

**SUBMISSION TO THE NSW LAW REFORM COMMISSION RELATING TO THE
CRIMES (SENTENCING PROCEDURE) ACT 1999 (NSW): SENTENCING -
QUESTION PAPERS 1-4 (2012)**

1 OVERVIEW OF SUBMISSION

This is a submission to the NSW Law Reform Commission in response to a request for submissions regarding the most fundamental aspects of sentencing law and in particular:

Question Paper 1 – the purposes of sentencing contained in s 3A of the Act.

Question Paper 2 – the common law sentencing principles.

Question Paper 3 – the factors to be taken into account on sentence, many of which are currently contained in the list of ‘aggravating’ and ‘mitigating’ factors found in s 21A of the Act.

Question Paper 4 – other discounting factors on sentence such as a discount for a guilty plea.

It is noted that submissions were due on 4 June 2012 and hence this submission is three weeks *late*. I apologise for that. However, I request that you kindly consider this submission.

The submission is unconventional because it refers to and attaches published material. This is the most efficient way to forward the submission because the published material is directly on point to the questions raised in Question Papers.

2 SUMMARY OF THE MOST SOUND EMPIRICAL AND NORMATIVE APPROACH TO SENTENCING

2.1 Aims of sentencing

There are two strategic objectives of sentencing:

- To protect the public by reducing crime.
- To implement sentencing measures that are cost-effective.

2.2 What can be accomplished through sentencing

- Incapacitation is flawed because it costs too much and we cannot predict which serious offenders are likely to re-offend.
- Rehabilitation is (probably) flawed because there are no wide-ranging techniques that work – although this conclusion is not certain.

- Specific deterrence does not work. Whether offenders receive a heavy or lenient penalty does not impact on their recidivism rate.
- General deterrence only works to the extent that there is a link between the existence of a penalty and a crime reduction, but higher penalties do not reduce crime.

This means that none of the above goals serve to either justify higher or lower penalties.

2.3 The principal (and perhaps only) consideration for setting penalties is the proportionality thesis

The hardship imposed on the offender must match the pain caused to the victim by the offence.

2.4 Judicial discretion should be significantly curtailed

Nearly all of the 200-300 sentencing considerations (such as remorse, offence prevalence and the personal circumstances of the offender) now used by judges to reduce or increase penalties are not justified by reference to the aims of sentencing or the objectives that can be accomplished through punishing offenders. They should be discarded (except for the plea guilty discount).

(Effectively) unfettered judicial discretion results in inconsistent and unfair sentences being imposed. This erodes community confidence in the sentencing system.

2.5 The plight of victims will be recognised

While the unreflective views of victims and the community cannot drive sentencing outcomes, victims need to be listened to because they provide us with the best information regarding one part of the proportionality formula: the impact that criminal behaviour has on well-being.

Surveys of victims and studies of their life trajectories tell us that sometimes their lives are ruined by being raped or bashed.

2.6 Two pronged sentencing system: sex and violent offenders (nearly) always to jail, other offenders no jail

Studies show that sex and violent offences often devastate the lives of victims. This is not the same for other offences such as welfare fraud and minor traffic offences. This will result in a net reduction in prison numbers.

2.7 Net reduction in prison numbers but ensure that all serious offenders do not avoid jail

It costs over \$70,000 per year to imprison each prisoner. Reducing prison numbers provides the government with more money to spend on other services, such as more police or better health services. The increase in the police presence on the streets will reduce crime and cut the road toll.

3 ARGUMENTS JUSTIFYING THE ABOVE APPROACH

There are four papers attached to the submission, which elaborate on the above approach. They all have the commonality that they examine the current state of knowledge regarding the efficacy of punishment to achieve the aims of:

- General deterrence;
- Specific deterrence;
- Rehabilitation; and
- Incapacitation.

The papers are:

1. Specific deterrence doesn't work, rehabilitation might and what it means for sentencing (2012) 35 *Criminal law journal* (with Theo Alexander) 159-172.
2. The fallacy that is incapacitation: an argument for limiting imprisonment only to sex and violent offenders (2012) 2 *Commonwealth Criminal Law Review* (with Theo Alexander). This paper is now in print and will be published in 2-3 weeks.
3. (Marginal) general deterrence doesn't work – and what it means for sentencing (2011) 34 *Criminal law journal* (with Theo Alexander) 269-283.

There is also a fourth paper, focusing on the need for uniform Australian Sentencing law. This paper has not been published yet. Pages 24 to 27 of this article set out the best approach to sentencing laws.

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25 June 2012

AN ARGUMENT FOR UNIFORM AUSTRALIAN SENTENCING LAW

Abstract: Sentencing law and practice impacts on fundamental individual interests, both from the perspective of offenders and victims. It also affects community safety and security. The scope of sentencing law and its principal objectives are broadly similar throughout Australia. However, there are many important differences, especially in relation to sentencing practice, with some jurisdictions appearing to impose considerably heavier penalties for certain offence types. This paper argues that uniform sentencing law should be implemented throughout Australia. The likely benefits would extend beyond achieving greater consistency in sentencing outcomes. A move toward uniform national sentencing laws would provide the catalyst for an objective, evidence-based review of sentencing policy and practice, thereby providing a vehicle for harmonising the law with a wealth of empirical data regarding the objectives that can be achieved through a system of state-imposed sanctions. It would also present a meaningful opportunity for a normative assessment of the justifiable operation of sentencing law. The main impediment to uniform sentencing laws is likely to come from state and territory governments seeking to maintain control over this often socially controversial area as a means of securing and maintaining community support. However, this obstacle is not necessarily insurmountable. It is not clear whether sentencing policy is, in fact, a main driver of voter preferences. Some politicians may prefer to have 'national uniformity' as a buffer to counteract reflexive calls for tougher sentencing that often occur following particularly serious crimes or seemingly light sentences handed down by courts.

1 Introduction

Sentencing is the 'sharp end' of the criminal law and deals with fundamental interests, from the perspective of victims, offenders and the wider community. It is also, arguably, 'the most controversial and politically-sensitive aspect of the criminal law'.¹ Despite this, sentencing law has traditionally been one of the most impressionistic and least predictable areas of law. Judges have displayed a reluctance to fetters being imposed on their sentencing discretion.² This has been tacitly supported by legislatures which have refused to critically evaluate the often conflicting established purposes of sentencing in the form of community protection, (general and specific) deterrence, rehabilitation, retribution and denunciation.³

¹ I Freckelton, 'Introduction: Criminal Sentencing', *The Laws of Australia*, vol 12 ix.

² See discussion below regarding the instinctive synthesis methodology.

³ This leads to unpredictable and inconsistent outcomes: see, J Smith, 'Clothing the Emperor: Towards a Jurisprudence of Sentencing' (1997) 30 *Australian and New Zealand Journal of Criminology* 168, 170; M Bagaric, 'Sentencing: The Road to Nowhere' (1999) *Sydney Law Review* 597. Similar observations have been made in relation to sentencing systems in other jurisdictions. Leading UK scholar, Andrew Ashworth, has labelled UK sentencing law a 'cafeteria system' of sentencing (A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995) 331). In a similar vein, over 40 years ago United States federal judge Marvin Frankel described sentencing law as a wasteland in the law (M Frankel, *Criminal Sentences: Law Without Order* (1972)).

The complex and unsatisfactory nature of existing sentencing laws was recently noted by NSW Attorney General and Minister for Justice, Greg Smith SC, who stated:

I referred earlier to the inquiry which is addressing the ridiculous complexity of our sentencing laws. There is a solid argument in favour of a consistent and transparent framework for sentencing decisions ...⁴

He further noted:

Sentencing has become the most complex area of criminal law. I hope there is will from both sides – the bench and the profession - to clear this up.⁵

In the past decade there has, however, been one very broad trend that has occurred in Australia. This has been the move to ‘tougher’ sanctions,⁶ which has resulted in prisoner numbers reaching record highs in Australia.⁷

There has also been an increase in the clarity of certain sentencing principles and moves towards convergence in the operation of sentencing laws. This has been driven by an increase in the number of sentencing matters decided by the High Court;⁸ the enactment of similar sentencing legislative schemes⁹ and the general move towards more punitive sentences.¹⁰ Yet, sentencing remains a rudimentary process, with a considerable gulf between sentencing theory and empirical knowledge – the weight of empirical evidence suggests that many of the objectives of sentencing cannot be achieved through a system of state-imposed sanctions.¹¹

Moreover, there are evident jurisdictional differences regarding the sentencing outcomes for similar offences. A person who commits, say, a drug trafficking offence in New South Wales is likely to get a much heavier penalty than an offender who commits the identical offence in Victoria, for example. This is irrespective of whether the offence is charged under the

⁴ Speech by Greg Smith SC MP, Attorney General and Minister for Justice to open the Public Defender’s Conference, Saturday 24 March 2012, at Taronga Park Zoo Conference Centre, 6.

⁵ Ibid, 7.

⁶ A recent analysis by the Sentencing Advisory Council of Victoria also showed that in the higher courts the number of offenders receiving immediate custodial sentences has increased from 54.1% in 2003–04 to 60.5% in 2008–09: Sentencing Advisory Council, *Sentence Appeals in Victoria Statistical Research Report* (March 2012), 98. Further, it was noted that the mean term of imprisonment went from 4.0 to 4.5 years between 2000–01 and 2005–06. It reduced to 4.2 years in 2007–08 and increased to 4.6 years in 2008–09: *Sentence Appeals in Victoria Statistical Research Report* (March 2012), 99. The success rate is over 50%, pages 123-124.

⁷ The same trend is evident in the United Kingdom, and especially in the United States. For the first three-quarters of the last century the US imprisoned about 110 persons per 100,000 of the adult population (A Blumstein, ‘US Criminal Justice Conundrum: Rising Prison Populations and Stable Crime Rates’ (1998) 44(1) *Crime and Delinquency* 127, 129), but the rate is now nearly 750 per 100,000 of the adult population (the highest in the world) - which has produced a near doubling of the US prison population in the past 20 years. See, Bureau of Justice Statistics, *Correctional Population*: <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>. The rate of imprisonment in the United Kingdom is slightly less than in Australia, at around 150 per 100,000. The total number of UK prisoners in 2011 was slightly more than 88,000. The average prison population has increased by about 3.7% each year over the past 25 years (Social and General Statistics, *Prison Population Statistics*, 23 February 2012. Twenty-eight per cent of prisoners were sentenced for violent offences. More wide-ranging comparisons are found in this publication. Weekly population figures for the United Kingdom are updated at: <http://www.justice.gov.uk/statistics/prisons-and-probation/prison-population-figures>).

⁸ See R Edney, ‘High Court Sentencing Jurisprudence’ (2007) 3 *High Court Quarterly* 1.

⁹ See section 3 below.

¹⁰ See section 3 below.

¹¹ See section 3 below.

respective state laws or federal law - where there is meant to be (near) identical sentencing principles and practices in each Australian jurisdiction.¹²

To be clear, there are two key problems with sentencing as it is currently administered throughout Australia:

- (i) It is not uniform; and
- (ii) It is flawed, in that some of its objectives are unattainable.

The main recommendation in this paper is that uniform sentencing laws should be implemented throughout Australia. All Australian states, territories and the federal jurisdiction should adopt a uniform sentencing regime and implement procedures to ensure greater uniformity of outcome.

The proposal in this paper is, admittedly, ambitious.¹³ This is especially in light of the fact that attempts to implement uniform substantive criminal laws have failed, despite long standing efforts to that end dating back more than two decades.¹⁴ However, it is not unattainable in the medium term. The arguments for coherent and uniform national laws are generally self-evident and, over the past decade, have resulted in largely consistent laws being adopted in relation to several areas of the law, including torts¹⁵ and defamation law¹⁶. All Australian jurisdictions except Queensland, South Australia and Western Australia have adopted the Uniform Evidence Act.¹⁷ Further, the states (except Western Australia) have referred their industrial relations powers and authority over de facto couples to the

¹² Pursuant to the rules set out in the *Crimes Act* 1914 (Cth), especially s 16A. See further, section 3 below.

¹³ There has been surprisingly little discussion of this proposal, although at times various bodies have agitated for similarity of uniformity regarding aspects of sentencing law. An example is the proposal by the Council of Australian Governments to remove cultural considerations from the sentencing calculus. This proposal was opposed by the Law Council of Australia: see Law Council of Australia: Media Release: *Law Council Urges COAG to Re-think Customary Law Changes*, 13 July 2006:

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=E3FF7936-1E4F-17FA-D2FF-A061316B84B9&siteName=lca

¹⁴ In the 1990s, the Standing Committee of Attorneys-General (SCAG) established a committee known as the Criminal Law Officers Committee (CLOC) consisting of ministerial advisers from the Attorneys-General departments from each Australian jurisdiction. The main purpose of CLOC was to develop a national Model Criminal Code. CLOC first met in May 1991, though its name was changed in November 1993 to the Model Criminal Code Officers Committee (MCCOC). MCCOC has published over thirty reports in the form of discussion papers and final reports, covering wide-ranging aspects of the criminal law. Despite the comprehensiveness of these reports, the proposed National Criminal Code has only been implemented in full in the Commonwealth jurisdiction - from 15 December 2001 (*Criminal Code Act 1995* (Cth) - and has been implemented to a large part in the ACT and to some degree in the Northern Territory. For a discussion, see M Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152.

¹⁵ See Justice David Ipp, *Review of the Law of Negligence—Final Report* (2002)); *Civil Law (Wrongs) Act 2002* (ACT); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2002* (NSW); *Personal Injuries Proceedings Act 2002* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

¹⁶ See *Civil Law (Wrongs) Act 2002* (ACT), Ch 9; *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

¹⁷ *Evidence Act 2011* (ACT); *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence (National Uniform Evidence Legislation) Act 2011* (NT) – which has not yet commenced; *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

Commonwealth, leading to national industrial relations laws¹⁸ and consistent laws regulating the break-down of de facto couple relationships.¹⁹ The imperatives favouring uniform sentencing laws are no less powerful than in these other areas of law.

This paper does not suggest that the sole reason for adopting consistent sentencing laws is to address the first concern. It is contended that the need to make sentencing a more coherent and justifiable practice is also a strong basis for implementing wide-ranging reform. It is accepted that sentencing law and practice can be improved without uniform laws, however, the impetus towards uniformity would provide a strong rationale for fundamentally reviewing the current law and, in this way, the two objectives are linked.

The next part of this paper examines the reasons in favour of consistent national sentencing laws. The third part of the paper sets out the key similarities and differences between sentencing law across Australia. Part four makes some preliminary observations about the approach that should be taken to determine the content of uniform sentencing law.

2 Reasons in favour of uniform sentencing law

2.1 Sentencing ‘matters’

2.1.1 The interests of offenders

All areas of law deal with important human interests, but in the sentencing realm the interests are especially acute. This is most obvious from the perspective of offenders. The sentencing process in most cases involves a punitive disposition being imposed on an offender. As noted by Jeremy Bentham, ‘all punishment is mischief, all punishment in itself is evil’.²⁰ In a similar vein, C L Ten notes that punishment ‘involves the infliction of some unpleasantness on the offender or it deprives the offender of something valued’.²¹

The harshest penalty in our system of law is imprisonment. To this end, the hardship consequent upon a term of imprisonment goes well beyond the deprivation of liberty that is evident from the presence of prison walls. As noted by Gresham Sykes over 50 years ago, ‘pains’ of imprisonment include:

- The deprivation of goods and services;²²
- The deprivation of heterosexual relationships;²³
- The deprivation of autonomy;²⁴ and
- The deprivation of security.²⁵

¹⁸ These powers are discharged in numerous legislative instruments, particularly the *Fair Work Act 2009* (Cth).

¹⁹ See *Family Law Act 1975* (Cth), Part V, Part VII, Subdivision D; Part VIIIAB.

