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Modernizing and Activating Beccaria's Proportionality
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Abstract:

Cesare Beccaria (1738-1794) offered a progressive view of punishment centered on a law-based proportionality for fair and effective crime prevention. Moderation of severity was placed in the hands of legislators and in the laws. Political proportionality, which eschews moderation of severity, dominates modern crime prevention. Current preferences for legal decision-making reflects generalized disproportionality applicable to all offenders. The limits of legislative and politicized proportionality necessitate modifying Beccaria's proportionality to modern contexts, and the principle and concept of specific proportionality offer a viable alternative. Contextualization, inquiry, and intra-legal engagement underpin discretion-based specific proportionality. Modernizing proportionality, while presenting some challenges, offers significant benefits to society.

Introduction: Revisiting Beccaria's Principle of Proportionality

Beccaria's treatise on crime and punishment remains at the forefront of modern-day penal code, legal practice, and criminal justice scholarship and theory (Bessler 2016). Beccaria's principles are still very influential even today in classical criminology, with utilitarian justifications for punishment, and the philosophy and practice of deterrence in civil and criminal justice. Unfortunately, the focus on punishment has overshadowed what may be Beccaria's greatest contribution: proportionality. Proportionality is an area in his work that has been relatively neglected, especially in its relevance for today's legal and criminal justice policies and practices. At its core, proportionality is the methods or means to limit or moderate excessive or severe punishments. Beccaria recognized that brutal punishments could lead to more individual criminality as well as fail to prevent physical crime. This insight remains useful today and provides a vital perspective to examining proportionality and severity.

Beccaria presented a legislation-based proportionality believing that it would be sufficient to prevent crime. Subsequently, a more political or politicized proportionality has dominated in more recent decades, transforming Beccaria's proportionality into disproportionality or severity. Unfortunately, the retributive aspect of punishments fitting the crime coupled with acceptance of severe punishments has diminished the value of proportionality as a penal principle. Today, responses to crime or criminality are often retroactive and disproportional as excessive punishments become normalized. In the present era, which has seen the growth of legal systems and increased number of professional ranks beginning at the end of the 19th century, the focus of a substantial number of discretionary decisions by legal and criminal justice professionals emphasizes severity, which has overtaken proportionality. Viewed from this perspective, the importance of these proportionality decisions and proportionality itself need fuller consideration. Discretion is key to making these proportionality choices, and assessment of these decisions is critical to the quality of criminal justice in our society. These discretionary decisions concern not just with punishment, but also with the numerous decisions made by criminal justice or legal professionals from the use of force by the police, sanctions for technical violations of parole, probation, and specialized courts, or custody and control-related decisions inside prisons and jails.

When severity dominates, crime prevention is narrowed, standardized, and fixed, posing a significant problem for proportional decision-making. Fortunately, active exercise of discretion allows professionals to consider proportionality as an alternative to severity. Pervasive discretionary judgments by modern professionals permits the practice of specific proportionality, which is more consistent with Beccaria's original principle of proportionality. The main purpose of this paper is to direct attention to Beccaria's proportionality principle and apply it to modern contexts, through development of a modified principle of specific proportionality, which pertains to modern day legal decision making. Beccaria's proportionality concept intended to moderate severity through legislation. In modern contexts, moderation of severity is better accomplished through the 'specific' decisions and judgments of professionals. The value of specific proportionality rests with proportional judgments and there is a need for professionals to carefully consider the varied contexts of crime and criminality. This new principle challenges the prevailing acceptance of severity as the most effective response to crime.

Beccaria failed to see the limits of legislative proportionality and could not foresee the moves toward excessive punishments with the development of complex and large criminal/legal systems. Beccaria seemed to believe that reducing the discretion of judges would be sufficient to ensure that the written laws could then assure proportional response to crime. He could not foresee a criminal justice system with 2.2 million incarcerated felons, thousands of police officers, and a sophisticated series of courts. Even in such a large system, we argue that intralegal proportionality, which signifies proportionality within the law, can encourage moderation. Moreover, proportionality is critical to moderation of severity for three crucial reasons: 1) written laws can provide only general responses to prevent crime, 2) rationality requires specificity in response to crime for the purpose of crime

prevention, and 3) discretionary proportionality decisions are made by capable lower ranking criminal justice agents who actively consider moderation (Harcourt 2014). Beccaria believed the courts could sufficiently implement proportionality; we propose that lower level legal professionals are capable of initiating proportionality and selecting specific responses.

