



Deposited via The University of Sheffield.

White Rose Research Online URL for this paper:

<https://eprints.whiterose.ac.uk/id/eprint/93393/>

Version: Accepted Version

Article:

Hayes, D.J. (2016) Penal Impact: Towards a More Intersubjective Measurement of Penal Severity. *Oxford Journal of Legal Studies*. ISSN: 0143-6503

10.1093/ojls/gqv042

Reuse

Items deposited in White Rose Research Online are protected by copyright, with all rights reserved unless indicated otherwise. They may be downloaded and/or printed for private study, or other acts as permitted by national copyright laws. The publisher or other rights holders may allow further reproduction and re-use of the full text version. This is indicated by the licence information on the White Rose Research Online record for the item.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.

Penal Impact: Towards a More Intersubjective Measurement of Penal Severity

David Hayes*

Abstract: The measurement of penal severity is vital to a range of different justifications of criminal punishment, not least those that value proportionality. However, despite the wealth of material devoted to the measurement of penal severity, there remain critical weaknesses in our ability to say that like cases have been treated alike in modern (Western) penal systems. This article explores existing measures of sentence severity and argues that each is fundamentally limited for the purposes of analysing penal severity in practice. It then provides an overview of an alternative framework, “penal impact”, which explores subjective experiences of punishment in terms of both the diversity and the quantum of the pains imposed by punishments. It examines some of the epistemological and ethical challenges of pain-based analysis, and concludes on the strengths and limitations of penal impact, in comparison to the other measures canvassed, offering justifications for an intersubjective measurement of penal severity.

Keywords: pains of punishment, proportionality, parsimony, penal minimalism, sentence severity

* School of Law, The University of Sheffield. Email: d.j.hayes@sheffield.ac.uk. This paper draws upon doctoral research supported by the Economic and Social Research Council, Award No. ES/I02159/1, supervised by Dirk van Zyl Smit and Candida Saunders, and examined by Paul Roberts and Fergus McNeill. I am grateful to Esther van Ginneken for advice and suggestions on an early draft of this paper.

1. Introduction: Why Measure Penal Severity?

The attempt to measure the severity of a sentence, that is, the extent to which it is a greater or lesser punishment than its alternatives, is a common feature of Western criminal justice theory and policy. Whilst there might be any number of political, economic and cultural reasons that would compel one to measure penal severity, most contemporary measurements are concerned with the *justification* of criminal punishment. Since punishment involves the intentional infliction of unpleasantness upon the subject, it is an institution requiring careful political and moral evaluation in (notionally) liberal societies that value the dignity of the individual.¹

Measurement of sentence severity becomes relevant to this pursuit where a justification requires the *constraint* of the penal State within certain boundaries: one must know how punitive a certain intervention is in order to determine whether the State is being too harsh (or indeed too lenient). In particular, it is central to the accounts of: retributivists, and others for whom justifiable punishment requires (some level of) *proportionality* between the seriousness of the offence committed and the severity of the sentence imposed;² advocates of *parsimony*, for whom penal severity should be limited to the minimum level necessary to achieve one's aims, on 'utilitarian and humanitarian' grounds;³ and *penal minimalists* who advocate the restriction of penal severity to a bare minimum on anti-authoritarian grounds.⁴

In other words, measuring penal severity is a task of no small importance for contemporary penal theory, and has been the subject of much academic discussion. However, this paper argues that critical gaps remain in our ability to effectively measure

¹ Hyman Gross, *Crime and Punishment: A Concise Moral Critique* (Oxford University Press, 2012), 7-27.

² Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010), ch 4; Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press 1993); cf Richard Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press 2013), an account in which retribution plays a more limited (and limiting) role.

³ Norval Morris, *The Future of Imprisonment* (University of Chicago Press, 1974), 59-61.

⁴ 'Anti-authoritarian' broadly means 'liberal' in this context, but one should not discount the views or the role of more radical anti-authoritarians, such as (individual and social) anarchists, whose influence can be felt in developments such as the penal abolitionist and the restorative justice movements. Liberals in particular may strive for absolute minimalism, as Gross (n 1) does, or may adopt more complex methods of constraining the penal State – hence the commonality of liberal retributivists. cf Paul Roberts, 'Criminal Law Theory and the Limits of Liberalism' in AP Simester, Antje du Bois-Pedain, and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014). cf American Friends Service Committee, *Struggle for Justice* (Hill and Wang 1971).

punishment, and therefore, our ability (as theorists and as citizens) to critically consider the extent to which modern penal systems impose criminal punishment justly. It proceeds in Part 2 to lay these out, before outlining several notable issues with each of them in Part 3. Part 4 then proposes a new analytical framework for measuring sentence severity, 'penal impact', to resolve some of these weaknesses. The paper concludes by noting some of the limitations and strengths of this framework, and the conditions that different ends of measurement place upon the means used.

2. Existing Measures of Penal Severity

The need for an answer to the question, "How do we *measure* punishment?" is as old as attempts to calibrate and control the amount of punishment inflicted. As a result, a number of different approaches have proliferated. We may distinguish four broad categories of types of measurement for present purposes: *retaliation*; *standardized deprivation*; *punishment equivalency*; and the *pains of punishment* approach. In this section, I briefly set out the essential characteristics of each of these approaches in turn, relying on a few of the most important examples from each category.

A. Retaliation

Fish has argued that the popular conception of the *lex talionis* as demanding exact, bloody vengeance against the offender is a modern stereotype, built upon an overly literal reading of the Pentateuch.⁵ Nonetheless, it is useful to start with the most basic measurement one can use to identify the appropriate punishment of the particular crime: *retaliation*, or exact, tit-for-tat equivalence. For example, the infamous Biblical invective demands that 'as he hath done, so shall it be done to him: Breach for breach, eye for eye, tooth for tooth'.⁶

⁵ Michael Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment' (2008) 28(1) *Oxford Journal of Legal Studies* 57.

⁶ Leviticus 24:19-20. cf CHW Johns (tr), *The Code of Hammurabi* (CreateSpace Independent Publishing 2013), §§196-230.

Retaliation is not an alien consideration to the concept of punishment in the 21st Century, as is evidenced by the shrinking but still very much present level of international support for capital punishment as a response to murder.⁷ Nonetheless, retaliation has been rejected in most jurisdictions as simply too crude and unconstrained a measurement, and one that stains the State's hands with the same wrong that they claim to punish. If the rhetoric of 'an eye for an eye' is trite, it is no less so to respond that 'an eye for an eye leaves the whole world blind'.⁸

The *range* of penal severity is therefore increasingly restricted by norms that preclude absolute equivalence crime and punishment. Particularly within the European context, it became increasingly necessary for penal severity to be measured in terms other than retaliation, as the norms around the penal State developed through the modern, human rights-dominated period. This general trend forced advocates of proportionality to recalibrate penal scales in terms of *equivalence*, rather than replication, such that the most severe sentence attaches to the most serious offence, the least to the least, and so, *mutatis mutandis*, for everything in between. As a result, measurement of penal severity became a meaningful task for those who justified punishment on the basis of its constraint, and led to the establishment, *inter alia*, of sentencing tariffs that ranked sentencing options in terms of their *cardinal* proportionality (that is, relative to one another).⁹ It is out of this context that the standardized deprivation approach arose.

B. Standardized Deprivation

Models that measure penal severity in terms of 'standardized deprivation' calculate the severity of a sentence objectively, in terms of some quality of punishment that affects every punished offender to at least some extent. So, for instance, Mara Schiff's 'Criminal

⁷ However, it would be a mistake to assume that death penalty retention in particular is justified (even primarily) on the basis of retaliation: see David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Oxford University Press 2012); Michel Foucault, *Discipline and Punish* (Alan Sheridan (tr), Penguin 1977), 32-69.

⁸ Martin Luther King, *The Words of Martin Luther King, Jr.* (Coretta Scott King (ed), Newmarket Press 1983), 73.

⁹ Ashworth (n 2), 89.

