Is it Legitimate for Courts to Respond to Moral Panic?

Perceived vs. Normative Legitimacy

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Introduction

There are instances in which the criminal justice system is affected by moral panic, i.e. by an exaggerated societal reaction to an assumed threat to moral values. In such instances, Courts react to the panic by both demonising defendants and aggravating punishments. Is such a response legitimate?

In answering this question the article will distinguish between two aspects of the response to moral panic - demonising defendant and aggravation of punishment - and will argue that demonising defendants is never legitimate. The legitimacy of aggravating punishments as a response to moral panic is a more complicated issue. During the time of the panic a gap between two notions of legitimacy might be created: legitimacy as a sociological concept, "perceived legitimacy", and legitimacy as a moral concept, "normative legitimacy". As a sociological concept, aggravating punishments in response to a moral panic might be perceived as legitimate, since it expresses public perceptions as to the severity of the threat to social values, even though these perceptions are exaggerated as a result of moral panic. As a moral notion, aggravated punishments imposed in response to a moral panic are, by definition, disproportionate to the real threat to social values and as such are "unjust" and "unfair" and therefore normatively illegitimate. Can the legal system bridge the gap between perceived and normative legitimacy in order to gain full legitimization?

The article will suggest that during the time of a panic courts, which are themselves influenced by the panic, are probably unaware of the gap between perceived and normative legitimacy; judges share the public perceptions as to the seriousness of the threat to moral values. However, moral panic is volatile; the panic erupts fairly suddenly and as suddenly it subsides. When the panic subsides, should and can the criminal justice system bridge the gap retroactively? In answering this question the article will discuss two possible mechanisms. The

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more moderate one would allow a defendant who was sentenced severely during a panic to apply for clemency and a reduction of punishment once the panic has subsided. The more revolutionary mechanism would allow for sentence modification once the panic subsides.

The article proceeds as follows. Part I touches upon the notion of moral panic, emphasising the main criteria that have to be met for a societal reaction to be characterised as a moral panic. Part II describes the indications for concluding that the criminal justice system was affected by moral panic. These indications will be demonstrated by an example taken from Israeli experience. Part III argues that demonising defendants is never legitimate. Parts IV-V evaluate the legitimacy of aggravating punishments in response to moral panic: Part IV focuses on "perceived legitimacy" (the sociological concept of legitimacy), Part V focuses on "normative legitimacy" (the moral concept of legitimacy). Part VI offers two possible mechanisms for retroactively bridging the gap between perceived and normative legitimacy: clemency and sentence modification. Concluding remarks follow.

I. Moral Panic

The term "moral panic" describes an exaggerated societal reaction to an assumed threat to moral values. For an event to be characterised as a "moral panic" specific criteria have to be met. The reaction to the assumed threat has to lead to widespread anxiety; the anxiety must be disproportionate to both the size and the nature of the threat. There must be an increased level of hostility towards those involved in the conduct that creates the assumed threat to moral values – they are demonised and seen as Folk Devils, popular demons whose existence and behaviour threatens prevailing morality. Moral panic is volatile; even when the panic has a long-term impact, the degree of hostility generated during a moral panic tends to be temporary: the panic erupts fairly suddenly and subsides suddenly.

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The media has an important role in promoting moral panic. It exaggerates the numbers of incidents; in describing the nature of the incident it attaches disproportional severity to it; and it demonises those involved in the incident. Once a moral panic mobilises the public, pressure increases on both the legislator and the courts to do something, mainly to impose harsher punishments. Therefore, moral panics are likely to have an impact on the criminal justice system. However, while much research and published literature can be found on the concept and theory of moral panic (mostly in sociology), and while an impressive array of specific case analyses exists, there are not many studies that focus on the relationship between the societal phenomenon of moral panic and the specific waves that they generate in the legal system. To the extent that it has been studied, this relationship has been noted mainly with regard to legal responses to pedophilia, which has created a moral panic affecting the criminal justice system worldwide. The example discussed below to demonstrate the reaction of courts to moral panic - hit-and-run traffic offences - is an example of moral panic uniquely affecting one specific legal system; it generated moral panic with a huge impact on the Israeli criminal justice system during the years 2002-2013.

II. The Impact of Moral Panic on Courts

The indications for concluding that courts have been impacted by moral panic are to be found in both the courts' rhetoric and the severity of the punishments imposed. Rhetorically, one can find traces of the media hype in courts exaggerating the numbers of the offences committed, in describing the nature of these offences and in demonising defendants. Such rhetoric is used to justify aggravation of punishments, which are then disproportionate to both the nature of the offence and the frequency of its commission. To demonstrate courts' response to moral panic let me relate to hit-and-run traffic offences in Israel during 2002 and

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4 In addition to the references in note 2 supra, see, volume 49 of the British Journal of Criminology (2009) devoted entirely to moral panic


Hit-and-run traffic offences are offences of omission imposing on a driver involved in a traffic accident a duty to stop the car, find out whether there are any injured people, and render assistance when necessary. Criminal liability for omissions is exceptional. Legally, punishment is generally imposed for bad acts (acts that caused harm) rather than for failure to do good acts (a failure to rescue from harm). Even among the offences of omission, hit-and-run traffic offences are exceptional: liability is imposed on a driver involved in a traffic accident even where her involvement in the accident was not due to any fault of her own, and even when abandoning the scene of the accident did not contribute in any way to the harm, such as when the victim died as a result of the traffic accident before the driver ran away. Moreover, due to the privilege against self-incrimination there is no other offence which requires offenders to stay at the scene of their crime. One might have expected that due to the exceptional nature of these offences, the punishment imposed on a driver who flees from the scene of the accident would be relatively lenient. This is indeed the case in some countries: in England and Wales the maximum punishment for hit-and-run traffic offence is 6 months imprisonment, in Germany and France, it is 3 years imprisonment. In various States in the United States, as well as in Israel, the maximum punishment for hit-and-run traffic offences is more severe: between 5 and 10 years in the United States (depending on the state), and until recently in Israel it was 9 years' imprisonment; however even in these systems drivers are often sentenced to more lenient punishments.