²⁰ J Bentham, *Principles of Morals and Legislation*, in J H Burns and HLA Hart (eds), (1970 ed) 158.

²¹ C L Ten, *Crime, Guilt and Punishment* (1987) 2. See also, R A Duff, ‘Punishment, Citizenship & Responsibility’ in H Tam, (ed) *Punishment, Excuses and Moral Development* (1996) 17,18; N Walker, *Why Punish?* (1991) 1; HLA Hart, *Punishment and Responsibility* (1968) 4-5; T Honderich, in *Punishment: The Supposed Justifications* (1984) 15, 19.

²² G Sykes, ‘The Pains of Imprisonment’ in G Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (1958), 285, 287.

²³ *Ibid*, 289.

²⁴ *Ibid*, 290.

How these deprivations affect the life trajectories of prisoners is not well known, but the evidence indicates that they have a considerable negative impact which transcends the actual term of imprisonment. Research shows that imprisonment impacts adversely on prosperity measures after the conclusion of the sentence, even to the point of significantly reducing life expectancy. A study which examined the 15.5 year survival rate of 23,510 ex-prisoners in the US State of Georgia, found much higher mortality rates for ex-prisoners than the rest of the population.²⁶ There were 2,650 deaths in total, which was a 43% higher mortality rate than normally expected (799 more ex-prisoners died than expected).²⁷ The main causes for the increased mortality rates were: homicide, transportation accidents, accidental poisoning (which included drug overdoses) and suicide.²⁸

Thus, it is clear that sentencing can have a profoundly negative impact on offenders. It is just as clear that criminal conduct can have a profoundly negative impact on victims; and it seems that this is especially the case in relation to sexual and violent offences.

2.1.2 Victims also have a lot at stake

Rochelle Hanson, Genelle Sawyer, Angela Begle, and Grace Hubel reviewed the existing literature regarding the impact of violent and sexual crimes on key quality of life indices.²⁹ The crimes that were examined included rape, sexual assault, aggravated assault, survivors of homicide (i.e., relatives of those killed) and intimate partner violence. The key quality of life indicia that were examined were: role function (i.e., capacity to perform in the roles of parenting, intimate relationships and function in the social and occupational domains); reported levels of life satisfaction; and, well-being and social-material conditions (i.e., physical and mental health conditions). The report demonstrated that many victims suffered considerably across a range of well-being indicia, well after the physical signs had passed. The report concluded:

Findings showed that victims of violent crime and sexual crime in particular, have:

- Difficulty in being involved in intimate relationships and far higher divorce rates;³⁰
- Diminished parenting skills (although this finding was not universal);³¹
- Lower levels of success in the employment setting (especially in relation to victims who had been abused by their partners) and much higher levels of unemployment;³²

²⁵ Ibid, 292. See also, J Tosh, *The Pains of Imprisonment* (1982).

²⁶ A C Spaulding et al, *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning* (2010).

²⁷ However, this and other studies reported lower mortality while in prison. It was postulated that this could be because of: ‘access to health care that many persons lack on the outside; a controlled environment, with fewer hazards and a more regular sleep schedule and diet; compassionate release of moribund inmates just prior to death; and selection of already-healthy persons based on their ability to commit crime’: *ibid*.

²⁸ The higher mortality rates for ex-prisoners were consistent with findings in other reports, which are cited in A C Spaulding et al, above n 26.

²⁹ ‘The Impact of Crime Victimization on Quality of Life’ (2010) *Journal of Trauma and Stress* 189.

³⁰ *Ibid*, 191-192.

³¹ *Ibid*, 191.

³² *Ibid*, 192.

- Considerable impairment and dysfunction in social and leisure activities, with many victims retreating from conventional social supports;³³ and,
- High levels of direct medical costs associated with violent crime (over \$24,353 for an assault requiring hospitalization).³⁴

Chester L Britt, in a study examining the effects of either violent or property crime on the health of 2,430 respondents,³⁵ noted:

Victims of violent crime reported lower levels of perceived health and physical well-being, controlling for measures of injury and for socio-demographic characteristics.³⁶

These findings were not confined to violent crime. Victims of property crime also reported lower levels of perceived well-being, but the effects were less profound than in the case of violent crime.³⁷

The above effects relate to the consequences of crime and, obviously, cannot be reversed or totally cured by the sentencing process. Hence, victims have less at stake in the sentencing process than offenders. It is a mistake, however, to suggest that victims have only a negligible interest or standing in sentencing determinations.

As noted by Andrew von Hirsch, the imposition of a criminal sanction ‘acknowledges that the victim’s hurt occurred through another’s fault’.³⁸ It also expresses society’s recognition of the importance of the victim. Pragmatically, this is acknowledged by the move in all Australian jurisdictions to permit victim impact statements in the sentencing plea³⁹ and for compensation and restitution orders to be made at sentencing.⁴⁰

2.1.3 Sentencing is also important to the wider community

³³ Ibid, 193.

³⁴ Ibid.

³⁵ ‘Health Consequences of Criminal Victimization’ (2001) 8 *International Review of Criminology* 163.

³⁶ Ibid, 163.

³⁷ See also, A M Denkers and F W Winkel, ‘Crime Victims Well-Being and Fear in a Prospective and Longitudinal Study’ (1998) 5 *International Review of Victimology* 141.

³⁸ A von Hirsch, ‘Censure and Proportionality’ in R A Duff and D Garland (eds) *A Reader on Punishment* (1994), 10.

³⁹ See *Crimes (Sentencing) Act 2005* (ACT) ss 47-53; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26-30A; *Sentencing Act* (NT) ss 106A & 106B; *Criminal Offence Victims Act 1995* (Qld) s 14; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Victims of Crime Act 2001* (SA) s 10; *Sentencing Act 1997* (Tas) s 81A; *Sentencing Act 1991* (Vic) ss 95A-95H; *Sentencing Act 1995* (WA) ss 24-26.

⁴⁰ *Crimes (Sentencing) Act 2005* (ACT), s 19; *Crimes Act 1914* (Cth), s 21B; *Criminal Procedure Act 1986* (NSW), s 43; *Victims Support and Rehabilitation Act 1996* (NSW), Pt 4, Div; *Sentencing Act 1995* (NT), ss 88, 97; *Penalties and Sentences Act 1992* (Qld), ss 35-43, 194; *Criminal Law (Sentencing) Act 1988* (SA), s 13, 14, 52; *Criminal Law Consolidation Act 1935* (SA), s 355; *Sentencing Act 1997* (Tas), s 68(1). *Criminal Procedure Act 2009* (Vic), s 311; *Sentencing Act 1991* (Vic), ss 86, 86B; *Sentencing Act 1995* (WA), ss 109 – 122.

From the community's perspective, sentencing is important because it plays a vital role in attaining and enhancing safety and security. As noted by Brennan J in *R v Channon*,⁴¹ community protection is the ultimate aim of sentencing:

The necessary and *ultimate justification for criminal sanctions is the protection of society* from the conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of the offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose. In *Cuthbert* (1967) 86 WN (pt1) (NSW) 272 at 274 [[1967] 2 NSW329], Herron CJ in a judgment in which Sugerman and Walsh JJA agreed, said: The function of the criminal law and the purposes of punishment cannot be found in any single explanation, for it depends both upon the nature and type of the offence and the offender. But all purposes may be reduced under the single heading of protection of society, the protection of the community from crime. The sentence should be such as, having regard to all the proved circumstances, seems at the same time to accord with the general moral sense of the community and to be likely to be a sufficient deterrent both to the prisoner and others: per Jordan CJ [in] *Geddes* (1936) 36 SR (NSW) 554 [53 WN 157]. Courts have not infrequently attempted further analysis of the several aspects of punishment ([I (1952) 70 WN (NSW) 42, where retribution, deterrence and reformation are said to be its threefold purposes). In reality they are but the means employed by the courts for the attainment of the single purpose of the protection of society (emphasis added).⁴²

It has also been suggested that punishing offenders is important from the perspective of victims and the broader community because, by recognising the victim's unfair fate, it pleases the victim, and an institutional system of punishment serves to quell the desire for socially harmful vendettas which may otherwise be unrestrained.⁴³

Law by its nature is concerned with regulating important human interests and activities. Hence, it is difficult to persuasively argue that certain areas are more cardinal than others. However, it is clear that sentencing law deals with fundamental individual rights⁴⁴ and broader interests that are centrally important to the flourishing of the wider community. Accordingly, it is important that the principles and rules that govern this area of law are justifiable and attainable.

2.1.4 Sentencing is perhaps the most litigated area of law

From the perspective of legal administration and public resources, sentencing is a crucial area of law because it consumes so much court time and public resources – perhaps more so than any other area of law. Data from the Australian Bureau of Statistics for the period 1 July 2009 to 30 June 2010 reveal a number of illuminating facts about the number of criminal proceedings annually, and the manner in which they are determined.⁴⁵

During that financial year, the cases of 661,713 defendants were finalised in Australia's Courts. The vast bulk of these, about 91% (603,604), were in the Magistrates Court (in some jurisdictions this is referred to as the Court of Summary Jurisdiction or Local Court). A

⁴¹ (1978) 20 ALR 1.

⁴² *Ibid.*, 15.

⁴³ See C L Ten, above n 21, 51.

⁴⁴ Although it is not the legal orthodoxy to view sentencing policy through the prism of human rights dialogue.

⁴⁵ The data is from: ABS, *Criminal Courts 2009-2010 (4513.0)*, published 27 January 2011. It is available at: [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/4AF5F0DDDDA509BFCA25782300154372/\\$File/45130_2009-10.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/4AF5F0DDDDA509BFCA25782300154372/$File/45130_2009-10.pdf).

relatively small number (16,834, i.e., 2.5%) were dealt with in the Higher Courts (Supreme and intermediate courts), while 41,275 (6.2%) were finalised in the Children's Courts.⁴⁶

Eight per cent of matters were resolved with the case being withdrawn. Of the cases that were adjudicated, 96% resulted in a finding of guilt, with 11% of them (60,665) resulting in a custodial term.⁴⁷

Following each finding of guilt, a sentencing hearing occurs. Thus, there are well over *half a million (570,458) sentencing hearings* and determinations in Australia each year.⁴⁸

Uniform laws have the capacity to streamline and simplify sentencing hearings not only across the country but also within each jurisdiction and, hence, have the potential to significantly reduce court time and resources spent on this area of law.

In terms of appeals to the respective Court of Appeal in each jurisdiction, sentencing again consumes a very large amount of court time and resources. A recent study revealed that in Victoria approximately 500 cases are determined by the Court of Appeal annually, and approximately 60% relate to sentence only appeals.⁴⁹ A further approximately 15% relate to conviction and sentence.⁵⁰

2.2 Consistency is an important consideration

Despite the federal character of the Australian nation, it has largely homogenous laws and values. Certainly, there are no demonstrable regional differences regarding the manner in which crime impacts on communities and the level of commitment to properly dealing with offenders.

Given the importance of the interests at stake in relation to sentencing decisions and the homogenous nature of the Australian national rubric, it is important that these interests are dealt with similarly.⁵¹ South Australian opposition leader, Isobel Redmond, put it most strongly when she stated:

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Queensland contributed the most to the defendant population with 28% of all matters (184,307). This was followed by New South Wales (25%); Western Australia (17%); Victoria (16%); South Australia (8%) and then Tasmania; the Northern Territory and the ACT, each contributing well under 5% of the defendant population. The percentage of finalised matters that resulted in a finding of guilt varied markedly in some cases. In Queensland it was 91%, whereas in the ACT it was 65%. The most common offence types were traffic and regulatory offences (41%); public order offences (11%); acts intended to cause injury (9.7%); theft and related offences (7%); dangerous or negligent acts endangering persons (6.6%); drug offences (6.6%) and offences against justice (6.1%).

⁴⁹ *Sentencing Advisory Council, Sentence Appeals in Victoria Statistical Research Report* (March 2012), 84. The success rate is over 50%, pages 123-124. A similar success rate occurs in New South Wales, at least for serious offences. See Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010), 53.

⁵⁰ Ibid, 85.

⁵¹ Although, there is no constitutional principle of this nature. In *Leeth v The Commonwealth* [1992] HCA 67 four members of the High Court stated that the Constitution contained an implied right to equality. The judges made this comment in the context of considering whether a Commonwealth law that allowed state and territory laws to determine non-parole periods was valid. The exact basis for the right to equality was unclear. Deane and Toohey JJ suggested that it derived from Chapter III, because acting judicially requires equal justice. They also

[R]idiculous that an armed robber who committed an offence in Mt Gambier would most likely receive a different sentence if he or she committed the same offence across in Victoria.⁵²

As discussed below, sentencing decisions are, by their nature, discretionary – there is no single correct sentence in any case. Accordingly, it is not tenable to expect exact conformity in relation to sentencing outcomes. However, as is noted by Chief Justice Gleeson in *Wong v The Queen*⁵³:

...[T]here are limits beyond which ... inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair.⁵⁴

Patent inconsistency, offends the principle of equality before the law and the rule of law maxims that the law must be certain and that legal standards must be declared in advance.⁵⁵ In *Lowe v The Queen*,⁵⁶ Mason J stated:

Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as the badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice.⁵⁷

Echoing the comments of Mason J, Spigelman C L has stated that the absence of consistency threatens the ‘maintenance of the rule of law’ and undermines the integrity of sentencing as a judicial activity.⁵⁸

It is, however, important not to overstate the importance of consistency. Legal theory suggests that inconsistent legal outcomes can undermine public confidence in the integrity of the judicial sentence. Further, the importance of public confidence in the judiciary is an

suggested that it was derived from fundamental underpinnings of the Constitution and that the doctrine required that ‘every person of whatever rank, was subject to the ordinary law’. Gaudron J also stated that the concept of equality required that ‘like persons in like circumstances’ were treated in the same way and that concept was ‘fundamental to the judicial process’. However, in the more recent decision of *Kruger v Commonwealth* (1997) [1997] HCA 27, the High Court rejected the notion of a wide-ranging right to equality in the Constitution. Brennan CJ and Gaudron J reached a similar conclusion, with Gaudron J emphasising that there was ‘no implication of equality beyond a limited one in Ch III’. Gummow J also said that no doctrine of equality was apparent from the Constitution or existed through a broader implication. In *Putland v The Queen* [2004] HCA 8 the notion of equality was again disavowed by Gummow and Heydon JJ.

⁵² G Keltonstate, ‘Push for uniform sentencing law’, *The Advertiser*, 31 August 2007.

⁵³ (2001) 207 CLR 584.

⁵⁴ *Ibid*, 591.

⁵⁵ See J Raz, *The Authority of Law* (1979) ch 11, esp 211, 214-6; J Finnis, *Natural Law and Natural Rights* (1980) 270-6.

⁵⁶ (1984) 154 CLR 606.

⁵⁷ *Ibid*, 610-1.

⁵⁸ ‘Sentencing Guideline Judgments’ (1999) 73 *Australian Law Journal* 87. McHugh J in *Perre & Ors v Apand Pty Ltd* (1999) 164 ALR 606 at 628 in the context of tort law damages notes that: ‘The effectiveness of law as a social instrument is seriously diminished when legal practitioners believe they cannot confidently advise what the law is or how it applies to the diverse situations of everyday life, or when the courts of justice are made effectively inaccessible by the cost of litigation. When legal practitioners are unable to predict the outcome of cases with a high degree of probability, the choice for litigants is to abandon or compromise their claims or defences and not to expose themselves to the great expense and unpredictable risks of litigation’.

important matter and has been used as the foundation for the revival of the *Kable*⁵⁹ separation of powers doctrine in a trilogy of recent High Court cases.⁶⁰ However, there is often a gap between theory and reality in the law. The current level of inconsistency in sentencing outcomes (which is discussed below) has not eroded public confidence in the courts. The Australian public almost without qualification continues to accept the authority and legitimacy of court determinations and complies with court orders.