Punishment Severity Scale' identifies the socio-politically foundational concept of *liberty* (freedom of movement and choice of action) as something that is deprived (to some extent) by all forms of punishment. Using this concept, she constructs a quantitative scale within which to judge the relative severity of punishments.¹⁰ Similarly, in the related but separate field of offence seriousness, von Hirsch and Jareborg proposed a percentile scale for measuring the harm caused by an offence in terms of its negative impact upon the victim's socioeconomic standard of living.¹¹ Both metrics seek to *quantify* unpleasantness in terms of socio-economic or -political indicators that are normatively significant to the polity imposing the punishment. Although both Schiff and von Hirsch and Jareborg noted that the means by which they assigned severity 'points' to different sentences were relatively arbitrary, they intended to create frameworks that could be brought closer to social reality through ongoing research and discussion.¹²

The propagation of metrics such as those advocated by Schiff and von Hirsch and Jareborg in the 1990s was not coincidental. The provision of a standardized metric of penal severity became increasingly important because of the move in Anglo-American penal policy towards treating non-custodial sentences as *alternative punishments to imprisonment* rather than as alternatives to formal punishment.¹³ If non-custodial sanctions were to work as alternative punishments, then there needed to be a common metric that allowed sentencing authorities and policy-makers to determine when and in what circumstances various different types of punishment could be substituted for one another. Models built around standardized deprivation provided a means of doing so logically, although this was not to say that the substitutability of alternative sanctions for imprisonment was (or indeed is) uncontroversial.¹⁴ Regardless, the general notion of punishment as 'liberty deprivation' is broadly accepted, and uses a concept similar to

¹⁰ Mara Schiff, 'Gauging the Severity of Criminal Sanctions: Developing the Criminal Punishment Severity Scale (CPSS)' (1997) 22(2) *Criminal Justice Review* 175.

¹¹ Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11(1) *Oxford Journal of Legal Studies* 1. Their concept of 'living standards' is taken from Amartya Sen, *The Standard of Living* (Cambridge University Press 1987).

¹² *Ibid.*, 3-7, 21; Schiff (n 10), 190, 202-203.

¹³ George Mair, 'Community Penalties in England and Wales' (1998) 10(5) *Federal Sentencing Reporter* 263.

¹⁴ Dan M Kahan, 'Punishment Incommensurability' (1998) 1 *Buffalo Criminal Law Review* 691.

standardized deprivation in which punishments bear objective severity according to their (standardized) interference with profoundly important values.¹⁵

C. Punishment Equivalency

Meanwhile, a number of US studies were measuring penal severity on the basis of the concept of 'punishment equivalency'.¹⁶ This approach was concerned with evaluating the experienced proportionality of different sanctions within (US) penal systems, especially between incarceration and its alternatives. As a result, their attention was focussed on the subjective perspectives of the offender, and adopted a novel methodology for constructing quantitative measures of experienced severity. These studies offered a series of preference decisions to offenders, asking questions in the following terms: 'Which would you prefer: duration "X" of imprisonment, or duration "Y" of alternative "Z"?' By logging offenders' preferences in each decision, it was possible to identify ranges of equivalence: durations of various modes of punishment where offenders tended to show *no particular preference*, suggesting that the two sentences were of comparable penal severity.

Punishment equivalency was ultimately flawed, however, in its (not unreasonable but rather simplistic) assumption that offender preferences were based entirely upon the perceived severity of the sentence, to the exclusion of other criteria, such as whether the availability of formal or informal support in each penal setting. Although these studies demonstrated an interest in the subjective experience of punishment, in other words, that interest was limited to *what* offenders subjective preferences were, and not *why* they preferred particular options – a question that is vital to an effective analysis of what makes punishment punitive, and to what extent. Furthermore, since several of these studies focussed upon incarcerated offenders with experience of non-custodial

¹⁵ For a recent defence of this approach, see Dan Markel and Chad Flanders, 'Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice' (2010) 98(3) *California Law Review* 907.

¹⁶ *E.g.* Ben M Crouch, 'Is Incarceration Really Worse? Analysis of Offenders' Preferences for Prison over Probation' (1993) 10(1) *Justice Quarterly* 67; William Spelman, 'The Severity of Intermediate Sanctions' (1995) 32(2) *Journal of Research in Crime and Delinquency* 107; Peter B Wood and Harold G Grasmick, 'Toward the Development of Punishment Equivalencies: Male and Female Prisoners Rate the Severity of Alternative Sanctions Compared to Prison' (1999) 16(1) *Justice Quarterly* 19.

penalties,¹⁷ participants in those studies may well have under-valued the severity of incarceration as a result of 'hedonic adaptation', whereby sufferers learn to cope with adverse circumstances, so that they then seem less unpleasant with time.¹⁸

Nonetheless, punishment equivalence studies demonstrated an interest in using subjective experiences of punishment to create a 'valid continuum of sentencing options' that would gradually build up a (standardized) sentencing tariff more closely aligned to the subjective experience of imprisonment than a wholly theoretical model of standardized deprivation could provide.¹⁹

D. Pains of Punishment and Subjective Suffering

Indeed, the subjective focus of punishment equivalence studies was a forerunner of more qualitative and experiential approaches that have proliferated more recently. In particular, the two most recent decades have seen a resurgence of interest in the *pains of punishment*, and in more general accounts of *subjective suffering*.

The pains of punishment have a long history as measures of the sociological impact of punishment, particularly in prisons.²⁰ Since the late 1990s, however, they have played a greater role in the evaluation of punishment as a *penal* intervention, typically with the attempt of combatting and minimizing, rather than measuring, their impact.²¹

Pains of punishment approaches identify the punitive (or at least, unpleasant) features of a sentence with a *qualitative* and *inductive* approach, stressing the offender's own experiences and the ways in which their punishment negatively affects their life in both the short- and long-term. It then uses these experiences to construct a grounded theory of the pains that tend to attend a particular intervention.²² The discussion of these pains tends to resemble a catalogue, which shows the incidence and variation of

¹⁷ E.g. Wood and Grasmick (ibid); Crouch (ibid).

¹⁸ John Bronsteen, Christopher Buccafusco, and Jonathan S Masur, 'Happiness and Punishment' (2009) 76(3) *University of Chicago Law Review* 1037.

¹⁹ Wood and Grasmick (n 16), 16.

²⁰ Starting with Gresham M Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press 1958), ch 4.

²¹ E.g., Brian K Payne and Randy R Gainey, 'A Qualitative Assessment of the Pains Experienced on Electronic Monitoring' (1998) 42(2) *International Journal of Offender Therapy and Comparative Criminology* 149; Ioan Durnescu, 'Pains of Probation: Effective Practice and Human Rights' (2011) 55(4) *International Journal of Offender Therapy and Comparative Criminology* 530.

²² E.g. Durnescu (n 21), 533-538.

pains without accounting for the *quantum*: that is, their relative severity compared to one another, and in terms of the relative impact they have on the individual offender's life. This limits their utility for the measurement of penal severity, since it undermines the validity of any comparisons drawn between different pains and penal subjects.²³

More recently, approaches to punishment based upon more general subjective *suffering* have proliferated, particularly within US criminology (although their intellectual heritage can be traced far earlier).²⁴ This most recent revival of the subjectivist trend began with Adam Kolber, who argued that accounts of punishment could not ignore its subjectively-experienced social impacts when considering its impact and desirability.²⁵ Rather, punishment should be measured in terms of the extent to which one's subjective quality of life during punishment deviates from one's previous 'baseline condition'.²⁶ This primarily sociologically-informed *experiential* account was supported by the contemporaneous emergence of Bronsteen, Buccafusco, and Masur's (aforementioned) interest in 'hedonic adaptation' as a psychological response to incarceration.²⁷

Both of these accounts have been raised at the abstract, theoretical level, and have been subject to strenuous contestation from objectivist retributivists.²⁸ More recently, however, Sexton has attempted to supplement this argument with empirical discussion, in order to 'allow punishment to be examined *in situ* rather than in its ideal, articulated or abstract form'.²⁹ Sexton uses 80 prisoner interviews to identify a range of sources of pain, from 'concrete', day-to-day deprivations to more abstract, 'symbolic' punishments, such as loss of freedom; the latter being generally experienced as more severe than the former. Her overall thesis is that the 'penal consciousness' of prisoners

²³ An attempt at such a comparison *is* made in Randy R Gainey and Brian K Payne, 'Understanding the Experience of House Arrest with Electronic Monitoring: An Analysis of the Quantitative and Qualitative Data' (2000) 44(1) *International Journal of Offender Therapy and Comparative Criminology* 84. However, their approach ultimately fell foul of the conceptual limitations raised in Part 3 below.

