as Michel Foucault pertinently stressed, was to demonstrate the great distance ('dissymmetry') separating the little criminal man from the omnipotent state, against which he had dared to raise his insignificant stature.[35] In fact, punishments with disproportionate suffering, such as the dismemberment of the traitor by four horses riding in different directions, turned from time to time into a popular spectacle,[36] as mentioned by Foucault in '*Surveiller et Punir*' (Discipline and Punish).[37] Nevertheless, it is remarkable that *punishments were not the same for all citizens*. For example, in the Roman Empire and also in the Byzantine Empire of the Justinian era, an important distinction was made between high-class citizens, the so-called *honestiores* (the more honourable), who principally received a rather favourable penal treatment, and low-class subjects, the so-called *humiliores* (the more lowly), for whom cruel punishments and tortures were the rule.[38] Thus, during this dark period, punishments are based on the general idea that the life and value of human beings, at least of the more humble among them and certainly of the criminals, are insignificant and, consequently, taking their lives for even minor causes is entirely justified. Under such circumstances, there is really no place for a proper enactment and application of the principle of proportionality. Nevertheless, deadly force in the context of self-defence (a relic of the archaic institution of retaliation for private offences) continued to be permitted during this period. Such acts were considered justified by the right of every person to defend him-/herself in case of an attack, but only within proportional limits, ie, provided that the person defends his/her own life or corporal integrity.[39]

punishments mentioned there are atrocious, irrespective of whether the offence is public or private. For details on the issue of punishments during the Roman Empire, see mainly T Mommsen, *Römisches Strafrecht* (Leipzig, Duncker & Humblot, 1899 and reprinted in Graz, 1955) especially 895ff.

[33] The *Constitutio Criminalis Carolina* is the first modern codification of penal provisions (on felonies). In spite of its subsidiary position in relation to local law, it succeeded in remaining in force in German territories for centuries. Some of its provisions include punishments fixed on a retaliatory basis, for example in the cases of perjury and false accusation, for which the punishment is the same evil which the offender intended to cause another person (Arts CVII and CX).

[34] See J-P Duroché and P Pédron, *Droit pénitentiaire*, 2nd edn (Paris, Vuibert, 2013) ch 2 section 5.17.

[35] M Foucault, *Surveiller et Punir. Naissance de la Prison* (Paris, Gallimard, 1975) 52.

[36] This penalty of dismemberment was also provided for traitors in Art CXXXI *Constitutio Criminalis Carolina*. Other cruel penalties of that period, apart from the death penalty, were branding, whipping, maiming and pillorying.

[37] Foucault (n 35) 9.

[38] *cf Digesta* 48, 19, 9.11 and 48.19, 15. See also P Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford, Clarendon Press, 1970).

[39] See Art 140ff *Constitutio Criminalis Carolina* (a similar provision existed already in the Justinian Code 8.4.1: *moderatio inculpatae tutelae*); *cf* C F von Scherenberg, *Die sozialethischen Einschränkungen*

D. The Rational Approach by the School of Natural Law (Grotius)

In reaction to the authoritative practices of the previous, state-oriented period, some scholars, and particularly the Dutchman Hugo Grotius in the seventeenth century, undertook the task of approaching punishment from a more rational perspective. In this fourth stage of evolution, Grotius sought to base his argumentation on Natural Law, focusing mainly on issues of international criminal law and of the so-called Just War. More specifically, he famously defined *punishment*, in his treatise *The Rights of War and Peace* (1625), as an evil, inflicted by way of a symmetrical response to an evil action of the offender (*malum passionis, quod infligitur ob malum actionis*).[40] On this basis, he further established as the aim of punishment the *prevention of a future mischief*, by promoting the welfare of the offender, his victim and of society as a whole.[41] Grotius even accepted that punishment can be more lenient, if this is in accordance with the aims of punishment.[42] One may therefore speak of a 'broad' and prospective concept of proportionality.

IV. Consolidation of the Principle in Modern Times

A. New Ideas in the Age of Enlightenment

During the eighteenth century, the notion of proportionality enters its fifth stage of evolution and gradually becomes the primary principle to be discussed and promoted by the liberal intellectuals of the Enlightenment, in connection with the necessary penal system reforms of that time. First, Montesquieu in two of his works (1721 and 1748) declares that punishments in Europe should be inflicted in a temperate manner and with the least burdens for the citizens.[43] In particular, in terms of the evaluation scale, *punishments must be proportionate to the gravity of the crimes*, so that criminals avoid committing dangerous crimes and have recourse to minor offences. Thus, Montesquieu emphasised the direct correlation between (a) the crime's harmfulness and the offender's culpability and (b) the

der Notwehr (Frankfurt am Main, Peter Lang, 2009) 16 and N Courakis, *Zur sozialethischen Begründung der Notwehr* (Baden-Baden, Nomos, 1978) 55 and fn 21.

[40] H Grotius, *The Rights of War and Peace* (*De jure belli ac pacis*, 1625) Book II, ch XX, I (available at: oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-1901-ed).

[41] ibid, Book II, ch XX, Vff.

[42] ibid, Book II, chs XX, XXVIII.