Thus, the need for consistency in the law favours uniform sentencing laws, but it is not a ‘knock-down’ argument to that end.

2.3 Efficiency, depoliticisation and substantive improvements

There are several other benefits that would stem from harmonising sentencing law. The most obvious is that it would create economic and workplace efficiencies. While it is not common for lawyers to practise in more than one state or territory, it would eliminate the need for lawyers to be familiar with two sentencing regimes: that of their home state or territory and the Commonwealth regime.⁶¹

Uniform laws would also mean that the various sentencing bodies across the country⁶² could possibly merge, or at least make it more likely that they could share resources and work on common projects, thereby enhancing knowledge in this area.

Another advantage of having uniform laws is that it would also assist to depoliticise the process of sentencing reform. Sentencing is often a socially controversial topic. This is understandable because it relates to extreme forms of human behaviour, often with life defining or shattering outcomes. Serious crimes often generate a large amount of media attention and reflexive and often loud calls by concerned members of the community for retribution against offenders. This naturally encourages politicians and political parties to increase the severity of criminal sanctions.

The trend to tougher sanctions has resulted in a slow but clear increase in prisoner numbers. Australia-wide, the rate of imprisonment has approximately doubled in the past 25 years.⁶³ Currently, the imprisonment rate is 165 per 100,000 of adult population. However, this is by no means uniform. The highest rate of imprisonment is in the Northern Territory (719 prisoners per 100,000 adult population), followed by Western Australia (262). The lowest is the Australian Capital Territory (83).⁶⁴

⁵⁹ *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

⁶⁰ *International Finance Trust Company v New South Wales Crime Commission* [2009] HCA; *South Australia v Totani* [2010] HCA 39; *Wainohu v NSW* [2011] HCA 24.

⁶¹ See discussion below regarding the existing sentencing legislation in the various jurisdictions.

⁶² Namely, the Sentencing Advisory Councils in Queensland and Victoria, and the New South Wales Sentencing Council.

⁶³ This data is for the period 1984 to 2010: see Australian Institute of Criminology, Corrections: http://www.aic.gov.au/en/publications/current%20series/facts/1-20/2011/6_corrections.aspx. The trend has not been linear. There have been significant fluctuations over this period.

⁶⁴ See Australian Bureau of Statistics, 512.0 - *Corrective Services, Australia*, March 2011: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4512.0Main%20Features2Mar%202011?opendocument&tabname=Summary&prodno=4512.0&issue=Mar%202011&num=&view=>.

Uniform sentencing laws would not totally depoliticise sentencing. The governments in each jurisdiction would be free to change legislation in their jurisdiction as they wished⁶⁵ (and, indeed, uniformity even at the commencement of the process does not require identical legislation, as we have seen with ‘uniform’ evidence, torts and defamation regimes).⁶⁶ However, the reasons that justified the adoption of uniform laws would provide at least a logical obstacle to unilateral change, which presumably would be sufficient to negate reflexive moves in all but exceptional circumstances.

The depoliticisation of sentencing law would lead to more informed, evidence-based sentencing law, but this is also possibly one of the main barriers to implementation of uniform laws. Governments may form the view that it is important for them to maintain total authority and capacity over sentencing law and practice as a means to properly responding to their constituencies and to shape their voting preferences. At the end of the day, principled reform may be trumped by the realities of politics. However, this is not a reason for not making the case for the proposed reforms as persuasively as possible.

The main advantage of uniformity is likely to be a modernisation of sentencing law. It is acknowledged that it does not necessarily follow that the adoption of uniform sentencing laws will result in improvements to the law. Theoretically, for example, the jurisdictions could agree to simply adopt what happens to be the worst-case example of sentencing legislation. However, this is unlikely. History shows that fundamental procedural change in the form of a nation-wide move to uniformity is coupled with a detailed and critical examination of the subject matter, and that this analysis underpins the legislative model which is adopted.⁶⁷ The same will likely occur in the case of sentencing. It is not possible to predict with certainty the form that uniform sentencing legislation may take. I make some preliminary observations in section 4 below. However, in a general sense, it is likely that the improvements will come in three main forms.

First, the gap between sentencing theory and knowledge will be reduced. Thus, it is likely that the objectives of evidence will be brought more in line with what the empirical data indicates is achievable through court-imposed sanctions. Secondly, punitive dispositions may be expanded or changed to reflect advances in modern tracking and monitoring technology, which is likely to see less reliance on imprisonment. Thirdly, research into the effects of crime and sanctions will better facilitate the matching of penalties to offences, resulting in normative and doctrinal enhancements.

3 Current sentencing landscape

In section three of the paper, I provide an overview of the current Australian sentencing landscape. While sentencing law differs in each jurisdiction, considerable convergence

⁶⁵ Given that I am not calling for state governments to refer their sentencing law powers to the Commonwealth government, as was the case with Industrial Relations laws.

⁶⁶ There are, for example, a large number of differences in the exact operation of negligence rules throughout Australia (see D Mendelson, *The New Law of Torts* (2nd ed, 2010) and, in relation to the jurisdictions that have adopted the Uniform Evidence Law, there are numerous differences, especially in relation to the privileges that are recognised in each jurisdiction (see S Odgers, *Uniform Evidence Law* (9th ed, 2010)).

⁶⁷ See, for example, the Australian Law Reform Commission Reports underpinning the Uniform Evidence Legislation (ALRC 26, 38 and 102) and the report by Justice David Ipp, *Review of the Law of Negligence—Final Report* (2002), which underpinned the move toward uniform national negligence laws.

already exists in this area. As is explained below, the commonalities that are shared relate to core or framework aspects of sentencing.

In this section, I briefly explain the main commonalities that exist. The level of existing similarity provides a degree of confidence that sentencing can be totally harmonised in Australian. At the same time, I recognise that it potentially undermines the need for further uniformity – if all jurisdictions are effectively already ‘on the same page’ it could be charged that there is no need for further convergence. However, as is discussed below, even where similar legal rules apply, regional differences in practice have emerged. Moreover, there are considerable sentencing disparities that do exist and there is also a need to modernise sentencing law and practice.

It is not feasible to explain all of the similarities and differences in relation to nine different statutory regimes covering a wide range of subject matters – there are simply too many variables. Hence, the analysis below is admittedly selective, focusing on what I regard as being the most important framework areas of sentencing.⁶⁸

3.1 The key legislative schemes

Sentencing in each of the nine Australian jurisdictions (the six states, the Northern Territory, the Australian Capital Territory and the Federal jurisdiction) is governed by a combination of legislation and the common law. The main statutes that deal with sentencing in each jurisdiction are:

- *Crimes Act 1900* (Cth), Part 1B (sections 16-22A)
- *Crimes (Sentencing) Act 2005* (ACT)
- *Crimes (Sentencing Procedure) Act 1999* (NSW)
- *Sentencing Act* (NT)
- *Penalties and Sentences Act 1992* (Qld)
- *Criminal Law (Sentencing) Act 1988* (SA)
- *Sentencing Act 1997* (Tas)
- *Sentencing Act 1991* (Vic)
- *Sentencing Act 1995* (WA)

There are differences between these statutes but they share many commonalities, both in form and substance. Each statute deals with three main dimensions of sentencing. First, it sets out the purposes and aims of sentencing.⁶⁹ Typically, these include deterrence, community protection, rehabilitation and denunciation. While these objectives are often clearly set out, they are often contradictory⁷⁰ and there is no attempt to prioritise which aim is the most important.

⁶⁸ For further discussion about the contours of sentencing law throughout Australia, see G Mackenzie and N Stobbs, *Principles of Sentencing* (2010); M Bagaric and R Edney, *Australian Sentencing* (2011); R G Fox and A Freiberg, *Sentencing: state and federal law in Victoria* (2nd ed, 1999).

⁶⁹ *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes Act 1914* (Cth) s 16A(1)(2); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A; *Sentencing Act* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

⁷⁰ See M Bagaric, *Punishment and Sentencing: A Rational Approach* (2001).

The second main issue that is dealt with by the sentencing statutes are the aggravating and mitigating factors. There is a considerable degree of variation in the extent to which these factors are set out. These considerations are set out most expansively in *Crimes (Sentencing Procedure) Act 1999* (NSW),⁷¹ which lists 30 relevant factors. Most sentencing statutes only sparsely deal with these considerations. This is not, however, indicative of a legal divergence between the respective jurisdictions. This is because, as is discussed below, aggravating and mitigating factors are mainly defined by the common law, which continues to apply in all jurisdictions.⁷²

The third main aspect that is covered by the sentencing statutes is the type of sanctions that can be imposed on offenders. These are similar across Australia.⁷³ Typically, there are many sanctions, however, in essence, there are four different types of sanctions.

The least serious is a finding of guilt without any further harshness being imposed on the offender apart from a promise to the sentencing court not to re-offend during the period of the sanction. These sanctions include a dismissal, discharge or bond. The second, and most common, sanction imposed in Australia is a fine, which is a monetary exaction against the offender. The third, and harshest, form of punishment in Australia is imprisonment. The fourth general form of sanction consists of what are collectively known as intermediate punishments. These are generally imposed when the offence is too serious to be dealt with by a fine, but is not serious enough to warrant a term of imprisonment. Intermediate sanctions often involve a work component and an order to undertake some form of counselling or training, which is designed to have a rehabilitative effect. These come under various labels including community service orders, home detention, suspended sentences and intensive corrections orders.⁷⁴

3.2 Existing uniformity

A key reason for the existing sentencing uniformity that exists stems from principles developed by the High Court⁷⁵ and the fact that much of sentencing law is still guided by common law rules, which have not been abrogated in relation to many sentencing areas.

3.2.1 Methodology for making sentencing decisions - instinctive synthesis approach

The overarching methodology and conceptual approach that sentencing judges undertake in making sentencing decisions is the same in each jurisdiction. This approach is known as ‘instinctive synthesis’. The term originates from the Full Court of the Supreme Court of Victoria decision of *R v Williscroft*,⁷⁶ where Adam and Crockett JJ stated:

Now, ultimately, every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.⁷⁷

⁷¹ See sections 21A and 24.

⁷² See *Bui v Director of Public Prosecutions* (Cth) [2012] HCA 1 with particular reference to federal sentencing regime.

⁷³ For a further discussion, see G Mackenzie and N Stobbs, *Principles of Sentencing* (2010), ch 6.

⁷⁴ *Ibid.*

⁷⁵ See, R Edney, ‘High Court Sentencing Jurisprudence’ (2007) 3 *High Court Quarterly* 1.

⁷⁶ [1975] VR 292.

⁷⁷ *R v Williscroft* [1975] VR 292 at 300 per Adams and Crockett JJ.

The general methodology for reaching sentencing decisions has been considered by the High Court on several occasions, and the Court has consistently adopted the instinctive synthesis approach and rejected the alternative, which is normally referred to as the two-step approach. The alternative approach involves a court setting an appropriate sentence commensurate with the severity of the offence and then making allowances up and down, in light of relevant aggravating and mitigating circumstances.

In *Wong v R*⁷⁸ most members of the High Court saw the process of sentencing as an exceptionally difficult task with a high degree of ‘complexity’.⁷⁹ Exactness is supposedly not possible because of the inherently multi-faceted nature of that activity.⁸⁰

Despite the uncertainty of outcome that is produced by this approach, the methodology was confirmed by the majority in *Markarian v R*,⁸¹ where it was noted:

Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently derived figure, passages of time in order to fix the time which an offender must serve in prison.⁸²

Their Honours added that the instinctive synthesis is not inconsistent with a degree of certainty:

That is not to say that in a simple case in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of “instinctive synthesis”, is useful as shorthand terminology may on occasions be, if no more is said or understood about what that means. The expression “instinctive synthesis” may then be understood to suggest an arcane process into the mysteries of which judges can only be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends. This case was not however one of them because of the number and complexity of the considerations which had to be weighed by the trial judge.⁸³

More recently, in *Hili v The Queen; Jones v The Queen*,⁸⁴ French CJ, Gummow, Hayne, Crennan, and Kiefel stated that consistency in sentencing is important, but the:

[C]onsistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence. Consistency in sentencing federal offenders is achieved by the proper application of the relevant statutory provisions, having proper regard not just to what has been done in other cases but *why* it was done, and by the work of the intermediate courts of appeal.⁸⁵

⁷⁸ (2001) 76 ALJR 79.

⁷⁹ *Wong v R* (2001) 76 ALJR 79, 94 per Gaudron J, Gummow and Hayne JJ.

⁸⁰ See the dicta of McHugh J who notes the difficulties of any ‘attempts to give the process of sentencing a degree of exactness which the subject matter can rarely bear’: *AB v The Queen* (1999) 198 CLR 111.

⁸¹ (2006) 228 CLR 357; 215 ALR 213.

⁸² *Makarian v R* (2005) 215 ALR 213, per Gleeson CJ, Gummow, Hayne and Callinan JJ at [39].

⁸³ *Makarian v R* (2005) 215 ALR 213, at [39].

⁸⁴ [2010] HCA 45.

⁸⁵ *Ibid*, [18].

As a result of this approach, there is no single sentence which is accurate in a particular case. In *Freeman v The Queen*⁸⁶ it was observed that:

It is a basic principle of sentencing law that there is no single correct sentence in a particular case. On the contrary, there is a 'sentencing range' within which views can reasonably differ as to the appropriate sentence.⁸⁷

The instinctive synthesis approach applies even where the legislature has set statutory 'standard penalties'⁸⁸ or mandatory minimum penalties.⁸⁹

3.2.2 Procedure and standards of proof for reaching sentencing decisions

The procedural approach to reaching sentencing decisions and the presumptions that apply to guide sentencing judges in reaching sentencing decisions are the same in each jurisdiction. Again, this is principally as a result of principles set out by the High Court.

Where an accused is found guilty by a jury, the sentencing facts must be consistent with the verdict of the jury. In *Cheung v R*,⁹⁰ Gleeson CJ and Gummow and Hayne noted that facts that are not an inherent part of the jury verdict need to be determined by the judge, and these need not always be on a basis most favourable to the offender.⁹¹

Where the facts would aggravate the penalty, they need to be established beyond reasonable doubt.⁹² Aggravating facts are defined broadly. The standard of proof of beyond reasonable doubt in sentencing applies not solely to matters of aggravation but extends to any circumstance which the 'judge proposes to take into account adversely to the interests of the accused'.⁹³ An adverse consideration is anything that would be 'likely to result in a more severe sentence than would otherwise be the case'.⁹⁴ By contrast, mitigating factors must be established only on the balance of probabilities.⁹⁵

In framing the sentencing calculus, the sentencing judge must disregard conduct by the offender which constitutes an uncharged act. Chief Justice Gibbs in *R v De Simoni*⁹⁶ stated this principle, as follows:

...the general principle, that the sentence imposed on an offender should take account of all the circumstances of the offence, is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted.⁹⁷

⁸⁶ [2011] VSCA 349.

⁸⁷ *Ibid*, [6].

⁸⁸ *Muldrock v R* [2011] HVA 39.

⁸⁹ *Bahar v R* [2011] WASCA 249.

⁹⁰ [2001] HCA 67.

⁹¹ See also, *R v Olbrich* (1999) 199 CLR 270.

⁹² *R v Olbrich* [1999] HCA 54.

⁹³ *R v Storey* [1998] 1 VR 359 at 369.

⁹⁴ *R v Storey* [1998] 1 VR 359 at 369; *R v Langridge* (1996) 17 WAR 346 at 367 per Kennedy J.

⁹⁵ *R v Olbrich* (1999) 199 CLR 270. See further, *Roberts v State of Tasmania* [2011] TASCCA 2. The principle was applied in the context of section 53A of the *Sentencing Act* (NT) by the High Court in *Leach v R* [2007] HCA 3.

⁹⁶ (1981) 147 CLR 383, 385.