²⁴ *E.g.*, Nils Christie, *Limits to Pain* (Martin Robertson 1981).

²⁵ Adam Kolber, 'The Comparative Nature of Punishment' (2009) 89(5) *Boston University Law Review* 1565.

²⁶ *Ibid*; Adam Kolber, 'The Subjective Experience of Punishment' (2009) 109(1) *Columbia Law Review* 182.

²⁷ Bronsteen, Buccafusco and Masur (n 18); John Bronsteen, Christopher Buccafusco, and Jonathan S Masur, 'Retribution and the Experience of Punishment' (2010) 98(5) *California Law Review* 1463.

²⁸ See Markel and Flanders (n 15); David Gray, 'Punishment as Suffering' (2010) 63(6) *Vanderbilt University Law Review* 1619; Dan Markel, Chad Flanders and David Gray, 'Beyond Experience: Getting Retributive Justice Right' (2011) 99(2) *California Law Review* 605; and Adil Ahmad Haque, 'Retributivism: The Right and the Good' (2013) 32(1) *Law and Philosophy* 59, 79-80.

²⁹ Lori Sexton, 'Penal Subjectivities: Developing a Theoretical Framework for Penal Consciousness' (2015) 17(1) *Punishment and Society* 114, 131.

reveals a 'punishment gap' between their expectations about punishment and its experience, which alters the 'salience' (prominence) of that punishment in the prisoner's day-to-day life.³⁰

Sexton's empirical and Kolber's theoretical positions share the pains of punishment discourse's *inductive, experiential* approach to measuring penal severity. All of the models highlighted here understand punishment as suffering, deriving from the orthodox account of punishment as something that is, *inter alia*, unpleasant,³¹ together with a recognition that pain is both subjectively experienced and incapable of being boiled down to a single predetermined metric. Although this qualitative tendency has mostly limited analysis to the identification of the incidence and variety of the pains of punishment, increasing attention is also being paid to questions of penal severity.

3. *Objections and Limitations*

Although each of the models for measuring penal severity sketched above has particular uses and advantages, they are also characterized by weaknesses and limitations, which I explore in this part, with the aim of demonstrating the need for a more *intersubjective* account of punishment. In particular, two issues, which I have labelled as the problems of 'the law of the instrument' and of 'presumed normative objectivity' require consideration. Firstly, however, I must consider two more foundational problems with the measurement of sentences' severity, raised by Jesper Ryberg.³²

A. Ryberg's Challenges: Foundational Issues

Ryberg identifies three key challenges to retributive reasoning, particularly as regards measuring penal severity. Although he does not see these issues as necessarily insurmountable, he noted three conceptual challenges, which continue to pose difficulties when measuring penal severity: of *differences in impact*; of *delimitation*; and of *severity*.

³⁰ Ibid, 128-131.

³¹ Ashworth (n 2), 95; Thomas McPherson, 'Punishment: Definition and Justification' (1967) 28(1) *Analysis* 21.

³² Jesper Ryberg, 'Punishment and the Measurement of Severity', in Jesper Ryberg and J Angelo Corlett (eds), *Punishment and Ethics: New Perspectives* (Palgrave MacMillan 2010).

The third, however, only concerns the practical and theoretical ramifications of the former two, to which I limit the present discussion.

(i) Differences in impact

The challenge of differentiated impact is relatively self-explanatory, and has its roots in the orthodox definition of punishment as something that is 'normally considered unpleasant'.³³ The problem with a statement such as, 'Imprisonment is a more severe punishment than a community penalty' is that it assumes that (sufficiently) standardized descriptions of penal severity are *possible*. But if punishment is (actually or potentially) unpleasant then it is an *experience*, and therefore inevitably subjective. The result is that the individual's experienced pains of punishment will differ from any standardized account due to her particular circumstances, attitudes, and perspectives before, during, and after her punishment. As Christie observes, 'Literature is full of heroes so great that pain becomes small, or cowards so small that almost everything becomes pain'.³⁴ Ryberg's point is that to speak of things 'normally considered unpleasant' invites the measurement of punishment in terms of unpleasantness, which must either be actually experienced (and therefore subjective), or based upon a standardization of experiences, and therefore more or less arbitrary and inaccurate.³⁵

In their defence of retributive objectivism, Markel and Flanders respond to this criticism by opting for a third option: denying that punishment's severity has anything at all to do with experienced unpleasantness, in defiance of the orthodox definition. On their account, a criminal punishment is an objective *condemnation*, whose relative severity is absolutely predetermined by the government, as servant of the electorate. To account for subjective differences in experience would therefore be to treat the individual offender's perspective as more important than that of the electorate, and to undermine the democratic credentials of criminal justice.³⁶

³³ McPherson (n 31), 21.

³⁴ Christie (n 24), 9.

³⁵ Ryberg (n 32), 74-82. Compare Kolber's fictional account of 'truncation': (n 25), 188.

³⁶ Markel and Flanders (n 15), 979-982. This position is only true to the extent that modern (US) (liberal) democracy is (sufficiently) representative of the electorate (an empirical claim that is vulnerable, in particular,

However, Bronsteen, Buccafusco and Masur's response to this argument makes a more fundamental, historical point. After all, as they note, if unpleasantness had nothing to do with punishment, then one would expect to see suffering and punishment paired only intermittently throughout history and worldwide. In fact, however, unpleasantness is an ever-present feature of criminal punishment. For example, the deprivation of wealth may or may not be described as a punishment in a particular place and time, but no penal system has ever called it a punishment to *receive* additional wealth. If condemnation were all that mattered, then such a state of affairs would be possible, and therefore its historical absence is significant, suggesting (although not proving) that there is necessarily something unpleasant about the nature of punishment.³⁷

It must be said that it is specious to assume that simply because something has never been, that it is impossible under present or future conditions. Haque implicitly raises this point, noting that the basic requirement of a proportionate punishment is that it is a *satisfactory* condemnation, and is effective at *communicating* censure to the offender. Harm is therefore moderately useful, and seems to be necessary in the punishment of those crimes that involve the infliction of harm themselves: 'It is hard to imagine any harmless punishment comparable in seriousness to murder, rape, or other violent crimes'.³⁸ In other words, harm is a source of penal severity, but not the *only* such source. Given a plurality of different sources of punitive meaning (including objective condemnation and communication of censure), then, his account is that unpleasantness may well be required, especially for serious crimes, but it should be strictly minimized, rather than doled out proportionately, in order to reduce the damage done by the penal State to individuals' lives – an argument with clear moral and humanitarian weight, given the moral unattractiveness of a system that intentionally inflicts pain on other human beings.³⁹

to the limitations of electoral choice imposed by the US's bipartisan political system). The point is not that US democracy is necessarily insufficient or illusory (although cf, e.g., Sheldon Wolin, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism* (Princeton University Press 2008)), but that Markel and Flanders beg a crucial empirical question in justifying their normative position.

³⁷ Bronsteen, Buccafusco and Masur, 'Retribution and the Experience of Punishment' (n 27), 1471-1473.

³⁸ Haque (n 28), 77-78.

³⁹ Ibid, 78-79.

Despite this moral weight, however, it is enough for present purposes to observe that Haque has really only brought this debate full circle. Even if one accepts that there are multiple sources of penal severity, Ryberg's point about difference of impact still stands, as offenders are liable to respond just as differently to the communication of censure as they would to the experience of suffering. A vital component of proportionality's moral claim to do justice, for instance, is its ability to treat like cases alike, and yet different offender circumstances, attitudes, and perspectives continue to lead to the same imposition leading to different outcomes.⁴⁰

The discussion of severity models in Part 2 is framed in terms of the struggle to address this challenge. Since the challenge of differentiated impact addresses the claim that a monistic standard of severity can exist, it is most challenging to standardized deprivation accounts. Punishment equivalency studies, whilst addressing individual differences at the level of data collection, nevertheless use those data to construct objectivized standards that do not sufficiently account for individual experience when establishing equivalences. This deficiency partly motivated the increasing focus on qualitative measures in recent decades, but has ultimately gone too far in the opposite direction, providing a plurality of recognised pains, but no account of their quanta.