[43] Montesquieu, *Lettres persanes* (Cologne, Pierre Marteau, 1721), Lettre no LXXX (available at: vousnousils.fr/casden/pdf/id00233.pdf).

response to the crime in the form of punishment, whereby the death penalty is also acceptable for serious crimes.[44] In the light of this, the nature of proportionality is 'strict'.

Several years later, in 1764, Cesare Beccaria, in his influential book *On Crimes and Punishments*, undertakes the hard work of systematising and updating, with fresh and rational ideas, the knowledge of his time about liberal penal policy. Beccaria sets as the starting point for his reasoning *Rousseau's idea of the social contract*, pursuant to which citizens sacrifice some of their liberties in return for safety. From this axiom he draws the conclusion that these relinquished parts of liberty constitute the foundation of the state's right to punish (*jus puniendi*). Hence, 'all that extends beyond this [=limit of absolute necessity to ensure the objective of common salvation], is abuse, not justice'.[45] Penal legislation is primarily aimed at preventing new offences (*prospective aim of punishment*); this can be achieved when penalties are proportionate to offences in terms of their social harm, so that the offender may be induced to choose to commit a lesser offence with a more lenient punishment.[46] In this context Beccaria rejects the old-fashioned notion of retaliation, opting in its place for a more rational approach to proportionality. Consequently, Beccaria rejects the punishments of death, infamy, general confiscation and torture (at XVIff). Accordingly, the legislator must give priority to mild penalties, which prevent crime in the long term.[47] Clearly, Beccaria rejects the idea of retaliation ('an eye for an eye') and his idea of proportionality assumes a more moderate, 'broad' and prospective[48] character.

The ideas of Jeremy Bentham move in the same liberal direction. In his *Treatise on Civil and Penal Legislation* (1820), he proclaims that a legislator must seek, by means of norms, to ensure, in intensity and duration, the greatest possible happiness and satisfaction for the greatest number of people. In practice, this can be achieved through the so-called '*felicific calculus*', weighing each time the pros and cons of one or more future actions against the degree of happiness they can provide.[49] As far as punishments are concerned, they are evils justified only if they produce other benefits or satisfactions to an equal or greater degree[50] by exceeding the harm of the crimes they are meant to prevent.

[44] Montesquieu (n 10) chs VI, XVI and XIX.

[45] Beccaria (n 10) ch II; *cf* F Venturi, *Utopia and Reform in the Enlightenment* (Cambridge, Cambridge University Press, 1971) 100ff.

[46] Beccaria (n 10) ch XXVII.

[47] *cf* Beccaria (n 10) ch XXIII.

[48] It is prospective rather than retrospective, but its prospectivity still seems narrowly focused on rational deterrence.

[49] J Bentham, *Traités de législation civile et pénale*, vol 1 (Paris, 1820) ch V, 28ff, available at: isidore.science/document/ark:/12148/bpt6k5696197f.

[50] von Hirsch (n 8) 55–98, 58 and J Goh, 'Proportionality – An Unattainable Ideal in the Criminal Justice System' (2013) 2 *Manchester Student Law Review* 41, 48, available at: hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_FullWebVersion.pdf.

Bentham defines, inter alia, the following as criteria for legislative proportionality:[51]

- A crime must be punished according to its magnitude (harmfulness), which means that a more harmful crime must elicit a stricter punishment; in this way, a criminal may, if he so chooses, opt for the crime with the lighter punishment.
- The harm inflicted by the punishment on the criminal must exceed the benefits of committing the crime.
- The punishment must be inflicted according to the personal characteristics of the criminal (family, financial situation, etc) and the specific circumstances which may act upon his sensitivity to punishment (for example, different pecuniary penalties for different perpetrators according to their financial status).

Bentham pays particular attention to the circumstances of the criminal event as well as to the characteristics of the offender. As a result, he evidently adopts a 'broader' notion of proportionality compared to Montesquieu or Beccaria. Regarding punishments per se, he insists that they must be *those that are absolutely necessary* in view of the purpose they serve. Further, Bentham does not support penalties inflicted for reasons of revenge, and therefore also rejects the death penalty.[52]

By contrast, regarding retribution, a few further ideas by its main advocate, Immanuel Kant, may be helpful at this point for clarifying his position on the principle of proportionality. Kant's starting point is the need for recognition of human dignity as the supreme value of every human being.[53] He also makes clear that culpability or guilt is a necessary condition for a conviction. As a consequence, punishment should be a response to a crime only when the accused is declared guilty.[54] Proportionality comes into play when a penalty/sentence is imposed on the offender as a guilty person and according to his inner wickedness (*innere Bösartigkeit*)[55] and subsequent blameworthiness [=responsibility for wrongful conduct]. Kant contends that punishment should depend on the criminal's own deserts rather than on the penalty's societal benefits.[56] In a way, retaliation (*lex talionis*) as an absolute form of retribution expresses 'the principle of equality, by which the pointer of the scale of justice is made to incline no more to one side than the other'.[57] In Kant's opinion, if the guilty are not punished, then justice is not

[51] Bentham (n 49).

[52] Bentham (n 49) chs II, III, IX, 187ff.