6 Section 64A of the Traffic Ordinance (New version), enacted by amendment No. 5 of the traffic ordinance in 1965.
7 In addition, drivers involved in traffic accidents resulted in either death or personal injuries are required to both inform the police of the accident and disclose their identity to the other drivers involved in the accident. In Israel, the duty to inform is imposed by regulation 144 of the Traffic Ordinance (New Version) 1961.
9 Sec. 142 of the German Criminal Code, as was promulgated on 11.13.1998, compels a driver who has been involved in a traffic accident to stay to the scene and to identify herself. Drivers who violate that duty are liable to maximum of 3 years' imprisonment. The duty to render an aid to the victim of the accident, on the other hand, is included under sec. 323c, which applies to anyone who can render the aid (Good Samaritan) and the maximum punishment of which is one year's imprisonment. The maximum punishment for hit and run traffic offence, defined in ss. 434-10 of the French Code Penal, was raised in March 2011, from two years to three years' imprisonment.
10 For maximum of 5 years' imprisonment see, for example, Ohio (ORC Ann. 4549.021); OreTexas (Tex. Transp. Code sec. 550.021 (2012)); Minnesota (Minn. Stat. sec. 169.09 (2012)); Michigan (MCLS sec. 257.617 (2012)). For 10 years' imprisonment see: Pennsylvania (75 Pa.C.S. sec. 3742 (2012)); New-York (NY Veh & Tr sec. 600 (2012) NY VLS Penal sec. 70.00 (2012)); However, there are few exceptions that allows the imposition of either severer or more lenient punishments, such as South Carolina (25 years' imprisonment in cases of HR fatal accidents, according to the S.C. Code Ann. sec. 56-5-1210 (2011)), Vermont (15 years' imprisonment for HR fatal accidents, according to the 23 V.S.A. sec. 1128 (2012)) on the one hand, and California (4 years' imprisonment for both severe and fatal accidents, according to the Cal Veh Code sec. 20001 (2012), on the other hand.
11 As enacted in 1965 - Amendment No. 5 of the Traffic Ordinance (New version)
12 During the first decade after the offence came into force Israeli Courts were of opinion that sever punishment ought to be imposed on drivers 'who lack a minimal sensitivity to civic responsibility and are willing to desert
By contrast, during 2002-2013 punishments for the various offences involved in hit-and-run traffic accidents in Israel rose dramatically, and in 2011 the legislator intervened and raised the maximum punishment for hit-and-run accidents that are fatal or that cause grievous bodily harm - to 14 years imprisonment. Elsewhere I have argued, based on empirical data, that the dramatic increase of punishments for hit-and-run traffic offences was motivated by moral panic. Below are the main indications which support that conclusion.

During 2002 and 2013 there was media hype around specific hit-and-run traffic accidents. Thus for example, one hit-and-run accident that occurred in 2002 (the Ysreali case) was covered by 12 articles in Yedioth Ahronoth, (one of the most circulated newspapers in Israel), a hit-and-run traffic accident occurring in 2008 (the Yemini &Simon case) was covered by 33 articles in Yedioth Ahronoth. By contrast, in 2000, 13 articles in Yedioth Ahronoth covered all 22 fatal hit-and-run accidents occurring in that year, and in 2001 only 7 articles covered the 22 fatal hit-and-run accidents of that year. The hype around hit-and-run offences was not limited to one newspaper alone. Newspapers, TV channels, radio and internet websites were all involved in constructing hit-and-run traffic accidents as "a national disaster".


2 articles in the news section, 5 articles over 600 words long among those the longest article re hit-and-run – 6015 words long.

9 of which appeared in the news section, 8 articles were over 600 words long, among those 1 article – 1696 words long, and another – 2116 words long

none of which appeared in the news section

The official data with regard to hit-and-run traffic accidents in Israel between 2002 and 2014\textsuperscript{19} does not support the claim that hit-and-run traffic accidents have become a national disaster in Israel. Since 2000, there has been an overall decline in the number of hit-and-run traffic accidents: while 22 fatal and 105 severe hit-and-run accidents occurred in 2000, only 11 fatal and 66 severe hit-and-run accidents occurred in 2007, and in 2014 the numbers dropped further to 9 fatal and 49 severe hit-and-run accidents. Moreover, the comparison of the number of total fatal traffic accidents and that of fatal hit-and-run accidents reveals that the number of fatal hit-and-run accidents is significantly lower than that of fatal traffic accidents in general. At their peak, fatal hit-and-run accidents constituted 6\% of the total fatal accidents in Israel; in 2010, fatal hit-and-run accidents were only 3.5\% of the total fatal accidents that year. Nonetheless, the notion of “national disaster” had not been attached to fatal accidents that did not involve fleeing from the scene of the accident.

In addition to this exaggeration of the number of hit-and-run traffic accidents, since 2002 one can identify a process of gradual escalation in demonising the drivers involved in hit-and-run accidents. The media demonises drivers of fatal hit-and-run accidents and socially constructs them as "murderers and predators".\textsuperscript{20} In a confrontation over the question whether hit-and-run traffic accidents should be classified as murder published in Yedioth Achoronot in 2011\textsuperscript{21}, Moshe Ronen, a journalist and a lawyer, opposed the idea: "Murder requires intent. Hit-and-run is a severe crime, but it is not murder". Semadar Shir, a writer and journalist, was in favor of the idea: "Intent is used by lawyers to protect monsters". The readers were asked to vote and according to the results published the next day 87\% of the readers agreed with Semadar Shir that hit-and-run traffic accidents should be classified as murder.\textsuperscript{22}

The Israeli Courts were affected. Statistically, punishments for offences involved in fatal hit-and-run accidents rose from 4 years imprisonment (2001) to 6 years (2003), and at the peak reached 14 years imprisonment (2011). Punishments for offences relating to severe hit-and-run traffic accidents rose from 3 years (2001) to 11 years (2009, 2011).\textsuperscript{23} In two cases the courts explicitly deviated from the