(ii) Delimitation

Ryberg's second challenge critiques the orthodox account of punishment's focus only upon unpleasantness stemming from the intentional acts of a State agent.⁴¹ For Ryberg, it is simply too difficult to separate out the unpleasantness stemming from penal intervention from the corollary effects of that punishment upon the community, and from the community's response to the punishment.⁴² This is particularly the case for community penalties, where the punishment is undertaken within one or more community contexts and where pre-existing pains, marginalization, and deprivations

⁴⁰ Michael Tonry, 'Proportionality, Parsimony, and Interchangeability of punishments', in Michael Tonry (ed), *Why Punish? How Much? A Reader on Punishment* (Oxford University Press 2011) 217-237, 225-229.

⁴¹ McPherson (n 33).

⁴² Ryberg (n 32), 82-87. cf Nigel Walker, *Why Punish?* (Oxford University Press 1991).

interact with the pains of punishment.⁴³ So the question is: where do we draw the line between an effect of the punishment and an unconnected, coincidental pain, which of course presupposes another question: to what extent *can* we?

It is in response to this challenge that recent retributive subjectivists have narrowed, and even rejected, the orthodox requirement that punishment be intentionally imposed by State agents. In any event, the 'intentionality' requirement is unnecessarily restrictive, ruling out as it does much that seems intuitively punitive, such as the punishment of oneself, social stigma, vigilantism, and the outcomes of mutualistic restorative justice mechanisms.⁴⁴

However, none of the new subjective accounts provide an adequate response to the wider point behind Ryberg's critique, which is that we *should* be able to draw that line. To be able to measure punishment we must not only be able to say what it is, but also what it is not. Clearly not all that is unpleasant is punishment, so there must be some grounds for distinction.⁴⁵ In rejecting the intentionality argument so completely, modern subjectivists substantially reduce their ability to describe the limits of punishment, and therefore to measure its severity.

However, objectivist accounts do no better, and in particular, struggle to take account of relatively indirect impacts of punishment. Standardized deprivation models are ill-suited to recognizing the external consequences of punishment even if they do extend beyond the limitations imposed by the intentionality requirement. When punishment is objectively determined, it is difficult to account for the extremely situated impacts of punishment on communities (and indeed, of communities on punishment), however the concept of 'community' is constructed.⁴⁶ For this reason, Markel, Flanders and Gray adopt the unduly disparaging label of 'post-prison blues' for the unintended pains (from the banal to the profound) that punishment can cause to offenders and

⁴³ David Hayes, 'The Impact of the Supervisory Relationship on the Pains of Community Penalties: An Exploratory Study' (forthcoming).

⁴⁴ McPherson (n 31); Ashworth (n 2), 95.

⁴⁵ Feinberg identifies this missing component as *censure* (in his terminology, 'reprobation'): Joel Feinberg, 'The Expressive Function of Punishment', in R. A. Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press 1994; first published 1970), 74-75.

⁴⁶ See generally Simon Green, *Crime, Community and Morality* (Routledge 2014).

those around them.⁴⁷ Whilst not necessarily adopting the same tone, objectivist models have shared this difficulty in accounting for the indirect punishment of offenders and third parties, with the result that their image of punishment is only partially reflective of the concept's broader meaning.

In sum, both of Ryberg's challenges to the comparative measurement of sentence severity stand, and none of the subjective nor objective approaches discussed in Part 2 have managed to entirely resolve them. However, before proposing a way forwards, it is worth examining two further limitations of quantitative measures of punishment, and considering whether qualitative approaches have fared any better.

B. The Law of the Instrument: When All You Have is Liberty Deprivation...

The problem of the 'law of the instrument' can be summed up by the well-known aphorism that, 'if all you have is a hammer, then all your problems start to look like nails'.⁴⁸ The problem with a monistic theory of punishment (*i.e.* one that attempts to describe penal severity in terms of a single standard) is that social reality is almost infinitely plural, and cannot be readily reduced to a single metric.

Standardized deprivation studies provide the clearest example of this limitation. For example, recall Schiff's liberty-based 'Criminal Punishment Severity Scale'.⁴⁹ Schiff's approach is to focus upon the various effects of punishment upon the right to liberty, a representative right that is 'sacred' in a liberal democracy.⁵⁰ This right is subdivided into a number of impacts upon liberty, in terms of: freedom of movement; freedom from supervisory control; economic restrictions; and other stipulations that either negate freedom of choice or mandate specific actions. However, each of these is considered exclusively in terms of the deprivation of liberty, to which she reduces the broader spectrum of 'quality-of-life interests'.⁵¹

⁴⁷ Markel, Flanders and Gray (n 28), 618. Whilst they do qualify this terminology, it is still an unfortunate choice of words, given their claim to respect the human dignity of offenders as a matter of foundational importance.

⁴⁸ Abraham Kaplan, *The Conduct of Inquiry: Methodology for Behavioral Science* (Chandler 1964); Abraham Maslow, *The Psychology of Science: A Reconnaissance* (Harper & Row 1966).

⁴⁹ Schiff (n 10).

⁵⁰ *Ibid*, 190; cf Kahan (n 14), 697.

⁵¹ Schiff (n 10), 180-184.

It is worth recognizing the value of the simplicity of this model, which allows for relatively straightforward comparisons at the level of both sentencing decisions and public policy. Indeed, the primacy Schiff gives to liberty is not unreasonable, given its political and cultural importance in the operation of (Anglosphere) liberal democracies, and the impact that modern modes of punishment tend to have upon it.

However, what Schiff is effectively doing is creating a *taxonomy of liberty deprivation* with which to evaluate sentence severity. The problem is that this taxonomy cannot parse that which cannot be expressed in terms of the deprivation of liberty, with the result that anything that does not fit into the taxonomy must either be discarded as irrelevant to the question of punishment (raising Ryberg's challenge of delimitation), or misrepresenting the effect so that it fits the taxonomy.

For instance, consider *shame*, a potent and commonly-experienced pain of punishment.⁵² Whether it originates from conscious efforts at shaming by penal agents, stigmatization by friends, family, and the wider community, or indeed from the offender's critical self-examination, it is difficult to say that shame is not painful, nor even something that is 'normally considered unpleasant'.

Nor can one say that shame never has an effect upon one's liberty: it may indirectly reduce one's choices by causing one to recoil from social interactions, for instance, in order to avoid (perceived) stigma. But that reduction of choices is not what *characterizes* shame, what makes it painful, and ultimately *punishing*. As a result, the impact that shame has upon one's life can only be indirectly and imperfectly transliterated into the taxonomy of liberty deprivation.

Punishment equivalence studies also fall foul of the law of the instrument. Recall that these studies make the fundamental assumption that penal subjects will always prefer the less severe intervention, with the result that other benefits of particular sanctions that compensate for greater overall severity are ignored, which fundamentally undermines the conclusions of these studies.

⁵² E.g. Durnescu (n 21), 535-537; Hayes (n 43).

By contrast, pains of punishment approaches avoid this limitation by dispensing with the need for a predetermined taxonomy of penal severity. Pain is a sufficiently broad concept to incorporate the experiences as diverse as: paper-cuts; bereavement; shame; childbirth; poverty; heartbreak; severe beatings; and the frustrations of trimming an article to meet a publisher's word limit.⁵³ It can also speak in terms of intensification or amelioration. However, the trade-off for this conceptual flexibility is the absolute subjectivity of the pains of punishment approach, and its inability to accurately and consistently compare individual experiences against one another. Before considering attempts to move past these difficulties, however, there is another issue that needs to be addressed with standardizing and quantifying accounts of penal severity, which I have called *presumed normative objectivity*.

C. Presumed Normative Objectivity: The Subjectivity of Freedom

When a particular value (or set of values) is used as a standardized metric, one not only assumes that everything you are seeking to measure (in this case penal severity) is capable of being expressed through that metric, but also that the values in question bear an objective level of *normative importance*. This is a noteworthy assumption, as Sexton's contention that 'symbolic' deprivations are generally experienced as subjectively harsher than 'concrete' ones suggests that the subjective valuation of norms is significant in the experience of punishment.⁵⁴

There are two specific problems with presuming an objective level of normative value for a given metric: one assumes, firstly, that the normative value of the metric is *uniformly shared* within a given community; and secondly, that the normative value is shared *in the same way*. To illustrate the first point, recall the sanctity that Kahan and Schiff attribute to liberty in a liberal democracy.⁵⁵ On their accounts, the importance of liberty is defined abstractly, in terms of the socio-political importance of citizens'

⁵³ On the chameleonic nature of pain, see Christie (n 24), 9-11; Sykes (n 20), 63-64.