[53] *cf* J Rachels, 'Kantian Theory: The Idea of Human Dignity' in J Rachels, *The Elements of Moral Philosophy* (New York, Random House Inc, 1986), available at: public.callutheran.edu/~chenxi/phil345_022.pdf.

[54] Actus reus is not enough unless it is accompanied with mens rea (purpose or negligence).

[55] Kant (n 5) 455. As Tonry noticed, Kant referred to offenders' 'inner wickedness' and A von Hirsch wrote of their 'just deserts', while others refer to blameworthiness, wrongfulness or moral culpability, see M Tonry (ed), *Proportionality Theory in Punishment Philosophy: Fated for the Dustbin of Otiosity? Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (New York, Oxford University Press, 2019).

[56] von Hirsch (n 8) 59.

[57] Kant (n 5) 454.

done and the idea of law and justice itself is undermined. As he mentioned in his famous '*Inselbeispiel*' (Island example), even in the case of a society which is about to be dissolved, its members should not fail, before its dissolution, to execute the last murderers on death row, so that justice be done and the souls of the murdered can find serenity.[58]

Among the theoretical positions of the period, utilitarian ideas exercised a strong influence over legislation or declarations enacted at the end of the eighteenth century. Most were marked by the notion of proportionality and by its limits and were based on the intrinsic character of punishment itself, mainly in the form of what we would actually call 'necessity testing'. This is the case, for example, with the Constitution of the United States (Eighth Amendment) of 1791[59] (rooted in the British Magna Carta of 1215 and the Bill of Rights of 1689) and with the French Declaration on the Rights of Man and Citizen of 1789.[60] Some years later, the Prussian Civil Code 1794 (*Allgemeines Landrecht für die Preußischen Staaten*)[61] also incorporated a provision stating that [only] 'necessary measures' (*die nöthigen Anstalten*) should be taken by the state police in order to maintain public peace, security and order. It should be noted that many scholars consider this provision the first modern crystallisation of the proportionality principle in public law. Around the same time, in the field of penal law, prominent social activists, such as Thomas Jefferson in American Virginia (1776)[62] and Jean-Paul Marat in France (1782),[63] produced drafts of penal legislation, where the principle of proportionality formed the basis of a rational and thus efficient sanction system.

In spite of all these remarkable ideas, the major penal codifications adopted immediately afterwards took a *particularly punitive approach* to criminals.

[58] Kant (n 5) 455.

[59] See the Eighth Amendment of the US Constitution: 'excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted', compared with the relevant provision in s 12 of the Canadian Charter of Rights and Freedoms, which also refers to 'cruel and unusual punishments', and also with Art 3 of the European Convention on Human Rights: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. In both British and US common law, the Magna Carta of 1215 (mainly because of its chapter 20, which sets the rule that 'amercements' may not be excessive) is sometimes considered to be the modern legal source of the principle of proportionality.

[60] Indeed, Art 8 of the French Declaration on the Rights of Man and Citizen 1789 included a provision, according to which: 'The Law must prescribe only the punishments that are strictly and evidently necessary' ('*... des peines strictement et évidemment nécessaires*'), thus presaging what we actually call the necessity test of proportionality; on this notion, *cf* G Gerapetritis, *Proportionality in Administrative Law* (Athens, Ant N Sakkoulas, 1997) 54.

[61] See Part II title 17 para 10 of the 'Allgemeines Landrecht' of 1794. According to Porat and Eliya (n 2 at p 3), the principle of proportionality first arose in Germany, specifically in Prussia, the politically and intellectually dominant German Land in the 18th and 19th centuries. However, strictly speaking, necessity is not the same as proportionality. To use an example from the German legal discussion on defensive violence, if the only way to prevent a thief from stealing apples from an orchard would be to shoot and kill him/her, shooting him/her would then be 'necessary' but would certainly also be disproportionate.

[62] JP Boyd (ed), *The Papers of Thomas Jefferson vol 2 (A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital)* (Princeton NJ, Princeton University Press, 1950) 492–507.

[63] Marat (n 11) 70.

Proportionality was merely meant as a restraining mechanism to keep penalties within specific, but nonetheless strict, limits. As an example, the French Penal Code of 1791 punished bigamy with 12 years of incarceration with hard labour (*'fers'*), while abortion and false testimony were punished with 20 years of the same penalty.[64] The death penalty was also a fundamental part of the penal arsenal of this Code, constituting the state's response to 32 types of crime.[65] The same is true for the Napoleonic Penal Code of 1810, whose harsh and authoritative character was to some extent moderated only many years later, in 1832 and in 1863.

For the so-called Classical School of Penal Law, the criminal offender, at the theoretical level, never ceased to be a rational human being and a reasonable man, who makes his choices with free will and faces a punishment proportionate to his culpability or guilt. It is true that the penal system during that period 'focused not only on doing justice but also on disciplining the subjects of punishment in a more systematic way, notably through the modernisation and expansion of the prison' (instead of corporal punishments).[66]

B. Taking into Account the Personal Characteristics of the Offender

As a reaction to the Classical School and its formalism, but also under the influence of the teachings of Darwin, Marx and Comte, a new current of thought started gaining ground from the end of the nineteenth century. At the forefront was the Italian Positive School, whose ideas set the framework for a new, sixth stage in this historical evolution. This School's main contribution is its emphasis on the different categories for classifying criminals, namely: criminals by birth, by accident and by emotion, as well as habitual and insane offenders. Indeed, the

[64] French Penal Code 1791: Part II, Title II, section I, Art 33 (bigamy); Part II, Title II, section I, Art 17 (abortion); Part II, Title II, section II, Art 48 (false testimony).