\textsuperscript{19}Yedioth Ahronoth 6 September, p. 15, 2002.
\textsuperscript{20}Yedioth Ahronot, "24 hours" supplement, 19 September 2011, p. 1, emphasis added
\textsuperscript{21}Yedioth Ahronot, 20 September 2011
\textsuperscript{22}The data is based on information received from both the police and the prosecutor’s office relating to indictments that included the offence of abandoned after injury between 1 January 2000, and 30 April, 2013, in cases of fatal and severe accidents. Out of 375 indictments that originally included the offense, 296 resulted in conviction (81 fatal, 215 sever); the rest resulted in either acquittal or dropping the desertion charge in the course of a plea bargain.
punishments previously imposed for fatal hit-and-run accidents and aggravated the punishment considerably; in both these cases the death was caused directly by the accident. In the Ysraeli case (2003)24 the trial judge was aware that punishments for various offences involved in fatal hit-and-run accidents had never before exceeded 4 years' imprisonment. Nevertheless, he held explicitly that punishment for fatal hit-and-run accidents ought to be aggravated. The driver was thus sentenced to 6 years' imprisonment: 1 year for causing death by negligence, and an additional 5 years for the abandonment after injury (the legal term for hit-and-run traffic offence in Israel).25 In the case of Yemini & Simon (2010)26 the trial judge sentenced the driver - Simon - to 20 years' imprisonment: 12 years for manslaughter, 2 additional years for causing grievous bodily harm and 7 years for the abandonment, 1 year of which to be served concurrently the punishment for manslaughter. In the appeal (2011), the Supreme Court was of the opinion that although the punishment for the offences involved in fatal hit-and-run accidents should indeed be significantly increased, 20 years' imprisonment was too extreme a deviation from punishments imposed previously. The Supreme Court reduced the driver's (Simon) punishment for all the offences involved to a total of 14 years' imprisonment. While reducing the punishments, the Supreme Court found it necessary to note that the 14 years' imprisonment imposed on the driver was "a step up" in the punishments previously imposed on drivers involved in fatal hit-and-run accidents.27

In justifying the aggravation of punishments for hit-and-run traffic offences the courts, like the media, exaggerated the number of hit-and-run traffic offences, attributed special severity to the nature of the offence and demonised hit-and-run drivers. According to the courts, the need to aggravate the punishments for offences involved in hit-and-run traffic accidents is based on the premises that "hit-and-run traffic accidents have become a 'national disaster'";28 that "the offence of abandonment after injury" is "among the most repugnant offences, an ugly and severe offence";29 and that drivers of both fatal and severe accidents who flee from

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24 Cr. C. 40282/02 (Tel Aviv) State of Israel v. Ysraeli (D. Ct. 2003)
25 In the appeal (Cr. App 11222/03 Ysraeli V. State of Israel (Sup. Ct. 2004, the Supreme Court approved the 6 years' imprisonment imposed upon Ysraeli despite its being "a step up" in the punishments previously imposed for hit-and-run fatal accidents (J. Levi para. 3).
26 Cr. C 40238/08 (Tel Aviv) State of Israel v. Shalom Yemini & Shai Simon (D. Ct. (2010)
27 Cr. App. 2247/10 the State of Israel v. Shalom Yemini & Shai Simon (Sup. Ct. 2011). Amit J. para 71
28 Yemini & Simon (2011: para. 77)
29 Ibid.
the scene of an accident are either drivers with a "moral defect"30 or drivers who are "sub-human", bringing disgrace upon themselves.31

Is the courts' reaction to moral panic, as described above, legitimate? Before answering this question a clarification is needed.

Various legal systems protect courts from being influenced by the media in order to guarantee judiciary independence. The offense of sub-judica bans the media from publishing or broadcasting, including on the internet, any comments or information that might seriously prejudice criminal proceedings.32 In exceptional cases "trial by the media" infringes upon the defendant's right for a fair trial, and as such might result in overturning the defendant's conviction.33 Juries are explicitly instructed to decide on the case solely on the basis of the evidences heard at the courtroom and to ignore any media reports on the case, including social media.34 Even when criminal proceedings are heard before professional judges, judges dealing with high profile cases often find it necessary to explicitly note that in deciding the case they have not been influenced by the media.35 The influence of moral panic on the courts is different. Although the media has an important role in promoting moral panic, once the panic mobilises the public, it is the panic that directly influences courts' perceptions. Judges share the public perceptions of the seriousness of the threat to moral values; they believe that offences that are subject to moral panic are indeed "among the most repugnant offences" the commission of which has become a "national disaster", without being aware of the exaggeration of those perceptions. Therefore, evaluating the courts' reaction to moral panic raises different issues than those which are raised with regard to the impact of the media on courts, and the various tools aimed at guaranteeing that the judiciary will not be affected by the media are inapplicable in cases where courts are influenced by moral panic.

30 Yisraeli case (2003)
31 The State of Israel v. Edery 2004. See also the State of Israel v. Metiko (2006) in which the trial court emphasized its "disgust" from a driver who killed a pedestrian walking at the side of a highway and then ran away, despite the fact that the driver chose, of his own free will, to turn himself in to the police 6 hours after deserting the scene of the accident.
34 See for example cr.c. (Tel-Aviv) The State of Israel v. Mor, (2011).
In answering whether courts’ reaction to moral panic has been legitimate let me distinguish between two aspects of the moral panic – demonisation and aggravation of punishments.

**III Demonisation**

Criminal law involves condemnation. Does condemnation legitimate demonising defendants?

