POLSKA AKADEMIA NAUK • INSTYTUT NAUK PRAWNYCH

ZAKŁAD KRYMINOLOGII

ARCHIWUM KRYMINOLOGII

Archives of Criminology

PL ISSN 0066-6890

DOI 10.7420/AK2025.19

2025 • ONLINE FIRST• 1–27

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# Making sense of statutory penalty ranges: Proportionality and penalty value in Sweden

## Zrozumienie ustawowego wymiaru kar: proporcjonalność i wartość kary w Szwecji

**Abstract:** This article examines what it can mean for a sentencing system to be built on proportionality, using the Swedish notion of penalty value (straffvärde) as a case study. Penalty value translates the seriousness of an offence into the severity of the penalty, and it structures both statutory scale-setting and judicial sentencing. The analysis contrasts a desert-based account centred on blameworthiness with instrumental accounts in which seriousness is calibrated to preventive or expressive aims. Set against a period of rapid legislative change – involving reforms on organised crime, sexual offences and honour-related crimes – it illustrates how these rationalities interact in the construction of statutory penalty ranges. The article concludes by developing two ideal types and a third, less ideal-typical model to make systematic sense of this interaction. Methodologically, this reconstruction engages criminal policy from within the system's normative structure.

**Keywords:** penalty value, penal value, proportionality, just deserts, sentencing, sentencing rationalities, Swedish criminal law, statutory penalties, preventive turn, punitive turn

**Abstrakt:** Niniejszy artykuł analizuje znaczenie systemu wymiaru kar opartego na proporcjonalności i odwołuje się do szwedzkiej koncepcji wartości kary (straffvärde) jako studium przypadku. Wartość kary przekłada wagę przestępstwa na surowość kary i kształtuje zarówno ustalanie ustawowego wymiaru, jak i orzekanie wymiaru kary przez sąd. Analiza zestawia ujęcie oparte na zasłudze, skoncentrowane na stopniu winy sprawcy, z ujęciami instrumentalnymi, w których waga czynu jest określana w zależności od celów prewencyjnych lub symbolicznych. Na tle dynamicznych zmian legislacyjnych – obejmujących reformy dotyczące przestępczości zorganizowanej, przestępstw seksualnych oraz przestępstw związanych z tzw. „honorowymi" motywami – artykuł pokazuje, w jaki sposób te różne racjonalności oddziałują na siebie przy konstruowaniu ustawowych wymiarów kar. Artykuł kończy się opracowaniem dwóch typów idealnych oraz trzeciego, mniej idealnego, typu, które mają

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na celu systematyczne wyjaśnienie tych interakcji. Pod względem metodologicznym polityka karna analizowana jest z wewnętrznej perspektywy normatywnej struktury systemu prawnego.

**Słowa kluczowe:** wartość kary, wartość penalna, proporcjonalność, zasada zasłużonej kary, wymiar kary, racjonalność wymiaru kary, szwedzkie prawo karne, sankcje ustawowe, zwrot ku prewencji, zwrot ku surowszemu karaniu

## Introduction

This text is concerned with what it can mean for a sentencing system to be built on proportionality. It approaches that question through the concept of penalty value (*straffvärde*) in Swedish law, highlighting its historical development, ideological underpinnings and contemporary application. The penalty value is a concern for both the legislature and the courts, and it is described as an expression of proportionality between a crime and its punishment (Prop. 1987/88:120: 77 f.). Penalty value serves to translate the seriousness of an offence into either a number of day-fines or a custodial term of a certain length. The ranges set out in statutes – the prescribed minima and maxima – reflect the "abstract penalty value," whereas the sentence in an individual case, determined by the court within these ranges, is based on the "concrete penalty value." Because the function of penalty value is to ensure that the system and its application adhere to proportionality, it connects to and illustrates more general, principled questions that reach beyond Swedish law: What does it mean for a punishment to be proportionate? What can it mean for a sentencing system to be built on proportionality?

At the outset, it is important to note that this is a work of legal scholarship rather than traditional empirical inquiry of the kind typical in criminology. The primary object of study is not factual questions (such as the consequences of legal norms or the actual drivers behind them), but the legal norms themselves and the system they are presumed to form – in other words, the investigation operates in the realm of the "ought" rather than the "is" (Kelsen 1959–1960). The aim is to bring order to, or reconstruct, this system so that it appears coherent and rational (MacCormick 1978: 107 ff.; Dworkin 2000: 239 ff.). Because the object of study is norms, the inquiry engages with matters that are not empirically falsifiable, such as how blameworthy a particular offence should be regarded, or what level of severity a particular punishment should reasonably have. Put simply: in law we ask whether a norm is valid and how it should be justified, not whether it is true or false (von Wright 1963). Readers are, of course, free to agree or disagree; these conclusions ultimately rest on argumentation and its perceived force. That said, the goal is to present the legal system in a way that allows room for different interpretations and different normative stances.

The text begins by outlining – somewhat schematically – a historical evolution of sentencing rationalities, situating penalty value within broader paradigmatic

shifts. It then turns to proportionality in sentencing and criminal law, setting out the basic assumptions on which the analysis rests. Firstly, proportionality in this context is treated as a backward-looking criterion, concerned with the relation between the seriousness of an offence committed in the past and the severity of a penalty subsequently imposed. Secondly, proportionality is approached as a relative concept: what counts as proportionate is established through comparisons between offences and their corresponding penalties. The discussion then considers the central notion of the seriousness of an offence, and the grounds on which it should be assessed. In the classic – and probably intuitive – understanding, seriousness concerns the blameworthiness of the criminalised act: the determinant is desert, that is, the degree of blame or censure the act deserves. However, when studying the legal order, it can be argued that the seriousness of offences can also, to some extent, be assessed in more instrumental terms. Rather than desert, the determinant then becomes need – what is required to realise certain aims – at the cost of bringing the desert-based relative ordering out of alignment.

Next, the discussion examines the Swedish framework, focussing on different prescribed penalties (abstract penalty values) in relation to blameworthiness (retrospective) and instrumental aims (prospective) such as general prevention and expressive messaging. The analysis is situated in a period of markedly accelerated reform, in which statutory penalties are being raised across several areas. Recent reforms – e.g. higher statutory penalties for organised crime, sexual offences and honour-based crimes – can arguably be read as indicating that seriousness (penalty value) may rest on both desert-based and instrumentality-based reasoning.

Finally, the concluding section returns to the organising question of how a proportionality-based sentencing system is to be understood. It does so by setting out two ideal-typical sentencing rationalities and, against that background, proposing a third model that is less ideal-typical yet still preserves a systematic account of how offences are ranked and penal severity is distributed. The point of insisting on a systematic account is methodological. It makes it possible to engage with the legislature's own terms and to scrutinise criminal policy from within the normative structure, rather than merely concluding that the law is irrational or that particular penalty ranges conflict with abstract principles of justice. In a system-based approach, the central question becomes what grounds the assessment of seriousness should use in different contexts: a backward-looking assessment of blameworthiness or forward-looking considerations such as crime prevention or other policy aims. Once those grounds are made explicit, a further question arises: whether they are legitimate. A related, important question – though one which is not pursued in this article – is whether there is empirical support for the forward-looking assumptions that are allowed to shape the seriousness of offences and penalties.