Specific proportionality grounded in inquiry and using contextualization as detailed in the next section, remains consistent with Beccaria's undeveloped aims to simultaneously humanize and make effective crime prevention in their fullest sense. The proportionality for which we argue is *specific* and accounts for *varying contexts*, specific to the crime and the offender, calling for a diverse range of proportionality decisions made by police, the courts, and correctional professionals in preventing not only crime but criminality or criminal behavior. Crime prevention, as such, is broader and more encompassing than these approaches emphasizing severity. The means, ends, desired consequences, and the likely consequences of these decisions are the responsibility of the agents of the law or legal professionals. These decision makers are legal professionals who learn, interpret, and apply criminal laws through the exercise of their discretionary powers. As such, professionals practice contextualization that operates where the specific or particular circumstances and actors are taken into account in reaching proportioned decisions. We will discuss the implementation of specific proportionality later in this paper. Paradoxically, severe punishments or responses, which have dominated, coexist with proportional responses. Severity tends to derive from leadership preferences, who fix punishment or response, while proportional responses are more likely with rank-and-file decision-makers that actively consider responses specific to the particular incident or situation. Severe responses often provide the apparent default options to the agents of the law rather than allowing them to fully consider a wider range of options. We argue that this responsibility for the type of response and level of punishment to be imposed largely falls upon the agents of the law. These agents include police officers, legal actors, and correctional professionals at the lowest levels of criminal justice organizations. Most importantly, crime prevention is broadened when legal agents assume responsibility of putting the theory of proportionality into legal practice. These agents are key to making Beccaria's proportionality principle more specific and consistent with modern demands for variation in response to the full range of crime and criminality. For instance, a police officer using his perspective may direct a shoplifter merely to return the stolen property because he believes this action would be a sufficient act to prevent this particular thief from committing future offenses. Discretion already occurs at this level and we will explore the ramifications of promoting these discretionary decisions in criminal justice.

Our paper extends existing literature on Beccaria and Beccaria himself. Our approach avoids decision makers' over-reliance on the law to fix punishment, the inflexibility of legislators, and the resulting static proportionality decisions. Given their discretionary powers, modern legal agents recognize the limits of the law, appreciate the need to individualize responses as appropriate, and often hold themselves accountable on proportioned responses in lieu of their ability to maximize use of their powers, including that of lethal force. The next section presents a brief examination of the origins and evolution of proportionality from Beccaria's legislative proportionality to the present. Then we examine the evolution of proportionality and its transformation to politicized proportionality, emphasizing severity, leading to the third section, which develops specific proportionality. The summary of the potentials of specific proportionality provides directions for future research and our overall assessment.

Proportionality to Severity: From Beccaria to Modern Day Legal Decision Making

Proportionality, in Beccaria's (1764) treatise, is one of the core elements of crime prevention with its forward-looking orientation underpinning prevention of crime for specific offenders and the general population. Crime prevention for him involved targeting offender decision-making by imposing threats and sanctions to create a negative association in the minds of any offender. This deterrence approach also involves certainty, swiftness and legality as the other main elements of

Beccaria's psychological deterrence approach (Beirne 1993; Melossi 2008). The products of the combination of these elements is supposed to be fair and effective deterrents, to justify punishment, and to limit its excesses. While examining the dominant penal philosophies and practices in Italian and European societies, Beccaria identified disproportionality, cruel punishments, and arbitrary justice as serious problems. As Beccaria noted, severe punishments for theft were not related to the amount of harm caused rather, severe punishments were determined by most judges as fair and effective, which Beccaria deemed largely purposeless and not for designed for deterrence of future crime or crime prevention. Beccaria's proposal of using rational methods justified punishment only when absolutely necessary and then implemented to the minimal extent required. This is a responsible use of punishment can encourage legal agents to provide for security and ensure stability, without violation of freedoms and ensuing possibility of tyranny.

As a proponent of liberalism, Beccaria saw the moderating or limiting of punishment as fundamental to crime prevention (Harcourt 2014). However, as Baruchello (2004) points out, those liberal societies were not immune from brutal punishments noted in Beccaria's treatise. The possibility of sanctioned cruelty is present in liberal societies, especially in the judicial and economic spheres. For instance, Beccaria illustrated how free markets lead to pauperism, a major cause of theft. Further, economic inequalities arose. Fair and effective punishments were proportioned punishment involving temporary labor and enslavement (Baruchello 2004, p. 308). Beccaria maintains, however, that severe punishments were appropriate for violent crimes to maintain and restore order to society. Presently within modern proportionality decisions, i.e. laws imposing mandatory sentences, severity dominates and is used for both property and violent crimes and even for minor offenses. Beccaria's opposition to disproportionate responses to the crimes of theft and his opposition to the death penalty allow him to be classified as a reformer and humanist. Perhaps even more critical as developed below, comes an opening for modifying Beccaria's concept of proportionality to fit modern contexts with the possible result of crime prevention as Beccaria wanted. The War on Drugs and its resulting mass incarcerations are notable examples of disproportional or severe punishment in contemporary criminal justice. The implementation of Drug Courts offers a more specific proportional and individualized response suiting the nature of the threat or potential harm. In addition, these courts demonstrate more appropriate responses by legal agents to the use and abuse of drugs. Not only can these drug courts respond to specific uses and abuses of drugs, but they also chip away at the profit motives underpinning drug-dealing offenses. The present profiting from drug sales has significant parallels to capitalistic theft in Beccaria's time. The severe punishments deemed appropriate by legislators and minimizing the discretion of the courts has not won the war on drugs. Politicians and legal professionals in leadership positions have heavily politicized proportionality. In this sense, Beccaria's recommendation to allow the legislators to enact punishments demonstrates that not all of Beccaria's treatise on crime applies to the modern-day criminal justice system. Following Beccaria, however, one sees how the shift in focus of criminal justice from specific deterrence and general deterrence to a specific proportionality comes logically. Specific proportionality cannot be legislated, as it requires discretion by legal professionals responding to crime and individual criminality in specific situations.