Two competing theories justify criminal blame and condemnation: a choice-based and a character–based theory.36

According to the choice-based theory, criminal condemnation is based on the choice to engage in conduct that violates the prohibitory norm. The underlying assumption is that in the area of criminal law defendants should be treated as “moral agents” who are able to distinguish between good and evil, between what is forbidden and what is permitted, and to behave accordingly. A defendant who chose to do actions that violate an external norm of permissibility deserves moral blame because he/she could have chosen to comply with that norm.37 The defendants’ voluntary conduct that does not conform to the prohibitory norm is what justifies condemnation. By contrast, according to the character-based theory, a bad character revealed by the criminal conduct is what justifies conviction and condemnation. A defendant "is convicted if and because his actions warranted an inference of an undesirable character-trait; it is that character-trait which the law condemns and punishes.”38

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38 Antony Duff, "Choice, Character and Criminal Liability", suparnote at p. 12
It follows that according to the choice-based theory, condemning defendants, rather than their wrongful conduct, is not legitimate, all the more so when the condemnation include demonizing defendants, treating them as "sub-human" (as hit-and-run drivers were treated by Israeli courts when swept by moral panic). Whereas, according to the character-based theory defendants rather than their wrongful conduct are to be condemned

Without undermining some of the difficulties raised by the choice-based theory, I believe, like many others, that the choice-based theory should prevail, and that the criminal law should condemned defendants' wrongful conduct rather than defendants themselves. The main reason for my preference has to do with the importance of guaranteeing defendants' dignity. The intrusive power granted by the character-based theory to inquire into the defendants' character infringes upon the defendant's dignity in its Kantian sense. Treating human-beings as subject rather than as an object, respecting individualism, require that the criminal law should steer clear where the core of an individual’s personality can be affected. Such an intrusion further constitutes an infringement of dignity since defendants are condemned for character-traits that are beyond their control as we do not necessarily have control over how we acquired character nor could we always change our character.

However, even within the character-based theory demonizing defendants ought not to be legitimate. One should distinguish between condemning defendants and demonizing them. Attributing "a bad character" to a defendant does not legitimate demonizing that defendant, treating him/her as "sub-human."

Demonizing defendants infringes upon an additional notion of human dignity, that of non-humiliation. "A decent society is one whose institutions do not humiliate

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39 See for example, Duff, Ibid. R.A. Duff, Virtue, Vice and Criminal Liability: Do We Want An Aristotelian Criminal Law?, supra note ; Benjamin Sendor, The Relevance of Conduct and Character to Guilt and Punishment, 10 Notre Dame J.L. Ethics & Pub. Pol'y 99 (1996); Michael S. Moore, supra note ; Finkelstein, supra note
40 The prevailing view in Germany, is that the meaning of the contitutional notiuon of human dignity should be based on the object-subject formula, derived from Kant. See
41 This is indeed the aproach of the German legal system, see Mirian Gur-Arье & Thomas Weigend, Constitutiona...L. Rev. 63 at p. 84 (2011)
42 Duff, supra
43 In this spirit see Duff…
Society, through the institutions of criminal law, should respect the dignity of defendants and refrain from conveying the message that defendants are excluded from "the family of man." Indeed, in other contexts Israeli courts take care to refrain from humiliating defendants. Even when defendants commit "repugnant" offences such as sexual offences, including pedophilia within the family, Israeli courts do not humiliate the defendants; they condemn the defendants' conduct rather than the defendants themselves. Below are some examples of the terms used by Israeli courts to condemn sexual offences:

"Sexual offences within the family are ugly, and the punishment of those offences should reflect in addition to both retributive and deterrence considerations, our disgust at such actions."45 "The defendant's actions constitute despicable and abhorrent exploitation of the physical and mental weakness of a seven year old child… The court must condemn this behaviour and aggravate the punishment of the offender in order to convey the message that society will not tolerate such behaviour."46

By contrast, when swept by moral panic, as in the case of hit-and-run traffic offences describe in Part II, courts explicitly humiliate the defendants; they condemn the defendants rather than their conducts, and by treating them as "sub-human" these defendants are excluded from the family of human-being. In doing so courts are clearly affected by the general hostility towards those involved in conduct creating an assumed threat to moral values. Courts share the perception that defendants involved in such conduct are Folk Devils, popular demons whose existence and behaviour threaten prevailing moralities.

Humiliating defendants in this way, treating them as "sub-human", can never be legitimate. To guarantee defendants' dignity, even when they do not arouse our sympathy, their dignity should function as a constraint on public expectations. There should be an absolute ban on humiliating defendants. One should only hope that a constant criticism against the process of demonising defendants by courts, would eventually lead judges to refrain from demonising defendants, even when influenced by moral panic.

46 The State of Israel v. John Doe (2009)
IV. Aggravating punishment – perceived legitimacy

The view that it is legitimate to aggravate punishments in response to a moral panic might be based on the sociological concept of legitimacy, according to which legitimacy derives from public belief (“perceived legitimacy”). Within the criminal justice system, the underlying assumption is that to gain the credibility necessary to communicating stigmatisation and to achieve compliance, the system should be perceived by the public as just. To achieve public trust in the criminal justice system, law enforcement institutions, both police and courts, should employ fair procedures, and in determining sentences courts should pay attention to public opinion. Similarly, the claim would be that, in order to gain public trust in the criminal justice system during a period of moral panic, punishments should reflect public perceptions as to the severity of the threat to social values, even when these perceptions are exaggerated.

The claim that aggravating punishment as a response to moral panic is, sociologically, legitimate (perceived legitimacy) might be supported by considerations relating both to the dual function of the criminal law and to justifications of punishment, as described below.

Criminal law aims both to protect social values and to guarantee the public sense of security. By imposing severe punishments in cases of moral panic the criminal justice system responds to widespread anxiety aroused by the commission of the offence. Meeting this public anxiety will contribute to reducing the panic, and to reinforce the public's sense of security.

The media hype, the response of the courts in aggravating punishments and the media reports on these aggravated punishments, all have an effective deterrent effect. Indeed, Israeli experience with regard hit-and-run traffic accidents supports

47 Procedural justice, due process
48 One of the goals of the Sentencing Council for England and Wales is "to play a greater part in promoting understanding of, and increasing public confidence in, sentencing and the criminal justice system. To achieve that goal "The public is regularly consulted about the Council’s work. Once a draft sentencing guideline is produced, the public as well as criminal justice professionals are consulted about it, and their views feed into the final guideline which is issued to judges and magistrates.” See, Sentencing Council, "About-Us", available At: [https://www.sentencingcouncil.org.uk/about-us/](https://www.sentencingcouncil.org.uk/about-us/). In the US, in deciding whether a sentence is "cruel and unusual punishment" infringing U.S. CONST. amend. VIII, courts have to take into account public, see Weems v. United States, 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86 (1958); Tracy E. Robinson, By Popular Demand?, 14 GEO. MASON U. CIV. RTS. L.J. 107, 110-122 (2004); David A. Singleton, What is Punishment? The Case for Considering Public Opinion Under Mendoza-Martinez, 45 SETON HALL L. REV. 435, 454-457 (2015). For various views with regard to whether public opinion should play a role in determining sentences, see, Jesper Ryberg & Julian Roberts, Popular Punishment: On the Normative Significance of Public Opinion (Oxford University Press, 2014)
the conclusion that moral panic leads to a significant decline in the number of the incidents. As already noted, the number of hit-and run accidents dropped from 22 fatal and 105 severe incidents in 2000 to 11 fatal and 66 severe incidents in 2007, and in 2014 only 9 fatal and 49 severe incidents took place.