# 1. Enduring tensions in sentencing

## 1.1. Retrospective and prospective rationalities in sentencing

At first glance, if one has not reflected much on these matters, the development of the rules governing sentencing within criminal law may appear akin to that of the natural sciences. One may be inclined to imagine this as a linear, progressive process: a sort of technical progression, an ongoing modernisation in which new breakthroughs are made, suggesting movement towards ever greater perfection. Such a technocratic view of the state of affairs, however, can be misleading. In fact, there is not much new under the sun when it comes to determining punishments; the scope for meaningful advancement is limited. The ideological foundations – and the inherent tensions between competing interests – emerged long ago. A closer examination reveals a cyclical pattern rather than a linear one: past fashions inevitably resurface, and what once seemed modern eventually becomes outdated.

In reflecting on the justification of punishment – why and how we punish – two intuitively competing ideas tend to recur. One ties punishment primarily to the wrong that was committed, the other to the beneficial effects that punishment is hoped to produce. Traditionally, this contrast has been presented as one between retributive and consequentialist theories of punishment (see e.g. Hart 1968; Lacey 1994). One way of characterising this contrast is as a distinction between retrospective and prospective approaches. The retrospective approach emphasizes the relationship between punishment and the criminal act committed in the past. In this sense, punishment is viewed as an almost logical consequence of the crime and should therefore reflect the seriousness of the offence (e.g. Kant 1978: 331 ff.). This involves a general principle of justice: the punishment should fit the crime. By contrast, the prospective rationality focusses more on the purpose of the penal response and what it is expected to achieve in future. According to this view, the intervention is motivated and justified by a particular goal – preventing crime – and this goal should influence both the severity and the form of the punishment (e.g. Bentham 1970: 11 ff.). Naturally, these two positions may come into conflict. What is expedient is not always just, and vice versa. At the same time, it is difficult to adopt only one position and entirely disregard the other; each corresponds to distinct expectations of punishment, both appearing equally necessary and reasonable.

## 1.2. Three phases in the evolution of sentencing

Over the past two centuries, Western legal thought on how punishment ought to be determined can, in very broad strokes, be divided into three phases. A familiar way of presenting this development is to describe it as a pendulum moving between more retrospective and more prospective modes of justification. As scho-

lars have pointed out, however, pendulum narratives risk becoming misleading when they are treated as sociological explanations of penal change, purporting to show why criminal justice policy swings from one pole to another (Goodman, Page, Phelps 2017). The present account does not attempt such an explanation. Its purpose is only to provide a simplified intellectual backdrop – an ideal-typical sketch of how different justificatory frameworks have been emphasised at different moments in legal thought. On that basis, three broad phases can be distinguished.

The first of these phases is associated with the intellectual climate of the Enlightenment and the long 19th century that followed. It is to this period that many of the concepts structuring modern law can be traced, such as constitutional rights and liberties and the distinction between public and private law. In continental Europe, modern criminal law took shape, with core components such as the principles of legality and culpability and the idea of proportionality between crime and punishment (see e.g. Feuerbach 1801; Binding 1872; Beccaria 1986). Conceptually, the phase was marked by a predominantly retrospective, act-centred conception of justice. In later accounts, this period has sometimes been collectively referred to as the "classical school of criminal law" (e.g. Wetzell 2022: 43).

Around the turn of the 20th century and in the years that followed, these ideas were challenged by an alternate paradigm. The then-prevailing belief in science, optimism about progress and social engineering aimed to treat criminality as any other social problem. As a result, special-preventive ideas came to the forefront, representing the sort of prospective thinking mentioned above. Society's responses should serve the aims of public protection and rehabilitation, and punishments should be tailored to the offender's dangerousness and potential for reform (e.g. von Liszt 1892). Conceptually, this marked a shift in emphasis from the criminal act to the offender, from what had been done to who was thought to have done it. Concepts such as moral culpability and criminal punishment were to some extent seen as outdated. In its most extreme form, this thinking was based on a deterministic view of human behaviour that wholly rejected the idea of individual responsibility (Lombroso 1876; Ferri 1896). Although special-preventive ideas in sentencing largely persisted, it is worth noting that confidence in its transformative potential was notably tempered in the period following World War II.

In the second half of the 20th century, special-preventive ideas increasingly came under scrutiny in debates that invoked both empirical and normative concerns. The special-preventive approach to sentencing was often portrayed as having failed to deliver on its promise to "treat away" crime (e.g. Martinson 1974; Wilson 1975; Brody 1976), and basing punishment on the offender's personal characteristics was criticised as fundamentally unjust and unpredictable. Attention once again turned to the offence itself, rather than to the individual, and punishment was to be handed down without regard to various preventive considerations in the individual case – equal crimes should result in equal punishments. One buzzword during this transitional period was "just deserts" (e.g. von Hirsch 1976; Singer 1979). Part of the theoretical framework underpinning these reforms was

the distinction between what might be called the "why" and the "how" of punishment. Punishment could be justified (why punish) by reference to general preventive aims, but the distribution of punishment (how to punish) should be dictated by principles of justice, fairness and backward-looking proportionality (see e.g. Hart 1959–1960: 8 ff.; Roxin 1973: 5 ff.). In Sweden and Scandinavia, this line of reasoning gained considerable influence and was sometimes – at least among professionals – referred to as "neoclassical," representing a kind of return to the principles of the classical legal school (e.g. Heckscher 1980; Lahti 2000). This way of thinking also found tangible expression in legislation – through a major reform of the sentencing rules that entered into force in 1989 (Prop. 1987/88:120).

It should be emphasised that both "pendulum swings" – the special-preventive and the "neoclassical" – were primarily changes in theory and legal thought rather than in sentencing practice. There was an aspiration to move in a certain direction, yet the actual impact remained rather modest. Despite the ideological superstructure shifting back and forth over the course of a century, sentencing practice in Sweden, for the most part, appears to have continued to be guided by the same backward-looking, act-orientated conceptions of justice that had been associated with the era of the classical school of criminal law (SOU 1986:14: 427; Prop. 1987/88:120: 38). What the "neoclassical" turn primarily brought was greater transparency and predictability – which, of course, are not insignificant matters.

