



Deposited via The University of Sheffield.

White Rose Research Online URL for this paper:

<https://eprints.whiterose.ac.uk/id/eprint/241147/>

Article:

Bennett, C. (2026) What do we need from an account of lex talionis? A response to Lewis. *Journal of Legal Analysis*, 18 (1). pp. 80-87. ISSN: 2161-7201

<https://doi.org/10.1093/jla/laag002>

Reuse

This article is distributed under the terms of the Creative Commons Attribution (CC BY) licence. This licence allows you to distribute, remix, tweak, and build upon the work, even commercially, as long as you credit the authors for the original work. More information and the full terms of the licence here:

<https://creativecommons.org/licenses/>

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.



What do we need from an account of lex talionis? A response to Lewis

Christopher Bennett *

The University of Sheffield, School of History, Philosophy and Digital Humanities, United Kingdom

*The University of Sheffield, 9 Mappin St, Sheffield S1 4DT, United Kingdom.

E-mail: c.bennett@sheffield.ac.uk

Abstract

This paper is a response to Christopher Lewis's recent paper on lex talionis. I claim that Lewis's interpretation cannot answer some of the questions that it needs to. In particular, we need to understand what our fundamental motivation is for subscribing to a principle of proportionality in the first place. Facing this kind of question head on is the only way to rehabilitate the principle of lex talionis—if indeed, it merits rehabilitation.

1. INTRODUCTION

Something like a principle of lex talionis seems to play a significant role in our ethical life as well as in our systems of criminal justice. Nevertheless, it is a controversial matter whether the principle survives critical scrutiny. Critics have argued that the idea is at best morally repugnant and at worst completely meaningless. Not a happy set of alternatives. Christopher Lewis, by contrast, argues not only that lex talionis can be operationalized with reasonably precise results, but that the results are radically lenient by comparison to current US sentencing practice (Lewis 2026). Lewis claims that “in today's United States, the lex talionis principle implies a case for reducing time served in prison for nonhomicide offenders by an order of magnitude or more” (Lewis 2026: 20). His argument, if successful, would show that critics are wrong to think that lex talionis is a key contributor to the moral catastrophe of mass incarceration. Lewis claims rather that “the ‘eye for an eye’ principle can provide a clear, principled, explanation of what is wrong with American mass incarceration: the amount of time people serve in prison for nonhomicide offenses is wildly disproportionate” (Lewis 2026: 20).

These are great headline conclusions. I am on board with thinking that we urgently need to re-examine basic moral ideas about punishment and desert (Bennett 2024). It is highly plausible that some key institutions of our social world are partly structured by inadequate interpretations of ideas like lex talionis. And I recognize the ingenuity and analytical skill, not to mention impressive command of a range of disciplines, that has gone into Lewis's project.

However, I will urge that our reinterpretation of proportionality needs to be more thoroughgoing than the one offered by Lewis. Lewis's project is consciously a limited one. He does not defend a view of lex talionis. He simply claims that there is at least one interpretation of lex talionis that is operationalizable and that leads to surprisingly lenient results. However, I will claim that Lewis's interpretation cannot answer some of the fundamental questions that it needs to be able to answer. In

particular, I will claim, we need to understand what our fundamental motivation is for subscribing to a principle of proportionality in the first place. Facing this kind of question head-on is the only way to rehabilitate the principle—if indeed, it merits rehabilitation. If we have a good answer to the question of why proportionality is important, it will help us to see what proportionality requires in any given case. However, doing these hard yards might also help us to respond better to the criticisms Lewis is trying to counter. If we have a better sense of what we are doing (and why) in pursuing proportionate responses to criminal activity, we can address directly claims that proportional punishment is morally repugnant. With such an account in hand, it may then matter less if particular judgments about what proportionality requires in a given case remain unclear or contestable. In a word, contrary to Lewis, operationalizability may turn out not to be the cardinal virtue of an interpretation of cardinal proportionality.