[65] H Remy, *Les principes généraux du Code Pénal de 1791* (Thèse Paris, 1910) 54ff. We may say that in that Code serious crimes received harsher punishments (in modern terminology: ordinal proportionality) and that the overall punishment scale was equally much harsher (cardinal proportionality).

[66] N Lacey and H Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78(2) *Modern Law Review* 216–40, 223. Yet, in practice, the *criminal was considered something like an enemy of society* and had to suffer greatly in prison to 'pay off' his mischief. Even at the end of the nineteenth century, the situation had not changed. A characteristic testimony of this gloomy mentality of retaliation is the poem *The Ballad of Reading Gaol*, composed by the prominent Irish author, Oscar Wilde, during his incarceration for a sexual offence (gross indecency) in the prison of Reading in the years 1895–97. Indicative are the following two verses:

> With midnight always in one's heart, And twilight in one's cell,
> We turn the crank, or tear the rope, Each in his separate Hell,
> And the silence is more awful far Than the sound of a brazen bell.
> And never a human voice comes near To speak a gentle word:
> And the eye that watches through the door Is pitiless and hard:
> And by all forgot, we rot and rot, With soul and body marred.

personal particularity of each criminal was considered to influence their motivation, their degree of 'dangerousness' for society and, consequently, the way in which society should respond in a kind of 'social defence' against the most dangerous among them. For the main proponents of this School, ie, Lombroso, Garofalo and Ferri, the criminal was not necessarily a reasonable human being. In most cases the criminal acts emotionally; hence, his punishment had to be determined not on the basis of his supposed 'rationality', free will and culpability or guilt, as was the opinion of the Classical School, but in view of his *social responsibility* and 'dangerousness'. From this perspective, the previous notion of proportionality as the relationship between gravity of crime and/or culpability or guilt of the criminal, on the one hand, and the severity of the sanction, on the other, played a rather minimal role.

The Positivists, however, did enrich the discussion on the issue of proportionality in two interesting ways. First, they stressed the importance of taking into account – at the legislative and judicial levels – the *offender's personal characteristics* and the specific circumstances under which he committed a crime in order to take social defence measures; this consideration is evidently significant for a 'broader' meaning of proportionality. Second, they correlated the type of punishment with the type of the offender, proposing *interesting new penal measures* – the first hints of the 'alternative penalties' that developed thereafter – such as work in an agricultural colony (*lavoro all' aperto*) as a penalty for 'offenders by accident', namely for those whose crime was due to the 'temptations' from the environment in which they lived. These proposals gave rise to what later (after 1945) would be called the 'welfare model of criminal policy', with emphasis on the 'rehabilitative ideal'[67] (individualisation of sanctions). As a result, the increase in types of penalties and aims of punishment due to the Positivists had a positive impact on the principle of proportionality, particularly in the sense of greater flexibility and a broadening in its application, especially for less serious offences and where the offender could therefore be treated more mildly.[68]

C. Twentieth Century: New Wine in Old Bottles?

Finally, during the seventh stage of its history, the pendulum in terms of the principle of proportionality swings to the other side. Particularly after 1975, the 'justice model of criminal policy' gradually becomes predominant in Europe and the United States and displaces the welfare model, which had been dominant until then. According to this new model, the rights of the accused and convicted must

[67] Lacey and Pickard (n 66) 224–26, referring to D Garland, *The Culture of Control* (Oxford, Oxford University Press, 2001) and D Garland, *Punishment and Welfare* (Aldershot, Gower, 1985).

[68] However, as far as retrospective proportionality is concerned, it could be argued that introducing such new types of penalties actually makes it harder to achieve proportionality by making it harder to measure the relative severity of different kinds of punishment.

be carefully respected, judges' discretion must be constrained, sanctions must be proportionate to the severity of the offences and imprisonment must be only a measure of last resort (*ultima ratio/ultimum refugium*) of the machinery of the penal system, whereas alternative punishments must have priority with respect to minor offences. These ideas have been consolidated in international conventions, such as the UN Convention on the Rights of the Child (1989), especially in Articles 37–40, and have been repeatedly included in soft-law instruments of the UN[69] and the Council of Europe.[70]

As regards the theoretical approaches of the principle's evolution in the twentieth century, there are many important contributions, mainly related to sentencing and the aims of punishment, such as the communicative theory of punishment and criminalisation by Antony Duff.[71] However, the scope of this chapter allows only a brief outline of the historical evolution of the principle of proportionality. In an effort to restrain ourselves, we singled out three penologists and philosophers of penal law whose contributions on this very principle opened up new avenues in the relevant discussion, namely Andrew von Hirsch, Joel Feinberg and H L A Hart.