In regards to the judiciary, Beccaria gave specific attention to brutalities and disproportionalities. Judges were identified as practicing their own form of justice and had little interest in preventing crime. Punishment for its own sake characterized penal philosophy and practice. According to Beccaria, as the main legal agents, judges had little restraint and were irresponsible with sanctions. The solution offered by Beccaria combined legislation and legislators to establish proportional punishments for crimes scaled to the level of harms with violent crimes deserving the most severe punishments, but Beccaria deemed the death penalty inappropriate for even the most harmful crimes. He contended that this ultimate punishment increased future crimes and the brutalization and cruelty of such punishment was ineffective and unfair. For Beccaria, legislators produced laws with proportional punishments and conveyed the threat of punishment to dissuade offenders as appropriate and scaled to the offenses. Translated into modern parlance,

legislators easily established ordinal proportionality. Ordinal proportionality involves scaling offenses on a continuum from most harmful to least harmful and punishments from most severe to the least severe. The par excellence legal agents for Beccaria were legislators. One can understand how Beccaria saw legislators as more unbiased and more responsible than judges, which implied that the former were able to make the more difficult cardinal proportionality decisions (Lacey 2016). However, due to the exponential growth of legal systems, legislators are significantly limited in making these proportionality decisions. The vast majority of proportionality choices are made by agents of the law, not legislators. Legislators only establish proportionality generally through the creation of laws and without consideration of unique circumstances in relation to crime and criminality. This appears to be the method of Andrew von Hirsch (1992), though the process is often considered as being specific; the legislation can only be general in formation and application. However, legal agents can determine proportionality by enforcement and implementation, which is specific and considers the particularities of crime and criminality.

These decisions are cardinal proportionality, defined as those that call for precise punishment or response through consideration of the specific offense, circumstances, and offender (including intent), are better made by legal agents who directly enforce and implement the law. Of course, if Beccaria could have foreseen the growth of criminal justice systems with modern police departments, prisons, jails, and community corrections, then he may possibly have seen the importance of their decision-making. Cardinal proportionality is distinct from specific proportionality in that specific proportionality considers each criminal act within its own context, while cardinal proportionality is determining punishment based on the crime as defined by law.

Another potential area relating to Beccaria is his reliance on the law that for many brings cohesiveness to his treatise. While others may see this as an over-reliance on generalized laws because of the failure of the law to specify appropriate response to crime in many cases. The positive aspects of legality in Beccaria's penal reforms including the rule of law are significant (Bessler 2016 ; Ferrajoli 2014) however, over-reliance on the law to guide discretionary decisions including proportionality may be problematic from our perspective. Given that legal decisions must always be accountable, the law by itself only provides generalized guidelines for specific crime prevention goals that produce generalized accountability. Further, written law cannot anticipate all options or all possible means to achieve these goals, giving prominence to discretionary decision-making. Perhaps most importantly, human factors are often missing in such decisions when these are the very factors that make individualized proportionality consistent with Beccaria's intentions of fair and effective crime prevention. While Beccaria proposed legal reform removing discretion from judges, judges without the ability to make discretionary decisions, the quality of proportional decision-making is in question.

A further problem that went unanticipated by Beccaria concerned the politicization of punishment and proportionality. Modern notions emphasize the achievement of crime prevention goals by increased severity, which is passed into legislation through the politics of crime and punishment. Legislators have few incentives to address the complexities of the causes of crime through passing of legislation such as lenient punishments. Further, generalized approaches to crime and punishment as well as justice became favored, i.e. longer sentences, and habitual offender statutes. Judges, like legislators became indirect legal agents who do not differentiate the full variety of crimes and criminality in establishing proportioned responses to crime. Instead, standardization and uniformity are preferred by the legislatures and the courts. Moving away from crime prevention as a goal, proportionality became unfocused, imprecise, and crude responses in an effort to control crime and impose retributive proportionality. In response to crime and for the expressed intent of preventing crime, legislators became inflexible and rigid.

The transition to severity-dominated philosophies of punishment as these theories and practices accelerated the transformation of criminal justice systems, resulting most notably with prosecutors emerging as the most powerful decision-makers (Stuntz 2001). Prosecutors claim to prefer broader laws over narrow ones and are incentivized by having discretion to maximize charges

and send signals through more severe punishments or responses, though in practice these broader laws lose their potency as prosecutors are required to resort to plea bargaining. As Stuntz (2001, p. 510) states, the political and bureaucratic incentives with "... deeper politics, a politics of institutional competition and cooperation, always pushes toward broader liability rules, and toward harsher sentences as well". With the decline of proportionality and the rise of severity in discretionary responses, these prosecutors and legislators pushed for the political benefits of reducing and preventing crime with severe means, i.e., three strikes laws.

