

Reforming Maximum Sentences and Respecting Ordinal Proportionality

Rory Kelly*

“Has not the time come for new statutory maxima?”¹

Summary

It is the fortieth anniversary of the review of maximum sentences by the Advisory Council on the Penal System. This article examines the ongoing issues with setting statutory maxima and reflects on the Advisory Council’s review. It argues that when appraising the appropriateness of a maximum sentence, comparison to the maxima of other offences is theoretically grounded. Yet problems arise in practice due to the historical contingency of statutory maxima. It argues that there is too much scope for the rhetorical use of comparison to increase maxima and, indirectly, to drive-up sentencing levels. The time has come for a new review.

Forty years ago, the Advisory Council on the Penal System reviewed the maximum penalties of imprisonment for statutory offences.² The anniversary of the review is not only an opportunity to look back, but also an opportunity to critically appraise ongoing issues with setting statutory maxima.

The article is presented in five sections. Section I will explain the theoretical foundations of comparison to sentences for other offences when reviewing maximum sentences. To do so, the

* Worcester College, University of Oxford. My thanks to Andrew Ashworth, Lyndon Harris, Karl Laird, Julian Roberts, Leila Tai, and Lucia Zedner for their comments on earlier drafts. Thanks also to the reviewers and the Editor. I acknowledge that I was employed by the Law Commission between September 2015 and September 2016.

¹ Winston Churchill (1910) as cited in Advisory Council on the Penal System, *Sentences of Imprisonment* (London: Her Majesty’s Stationery Office, 1978), p.1.

² Advisory Council on the Penal System, *Sentences of Imprisonment* (1978).

section will draw on von Hirsch’s work on ordinal proportionality which, in essence, requires that the graver the offence the more serious the sentence it should attract.³ Section II will argue that statutory maxima for new offences are not set in a considered manner and that this undermines the capacity to compare them appropriately with other offences to help maintain ordinal proportionality. The section will draw on the Advisory Council’s review. Section III will then engage critically with recent parliamentary debate on the maximum sentences for stalking and animal welfare offences. It argues that parliamentarians have employed a flawed and rhetorical form of ordinal proportionality—based on comparison to sentences that were not themselves appropriately considered—to increase maximum sentences. Section IV argues that statutory maxima, and their reform can still, albeit indirectly, affect sentencing practice in an era of sentencing guidelines. Two recent Sentencing Council consultation documents that were influenced by the reform of statutory maxima are examined to substantiate this indirect affect argument. Section V concludes the article by making a call for the reform of statutory maxima.

I. Ordinal proportionality and comparing maximum sentences

On von Hirsch’s account, there are two forms of proportionality: ordinal and cardinal.⁴ Ordinal proportionality requires that a penalty should be proportionate to the gravity of the offence for which it is imposed. Those convicted of grave crimes ought to have correspondingly severe sentences, and those convicted of less grave crimes ought to have correspondingly less severe sentences. It is thus a relative concept. Cardinal proportionality, by contrast, is a non-relative concept. It sets the overall level of punishment on a scale. So a sentencing system may be

³ Andrew von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1996). It is beyond the scope of this article to engage with the larger question of whether maxima should be influenced by consequentialist factors such as deterrence as well as or instead of concerns related to proportionality. An initial issue for those who would want deterrence to underpin reform of maxima is the lack of empirical evidence: Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 2015), pp.84-85.

⁴ Andrew von Hirsch, “Proportionality in the philosophy of punishment” (1992) 16 *Crime and Justice* 55, 75-79; Von Hirsch, *Censure and Sanctions*, pp. 17-19; Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005), pp.137-147. Von Hirsch does not focus on the proportionality of maximum sentences to the gravity of offences, but instead on the proportionality of sentences handed down to the gravity of offences. This limitation informs the more conservative application of von Hirsch’s work in this article.

cardinally disproportionate if the sentences it imposes are too high even if graver offences are punished more severely than less grave offences.⁵ This article focuses on ordinal proportionality.

If a maximum sentence is to be ‘ordinally proportionate’, comparisons to the maximum for other offences must be drawn. To this end, von Hirsch comments:

“If the penalties for some other crimes have been decided, then the penalty can be fixed for (say) a robbery by comparing its seriousness with those other crimes.”⁶