⁹⁷ *Ibid*, [8].

This does not mean that the surrounding circumstances of an offence are to be ignored for the purpose of sentencing;⁹⁸ rather, they must be considered in a proper manner and in accordance with the offence to which the accused has pleaded guilty or been found guilty of after trial. Chief Justice Gibbs further elaborated on the implications of this common law principle:

... a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.⁹⁹

Moreover, the sentencing process is guided by considerations of procedural fairness. The application of the procedural fairness principle in the context of sentencing was discussed in *R v Grillo*,¹⁰⁰ as follows:

Furthermore, in *Chow v Director of Public Prosecutions* [(1992) 28 NSWLR 523] Kirby, P said [at 606]: "... circumstances may exist where a failure on the part of a judge to disclose matters of concern, or a course of conduct contemplated, will [itself] amount to a departure from the rules of procedural fairness ... There is [a] fine line between excessive and unjudicial intervention (on the one hand) and candid disclosure of matters of concern to invite response (on the other)." And, as Winneke, P said in *Li* [at 643] "[I]t is inappropriate for a sentencing judge to aggravate a sentence by reference to facts of which he has knowledge (and which are not a matter of notoriety), without first giving to the accused, or his counsel, an opportunity to meet and counter such facts by appropriate submissions or otherwise. ... Procedural fairness requires no less (emphasis added).¹⁰¹

3.2.3 The main objectives of sentencing are similar

Broadly, each jurisdiction endorses the same objectives of sentencing in the form of community protection (or incapacitation), general deterrence, specific deterrence, rehabilitation and denunciation.¹⁰² These overarching purposes, however, are generally too abstract to provide meaningful guidance. They often conflict¹⁰³ and, as further discussed below, it is not clear that in fact several of them are attainable through the sentencing process.

3.2.4 Proportionality is the main guide to determining the appropriate penalty

A clear statement of the principle of proportionality is found in the High Court case of *Hoare v The Queen*:

⁹⁸ *R v Birnie* (2002) 5 VR 426 at 432 per Ormiston JA.

⁹⁹ (1981) 147 CLR 383 at 389 per Gibbs CJ. *Adams v R* [2011] NSWCCA 47 provides further guidance regarding the principle in *DeSimoni*.

¹⁰⁰ [2003] VSCA 143.

¹⁰¹ *Ibid* [17]. See also, *R v Lowe* [2009] VSCA 268; *Medan v R* [2011] WASCA 46; *Weir v Regina* [2011] NSWCCA 123.

¹⁰² *Crimes Act 1900* (Cth), s 16A does not specifically mention general deterrence, however, the common law injects this consideration (*Director of Public Prosecutions v El Karhani* (1990) 21 NSWLR 370); *Crimes (Sentencing) Act 2005* (ACT), s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A; *Sentencing Act* (NT), s 5; *Penalties and Sentences Act 1992* (Qld), ss 5, 9; *Criminal Law (Sentencing) Act 1988* (SA), s 10; *Sentencing Act 1997* (Tas), s 3; *Sentencing Act 1991* (Vic), s 5; *Sentencing Act 1995* (WA), 6 (which merely lists community protection).

¹⁰³ Especially, for example, rehabilitation and general deterrence and community protection. See further, M Bagaric, *Punishment and Sentencing; A Rational Approach* (2001), ch 1-4.

A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.¹⁰⁴

In *Veen (No 1) v R*¹⁰⁵ and *Veen (No 2) v R*¹⁰⁶ the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which at various times has also been declared as the most important aim of sentencing.¹⁰⁷ Thus, in the case of dangerous offenders, while community protection remains an important objective, at common law it cannot override the principle of proportionality. It is for this reason that preventive detention is not sanctioned by the common law.¹⁰⁸

In *DPP v Neethling*¹⁰⁹ the Victorian Court of Appeal stated that the need for the punishment to fit the crime is also integral to achieving the objectives of the criminal law and 'social rehabilitation'.¹¹⁰

Proportionality has also been given statutory recognition in all Australian jurisdictions.¹¹¹ However, there are a number of statutory incursions into the proportionality principle. These mainly stem from the trend towards tougher sentences. In Victoria, for example, serious sexual, drug, arson or violent offenders¹¹² may receive sentences in excess of that which is proportionate to the offence. Indefinite jail terms may also be imposed for offenders convicted of 'serious offences',¹¹³ where the court is satisfied 'to a high degree of probability' that the offender is a serious danger to the community.¹¹⁴ Similar provisions to

¹⁰⁴ (1989) 167 CLR 348, 354.

¹⁰⁵ (1979) 143 CLR 458, 467.

¹⁰⁶ (1988) 164 CLR 465, 472.

¹⁰⁷ For example, see *R v Channon* (1978) 20 ALR 1.

¹⁰⁸ *Chester v R* (1988) 165 CLR 611, 618. See also, *R v Chivers* [1993] 1 Qd R 432, 437-8.

¹⁰⁹ [2009] VSCA 116.

¹¹⁰ See also, *Cajina v R* [2009] ACTCA 2; *DPP v DDJ* [2009] VSCA 115.

¹¹¹ The *Sentencing Act 1991* (Vic), s 5(1)(a) provides that one of the purposes of sentencing is to impose just punishment, and that in sentencing an offender the court must have regard to the gravity of the offence (s 5(2)(c)) and the offender's culpability and degree of responsibility (s 5(2)(d)). The *Sentencing Act 1995* (WA) states that the sentence must be 'commensurate with the seriousness of the offence' (s 6(1)(a)) and the *Crimes (Sentencing) Act 2005* (ACT), s 5(1)(a) provides that the sentence must be 'just and appropriate'. In the Northern Territory and Queensland, the relevant sentencing statute provides that the punishment imposed on the offender must be just in all the circumstances (*Sentencing Act* (NT) s 5 (1) (a); *Penalties and Sentences Act 1992* (Qld) (s 9(1)(a)), while in South Australia the emphasis is upon ensuring that 'the defendant is adequately punished for the offence' (*Criminal Law (Sentencing) Act 1988* (SA) s 10 (1) (k)).¹¹¹ The need for a sentencing court to 'adequately punish' the offender is also fundamental to the sentencing of offenders for Commonwealth matters (*Crimes Act 1914* (Clth) s 16A (2)(k)). The same phrase is used in the New South Wales (*Crimes (Sentencing Procedure) Act 1999*, s 3A(a)).

¹¹² See Part 2A; esp 6D(b). Serious offenders are essentially those who have previously been sentenced to jail for a similar type of offence, except in the case of serious sexual offenders, where the offender must have two prior sexual matters or a sexual and violent prior arising from the same incident. See *R v LD* [2009] VSCA 311; *R v Dooley* [2006] VSCA 269; *R v Nguyen* [2008] VSCA 141 for an example of the wrong application of this section.

¹¹³ *Sentencing Act 1991* (Vic), s 18A-18P. Serious offences include certain homicide offenders, rape, serious assault, kidnapping and armed robbery (s 3). The constitutionality of the indefinite sentencing provisions was confirmed in *Moffat v R* [1998] VR.

¹¹⁴ *Sentencing Act 1991* (Vic), s 18B(1).

those operating in Victoria regarding serious violent and sexual offenders¹¹⁵ and indefinite sentences also exist in other jurisdictions.¹¹⁶ The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) goes one step further and allows for preventive detention of offenders who have completed their sentence if there is a high degree of probability that they are a serious danger to the community.¹¹⁷

3.2.5 Aggravating and mitigating factors operate similarly throughout Australia

Another commonality in all jurisdictions is that aggravating and mitigating factors operate relatively uniformly throughout the country, despite the different ways in which they are dealt with by statute. These considerations stem mainly from the common law and are continually evolving. An earlier study noted that there are about 300 such factors.¹¹⁸ Key mitigating considerations include: a plea of guilty; assistance to law enforcement authorities; remorse; voluntary cessation from offending; voluntary disclosure of crime; psychiatric and psychological illness; intellectual disability; youth, good prospects of rehabilitation; previous good character; onerous prison conditions; hardship of family; poor health; forgiveness of victim; offences committed under duress; provocation; offences could have been dealt with in a lower court.¹¹⁹

Important aggravating factors are: prior criminal record; significant level of injury or damage caused by the offence; vulnerability of victim; high level of planning; offences committed while on bail or parole; offences committed with others – gangs; breach of trust; monetary motive and prevalence.¹²⁰

The large number of aggravating and mitigating factors is one of the key reasons that it is not possible to predict with confidence the exact sentence that will be imposed in any particular case. A degree of certainty is, however, injected by the fact that two factors attract a numerical discount. An earlier guilty plea can, in most jurisdictions, attract a 25%

¹¹⁵ *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act* (NT) s 65; *Criminal Law (Sentencing) Act 1988* (SA) s 23; *Sentencing Act 1997* (Tas) s 19; *Sentencing Act 1995* (WA) s 98.

¹¹⁶ See, for example, *Penalties and Sentences Act 1992* (Qld) Pt 10; *Sentencing Act 1995* (NT), ss 65-78; *Sentencing Act 1995* (WA), ss 98-101; *Criminal Law (Sentencing) Act 1988* (SA), Part 2, Div III; *Criminal Code 1924* (Tas), s 392.

¹¹⁷ The constitutional validity of this Act was upheld by the High Court in *Fardon v R* (2004) 78 ALJR 1519. For a discussion of the Queensland provision, see Mackenzie and Stobbs, above n 73, 210-211. See also, *Crimes (Sentences) Act 1999* (SA), s 23.

¹¹⁸ J Shapland in *Between Conviction and Sentence* (1981) 55, identified 229 factors, while R Douglas in *Guilty Your Worship* (1980) in a study of Victorian Magistrates' Courts identified 292 relevant sentencing factors.

¹¹⁹ For recent discussions about key mitigating factors, see M Bagaric and R Edney, *Australian Sentencing* (2011); Mackenzie and Stobbs, above n 73, ch 4.

¹²⁰ For recent discussions about key mitigating factors, see M Bagaric and R Edney, *Australian Sentencing* (2011).

discount,¹²¹ while a guilty plea coupled with assistance to authorities can result in a 50% reduction in penalty.¹²²

3.3 Prevailing differences in sentencing practice

There are several key differences in sentencing practice.

3.3.1 Guideline judgments

Guideline judgments consider numerous variations of a specific offence and the importance of factors commonly raised in mitigation and aggravation for that offence, and then often suggest an appropriate sentencing tariff for that offence. Guideline judgments are directory, not mandatory. In a nutshell, they set out ‘guidelines not “tramlines”’.¹²³

Legislative provisions in New South Wales, Queensland, South Australia, Victoria and Western Australia¹²⁴ expressly provide for the respective Appeal Courts to provide guideline sentencing judgments. However, this does not reflect existing practice.

The New South Wales Court of Criminal Appeal has issued a number of guideline judgments since the first guideline judgment in *R v Jurisic*¹²⁵. In *Jurisic*, the Court issued a guideline judgment for the offence of dangerous driving occasioning death or grievous bodily harm pursuant to section 52A of the *Crimes Act 1900* (NSW). In *R v Henry*,¹²⁶ the Court issued a guideline judgment in circumstances where a young offender pleads guilty to armed robbery and held that the appropriate sentence should be within the range of four to five years’ imprisonment. *R v Ponfield*¹²⁷ is a guideline judgment where the Court set out the main aggravating and mitigating offence of burglary, but did not set a numerical sentence. In *R v Thomson*,¹²⁸ the Court issued a guideline judgment for the utilitarian value of pleading guilty, and set the discount at between 10 and 25 per cent.

In *Wong v The Queen*,¹²⁹ the High Court cast doubt over the constitutional validity of certain forms of guideline judgments, at least so far as they concern federal offences. Following *Wong*, the NSW government amended the *Crimes (Sentencing Procedure) Act (2001) (NSW)*

¹²¹ This is similar in each jurisdiction: see *R v Cameron* (2002) 187 ALR 65; *Deering v The State of WA* [2007] WASCA 212; *Fischer v Police* (2005) 154 A Crim R 511; *R v Thomson* (2000) 49 NSWLR 383 and s 17 of the *Criminal Case Conferencing Trial Act 2008* (NSW); M Bagaric and R Edney, *Australian Sentencing* (2011); New South Wales Sentencing Council, *Reduction in Penalties at Sentence* (2009): [http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/ReductioninPenaltiesatSentence.pdf/\\$file/ReductioninPenaltiesatSentence.pdf](http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/ReductioninPenaltiesatSentence.pdf/$file/ReductioninPenaltiesatSentence.pdf).

¹²² *R v Jones*; *R v Hile* [2010] NSWCCA 108; *R v Holland* [2011] NSWCCA 65; *R v Baldock* [2010] WASCA 170.

¹²³ *Hardcastle v R* [2011] NSWCCA 87, [36].

¹²⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3, div 4 (ss 36-42A); Penalties and Sentences Act (Qld), s 15AA-15AL; *Criminal Law (Sentencing) Act 1988* (SA), ss 29A, 29B; *Sentencing Act 1991* (Vic) s 6AB (1) (a)-(b); *Sentencing Act 1995* (WA) s 143.

¹²⁵ (1998) 45 NSWLR 209.

¹²⁶ [1999] NSWCCA 111.

¹²⁷ (1999) 48 NSWLR 327.

¹²⁸ (2000) 49 NSWLR 383.

¹²⁹ (2001) 207 CLR 584.

and (pursuant to sections 37, 37A and schedule 2, clause 41) retrospectively validated earlier guideline judgments.

Despite this, the enthusiasm for guideline judgments following *Wong* has diminished. The one guideline judgment which was issued post *Wong* is *R v Whyte*.¹³⁰ In *Whyte*, the court reformulated the guideline judgment in *Jurisc* and took the view that guideline judgments, even numerical ones, were not invalidated by *Wong v The Queen*.¹³¹

In South Australia, guideline judgments were issued in *Eldridge v Bates*¹³² (driving while disqualified); *Police v Cadd*¹³³ (driving while disqualified) and *R v Place*¹³⁴ (armed robbery and discount for pleading guilty). Guideline judgments in South Australia were initially driven by the judiciary,¹³⁵ even when there was not a clear legislative basis for issuing such judgments.

In more recent years, the Court of Criminal Appeal in South Australia has steered clear of issuing further guideline judgments, and expressly declined to do so in *Payne*.¹³⁶ In doing so, it usefully set out the principles relating to guideline judgments. The Court noted that, in its view, guideline judgments are not different in nature to the normal judgments given by the Court which set down sentencing principles which give guidance to lower courts. Thus, it took the view that the legislative power to issue guidelines in South Australia does not extend the Court's power beyond that at common law (this is in contrast to the position in NSW).¹³⁷

In Western Australia, the Court of Criminal Appeal has declined to issue formal guideline judgments,¹³⁸ however, it has issued a number of judgments setting out detailed offence specific criteria.¹³⁹ In practice, these are as informative as guideline judgments.

Guideline judgments are unlikely to be issued in Victoria. In *R v Ngui and Tiong*,¹⁴⁰ Winneke P stated:

Experience in other areas of the law has shown that judicially expressed guidelines can have a tendency, with the passage of time, to fetter judicial discretion by assuming the status of rules of universal application which they were never intended to have. It would, in my opinion, be unfortunate if such a trend were to emerge in the sentencing process where the exercise of the judge's discretion, within established principles, to fix a just sentence according to the individual circumstances of the case before him or her is fundamental to our system of criminal justice.

¹³⁰ [2002] NSWCCA 343. See also, *Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, where some guidance was given by the Court in a manner akin to a guideline judgment.

¹³¹ (2001) 207 CLR 584.

¹³² (1989) 51 SASR 532.

¹³³ (1997) 69 SASR 150

¹³⁴ (2002) 81 SASR 395.

¹³⁵ Prior to the enactment of the *Criminal Law (Sentencing) Act 1988* (SA), ss 29A, 29B.