## 2. The notion of penalty value in Swedish law

### 2.1. A juridification of sentencing

Before the aforementioned reform in 1989, the statutory provision governing sentencing was comparatively sparse, reading as follows:[1]

> When determining the appropriate sanction, the court shall, while considering what is necessary to maintain public compliance with the law, place particular emphasis on ensuring that the sanction is suited to promote the offender's reintegration into society. (Criminal Code, ch. 2, s. 7, as then in force; author's translation)

As is evident, courts were required to navigate a delicate balance between general preventive considerations (i.e. ensuring public compliance with the law) and individual preventive concerns (i.e. promoting the offender's reintegration into society). However, as mentioned above, courts in practice made such explicit trade-offs only to a limited extent – sentencing largely adhered to a pattern of retrospective equal

[1] Swedish: "Vid val av påföljd skall rätten, med iakttagande av vad som kräves för att upprätthålla allmän laglydnad, fästa särskilt avseende vid att påföljden skall vara ägnad att främja den dömdes anpassning i samhället."

treatment based on the severity of the offence. Taken seriously, this balancing would be demanding in practice. The now-repealed provision, for its part, bears some similarities to the current sentencing rule in German law (Strafgesetzbuch § 46(1)). Among other things, the German provision requires consideration of both the offender's culpability (*Schuld*) and the effects that the punishment is expected to have on the offender's future life in society.[2]

However, with the 1989 reform, Swedish law introduced relatively detailed rules for sentencing, which remain largely unchanged to this day (Prop. 1987/88:120). The primary point of departure for both sentencing decisions and the choice of sanction became the concept of penalty value – essentially a quantification of the seriousness of the offence. Regarding the ideological framework, a primarily prospective approach was explicitly replaced by a predominantly retrospective one. This shift can be viewed as an attempt to resolve the tension between retrospective and prospective considerations. Sentencing decisions thus became explicitly retrospective and norm-rational, whereas prospective, goal-orientated considerations were restricted to the legislative domain through decisions concerning criminalisation. In many respects, this major reform also marked what could be described as a juridification of sentencing. An area previously understood to be guided by considerations beyond the legal domain and largely left to judicial discretion manifestly became more rule-bound, predictable and transparent.

## 2.2. The sentencing rules and role of penalty value

Swedish sentencing rules structure the decision-making process into two distinct stages (for a more detailed account in English, see Asp, Holmgren 2020). The first stage is the measurement of punishment (*straffmätning*), followed by the choice of sanction (*val av påföljd*). There are good reasons for this order, although at first glance, it may appear somewhat backwards. This structure means that before deciding whether imprisonment is appropriate, the court has already determined the severity of a potential prison sentence.

The first – and in many cases only – step of measurement of punishment is when the court determines the penalty value. As noted, the penalty value refers to a quantification of the seriousness of the offence, expressed as a specific sanction, i.e. a certain number of day-fines or a given duration of imprisonment. The central provision for determining the concrete penalty value is chapter 29, section 1 of the Swedish Criminal Code:

> When assessing penalty value, consideration is given to the damage, violation or danger involved in the act, what the accused realised or ought to have realised in this respect, and their intentions or motives. (Criminal Code [*brottsbalken*, SFS 1962:700], ch. 29, s. 1; Government Offices of Sweden, unofficial translation)

[2] German: "die Wirkungen, die von der Strafe für das künftige Leben des Täters in der Gesellschaft zu erwarten sind, sind zu beruchsichtigen."

Thus, one can distinguish between what might be called act-related and culpability-related factors. The act-related factors primarily concern the type and extent of harm, danger or violation brought about by the act; *ceteris paribus*, the greater the harm, the higher the penalty value. The culpability-related factors address *mens rea*, i.e. the offender's intent, awareness and motives. An intentional act will normally result in a higher penalty value than a reckless one, and a carefully planned offence will carry a higher penalty value than the same act committed impulsively. In addition, sections 2, 2a and 3 of chapter 29 list further aggravating and mitigating circumstances that may raise or lower the penalty value, such as whether the offence was committed against a particularly vulnerable victim or whether the offender, owing to a mental disturbance, had a reduced capacity to realise the implications of the act.

Certain mitigating circumstances not related to the penalty value, but rather the offender's personal situation or post-offence actions – including substantial cooperation during the investigation – may reduce this value further, resulting in what is called the punishment measurement value (*straffmätningsvärde*) (ch. 29, ss 5–7).

Once this value has been established, the second stage involves choosing the appropriate sanction. Under chapter 30 of the Criminal Code, the sentencing framework operates with a presumption against imprisonment: where the penalty value is low and neither the nature of the offence nor the convicted person's prior record calls for imprisonment, there is room for non-custodial sanctions. Conversely, where the penalty value is sufficiently high and/or other grounds for imprisonment carry sufficient weight, a custodial sentence will be imposed (Prop. 1987/88:120: 100).

We will not go further into the details of the sentencing rules here. What should be clear, however, is that penalty value plays a central role in structuring sentencing: when the penalty value is relatively high, it will ordinarily determine both the type of sanction (imprisonment) and the length of the custodial sentence.

### 2.3. The notion of abstract penalty value

As described in the previous section, penalty value represents a quantification of the seriousness of the offence, focussing on past factors – namely, the circumstances of the act. A distinction is also made between the concepts of "abstract" and "concrete penalty value." The abstract penalty value refers to the legislature's assessment of the offence's seriousness; it is expressed through the offence's statutory range (i.e. the minimum and maximum penalties). The concrete penalty value, in turn, concerns the court's assessment of these same factors. As noted, it manifests in the specific penalty set within the statutory range established by the legislature. The premise of the framework is thus that the same underlying rationale informs both the legislature's determination of statutory penalty ranges and the courts'

sentencing within those limits; in both settings, punishment severity is taken to express the penalty value.

## 3. A systematic understanding of proportionality in sentencing

### 3.1. Three questions about the meaning of proportionality

In Swedish sentencing law, penalty value is commonly described as an expression of proportionality. In contemporary legal theory, commentators have often remarked that proportionality in sentencing is an elusive idea, difficult to define and operationalise (Lacey, Pickard 2015; Matravers 2019; Tonry 2019; Lacey 2021). The very term "proportionality" may invite expectations of quasi-scientific precision in the relationship between crime and punishment that no plausible theory can satisfy, and there is also disagreement about whether the principle should be understood as a determining rule or rather as a limiting constraint (Morris 1998; von Hirsch, Ashworth 2005). However – arguably – much of the perceived indeterminacy can be traced to three more basic uncertainties: firstly, whether proportionality in sentencing is conceived as a forward-looking or a backward-looking idea (or some combination of the two); secondly, whether it is understood as an absolute or a relative principle; and thirdly, what is meant by the key variable of "seriousness of the offence."

### 3.2. Proportionality as backward-looking (rather than forward-looking)

In legal contexts, "proportionality" is used in more than one sense. A first distinction is between "forward-looking" and "backward-looking" proportionality (see e.g. Asp 2012: 188 ff.). In general legal discourse, proportionality most often refers to the forward-looking sense: a relation between means and future-orientated ends, typically operating as a constraint on the exercise of public power, both in legislation and in adjudication. In constitutional law, it may structure the assessment of how far the legislature is permitted to go in restricting individual rights; in public law and criminal procedure, it informs judgments about the degree of coercion or force that public officials may legitimately employ.