Von Hirsch[72] elaborated the important notion of 'just deserts'[73] in sentencing, which is based on the idea that the distribution and the quantum of punishment

[69] *cf* UN Standard Minimum Rules for the Administration of Juvenile Justice. The Beijing Rules, Rule 17.1 (a) and (b) (available at: ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf).

[70] For example, the Council of Europe's recommendation on Consistency in Sentencing [Recommendation No R (92) 17, Appendix] states: 'A.4. Whatever rationales for sentencing are declared, disproportionality between the seriousness of the offense and the sentence should be avoided'. Similarly in B.5.*a*, noting that 'Custodial sentences should be regarded as a sanction of last resort' (available at: rm.coe.int/16804d6ac8).

[71] R A Duff, *Punishment, Communication and Community* (Oxford, Oxford University Press, 2003) ch 4. Already in his earlier study, R A Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 *Crime and Justice* 1–97, 58 summarises the relation of his theory to the principle of proportionality as follows: 'If punishment is to communicate to a wrongdoer the censure his crime deserves, then since the severity of the punishment expresses the strength of the censure, communicative honesty requires the severity of the punishment must be at least relatively proportionate to the seriousness of the crime. It follows that, whatever the absolute levels of punishment, proportionality is respected only when equally guilty offenders (those equally culpable of equally serious crimes) are punished with equal severity, while those guilty of more serious offenses are punished more severely than those who are less culpable.' For the modification of Duff's initial approach of punishment, *cf* the discussion of Antony Duff and Sandra Marshall with Konstantinos Papageorgiou, Dimitris Kioupis and Tonia Tzannetaki in *The Art of Crime*, May 2018 (available at: theartofcrime.gr/may-2018/).

[72] *cf* in particular A von Hirsch, 'The "Desert" Model for Sentencing: Its Influence, Prospects, and Alternatives' (2007) 74(2) *Social Research: An International Quarterly* 413–34 and A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford, Oxford University Press, 2005).

[73] 'Just deserts' is referred to as the 'retribution' type of sentencing, (desert < Middle English < Old French *deserte*, noun use of feminine past participle of *deservir: to deserve*). The notion is also used in political philosophy. John Rawls argued that a person does not morally deserve the fruits of his/her talents and/or efforts, such as a good job or a high salary, which are purely the result of the 'natural lottery', see in J Rawls, *A Theory of Justice* (Cambridge MA, Harvard University Press, 1971) para 17. These views were objected to by the libertarian R Nozick in *Anarchy, State and Utopia* (Oxford, Blackwell, 1974) 228, while J Hampton intervened in the discussion by proposing the parameter of moral responsibility in J Hampton, *Political Philosophy* (Oxford, Westview Press, 1997) 150.

must be linked to the offender's desert,[74] and that, consequently, just deserts are in direct relation to the principle of proportionality.[75] Following this approach, the severity of punishment should be measured by how much punishment is deserved,[76] ie, by the seriousness of the convicted person's criminal conduct. This measurement is conducted according to the principle of culpability or guilt (*Schuldprinzip*), which means that it would be impermissible, in the opinion of von Hirsch,[77] to adopt a severe response to minor crimes simply because the offender might commit major crimes in the future.[78] The 'just deserts' notion is consistent with the so-called 'equity factors', which, for example, can lead to the prisoner's early release from the penal institution for reasons of health after the initial sentence; however, such moderations of punishment should not be primarily based on the judge's discretion but on specific legal provisions[79] (a list of equity factors is included in the desert-orientated Swedish Criminal Code, chapter 29, section 5). Nevertheless, 'just deserts' is not in principle opposed to the so-called 'limiting retributivism', which is supported by Tonry, Morris, Frase and others,[80] but can accept such limitations only to a certain extent. Furthermore, the notion of 'just deserts' also limits criminalisation with regard to the seriousness and quality of offences at issue. For example, it cannot be acceptable to criminalise conduct which merely bears on social mores.[81] Finally, a basic distinction in the desert theory is between ordinal proportionality – concerning the relative seriousness of offences and the relative severity of punishments among themselves – and cardinal proportionality, which connects the ordinal ranking to a scale of punishments (anchoring the penalty scale).[82]

Another prominent scholar who discussed the problem of proportionality in the context of punishment is Joel Feinberg. Feinberg gives the impression of adopting a position closer to utilitarian (liberal, of course) proportionality, given that he uses the severity of crime as a measure not for requital or revenge but

[74] von Hirsch (n 9) 375; *cf* Lacey and Pickard (n 66) 225.

[75] *cf* A Ashworth and J Horder, *Principles of Criminal Law*, 7th edn (Oxford, Oxford University Press, 2013) 19–20.

[76] A von Hirsch, *Doing Justice: The Choice of Punishments* (New York, Hill & Wang, 1976) and von Hirsch (n 8) 55–98.

[77] A von Hirsch, *Past and Future Crimes* (Manchester, Manchester University Press, 1985); *cf* the interview by Georgios Giannoulis with A von Hirsch in *The Art of Crime*, May 2017 (available at: theartofcrime.gr/may-2017/).

[78] *cf* M Sumner, 'Retribution' in E McLaughlin and J Muncie (eds), *The Sage Dictionary of Criminology* (London, Sage, 2013) 456–58, 458.