¹³⁶ (2004) 146 A Crim R 98.

¹³⁷ *R v Whyte* [2002] NSWCCA 343.

¹³⁸ See *Yates v State of WA* [2008] WASCA 144.

¹³⁹ See, for example, *The State of Western Australia v Wells* [2005] WASCA 23; *The State of WA v Atherton* [2009] WASCA 148; *Ljuboja v R* [2011] WASCA 143; *The State of Western Australia v Prince* [2011] WASCA 22.

¹⁴⁰ [2000] VSCA 78.

Thus, the use of guideline judgments is inconsistent in Australia. In reality, they are only issued in New South Wales and South Australia and not at all in the other jurisdictions.

3.3.2 Standard minimum penalties

In response to the High Court decision in *Wong v The Queen*,¹⁴¹ the New South Wales legislature enacted the (*Sentencing Procedure Amendment (Standard Minimum Sentencing) Act 2002 NSW*). Division 1A of Part 4 (s 54A(2)) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* sets designated penalties for a range of offences.¹⁴² By way of example, the penalty for murder is 20 years, and 25 years where the victim was a police officer, emergency services worker, correctional officer, judicial officer, or other designated official. The penalty for sexual assault is 7 years, and 3 years for unauthorised possession or use of firearms. The standard non-parole provisions commenced on 1 February 2003.¹⁴³

The standard non-parole periods apply where the offender is found guilty after a trial. They are useful reference points where the offender pleads guilty, and even when it is found that the objective seriousness of the offence is below the middle range. Pursuant to section 44(2) the parole period must not exceed one-third of the non-parole period for the sentence, unless special circumstances exist. Thus, in normal circumstances, the non-parole period cannot be less than 75% of the head sentence.¹⁴⁴

In *Muldock v The Queen*,¹⁴⁵ the High Court gave guidance regarding the appropriate methodology for dealing with standard non-parole periods prescribed by the *Crimes (Sentencing Procedure) Act 1999*. It noted that the methodology for determining the appropriate sentence does not permit a two-step process, which starts with an assessment of whether the crime in question falls within the middle range of seriousness compared with a 'typical' offence of that nature, and then inquiring whether the offence merits a harsher or more lenient disposition. Instead, the normal instinctive synthesis methodology is still employed, where the Court uses the standard non-parole penalty as a guidepost in the same way in which it does the maximum penalty.¹⁴⁶

Similar provisions to those in NSW operate in South Australia. Section 32A of the *Criminal Law (Sentencing Act) 1988 (SA)* operates in a similar manner. The provision applies in relation to a range of serious offences, mainly involving sex or violence.¹⁴⁷

¹⁴¹ (2001) 207 CLR 584.

¹⁴² These are currently under review, see New South Wales Sentencing Council, *Standard Non-parole Periods* (2011):

[http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/FinalReport2011.pdf/\\$file/FinalReport2011.pdf](http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/FinalReport2011.pdf/$file/FinalReport2011.pdf). For an assessment of the scheme, see Sentencing Advisory Council (Qld), *Minimum standard non-parole periods, Final Report* (2011).

¹⁴³ For a discussion of these provisions, see Judicial Commission of NSW, *The Impact of the standard non-parole period sentencing schemes on sentencing patterns in New South Wales* (2010), 4-6.

¹⁴⁴ For a discussion, see *Marshall v R* [2007] NSWCCA 24.

¹⁴⁵ [2011] HCA 39.

¹⁴⁶ See especially, [27]-[28]. The post-*Muldock* approach to standard non-parole periods as set out by the NSW Court of Criminal Appeal in *MDZ v R* [2011] NSWCCA 243; *Beveridge v R* [2011] NSWCCA 249 and *Sheen v R* [2011] NSWCCA 259; *Madden v R* [2011] NSWCCA 254.

¹⁴⁷ *Criminal Law (Sentencing Act) 1988 (SA)*, s 33. See also, *Sentencing Act 1995 (NT)*, s 53A, which implements a similar regime for the offence of murder.

3.3.3 Different outcomes

Potentially, a major obstacle to uniform sentencing laws is that there is no consistency regarding substantive criminal law and, in particular, offence types throughout Australia. However, the lack of convergence on this front is more theoretical than real. While the precise terminology setting out the elements of criminal offences often varies considerably throughout Australia, pragmatically there is a large convergence in all jurisdictions regarding the type of acts which are criminalised.¹⁴⁸ The maximum penalties often differ for the comparable offence categories, this is, only one consideration relevant to penalty¹⁴⁹ and does not undermine the operation of the same sentencing principles and rules to each offence.

The fact that the maximum penalty for substantive criminal offences can vary throughout the jurisdictions, is one reason to expect regional differences in offence tariffs. However, it is evident that this occurs even where the maximum penalties are the same.¹⁵⁰ Such differences could potentially be explained by differences in the respective statutes (for example, differences in emphasis on certain aggravating and mitigating factors) and, hence, do not necessarily evince a fundamental difference in approach to sentencing.

However, what is strongly indicative of different regional sentencing ‘cultures’ are the considerable sentencing differences that occur among states applying substantially the same sentencing law.¹⁵¹ ALRC Report 103, *Same Crime, Same Time: The Sentencing of Federal Offenders*,¹⁵² looked at sentences across Australia involving the same offences where the courts were all applying the federal sentencing regime¹⁵³ and noted considerable differences in penalties across the jurisdictions. The offences that were focused on were drug offences and fraud offences.

For example, the report looked at 63 instances of trafficking a commercial quantity of MDMA during the five-year period 2000–2004. The jurisdictions where most cases occurred were NSW, Western Australia and Victoria. Overall, the mean terms (maximum and minimum) were 136 and 66 months: in NSW (154: 72); WA (132: 69); Victoria (66: 39).¹⁵⁴

For a commercial quantity of heroin there were 155 cases, of which 86 per cent involved this charge only. The mean term was 87: 48, but once again there were considerable regional differences: NSW (81: 48); WA (169: 70); Victoria (65: 43).¹⁵⁵

¹⁴⁸ See B McSherry and S Bronitt, *Principles of Criminal Law* (3rd ed, 2010); K Arenson and M Bagaric, *Criminal Laws of Australia* (2nd ed, 2007).

¹⁴⁹ See *DPP v DDJ* [2009] VSCA 115; *Dodds v R* [2009] NSWCCA 191.

¹⁵⁰ Considerable regional differences have been noted even where the maximum penalties are the same; see M Bagaric and R Edney, *Australian Sentencing* (2011), [800]–[1040].

¹⁵¹ There are some differences even in relation to the application of federal sentencing law, see especially s 16E of the *Crimes Act* 1914 (Cth) which states that pre-sentence detention is governed by state law – however, in most states, pre-sentence detention is taken into account in the sentence. See Wendy Kukulies-Smith, ‘The Quest for Sentencing Consistency in the Federal System’, a paper delivered at the *NJCA Sentencing Conference* on 6 & 7 February 2010.

¹⁵² <http://www.austlii.edu.au/au/other/alrc/publications/reports/103>.

¹⁵³ (2006). It is available at <http://www.alrc.gov.au/report-103>.

¹⁵⁴ See <http://www.austlii.edu.au/au/other/alrc/publications/reports/103/38.html>.

¹⁵⁵ See <http://www.austlii.edu.au/au/other/alrc/publications/reports/103/38.html>. In 2008 the High Court in *Adams v R* [2008] HCA 15 ruled that there is no difference in drug seriousness for sentencing purposes. Thus, the disparity between sentences for MDMA and heroin is no longer justified.

The report also looked at two model fraud offences in the Commonwealth jurisdiction. The first offence termed ‘FM1’ is fraud of between \$50,000 and \$500,000. ‘FM2’ is a fraud offence where the sum involved is in excess of \$500,000. The data again relate to prosecutions for the years 2000-2004.

The overall mean maximum and minimum terms for frauds between \$50,000 and \$500,000 are 23 months and 6 months, and the regional differences are profound: NSW 29:10; Queensland 32:7; Victoria 15:3. The survey also looked at sentences for frauds over \$500,000. However, there were only a small number of instances, hence, meaningful comparisons could not be made. However, the greater majority of these were in Victoria, which did have a statistically relevant number of cases. The mean was 22:8, which is significantly less than for frauds in Queensland below \$500,000.¹⁵⁶

These figures only relate to a small number of offences and, hence, are not conclusive of significant sentencing disparity. However, the ALRC concluded that:

20.26 Accurately documenting inconsistency in the sentencing of federal offenders requires evidence of systematic and substantial variation in sentences for like cases. There are limitations, discussed above and in Appendices 1 and 2, on the data that are currently available. The proposed federal sentencing database, discussed in Chapter 21, should in time address the lack of data. However, on the basis of the information available to the ALRC at this time, including the analysis set out in Appendix 1 and, in particular, the new and more detailed information set out in Appendix 2 covering more than 25,000 fraud and drug cases over a five-year period, there are strong indications of inconsistency between jurisdictions in the type and severity of sentences imposed for the same category of federal crime.¹⁵⁷

4 What the uniform legislation might look like

It is not tenable to set out with certainty the likely content of uniform sentencing law. However, it is obvious that the law should be fair and workable (in that it only strives to achieve goals that are attainable), as well as modern (in that it takes advantage of modern technological advances, as opposed to necessarily being rusted to centuries old practices).

The starting point is to accept that sentencing is a rational, purposive, social endeavour. Accordingly, it is important that it is guided by rational inquiry, not raw impulse and public sentiment. To this end, there is a need to ascertain what can be achieved through a process of state-imposed punishment of wrongdoers.

As noted above, there is general consensus in the respective sentencing regimes that the main purposes of sentencing are community protection, (general and specific) deterrence, rehabilitation and denunciation. A large number of empirical studies have been undertaken examining the efficacy of sentencing to achieve the first three objectives. The objective of ‘denunciation’ is not measurable and, in the empirical realm, community protection is normally termed incapacitation.

It is beyond the scope of this paper to consider at length the empirical findings regarding the efficacy of punishment to achieve the objectives of incapacitation (which is the strongest form of community protection), deterrence and rehabilitation. However, the trend of the

¹⁵⁶ Ibid, Figure A2.81.

¹⁵⁷ Ibid, ch 20.

findings is relatively consistent, hence, it is possible to provide an overview of the relevant literature. In short, current empirical evidence provides no basis for confidence that punishment is capable of achieving the goals of incapacitation and specific deterrence. General deterrence works only in the absolute sense, and the jury is still out on the capacity of the sentencing system to rehabilitate offenders.

Incapacitation is flawed, since we are very poor at predicting which offenders are likely to commit serious offences in the future.¹⁵⁸ While minor offenders often re-offend, the cost of imprisoning them normally outweighs the seriousness of the offence.¹⁵⁹ There is nothing to suggest that offenders who have been subjected to harsh punishment are less likely to re-offend, thus there is no basis for pursuing the goal of specific deterrence.¹⁶⁰

Rehabilitation fares slightly better. Certain rehabilitative techniques work for some offenders, but there is no data to show that there are wide-ranging techniques to reform all offenders.¹⁶¹

The findings regarding general deterrence are relatively settled.¹⁶² The existing data show that in the absence of the threat of punishment for criminal conduct, the social fabric of society would readily dissipate; crime would escalate and overwhelmingly frustrate the capacity of people to lead happy and fulfilled lives. Thus, general deterrence works in the absolute sense: there is *a connection* between criminal sanctions and criminal conduct. However, there is insufficient evidence to support a direct correlation between higher penalties and a reduction in the crime rate. It follows that marginal deterrence (which is the theory that there is a direct correlation between the severity of the sanction and the prevalence of an offence) should be disregarded as a sentencing objective, at least unless and until there is proof that it works.¹⁶³

The failure of marginal general deterrence means that absolute general deterrence justifies inflicting some punishment on offenders, but it is of little relevance in fixing the amount of punishment.

¹⁵⁸ M Brown, 'Serious Violence and Dilemmas of Sentencing: A Comparison of Three Incapacitation Policies' [1998] *Criminal Law Review* 710, 713; J Monahan, 'The Prediction of Violent Behaviour: Toward a Second Generation of Theory and Policy' (1984) 141 *American Journal of Psychiatry* 10; K Kozol, 'Dangerousness in Society and Law' (1982) 13 *University of Toledo Law Review* 241, 267; J Black, 'Is the Preventive Detention of Dangerous Offenders Justifiable?' (2011) *Journal of Applied Security Research* 317, 322-323. The most thorough treatment of the subject matter is B McSherry and P Keyzer (eds), *'Dangerous' People: Policy, Prediction and Practice* (2011). See also B McSherry and P Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (2009).

¹⁵⁹ D Weatherburn et al, entitled: *How much crime does prison stop? The incapacitation effect of prison on burglary* (2006).

¹⁶⁰ D S Nagin, F T Cullen, and C L Johnson, *Imprisonment and Reoffending* (2009) 38 *Crime & Just.* 115; D Weatherburn et al, 'The specific deterrent effect of custodial penalties on juvenile reoffending', *Crime and Justice Bulletin* No. 132 (2009).

¹⁶¹ K Heseltine et al., Prison-based offender rehabilitation programs: The 2009 national picture in Australia (2011):<http://www.aic.gov.au/documents/5/6/4/%7B564B2ECA-4433-4E9B-B4BA-29BD59071E81%7Drpp112.pdf>; Ojmarrh Mitchell et al., *The effectiveness of incarceration-based drug treatment on criminal behaviour*. Campbell Collaboration Criminal Justice Review Group (2006): www.campbellcollaboration.org/lib/download/98.

¹⁶² For an overview of the literature, see Victorian Sentencing Advisory Council. *Does Imprisonment Deter? A Review of the Evidence* (2011).

¹⁶³ See M Bagaric and T Alexander, '(Marginal) general deterrence doesn't work – and what it means for sentencing' (2010) 35 *Criminal Law Journal* 269.

This suggests that imprisoning solely for the purpose of protecting the community should be used far more sparingly, and that specific deterrence and marginal general deterrence should be abolished as sentencing objectives. A limitation of the findings is that they generally relate to studies overseas (and, in particular, the United States), hence, there is a need to undertake similar Australian-based studies.

In terms of fixing the amount of punishment, as we have seen, the cardinal determinant is the principle of proportionality. That the severity of the punishment should be roughly commensurate with the gravity of the offence, is one of the few principles of the debate about punishment and sentencing which enjoys widespread acceptance by philosophers, legislatures and the courts.¹⁶⁴ Despite this, sentences for similar offences vary widely from jurisdiction to jurisdiction and from court to court. There are two reasons for this. The first is that legislatures and the courts have not developed a workable way to match the two limbs of the principle. The second is that the principle of proportionality is distorted by the notion of aggravating and mitigating factors. The manner in which aggravating and mitigating factors should be dealt with is discussed shortly.

The more complex inquiry is how legislatures can go about matching the two limbs of the proportionality principle - this is a difficult task. How many years of imprisonment correlate to the pain endured by a rape victim? As noted by Andrew von Hirsch and Nils Jareborg, in developing their 'living standard approach' to offence seriousness,¹⁶⁵ 'virtually no legal doctrines have been developed on how the gravity of harms can be compared'.¹⁶⁶

The main difficulty here is that the two currencies are different. The interests typically violated by criminal offences are physical integrity and property rights. At the upper end of criminal sanctions, the currency is (deprivation of) freedom. The only conceivable way to give content to the proportionality principle is to ascertain the extent to which offenders and victims are set back by various offence and penalty types.¹⁶⁷ This requires extensive research into the life trajectories of both victims and offenders. As noted in section 2 of this paper, some work to this end has been undertaken, but it is only at the rudimentary stage.