By contrast, the kind of proportionality that is at stake when one speaks of the relation between crime and punishment is backward-looking – and that is expressed in Swedish law through the notion of penalty value. Here the focus is on the relation between a sanction and an offence that lies in the past: a principle of justice which holds, in simple terms, that the severity of punishment should reflect the seriousness of the offence. This backward-looking principle can be regarded as determining (a sentence that departs from it is, in that sense, unjust) and the-

reby also as limiting, much like its forward-looking counterpart (a sentence that exceeds what the principle allows is unjustified). The two forms of proportionality, however, rest on distinct rationalities. Forward-looking proportionality takes as its point of departure the relation between means and ends, whereas backward-looking proportionality concentrates on the relation between the seriousness of the offence and the severity of the punishment.

### 3.3. Proportionality as relative (rather than absolute)

Within a backward-looking conception of proportionality, the determining variable is the seriousness of the offence. Plausibly, seriousness is intuitively linked to how morally wrong the conduct is taken to be: one can speak of the degree of blameworthiness associated with a given type of offence. Blameworthiness is a normative notion, and views on how different offences should be evaluated will naturally diverge, depending on people's underlying moral outlook. As a heuristic, one may distinguish between more individualistic and more collectivistic moral conceptions (see e.g. Shweder et al. 1997; Graham, Haidt, Nosek 2009). Even so, it should be relatively uncontroversial to assume that, within a given cultural and historical context, there is at least a rough consensus on how different types of offences can be ranked in terms of their relative blameworthiness. For example, many would regard theft as less blameworthy than rape, which in turn is commonly regarded as less blameworthy than murder. In this view, the concept that links an assessment of the seriousness of an offence to a punishment of a certain severity is that of desert: the question is what punishment is deserved, given how blameworthy the offence is (von Hirsch, Ashworth 2005: 135).

In the literature, a distinction is often drawn between cardinal (absolute) and ordinal (relative) proportionality (von Hirsch, Ashworth 2005: 137 ff.; Duus-Otterström 2019). Different meanings can be attached to the idea of cardinal proportionality, but in one plausible understanding a proportionality principle that rests on blameworthiness is inherently ordinal or relative. It offers guidance as to how different offences and sanctions should be ranked in relation to one another and thereby helps to structure a system. However, distinct penal systems may all satisfy this relative proportionality requirement while operating at very different overall levels of punishment. How severe punishments should be in general – or, put differently, how the system is to be "anchored" – is a question that proportionality cannot answer (von Hirsch, Ashworth 2005: 141). From an ideal-typical perspective (and not as a realistic description of actual legislative practice), that question can instead be seen as depending on how the aims of the penal system are defined and what overall level of punishment is thought necessary to realise those aims – something closer to the aforementioned forward-looking proportionality assessment (Holmgren 2022).

### 3.4. Proportionality and competing conceptions of seriousness

As noted in the previous section, there is an intuitive link between blameworthiness and assessments of the seriousness of offences. Although blameworthiness is meant to function as the primary yardstick for evaluating how serious a crime is, a sentencing system such as the one just described is not without imperfections; it is not fully coherent. As already emphasised, blameworthiness is a normative and contestable notion. With that reservation, it may nonetheless appear, when comparing different offences and their corresponding punishments, that some crimes are punished more severely than their relative blameworthiness would seem to warrant, and others more leniently. If this discrepancy is not merely coincidental, a plausible explanation is that various instrumental considerations have been prioritised over blameworthiness in determining the relative severity of punishment for some offences. It might involve an ambition to use general deterrence or individual deterrence to combat particular categories of offending, or it might be about sending targeted signals about particular forms of offending. Such patterns do not necessarily reflect a principled or coherent stance on the part of the legislature; more often, they may stem from political expediency – a desire to demonstrate firmness in the face of particular offences, without fully considering the implications for the penal system as a whole. Yet if the system is to remain coherent in theory, one has to assume a degree of rationality that, in practice, may be only partially present.

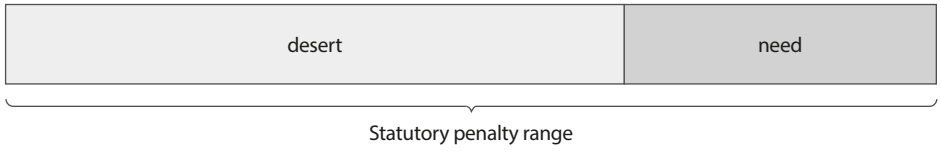
As discussed, blameworthiness is a normative concept, and views on the degree of blame assigned to different kinds of conduct may reasonably diverge. If one were nonetheless to single out an example of the imperfection described above – one which many would arguably recognise, and which is by no means unique to the Swedish system – it might be found in the treatment of drug offences. Substances classified as narcotics are typically both dangerous and addictive, and handling them – particularly with intent to distribute for profit – can certainly be regarded as blameworthy. However, it is at least arguable that the sale of drugs is not, in ordinary moral judgment, considered as blameworthy as serious assault or rape, for example. Yet in many legal systems, serious drug offences are punished on par with, or even more severely than, serious violent crimes. The reason for these harsh penalties is plausibly instrumental; they reflect the goal of curtailing behaviour that is deemed harmful at a societal level. Whether or not such measures actually work, the aim can be understood as deterring individuals from becoming involved with narcotics, or alternatively, incapacitating those who are inclined to do so.

One way of characterising the distortions that then arise within the system is to distinguish between two different senses in which – from the legislature's point of view – a crime can be said to be serious (see Holmgren 2021: 131 ff.). Firstly, there is the form of seriousness, which relates to how blameworthy the offence is when compared with other offences. In this sense, the determining factor is "desert": the punishment is calibrated by how much blame the offender is thought to deserve, relative to other crimes and penalties. Additionally, there is another form of

seriousness that instead relates to various instrumental considerations. Here, one might say that the determining factor is "need": the degree of punishment is made commensurate with the perceived need to realise certain preventive or other penal aims. With this distinction in place, the following section illustrates how need-based reasoning can be discerned in recent adjustments to abstract penalty values.

For many offences, these two conceptions of seriousness will overlap substantially. Murder, for instance, is both highly blameworthy and associated with a strong (perceived) societal interest in deterrence and incapacitation; its statutory penalty can thus be understood as reflecting both desert and instrumental need. In other cases, however, a discrepancy emerges in which instrumental considerations weigh more heavily than blameworthiness. Drug offences can again serve as an example. It can be said that the prescribed level of punishment in such cases is justified by desert only up to a certain point, and that any excess must instead be explained – and potentially criticised – in terms of other instrumental considerations. This relationship could, in principle, be expressed schematically, with desert setting a baseline and instrumental need accounting for a further upward adjustment (see Holmgren 2021: 141 ff.).

**Figure 1. Seriousness of an offence (abstract penalty value)**




Source: Holmgren 2021.