In modern penal regimes, tougher approaches applied to responses. It appears that modern decision-making is singularly focused on achieving the same or similar goals with severe means. The dominance of politicized proportionality is obvious from our perspective. The resulting crude and cruel decisions mirrored what Beccaria desired to eliminate with precise and limited proportionality. Ristroph (2014) characterizes this approach as having an abstract and generalized view of crime and criminals with no appreciation of the importance of looking at the specifics of each case. For her, only justifications of punishment are examined in scholarship and practice rather than the ethics of the how to punish. Ethics involves specific means, and goals, and requires examination of the benefits and costs of limiting punishment. In contrast, to justify punishment is relatively easier and more of an idealized and abstract set of ideas than those based on assessment of actual punishments in their variety. After all, as Ristroph (2014, p. 1043) persuasively argues, "...punishment theories say surprisingly little about the exact way in which offenders are to be punished". Finally, one of the other insights from Ristroph (2014) is that the focus in punishment theory is more with the ends of punishment than the means. Consequently, severity replacing proportionality went largely unnoticed. Again, applying her reasoning to modern day proportionality decisions is critical and necessary. Generalized severity is a poor basis for proportionality choices.

Specific proportionality is not amenable to a generalized goal. Proportionality has to be contextualized as well as specified in each instance. Specific proportionality assists in reducing extremism by avoiding fixed goals and methods to achieve these goals. Zedner (2003) also offers a lesson on approaching proportionality in this regard. Like Ristroph, she views the need to be specific but adds that the fixing of these approaches results in extremism. The issue is framed in that too much of any standardized goal regardless of the costs in achieving this goal must be questioned. Her reframing of security applies to proportionality by raising the question of how much severity is too much severity. Maximizing severity would likely create unjust laws as what Beccaria recognized in his treatise, He recognized the injustices of the law (Bernard et al 2002) and proposed that the "surest but most difficult means of preventing crimes is to improve education" (Maestro 1972, p. 62). For Beccaria, education teaches citizens rights and wrongs and tempers excess. The limits of extremism will likely be avoided with such types of moderation.

The target of deterrence is the offender but with little appreciation for contextual forces responsible for criminal choices. In other words, there is no differentiation in context in modern day deterrence thought and practice. Severity and overemphasizing severity are antithetical to Beccaria's treatise. Harsher sentences or tougher responses are particularly troubling. The modern acceptance of certainty and swiftness as effective crime deterrents conflicts with both Beccaria's treatise and specific proportionality. Even all three elements together violates the need for any response to crime and criminal behavior to actively consider moderation as appropriate.

Variation in proportionality requires differentiated responses. For Beccaria, proportionality means what is appropriate for the specific offense, specific offender, and possibly contextual circumstances operative in each given instance. For that matter, even Beccaria recognized that the laws themselves were limited in addressing the crime of theft. Because Beccaria advocated education as the best means to prevent crime, one could interpret him to mean that education dealt with each person and his or her potential for criminality not just the fact that he or she committed a crime. The humanist and rehabilitative aspects of Beccaria are implied but not developed. We argue that proportionality encompassed the physical crime *and* criminality (defined here as the propensity to offend or patterns of offending). Here,

Beccaria hints but does not develop how prevention of criminality requires looking beyond offender choices on whether to commit the crime or not. Rather, criminality is a function of contextual conditions and may even be exacerbated by the punishment or response by legal agents. The prevention of criminality, as argued here, is a significant part of modern crime prevention.

Our approach to crime and criminality prevention considers proportionality that heavily reference the law. Decision-makers interpret and enforce the law and do not operate outside of the law for the vast majority of decisions. Even intralegal decisions can be multifaceted, with considerable variation, requiring individualized examinations. The case for a concept that recognizes proportionality decisions in their full bases, range, and variation, is important because these decisions are consequential and impactful on crime and criminality prevention. Specific proportionality grounded in inquiry and using contextualization as detailed in the next section, remains consistent with Beccaria's undeveloped aims to simultaneously humanize and make effective crime prevention in their fullest sense. Examined holistically, specific proportionality broadens crime prevention by asking decision-makers to not just prevent crime choices by offenders but to reflect on their own choices on punishment and response.

In summary, legislators are not true decision-makers making proportionality choices given how removed and distant they are from law adjudication and enforcement. Specific proportionality decisions vary considerably and cannot be fixed and standardized. Beccaria thought that the laws and legality would be sufficient for judges to follow and by extension, other technicians of the enforcement of the law. After all, for Beccaria, even judges were to only implement the law, not interpret it. Today, discretion cannot be ignored; rather it is pervasive and present at all levels of legal professionals. Police officers and correctional professionals make discretionary decisions that include proportionality. The law or policy offers minimal definitive guidance on if, when, and how they apply. For a majority of crimes and offenders, law and policy do not provide guidance on making discretionary decisions. The exceptions are the most serious violent crimes like homicides where there is minimal discretion within the law. In Beccaria's mind, judges were biased and practicing "personalized" justice," which made law adjudication and law enforcement largely extralegal for him. Our perspective emphasizes the agency of decision makers in modern proportionality decisions while remaining within the law. Avoiding extralegal factors is possible with discretion. Moderating severe punishment and responses falls with these agents.

Interpretations of Beccaria still remain contested. For example, Bernie (1993) offers a different perspective than the one in this paper with regard to the conclusion that Beccaria's crime prevention was self-serving for the bourgeois and largely narrow. Beccaria is challenged as a reformer and humanist. Extending his logic, Beccaria's concept of proportionality is not seen as counter to severity. We argue that this perspective, like others, misses the importance of proportionality as a counter to severity. While a full accounting of the reasons for the dominance of severity and the decline of proportionality are beyond the scope of this paper, modifying proportionality for modern legal professionals and the discretionary decisions they make is a worthwhile endeavor.