Another important step in developing a modern sentencing model involves addressing the issue of aggravating and mitigating factors. The starting point is that all of these considerations should be ignored unless a cogent justification is given for them. To justify the existence of a sentencing practice or rule it is necessary to state the sentencing aim that is being invoked, and demonstrate how this consideration will assist to advance that aim. It is likely that this will result in an abolition of a large number of existing factors as being relevant to the sentencing calculus.

¹⁶⁴ M Bagaric, *Punishment and Sentencing* (2001), ch 5.

¹⁶⁵ A von Hirsch and N Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.

¹⁶⁶ *Ibid.*, 3.

¹⁶⁷ See further, A von Hirsch and A Ashworth, *Proportionate Sentencing: exploring the principles* (2005); M Bagaric and R Edney, 'Proportionality in Sentencing: Its Justification, Meaning and Role', (2000) *Current Issues in Criminal Justice* 143.

Finally, it is necessary to review the current range of criminal sanctions, with a particular focus on the role of imprisonment in the 21st century.¹⁶⁸ It is especially appropriate to reconsider the heavy reliance on imprisonment given the prohibitive cost of this to the community (more than \$200 per day for each prisoner)¹⁶⁹ and the fact that technological advances can now effectively achieve one of the most important functions of imprisonment, in the form of constant monitoring by use of electronic bracelets, for a fraction of the cost of imprisonment.¹⁷⁰

This could potentially result in imprisonment being used for only the most serious forms of crime, namely, violent and sexual offences. This would constitute a significant departure from the current situation, where only 50 per cent of people in Australian prisons are there for committing a sexual or violent offence. In 16 per cent of cases, the most serious offence was a property offence. In the remaining 34 per cent of cases, imprisonment was the result of some other offence type (defined as either fraud offences, justice offences, offences against government, driving offences and drug offences).¹⁷¹

5 Conclusion

Sentencing impacts on important individual and community interests which are uniform throughout the country. Equal justice requires that sentencing outcomes should be similar in every Australian jurisdiction.

Sentencing is also a complex and often controversial area of law. Moreover, the sanctions imposed by courts have considerable resource implications for the community. It is important to get sentencing 'right' and is most likely to be achieved by implementing uniform national evidence-based laws.

State, territory and the federal government should form a working party to canvass the desirability of uniform sentencing laws and commission a detailed report regarding the best model for harmonious sentencing laws.¹⁷² It is likely that such laws would depart considerably from the general thrust of existing sentencing laws, which often have a heavy

¹⁶⁸ *The Australian Law Reform Commission more than thirty years ago recommended the need to look for alternatives to imprisonment: see Sentencing of Federal Offenders (Interim report) (ALRC Report 15):* <http://www.alrc.gov.au/report-15>.

¹⁶⁹ Productivity Commission, *Government Report on Services 2012*: http://www.pc.gov.au/_data/assets/pdf_file/0019/114940/24-government-services-2012-chapter8.pdf Australian Productivity Commission.

¹⁷⁰ A review in 2006 of the electronic monitoring of offenders found that the cost is about one-fifth that of imprisonment and 'robust' in detecting violations of the term of the order, see UK National Audit Office, *The Electronic Monitoring of Adult Offenders* (2006): http://www.nao.org.uk/publications/0506/the_electronic_monitoring_of_a.aspx.

¹⁷¹ Australian Institute of Criminology, *Corrections*: http://www.aic.gov.au/en/publications/current%20series/facts/1-20/2011/6_corrections.aspx.

¹⁷² Previous extensive inquiries have been undertaken but have failed to provide the platform for coherent evidence-based laws, and have not suggested uniform national laws: see Victorian Sentencing Committee, *Sentencing* (Melbourne, 1988); New South Wales Law Reform Commission, *Sentencing*, Report No 79, 1996); Australian Law Reform Commission, *Sentencing of Federal Offenders* (Report No 15, Canberra, 1980); NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003); Australian Law Reform Commission, *Sentencing: Penalties* (Discussion Paper No 30, 1987); Australian Law Reform Commission, *Sentencing* (Report No 44, 1988); Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008).

reliance on sentencing objectives that do not seem to be attainable. There may also be a considerable change to the nature of some criminal sanctions if the law is modernized to take into account newly-emerged technologies which can more economically achieve key sentencing goals.

(Marginal) general deterrence doesn't work – and what it means for sentencing

Mirko Bagaric and Theo Alexander*

General deterrence is broadly understood as the theory that correlates increased sanctions with decreased crime rates. It is one of the principal objectives of sentencing in Australia; regularly used by courts to increase penalties in criminal matters in an endeavour to discourage others from committing offences. Imposing harsh sanctions on offenders, so the theory runs, discourages by example other people from breaking the law. General deterrence theory is a virtually unchallenged orthodoxy in Australian courts. Yet, it is in this area of the criminal law that the greatest discord between legal theory and social reality exists. The reality is that general deterrence, as universally applied, does not work. The overwhelming trends evident in empirical research suggest that higher penalties do not serve as disincentives to crime. The current practice of increasing penalties to give effect to general deterrence has no social utility. Accordingly, it is merely the infliction of additional punishment in the absence of any associated direct or indirect benefit. It is therefore socially and morally unjustifiable. There may yet be other justifications for imposing harsh penalties on offenders, but they must be found elsewhere than within the rubric of general deterrence. This article sets out the current relevance of general deterrence to the sentencing calculus. It then examines the empirical data regarding the efficacy of punishment to deter offenders, and makes suggestions for reform in light of these empirical findings.

INTRODUCTION

It is trite to observe that general deterrence is one of the principal objectives of sentencing. It operates to increase the severity of the sanctions imposed on offenders by reference to its effects on people other than the offender. It assumes that the imposition of punishment on offenders will deter other people from committing (a) the same or similar crimes, and (b) crimes in general. Intuitively, it is a persuasive theory. This is because it relies upon a series of seemingly sound premises:

P1: Humans have a strong desire to avoid hardships or pain.

P2: Criminal sanctions normally involve the imposition of hardships or pain.

P3: Imposing pain on offenders illustrates to people the adverse consequences stemming from criminal conduct.

P4: People will avoid engaging in conduct that risks pain being imposed on them.

P5: The greater the potential pain, the stronger the desire to avoid being subjected to it.

Conclusion: General deterrence is justifiable.

The inductive force of this seemingly “sound” reasoning is strong; however, even seemingly strong inductive arguments can lead to a false conclusion. General deterrence is one such argument. The false conclusion is exposed and debunked when tested against the empirical evidence. The overwhelming weight of scientific testing establishes that there is no – or, at best, a slight – connection between higher penalties and lower crime.

This conclusion is not new. It has been noted repeatedly in the academic literature of the United States,¹ especially in the past five or so years. However, what has not been clearly and widely

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¹ The United States is the jurisdiction where most of the empirical testing of general deterrence has been undertaken.

articulated is that the disjunction between higher penalties and lower crime rates does not necessarily mean that general deterrence as a theoretical proposition is totally flawed; rather, the crude theory upon which it has traditionally been based requires re-examination.

There are two forms of general deterrence. *Marginal general deterrence* concerns the correlation between the *severity* of the sanction and the prevalence of an offence. *Absolute general deterrence* concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct.²

Only marginal deterrence has been disproved. Absolute general deterrence works. In this article, the authors examine the research data that demonstrates the failure of marginal general deterrence but which supports the effectiveness of punishment to achieve absolute general deterrence.³

Implications for sentencing law and practice are also discussed. In short, it means that legislatures and courts should not increase sentences in the futile pursuit of marginal general deterrence. However, the pursuit of absolute general deterrence remains a valid sentencing objective. This can be achieved simply by ensuring that offenders are penalised by the imposition of appropriate pain and hardship, but such penalties should not be aggravated in order to achieve an unattainable objective.

In precise terms, the impact of the suggested reforms is that penalties should be reduced to the extent that they are currently increased in pursuit of the objective of marginal general deterrence. Given the “instinctive synthesis”⁴ required by the process of criminal sentencing, it is unlikely that any reduction could be precisely measured. However, essentially it means that penalties in relation to types of offences where marginal general deterrence currently plays a central role, such as drug and revenue offences, should be significantly reduced.

These proposed changes can best be achieved by legislative reform. This is unlikely given the near universal political trend towards tougher sanctions. However, the suggested reforms in this article can also be achieved by judicial redefinition of the meaning of general deterrence and how it is accommodated within the sentencing calculus. The authors recommend that general deterrence should be confined to absolute general deterrence.

The next section of this article provides an overview of the current role of general deterrence in the sentencing inquiry. This is followed by an examination of the empirical data regarding general deterrence, and an explanation of possible sociological and institutional reasons for the failure of marginal general deterrence. The next section provides a basis for rejecting the logical form of the argument. The authors then look at the success of absolute general deterrence by way of contrast. A brief discussion of the normative criticisms of general deterrence then follows before reform proposals are set out in the concluding remarks, along with the limitations of these proposals.

THE ROLE OF GENERAL DETERRENCE IN THE SENTENCING INQUIRY

The form in which general deterrence most often appears in the sentences of courts is as marginal general deterrence.⁵ In this form, it has long enjoyed a cardinal role in sentencing law and practice; widely endorsed as the paramount objective of sentencing. Nearly half a century ago the New Zealand Supreme Court in *R v Radich* stated that:

One of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, [deterrence] has been the main purpose of punishment and still continues so. The fact that punishment does not entirely prevent

² Zimring F and Hawkins G, *Deterrence: The Legal Threat in Crime Control* (1973) p 14.

³ The analysis in this article builds on the analysis by one of the authors a decade earlier: see Bagaric M, “Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals” (2000) 24 *Crim LJ* 21. The current analysis of the data on general deterrence has been used to suggest reforms to the specific area of tax offenders: see Bagaric M et al, “The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud” (2011) (July) *Australian Taxation Forum*. This article extrapolates the reform proposals to sentencing law in general.

⁴ For a discussion of the current approach to sentencing, see Bagaric M and Edney R, *Australian Sentencing* (2007) Ch 1.

⁵ Sir William Young, “The Effects of Imprisonment on Offending: A Judge’s Perspective” [2010] *Criminal Law Review* 3.

all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only light punishment.⁶

This passage has been cited with approval in numerous cases⁷ and deterrence remains a key sentencing concept in each Australian jurisdiction.⁸ General deterrence is relevant to sentencing for most offences, including where the offence is prevalent;⁹ public safety is at issue;¹⁰ the offence is hard to detect;¹¹ it involves a breach of trust;¹² or where vulnerable groups need protection.¹³

It is particularly important in relation to offences involving a material benefit to the offender. Thus, in relation to drug distribution offences, tax and social security frauds, it has been held to be the most important factor in determining a sentence.

In the context of large scale drug offences, the court said in *Aconi v The Queen* that:

[18] It can ... be accepted that the applicant had an important role in the distribution chain, having access, for distribution purposes, to relatively large quantities of high grade heroin. In those circumstances this was a case in which the starting point for the sentencing of the applicant could be expected to be severe. As was pointed out by Kennedy J in *Serrette [v The Queen]* [2000] WASCA 405] at [2], it has frequently been said that those who engage in the illicit drug trade, whatever their role in the enterprise, must expect heavy sentences in which general deterrence will be the principal purpose of the punishment. This is especially so where an offender plays an important role in the distribution process.¹⁴

In a similar vein, in *R v Riddell* it was noted that:

[57] Courts have also long recognised the importance of general deterrence in sentencing in respect of drug importation offences. In *R v Cheung* ... Sully J said:

The importation of heroin into this country in any amount and at any time constitutes a deliberate threat to the well being of the Australian community ... The importation or the attempted importation of, and the trafficking or attempted trafficking [of heroin] ... is in a very real sense a declaration of war upon this community ... In the face of such challenges each of the institutional supports of our society has a role to play. That of the Courts is to punish and deter according to law. Obviously, the Courts alone cannot meet adequately, let alone defeat, the challenge of which I have been speaking. What the Courts can do is to punish drug-related crime in a way which signals plainly to drug traffickers, especially foreign drug traffickers, that the Courts are both able and willing to calibrate their sentences until a point is reached at which, to a significant extent even if never perfectly, fear of punishment risked will neutralise the greed which is the only possible motive of those who ... engage in drug-related crime when they are themselves not drug dependent.¹⁵

In the context of taxation offences, in *R v Izhar Ronen*, the New South Wales Court of Criminal Appeal said:

⁶ *R v Radich* [1954] NZLR 86 at 87.

⁷ For example, in *Walden v Hensler* (1987) 163 CLR 561 at 569; 29 A Crim R 85, Brennan J stated that the “chief purpose of the criminal law is to deter those who are tempted to breach its provisions”. See also *R v Willisroft* [1975] VR 292 at 298-299; *R v Porter* (1933) 55 CLR 182 at 186; *R v Lambert* (1990) 51 A Crim R 160 at 171.

⁸ *Sentencing Act 1991* (Vic), s 5(1)(b); *Criminal Law (Sentencing) Act* (SA), s 10(j); *Sentencing Act 1995* (NT), s 5(1)(c); *Penalties and Sentences Act 1992* (Qld), s 9(1)(c).

⁹ *R v Willisroft* [1975] VR 292 at 299; *R v Taylor* (1985) 18 A Crim R 14.

¹⁰ *R v Dixon-Jenkins* (1985) 14 A Crim R 372 at 376.

¹¹ *R v Jamieson* [1988] VR 879; 34 A Crim R 308; *R v Pantano* (1990) 49 A Crim R 328 at 338.

¹² *R v Hawkins* (1989) 45 A Crim R 430.

¹³ *Kumantjara v Harris* (1992) 109 FLR 400; *R v Kane* (1987) 29 A Crim R 326; *DPP (Cth) v D'Alessandro* (2010) 26 VR 477.

¹⁴ *Aconi v The Queen* [2001] WASCA 211, approved in *Tulloh v The Queen* (2004) 147 A Crim R 107.

¹⁵ *R v Riddell* (2009) 194 A Crim R 524 at [57]. The court noted at [58] that: “This passage has been cited with approval on numerous occasions. Its relevance is not restricted to the importation of the particular drug in that case. It is an important statement of principle relating to the importation of any illegal drug. Sully J reiterated his comments in *R v Nguyen* [2004] NSWSC 144 at [53], which involved the importation of ecstasy. See also *R v Chen* (2002) 130 A Crim R 300 at [286]; *R v Law*

It has been stated time and time again and in all jurisdictions that the most important aspect of punishment in relation to frauds on the Commonwealth's revenue is general deterrence.¹⁶

More recently, in a unanimous judgment of the Victorian Court of Appeal in *DPP (Cth) v Gregory*, Warren CJ, Redlich JA and Ross AJA said that:

[53] In seeking to ensure that proportionate sentences are imposed the courts have consistently emphasised that general deterrence is a particularly significant sentencing consideration in white collar crime and that good character cannot be given undue significance as a mitigating factor, and plays a lesser part in the sentencing process. In the case of taxation offences general deterrence is also given special emphasis in order to protect the revenue as such crimes are not particularly easy to detect and if undetected may produce great rewards. "Deterrence looms large" as the present process of self assessment reposes on the taxpayer a heavy duty of honesty ...

[54] In many if not most cases, imprisonment will be the only sentencing option for serious tax fraud in the absence of powerful mitigating circumstances.¹⁷

The same enthusiasm for general deterrence applies in relation to social security offences. Over a decade ago, Underwood J in *Hrasky v Boyd* stated:

For many years now, Australian courts have emphasised the importance of general deterrence when imposing sentence for what is loosely referred to as social security fraud. In *Laxton v Justice* (1985) 38 SASR 377, Olsson J said at 381:

- (1) Offences of this type are now prevalent. The offence is difficult to detect and penalties should reflect a concern for the protection of the revenue.
- (2) Frauds of this kind must be viewed seriously because they threaten the basis of the social security system which is designed to provide financial security for those in the community who are in need. A deterrent penalty is called for...¹⁸

These comments were expressly endorsed in *Emms v Barr*¹⁹ and have been adopted in numerous decisions since.²⁰

The allegiance by the courts to general deterrence theory is so steadfast that judges have refused to renounce it even in the face of apparent legislative disavowal of it as a sentencing objective.