⁵⁴ Sexton (n 29), 120-121.

⁵⁵ n 50 and accompanying text.

individual autonomy. They are free to pursue their own courses of action (until such a course interferes with fellow-citizens' abilities to do the same).⁵⁶

However, it does not follow that liberty (or any other right) is *equally* important to all individuals in practice. Free movement and choice will be more important to a rebellious wanderer than it will be to a compliant layabout. Both would be likely to object to any reduction of their liberty, but that is not to say that they would experience the same *level* of deprivation, or have the same sense of being deprived, even in the abstract. Even if liberty is more theoretically fundamental than other human rights in a liberal democracy, it does not follow that all individuals will consider the same right to be equally important in their lives. It would be an error to assume, on that basis, that its deprivation will affect each individual equally in practice. Perspectives, attitudes and lifestyles will affect the subjective normative valuation of each right, to say nothing of the capacity and opportunity of the individual to enjoy it. After all, freedom of choice is not so useful when one uses a wheelchair in a city full of staircases.

This leads on to the second feature of presumed normative objectivity: that the supposed uniformity of normative value presumes uniformity in the *way in which* people value the norm. Again, this charge applies most clearly to the standardized deprivation models' focus upon (human and/or civil) rights and (socioeconomic) living standards.

Compare, for instance, the following two illustrative statements: (a) "They are stopping me from seeing my family. Haven't I got rights?" and (b) "They won't let me see my family, and it's killing me." Both express frustration with a deprivation of the right to a family life. However, whilst the first expresses its concern in terms of the right itself, the latter goes behind the right, the moral and legal device, to the *interest* that the right protects: access to the love and support of one's family. In other words, the former treats the right as *inherently* valuable, and the latter only as *instrumental*, as a way of defending what actually matters.

⁵⁶ This conception underpins the justification of liability in liberal criminal theory: Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford University Press, 2013), ch 2; Roberts (n 4).

Once again, the pains-based approach, with its inductive approach, avoids both of these issues, at least to the extent that pain is sufficiently broad and pluralistic to accommodate the specific valuations of particular norms by individual offenders. It must still fit the experience of the offender in terms of pain, which cannot encompass every experience any more than liberty deprivation can.⁵⁷ However, within these broad conceptual constraints, the sufferer is left to express the importance and severity of her suffering, and the level at which she feels it, in her own terms. Provided that the researcher is suitably considerate of those terms when coding, it is then relatively easy to reflect this variety in one's analysis of the pains of punishment.

However, this approach leaves one with a mere catalogue, which fails to describe the relative quantum of pains, both between individuals and in a particular sufferer's case. We might be able to say that one or more clusters of pains are more significant than another in a particular person's experience of punishment, but not by how much, or how severely that person suffers when compared to others.

The question therefore becomes: can the two approaches be reconciled, in a way that ameliorates the weaknesses of both? In other words, is an approach to measuring sentencing severity that accounts for subjective differences without losing sight of the quantum of unpleasantness possible?

D. Pain and its Quantum: Towards a More Intersubjective Approach

I have spent some time considering the weaknesses of both subjective and objective measures of penal severity, since they have received relatively little attention in recent discussions of the subject. However, none of the limitations discussed so far are insurmountable. Indeed, several scholars (most importantly Ben Crewe and Lori Sexton)⁵⁸ have recently attempted to bridge the divide between qualitative and

⁵⁷ For instance, the taxonomy of pain cannot properly parse the receipt of positive benefit. Defining improvement as 'negative pain' is as clumsy and ineffective as defining shame in terms of liberty deprivation (although describing it as 'ameliorated pain' may well not be).

⁵⁸ Ben Crewe, 'Depth, Weight, Tightness: Revisiting the Pains of Imprisonment' (2011) 13(5) *Punishment and Society* 509; Sexton (n 29).

quantitative measures of punishment, conceptualising punishment in terms of consistent comparisons of individuals' subjective experiences.

Crewe's addition to Sykes' pains of imprisonment was to give them *dimensionality* – that is, he differentiates experiences of particular pains by reference to their 'depth, weight, [and] tightness'.⁵⁹ These concepts are characterized as follows: *depth* indicates the 'degree to which the prison was oppressive and psychologically invasive'; *weight*, the extent to which prison interferes with and imposes upon offenders' experiences;⁶⁰ and *tightness*, the level of penetration of the power relationships typifying prison into offenders' lives, and even their behaviour and modes of thinking.⁶¹

Crewe's innovation is to view the pains of punishment as subject to particular webs of (formal and informal) authority, relations with fellow prisoners and staff, and external control over access to the outside world, all of which contribute to the experienced nature of imprisonment. Although his framework is presented without empirical data, and so does not attempt to quantify (or otherwise systematize) these dimensions of imprisonment in different institutions and for different offenders, Crewe's account offers a useful heuristic for measuring subjective differences. The theoretical taxonomy he proposes is amenable to deployment in future empirical study, and offers a basis upon which to build a relatively precise framework for evaluating and comparing the severity of the pains of imprisonment (and other penalties).

Sexton's approach, by contrast, is explicitly empirical from the outset. As she notes, subjectivity is important because 'punishment is not just something that is done – it is something that is done *to* people and experienced *by* people'.⁶² To explore these subjectivities, she adopts a framework based around the concept of 'penal consciousness': that which is experienced and understood as punitive by the subjects of particular forms of punishment. Using semi-structured interviews, she adopts this

⁵⁹ Crewe (n 58). These concepts are taken up and expanded upon from Roy D King and Kathleen McDermott, *The State of Our Prisons* (Clarendon 1995).

⁶⁰ Crewe (n 58), 521. Furthermore, at 525, Crewe notes that one could also consider punishment's 'breadth' more generally, exploring the 'dispersal of discipline' into non-custodial fora: cf Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Polity 1985), 40-86.

⁶¹ *Ibid*, 522.

⁶² Sexton (n 29), 115. Emphasis in original.

framework to identify the punitive features of imprisonment, as perceived by prisoners. These include: the 'punitive referent', or the particular phenomenon experienced as punishment (a concept that overlaps but is not synonymous with the pains of punishment); the 'level of abstraction' of that referent, that is, where the referent sits on a binary scale between the 'concrete' and the 'symbolic'; the *experienced* severity of the referent; and its 'salience', measured in terms of the distance between the experienced and expected punishment imposed.⁶³

Unfortunately, this rich range of measurements is poorly suited to providing an accurate measurement of penal severity. Sexton's account of severity, for instance, is in terms of 'the intensity or magnitude of punishment as it is experienced by the prisoner',⁶⁴ but no detail is given as to how prisoners calculated this severity, whether they were asked to do so in a particular way, or the extent to which each offender's perceptions of severity differed those of others. It is therefore impossible to effectively compare the severity of different offenders' experiences. Two participants may experience a particular referent as extremely severe, but without some knowledge of their circumstances both before and during its experience it is impossible to say that they have been punished thereby by 'the same amount', since each individual's basis for determining severity could be radically different from the other's.

In fairness, Sexton is not attempting to provide such an account. Rather, she aims to evaluate the distance between what formal accounts of 'punishment on the books' in law and public policy, and the experienced realities of 'punishment in action'.⁶⁵ However, this position weakens her model as a means of understanding penal severity. What is needed is not so much a dialectic interchange between objective and subjective accounts of punishment, as one that takes account of subjective differences in experience whilst also allowing meaningful comparisons of different pains to be drawn between different experiences.

⁶³ Ibid, 120-121, 125-131.

⁶⁴ Ibid, 125.

⁶⁵ Sexton (n 29), 117-118.

Achieving this would not be easy. Indeed, it may be practically impossible, given that it requires a considerable bridging of the divide between qualitative and quantitative methodologies. However, we can go further than we have so far in identifying the subjective characteristics of penal severity, and their impact upon penal severity in practice. Doing so would not completely fulfil the transcendental goal of perfect severity measurement, but would add to the *comparative* accuracy, and thus the level of (criminal) justice achieved in penal systems that attempt to justify themselves on the basis of theories that measure penal severity.⁶⁶ I therefore turn to sketching the preliminary features of such an approach, which I call 'penal impact'.