Explicating and Evaluating Specific Proportionality

Specific proportionality encourages the use of discretion, but also recognizes the capability of modern legal professionals to make discretionary proportional decisions. Even though Beccaria clearly favored establishing proportionality within the written law, he failed to account for how proportionality could be determined in each specific case. Consequently, Beccaria over-relies on the written law for determining proportionality, where punishments for crimes become generic categories produced in the form of a generalized legislative proportionality. The interpretation and application of the law resulted in a general proportionality, which remains insufficient for legal actors to determine proportionality. While Beccaria questioned whether or not legal professionals should be allowed to

use discretion, he thought that clearly written laws would eliminate the need for discretion. In modern criminal justice, we see many instances where discretion is not only relevant and/or significant, but also as Skolnick (1966) has indicated, discretion is inevitable.

Modern legal professionals often rely on their own discretionary powers not the law or policy. The use of discretion remains widespread despite attempts to eliminate it or control it by legal management and leadership. Most importantly from our perspective, legal agents have little choice but to consider proportionality more specifically, because they confront specific instances of crime and criminality that may require more than a generalized response. Legislators either had little incentive or desire for such specificity. Common misperceptions hold that specificity would dilute the power of the legal sanction or that crime could be controlled with generalized measures. In contrast, agents of the law have incentives to make proportional decisions by balancing the intent of the law against the ground-level realities (Brown 1981; Skolnick 1966).

As discussed in the previous section, legislators established a graduated scale of punishment on the harms from the crime. Beccaria's approach was generalized. Modern deterrence also favors generalized principles and their application. The dominance of neoclassical, rational choice, and social control perspectives in criminology and criminal justice reflects the notions that general explanations are better for law, policy, and implementation. Mostly, criminals become categorized as different than non-criminals on these general factors. Consequently, legislation calls for the identical response in each case. Law, and even policy, are blunt instruments (Winston 2008). Consequently, discretion within the law has meant to allow legislators, and only legislators, to determine what should be a crime and then the courts to determine the severity of the offense and pass along proportional punishment. Expecting the courts to determine the mitigating and extenuating circumstances of a particular crime seemingly should result in a more proportional sentence.

Unsurprisingly, severity and the option to use severe punishments or responses by legal agents overtook and continue to be elevated over proportionality. The pressures on the criminal justice system to take effective action or any action often become more important than if the action should vary on the severity of response or punishment. The role of discretion in criminal justice has remained undervalued for several reasons. First, discretion is not clearly recognized as appropriate or lawful. Next, more importantly, discretion is not recognized as a beneficial crime preventive element. Rather, the dominant norms seem to promote aggressive actions as the minimum rather than as maximum reserved for the last resort. This is counter to Beccaria. Severity is accompanied by a preoccupation with maintaining order. Both severity and order are consistent with an acceptance that the severe laws are instrumental means, which in turn supports a manipulative view of the law. Tamanaha (2006) argues that legal actors themselves have used law in the 20th century as a means to achieve varied ends specific to the actor. This instrumentalist reasoning encourages satisfaction of private interests versus the law's key role in promoting the public interest. The use of this reasoning is strongly supported by legal and criminal justice leadership, closer to the politics of severity and proportionality, especially with prosecutors, sheriffs, and wardens. We label this politicized proportionality, one that often reflects or encourages ideological and rhetorical sentiments by politicians and leaders in the legal system. The discretion of legal professionals who have close or immediate contact with offenders or potential offenders is valued with specific proportionality. The judgments of police officers, probation officers, and corrections personnel often leads to effective and efficient responses specific to the crime and results in specific crime prevention. Crime prevention is broadened to include prevention of criminality, which remains the most underdeveloped part of Beccaria's treatise. Prevention of criminality is likely for many reasons because legal agents are experienced and, consequently, familiar with the specific nature of crime and criminality in their jurisdictions. Specific proportionality avoids severity as the default option and considers options based on the discretionary proportionality of these other legal professionals. Specific proportionality replaces legislative proportionality with specific discretionary choices at the center and those whose contributions have not been given full credit.

Specific proportionality decisions are ones that vary by the decision-maker (agent of the law), involved parties (victim, community member, and offender, often ignored in legislative and politicized proportionality), and some level of inquiry, contextualization, and engagement (on goals, means to achieve these goals, and consideration of consequences of any decision). Specific proportionality differs significantly from Beccaria's legislative proportionality and modern-day politicized proportionality. The later two are distinctly standardized, severe, and fixed by crime because the decision-makers and agents of the law residing at the leadership levels favor uniformity, harshness, and consistency in response. While political discretion attempts to achieve of a sense of certainty by fixing ends through the prescription of law or through conformity to ideology, specific proportionality does not aim to achieve a sense of certainty for either political or ideological purposes. Because certainty is very elusive and any sense of certainty may rely upon unverified goals, it cannot be a focus for specific proportionality. Rather, crime prevention through specific proportionality operates with full awareness that failure is possible and understands that the expectation of certainty is an irrational goal. Further, with specific proportionality, there exists an insistence that the earliest interventions, tactical or strategic, provides the greater possibility of crime prevention. Accordingly, specific proportionality recognizes the contribution of many criminal justice professionals and elevates their discretionary decisions as critical to the legal profession.