Aggravated punishments in response to moral panic might additionally serve retributive goals, as long as one is willing to accept the view that in determining "just desert", it is not a moral deontological notion of justice that counts but rather the community's shared intuitions of justice – "empirical desert". Like the notion of "perceived legitimacy", the notion of "empirical desert" is a sociological concept, according to which to ensure the criminal law's moral credibility, the distribution of criminal liability should derive from community perceptions of just desert. Empirical desert might have strong appeal in cases of moral panic, due both to the broad consensus with regard to the perceived severity of the threat and to the anxiety it arouses. Criminal justice systems that disregard the "panic", and do not share the popular perception of the severity of the threat to social/moral values might lose their credibility.

To justify aggravated punishments in response to moral panic on retributive grounds one might further argue that the culpability of those who commit the offence that is the object of moral panic is more severe. The defendants in such cases are willing to act against values that are widely and publicly perceived as fundamental social/moral values; they are willing at act as Folk-Devils whose behaviour threatens prevailing moralities.

Even if one is willing to accept the analysis in this Part and to conclude that aggravating punishment in response to moral panic is legitimate in the sociological sense of legitimacy, the legitimisation of the criminal justice system should not be based solely on perceived legitimacy. A system that is supposed to deliver justice cannot be "just" simply because the public at large perceives it as just. The system has in addition to be morally just in order to gain normative legitimacy. Is aggravating punishment in response to moral panic normatively legitimate?

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V. Aggravating punishment – normative legitimacy

To gain normative legitimacy the criminal justice system has to be "just" and "fair". The conclusion that aggravating punishments in response to moral panic is "unjust" and "unfair" would be based on the following reasoning.

Proportionality, which requires that punishment be proportionate to both the harmfulness of the conduct and the defendant's culpability, is considered one of the main guarantees of a just and fair system of punishment. Evaluating proportionality, ruling on "how much" punishment a defendant deserves, is a matter of convention. However, once an encoring point of deserved punishment has been established, the requirements of ordinal, or relative, proportionality apply. Defendants convicted of crimes of comparable severity should receive punishments of comparable severity (special circumstances altering the harm or the actor's culpability in the particular case being taken into account). Aggravating punishments in response to moral panic infringes upon ordinal proportionality. Punishments which are proportionate to the perceived exaggerated, rather than to the real, threat to a social value necessarily distort the hierarchy of severity between offences. To show this, let me return to the Israeli experience with regard to hit-and-run traffic offences, as analyzed in Part II.

Rhetorically the courts treated hit-and-run traffic offence as one of the "ugliest and most despised offences" in the criminal law. This, despite the exceptional nature of hit-and-run traffic offence as an offence of omission, imposing a legal duty to stay at the scene of a crime; a duty which erodes the privilege against self-incrimination. Is the severity of that exceptional offence indeed comparable with other "repugnant" offences such as sexual offences, including pedophilia, robbery of the elderly which involves severe violence, and the like? It should be noted that as opposed to offences which are planned in advance (like robbery), in many hit-and-run cases, drivers who find themselves involved in an accident run away in a moment of panic, in an attempt to distance themselves from the traumatic event/scene.

50 Proportionality has a dominant role within desert rationale of punishment. However, proportionality is relevant to all punishments' rationales, including those which are based on either utilitarian (crimes prevention) or expressive (censure) resonings. Some rationales allow proportionality to be trumped by utelior considerations. See, Andrew von Hirsh, Proportionality in the Philosophy of Punishment, 16 Crime and Justice, 55 at 66-75 (1992).


52 See, Powell v. Doe, 473 S.E.2d 407, 411 (N.C. Ct. App. 1996) (“Human nature being as it is, it is conceivable that the hit and run driver left the scene out of panic.”); in a similar spirit in Israel see Cr. App. 7936/13 Levi v. State of Israel (Sup. Ct. 2014), para. 35. During the discussion in the Knesset (the Israeli Parliament) of the bill suggesting to
During the period of moral panic, punishments imposed for hit-and-run traffic offence were significantly more severe than those imposed for other comparable offences. Thus, in the last decade, Israeli Courts explicitly treated fatal accidents caused by a driver under the influence of either alcohol or drugs severely, and drivers were convicted with manslaughter\textsuperscript{54} rather than with causing death by negligent driving.\textsuperscript{55} The harshest punishment imposed for causing a fatal accident while intoxicated, when no abandonment of the scene was involved, was 6 years imprisonment (2011).\textsuperscript{56} When the intoxicated driver, who caused a fatal accident, ran away from the scene, the punishment for both causing the fatal accident and abandoning the scene was raised to 12-14 years imprisonment (2011).\textsuperscript{57}

As noted before, in a response to the moral panic, in November 2011, the Israeli Knesset enacted an amendment to the Traffic Ordinance (New Version) which raised the maximum punishment for the offence of abandonment after injury to 14 years' imprisonment. The amendment additionally imposes on a passenger in a hit-and-run car the legal duty to render assistance.\textsuperscript{58} A passenger in a vehicle involved in a either fatal or severe traffic accident who does not render assistance is liable to 7 years' imprisonment, whereas a driver who passes by the scene of an accident and fails to render assistance might be sentenced to no more than 6 months' imprisonment,\textsuperscript{59} and in Israel, the "Bad Samaritan" might be sentenced only to a fine.\textsuperscript{60}