Moreover, the instrumental rationale is not always about preventive goals in a narrow sense. It may also serve communicative purposes. There may be, for example, a perceived need to employ more severe punishment in order to make a statement against, and mark blame for, a particular type of offence, or to draw attention to and provide recognition or redress for a certain group of victims – again without necessarily taking into account the overall coherence of the system.

## 4. Contemporary developments

### 4.1. A shift in paradigm?

Earlier in the article, it was outlined how the history of criminal law – particularly ideas about how punishments should be determined – can be schematically divided into three phases spanning the past two centuries. The first is a "classical"

period, which around the turn of the 20th century was challenged by an approach orientated towards individual prevention. This preventive thinking, in turn, was largely abandoned in the second half of the century in favour of a "neoclassical" renaissance.

This historical development was likened to the movement of a pendulum, with the emphasis moving between backward-looking and forward-looking considerations – that is, between sentencing based on the act itself and sentencing based on the offender as a person. In their ideal-typical forms, these two approaches can be regarded as distinct paradigms: mutually exclusive ways of reasoning about punishment. In practice, however, both types of considerations have likely coexisted in all penal systems. Rather than exclusive dominance, it is more accurate to speak of shifting emphases during particular periods. Nevertheless, in the Swedish context, recent developments invite the question of whether the most recent act-orientated and backward-looking "neoclassical" era is now being replaced by something else – i.e. whether we are moving into a fourth phase. Might the pendulum be swinging back so that the offender once again is becoming the focus at the expense of the act, or is some different configuration taking shape?

### 4.2. A changing landscape

In certain respects, Swedish criminal law and the rules governing sentencing find themselves in a period of rapid transition. The statutory penalties are being raised, and the general level of punishment is increasing at a pace not previously seen. The Swedish Prison and Probation Service anticipates that the number of people in prison will triple in the next 10 years (see Kriminalvården 2025). While one might certainly debate whether reactive criminal law is the appropriate measure to address organised crime, what primarily drives these legislative changes is the growing influence of organised and network-based criminality – manifested, among other things, in the large number of cases of deadly firearm violence compared to other European countries (Brottsförebyggande rådet 2024).

In this context, it is worth noting that the Swedish legislative process is relatively slow. The constitution provides for an extensive preparatory procedure involving consultations with relevant authorities and stakeholders (Sweden's Instrument of Government [*regeringsformen*] ch. 7, s. 2). Consequently, political ambitions for reform often take several years to translate into enacted legislation. In the present electoral term, however, these constitutional requirements have not prevented a strikingly rapid pace of reform. Legislative reforms are now being taken forward that will increase sentences, both through higher statutory penalties and through changes to the general rules on sentencing (Prop. 2025/26:218; Ett nytt straffrättsligt 2026). Further reforms are expected in 2026, including stricter rules for young offenders and a lower minimum age of criminal responsibility – from 15 to 13 – for certain serious offences (Prop. 2025/26:246). In addition, an

indeterminate custodial sanction has been proposed as an alternative to ordinary sanctions for a limited category of high-risk offenders (Prop. 2025/26:95).

A cautious reading of recent Swedish criminal justice policy suggests a renewed confidence in the capacity of repressive penal measures to bring about change. The retreat from special-preventive ambitions during the final decades of the 20th century was, in part, accompanied by a more sober assessment of what criminal law could achieve: it was increasingly framed as a costly and blunt instrument, ill-suited to remedy the underlying causes of criminality. In that climate, modest sentencing levels were often defended by the view that excessive severity was unlikely to be productive and might even be counterproductive – an orientation that has sometimes been captured under the label of Scandinavian penal "exceptionalism" (Pratt 2008). Against this background, parts of the current discourse may be understood as signalling a shift in expectations towards a more optimistic view of what punishment can achieve.

It should also be noted that the shift towards more severe penalties is not at all, in itself, a new development in Sweden: the legislature has been increasing various statutory penalties for a long time, especially over at least the past two decades. What distinguishes the present moment is the extraordinary, markedly accelerated pace of change – much of it concentrated within the current electoral cycle – and the extent to which criminal law is now mobilised. In the immediate term, as mentioned, this shift is motivated by efforts to address the significant societal challenge posed by network-based criminality. From a longer-term perspective, however, the Swedish trajectory is difficult to separate from broader developments identified in legal scholarship: the "punitive turn" and the emergence of a new "culture of control," with stronger reliance on expressive and exclusionary penal measures (Garland 2001: 6 ff.; Pratt 2007: 1 ff.; Demker, Duus-Otterström 2009; see also Pratt, Miao 2019, on penal populism as a prelude to wider populist politics), as well as what has more recently been described as a "preventive turn" in criminal law, characterised by risk-orientated and security-driven forms of criminalisation (Ashworth, Zedner 2014; Carvalho 2017; Melander 2023).

### 4.3. Instrumental trends

Though significant changes have been made, and even more are on the horizon, there is little to suggest that the overall rationality of Swedish sentencing will undergo a major transformation. The major reform of the sentencing framework mentioned above does propose a artly different structure, in which certain non-custodial sanctions are abolished in favour of a system of conditional imprisonment (see Ett nytt straffrättsligt 2026). Yet much of what is at stake here may be understood as a largely semantic reclassification of sentencing options – what the available responses are called – rather than a shift in the underlying logic. Whether or not the proposal is implemented, penalty value will retain its dominant influence over sentencing.

One way to describe the current development is therefore that the changes are primarily quantitative rather than qualitative: more punishment rather than punishment based on a fundamentally different rationale. Sentence severity is expected to increase significantly, yet there are few indications that the fundamental principles of sentencing will be altered in any substantial way. Even if certain exceptions exist – such as the above-mentioned proposal for an indeterminate custodial measure, intended for use in a limited number of cases – the general tendency appears to be that sentencing will remain predominantly retrospective, focussed primarily on the criminal act itself, and that sentence severity will continue to be determined primarily by the penalty value of the offence.

However, there are indications that the instrumental rationale described above (see section 3.4) is gaining ground in the legislature's determination of statutory penalties – that is, the abstract penalty values of offences. It can be argued that there are now more instances in which relative blameworthiness alone does not fully explain the legislated assessment of the seriousness of an offence, as reflected in the applicable penalty ranges. As noted in the introduction, the present analysis is not concerned with theories or causal explanations of these changes, but with how they can be rationalised from within the legal framework: how the proportionality principle and the system of rules are to be understood in normative terms. That said, the development can arguably – at least in part – be connected to the broader "preventive turn" outlined above. This does not mean, however, that a more preventive orientation is now guiding the courts' assessment and room for manoeuvre in individual cases; that assessment remains predominantly retrospective. Rather, the preventive rationale operates primarily at the legislative level: it shapes what is criminalised and the degree of penal severity the legislature permits itself to prescribe for different categories of conduct.