Generalized approaches to proportionality cannot ignore both how decisions are determined and the costs of these decisions. First, the costs of severity are not acknowledged and accounted for. Severity regardless of context and reasonableness is harmful and crude. Undoubtedly, like Beccaria warned, severity does not decrease crime and criminality, but increases them. Over-criminalization is a product of such generalized practices. Severity is overextended and applied even when not merited and appropriate. Offenders are placed in general categories that usually likely increase, not decrease, the probability of their future criminality. A second limitation is that proportionality cannot be determined in the abstract. What is proportional depends on the context and is specific to that context. The lack of expected variation in proportionality is highly suspect given that different crimes and offenders necessitate differentiated responses. Only in the concrete is the specific response properly established.

The concrete nature of specific proportionality is one of its most valuable elements. With these decisions, the variation in responses to crime are considered healthy due to the active nature and basis of these decisions. Only agents of the law, who act within the bounds of the law, properly decide what is appropriate in any given situation. While the law includes many factors at general levels, as a fixed document, it cannot contextualize. The specific elements are part of the interpretation and application of law operating in particular contexts. Further, the legal actors determine which factors operate in any incident. These agents of proportionality and discretion work within the law, but actively identify other non-legal factors that are deemed relevant and critical to the specific act, individual, and situation. These legal and non-legal factors are by nature subject to change and thus vary in their potentials for crime and criminality. If prevention of both crime and criminality is desirable, then decision-making should be dynamic, variable, and specific. While generality has the unintended effect of making agent dispositional choices devoid of influencing contexts, contextualizing, which entails identifying, selecting, applying, and acting on relevant conditions underlying crime and criminality specific to each case, is integral to discretionary responses to criminal incidents or those with potential to become such. Through contextualization agents are careful to consider the potential consequences of their choices on all parties. In particular, there is sensitivity to the potential impacts on offenders of their proportionality decisions.

Another critical part of the responsibility of these agents is to ensure that contextualization does not eliminate the law. While any dispositional choice does not have the same degree of law's application, agents of punishment and responses from police to court to correctional officials undoubtedly reference the law and the law determines the need for action. The law and criminal justice professionals, as legal agents with duties to take decisive action to resolve each case, dictate the need for action. These decision makers are just as much as legal professionals and far greater

in number than those normally thought of as the true legal professionals. Comparing the police officer, parole agent, and correctional officer to the prosecutor, police chief, and warden, one realizes they all are agents of the law, albeit making different decisions and with different training, roles, and expertise. From our view and consistent with Beccaria's emphasis on legislative proportionality and the dominant politicized proportionality, these agents, who are not perceived as true legal professionals, are actually more numerous and persuasive and often the decisive crime prevention agents. These are agents of the law and legal professionals in their own right. Enlarging and broadening proportionality to include decisions, responses, and dispositions by legal professionals rather than only by judges or prosecutors would mean a criminal justice more responsive to the context of crime and criminality. Offenders benefit from proportionality being a viable alternative in legal decision making. The growth of legal professions of many kinds resulted in the expansion of decision-making with discretionary decisions becoming central to law and its enforcement. These legal dispositions are formal as well as informal from police to courts to corrections. These professionals occupy all ranks of the criminal justice agencies from police officers to probation officers to assistant district attorneys.

Specific proportionality decisions made by legal agents are discretionary within the law (intralegal) and vary across contexts. As the making of choices about substantive (valued) ends and means (reasonable) from a range of alternatives, discretion is context-specific. The inherent nature of law and policy is to provide the outer limits of discretion or control and limit discretion within the law, not to guide discretionary decisions. Thus, what to do, how to do, and on what basis are all part of discretion-based specific proportionality decisions. Legal agents interpret and apply the law to the specific case in hand with all its particularities and complexities. The most critical part of the responsibilities of legal agents is sensitivity to the specific and relevant factors and conditions so as not to prejudge or predetermine the specific ends and means. When making discretionary proportionality decisions, legal actors select means and ends for each specific case or incident and also include the projected consequences on discretionary proportionality decisions. With regard to ends, Winston (2008) recommends that practitioners avoid ultimate ends but have a willingness to take responsibility accounting for "...by sensitivity to consequences for specific persons" (p. 19). Guarding against unintended consequences along with identifying the relevant conditions and factors operative in particular or specific situations are especially crucial. Legal agents at all levels or ranks are responsible for these decisions.

The key question emanating from the responsibilities and potentialities from specific proportionality decisions is whether these legal professionals are capable of making these decisions. Legal professionals are capable and do make those decisions though often not appreciated or acknowledged. One of the major legal decisions is the specific response, especially how much force or type and level of punishment and sanction is needed. Often, these decisions are made not only through formal procedures and policies or through the law. The capabilities to make these decisions thoughtfully and carefully requires fact-finding, observing, reflecting, analyzing, and choosing among different options. This process is largely cognitive and necessitates knowledge of the law and its limits, as well as discerning when the law applies and when it does not. In particular, discretion is used to determine the nature of the appropriate response for each specific situation.