Yet care must be taken when relying on such comparisons. As Feinberg wryly remarked: “Certainly, there is no rational way of demonstrating that one criminal deserves exactly twice or three-eighths or twelve-tenths as much suffering as another”.⁷ This article does not claim that comparison alone is sufficient to evidence the relative seriousness of different offences and to do so precisely. It claims instead, and more conservatively, that comparison can frame consideration of the relative seriousness of offences. Such framing can allow maximum sentences that depart significantly from contemporary views of the seriousness of offences to be addressed. In other words, comparisons allow us to reflect as follows: “The maximum sentence for offence X appears too low when compared to the maxima for offences Y and Z. Is there a reason why? Do we need to reform the sentences of any of crimes X, Y or Z so they reflect our views of the gravity of the offences?” If we engage with such comparative questions, it can allow us to maintain the ordinal proportionality of our sentencing system as our views of the seriousness of different offences change over time either due to our perceptions of the offence or factors external to it (such as technological advances). Comparison is thus not a

⁵ For criticism of cardinal proportionality, see Nicola Lacey and Hanna Pickard, “The chimera of proportionality: institutionalizing limits on punishment in contemporary social and political systems” (2015) 78(2) M.L.R 216, 227. Replying see, Andrew Ashworth, “Prisons, proportionality and recent penal history” (2017) 80(3) M.L.R 473.

⁶ Von Hirsch, “Proportionality in the Philosophy of Punishment”, (1992) 16 Crime and Justice 55, 77.

⁷ Joel Feinberg, “The Expressive Function of Punishment” in *A Reader on Punishment* (article first published in 1965, Oxford: Oxford University Press, 1994), p. 88.

replacement for consideration of why our views on offence gravity have changed, but an aid to it.

Two comparator offences, Y and Z, are referred to above because comparison to only one offence would make it harder to discern which maximum has become inappropriate. Comparison to multiple other offences can help overcome this problem because it becomes clearer which, if any, of the maximum sentences may need to be reconsidered. In more empirical terms, the bigger the sample, the easier it is to spot an anomaly.

Even if it is accepted that comparisons *in abstracto* have utility, it may be suggested that particular types of comparison are problematic. The short answer to this is, to accept that there will always be factors which limit the utility of comparisons. By way of example, the gravity of some offences is more variable than that of other offences.⁸ Though normal incidences of offence V and W may be of comparable seriousness it may also be possible to commit offence V in a significantly more serious manner. An example of an offence that can be committed in a broad range of ways is causing or allowing the death of a child or vulnerable adult; it has a maximum of 14 years' imprisonment.⁹ The offence could be committed in ways that lie at opposite ends of the culpability spectrum: causing (where the offender does an unlawful act that presented a significant risk of serious physical harm) and allowing (where the offender does not need to be aware of the risk to the victim).¹⁰ The causing or allowing offence should

⁸ This point has also been made by Nigel Walker in a critical commentary on von Hirsch's work: "Legislating the transcendental: von Hirsch's proportionality" (1992) 51(3) C.L.J 530, 533.

⁹ Domestic Violence, Crime and Victims Act 2004, s.5. The offence was amended by Domestic Violence, Crime and Victims (Amendment) Act 2012, s.1 to add 'suffers serious physical harm' as well as death, but the maximum for the former is 10 years. A further example of such a broad offence is handling stolen goods as in Theft Act 1968, s.22.

¹⁰ The additional elements of the allowing version of the offence are set out in Domestic Violence, Crime and Victims Act 2004, s.5(d)(i)-(iii). They are: (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c) [to the victim], (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen. It is also to be noted that the Court of Appeal have recently set out that causing will not always be more culpable than allowing the death of a child: *Attorney General's Reference (R. v Mills)* [2017] EWCA Crim 559; [2017] 2 Cr. App. R. (S.) 7 [41]. For supportive comment, Lyndon Harris, "*Case Comment, Sentencing: Attorney General's Reference (R. v Mills (Julie Lillian))*" [2017] Crim. L. R. 664.

not be ruled out as a comparator offence simply because it can apply to wrongdoing of a broad range of seriousness. But if the comparator offence selected necessitates a maximum that allows wider sentencing provision than that to which it is compared, this should lead to greater circumspection. A single example of how the comparator offence can be committed should not be paired with the maximum sentence available because this would risk perceptions of the seriousness of the offence either being unfairly inflated or deflated.

A brief example of such misuse of comparison may be instructive. Section 20 of the Offences against the Person Act 1861 makes malicious wounding an offence; the offence has a maximum of five years' imprisonment. The offence could be applied to serious injuries caused by stabbing or a minor break of the skin caused by a pinprick. Pairing the maximum sentence for the offence with only the latter example could lead the reader to unfairly inflate sentencing levels in favour of increasing the maximum sentence for the offence under consideration: if you can get five years for a pinprick, then surely Offence X needs a higher maximum?

The practical implication of this point will be drawn out in section III through engagement with the reform of the maximum sentence for stalking. At this stage it is enough to note that comparison can, at least in theory, frame consideration of whether the maximum sentence for an offence remains appropriate.¹¹ This makes comparison imperative to maintaining ordinal proportionality over time.