4. Penal Impact

A. Essential Features

Penal impact is an analytical framework for the measurement of penal severity in terms of the (negative) effects it has upon an offender's life.⁶⁷ Such an account demonstrates three key features. Firstly, it explores punishment as it is *subjectively* experienced, rather than as it is intended at sentencing. Secondly, it must provide a *pluralistic* account of the offender's penal experience, in a way that enables different facets to be directly compared without compromising subjective inflections of meaning. Thirdly, it requires *empirical* data, since penal impact is concerned with punishment as it is perceived and experienced in social reality, rather than as it is idealized in penal policy or philosophy. It is impossible to know how punishment affects an offender's day-to-day life without data drawn directly from their experience, whether that data is qualitative or quantitative in nature. The focus is therefore upon developing an understanding of experienced penal severity, on the basis of retrospectively-focussed empirical data.

Whilst data about penal impact could conceivably be collected by any number of different methodologies, the empirical data generated must share certain characteristics

⁶⁶ On comparative value and transcendentalism, see Amartya Sen, *The Idea of Justice* (Penguin 2010), 15-18.

⁶⁷ This is not to suggest that punishment cannot have positive (or neutral) effects in the short- or long-term, but rather that these effects are not to be understood as *punishing* the offender, except where they involve shorter-term pains: cf Fergus McNeill, 'Probation, Credibility and Justice' (2011) 58(1) *Probation Journal* 3, 17-18.

if they are to be useful for evaluating penal severity. Firstly, since penal impact aims to explore both the range and quantum of impacts that punishment has on offenders' lives, any study attempting to explore the penal impact of a particular punishment must adopt a *mixed-methods* approach. When considering the severity of a sentence, it is significant both *whether* it is proportionate (or parsimonious) to a given offence, and *how* that proportionality (or parsimony) is achieved.

Secondly, those data must be considered *inductively*, in order to avoid the pitfalls of presumed normative objectivity and the law of the instrument. In other words, it must be *intersubjective* – rather than suppressing subjective differences for the sake of identifying objective trends, penal impact studies must be able to compare and contrast those individual differences as rigorously as possible. This is particularly important when deploying quantitative methods, which must be able to accommodate as fully as possible the lived experiences of offenders into hypotheses at the research design stage, and generalizations drawn from the data collected.⁶⁸

Finally, the data generated must be expressed in terms of a *base unit* of measurement (that is, the *sine qua non* by which penal severity is understood) that is sufficiently flexible to avoid the problems of normative rigidity and the law of the instrument, whilst also allowing for sufficient recognition of sameness and difference between experiences.

Such a base unit is available in the concept of *pain*, which I define in (Nils) Christian terms, and as it is understood by the 'pains of punishment' theorists: in other words, as an inherently negative, subjective experience, including not only physical pains but also psychological torment, emotional anguish, and existential angst.⁶⁹

Where I must go further than these approaches to pain is in accounting for their *quantum*. Such an account is by no means impossible on the basis of measurement in terms of pain, which is, after all, comparable. It is possible to say, to return to a

⁶⁸ Indeed, it was the failure of Gainey and Payne (n 23) to do this consistently that undermined the value of their qualitatively-led approach. To avoid this pitfall, I would advocate: (a) putting a wide range of variables to participants in quantitative samples; (b) deriving those variables from exploratory qualitative research; and (c) exploring the quantitative data with qualitative follow-up interviews. Of course, the precise design of any future research aiming to explore penal impact should be left to the author.

⁶⁹ Christie (n 24), 9-11; Sykes (n 20), 64.

previous example, that pain attends (*inter alia*) a paper-cut, a broken arm, and bereavement. But it is also possible to say that the latter two hurt more than the first, regardless of the fact that they are entirely different types of pain. Of course, there is still a crucial gap in this analysis. Which pain is more serious: the broken arm, or the bereavement? On first principles, there is no way to quantify their qualitative differences. However, empirical data can help to make such a quantification. Who, after all, is better than the subject of pain to tell us how much it hurts?⁷⁰

Such a measurement would hardly be straightforward. After all, one person's agony might be another's trivial nuisance.⁷¹ Any methodology that proposes to measure pain severity across different individuals' experiences must take this challenge seriously, and consider the matter in much more detail than I can in this preparatory sketch. My point is that such a consideration *is* possible. Some generalization may prove necessary in the process, but we can bring our understanding of penal severity closer to the experienced intensity of the pains of punishment. Such a step would increase our ability to reflect social reality to penal policy, and thereby improve our claim to do (proportionate criminal) justice, even if it were only partially successful.⁷²

Of course, this approach would carry its own methodological and epistemological limitations. Before considering these, however, I should briefly confront some of the ethical challenges raised by measuring penal severity in terms of pain, a position that, as Markel and Flanders rightly note, places one in a morally ambiguous position.

B. Pain Manipulation: Ethics, (Liberal) Democracy, and Measurement

What I have effectively proposed is to measure the severity of a punishment in terms of *pain manipulation*.⁷³ One must identify (as fully as possible) the pains attending a particular punishment, and calibrate them in order to ensure that they correspond (as closely as possible) to the seriousness of the offence(s) in question. The implicit

⁷⁰ Spelman (n 24), 109.

⁷¹ Recall n 34 and accompanying text.

⁷² Recall Sen (n 66), making the same point about (distributive) justice more generally.

⁷³ I use the loaded concept of pain 'manipulation' intentionally. It serves as homage to Christie's own concept of 'pain delivery', although I seem to be advocating we go significantly further than bureaucratic banality, into the realms of the callous, even gleeful, infliction of pain upon our fellows: Christie (n 24), 19.

suggestion is that if proportionality in particular is to be measured in these terms, then the guilty deserve not only punishment, but to *suffer*.⁷⁴

This feature of subjectivist accounts based on offenders' suffering is a central reason for Markel and Flanders' objectivist stance. Citing Bronsteen, Buccafusco and Masur's analysis of 'hedonic adaptation', for example, they observe that recognizing that the experienced hardship involved in imprisonment lessens over time seems to advocate an increase in overall prison sentence duration, adding to the severity of the overall complicity of the State in pain infliction, and further increasing the threat that criminal justice poses to liberal citizenship.⁷⁵ Effectively, they argue, the penal State is required to engage in conduct 'dangerously approaching sadism'.⁷⁶

This is a fair point if one's objective is the minimization of penal suffering. Nevertheless, I differ from Markel and Flanders' analysis in two key respects. The first is that their objection is to measurements based upon *suffering*, and not upon *pain*. This may seem like an arbitrary distinction, since one cannot have the former without the latter. However, their notion of suffering seems to be substantially narrower than my notion of pain. The examples that Markel and Flanders raise concerns with judicial 'meddling' with the internal regime of imprisonment to ensure that each prisoner receives the 'correct' amount of pain. In other words, the substance of their concern is not with the observation that punishment is *generally* painful, but that punishments ought to be tailored to inflict a *specific* level of individual suffering (a position they suggest could justify or encourage abuses of the scale seen, *inter alia*, at Abu Ghraib).⁷⁷ Their primary concern is that prisons (and by extension, other forms of penal hard treatment) would be used *for* punishment, not *as* punishments, when principle compels us to do the opposite.⁷⁸

⁷⁴ R A Duff, *Punishment, Communication, and Community* (Oxford University Press 2001), 20-21; cf John Kleinig, 'What Does Wrongdoing Deserve?' in Michael Tonry (ed), *Retributivism has a Past: Has It a Future?* (Oxford University Press 2011).

⁷⁵ Markel and Flanders (n 15), 982-984.

⁷⁶ *Ibid*, 915.

⁷⁷ Markel and Flanders (n 15), 982-984.

⁷⁸ See, e.g., *Raymond v Honey* [1983] 1 AC 1, 10.