2. LEWIS'S ACCOUNT

As I have noted, Lewis's paper attempts to unpack the idea of proportionality between seriousness of crime and severity of punishment in such a way that the resulting interpretation is both capable of implementation and surprisingly lenient. Furthermore, I take it that the clear implication of his paper is that this leniency is highly morally attractive in certain respects.¹ To see how the account works, we need to understand three things: how, on Lewis's interpretation, we should think of the seriousness of crime; how we should think about the severity of punishment; and how we should think about the relation of proportionality between the two of these in such a way as can be readily implemented.

The seriousness of the crime, on Lewis's interpretation, is a function of the harm associated with the crime, multiplied by factors between 0 and 1 representing levels of risk and culpability. He takes the harm associated with the crime to be determined by the costs of crime, where this stands as a proxy for the crime's effect on victim well-being (it is not clear how this view handles crimes that do not cause harm or where the harms are diffuse rather than centered on an individual). If there was zero risk of such harm from the offender's conduct, the level of seriousness of the crime would be zero; but on the assumption that there was some risk that the conduct would incur relevant costs, there is some level of seriousness. To determine whether there is some degree of seriousness, we need to move to assess culpability. Note, however, that it is an implication of Lewis's approach that what determines seriousness on the harm component is only the harm risked; it makes no difference, on this calculation, whether that risk is actualized.

Culpability, meanwhile, has two components, also both measured from 0 to 1: level of control and badness of motivation. If the offender had zero control, or a morally pure motivation, this would reduce the seriousness of the crime to zero, no matter what harm had been caused or risked. There could be questions about what is meant by control, whether it is the degree of one's control over one's own *harmful conduct* or control over the *harmful consequences* of one's actions. However, on the assumption that there is some level of control and some level of wickedness, and that some degree of harm has been risked, the crime will have some degree of seriousness. For the principle to be operationalizable in the way he wants, Lewis's interpretation of lex talionis requires at least proxy quantifications for these 'levels' or 'degrees.' This may be harder to envisage in some areas more than others: for instance, even if we can quantify harm as costs of crime and quantify risk, can we quantify control or wickedness? We will return to these questions later.

On Lewis's interpretation, severity of punishment is measured by hardness of treatment, where that is determined by its effect on the wrongdoer's well-being. Well-being is a controversial and complex matter. Again, for the purposes of making operationalizable judgments of proportionality, Lewis requires an account of well-being that is quantifiable. It is predictable, therefore, that he steers clear of normatively rich Aristotelian accounts of well-being as meaningful engagement with worthwhile pursuits or values. For the purposes of operationalizing lex talionis, Lewis considers well-being a matter either of pleasure and pain, as in the hedonistic theory, or of desire-satisfaction, where there seems to be some room for desires to be more or less important. To be fully operationalizable, the interpretation would further need to specify whether severity depends on the actual effect on each individual offender's well-being or on some estimation of the probable effect on a typical offender's well-being.

¹ I should note that in communication Lewis has denied this implication.

Now let us consider how Lewis's interpretation sees the relation of proportionality between seriousness of crime and severity of punishment. On this point, "fit" is interpreted literally as an equivalence between the former and the latter. Lewis doesn't really explain this theoretical choice. Proportionality is a rich idea, and equivalence is at the literal, some might say simplistic, end of things. If you do me a favor, then my thanks to you should be proportionate: neither over-the-top nor mean-spirited, but properly fulsome. However, proportionate gratitude does not require equivalence; indeed, strict equivalence might be a bit weird in the context of gratitude. My suspicion is that Lewis opts for proportionality as equivalence because he is keeping his eyes on operationalizability. We will return to whether this is the right priority below. But given this understanding, proportionate punishment, in Lewis's terms, involves an equivalence between 1 the product of, on the one hand, the harm associated with the offense, and on the other (as a factor between 0 and 1), the degree of risk of that harm occurring, the degree of control that the offender had, and the degree of the wickedness the offender manifested in so acting; and 2 the (probable?) detrimental effect of the punishment on the (typical?) offender's well-being.