II. The problem of historical accident

Our attention can now turn from ideal theory to history. Comparison can only be employed to help maintain ordinal proportionality if there are offences with ordinally proportionate statutory maxima with which the offence under consideration can be compared. The Advisory

¹¹ In practice, the trend is not of changes to maximum sentences over time but increases over time. This trend is critiqued further in Section III. The most recent example of the reduction of a maximum sentence known to the author is the reduction of the maximum for theft from 10 to seven years' imprisonment by the Criminal Justice Act 1991, s.26(1).

Council's review of maximum sentences, however, evidences that such ordinarily proportionate comparator offences do not exist.¹²

Some context is needed here. The Council undertook a 30-month review to examine statutory maximum sentences of imprisonment and their relevance for sentencing practice.¹³ The Advisory Council described the state of maximum sentences in 1978 as "governed by historical accident" and it emphasised "the lack of any rational system of maximum penalties".¹⁴ This state of affairs was a result, the Council argued, of Parliament introducing offences incrementally, and irregularly giving significant thought to what the appropriate maximum for a new offence ought to be.¹⁵ The Council took the maximum sentence for theft as the exemplar of this problem:

"The extent to which the pattern of maximum penalties has been governed by historical accident and not by any rational penal or sentencing policy is perhaps best exemplified by the variety of penalties for theft that have emerged over the years."¹⁶

The Advisory Council traced the myriad of maxima that were available for theft from 1717 until the Theft Act 1968. The 1968 Act increased the maximum sentence for theft from five years' penal servitude to 10 years' imprisonment.¹⁷ On this, the Council commented:

"This changing of the penalty for the most common crime was achieved without any reference to any other branch of the criminal law, except aggravated forms of theft and related dishonesty offences, and with scarcely any consideration of penal policy."¹⁸

¹² Advisory Council on the Penal System, *Sentences of Imprisonment* (1978).

¹³ Advisory Council on the Penal System, *Sentences of Imprisonment* (1978), paras.[1]-[6].

¹⁴ Advisory Council on the Penal System, *Sentences of Imprisonment* (1978), paras.[63]-[66].

¹⁵ Advisory Council on the Penal System, *Sentences of Imprisonment* (1978), paras.[63]-[66].

¹⁶ Advisory Council on the Penal System, *Sentences of Imprisonment* (1978), para.[66].

¹⁷ The maximum was again altered by the Criminal Justice Act 1991, s.26(1) to seven years' imprisonment.

¹⁸ Advisory Council on the Penal System, *Sentences of Imprisonment* (1978), para.[66].

The Council was of the view that this irrationality meant both that parliamentary attitudes to the relative seriousness of offences were not reflected in statutory maxima and that the maxima bore no relation to the sentences handed down in practice.¹⁹

The recommendations of the Advisory Council will be examined and challenged in section IV below. For now, it is enough to note that legislation did not follow the review. There has also been neither another review nor legislative overhaul of statutory maxima since the report of the Council in 1978. The problems identified by the Council remain. For present purposes, the consequence is that comparisons to the maxima of other offences cannot be assumed to help maintain ordinal proportionality. Due to the lack of a rational foundation in how maxima are set, it is questionable whether there is any ordinal proportionality to maintain.

III. The (ab)use of comparison in practice

We can now move from history to assess current practice. More specifically, this section critically appraises two recent examples of parliamentarians (ab)using comparison to other maximum sentences in debate. First, the work of Alex Chalk MP and Richard Graham MP on stalking,²⁰ and second, that of Neil Parish MP on animal welfare offences.²¹ The focus of the section is Chalk and Graham's report because they engage more substantively with comparison than Parish. Parish's work is included because it highlights that the use of problematic comparison is not unique.

In April 2016, Chalk and Graham published a report on the maximum sentences for stalking. They argued for an increase in the maximum sentences for the offences in section 2A (simple stalking) and section 4A (stalking involving fear of violence, serious alarm or distress) of the Protection from Harassment Act 1997. When the report was published, the maximum sentence for the section 2A offence was six months, and for the section 4A offence was five

¹⁹ Advisory Council on the Penal System, *Sentences of Imprisonment* (1978), para.[162].

²⁰ Alex Chalk and Richard Graham, *Stalking: The Case for Extending the Maximum Penalty* (House of Commons, 2016).