The following section discusses some examples in which it can be argued that instrumental, crime-control considerations inform the statutory penalties. Such instrumental rationality, when it leads to more severe penalties than relative blameworthiness alone might justify, can be driven by either the goal of using punishment as a practical tool to combat crime or more purely communicative purposes, such as a perceived intrinsic value in expressing censure to the public or to victims. Often, such objectives may overlap with the requirement of proportionality: punishment may, for example, serve to deter crime or signal societal disapproval while at the same time aligning with relative blameworthiness. In other cases, however, a more pronounced discrepancy emerges (see Figure 1). It is important to bear in mind what was noted already: blameworthiness is a normative notion, and assessments of how blameworthy a criminalised behaviour is may reasonably vary between observers. Consequently, the extent to which particular statutory penalties are perceived as disproportionate – and, in turn, the extent to which an instrumental explanation is thought necessary – will itself be open to debate. The examples discussed below should be read with that caveat in mind; they are intended to illustrate how instrumental rationales may be seen to affect penalty levels, not to offer a definitive ranking of offences in terms of blameworthiness.

As previously mentioned, conceptualising the system in this way is, in a sense, an exercise in retrospective rationalisation. One need not be especially cynical to suspect that legislative decisions often function as political signals or demonstrations of resolve rather than as elements of a coherent strategy. Even so, treating them as if they expressed a certain degree of rationality can be analytically useful: it makes it possible to reconstruct the structure they imply and to engage in a more substantive critical dialogue about questions such as whether particular increases in punishment can be reconciled with the principles the system officially claims to embody.

### 4.4. Examples of instrumental drift in penalty values

#### 4.4.1. Organised crime

As noted above, a significant portion of recent legislative measures in Sweden are aimed at criminal networks and gang-related violence. These measures include higher penalty values through both stricter statutory minima and new general rules on aggravating circumstances in sentencing. While there is undoubtedly a communicative aspect to these reforms, they are also driven by a clear desire for crime prevention. The aim is to use criminal law as a practical tool to address the societal problem posed by this form of criminality.

Offences involving unlicensed firearms have, in recent years, been strongly associated in policy and public discourse with organised criminal networks and gang-related violence. One offence for which the statutory minimum has been gradually increased is the aggravated weapons offence. This is a purely conduct-based offence built on presumed danger: liability arises solely from possessing a firearm without a permit (Weapons Act [*Vapenlagen*], ch. 9, ss 1 and 1a). To qualify as an aggravated offence, it is sufficient that the weapon in question is an ordinary pistol or revolver. The possession may be brief, and the actual risk of the weapon being used is largely irrelevant. In 2014, the statutory minimum sentence was 6 months; since then, it has been raised in several steps, culminating in a 4-year minimum in 2024. For comparison, the statutory minimum for aggravated assault is 18 months' imprisonment, while manslaughter has a statutory minimum of 6 years.

Firearms are dangerous, and possessing them without legal authorisation is, of course, blameworthy – often carrying a concrete risk that the weapons will be used. From the standpoint of relative blameworthiness, however, it is not straightforward to regard such an offence as directly comparable to crimes that target life and physical integrity. Reasonable observers may of course differ in their assessments: one might emphasise the broader risks associated with the handling and distribution of illicit firearms. Even so, it remains difficult to equate mere possession with using a firearm to harm another person.

The rationale for increasing the abstract penalty value for the aggravated weapons offence is difficult to explain solely in terms of a changed assessment of

blameworthiness. Rather, it appears primarily instrumental. By coupling the offence with a harsher penalty, criminal law is mobilised in a preventive and proactive manner, enabling intervention and incapacitation before harm occurs – without the need to prove intent to commit, or to facilitate, offences such as murder. Moreover, the higher statutory minimum can be expected to have a deterrent effect, strengthening the incentive to refrain from carrying firearms in public spaces (Holmgren 2021: 267 ff.).

Another legislative amendment that aims to address the problem of network-based and gang-related crime, as with the statutory minimum for weapons offences, is the 2023 introduction of certain general sentencing enhancements: so-called particularly aggravating circumstances (*synnerligen försvårande omständigheter*). Among other things, a particularly severe sentencing enhancement applies when an offence both involves a serious attack on someone's life, health or personal security and "has its background in or was intended to provoke a conflict between groups of people in which firearms, explosives or other comparable devices are used" (Criminal Code, ch. 29, s. 2a). When such circumstances are present, the punishment is therefore significantly harsher than it would otherwise be. In the 2026 reform package, this legislative technique is taken further: where the relevant network-related enhancement applies, the penalty value – as a general rule – shall be doubled (Dubbla straff 2026).

Here, too, one may question whether the circumstances that trigger this enhancement genuinely make the offence proportionally more blameworthy. Naturally, committing a crime in such a context is reprehensible, but it is not obvious that the context, as such, increases the censure the offender deserves – at least not to an extent that would justify doubling the penalty value. Is it inherently more blameworthy to commit an act of violence such as assault when it arises from such a conflict, compared to committing the same act purely out of sadism or personal enjoyment? And is violence in the context of gang-related conflicts really more blameworthy – *ceteris paribus* – than domestic violence? One might even argue that the act in the former case is, if anything, somewhat less blameworthy, to the extent that one accepts that the offender is more clearly embedded in a structure and social environment that may, in part, help to explain the offence. In that sense, these sentencing enhancements are ultimately about targeting a specific type of offence and offender. The aim is to respond forcefully to a phenomenon perceived as a major societal problem. However, the stricter penalties introduced on the basis of this instrumental rationale do not necessarily reflect a corresponding increase in blameworthiness.

### 4.4.2. Sexual offences

Rape is another category of crime for which the statutory minimum has recently been raised: since 2022, the minimum penalty has been 3 years' imprisonment, having previously been 2 years since the 1930s (Prop. 1937:187). However, over

the past decades the legal definition of the offence has been expanded in stages, widening the scope of criminal liability. Violence, threats or a more qualified form of exploitation are no longer required elements. Since 2018, it has been sufficient for the perpetrator to engage in sexual intercourse or an equivalent act (e.g. oral sex or penetration with fingers) while the victim is not participating voluntarily (Criminal Code, ch. 6, s. 1). Whether participation is voluntary is assessed objectively. Merely having an internal unwillingness to participate is not enough; the decisive factor is the victim's ability to freely decide whether to take part (Prop. 2017/18:177: 78).

One might argue that the expansion of criminal liability for sexual offences raises concerns about legal predictability, since the requirement of non-voluntary participation is, by its very nature, an element that may in some cases manifest only to a limited extent in observable external circumstances. Nevertheless, the expansion can, in many respects, be considered justified. From the standpoint of relative blameworthiness, however, it is at least arguable that a statutory minimum of 3 years may be difficult to defend across the full range of cases now encompassed by the offence. A less severe form of the offence, with a more lenient statutory minimum, does exist, but according to the preparatory works it is to be applied restrictively (see Prop. 2004/05:45: 138). It is also noteworthy that there is a negligent form of rape, which likewise carries a lower statutory minimum (Criminal Code, ch. 6, s. 1a). In this case however, the crucial distinction lies entirely in the culpable mental state – the act itself remains the same.