With these understandings of the seriousness of crime, severity of punishment, and the proportionality between the two on the table, Lewis argues that it is possible to determine, in a reasonably precise and operationalizable way, which type of punishment is equivalent to which type of crime. He illustrates this in his discussion of the anchor point for his scale of equivalences. Lewis calculates that 40 years in a US prison is not a disproportionately lenient punishment for murder (if anything, it is too severe). This anchors a sentencing scale that is meant to be an uncontroversial conclusion given the search for equivalence between the cost of crime and severity of punishment. Indeed, the conclusion is a conservative one, employing assumptions biased against the Lewis's view. With that anchor point held fixed, we can then plot a range of punishments that would be equivalent, on the same set of assumptions, to less serious crimes from rape to larceny, and so on.

Lewis takes this interpretation of *lex talionis* to give determinate and implementable results, and he strongly implies, I believe, that in virtue of recommending huge reductions in sentences, the resulting interpretation is morally attractive.² He concludes that his account shows how the main criticisms that face the notion of proportionality in criminal justice can be met. In what follows, I identify reasons to think that Lewis's approach has not succeeded in this aim.

3. SOME INITIAL PROBLEMS FOR LEWIS

An initial question is, does Lewis succeed in devising an interpretation of *lex talionis* that can feasibly be operationalized? As I have suggested, this would rely on having understandings of the seriousness of crime and severity of punishment for which there are at least quantifiable proxies, and an understanding of equivalence that is more or less literal. Lewis need not be committed to a particular way of quantifying seriousness and severity. But he must at least be committed to the idea that a reasonable quantification is available. On this point, he is more optimistic than I am. As I mentioned, it is hard to see how control and wickedness can be quantified. I don't doubt that it makes sense to talk about greater and lesser degrees of control and wickedness. However, I doubt that these are susceptible to plotting on a numerical scale. While quantifiable proxies could be used, my concern is that to do so would be inaccurate and distorting of the basis of our grip on greater and lesser in these areas. Similarly, take Lewis's observation that most lifers would not choose death over life imprisonment. He takes this to show that revealed preferences are not always a good guide to well-being. While I agree that revealed preferences are not always a good guide to well-being, I think revealed preferences may be at least in some way measurable. However, it is harder to see how the same can be said about the kind of "informed" preferences that Lewis seems to have in mind. Any final evaluation of whether Lewis's account is operationalizable would depend on a more precise specification of how the relevant notions are to be understood, so I will refrain from making any such evaluation. But this is not the main challenge facing Lewis's view.

Say the answer to this initial question is yes, Lewis does succeed. Then Lewis will have established that there is at least one way in which *lex talionis* can be interpreted that will give us practically implementable results. However, is that enough to show that the main objections to *lex talionis* can be answered? I do not think so. There is a further question as to whether the account thus arrived at is one that we have independent reason to accept. Lewis may have shown that there is an interpretation of *lex talionis* that gives morally acceptable results. But he does not show that it gives those results for

² See footnote 2.

the right reasons. The outputs of the theory are morally attractive in the sense that they recommend something much less harmful than lex talionis is sometimes taken to recommend. But this is not yet a good argument that this is the right way to interpret lex talionis.

One way to dramatize this general point is to consider what Lewis can say to someone who claims that his conclusions about the desirability of radically reducing the severity of sentences are nothing but soft liberal claptrap. Lewis has devised his interpretation to counter criticisms from theorists concerned about over-punishment. Furthermore, the crucial thing that is meant to be appealing about his interpretation to those critics is its results when operationalized. However, it would be odd to put forward an interpretation of lex talionis that one thought only appealed to a certain reader, and only because of its results. Certain big questions about such an account simply cannot be answered. For instance, if a reader is not immediately convinced of the attractiveness of the results of a given interpretation of lex talionis, we would normally look to explain the foundational claims that ground that result, showing, for instance, how those results follow from values that the disputant has reasons to accept. However, it is not clear how we could explain the attractiveness of the results of lex talionis as Lewis understands it, other than that they would not lead to mass incarceration.