Whilst this is a valid concern, it only applies to the extent that we require judges to inquire into the individual offender's level of pain. However, as I will argue below, penal impact is not suitable for making that kind of proportionality judgement, not least because of its necessarily research-intensive methods. Rather it allows us, as citizens engaged in a policy discourse, to recognise the fact that *all* punishment is painful to at least some extent, and that that pain is relevant to judgements about the punishment's severity.⁷⁹ Doing so provides a basis on which to review the perceived severity of punishment, stripped clean of politically convenient euphemism.⁸⁰

Indeed, this leads onto my second reason for deviating from Markel and Flanders on the desirability of pain-based severity calculation. Examining a sentence's severity in terms of pain is not to justify pain infliction, but to identify that which needs justification. It is to take seriously what Victor Tadros describes as 'the problem of punishment':

Punishment is probably the most awful thing that modern democratic states systematically do to their own citizens... when an offender is punished he is harmed intentionally. If offenders do not suffer, or are not harmed in some other way, they have not been punished, or at least they have not been punished very successfully.⁸¹

Even if Markel and Flanders (and other objectivists who deny the need for punishment to cause pain, harm, or suffering) can provide internally consistent *justifications* of punishment along retributive (or other severity-measuring) lines, they are poor *descriptions* of punishment as it is currently practiced.⁸² It is ahistorical to describe punishment as not involving pain, given its emergence (at least in the Anglo-American tradition) as a replacement for private systems of vendetta, as Christian, monarchical traditions supplanted (and therefore had to provide a valid alternative to) the *Lex Salica*

⁷⁹ McNeill (n 67).

⁸⁰ Christie (n 23), 100-101; Cohen (n 60), 266-267.

⁸¹ Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press 2011), 1.

⁸² This is not to say that there is no role for purely normative theories of punishment. Compare, *e.g.*, Anthony Duff's purposefully utopian presentation of his 'communicative' aspirations, in R A Duff, 'Probation, Punishment and Restorative Justice: Should Altruism be Engaged in Punishment?' (2003) 42(2) *The Howard Journal* 181, especially at 192-194.

blood-feud.⁸³ Moreover, it is socially myopic to contend that modern punishment has escaped these historical trappings, and moved solely to the realm of abstract, civic condemnation. To do so is to ignore the wealth of sociological, criminological and penological literature on the pains, harms, rights infringements, and other issues arising out of punishment.⁸⁴ Thus, the definition of punishment has always involved at least some recognition of the infliction of pain (usually through the objectivised euphemism of things 'normally considered unpleasant').⁸⁵ It is my central contention that, by taking account of the effect that the subjective impact of punishment has upon those subject to it, we can make this recognition more effectively.

However, the upshot of the claim that we should measure penal severity in terms of pain in order to better identify that which requires justification is ultimately *political*, rather than social or historical. Like Markel and Flanders, I am concerned with measuring penal severity for *evaluative* purposes: to examine the severity of sentences that have been imposed, rather than setting out a framework for the imposition of future sentences proportionately. But precisely because we are concerned with the evaluation of penal policy and practice, it will not do to ignore the pains that regularly attend, and indeed, are often inherent features of modern criminal justice.⁸⁶ That is to evade Tadros's 'problem of punishment' by pretending that it does not exist, in denial of the sociological evidence.⁸⁷

A concern with subjective pain improves academic capacity to engage with the brute horror of State punishment. Criminal justice is (and always should be) morally disturbing to any observer that values human dignity. If we are to convincingly justify punishment (as it is rather than as it should be) then we must defend those disturbing

⁸³ Alan Harding, 'The Origins of the Crime of Conspiracy' (1983) 33(1) *Transactions of the Royal Historical Society* 89; Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century, Vol One: Legislation and its Limits* (Blackwell 1999), 39-40, 311-312. We might extend this analysis to jurisdictions which derive their penal institutions from their colonial British past, such as the USA: see Markus D Dubber, 'Foundations of State Punishment in Modern Liberal Democracies: Towards a Genealogy of American Criminal Law', in R A Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011). However, other penal traditions are beyond the scope of this particular analysis.

⁸⁴ There are too many such accounts to discuss, although many of the other references I supply herein raise valid examples. However, cf Gross (n 1), 7-27, for an ethical overview of some of the core issues.

⁸⁵ Recall McPherson (n 31); Feinberg (n 45).

⁸⁶ Markel and Flanders (n 15), 949-952 explicitly pursue this evaluative aim, despite their staunch objectivist insistence on direct intentionality. It is the adoption of this level of analysis that renders their naïve conception of abstract liberty deprivation more problematic than, say, Duff's (n 82) communicative utopia.

⁸⁷ Recall n 81 and accompanying text.

features, rather than ignoring them. Retributivism has attempted a number of these justifications: that punishment is made appropriate by the equally horrific behaviour of the offender (*i.e.* the punishment fits the crime); that some response is better than no response;⁸⁸ that pain manipulation expresses socio-political censure, whether to the offender or the wider community;⁸⁹ and possibly, that the proportionate, calibrated infliction of pain is less sadistic overall than the alternatives (*i.e.* penal minimalism).

Regardless of how convincing these justifications are, the point is that any attempt to *justify* the imposition of criminal punishment must confront criminal justice as it is, rather than as we might wish it to be. If conditions in the penal system are 'dangerously approaching sadism' then we ought to be aware of it, not least because, as citizens of (at least notional) democracies, we bear at least some responsibility for the shape of criminal liability and justice.⁹⁰ But we cannot do that if we shy away from engagement with the sociological characteristics of punishment – which is exactly what an exclusively objective and abstract engagement with intended liberty deprivation proposes.⁹¹

C. Penal Impact: A Preliminary Overview

In sum, penal impact measures penal severity in terms of the incidence and magnitude of the pains of punishment. Those pains are identified and schematised by a programme of empirical research, which is used to evaluate the success with which the pain delivered by the sentence is calibrated to the seriousness of the offence. Doing so takes the problem of punishment in a liberal society seriously, by recognizing the negative consequences attending punishment (at least as it is currently imposed in Western democracies), and demanding their careful justification. Indeed, it enables a

⁸⁸ *E.g.* Andrew von Hirsch, *Past or Future Crimes: Deservedness or Dangerousness in the Sentencing of Criminals* (Manchester University Press 1986), 48. cf Gross (n 84), 1-6; this argument is not the sole preserve of retributivists!

⁸⁹ Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press 1993). cf Duff's (n 74) 'communicative' approach, which, if not straightforwardly retributive, at least carries distinctive retributive stigmata.

⁹⁰ *E.g.* Alice Ristroph, 'Responsibility for the Criminal Law', in R A Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011).

⁹¹ Barbara Hudson makes this point more generally in her critique of the primacy afforded to 'legal reasoning' over sociological modes of enquiry in legal and penal theory. See, *e.g.*, Barbara Hudson, 'Punishing the Poor: Dilemmas of Justice and Difference', in William C Heffernan and John Kleinig, *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (Oxford University Press 2000).

closer recognition of those consequences as they are subjectively experienced, whilst also allowing for their effective comparison with one another.

5. The Uses of Penal Impact: Of Metrics, Means, and Ends

This is not, however, to say that penal impact provides a perfect account of penal severity. I therefore close this piece by identifying some of this approach's limitations, and identifying three contexts in which a more intersubjective account, however limited, would enrich penal discourse.

A. What Penal Impact Cannot Tell Us: Some Limitations and Qualifications

The broad research design I have advocated carries with it a number of inherent limitations.⁹² In particular, analysis based upon penal impact is very research-intensive, requiring a great deal of time and resources to reach firm conclusions about experienced penal severity. Moreover, it can only provide retrospective data about how painfully punishments *have* been experienced. Information about how punishments *will* be experienced can only be extrapolated, and could never be perfectly predicted, given the unique personal circumstances and perspectives of each individual offender.

Kolber pre-empts this limitation by considering the abstract example of a wealthy and a destitute person who have committed, for the sake of the argument, exactly identical offences. Does a subjective position not commit us to punish the wealthy person for a shorter period than the destitute one, given that the material conditions of punishment will reduce the rich person's quality of life more sharply? Ultimately, he concludes that we should not, since we cannot stereotype the experience of *all* wealthy and *all* impoverished offenders by dint of a single qualifying characteristic, no matter how significant it is to their socioeconomic wellbeing.⁹³ To use another example, one would expect an offender who has dependent children with whom she lives to experience pain as a result of separation from them through incarceration. However, it is quite

⁹² In addition to the practical limitations that bedevil any empirical research during data generation.

⁹³ Kolber (n 25), 1598-1600.

impossible to predict *how much pain* she will suffer. We could not use penal impact to predict how painful particular punishments will be in practice, in other words.