There is strong evidence of a societal shift in attitudes, with behaviours involving a violation of sexual integrity and autonomy – including cases that do not involve more qualified exploitation, violence or threats – now being regarded as more morally objectionable than before. There is also greater awareness of the harms that sexual offences can inflict on victims, and of the extent to which this type of criminality ought to be understood from a gender-equality perspective, as part of a broader pattern of gendered power and inequality. Even so, and leaving room for reasonable disagreement, it is not self-evident that a statutory minimum of 3 years' imprisonment is in line with the offence's relative blameworthiness in all configurations – particularly in cases without violence, threats or exploitation, where the absence of voluntary participation is covered only by the lowest form of intent in Swedish law (*likgiltighetsuppsåt*, close to *dolus eventualis*). As a point of comparison, one might once again consider the sentencing range for aggravated assault, which carries a statutory minimum of 18 months. Engaging in sexual intercourse with someone who does not participate voluntarily is, of course, profoundly blameworthy. But is it truly twice as blameworthy as assaulting someone and causing them severe bodily harm – particularly when no threats, violence or exploitation are involved? The answer is, of course, a matter of judgment. Yet, if one does not accept such a hierarchy of blameworthiness, the relatively high statutory penalty must be explained on other grounds.

Sexual offences are likely an area of criminal law where symbolic significance

and norm-setting functions are particularly pronounced (see Holmgren 2021: 274 ff.). It can be assumed that, perhaps more directly than offences against life and health, sexual offence legislation is expected to uphold social norms and shape public attitudes. It is also an area where the interests of victims are particularly prominent. A conviction, and perhaps even a severe sentence, serves – presumably to an even greater extent than in other types of crime – as a confirmation that the victim has suffered a violation; that the victim's account is vindicated. Regardless of whether the higher statutory penalty has a preventive effect or actually influences social norms, one could argue that there is an inherent value in expressing condemnation and moral censure through severity – primarily for the sake of the victim, but also in relation to the public and the offender. The ambition to realise such an expressive goal may, in turn, result in penalty values that deviate from what would be expected from a relative perspective in a system that otherwise treats blameworthiness as its organising principle.

### 4.4.3. Honour-related crime

In 2020, a general sentencing provision was introduced, providing for higher penalties when "a motive for the crime was to preserve or restore the honour of a person, family, kin or other similar group" (Criminal Code, ch. 29, s. 2, para. 10). Since 2022, there has also been a stand-alone offence targeting acts that are already criminalised when committed in such a context and resulting in a harsher penalty than would otherwise apply (Criminal Code, ch. 4, s. 4e). These provisions – relying on different legislative techniques – specifically target criminal acts rooted in so-called honour norms and honour-based oppression. The phenomenon is difficult to define with precision here, but broadly refers to a form of control – typically directed at girls and women – based on ideals of chastity and purity, where individual interests are subordinated to collective ones. At its most extreme, honour norms can lead to coercion, threats and violence that constitute criminal offences (see SOU 2018:69: 68 ff.; SOU 2020:57: 98 ff.).

Crimes committed with an honour-related motive are blameworthy, naturally and undeniably. However, as in the previous discussion, one may problematise whether such an offence is more blameworthy, *ceteris paribus*, than a comparable crime committed without such a motive. Opinions may differ on this point. One perspective could be that honour norms function as a tool that individuals use to exert power and oppress others. However, one might also understand these norms – drawing on reasoning similar to that applied in relation to gang-related crime – as part of a broader social structure in which both the victims and the perpetrators are embedded. If one emphasises the structural rather than the individual dimension, it could even be argued – along the lines of the so-called "cultural defence" – that such a context may count as mitigating, from the standpoint of relative blameworthiness. Honour norms may constrain an individual's capacity to comply with the

law, functioning as a compelling background condition for actions that might not have otherwise occurred. Even if one does not share – or indeed repudiates – the view that a family's reputation is tied to the chastity and purity of its members, one could still argue that the motive of preserving such a reputation, compared to motives primarily driven by personal gratification, makes an offence less morally reprehensible than it would otherwise be (Holmgren 2021: 308 ff.).

Yet, even if one can with some effort conceive of honour norms as a factor that, *ceteris paribus*, makes a crime slightly less blameworthy, for many the idea of treating an honour-related motive as a mitigating circumstance is instinctively unthinkable. One might instead argue that the presence of honour motives should make no difference – that such motives should neither be an aggravating nor a mitigating factor. There is a case to be made for the symbolic value of criminal law maintaining, where possible, a principled distance from ideological beliefs and motivations. Treating all crimes equally, regardless of motive, could be seen as reinforcing the principle that harming, violating and restricting the freedoms of others is morally wrong, no matter the underlying justification.

However, if honour motives are to play any role in sentencing, the intuitive response is that they should serve as an aggravating rather than a mitigating factor, as has been the case in Swedish law since 2020. The underlying rationale likely has less to do with blameworthiness and more to do with the instrumental function of punishment. There is strong evidence that honour-based crime and honour-related oppression constitute a relatively widespread problem with significant underreporting. It is an area where there is a particularly pressing need to combat criminality and to send a strong symbolic message of societal condemnation. It is also likely an area where victims are especially marginalised and vulnerable – embedded in broader structures of control and subordination that extend beyond the specific criminal acts to which they are subjected. One could therefore argue that, compared to other victims, these individuals have a particularly strong need for visibility and recognition – something that may be reinforced by explicitly treating honour motives as an aggravating circumstance. From this perspective, the justification for higher penalty values in cases involving honour-related crime is best understood in instrumental terms, rather than as an expression of the view that such motives render the offence inherently more blameworthy, *ceteris paribus*.

## 5. A less ideal-typical account of a proportionality-based system

### 5.1. Two ideal types and a third model

To summarise and clarify the preceding discussion schematically, sentencing can be conceptualised through a set of ideal-typical models. The development over the

past two centuries was described above as comprising three phases in the history of sentencing rationalities. It can be seen as the movement of a pendulum, in which the relevant factor for determining the criminal justice response has shifted from the act to the offender, and then back to the act again. Ideal-typically, these phases can be understood as an oscillation between two sentencing rationalities: prospective "goal-rationality," on the one hand, and retrospective "formal-rationality," on the other. Additionally, a third model can be considered to refine the picture and capture more recent developments (Holmgren 2021: 345 ff.).

The first ideal-typical model makes a clear distinction between the legislative and the judicial levels, as well as between prospective and retrospective rationality. In this model, forward-looking, goal-rational considerations are invoked to justify the overall existence of the penal system; its purpose is general prevention – counteracting crime. Such considerations influence the general severity of punishment. On this view, a certain level of punishment is required for the penal system to fulfil its general preventive function or to adequately serve more communicative aims, such as expressing censure and acknowledging victims. However, when it comes to how different types of offences relate to one another within the system – how they are ranked and distributed – the determining factor is blameworthiness: more blameworthy crimes attract more severe punishments, and less blameworthy crimes less severe ones. At the judicial level there is no place for goal-rationality. The severity of the punishment is determined by the penalty value as a measure of the seriousness of the offence in terms of blameworthiness. Crimes of equal blameworthiness deserve equivalent censure and thus receive equally severe punishments.