For example, general deterrence is not specifically mentioned as one of the relevant sentencing factors in the *Crimes Act 1914* (Cth).²¹ This was apparently in response to a specific recommendation by the Australian Law Reform Commission that it not be adopted as a sentencing objective because sentences should be commensurate with the seriousness of the offence committed. It was considered unfair to impose heavier sanction on a particular accused because of the effects it might have on the behaviour of others (discussed further below).²²

In *DPP (Cth) v El Karhani*, while noting that general deterrence is one of "the fundamental principles of sentencing, inherited from the ages", the court attributed the legislative omission of

[2002] NSWSC 952 at [24] and *R v Stanbouli* (2003) 131 A Crim R 513 at [14] per Hulme J (with whom Spigelman CJ and Carruthers AJ agreed on this point)." Most recently, see *Nguyen v The Queen* [2011] VSCA 32; *R v Nguyen* [2010] NSWCCA 238; *DPP (Cth) v De La Rosa* (2010) 243 FLR 28.

¹⁶ *R v Ronen* (2006) 161 A Crim R 300 at [66]. See also *R v Peterson* [2008] QCA 70 at [22].

¹⁷ *DPP (Cth) v Gregory* (2011) 250 FLR 169 at [53]-[54] (footnotes omitted). The central role of general deterrence in the sentencing of tax offenders has been noted in numerous decisions: see, for example, *R v Nicholson*; *Ex parte DPP (Cth)* [2004] QCA 393; Sheller JA in *DPP v Hamman* (unreported, NSWCCA, 1 December 1998) at 6; *DPP (Cth) v Rowson* [2007] VSCA 176 at [21].

¹⁸ *Hrasky v Boyd* (2009) 9 Tas R 144 at [20]; 113 A Crim R 11.

¹⁹ *Emms v Barr* (2008) 187 A Crim R 390.

²⁰ For example, see *Ivanovic v The Queen* [2009] NSWCCA 28. However, this does not exclude the need to give weight to other considerations, such as rehabilitation, especially in respect to young offenders. See, for example: *R v Wyley* [2009] VSCA 17; *DPP v Lawrence* (2004) 10 VR 125; *R v PJB* (2007) 17 VR 300; *R v Mills* [1998] 4 VR 235.

²¹ See *Crimes Act 1914* (Cth), s 16A(1) and (2); however, specific deterrence is: s 16A(2)(j).

²² Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) p 18.

general deterrence to a “legislative slip”.²³ The court stated that general deterrence is still an important sentencing consideration and no less important than the other factors expressly mentioned, even though it is absent from the detailed list of relevant sentencing criteria.²⁴

The courts appear so keen to invoke the power of general deterrence to discourage offenders from their criminal ways that they have adopted it *a priori* as an article of faith. In *Yardley v Betts*, the court stated: “the courts *must assume*, although evidence is wanting, that the sentences which they impose have the effect of deterring at least some people from committing crime”.²⁵ Similarly in *Fern*, King CJ held that:

Courts are *obliged to assume* that the punishments which Parliament authorises will have a tendency to deter people from committing crimes. The administration of criminal justice is based upon that assumption.²⁶

The basis of the imperative to pursue deterrence as a sentencing goal is unclear. It is not as if there are no other sentencing objectives for which the courts can justify punishing wrongdoers: denunciation, rehabilitation and reparation to name a few.²⁷ Even if there were not, to the extent that the law pretends to logical consistency, it would seem preferable to abandon punishment altogether, than to punish criminals on the basis of a flawed rationale.

It is only on rare occasions that the courts have expressed concern or equivocation regarding the efficacy of punishment to deter crime. In *Pavlic v The Queen*, Green CJ stated that:

[G]eneral deterrence is only one of the factors which are relevant to sentence and must not be permitted to dominate the exercise of the sentencing discretion to the exclusion of all the other factors which the law requires a judge to take into account. Secondly, although a court is entitled to proceed on the basis that there is a general relationship between the incidence of crime and the severity of sentences, there is no justification for the view that there exists a direct linear relationship between the incidence of a particular crime and the severity of the sentences which are imposed in respect of it such that the imposition of heavier sentences in respect of a particular crime will automatically result in a decrease in the incidence of that crime.²⁸

Most recently, in *Glascott v The Queen*, the Victorian Court of Appeal observed that punishment will not deter offenders who are “emotionally wrought or otherwise irrational” at the time of offending.²⁹ Of course, this observation still works on the presumption that offenders would be deterred if they were in control of their faculties at the time of offending.

Thus, general deterrence has been and remains an important consideration in the sentencing calculus. In relation to some categories of offences it is even the most important sentencing variable. When general deterrence is factored into the sentencing equation it is an aggravating factor and thereby operates to increase the severity of the penalty. The central and repeated rationale offered by the courts for pursuing this objective is that it will deter other people from committing crime. In the next section the validity of this assumption will be examined.

THE EMPIRICAL DATA ESTABLISHING THAT GENERAL DETERRENCE DOES NOT WORK

The theory that criminal sanctions deter crime has a long history, dating back more than 300 years.³⁰ Despite this pedigree, it has been difficult to either prove or disprove the soundness of the theory. The

²³ *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 at 378; 51 A Crim R 123.

²⁴ See *Crimes Act 1914* (Cth), s 16A.

²⁵ *Yardley v Betts* (1979) 1 A Crim R 329 at 333 (emphasis added). See also *R v Dixon* (1975) 22 ACTR 13 at 18.

²⁶ *R v Fern* (1989) 51 SASR 273 at 274 (emphasis added).

²⁷ These are discussed in Bagaric and Edney, n 4.

²⁸ *Pavlic v The Queen* (1995) 5 Tas R 186 at [6]; 83 A Crim R 13. See also *R v Dube* (1987) 46 SASR 118.

²⁹ *Glascott v The Queen* [2011] VSCA 109 at [152].

³⁰ The history of deterrence theory can be traced to the works of Cesare Beccaria (see Beccaria C, *On Crimes and Punishments* (Henry Paolucci translation, 1986; original 1764) and Jeremy Bentham (see Bentham J, *The Principles of Morals and Legislation* (1988 translation; original 1789).

main reason for this is the number of other variables that contribute to the crime rate. In order to demonstrate the link between crime and penalty levels, it would be necessary to control for all other variables which may affect the crime rate while increasing the dependent variable being the penalty levels.³¹ Even if this could be done, it would be difficult, except perhaps in relation to homicide offences, to get accurate information regarding actual crime rates due to the large number of offences which are unreported.³²

The complexity of the inquiry was noted more than 30 years ago by the Report of the Panel of the National Research Council in the United States.³³ The Panel concluded that the research evidence that does exist regarding marginal deterrence is, overall, inconclusive.

We cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence. We believe scientific caution must be exercised in interpreting the limited validity of the available evidence and a number of competing explanations for the results. Our reluctance to draw stronger conclusions does not imply support for the position that deterrence does not exist, since the evidence certainly favors a proposition supporting deterrence more than it favors one asserting that deterrence is absent.³⁴

Several years earlier, after a comprehensive review of the evidence regarding marginal deterrence, Zimring and Hawkins were more definitive in their findings regarding the link between harsher sentences and lower crime. They stated:

Studies of different areas with different penalties, and studies focusing on the same jurisdiction before and after a change in punishment level takes place, show rather clearly that the level of punishment is not the major reason why crime rates vary. In regard to particular penalties, such as capital punishment as a marginal deterrent to homicide, the studies go further and suggest no discernible relationship between the presence of the death penalty and homicide rates.³⁵

The failure of even the death penalty to act as a marginal deterrence is exemplified by the experience in New Zealand. Between 1924 and 1962 the death penalty for murder was in force, then abolished, then revived, and abolished again. The changes generally followed some level of public debate and were well publicised. Although the murder rates fluctuated during this period, they bore no correlation to the prevailing penalty, whether capital punishment or life imprisonment.³⁶ Similar findings have emerged in the United States.³⁷

However, whilst the absence of a link between homicides and the death penalty has been challenged by some commentators,³⁸ the evidence used in support of the link has been debunked; primarily because the data upon which it is based is statistically insignificant and the evidence goes against the overwhelming trend of empirical data. As has been pointed out by Richard Berk,³⁹ the main findings in support of the hypothesis that capital punishment is a deterrent to homicide relate to

³¹ For a discussion regarding the difficulties in evaluating data relating to deterrence, see Wilson JQ, "Penalties and Opportunities" in Duff A and Garland D, *A Reader on Punishment* (1994) p 177; von Hirsch A et al, *Criminal Deterrence and Sentence Severity* (1999) Ch 5.

³² For example, see Walker N, *Why Punish?* (1991) p 16.

³³ Nagel D, "General Deterrence: A Review of the Empirical Evidence" in Blumstein A et al (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, Report by the Panel on Deterrent and Incapacitative Effects (1978) p 39.

³⁴ Blumstein et al, n 33, p 7.

³⁵ Zimring and Hawkins, n 2, p 29. See also Morris N, "Impediments to Penal Reform" (1966) 33 *University of Chicago Law Review* 632.

³⁶ See Walker N, *Sentencing in a Rational Society* (1969) pp 60-61, 191. See also Hood R, *The Death Penalty: A World-Wide Perspective* (1996) Ch 6, especially pp 211-212.

³⁷ For example, see Cochran J et al, "Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment" (1994) 32 *Criminology* 107 at 129.

³⁸ See, for example, Cloninger D and Marchesini R, "Executions and Deterrence: A Quasi-controlled Group Experiment" (2001) 35 *Applied Economics* 569; Zimmerman PR, "State Executions, Deterrence, and the Incidence of Murder" (2004) 7 *Journal of Applied Economics* 163.

³⁹ See Berk R, "New Claims about Executions and General Deterrence: Déjà Vu All Over Again?" (2005) 2 *Journal of Empirical Legal Studies* (2005) 303.

11 observations⁴⁰ out of a sample size of 1,000 observations⁴¹ where the homicide rate dropped in an American state following an execution in the previous year. The data is statistically meaningless and contrary to the trend of 99% of the observations. Berk stated:

Whatever one makes of those 11 observations, it would be bad statistics and bad social policy to generalize from the 11 observations to the remaining 989. So, for the vast majority of states for the vast majority of years, there is no evidence for deterrence in these analyses. Even for the remaining 11 observations, credible evidence for deterrence is lacking.⁴²

Berk concluded:

It is apparent that for the vast majority of states in the vast majority of years, there is no evidence of a negative relationship between executions and homicides.⁴³

The strongest evidence in support of the theory of marginal general deterrence stems from the considerable drop in serious crime levels in the United States over the past 30 years. This drop coincided with increased penalties (including mandatory imprisonment in some states) and significant increases in the imprisonment rate. Statistically, between 1990 and 2009:

- (a) the rate of violent crime in the United States dropped by more than 60%, with most of the decline being recorded after 1996;
- (b) the violent victimisation rates per 1,000 people aged 12 years or older dropped from 44 to 17.⁴⁴

During this period the imprisonment rate rose from 1.15 million to 2.3 million prisoners.⁴⁵ Currently, the rate at which the United States imprisons its citizens is approximately 750 per 100,000 people (the highest in the world), which is nearly double that of 20 years ago. At face value, these figures suggest a causal link between imprisoning greater numbers of offenders and effectively reducing the crime rate.

A number of detailed studies have been undertaken to examine and explain this apparent causal link between crime and imprisonment rates. For example, William Spelman has stated that up to 21% of crime reduction is attributable to the increased rate of imprisonment.⁴⁶ However, Spelman is unclear whether the reduction is attributable to the incapacitation of offenders (who are thereby prevented from committing crimes whilst they are imprisoned) or to the salutary effects of marginal deterrence.⁴⁷ Clearly, if, during that decade, around one million American offenders were taken from the streets and imprisoned for various periods of time, it was to be expected that the opportunity to commit crimes, and hence add to the crime statistics, was significantly impaired.⁴⁸

⁴⁰ Situations in which five or more executions occurred in a state in a single year.

⁴¹ Each "observation" is the homicide rate in an American state over the period of one year.

⁴² Berk, n 39 at 330.

⁴³ Berk, n 39 at 330. For a more wide-ranging study with similar conclusions see: Dölling D, Entorf H, Hermann D and Rupp T, "Is Deterrence Effective? Results of a Meta-analysis of Punishment" (2009) 15 *European Journal on Criminal Policy and Research* 201; Donohue J, "Assessing the Relative Benefits of Incarceration: The Overall Change over the Previous Decades and the Benefits on the Margin" in Raphael S and Stoll MA (eds), *Do Prisons Make us Safer?* (2009); Doob AN and Webster CM, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 13 *Crime and Justice* 143.

⁴⁴ Bureau of Justice Statistics, *Key Facts at a Glance: Violent Crime Trends*, <http://www.bjs.ojp.usdoj.gov/content/glance/tables/vioctrdtab.cfm> viewed 8 September 2011. The rate of decline in other forms of crime was similar.

⁴⁵ Bureau of Justice Statistics, *Key Facts at a Glance: Correctional Populations*, <http://www.bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> viewed 8 September 2011.

⁴⁶ Spelman W, "What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime" (2000) 27 *Crime & Justice* 419 at 485. See also Blumstein A and Wallman J, *The Crime Drop in America* (2000); Levitt SD, "Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not" (2004) 18 *J Econ Persps* 163 at 177.

⁴⁷ On balance, studies show that a 10% increase in imprisonment rates produce a 2% to 4% reduction in the crime rate, most of which is in relation to non-violent offenders: see Warren R, "Evidence-based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy" (2009) 43 *USF L Rev* 585 at 594 and the references cited therein.

⁴⁸ As noted below, some of this reduction is also attributable to more police.

Further, it has been noted that similar crime reduction trends occurred in Canada, the nearest neighbour to the United States, over approximately the same period. During that period, the imprisonment rate in Canada actually fell.⁴⁹

Empirical evidence not only questions the causal link between higher penalties and lower crime, but also provides strong evidence of alternative explanations for falling crime rates. For example, it has been argued that 50% of the fall in the United States crime rate is the result of an increased number of women from disadvantaged groups (teenagers, the poor and minority groups) having abortions. It is argued that these pregnancies would have resulted in births of children who would have been most likely to commit crimes as adults. Thus, so it is argued, the legalisation of abortion in the 1970s resulted in lower crime rates in the 1990s; with each 10% rise in abortions corresponding to a 1% drop in crimes two decades later.⁵⁰ In commenting on the causal link between increased abortions and reduced crime, Steven Levitt stated:

The five states that allowed abortion in 1970 (three years before *Roe v Wade*) experienced a decline in crime rates earlier than the rest of the nation. States with high and low abortion rates in the 1970s experienced similar crime trends for decades until the first cohorts exposed to legalized abortion reached the high-crime ages around 1990. At that point, the high-abortion states saw dramatic declines in crime relative to the low-abortion states over the next decade. The magnitude of the differences in the crime decline between high- and low-abortion states was over 25 per cent for homicide, violent crime and property crime ... Panel data estimates confirm the strong negative relationship between lagged abortion and crime. An analysis of arrest rates by age reveals that only arrests of those born after abortion legalization are affected by the law change.⁵¹

Recent empirical research from Germany is consistent with United States findings regarding the failure of marginal general deterrence.⁵² At the Goethe University, Frankfurt, Horst Entorf reviewed 24 years of criminal sentencing practices in West German states for correlates of the crime rate. Entorf sought to examine the effect of each stage of the prosecution process, from investigation to conviction, on the commission rates of two specific crimes (“major property” and “violent crimes”), in order to assess their relative contribution to the overall effect of the criminal prosecution process on crime rates. The results were analysed by the theoretical econometric analysis methodology, which considered the deterrent effects of formal and informal, as well as custodial and non-custodial, sanctions.⁵³

The results of the research challenged the perceived wisdom about marginal general deterrence. It was discovered that a deterrent effect was found at “the first two stages of the criminal prosecution process” (charge and conviction) rather than at the “less robust” severity of punishment stage (sentencing). Entorf also found that:

Results presented in [the] article suggest that crime is particularly deterred by certainty of conviction. Here, contrary to popular belief, neither police nor judges but public prosecutors play the leading role. Extending severity of sentences, however, does not seem to provide a suitable strategy for fighting crime. In particular, the *length of the imprisonment terms proves insignificant*.⁵⁴

As a consequence, he suggested that the public policies pursued by courts and legislatures in the name of marginal deterrence must be reconsidered. Building more prisons, creating harsher mandatory sentencing regimes and devoting more resources to the detention of offenders must be critically questioned. Fashionable policies which divert offenders from the criminal justice system (and

⁴⁹ Paternoster R, “A Century of Criminal Justice: Crimes and Punishment: So, How Much Do We Really Know About Criminal Deterrence?” (2010) *J Crim L & Criminology* 765 at 803.