[79] *cf* von Hirsch and Ashworth (n 72) app 1, 165–79.

[80] *cf* N Morris, 'Punishment, Desert and Rehabilitation' in H Gross and A von Hirsch, *Sentencing* (Oxford, Oxford University Press, 1981) 268–69; see also a differentiating opinion of R S Frase, 'Limiting Retributivism' in M Tonry (ed), *The Future of Imprisonment* (New York, Oxford University Press, 2004) 83–120. According to this theory, desert remains a cardinal principle, but functions only as an upper, and, more controversially, a lower limit on just punishment.

[81] *cf* N Androulakis, 'Abschied vom Rechtsgut – Einzug der Moralität?' in U Neumann and F Herzog (eds), *Festschrift für Winfried Hassemer* (Heidelberg, CF Müller Verlag, 2010) 279.

[82] A Ashworth, *Sentencing and Criminal Justice*, 6th edn (Cambridge, Cambridge University Press, 2015) 94; *cf* Lacey and Pickard (n 66) 227ff.

in order to maximise society's benefit;[83] however, this is only the first impression. Despite some objections he raised to the pure idea of retribution,[84] Feinberg rather seems to belong himself to the retributivists. He recognises the *gravity of crime as a measure for the severity of punishment* and relates the concept of proportionality to the wrongdoer's degree of responsibility for his deed and to the degree of his blameworthiness, as determined by his motives and circumstances.[85] Furthermore, he criticises strict moralism and opposes (with some hesitation) the strict moralist view according to which we have good reasons to criminalise and punish any and every kind of moral wrongdoing; this view, however, is quite consistent with holding, as Feinberg does, that we have reason to criminalise and punish those kinds of moral wrongdoing that cause (or might cause) harm or serious offence.[86]

Connected to this is the 'expressive' idea that the severity of punishment should reflect society's 'level of condemnation or disapproval' of the conduct.[87] Accordingly, criminal punishment must be distinguished from other official sanctions – such as administrative ones – on the basis of moral wrongdoing. Feinberg refers to *punishment as a conventional device for expressing emotions* (ie, resentment and indignation, disapproval and reprobation) on the part of the punishing authority itself or of those 'in whose name' punishment is inflicted.[88] Yet, in Feinberg's mind, punishment is also a notion connected to *equality and fairness*, in the sense that the state should treat equals equally and unequals unequally.[89]

Finally, H L A Hart undertook in 1968[90] the difficult task of overcoming the polarity between retributivism and utilitarianism in search of a synthesis and a coherent reconciliation of their different approaches. He recognised the parallel utility of these two schools and their relevant contribution to the implementation of proportionality. In Hart's opinion, the two theories do not fight for control over the same field, as long as utilitarianism gives the answer to '*what is the main*

[83] J Feinberg, *Offense to Others – The Moral Limits of the Criminal Law*, vol 2 (Oxford, Oxford University Press, 1985) 66–67.

[84] For example, that causing harm to the offender does not mean that it affects only him/her (it strikes also his/her family) or that choosing the right amount of suffering in a given case is almost utopic, see A Corlett, 'The Philosophy of Joel Feinberg' (2006) 10 *The Journal of Ethics* 131–91, 140–42.

[85] J Feinberg, *Harmless Wrongdoing – The Moral Limits of the Criminal Law*, vol 4 (New York, Oxford University Press, 1990) 148ff.

[86] J Feinberg, *Harm to Others – The Moral Limits of the Criminal Law*, vol 1 (New York, Oxford University Press, 1984) 203. B Herman, 'Feinberg on Luck and Failed Attempts' (1995) 37(1) *Arizona Law Review* 143–50, 143 reminds us of one of Feinberg's positions: 'punishment is a legal sanction whose severity ought to be a function of the moral gravity of the criminal action'.

[87] J Feinberg, 'The Expressive Function of Punishment' (1965) 49(3) *The Monist* 397–423, 399.

[88] ibid 400ff.

[89] Feinberg (n 86) 149ff. See also K O'Day, 'Some Thoughts on Joel Feinberg's Modest Proposal: Is it Really Such a Modest Proposal After All?' (1995) 37(1) *Arizona Law Review* 243–50, 243.

[90] For what follows, see in particular H L A Hart, *Punishment and Responsibility* (Oxford, Clarendon Press, 1968) 8–27, 161–69, 186–237; *cf* M J Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment' (2008) 28(1) *Oxford Journal of Legal Studies* 57–71, 66ff and A von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime & Justice* 55–98, 62ff.

aim of punishment?' (ie, why punishment should exist at all) and retributivism to the '*problem of the criteria of distribution*' (ie, what are the criteria to determine the grade and extent a punishment should take).[91] Hence, utilitarianism and retributivism could live in harmony if we accept that the general justifying aim of punishment is utilitarian, while punishment should be dispensed on retributive basis. Following similar observations expressed by Jean-Paul Marat and others, Hart further stated that a penal system which imposes severe punishments for minor crimes runs the risk of being discredited and ridiculed.[92]