As noted above, any reliance on discretionary decision making with agents of the law must begin, end, and include the law. These intra-legal discretionary decisions are after all largely about the interpretation and application of the law. Discretion is at the concrete levels whereby legal actors decide the relevance and application of law. Further, being context-specific, the exercise of discretion cannot be uniform. Contextual conditions and factors produce varying opportunities and constraints for legal actors to actively decide what the goal(s) should be, how to achieve the goal(s), and what are likely impacts on all parties. Discretion permits flexibility and entails realism without the result of foreclosing crime and criminality prevention opportunities in advance. Like Beccaria, specific proportionality is forward-looking. Though some conjecture that allowing discretion introduces biases into decision-making, we assert that legal professionals can avoid making prejudicial decisions or

using rationalizations that would move the decision-making into an extralegal realm. Context-specific exercise of discretion avoids bias through consideration of all relevant factors for the specific case or incident with the law still determining what is relevant. Prejudices and rationalizations often ignore context for the purposes of achieving a preset goal or objective.

A positive factor in this regard is how discretionary decisions have the strong potentials to be solidified into best practices when moving from specific context to general application. The reverse direction from generalized judgment to mechanical application creates intractable biases in law itself by requiring legal agents to use one-size-fits-all regardless of contextual variation. A scenario where contextually grounded discretionary decisions become part of the knowledge base and encourage peer-review of these decisions is also highly likely to minimize biases. Most importantly, legal agents are actively involved in holding themselves and their peers accountable through discretionary decision-making.

The flexibility of specific proportionality decisions relates to the observation that these decisions are what Winston (2008) calls contingent judgments. These types of judgments are substantive, not procedural and dynamic, not static. Agents of the law pursue substantive ends through carefully considered means and an accounting for consequences, but these decisions are not binding for all decisions. As practitioners and inquirers, legal agents build knowledge that is collectively produced, reflected on, and experientially validated. Thus, unnecessarily limiting discretion, discourages engagement, inquiry, and contextualization

Contextualization is inquiry-based and engagement-oriented. As such and opposite to abstract decision-making in law and policy, contextualization refers to specific decision-making processes by agents of law involving the simultaneous selection of ends and means and establishment of projected consequences in the resolution and prevention of crime and criminality problems. Contextualization is akin to conducting a holistic assessment of a specific situation. Engagement with all involved and impacted parties is part of this contextualization-based inquiry to evaluate what has happened or happening and how best to respond. The reasoning in contextualized inquiry and engagement is concrete, not abstract, and grounded in specific realities, not abstract ideals. Inquiry avoids decisions being grounded on extra-legal bases. Inquiry here is grounded on reasoning and evidence or facts rather than preconceptions and prejudgments. Responsiveness is also a critical part of discretionary proportionality decisions. Legal agents use their capacities to being sensitive to facts and response to the specific context. For that matter, what is reasonable is not separate from these contexts but specific to those contexts. Overall, contextualization concerns the what, how, and why of solving and preventing crime and criminality problems. Discretion in context (who is involved) and through contextualization (how and what) is valuable for legal agents and practice.

The value of specific proportionality decisions reflects in fair and effective decision-making. The selection of specific means proportional to specific ends with minimal consequences is at the center of specific proportionality. Means and ends when proportioned are thought of as reasonable and appropriate. Minimizing negative consequences operates through contextualizing both the crime (including criminality) and discretionary response or punishment. The latter is largely missing in legislative and politicized proportionality. Engagement with offenders is the crucial aspect of specific proportionality decisions to ensure that legal agents consider all relevant factors and projected consequences to all parties, especially offenders.

With specific proportionality, legislative and politicized legality are enhanced. Law remains relevant and considered through active processes of inquiry and engagement. Legal agents arrive at judgments actively through incorporation of relevant non-legal factors as stated earlier. Crime prevention becomes broadened and severity is not mandatory for all decisions regardless of context. A related benefit is that common sense and simplistic judgments of a general and sweeping nature are less likely with specific proportionality discretionary decisions. Since the undeniable judgments of a person's character and criminality are part of any discretionary decision, judgments of criminality are not reduced to generalized and abstracted factors with specific proportionality

decisions. For that matter, the nature of criminality and its prevention are incorporated into these decisions, while the legal professional remains aware of his or her own tendencies for bias and rationalizations.

Another significant benefit concerns the personal career development of legal agents, who in turn contribute to organizational development (Toch 2008). Personal responsibility and careful judgments define legal professionals. These agents of the law, by respecting the particularities and complexities of human behavior and action includes self-reflection and careful selection of means, directly benefit the legal profession and the organizations they work for. Judgment-making requires skills and enlargement of these capacities is possible through this type of decision-making.

Perhaps the main advantage for agents of the law under specific proportionality is the potential to avoid excessive or severe responses. There are several reasons for the benefits from proportional responses. These professionals use their training and experience to determine whether or not the law is applicable and whether or not the law provides guidance. This means working within the law and being bound to the law. However, any decision to move beyond the law is done thoughtfully and meaningfully. The goal to be achieved for the resolution is often through selection of proportioned means. Excessive punishments are partially a product of narrow instrumental reasoning, whereby the end is to be produced by any means necessary. The potentials for proportional responses actualize through carefully considered means, ends, and consequences. More specifically with broader instrumental reasoning is the consideration of substantive ends and consequences. The resolution is likely to be less retributive and more preventative. Specific responses are more likely to be proportional if the emphasis on preventing crime, criminality, and both are given to the specific case not by general categories. By default, application to each case with the same severe responses even when not appropriate or necessary is what underpins narrow severity reasoning.