This suggests that something is missing in Lewis's approach. We can start to put our finger on what this is by considering that a full defense of any conception of proportionality would need three components. First, an explanation of how the "fit" between crime and punishment is to be conceived. Second, and fundamentally, an explanation of why the lex talionis principle so understood is plausible and morally attractive. Third, an explanation of what the principle so understood demands in practice, and how or to what extent it could feasibly be operationalized. On common philosophical approaches, the second component is foundational in the sense that it alone can provide the necessary orientation for addressing the first and third. It is not necessarily that, methodologically speaking, one must begin with the second component and then work outwards; that may or may not be true as a matter of the actual progress of philosophical inquiry. But in a full theory there should at least be some second component, and it must be coherent with the answers given in the first and third components, and provide grounds for those answers. Lewis does deploy answers to the first and second components. On the first, the answer is equivalence; on the second, it is assumed that lex talionis captures durable intuitions about permissible upper limits of punishment. But these choices are not given explicit defense. In particular, it is not explained what morally attractive account of lex talionis is being assumed that dictates the choice of equivalence as the account of proportionality and dictates the other theoretical choices in regard to the account of crime seriousness and severity of punishment.

I claim that this failure to engage with foundational questions prevents Lewis's account from meeting even its limited aim of showing that at least one interpretation of lex talionis is operationalizable and produces strikingly lenient results. In what follows, I briefly develop a range of arguments against Lewis's account. I claim:

- 1) Feasible implementation drives the value base of Lewis's interpretation, rather than the other way round: no independent reason is given for key theoretical choices involved in his account.
- 2) An overriding concern with feasible implementation leads Lewis to adopt positions on particular issues that are problematic.
- 3) While officially neutral on the justification of punishment, Lewis's approach in fact rules out some potentially plausible accounts, and indeed it is unclear what account of punishment his view is compatible with.
- 4) We cannot give non-arbitrary answers to the question of how lex talionis ought to be operationalized without addressing the question of the overall point or justifiability of the principle.

4. DEVELOPING THE CRITICISMS

Let me now expand on concerns 1–4.

Feasible implementation drives the value base of his theory, rather than the other way round: no independent reason is given for these theoretical choices.

My initial concern with Lewis's interpretation is that it has things back to front. Lewis's concern with feasible implementation drives the value base of his theory, rather than the other way round. When it comes to various choice points in the development of the account, Lewis opts for what he sees as a feasible account, but without questioning whether the result remains plausible and attractive as an

interpretation of what draws us to *lex talionis* in the first place. One such choice point is the assumption that proportionality should be understood as equivalence. This is based on a literal reading of the idea that punishment should fit the crime that most people interested in retributivism would reject. As I understand it, the only reason for this undefended choice is that it makes it more plausible that, on broadly welfarist assumptions, we can feasibly find an equivalence between seriousness of crime and severity of punishment. This choice is not made because it is independently theoretically valuable. The feasibility is driving the value base rather than the other way around.

In regard to the seriousness of crime, Lewis focuses on a harm-based account where harm is thought of in terms of the costs of crime. This theoretical choice is not argued for as independently plausible; rather, it seems to be adopted overtly because it helps with the operationalizability of *lex talionis*. Similarly, in selecting a theory of well-being, Lewis opts for hedonism or desire-satisfaction because he thinks that only those theories allow the interpersonal comparisons of well-being that judgments of equivalence between effects on victims and effects on offenders require. However, if it were to turn out that these theories are independently implausible (which is quite compatible with Lewis's argument), Lewis's use of them would not help us toward an account of *lex talionis* that we could regard as independently plausible.

His overriding concern with feasible implementation leads Lewis to adopt some problematic positions.

Furthermore, we have reason to doubt that the theoretical choices to which the concern with operationalizability drives Lewis are independently justifiable. For instance, Lewis opts for a harm-based account of the seriousness of crime, rather than one that prioritizes a notion of wrong that is at least partially independent of the seriousness of harm (Hampton 1992). Starting with wrongs would immediately make it harder to see how a strictly equivalent punishment could be sought—or what this would even mean. However, this theoretical choice brings problems in its wake. As I have already suggested, Lewis's account will struggle to deal with cases of harmless wrongdoing, cases of risky behavior where the level of harm risked cannot be determined precisely, and cases in which the amount of harm risked may simply be indeterminate.