V. Concluding Remarks on the Principle's Future Perspectives

Proportionality started out as retrospective retaliation and gradually obtained the more refined and sophisticated status of retribution,[93] especially concerning notions like self-defence and just war. Then, thanks to the realist ideas of Grotius and the utilitarian ideas of the philosophers of the Enlightenment, such as Montesquieu and Beccaria, it was connected to the prospective ideas of setting limits to acts of the police and, more generally, to the state's powers, hence also in the context of *jus puniendi*. Nowadays, the principle is treated as a synonym for justice and fairness, and has been widely approved in all modern legal systems – an evolution which, however, muddies the formerly clear content of the principle and creates serious difficulties in its interpretation. Similar problems arise due to the direct connection of the principle with the different aims of punishment and the opposing factors that exercise influence on its validity and content, namely liberalism versus authoritarianism and realism versus idealism – the latter pair especially in the form of retributivism versus utilitarianism. However, these difficulties can actually prove to be useful, in the sense that different views offer different ways of approaching the principle according to the various needs and the different historical, social and political characteristics of each society or individual.[94]

The evolution of the principle will be ongoing. It seems that it will absorb – in the spirit of objectivity and harmonisation – the various recent interpretations of retributivism and utilitarianism, which in our times can indeed be considered as nothing more than new wine in old bottles. Hence, future research should focus

[91] Hart (n 90) especially 9ff. According to Joshua Dressler, Hart's theory could be practically useful by 'applying the principles of retribution as a limit upon utilitarianism', ie, if 'harm sets the ceiling of punishment, while blamelessness sets the floor' in J Dressler, 'The Jurisprudence of Death by Another: Accessories and Capital Punishment' (1979–1980) 51 *University of Colorado Law Review* 17–75, especially 35ff.

[92] Hart (n 90) 20–30.

[93] *cf* Feinberg (n 86) 160.

[94] *cf* Lacey and Pickard (n 66) 216–40.

on two fields: first, on finding objective criteria that reflect the values of the society in question by which we can measure the gravity of crimes, so as to construct retrospective proportionality on a safe basis rather than on elastic and fluid conceptions;[95] secondly, on establishing a kind of 'synthesis' which might balance the two opposing approaches of retributivism and utilitarianism and exploit all their advantages[96] – a synthesis based mainly on the idea of 'just punishment'.[97]

Regarding the latter issue, Hart has already paved the way with his fundamental distinction between the question regarding the main aim of punishment and questions regarding the level and extent of punishment. Following this approach, retributivism could provide the upper limit in sentencing, ie, the limit up to which a punishment can be extended depending on what the guilty offender deserves. In other words, retributivism can be particularly helpful in defining the gravity of crime and the corresponding *uppermost level ('ceiling') of a punishment*, as already suggested by Grotius three centuries ago: *puniendus nemo est ultra meritum*[98] (we must not punish beyond what someone deserves). At the same time, utilitarianism can determine the *inner content, kind and concrete severity of the punishment*, in view of the personal characteristics and specific circumstances of the criminal and crime, and in connection with the aims of punishment. Within this framework of synthesis, Joel Goh[99] once undertook an interesting endeavour to fill the gap between retributivism and utilitarianism by proposing in 2013 a scheme of four criteria of proportionality. The first pair of these criteria concerns retributivism: (a) *defining retributivism*, which means, as a first step, determining punishment as precisely as possible in view of the severity of the offence; (b) *limiting retributivism*, which allows, in a second step, consideration of other sentencing goals by merely placing retributive outer limits on the range of potential sentences.[100] The second pair of criteria refers to utilitarianism: (a) *ends proportionality*, which examines whether the costs of pursuing the goals of the criminal sentence outweigh the benefits to be derived from it, both to society and the individual offender; and (b) *means proportionality*, which

[95] T Sellin and M E Wolfgang, *The Measurement of Delinquency* (New York, Wiley, 1978), proposed back in 1964 a method (the magnitude estimation method) on how to evaluate the seriousness of crimes. Besides, we have other interesting relevant assessments by committees such as the Sentencing Advisory Council of Victoria in 2012, or by judicial initiatives such as the Magistrates' Courts Sentencing Guidelines in 2008. For a normative approach, *cf* A von Hirsch and N Jareborg, 'Gauging Criminal Harm. A Living-Standard Analysis' (1991) 11(1) *Oxford Journal of Legal Studies* 1ff; von Hirsch and Ashworth (n 72) 186ff.

[96] A Kolber, 'The Comparative Nature of Punishment' (2009) 89 *Boston University Law Review* 1565–1608, 1566, 1607, 1608; J Amankonah, *Crime and Punishment, Examining Proportionality Issues within Criminal Law* (LLM thesis in University of South California, 2012) 1ff.

[97] On the content of this notion, *cf* M Tonry, 'Fairness, Equality, Proportionality, and Parsimony: Towards a Comprehensive Jurisprudence of Just Punishment' in A du Bois-Pedain and A E Bottoms (eds), *Penal Censure. Engagements Within and Beyond Desert Theory* (Oxford, Hart Publishing, 2019).

[98] Grotius (n 40) chs II, XX, XXVIII. As concerns the lower limit, see comments above (n 80) on limiting retributivism.

[99] Goh (n 50) 41–72.