When affected by moral panic, courts exaggerate the number of offences committed. Thus, as already noted, despite a constant decline in the number of hit-and-run traffic accidents, Israeli courts treated hit-and-run traffic accidents as a "national disaster". The term "national disaster" was used to justify aggravating punishments as a means of strengthening general deterrence. Severe punishments

\textsuperscript{54} Yemini and Simon, Mor From comparative prespective, it is intersting to note In the various jurisdictions in the US, in cases where drunken drivers caused fatal accident and fled from the scene, the punishments imposed for manslaughter are significantly more severe than those imposed for hit-and-run: 6 years' imprisonment for manslaughter and only 6 months' for hit-and-run (California v. Miranda, 21 Cal. App. 4th ed. 1464 (1994)); 15 years' imprisonment for manslaughter and 8 months’ for hit-and-run (California v. Butler, 184 Cal. App. 3d ed. 469 (1986)); 10 years’ imprisonment for manslaughter and 1 year’s for hit-and-run (California v. Scheer, 68 Cal. App. 4th ed. 1009 (1998)).

\textsuperscript{55} Regulation 146 of the Traffic Ordinance (New Version) 1961.

\textsuperscript{56} Thou shalt not Stand Idly by the Blood of thy Neighbor, 1998 § 4
that exceeds offenders' blameworthiness in order to strengthen deterrence infringes upon the dignity of the defendant who is treated as a means of deterring others.\textsuperscript{61} All the more so, when the phenomenon of a "national disaster" is only perceived, and in fact, there is a decline in the number of offences committed.

Normative legitimacy requires, additionally, equal distribution of punishments with regard to the same offence. Moral panic might lead to an unequal distribution, due to the volatility of the panic; it erupts fairly suddenly and as suddenly it subsides. The Israeli experience with regard to hit-and-run traffic offence shows that despite the statutory aggravation of the maximum punishment for these offences in 2011 to 14 years imprisonment, when the panic subsides, the punishments imposed by courts decline significantly. Thus for example, a driver who had been convicted, during the panic (2003), with negligently causing a fatal accident and abandoning the scene was sentenced to 6 years imprisonment, (50 percent of the maximum of 9 years for abandonment and 3 for causing death);\textsuperscript{62} a \textit{bus driver} who had been convicted with the same offences after the panic had subsided (2014) was sentenced to 3.5 years (approximately 20 percent of the maximum punishment of 14 years for abandonment and 3 years for causing death).\textsuperscript{63} Reducing punishments helps revive ordinal proportionality, yet it results in inequality between those who were punished during the panic and sent to prison for many years, and those punished after the panic had subsided and sentenced to a much shorter term in prison.

The conclusion from the analysis offered in both this \textit{Part} and the previous one, is that when courts are influenced by a moral panic a gap between perceived and normative legitimacy is created. Can the legal system bridge that gap in order to gain full legitimacy so that the system will both function as a just system and be perceived as such?

\textit{V. Bridging the Gap between Perceived and Normative Legitimacy}

During the panic courts influenced by the panic are unaware of the gap between perceived and normative legitimacy (as analyzed in \textit{Parts IV-V} above); judges

\textsuperscript{61}According to the Israeli guidelines, proportionality is the main consideration in sentencing (Penal Law § 40b). Courts are allowed to aggravate punishment in order to strengthen deterrence, as long as the punishment does not exceed the proportionate punishment (Penal Law § 40g)

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share the public perceptions of the seriousness of the threat to moral values. However, moral panic is volatile. As noted above, when the panic subsides, the punishments imposed by courts decline significantly. The reduction of punishments is just one outcome of the panic’s subsidence. Thus, in Israel during 2014, terms demonising drivers disappeared from both the media and court rulings, the term “national disaster,” which had previously been used to exaggerate the number of hit-and-run traffic accidents, was not found in either the media reports or the courts' rulings, and the number of media reports on hit-and-run traffic offences declined significantly. One may assume that those changes reflect a change in the societal reaction to hit-and-run traffic offences, and therefore the decline in punishments does not contradict public expectations; the public's perception of the threat to the social values is no longer exaggerated. It follows that when the panic subsides, lenient punishments could gain legitimacy both in the sociological sense (perceived legitimacy) and in the moral sense (normative legitimacy). The question is whether the criminal justice system should and can retroactively bridge the gap between perceived and normative legitimacy created during the panic, and by that retroactively revive the ordinal proportionality of punishments and guarantee equality?

There are two possible mechanisms for retroactively bridging the gap between perceived and normative legitimacy. A moderate one will allow a defendant who was sentenced overly-severely during a panic, to apply for a clemency and reduction of punishment after the panic has subsided. The more revolutionary mechanism will allow for sentence modification once the panic has subsided.

(I) Clemency

Clemency functions primarily as “mercy”; it is granted where legal rights end. It enables the Head of State (either the President or the Monarch) to exercise his/her discretion and to reduce punishments in the light of “new” personal circumstances. In some legal systems, like the U.S., and in exceptional cases in Israel, clemency also provides “a failsafe” in the criminal justice system, making it possible to

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64 During 2014, 23 articles in Yedioth Ahronoth reported on all hit-and-run traffic 9 fatal and 49 severe accidents. Whereas, as noted, during the panic one fatal hit-and-run t accident occurring in 2008 (the Yemini & Simon case) was covered by 33 articles in Yedioth Ahronoth

65 The mechanism for early release that exists in various legal system does not provide remedial justice that is able bridge the gap between perceived and normative legitimacy; early release aimed at rehabilitating prisoners rather than to correct injustices and as such subjects prisoners to restrictions of a parole. For various early release mechanisms see,

remedy injustices.\textsuperscript{67} Such a function permits a defendant who was sentenced overly-severely during a panic to apply for a clemency and reduction of punishment when the panic subsides.