Furthermore, the harm (typically) caused by an offense-type might depend on socially contingent factors. For instance, the harms associated with being a victim of rape might be exacerbated by substandard care and stigmatizing social attitudes. This could lead to radical differences in harms associated with offenses, and therefore, in the author's view, radically different punishments that have nothing to do with the offender's own culpability. If we compare two offenders, one who commits rape in an enlightened society that cares adequately for the victims of rape and one who commits rape in a society that is far less enlightened in that sense, the latter will end up, on the author's assumptions, being punished far more severely. This seems unsettling even to someone who is prepared to allow a measure of outcome-luck, because the harm in the second society results from failures of others to e.g. provide proper services, rather than from the sheer unlucky consequences of the offender's own actions.

If, by contrast with Lewis, one took the fundamental notion in crime seriousness to be that of seriousness of *wrong*, it is likely to appear immediately that equivalence is implausible as a conception of proportionality. There would be no sense in arguing that a person should be wronged in the way that they have wronged another. We might adjust the view so that it held not that the offender should suffer a like wrong, but that they should suffer the same treatment as that in which their initial wrong consisted. This would mean that murderers should suffer the treatment that murder consists in—i.e. intentional killing—and rapists should suffer sexual violation. This cannot be a good way of eliciting what might seem, to a reasonably virtuous person, correct in the *lex talionis* principle. Hence most people concerned to defend *lex talionis* or proportionality do not think of it in terms of equivalence. My own view, which I will expand on briefly below, is that to orient ourselves in this area, we should look at what proportionality consists of when we talk about responses other than punishment: for instance, the proportionality of gratitude, or anger behavior, or joyfulness.

While officially neutral on the justification of punishment, Lewis's approach in fact rules out some potentially plausible accounts, and indeed it is unclear what account of punishment his view is compatible with.

While he acknowledges that the usual home of lex talionis is a retributive account of punishment, Lewis is officially neutral on the topic of what justifies punishment. However, it is not clear that the question of what kind of proportionality we are looking for can be addressed independently of a particular view of punishment. At the very least, it is plausible to think that an account of proportionality and an account of punishment are interlinked. While one might be able to make claims at a very general level about what proportionality demands without an overall account of punishment to sustain it, such an account will be needed to explain and underpin detailed judgments of proportionality.

Lewis, however, assumes that lex talionis can be defended independently of an account of punishment. At any rate, he assumes—or at any rate, strongly implies—that we can see the attractiveness of his account of lex talionis on the basis of its lenient results, independently of further foundational justification. He does not defend this assumption against the line of thought I outlined in the previous paragraph, however: namely, that foundational justification is needed to underpin claims about specific results. This assumption—which is central to his set-up—needs a defense. Furthermore, on the face of it, it is hard to see how Lewis's version of proportionality would be an attractive addition to e.g. the retributive communicative theory defended by Antony Duff and his followers (Duff 2001). It is hard to see how equivalent harm could be what is deserved if Duff is correct that what is deserved is some treatment that could be a meaningful penance. This is, of course, not to assume that Duff's theory is correct. But it shows that Lewis is implicitly presupposing some background retributive theory of why we need lex talionis, which is compatible with some approaches and not with others. The articulation and defense of this background view would strengthen Lewis's view; however, it may also turn out that the resulting background theory is not an attractive one.

If I try to articulate the conception of retributivism that is compatible with all of Lewis's assumptions (that is, assumptions about the seriousness of crime, severity of punishment, and equivalence as the correct conception of proportionality), I find it hard to say what it would look like. This is not to say that it cannot be done. However, it would be a serious problem for Lewis if there were no theory of punishment in which his account of lex talionis were at home. I think that if it cannot be shown that there is some attractive conception of punishment that coheres with his view, this would significantly weaken Lewis's account.