[100] ibid 46–47.

assesses whether alternative, less costly sanctions are available for achieving the same intended benefit.

Besides, Antony Duff proposed already in 1996 an interesting sort of synthesis in the domain of sentencing and, more precisely, of what we call 'strict' and 'broad' proportionality within the context of retributivist theory:[101]

> We face ... a conflict between two different concepts of 'doing justice'. We can try to do formal justice, administering (as far as we can) formally equal quanta of censure to equally culpable criminals. Or we can try to do substantive justice by finding punishments that are substantively apposite to the offender and her crime. The former aim demands that we seek proportionate equality between criminals across the whole penal system, the latter aim that we seek the substantively apposite punishment for the particular case: but it is impossible consistently to pursue both aims together. We might try to reduce the tension between these aims: for instance, by suggesting that the formal principle of proportionality should figure only as a negative constraint on sentencing, precluding manifestly disproportionate sentences, rather than as a positive ambition requiring us to impose demonstrably proportionate sentences.

Furthermore, interesting ideas about the essence of the principle of proportionality and the feasible ways to combine its different elements can also be traced in the modern discussion about the right to self-defence and its prerequisites, defining the amount of force employed by the defender that can be considered proportionate to the aggressive force threatened.[102] A synthesis of opposing theories could also be attempted at the level of the aims of punishment. In our opinion, it seems reasonable for the main positions of retributivists and utilitarians to find a common denominator in the theory of 'positive general prevention', which was proposed by Johannes Andenaes[103] and further elaborated, among others, by Claus Roxin[104] and Günther Jakobs.[105] According to Jakobs, the emphasis is on the idea that, through punishment, members of *society should be educated in accepting and practising legal provisions* (*Einübung in die Normenanerkennung*). More specifically, this educational aim is geared to create these conditions so that citizens: (a) have confidence in the legal provisions, (b) act according to the law, and (c) accept the consequences of their acts. Evidently, these elements of the aim of 'positive general prevention' seem to deal not only with the classical utilitarian approach of prevention but also with the position of certain retributivists that law

[101] R A Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 *Crime and Justice* 1–97, especially 64 and 65.

[102] *cf* N Courakis, 'Self-Defense as a Domain of Moderate Paternalism: The Need for Social Solidarity and Cohesion' in C Papacharalambous (ed), *Paternalism and Criminal Law. Modern Problems of an Old Query* (Athens, Sakkoulas, 2018), 135–45, especially 140ff.

[103] *cf* J Andenaes, *Punishment and Deterrence* (Ann Arbor MI, University of Michigan Press, 1974) 111–28.

[104] C Roxin, 'Zur jüngsten Diskussion über Schuld, Prävention und Verantwortlichkeit im Strafrecht' in A Kaufmann (ed), *Festschrift für Paul Bockelmann* (München, CH Beck, 1979), 279–309.

[105] G Jakobs, *Strafrecht, Allgemeiner Teil: Die Grundlagen und ihre Zurechnumg* (Berlin, De Gruyter, 1991) 13ff.

must be respected and justice must be done. However, positive general prevention as an aim, as described above, is strictly forward-looking: it cannot encompass the backward-looking concerns of retributivism. Retributivists of course do care that justice is done; but, as Nozick also argues,[106] theoretically this is done in and by the very imposition of punishment, not as a contingent consequence.

The present outline of the historical evolution of the principle of proportionality has revealed specific aspects of the past and present which may shed some light on certain elements of the principle's evolution in the future. The main outcome is that there is a further need for a synthesis of the opposing approaches. Yet, at a strictly practical level this synthesis will not be easy, for, as an old proverb says, 'the devil is in the details', ie, in the implementation. For example, if an offence occurs frequently and in a way that is disturbing to the citizens, such as the staining of the facades of buildings by graffiti with no artistic value, the question arises: is it legitimate for a judge to impose a harsh penalty simply for reasons of deterrence, ie, as a means to send a message to the members of society that this kind of offence will no longer be tolerated? To this question, which can be integrated into the discussion about the so-called 'punishment-of-the-innocent' issue,[107] the utilitarian answer could be rather positive. By contrast, Kant's idealistic approach would surely be negative, given that with such a judgment a person would cease to be a goal in him-/herself (human dignity!) and would simply become the means to realise another goal, ie, deterring others.

In trying to tackle this question, it would be useful to distinguish between the competences of the judge and the legislator: the judge, when deciding on the sentence to be imposed within the statutory limits, must not, for any reason whatsoever, exceed the limit of what an offender deserves as punishment at a personal level of deterrence. Whereas the legislator, on an abstract basis and with an eye to the future, is undoubtedly legitimised to enact a law which will provide higher penalties for socially disruptive behaviour, provided these penalties are not excessive and, in particular, do not lead to harsher punishments for less serious crimes. Only in this way does criminal policy seem to comply with effectiveness as well as with the rule of law.

[106] R Nozick, *Philosophical Explanations* (Oxford, Clarendon Press, 1981) 374: 'The wrongdoer has become disconnected from correct values, and the purpose of punishment is to (re)connect him. It is not that this connection is a desired further effect of punishment: the act of retributive punishment itself effects this connection.'

[107] *cf* von Hirsch (n 8) 58.