²¹ HC Deb. vol 624. col. 446 (30 March 2017).

years' imprisonment. The report concludes that the maximum for the section 4A offence ought to be increased to 10 years' imprisonment.²²

This conclusion is based, in part, on comparison to the maxima of other offences.²³ In fact, the report opens with a comparison that Chalk had relied upon previously:

“Stalking destroys lives. And yet the maximum sentence for this offence is just 5 years’ imprisonment - less than you can get for stealing a Mars Bar. It’s time for the punishment to fit the crime.”²⁴

Later in the report, the comparison of the maxima for stalking to those for acquisitive offences is fleshed out somewhat. Chalk and Graham²⁵ set out the maximum sentences for theft (seven years),²⁶ fraud (10 years),²⁷ robbery (life),²⁸ and burglary (of a dwelling 14 years, otherwise 10 years).²⁹ The report goes on to state:

“It seems disproportionate that an individual can serve a longer sentence for theft, a non-violent crime, than for stalking, which as this report shows can cause so much long term damage across an entire family... We believe that if the maximum sentence were extended that would more reflect the trauma that some innocent victims have to endure from their stalkers: the maximum sentence should be in line with the punishments imposed for the crimes listed above.”³⁰

²² Alex Chalk and Richard Graham, *Stalking: The Case for Extending the Maximum Penalty* (House of Commons, 2016) pp. 10-11.

²³ The report also draws on a rehabilitative argument and the views of victims: Alex Chalk and Richard Graham, *Stalking: The Case for Extending the Maximum Penalty* (House of Commons, 2016) pp. 8-9.

²⁴ Alex Chalk and Richard Graham, *Stalking: The Case for Extending the Maximum Penalty* (House of Commons, 2016) p. 2.

²⁵ Alex Chalk and Richard Graham, *Stalking: The Case for Extending the Maximum Penalty* (House of Commons, 2016) p. 9. These offences are not described as acquisitive by Chalk and Graham. They are collectively labelled as such here because they contain an acquisitive element, this is not to deny the other elements of the offences.

²⁶ Theft Act 1968, s.7.

²⁷ Theft Act 1968, s.8.

²⁸ Fraud Act 2006, s.1.

²⁹ Theft Act 1968, s.9.

³⁰ Alex Chalk and Richard Graham, *Stalking: The Case for Extending the Maximum Penalty* (House of Commons, 2016) pp. 9-10.

Chalk and Graham's report was praised in later parliamentary debates.³¹ The result of the debates was that section 175 of the Policing and Crime Act 2017 increased the maximum sentence for stalking involving fear of violence, serious alarm or distress to 10 years as recommended in the report.

As a second example, in a debate on the maxima for animal cruelty offences, in March 2017, Parish argued for an increase from the current maximum of six months to five years' imprisonment.³² This followed an earlier recommendation of the Environment, Food and Rural Affairs Committee of which Parish was chair.³³ Parish argued:

“We should also consider the message that it sends if the sentence for beating to death a sentient being that relies entirely on human care is less than that for, perhaps, stealing a computer; it really is not on.”³⁴

The then Minister of State, George Eustice MP, was non-committal in response; he suggested the current maximum appeared sufficient, but that he would speak to his colleagues.³⁵ Government have since announced plans to increase the maximum sentence to five years' imprisonment.³⁶

The underlying issue with the above use of comparison to the maxima of other offences will be apparent in light of section II. Parliamentarians are debating and reforming the law on a flawed premise. Ordinal proportionality cannot be upheld by such comparison if the maxima of the comparator offences are the result of historical accident. This point is accentuated by the fact that Chalk and Graham, and Parish relied on theft as their comparator offence. Theft, it

³¹ HC Deb. vol 619, col. 247 (10 January 2017).

³² Animal Welfare Act 2006, s.32; HC Deb. vol 624. col. 446 (30 March 2017).

³³ House of Commons Environment, Food and Rural Affairs Committee, *Animal Welfare in England: Domestic Pets* Paper No.117 (Session 2016-17) para.[175].

³⁴ HC Deb. vol. 624 col. 447 (30 March 2017).

³⁵ A Private Member's Bill that also aimed to increase the maximum sentence for animal cruelty failed to receive a second reading due to the dissolution of Parliament: Animal Cruelty (Sentencing) Bill 2016-17.

³⁶ Department for Environment, Food & Rural Affairs, Animal and Plant Health Agency, Lord, and Michael Gove MP “Sentences for Animal Cruelty to Increase Tenfold to Five Years” (30 September 2017) *Gov.uk*, <https://www.gov.uk/government/news/sentences-for-animal-cruelty-to-increase-tenfold-to-five-years> [Accessed January 24, 2018].

will be recalled, was the very offence the Advisory Council gave as the exemplar of maxima being the result of historical accident.

What is more, this flawed argument can be abused in a manner that risks inflating statutory maxima. To evidence this point, we can examine the use of comparison in the stalking report more closely. The report used two techniques worthy of comment. First, it misleadingly paired an example of theft and the maximum sentence for theft, and, secondly, it selected questionable comparator offences.