The mitigation of punishments in individual cases through clemency makes it possible to remedy an injustice incurred by imposition of an exaggerated punishment in the course of a moral panic without infringing on the doctrine of finality, which requires that a conviction and sentence should be considered settled and should not be revisited once the ordinary course of legal appeals is concluded.\textsuperscript{68} Clemency will further permit the remedy of injustices without announcing publicly that the courts were influenced by a moral panic and imposed exaggerated punishments. Such announcements might erode public trust in the criminal justice system. Nonetheless, when the criminal justice system has been affected by moral panic, permitting remedial justice to function without transparency is, in my view, a disadvantage of the clemency.\textsuperscript{69}

Precisely because courts are unaware during the panic that the punishments they impose are exaggerated and that they are creating a gap between the perceived and the normative legitimacy of the sentence, the criminal justice system should be committed, once the panic subsides, to taking steps to bridge that gap retroactively. Such a bridge requires, acknowledging that a gap has indeed been created, i.e., acknowledging, in retrospect, that the criminal justice system was indeed influenced by the moral panic, resulting in exaggerated punishments that were proportionate to the perceived rather than the real threat to the social value. Bridging that gap requires conveying a clear message that the criminal justice system is committed to doing whatever is necessary to remedy the injustice caused by exaggerated punishments and to regain normative legitimacy. Such a clear message will not necessarily undermine public's trust in the criminal justice system. The fact that after the panic has subsided, the public's perception of the threat to the social value is no longer exaggerated might make it easier for the public to accept that during the panic sentences have been unduly severely, and needed to be corrected. However, even if in the short term, the acknowledgment that sentences were exaggerated due to the impact of moral panic on courts might erode public's trust in the criminal justice system, in the long term, the public might absorb that a legal system that is willing to admit that court rulings


\textsuperscript{68} Meghan J. Ryan, \textit{Finality and Rehabilitation}, 4 WAKE FOREST J.L. & POL’Y 121, 123 (2014)

\textsuperscript{69} For the view that sentence modification ought to be both transparent and publicly accountable, see Cecelia Klingele, \textit{Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release}, 52 WM. & MARY L. REV. 465 (2010)
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(sentences in our case) during a specific period have been unjust and at the same time is willing to take steps to correct the injustice is worthy of public trust. The way to achieve this is to adopt a more revolutionary mechanism, one that allows for sentence re-evaluation.

(2) A Mechanism for Sentence Re-evaluation

Statutory reduction of punishments usually applies retroactively. According to the common law doctrine of amelioration, when the legislator reduces the maximum punishment for an offence after a defendant has committed the offence but before he is sentenced, the new, more lenient, maximum punishment will apply. In Israel, the effect of statutory reduction of punishment is stronger: reduced punishments apply even to defendants whose sentences have been finally decided as long as the sentence modification does not require re-opening the case: their punishment will be reduced to the new maximum punishment. Should the legal system go even further and allow for a final sentence to be re-evaluated in order to enable courts to retroactively bridge the gap between perceived and normative legitimacy created during the moral panic?

When there is no statutory change, and the courts decide, as a matter of policy, to impose more lenient punishments, such a policy will obviously not apply retroactively to cases that have already been finally decided: applying the new policy would require re-opening all cases in which severer punishments were imposed and re-evaluating the punishment. Nonetheless, the analysis thus far supports creating an exceptional mechanism for final sentence re-evaluation in cases of moral panic. The view that punishments imposed during the panic were not normatively legitimate together with the empirical experience that during a panic it is impossible to convince judges that they are imposing exaggerated punishments, lead to the conclusion that the only way to guarantee ordinal proportionality and equal distribution of punishments, both of which are necessary to normative legitimacy, is to re-evaluate the sentences after the panic has subsided. In balancing the value of finality against the injustice caused by exaggerated sentences in cases of moral panic, the need to correct the injustice should prevail. Indeed, this is not the only instance in which the need to respond to

70 See, Eileen Morrison, Resurrecting the Amelioration Doctrine: A Call to Action for Courts and Legislatures, 95 B.U. L. Rev., 335 (2015); Comment, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Penn. L. Rev. 120 (1972);
71 Israeli Penal Law 1977 (as amnded in 1995) §5
unjust criminal rulings overcomes the value of finality. One of the criteria for re-trial is the “miscarriage of justice” caused to the defendant by the original conviction.\textsuperscript{72} “Miscarriage of justice” ought not to be limited to wrongful convictions; it should also apply to imposition of unduly aggravated punishments in response to a moral panic.\textsuperscript{73} 

The conclusion that the need to correct the injustice caused by exaggerated sentences in response to moral panic should overcome the value of finality can further be supported by constitutional considerations. In the US, a new rule of substantive constitutional law that controls the outcome of a case is given retroactive effect\textsuperscript{74} via \textit{habeas corpus} post-conviction proceedings.\textsuperscript{75} Thus for example, in Montgomery v. Louisiana (2016)\textsuperscript{76} the US Supreme Court held that the constitutional rule articulated in Miler v. Alabama (2012)\textsuperscript{77}, according to which the Eighth amendment prohibits mandatory life sentence without parole to juvenile offenders, applies retroactively to post-convicted prisoners.\textsuperscript{78} Therefore, juveniles who have been sentenced to life without parole are entitled that their final sentence be re-evaluated. Constitutional considerations might similarly justify re-evaluation of exaggerated sentences affected by moral panic. Unduly aggravating punishments in response to moral panic infringes upon basic human rights. According to various constitutions and international documents, gross disproportionate sentences, as such, violate human rights.\textsuperscript{79} Additionally, punishments that exceeds defendant's culpability infringes upon her dignity,\textsuperscript{80} all the more so when the defendant is demonized; aggravated punishments infringe upon equality due to both the distortion of ordinal proportionality and to the unequal distribution of punishments during the panic and after it has subsided.