The upshot is that this approach would be of little use to sentencing authorities in assigning particular sentences to individual offenders. Any guidance that could be given would be liable to at least as many problems as those I have identified in the foregoing sections. However, this reflects the focus of penal impact as an analytical framework: on the substantive nature of punishment as it is experienced, so that it can be critically justified, rather than as it is intended in the courtroom.

It is worth emphasizing this point. Each of the models I have dismissed above are not (necessarily) inherently weak methods of determining penal severity, so much as they are *limited as means for certain ends*. In particular, much of the discussion around standardized deprivation models and punishment equivalencies is specifically concerned with *ordinal proportionality*: the treatment of like cases alike at the point of sentencing.⁹⁴ Focus upon different levels of penal policy – legislation, sentencing, and implementation – will produce different levels of specialization to each level, and therefore limitation as a means of exploring other levels of enquiry. This does not invalidate the model itself; rather, it reduces the utility of that model for broader purposes. With this in mind, I close this piece with a consideration of what penal impact can contribute to discourse around severity.

B. What Penal Impact Can Tell Us: Policy, Custody and Democracy

Given the *evaluative* focus of penal impact, its principal utility rests in allowing exploration of the extent to which penal policy arrangements have produced cardinal proportionality in the cases under study – that is, that the punishment has fit those crimes.⁹⁵ Such an analysis offers two key advantages at the policy level: firstly, it allows for more nuanced penal policy; and secondly, it improves the democratic accountability of the penal system. Let us consider each issue in turn.

⁹⁴ *E.g.* Schiff (n 10); Wood and Grasmick (n 16), 16. Von Hirsch and Roberts (n 11) are concerned with the other side of the 'equation' – that is, with offence seriousness – but they are still concerned with providing a tool to guide sentencing practice.

⁹⁵ Ashworth (n 2), 89-90.

Firstly, greater recognition of both the plurality of pains and their quanta would improve political understanding of what punishment has entailed for particular samples of offenders. This could be used to refine our understanding of: which pains count as punishments; which factors affect their relative severity in which circumstances; and therefore how effective various forms of punishment are *qua* punishment. In particular, non-custodial options would benefit from a fairer representation of their punitive capacities, given the necessary shift in focus away from a metric of punishment based around liberty deprivation and towards a greater recognition of the punitive capacity of other types of pain that this would necessarily entail.

This, in turn, would allow the construction of sentencing tariffs that more closely correspond to experienced reality, sentencing guidelines that recognise more effectively a range of aggravating and mitigating circumstances based around (or at least, influenced by) a more 'sociological' reading of how the punishment is likely to be felt,⁹⁶ and criminal justice policies more reflective of the painful nature of criminal punishment and the need for both executive constraint and legislative restraint as regards the penal State.

The second, democratic justification for the pursuit of an analysis of penal severity on the basis of penal impact (or some other measure of pain manipulation) follows on from this point. The claim that a focus on pain manipulation would encourage penal restraint might seem rather utopian, given the well-documented issue of *populist punitiveness* in modern (Western) democracies. As a result of this phenomenon penal restraint becomes tantamount to political suicide due to the apparent desire of the public for a 'tough', punitive agenda.⁹⁷

However, a closer analysis of what the public wants from criminal justice (and therefore what they will vote for), suggests that their outlook is far from straightforwardly punitive. In particular, whilst condemnation and punishment are

⁹⁶ Hudson (n 91).

⁹⁷ Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press 2008).

common referents for members of 'the' public (however construed)⁹⁸ when asked about criminal justice, individual citizens are also more willing to recognize reparation and rehabilitation as desirable end goals, especially when furnished with the facts of individual cases.⁹⁹ In other words, the presumption of the inherent punitiveness of the populace potentially overreaches itself, and is difficult to put to the test in (at least) the Anglo-Welsh context, where the substantial agreement between the major political parties in the United Kingdom as to the best course of action makes the claim that voters will only vote in favour of punitive policies a rather self-fulfilling prophecy.¹⁰⁰

This is not to dismiss populist punitiveness as a problem for minimalist penologists. Rather it is to note that a combination of factors tend to preclude laypersons from developing an informed opinion of criminal justice, including a sensationalized and selective representation of crime (and therefore, punishment) in mass media,¹⁰¹ and a general lack of interest in the everyday realities of criminal and penal practice, compared with other aspects of public policy.¹⁰²

This presents a problem for the UK's democratic credentials, at least on one definition of democracy. Dalton, for instance, perceives democracy as involving not just the act of voting in elections and referenda, but as a broader process of individual engagement with civic life. He lists a number of essential criteria for ideal-typical democracy, the most important of which is that democratic opinion is *informed*, that is, that the electorate are (sufficiently) aware of what they are voting for to be able to make a (sufficiently) rational decision as to who to support.¹⁰³ Absent such information, the democratic claim to political legitimacy – we are doing what voters want – is undermined to at least some extent, because the electorate's consent to particular policies is

⁹⁸ Shadd Maruna and Anna King, 'Selling the Public on Probation: Beyond the Bib' (2008) 55(4) *Probation Journal* 337.

⁹⁹ Shadd Maruna and Anna King, 'Public Opinion and Community Penalties', in Anthony Bottoms, Sue Rex, and Gwen Robinson (eds), *Alternatives to Imprisonment: Options for an Insecure Society* (Willan 2004).

¹⁰⁰ Lacey (n 97), 173.

¹⁰¹ Claire Wardle, 'Crime Reporting', in Bob Franklin (ed), *Pulling Newspapers Apart: Analysing Print Journalism* (Routledge 2008).

¹⁰² Maria Yvonne Feilzer, 'Criminologists Making News? Providing Factual Information on Crime and Criminal Justice through a Weekly Newspaper Column' (2007) 3(3) *Crime Media Culture* 285, 286-294. Note that Feilzer does not allege a lack of interest in crimes themselves, as compelling moral dramas.

¹⁰³ Russell J Dalton, *Citizen Politics: Public Opinion and Political Parties in Advanced Industrial Democracies* (6th edn, CQ Press 2014), 15-36.

insufficiently informed. Therefore, if our aim is to be 'democratic', we should aim to improve the level of knowledge that citizens have about criminal justice (and, in this case, sentencing severity).

Penal impact (or something very much like it) offers a genuine opportunity to improve the calibre of public discourse about penal policy, both in terms of the *alternation agenda* (which aims at reducing the use of imprisonment by producing less inhumane alternatives) and of the *penal minimalist agenda* (which aims at reducing State reliance upon criminal justice at all). By highlighting the brutality of pain infliction, and challenging the discourse of euphemism and 'softness', any focus on the pain as a metric of punishment encourages a more forthright discussion of the benefits (and substitutability) of particular punishments, and of the very act of punishment. It is one thing to say that the public are in favour of ever more punitive responses to crime when punishment is measured in terms of abstract liberty deprivation. It is quite another to say that they are in favour of inflicting ever more *pain*.¹⁰⁴ By placing this aspect of criminal punishment in full view, analyses of penal impact would invite public debate on: the virtues and vices of punishment as a political, social and moral response to particular forms of activity; the effectiveness of alternatives to imprisonment as punishments in their own rights; and the desirability of punishment for at least some offenders and offences in the first place. If only because it would make criminal punishment seem less *comfortable* a moral proposition for an act the State takes on behalf of its electorate, such a development would encourage much more discussion of how *inevitable* criminal punishment is, and what form it should take where it is imposed.

Of course, such debate would not be unidirectional, and would not lead overnight to some sort of progressive penal utopia (even assuming one can have a utopia that requires the intrusive forcefulness of criminal punishment at all). Indeed, merely presenting the findings of penal impact studies through imperfect channels, such as mass media would be unlikely to have much effect whatsoever.¹⁰⁵ What would be

¹⁰⁴ Christie (n 24), 100-101.

¹⁰⁵ Feilzer (n 102).

required would be a greater academic engagement in public and political discourse (subject to the need for academic impartiality), which is far easier said than done. However, it is reasonable to examine criminal punishment in a public forum, and to ask “the public” whether and to what extent they are satisfied with the pains inflicted in their name, and on their behalf.¹⁰⁶ If this can be used to improve the capacity of penal politics (and therefore penal policy) to reflect the experienced realities of imprisonment, then for all its potential limitations, penal impact would be a step in the right direction, and a useful addition to our arsenal of frameworks within which to measure penal severity.

¹⁰⁶ Recall Ristroph (n 90).