To deal with the report's more rhetorical point first, stealing a Mars bar cannot conceivably result in more than five years' imprisonment. The Sentencing Council's *Theft Offences Definitive Guideline* can be used to substantiate this claim.³⁷ The brevity of Chalk and Graham's example, means that to examine it more closely we must assume essential details in order to work through the guideline. The first assumption is that there was little or no planning before the Mars bar theft, and second is that the theft would not have caused significant harm to the victim. The theft would be of lesser culpability if it was not planned. It would also be of low harm: the good was of low value and would hold no special significance to the owner. Such a theft would likely fall within the least serious category: category 4C (lesser culpability and category 4 harm).³⁸ This is hardly a surprise; it is the theft of a chocolate bar. The starting point for sentencing in category 4C is a Band A fine.³⁹ If the Mars bar was stolen from a shop, the starting point would be even lower: a Band B fine.⁴⁰ Furthermore, a police officer could issue a Penalty Notice for Disorder in response to such a theft instead of even pursuing a conviction.⁴¹

³⁷ Sentencing Council, *Theft Offences Definitive Guideline* (October 2015).

³⁸ For the rules on mode of trial for low-value shoplifting see Magistrates' Courts Act 1980, s. 22A.

³⁹ Sentencing Council, *Theft Offences Definitive Guideline* (October 2015) pp. 4-7.

⁴⁰ Sentencing Council, *Theft Offences Definitive Guideline* (October 2015) p. 12.

⁴¹ Criminal Justice and Police Act 2001, s.1.

By comparison, for a five-year sentence to be imposed for theft, it would likely have to be a theft of high culpability that caused significant harm. An example of which would be a thief who deliberately targeted a vulnerable person and stole valuable goods from them.⁴² Such a theft would fall into the most serious category—category 1A (high culpability and category 1 harm)—which has a starting point of 3 years and 6 months’ imprisonment.⁴³ The offence would also have to be significantly aggravated—and be without significant mitigation or an early plea—to result in the imposition of a five-year sentence. Aggravating factors include: previous convictions, the offence being committed whilst on bail, the offence being racially motivated, and attempts to dispose of evidence.⁴⁴ The essential point is that to suggest the theft of a Mars bar could result in a five-year sentence is a serious misrepresentation of the likely sentence for a theft of this kind.

The later comparison in the stalking report to the maximum sentences for acquisitive offences generally is also questionable. The report does not give a reason for comparing the maximum sentences for stalking to acquisitive offences and acquisitive offences only. Furthermore, there is good reason to query such narrow comparison. The acquisitive offences listed in the report each target wrongs of a broad range of seriousness.⁴⁵ Compare, for example, the Mars bar theft and the targeting of a vulnerable person described above. As per section I, there is a risk posed when such offences are used as comparators: the reader of the stalking report may unfairly inflate the seriousness of the acquisitive offences because the only information they have to go on is the available maximum. Such inflation may, in turn, make the maximum for the stalking offence appear too low by comparison. The report does not address this risk, but instead exacerbates it. First, it neither alerts the reader to the risk of

⁴² Sentencing Council, *Theft Offences Definitive Guideline* (October 2015) pp.4-5.

⁴³ Sentencing Council, *Theft Offences Definitive Guideline* (October 2015) p.6.

⁴⁴ Sentencing Council, *Theft Offences Definitive Guideline* (October 2015).p.7.

⁴⁵ For critique of the breadth of behaviours that can constitute fraud, see David Ormerod, “The Fraud Act 2006 - criminalising lying?” [2007] Crim. L.R 193.

inflation nor gives examples of the acquisitive offences paired with appropriate sentences to reduce the risk. Added to this, the stalking offences were enacted relatively recently, in 2012.⁴⁶ The maximum for robbery has not been amended since the sixties,⁴⁷ and theft and burglary were last amended in 1991.⁴⁸ If the maxima for either stalking offences or acquisitive offences were thought not to reflect current perceptions of the seriousness of the crime, then surely the presumption should be that the maxima of the older offences were inappropriate.

The report also fails to draw comparison to offences which have the same maximum as stalking involving fear of violence, serious alarm or distress then had. Maliciously inflicting grievous bodily harm⁴⁹ and sexual activity with a child in abuse of a position of trust both have a five-year maximum.⁵⁰ The argument being made here is not that ordinarily proportionate maxima for stalking offences would have resulted if the report acknowledged the relative datedness of the acquisitive offences and/or other offences with a five-year maximum. Instead, the lack of such engagement indicates that the report relied on comparison to cherry-picked examples as a rhetorical device to justify an increase in the maximum for stalking.

Chalk and Graham's selective use of acquisitive offences as a set of comparator offences leads them to questionable conclusions. Yet their approach was unquestionably effective: the maximum sentence for stalking was increased. The use of comparison to other maxima by parliamentarians is therefore not only problematic because it is based on a flawed premise, it also risks a dangerous effect: the inflation of statutory maxima. The next section will explain the risk such inflation can pose in practice.