\textsuperscript{72} Some scholars go even further and argue that the considerations justifying final convictions are less compelling with respect to final sentences. See, Douglas A. Berman, Re-Balancing Fitness, Fairness, and Finality for Sentences, 4 \textit{WAKE FOREST JOURNAL OF LAW & POLICY} 150 (2014); Andrew Chongseh Kim, \textit{Beyond Finality: How Making Criminal Judgments Less Final Can Further the “Interests of Finality”}, 2013 \textit{UTAH L. REV.} 561 (2013); Cecelia Klingele, \textit{Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release}, 52 \textit{W&M & MARY L. REV.} 465 (2010)

\textsuperscript{74} Montgomery v. Louisiana 136 S. Ct. 718, at 729 (2016)

\textsuperscript{75} In various legal systems, as well as in international legal documents, grossly disproportionate sentence is considered as a violation of human rights, see Dirk van Zyl Smit and Andrew Ashworth, \textit{67 Modern. L. Rev.} 541 (2004)

\textsuperscript{76} Montgomery v Louisiana, Supra note

\textsuperscript{77} 567 U.S. 460 (2012).


Therefore, prisoners, who were sentenced unduly severely during the panic, should be entitled that their sentence be-evaluated in order to guarantee their constitutional rights.

A mechanism for sentence re-evaluation does not have, necessarily, to be based upon constitutional proceedings such as the habeas corpus; it could be created via criminal proceedings, such as the mechanism offered by the Model Penal Code of the American Law Institute in 2011. The proposed mechanism creates a “second-look” process for sentence modification available to prisoners who have served exceptionally long terms. After 15 years of confinement, prisoners will be given the right to apply to a judicial decision-maker for possible modification of their original sentences. The main motivation behind this possibility rests on the “heavy use of lengthy prison terms” in the American criminal-justice system, which is "dramatically greater than in other Western democracies", and it has remained high even "after nearly two decades of falling crime rates." The second-look mechanism is meant to ensure that "when punishments are imposed that will reach nearly a generation into the future, or longer still" the punishments remain "intelligible and justifiable at a point in time far distant from their original imposition."

The motivation behind sentence re-evaluation in cases of moral panic is different: it rests on the injustice caused by the exaggerated severity of punishments during the panic. As such, the cases eligible for sentence modification should not necessarily be limited to sentences of exceptionally long terms of imprisonment. Nonetheless, practically, one may assume that sentences unduly influenced by moral panic that will be eligible for re-evaluation would in fact be those of relatively long imprisonment. The need to re-evaluate the sentences is acknowledged only after moral panic has subsided. Therefore, those who have been sentenced to moderate terms of imprisonment (though still aggravated), might already be released by the time the need to re-evaluate the length of their imprisonment term is acknowledge. Thus for example, although the sentence of 6

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81 American Law Institute, Model Penal Code: Sentencing (tentative Draft No. 2, 2011), § 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation, 75-95
82 Ibid.
83 Ibid. For support of the proposed mechanism for sentence re-evaluation see: Cecelia Klingele, supra note at 536 (2010); Sarah F. Russell, A “Second Look” at Lifetime Incarceration: Narratives of Rehabilitation and Juvenile Offenders, 31 QUINNIPLAC L. REV. 489, 519 (2013); Richard S. Frase, Second Look Provisions in the Proposed Model Penal Code Revisions, 21 FED. SENT’G REP. 194, 196-99 (2009). On the other hand, see Meghan Ryan, Taking Another Look at Second-Look Sentencing, 81 Brooklyn L. Rev. 149 (2015), who opposed the proposal because it infringes upon both the doctrine of fianlity and retributive punishment requiring to evaluate the severity of the offence at the time of cimitting it.
years imprisonment imposed on Ysraeli in 2003\(^8^4\) had been a step up in the punishments imposed up to this case for hit-and-run traffic offences in Israel, by 2014 when the panic subsided, Ysraeli was a free man. In 2014, punishment re-evaluation might avail cases like that of Simon, who in 2010 was sentenced to 14 years imprisonment.\(^8^5\)

**Concluding Remarks**

Courts respond to moral panic by both demonising defendants and aggravating punishments. As opposed to legitimate condemnation of conduct, demonising defendants ought not ever to be legitimate. Aggravation of punishments in response to moral panic might be perceived as legitimate; but normatively punishments that are proportionate to the perceived, exaggerated, rather than to the real threat to a social value, are unjust and unfair, and therefore are not normatively legitimate.

When the panic subsides, courts tend to return to lower levels of punishment, and the mitigated punishment could gain both perceived and normative legitimacy. The subsidence of the panic enables one to realize that a gap between perceived and normative legitimacy has been created during the panic. The criminal justice system should be committed to bridging that gap retroactively, and to correcting the injustice of imposing aggravating punishments.

One way to bridge the gap is to grant a clemency that will reduce the punishment of defendants whose sentences during the panic were exaggerated. The article proposes to adopt a more revolutionary mechanism for bridging the gap, one that allows for sentence re-evaluation. Such a mechanism will require further thinking with regard to the practical details, such as who should re-evaluate the sentences impacted by moral panic, what would be the proceedings for applying for re-evaluation of these sentences, etc.

The implicit assumption throughout the article is that the criminal justice system is aware of the possible impact of moral panic on sentencing; that although during the panic courts are unaware that the punishments they imposed are exaggerated, when the panic subsides, the criminal justice system is aware, in retrospect, that courts have been unduly influenced by moral panic and have imposed exaggerated
A legal system might not be aware either of the notion of "moral panic" or of its possible impact on the criminal justice system. Nonetheless, the arguments in this article will still be relevant to all instances in which, in retrospect, it turns out that during a specific period of time courts imposed exaggerated punishments that distort the hierarchy between the severity of offences and that are based on both an exaggeration of the number of offences committed and on demonizing offenders. Awareness of the possible impact of moral panic on the criminal justice system will increase the chances that the system will be aware of the unduly severely sentences during the period of the panic and therefore will be willing to take steps to bridge the gap between perceived and normative legitimacy after the panic has subsided.

86 The Israeli criminal justice system has indeed been aware, in retrospect, of the influence of the moral panic on the sentences for abandon after injury offences. While reducing the punishment for the offence of abandonment after injury from 36 to 26 months’ imprisonment in 2014, J. Solberg (Supreme Court) explicitly referred to arguments voiced in Israeli academia against the exaggerated and disproportionate punishments for the offence, including my own view that in sentencing hit-and-run traffic offences courts were influenced by moral panic. See Cr. App. 7936/13 Levi v. State of Israel, supra note at paras.32–35