We cannot give non-arbitrary answers to the question of how lex talionis ought to be operationalized without addressing the question of the overall point or justifiability of the principle.

The main contribution of Lewis's paper lies in showing that there is a way in which equivalence could feasibly be operationalized. The major question I have raised is whether this conclusion is still of interest when it has not been shown that the equivalence in question is a plausible, morally attractive, and not simply feasible, interpretation of lex talionis. In other words, do the punishments that Lewis recommends speak to the reasons that we have for being interested in lex talionis in the first place, given that those reasons cannot just be to do with feasibility?

To operationalize something is to show how it might work. But, if the arguments developed here are correct, Lewis has not yet shown that lex talionis can work to do something that anyone has reason to want to do. It is true that he has shown how we can devise a method that has claims to equivalence that will deliver a determinate result. But his is not the only possible such method—we could make up all sorts of versions of lex talionis that meet these conditions. What makes Lewis's particular set of determinate results the ones that we have reason to endorse?

Lewis wishes to claim that his method can overcome the charge that claims about proportionality are arbitrary. This is true in the sense that the method delivers determinate results. But I don't think it has thereby been shown that the choice of method is non-arbitrary. That is, it has not been shown that the specific understanding of lex talionis deployed by Lewis is non-arbitrary. Without showing that the choice of method is non-arbitrary, the fact that the method gives determinate results does not give a satisfying answer to the arbitrariness concern that Lewis claims to be addressing. Without getting some sense of the theoretical and normative background that is driving the specific understanding of lex talionis deployed here, and why that might be attractive, the argument does not yet do what it sets out to do.

5. AN ALTERNATIVE APPROACH TO LEX TALIONIS

If the concerns developed here motivate the search for a deeper reinterpretation of *lex talionis*, one that will avoid the problems of indeterminacy and mass incarceration, but will have a place within an attractive overall account of punishment and proportionality, where should we look? My suggestion would be to start by taking note of the fact that proportionality is a notion non-contingently related, not just to legal punishment, but to phenomena that are plausibly closely linked to legal punishment, such as condemnation and apology. Condemnation and apology can both be over-the-top; they can both be underwhelming; they can also both be proportionate.

When it comes to minor wrongs, a merely verbal response of condemnation or apology might be enough. But for serious wrongs, condemnation and apology must involve overt actions directed at the wrongdoer for their wrongdoing. These actions connect with the need to take the wrongdoing seriously. The relevant actions respond to the fact that the wrongdoing has changed how it is now appropriate to relate to the wrongdoer. In the face of serious wrongdoing, it is normally morally necessary to avoid treating the wrongdoer as if it were just business as usual. Some response is needed on the part of the wrongdoer to make up for the wrong and set things right before normal relations can be resumed. What, and how much, has to be done by way of dissociation from the wrongdoer, and how much the wrongdoer has to do to redeem themselves, are matters governed by norms of proportionality.

We are highly practiced—and highly skilled—in making such proportionality judgments. Whatever critics might say about the special case of retributive legal punishment, the claim that proportionality is indeterminate is unsustainable when it comes to everyday moral practice. This is not to say that everyone agrees about what makes condemnation or apology proportionate. But our thinking in this area is sufficiently rich that we have the basis of a space of reasons in which we can engage in rational inquiry about such issues, pursuing answers to our questions and refining our views on the basis of relevant considerations. In everyday moral practice, we draw on a body of thought, rooted in examples, that concerns the identification of what it is to condemn or apologize *enough* for a given wrong. Given the centrality of condemnation and apology to human relations, it is hard to see how society could function unless we had some shared basis for thinking about proportionality in this area. While I cannot present this argument in detail here, it seems to me highly implausible that our space of reasons as it concerns proportionate judgments about wrongdoing licenses the kinds of judgment that underpin the moral catastrophe of mass incarceration.