It is first important, however, to emphasise that this section suggests neither that stalking is a trivial matter nor that re-examining the maximum sentences for stalking was unjustified.

⁴⁶ Protection from Harassment Act 1997, ss.2A and 4A as amended by Protection of Freedoms Act 2012, s. 111.

⁴⁷ Theft Act 1968, s.8.

⁴⁸ Theft Act 1968 ss.7 and 9 as amended by Criminal Justice Act 1991, s.26.

⁴⁹ Offences Against the Person Act 1861, s.20.

⁵⁰ Sexual Offences Act 2003, s.16.

In fact, the report may well have been able to make a case for changing the maximum sentences for stalking offences if it compared them to other offences in the Protection from Harassment Act 1997. For instance, the harassment offence in section 2 of the Act has the same maximum as the simple stalking offence.⁵¹ Yet the simple stalking offence requires both the same course of conduct as the harassment offence and also the further wrong of that conduct “amounting to stalking”.⁵² Examples of conduct that can amount to stalking given in the 1997 Act include “following a person”; “interfering with any property in the possession of a person”; and “watching or spying on a person”. If the extra wrong constitutive of the simple stalking offence is to be reflected, then it is arguable that the offence should have a higher maximum sentence than the harassment offence. Though it would be near impossible to state what these maximum sentences ought to be without a wider review of statutory maxima.

It must also be stressed that this section has intended to evidence the misuse/abuse of comparison by parliamentarians and to show how this flawed comparison can be employed to increase maximum sentences. The section is not a criticism of the theory of ordinal proportionality. Braithwaite and Pettit have commented: “When you play the game of criminal justice on the field of retribution, you play it on the home ground of conservative law-and-order politicians.”⁵³ Similarly, Lacey and Pickard have stated:

“under conditions of a highly politicised climate for criminal justice policy-making, the commitment to just deserts all too easily produces insatiable demands for hard treatment.”⁵⁴

Yet to hold that misuse/abuse of the language of ordinal proportionality undermines it as a theory would be to conflate principle and practice. The comparisons relied on by

⁵¹ In the statute, the harassment offence has a maximum of six month’s imprisonment and the stalking offence has a maximum of 51 weeks. However, there is as of yet no indication that Government will bring section 154 of the Criminal Justice Act 2003 into force and thus extend magistrates’ sentencing powers beyond 6 months.

⁵² Protection from Harassment Act 1997, s. 2(a).

⁵³ John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1992), p.6.

⁵⁴ Lacey and Pickard, “The chimera of proportionality: institutionalising limits on punishment in contemporary social and political systems” (2015) p.238.

parliamentarians are dressed as respecting ordinal proportionality, but are rhetorical devices. We ought not to blame the theory, but instead beware the wolf in sheep's clothing.

IV. Maximum sentences and sentencing guidelines

The flawed use of comparison to increase maxima would be more tolerable if such increases did not pose a risk in practice. To understand the practical risk posed by heightened maxima, we must examine the importance of maximum sentences in an era of sentencing guidelines. Sentencing guidelines, of course, did not exist when the Advisory Council produced its report. It could be argued that disproportionate maximum sentences are of little relevance in practice because judges now rely on sentencing guidelines, not loose steering according to the relevant maximum, when they hand down sentences. This section looks to rebut such an argument by evidencing the indirect effect maxima can have on sentencing practices. Maxima and reform thereof can affect guidelines which in turn can affect practice. This claim can be substantiated through reference to two recent Sentencing Council consultation documents. Both documents comment explicitly on the effect of reforming a maximum sentence on the proposed guideline. In March 2017, the Sentencing Council published draft guidelines for intimidatory offences and domestic abuse, and a consultation document thereon.⁵⁵ Whilst the Council developed its guideline, Government amended the Policing and Crime Bill to, as described above, increase the maximum sentence for stalking from five to 10 years' imprisonment. The Bill received Royal Assent before the draft guidelines was published. The Council were left to comment on how this reform had affected their draft guideline. It stated:

“Sentences above five years are contained within one box, A1, which gives a sentencing range up to eight years, allowing some ‘headroom’ to the maximum available of ten years. Due to the very recent legislative change, this range is not based on any

⁵⁵ Sentencing Council, *Intimidatory Offences and Domestic Abuse Guidelines Consultation* (March 2017).

sentencing data. In taking this approach, the Council was mindful of the presumed intent of Parliament as evidenced by the debate within Parliament when the amendment was passed, that the increase to the maximum is intended to apply to the most serious cases within these offences.”⁵⁶

The reform of the maximum thus had a limited effect on the approach taken by the Sentencing Council because only the starting point and category range for the most serious offences was altered. Nonetheless, it seems that at least partly in consequence of a flawed comparison to acquisitive offences there is the likelihood of heightened sentences for stalking in practice.