These substantive judgments of response and punishment look at all parties involved and the impacts of any decision including on offenders allows for a reasoned and thorough inquiry of likely consequences. When the law does not dictate in advance the specific response or responses that are required, decisions are more likely to be proportional. As previously stated, for serious violent crimes, there is little discretion on response and avoiding excessive punishment is often not considered due to emphasis on achieving specific goals to control the incident, investigation, and apprehension of the offender for eventual conviction. Further, specific proportionality protects the rights of suspects and defendants through safeguards against abuse of discretionary powers. Any abuses as part of specific proportionality are likely checked by reasoned and thorough inquiry. Additionally, we are careful to point out that specific proportionality decisions are much more complex than presented in detail here.

There remains several interrelated challenges with specific proportionality discretionary decisions. Specific proportionality does not eliminate judgments made on extra-legal bases. Personal decision-making is an ever-present danger when coupled with the potentials for false assessments by legal agents on their expertise. Without extensive training, the police, courts, and correctional professionals may overextend their perceptions in being to handle complex psychological, health or social issues. The realities are that these issues require non-legal expertise that may be foreclosed with specific proportionality decisions being made by legal agents. Legal agents also can be overly lenient or overly excessive as the discretionary choices remain with them. For the former, agents would be motivated to reduce their workload by failing to respond with vigor, as the situation requires. Of course, decision-makers may feel that a severe response is appropriate or reasonable. A prominent example is with police use of lethal force. Police and correctional agents are rightfully trained and directed to take control of situations and force or aggression is acceptable for that purposes only. These agents may feel liberated to increase the use force or escalate situations in order to control situations by arguing they best know the level of force along with the goal (may be very short-term) with no concern for consequences. The pressures to make definitive decisions quickly are real in these dynamic and volatile situations. Other incidents, although not with the same

pressures, also may lead to coming up with definitive and simplistic resolutions of more complex issues.

Another challenge is organizational. Many agencies of the law are hierarchical and bureaucratic (even courts) with little tolerance for permitting discretion at the levels that actualize the crime prevention benefits from specific proportionality decisions. From leadership perspectives, discretion if left unchecked creates potential liabilities and poor public relations. Even perceptions of police, courts, and correctional agents abusing their powers are extremely damaging. The principle to control abuse of powers was behind Beccaria's insistence that no discretion for sentencing be given to judges. Overall, there needs to be more serious examination of the potentials and challenges of specific proportionality.

Conclusion: The Present and the Future of Specific Proportionality

Despite Beccaria's best intentions to reform penal systems by minimizing political and other biases through legislative proportionality, the dominance of a political form of proportionality characterizes modern legal and penal systems. Mechanisms to moderate through agents of the law were understandably missing in his work. Proportional laws by themselves have less effect on crime prevention than discretionary choices made by legal agents. Legislators are not direct agents of the law and offer little meaningful and thoughtful moderation of severity. Ordinal proportionality is easier and safer to pursue than cardinal proportionality. In fact, there is little incentive for legislators to acknowledge the variation in proportionality and severity of responses but to promote a generalized proportionality that supports either severity or leniency at the extremes. Specific proportionality exists and offers valuable moderating impulses to extreme politicized approaches to crime and criminality. Criminality in Beccaria's treatise was underdeveloped but he hinted as critical to address. Criminality gains prominence with specific proportionality. Contextualization with engagement and inquiry by agents of the law gets us closer to the more difficult cardinal proportionality decisions. Variation in proportionality is operative and enhances broader crime prevention than possible with either legislative or politicized proportionality. Further, recognizing the legal validity of the decisions of lower level staff would likely cause them to be more responsible for their decisions as are other professionals in criminal justice.

For our purposes, crime prevention can become more inclusive driven by both the law and contextualization. Even with severity in modern contexts being favored, the majority of decisions made by the more numerous legal agents operates through discretionary decision-making actively involve consideration of proportionality as a viable means for punishment or response. The position and placement of criminal justice professionals is unique and decisive. These professionals are on-the-ground, field agents who make discretionary choices of a great number and range that have consequences. For crime prevention, these agents engage with all parties including offenders and determine what best makes sense. In general, they are forward-looking and select what the goal, means, and desired consequences make best sense. Rather than blaming offenders for their crime choices, specific proportionality emphasizes the importance of legal professionals exercising their responsibilities to consider proportional responses.

As established in this paper, the costs of severity have been significant, and legality by itself is insufficient to temper severity. In these cases, proportionality decisions are consequently lacking in terms of substance and effect. The preferences of higher-level decision makers dictate response. Additionally, many debates in punishment and response are ideological and extremist. While discretion by the majority of the workforce is a reality and widespread, there is a general distrust and reluctance to encourage and permit because of the results of abuse of powers. However, discretion is context-relative. These are serious concerns but there is a critical need for principles and standards like specific proportionality to be explored and debated. Given that there are no universal standards for most discretionary choices and decisions made by legal professionals, standards like

specific proportionality that are sensitive to context and involve contextualized engagement and inquiry we would argue offer fuller consideration.

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