So much, then, for the claim that proportionality is indeterminate. The view of the basis of proportionality that I am outlining also fits into a morally attractive account of what we are doing in responding to wrongdoing. Condemnation and apology are not the only responses subject to a norm of proportionality. The same can be said about other actions like celebrating, thanking, welcoming, and mourning. In recent work, I have suggested that it is useful to think about this whole range of responses as the phenomenon of *expressive action* (Bennett 2016, 2026). An expressive action is a symbolic action that marks a situation as in some way significant, and where the symbolism of the action relates non-arbitrarily to the features of the situation being marked. In many pivotal situations in human life, we experience a need to do something simply to mark that situation: that is, to acknowledge its significance, independently of (also) trying to change that situation. If someone close to us dies, it would be very strange not simply to mark that fact. In trying to mark it, we are not simply noticing the fact; we try to do something that will *do justice* to the significance that the event holds for us. My claim is that we (rightly) experience as powerful a range of responses whose form in some way *speaks to* or *symbolizes* the situation we are marking. For instance, we might find it powerful to carry the coffin of a loved one on their journey to the grave (Bennett 2016). In order to have marked the situation properly, one needs to have done something that relates intelligibly to the gravity of the situation. Hence, expressive actions in general are subject to a norm of proportionality.

It is highly plausible that situations of serious wrongdoing are pivotal situations that we need to mark in this way. Marking them adequately involves finding actions with features that speak to the situation so understood. As I have previously argued, a plausible candidate for the appropriate expressive action in the case of serious wrongdoing is *dissociation*: a partial and temporary withdrawal of the normally required forms of respect and recognition from the wrongdoer, in virtue of their violation of the terms of moral community (Bennett 2008, 2024). In the case of apology, we mark the situation of our own wrongdoing by undertaking something penitential, which constitutes dissociation from oneself.

While it evidently requires further work to show how this might translate to the special case of legal punishment, my suggestion is that this idea of proportionate marking of wrongdoing by dissociation from the wrongdoer is the basis for an attractive conception of retributive proportionality. This requires a view of punishment on which it centrally shares features with condemnation and apology. One way to develop this thought would be to argue, as I have previously, that punishment condemns crimes in a way proportionate to their seriousness as wrongs by making the wrongdoer undertake the kind of penitential action that they would undertake willingly if they were properly apologetic for what they have done (Bennett 2008).

This brief sketch is clearly insufficient to vindicate this alternative approach to proportionality. But I hope to have done enough to show how there might be materials to build a case that proportionality judgments are not indeterminate, and that they have their place in an attractive overall account of what we are doing in responding to wrongdoing.

6. CONCLUSION

Christopher Lewis's paper on lex talionis is an impressive piece of scholarship. I share many of its headline aims. Nevertheless, for reasons that I have suggested, I don't think that it can do the work of rehabilitating the retributive principle of proportionality in even the limited way Lewis hopes. I have briefly tried to explain the fundamental context in which judgments of proportionality have their life. While legal applications of proportionality will differ in significant ways from proportionality "in the wild," it seems unlikely that the former can proceed in a non-arbitrary fashion without substantial reference to the latter.

ACKNOWLEDGMENT

For discussion and comments on an earlier version, I am grateful to Chris Lewis and to the editors of this journal.

REFERENCES

- Bennett, C. (2008) *The Apology Ritual: A Philosophical Theory of Punishment*, Cambridge: Cambridge University Press.
- Bennett, C. (2016) 'Expressive Actions', in Abell, C., and Smith, J., (eds.) *The Expression of Emotion: Philosophical, Psychological and Legal Perspectives*. pp. 73–94, Cambridge: Cambridge University Press.
- Bennett, C. (2024). 'Desert and Dissociation', *Journal of the American Philosophical Association*, **10**: 116–34.
- Bennett, C. (2026) *Expressive Action: A Philosophical Exploration*, Oxford: Oxford University Press.
- Duff, R. A. (2001) *Punishment, Communication and Community*, Oxford: Oxford University Press.
- Hampton, J. (1992). 'Correcting Harms Versus Righting Wrongs: the Goal of Retribution', *UCLA Law Review*, **39**: 1659–702.
- Lewis, C. (2026). 'Unlocking Lex Talionis', *Journal of Legal Analysis*, **18**: 19–32.