The approach taken by the Council to stalking makes for interesting comparison to its later approach to the collection of terrorist information offence as per section 58 of the Terrorism Act 2000. In October 2017, the Sentencing Council published a draft terrorism guideline and a corresponding consultation document.⁵⁷ The draft guideline was published soon after the Government had announced plans to increase the maximum sentence for the section 58 Terrorism Act offence from 10 to 15 years’ imprisonment, but before this proposal had been placed into a Bill. This led the Sentencing Council to comment:

“The Council believe that the existing factors capture the range of offending that is likely to be seen by those committing this offence, however if the statutory maximum changes in accordance with the Government’s proposal, it would be appropriate that the sentences should be higher in order to reflect the will of parliament, and in recognition of the fact that this type of offending is now considered to be far more serious than perceived when the legislation was first enacted.”⁵⁸

⁵⁶ Sentencing Council, *Intimidatory Offences and Domestic Abuse Guidelines Consultation* (March 2017) pp.17-18. For discussion of upward departures see Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 2015), pp.34-35.

⁵⁷ Sentencing Council, *Terrorism Guideline Consultation* (October 2017).

⁵⁸ Sentencing Council, *Terrorism Guideline Consultation* (October 2017) p.64.

In consequence, the Council set out two alternative seriousness tables. The first table is drafted for the current 10-year maximum, and the second is drafted to apply if the maximum is increased to 15 years' imprisonment. Unlike with the draft stalking guideline, it is not only the most serious category of offences that would face an uplift in starting point and category range. There is, instead, a proposed uplift in the seriousness of every starting point and range. So, by way of example, for the table designed for the 10-year maximum, the starting point for an offence of Category 2 Harm and B Culpability is three years and the category range is two-five years. By comparison, in the table designed for the heightened maxima, these values are increased to a starting point of four years' imprisonment and a category range of two-six years.⁵⁹ These two recent examples demonstrate that maxima and their reform can affect guidelines which in turn can affect practice.

There is thus a variation in the extent to which reform of maxima has affected draft guidelines: for stalking the reform only affected the most serious offences and for section 58 the proposed reform could affect any incidence of the offence. Despite this variation, both recent consultation documents explicitly set out how the reform of statutory maxima can impact on sentencing guidelines and, as a result, show how reform of maxima can indirectly affect sentencing practice. The misuse/abuse of comparison by parliamentarians thus risks leading to an increase in the length of sentences that are handed down.⁶⁰ This is troubling given both the threat that heightened sentences pose to the liberty of citizens and the economic consequences for a justice system that already suffers from prison overcrowding.⁶¹

⁵⁹ Sentencing Council, *Terrorism Guideline Consultation* (October 2017) p.64.

⁶⁰ I am grateful to the Editor for raising the point that in practice Government Departments may have significant input into which statutory maximum is chosen. Any reform of a maximum sentence would, however, still be a matter for Parliament. Further, the underlying problem of there being no ordinal proportionality to retain remains regardless of whether maxima are influenced significantly by departments or not.

⁶¹ Howard League for Penal Reform, 'Prisons' *howardleague.org*, <http://howardleague.org/prisons-information/> [Accessed January 24, 2018].

V. A call for reform

This article has critiqued both the process by which maximum sentences are reformed—or, more appropriately, increased—and the practical consequences that such increases risk. A systematic review of maximum sentences, if implemented, could obviate the historical contingency of statutory maxima. The result of which would be that comparison could not be so easily abused in debate and could instead frame consideration of whether maxima remain appropriate over time. This section will outline the reforms proposed by the Advisory Council before it sets out two conceivable impediments to a new systematic review of statutory maxima.

The Advisory Council recommended a two-tier approach to rationalise statutory maxima. First, the maximum for each offence would be set at a level of sufficient severity so that 90% of sentences of imprisonment could still be handed down.⁶² Secondly, a sentence that exceeded the new maximum for an offence could be imposed to protect the public.⁶³ This two-tier approach would later be described by a member of the Council as “consistency with a gentle downward thrust”.⁶⁴ The Advisory Council thus placed significant weight on how judges sentenced in practice. But this did not mean they avoided policy issues. By way of example, the report was criticised because it suggested a seven-year maximum for rape.⁶⁵ The report was not well received and was not even debated in Parliament.⁶⁶

A more ambitious approach to resetting statutory maxima could be employed in which the reviewing body looked beyond sentencing practice to develop an approach to maximum sentences with sound theoretical bases. A conceivable challenge to such a project is to query what those bases for setting maxima ought to be. This is no doubt a serious challenge, but is

⁶² Advisory Council on the Penal System, *Sentences of Imprisonment* (1978), paras.[169]-[170].