The second model comprises an arrangement in which the severity of punishment is determined exclusively on the basis of prospective considerations. Here, no distinction is made between the legislative and judicial levels; both are orientated towards the same forward-looking goals. In this model, the above-mentioned distinction between the "why" and the "how" of punishment collapses (see section 1.2). The forward-looking purpose may involve a special-preventive ambition focussed on the offender, aiming to combat crime through incapacitation or rehabilitation. The criteria determining the severity of the sentence would then be the individual's dangerousness or capacity for reform. A forward-looking rationality could also be based on general prevention, where in each case the court considers the need for deterrence or moral education of the public and lets such considerations determine the severity of the punishment. Judicial decision-making, in this view, is fully goal-rational.

Even if a system based purely on this second model might be effective and functional in counteracting crime, it would appear distinctly unjust. It is also likely that its application would lack predictability; while individuals can be treated consistently based on criteria such as reformability and dangerousness, the scope for arbitrariness and uncertainty is much greater when making prospective prognoses compared to a retrospective assessment based on the seriousness of the offence. A system in which punishment is determined solely from a forward-looking

perspective – without regard to the act – would also deviate from the concept of individual responsibility that is central to criminal law. The individual would not be held accountable for what they have done, but are rather treated as a means of achieving certain goals. In a democratic society, there is a strong presumption against responses to crime that do not, in some way, treat offenders as responsible individuals. However, as noted, this model is an ideal type. In its pure form, such a system has never existed and likely never will – though many legal systems incorporate elements of it, for example in relation to young offenders and offenders with mental disorders. In such a system, the concept of penalty value would, in principle, be redundant, since penalty value is a measure of the seriousness of the offence.

Against this backdrop, and as suggested by the understanding of proportionality (section 3.4) and the examples discussed above (section 4.4), one can envisage a third model – one that is arguably less ideal-typical, yet closer to the overall structure of the system. This model incorporates elements of both of the preceding models. Like the first, it maintains a distinction between the legislative and judicial levels. At the judicial level, decision-making remains norm-rational and backward-looking. However, the difference between this model and the second one is that the norms established at the legislative level are shaped and motivated in a partly different way. When it comes to the determining factor – the seriousness of the offence and how different types of crimes are ranked and ordered within the system – this model allows for a degree of forward-looking rationality. In some cases, punishments for certain types of offences are relatively harsher, within the overall ranking, than their blameworthiness would suggest. As illustrated in the preceding discussion, this may be because the legislature wishes to use criminal law as a means of counteracting particular types of crime. It may also be due to a perceived need to communicate condemnation and social disapproval more forcefully in relation to certain offences. When such considerations influence the assessment of the seriousness of an offence, the coherence of the system is strained. Penalty value still serves a function in such a system – as a measure of the seriousness of the offence – but it is determined on partly different grounds. Such an arrangement can lead to outcomes that appear unjust – offences that seem relatively less blameworthy may be punished as severely as, or more severely than, offences perceived as more blameworthy. At the same time, since this third model remains act-focussed and responsibility-based, it must be regarded as more just – and, in practice, likely more predictable – than the second model described above.

## 5.2. Concluding remarks

Without making a value judgment, one might argue that this third model does, in fact, come closer to reality than either of the two preceding ones. In this text, Swedish law has been the object of analysis; sentencing reasoning is relatively

structured and transparent – given the centrality of penalty value and its explicit articulation of the seriousness of an offence. However, this third model can be applied across many legal orders to make some systematic sense of sentencing rules and statutory penalties. The penalties for drug offences were mentioned earlier as an example, and even though blameworthiness is ultimately a subjective assessment, most would probably agree that the penalties for drug offences are harsher than their blameworthiness would warrant. In many legal systems this has been the case for a long time. However, as demonstrated by several recent legislative developments, one could argue that the conditions underpinning the third model have become increasingly pronounced in Swedish law. Sentencing remains retrospective in form, but we observe a growing willingness to depart from systemic coherence in order to use criminal law instrumentally – either to combat specific types of crime or to send targeted symbolic signals.

About 20 years ago, Duncan Kennedy identified what he called a "third globalization of law and legal thought" – a diagnosis of persistent internal tensions rather than linear development – which he argued has characterised contemporary legal thinking since the latter part of the 20th century (Kennedy 2006: 19 ff.). Two preceding legal globalisations – first the classical legal thought, followed by a socially orientated legal thought – provide the historical context for this third phase. Compared to these earlier epochs, contemporary legal thought is less paradigmatic and more internally contradictory; it constitutes a pluralism in which elements from previous legal traditions coexist. Perhaps the contemporary sentencing system – concretely in Sweden, but arguably also in other legal systems – reflects similar tensions. These tensions stem from the coexistence of competing demands and rationalities. On the one hand, there is a desire and expectation for criminal law to be functional, goal-rational and orientated towards societal purposes. On the other hand, the system remains constrained by juridification, by requirements of predictability and legal certainty, and by a formal, norm-orientated rationality. Within such a system, thesis and antithesis coexist – but a perfect synthesis remains unattainable.

## Declaration of Conflict Interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

## Funding

The author received no specific funding for this work.

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**Note on Swedish preparatory works**

Swedish official sources include (i) *Government Bills* (*Prop.*) submitted by the Government to the Riksdag; (ii) *Government Official Reports* (*SOU*) produced by commissions of inquiry; (iii) *Terms of Reference* (*Dir.*) setting up such inquiries; and (iv) other official documents in the legislative process (e.g., *Lagrådsremiss*). These materials are commonly cited in Swedish legal scholarship as legal source and as a part of legislative history and policy background.

**Government bills (*Propositioner*)**

Prop. 1937:187. Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i vissa delar av strafflagen [Bill submitted by the King in Council to the Riksdag with a proposal for an Act amending certain parts of the Penal Code].

Prop. 1987/88:120. om ändring i brottsbalken m.m. (straffmätning och påföljdsval m.m.) [amendments to the Criminal Code, etc. (measurement of punishment and choice of sanction, etc.)].

Prop. 2004/05:45. En ny sexualbrottslagstiftning [A New Sexual Offences Ac].
Prop. 2017/18:177. En ny sexualbrottslagstiftning byggd på frivillighet [A New Sexual Offences Act Based on Voluntariness].
Prop. 2025/26:95. Säkerhetsförvaring – en ny tidsobestämd frihetsberövande påföljd (22 January 2026) [Preventive Detention – a New Indefinite Custodial Sanction].
Prop. 2025/26:218. Dubbla straff för brott i kriminella nätverk och skärpta straffskalor [Double Penalties for Criminal Network Offences and Higher Statutory Penalty Ranges].
Prop. 2025/26:246. Skärpta regler för unga lagöverträdare [Tougher Rules for Young Offenders].

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