⁶³ Advisory Council on the Penal System, *Sentences of Imprisonment* (1978), para.[213].

⁶⁴ Louis Blom-Cooper, “The Penalty of Imprisonment” in *The Tanner Lectures on Human Values*, 6th edn (Cambridge: Cambridge University Press, 1988) vol.9, p.329.

⁶⁵ Blom-Cooper, “The Penalty of Imprisonment” in *The Tanner Lectures on Human Values* (1988), p.329. For current sentencing norms for rape, see Robert Banks, *Bank’s on Sentence* (London: Sweet & Maxwell, 2017) table 316.2. The table suggests 90 per cent of cases could now not be dealt with by a seven-year maximum.

⁶⁶ Blom-Cooper, “The Penalty of Imprisonment” in *The Tanner Lectures on Human Values* (1988), p.329.

better understood as a challenge for a reviewing body to grapple with as opposed to a reason not to have a review at all. What is more, since the Advisory Council's review, research on public perceptions of the relative seriousness of offences,⁶⁷ and theoretical work on the relative effect of various offences on the victim's standard of living, has been undertaken.⁶⁸ The theoretical literature to inform a review of maxima exists.

Perhaps the more serious impediment to a review of statutory maxima, is the question of who should undertake the review. Given the misuse of comparison by parliamentarians, there would appear to be good reason for an independent body such as the Law Commission or the Sentencing Council to undertake the review. Both bodies have significant experience of sentencing law,⁶⁹ and the capacity to address complex legal issues such as if and how a review would also consider cardinal proportionality. Given this would be a project of law reform and not the development of guidelines, the Law Commission may be the more appropriate body. The Commission's consultation process would also allow for the engagement from the public and interested groups that would be integral to setting ordinarily proportionate statutory maxima.

A rationalisation of maximum sentences would no doubt raise issues of political sensitivity and the Law Commission has quite recently been criticised in the press for querying the

⁶⁷ Paul H. Robinson and Robert Kurzban, "Concordance and conflict in intuitions of justice" (2007) 91 *Minnesota Law Review* 1831. For a critical response to Robinson, see Christopher Slobogin and Lauren Brinkley-Rubinstein, "Putting desert in its place" (2013) 65(1) *Stanford Law Review* 77.

⁶⁸ Andrew von Hirsch and Nils Jareborg, "Gauging criminal harm: a living-standard analysis" (1991) 11 *O.J.L.S.* 1. This literature is, of course, not a panacea. I am grateful to a reviewer for pointing out that there may well be difficulties in applying the living standard analysis to animal welfare offences: the suffering in the offence is directly that of the animal, but the living standard analysis would focus on the owner. For a recent attempt to develop on the living standard analysis, see Tom Sorell, "The scope of serious crime and preventive justice" (2016) 35(3) *Criminal Justice Ethics* 163.

⁶⁹ The Law Commission is presently developing a Sentencing Code: Law Commission, *The Sentencing Code: Volume 1: Consultation Paper* (Consultation Paper No 232, 2017). A review of maximum sentences would not fit within the terms of reference of the Law Commission's current project: "In particular, the penalties available to the court in relation to an offence are not within the scope of this project except insofar as some consideration of them is unavoidable to achieve the wider aim of a single, coherent Code." Nicola Padfield has questioned whether a full sentencing code can be produced given the restrictions on the project: "The Commission tries to simplify things with a 'clean sweep', but how can one sweep clean a real mess?" Nicola Padfield, "Editorial" [2017] *Crim. L. R.* 827, 827-828.

sufficiency of the two-year maximum for offences in the Official Secrets Act 1989.⁷⁰ Yet such issues would be inevitable if statutory maxima were reviewed, regardless of who undertook the review. To entrust the task to an expert law reform body who exist outside of the direct political pressures to increase any and every maximum sentence would seem appropriate, subject to the Commission accepting that the project would not be too political. The political safeguard of parliamentary scrutiny of any final report would, of course, remain. We are in dire need of a review of statutory maxima so ordinal proportionality can be upheld and to halt the drive for heightened maxima that risks increasing sentences in practice. The time has come for a new and comprehensive review of statutory maxima.

⁷⁰ Law Commission, *Protection of Official Data* (Consultation Paper No 230, 2017), paras.[3.180]-[3.189]. For criticism, The Guardian, “The Guardian View on Official Secrets: New Proposals Threaten Democracy” (12 February 2017) *The Guardian*, <https://www.theguardian.com/commentisfree/2017/feb/12/the-guardian-view-on-official-secrets-new-proposals-threaten-democracy> [Accessed, January 24, 2018].