⁵⁰ Ellison M, “US Study Ties Crime Fall to Abortions”, *The Age* (11 August 1999) p 13.

⁵¹ Levitt, n 46 at 182-183.

⁵² Entorf H, *Crime, Prosecutors and the Certainty of Conviction*, IZA Discussion Paper No 5670 (Goethe University Frankfurt, April 2011).

⁵³ Theoretical econometrics studies statistical properties of econometric procedures; such properties include power of hypothesis tests and the efficiency of survey-sampling methods, of experimental designs, and of estimators. See Pindyck RS and Rubinfeld DL, *Econometric Methods and Economic Forecasts* (4th ed, McGraw-Hill, 1998).

⁵⁴ Entorf, n 52, p 4 (emphasis added).

therefore reduce the likelihood of conviction after detection) must be abandoned. Political policies to universally increase minimum sentences and judicial responses to public criticism of “deficient” sentences should not be countenanced. The role of deterrence must be redefined:

“General deterrence” is still capable of curbing crime rates, but just by a more rigorous application of existing penal laws rather than by reforms extending the severity of measures. The latter strategy, followed in the US, might bear the risk that the prison population increases without any effect of deterrence.⁵⁵

These conclusions, derived from both common law and civil law experiences over three decades, beg the question: *why do higher sentences fail to deter would-be offenders?*

SOCIOLOGICAL AND INSTITUTIONAL SUGGESTIONS FOR THE FAILURE OF MARGINAL GENERAL DETERRENCE

It is not central to the argument in this article to establish *why* marginal general deterrence does not work. The only point that needs to be established to negate the justification for marginal general deterrence as a sentencing objective is that it in fact does not work. However, the law is a conservative enterprise and a tenable explanation for the failure of marginal general deterrence will assist in advancing the reform proposals.

The most obvious explanation is that the risks of hardship and pain occasioned by criminal offending are not adequately transmitted to potential offenders.⁵⁶ In other words, there is a failure of “threat communication” as it affects risk perception and negatively impacts crime rates.⁵⁷ Yet studies repeatedly show that awareness of potentially severe sanctions does not produce less crime. In one of the most wide-ranging studies of its type, 1,500 respondents in 54 large urban countries were interviewed to assess whether respondents had higher estimates of the certainty and severity of punishment and its timeliness (celerity) in jurisdictions where the levels were in fact higher.⁵⁸ No such link was established. The authors of the study (Kleck, Sever, Li and Gertz) noted that this is irrespective of whether the respondents had prior convictions or had no prior experience with the criminal justice system. They concluded that:

There is generally no significant association between perceptions of punishment levels and actual levels that CJS [criminal justice system] agencies work hard to achieve, implying that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms. Increases in punishment might do so through incapacitative effects, the effects of treatment programs linked with punishment, or other mechanisms, but are not likely to do so in any way that depends on producing changes in perceptions of risk ... Thus, increased punishment levels are not likely to increase deterrent effects, and decreased punishment levels are not likely to decrease deterrent effects.⁵⁹

A second explanation is that higher sentences do nothing to address the underlying causes of criminal behaviour. The deterrence argument is based on the economic rationalist theory of choice; it assumes that offenders rationally “choose” to offend in a type of criminological cost/benefit calculation. Of course, sociologists argue that this theory fails to account for the myriad reasons that predispose some individuals, and some groups, to crime. As Henry observed:

[M]uch of the criminological literature has demonstrated that there are a variety of motivations that shape criminal activity ranging from *biological predispositions, psychological personality traits, social*

⁵⁵ Entorf, n 52, p 30.

⁵⁶ For a discussion of the obstacles confronting this level of knowledge, see Robison P and Darley J, “The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best” (2003) 91 *Georgetown Law Journal* 949.

⁵⁷ Nagin D, “Criminal Deterrence Research at the Outset of the Twenty-first Century” in Tonry T (ed), *Crime and Justice: A Review of Research* (University Chicago Press) Vol 23.

⁵⁸ Kleck G et al, “The Missing Link in General Deterrence Research” (2005) 43 *Criminology* 623.

⁵⁹ Kleck et al, n 58 at 653-654. See also Watling C et al, “Applying Stafford and Warr’s Reconceptualization of Deterrence Theory to Drug Driving: Can it Predict Those Likely to Offend?” (2010) 42 *Accident Analysis and Prevention* 452.

*learning, cognitive thinking, geographical location and the ecology of place, relative deprivation and the strain of capitalist society, political conflict and social and sub-cultural meaning.*⁶⁰

This observation is considered self evident by many sociologists. Lamenting the failure of politics to adequately respond to this problem, Michael Tonry has suggested that the (desired) deterrent effect of harsher penalties on such offenders is “better characterized as ideological rather than as evidence-based”. In his survey of the academic literature, Tonry made the following simple observation:

Most people sent to prison are socially and economically disadvantaged, most are or have been alcohol or drug dependent, and most lack strong private systems of familiar or social support. Most after their release are stigmatized and often are explicitly handicapped by laws precluding many kinds of employment. Neither in the United States nor in the United Kingdom are strong systems of state support in place to provide adequate housing or income to ex-prisoners. In lawyer talk, a judge could take “judicial notice” (ie form a conclusion without needing to hear evidence) that already disadvantaged ex-prisoners facing additional handicaps and lacking systems of support are more likely than other people to engage in crime. Duh!⁶¹

A third explanation is the question of delay and similar systemic failure. In a recent wide-ranging extensive analysis of deterrence research, it has been postulated that a central reason for the ineffectiveness of marginal general deterrence is the extent of delays between detection and the imposition of punishment:

It is argued that the empirical evidence does support the belief that criminal offenders are rational actors, in that they are responsive to the incentives and disincentives associated with their actions, but that the criminal justice system, because of its delayed imposition of punishment, is not well-constructed to exploit this rationality.⁶²

This is an argument favoured by economic rationalists who consider that the effectiveness of punishment is increased by: (1) frequency of application; (2) immediacy of application; and (3) punishment used in conjunction with positive reinforcement of pro-social behaviour. Thus the amount of delay is an important part of the punishment-effectiveness matrix. As Friedman and Brinker have pointed out:

Punishment is not one single strategy but a collection of strategies that exist on a continuum from very mild to highly aversive approaches. Given our definition of punishment as a behavior-reducing technique, it is important to understand the nature of this continuum.⁶³

Hence, there are numerous sociological and institutional explanations for the failure of marginal general deterrence. It is conceded that none of them have been firmly proven. But cumulatively, they operate to soften the weight of the logical arguments in favour of marginal general deterrence.

THE LOGICAL FAILURE OF THE LOGICAL FORM OF THE ARGUMENT

As discussed in the introduction, the appeal of marginal general deterrence stems from the *logical* argument that can be made in support of its objective: the reduction of crime. The authors do not disagree with this objective, but challenge the means consistently adopted by courts and legislatures to achieve it. As noted in the preceding section, a number of sociological and institutional arguments have been advanced to explain the failure of marginal general deterrence. None have universal acceptance and hence the logical form of the argument remains potentially persuasive.

⁶⁰ Henry S, *On the Effectiveness of Prison as Punishment*, Paper presented at the Incarceration Nation: The Warehousing of America's Poor Conference Ivy Tech State College (South Bend, Indiana, 24 October 2003) (emphasis added).

⁶¹ Tonry M, “Less Imprisonment is No Doubt a Good Thing” (2011) 10(1) *Criminology and Public Policy* 137 at 139.

⁶² Paternoster, n 49. The same conclusion is reached in Tonry M, “The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings” (2009) 38 *Crime and Justice* 65 at 69, where Tonry stated that “[t]he clear weight of the evidence is that the marginal deterrence hypothesis cannot be confirmed”. See also Webster C, Doob A and Zimring F, “Proposition 8 and Crime Rates in California: The Case for the Disappearing Deterrent” (2006) 5 *Criminology and Public Policy* 417.

⁶³ Friedman SG and Brinker B, “The Facts About Punishment” (2001) 4 *Original Flying Machine* 14.

Cognitive and behavioural explanations have also been advanced to explain the gap between general marginal deterrence in theory and reality.⁶⁴ Again, none of these theories have been proven. In years to come it is hoped that psychologists and other behavioural experts will provide a valid explanation for the failure of marginal general deterrence.

But it is not necessary to wait until that time to at least diminish the intuitive appeal of the marginal deterrence theory. The logical form of the argument in favour of marginal general deterrence is set out in the introduction of this article. As noted, it is an ostensibly logically valid argument. And in fact, the evidence relating to marginal general deterrence partially supports the argument. As discussed above, absolute general deterrence does work. This is established by premises one to four.

The premise which has not been validated by empirical inquiry is the last one: the claim that the greater the potential punishment, the stronger the desire to avoid being subjected to it.

Logically this premise may seem appealing, but paradoxically it is the logical assessment of the premise that illustrates its flaw. An incontestable aspect of the human condition is that the matters which influence human action are not confined to logic alone. We are moved significantly, and perhaps principally, by our emotions and desires. If human action was dictated totally by logic people would avoid high-risk behaviour which involves short-term enjoyment, but is known to carry significant risks. The continued high incidence of tobacco use, alcohol consumption and the obesity epidemic plaguing Australia (which has been subjected to near saturation levels of public health campaigns)⁶⁵ is concrete proof that human behaviour is not solely, and perhaps not even principally, guided by logical considerations.

Accordingly, there is no basis for simply *assuming* that when deciding whether or not to commit a crime, humans are automatically influenced by the size of the penalty which may be imposed if apprehended.

This apparent gulf between our logical beliefs and action is a phenomenon that has been recognised for centuries. In the 18th century, Scottish philosopher David Hume distinguished between two states of mind: beliefs and desires.⁶⁶ Beliefs are copies or replicas of the way we believe the world to be. Desires are representations of how we would like the world to be; they are our wants and are impacted greatly by our emotional preferences. On their own, beliefs can never provide a source of motivation; “they are perfectly inert, and can never either prevent or produce any action”.⁶⁷ It is only our desires that can motivate us. We can assess beliefs for truth and falsehood – a true belief being one which is a copy of the way the world actually is. In order for an action to occur, we need: (a) desire that prompts us to effect a certain change in the world; and (b) a belief informing us how this change can be achieved.

According to Hume, only beliefs can be true or false, and hence are subject to reason. Desires, on the other hand are “original facts and realities”;⁶⁸ they just fall upon us. They cannot be true or false and therefore are not amenable to rationality: “Tis not contrary to reason to prefer the destruction of

⁶⁴ Many of these catalogued (but not evaluated) in the report by the Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (2011), <http://www.sentencingcouncil.vic.gov.au/news/2011-04-18/report-reviews-deterrent-effects-imprisonment> viewed 8 September 2011. After conducting a review of some empirical literature the report also concludes that marginal general deterrence does not seem to work.

⁶⁵ A federal government study (the National Health Survey) reported that in 2007-2008, 61.4% of Australians were overweight or obese: Department of Health and Ageing, *National Health Survey 2007-08* (2008), <http://www.health.gov.au/internet/healthyactive/publishing.nsf/Content/overweight-obesity> viewed 8 September 2011.

⁶⁶ Hume D, *A Treatise of Human Nature* (1978 ed; original 1738) p 458. For a fuller account of Hume's theory of motivation see Smith M, “Valuing: Desiring or Believing?” in Charles D and Lennon C (eds), *Reduction, Explanation and Realism* (1992) and “Realism” in Singer P (ed), *A Companion to Ethics* (1991) pp 399, 400-402.

⁶⁷ Hume, n 66, p 458.

⁶⁸ Hume, n 66, p 416.

the whole world to the scratching of my finger”.⁶⁹ A desire “must be accompany’d with some false judgment, in order to its being unreasonable”; and even then “tis not the [desire] which is unreasonable, but the judgment”.⁷⁰

Thus, the fallacy of the logical argument in support of marginal general deterrence is exposed if one looks at the argument, not through the prism of a purely logical construct, but instead through the lens of the actual sentiments that shape human conduct. The reason that people are not discouraged from committing crime by the size of the penalty is obvious: even in rational people there are an array of other more compelling factors that drive behaviour, these include anger, revenge, greed and jealousy, which cannot be negated even by harsh penalties.

The only consideration that can dilute the strength of these factors is an individual’s awareness that to act on them would ensure they remain dissatisfied primarily because they will be apprehended – hence the success of absolute general deterrence, which is now discussed.

Ultimately, whatever the reasons, the empirical evidence supports the contention that marginal general deterrence is an illusory concept – a mirage – which does little, if anything, to influence crime rates and trends.⁷¹

THE SUCCESS OF ABSOLUTE GENERAL DETERRENCE

By contrast, the evidence relating to absolute general deterrence is much more positive. There have been several natural social phenomena which have demonstrated human behavioural responses to a drastic reduction in the likelihood (perceived or real) of punishment for criminal behaviour. The key aspect to these phenomena was that the change occurred abruptly and the decreased likelihood of the imposition of criminal sanctions was the only apparent change in social conditions.

Perhaps the clearest instance of this was the police strike in Melbourne in 1923, which led to over one-third of the entire Victorian police force being sacked.⁷² Once news of the strike spread, mobs of thousands poured into the city centre and engaged in widespread property damage, looting of shops, and other acts of civil unrest including assaulting government officials and torching a tram. The civil unrest lasted for two days, and was only quelled when the government enlisted thousands of citizens, including many ex-servicemen to act as “special” law enforcement officers. This behaviour was in complete contrast to the normally law-abiding conduct of the citizens of Melbourne.

The Canadian Sentencing Commission, after reviewing the available literature, also took the view that absolute deterrence works:

Even if there seems to be little empirical foundation to the deterrent efficacy of legal sanctions, the assertion that the presence of some level of legal sanctions has no deterrent effects whatsoever, has no justification. The weight of the evidence and the exercise of common sense favour the assertion that, taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely.⁷³

The Canadian Sentencing Commission noted that “the old principle that it is more the certainty than the severity of punishment which is likely to produce a deterrent effect has not been invalidated by empirical research”.⁷⁴ The connection between the certainty of punishment and the crime rate has

⁶⁹ Hume, n 66, p 416.

⁷⁰ Hume, n 66, p 416.

⁷¹ Tonry, n 61 at 141.

⁷² The discussion regarding the events of the strike comes from Milte K and Weber TA, *Police in Australia* (1977) pp 287-292.

⁷³ Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) p 136. See more recently, Durlauf SN and Nagin DS, *The Deterrent Effect of Imprisonment* (2010), http://www.economics.uchicago.edu/pdf/durlauf_060710.pdf viewed 8 September 2011.

⁷⁴ Canadian Sentencing Commission, n 73, pp 136-137. In this context certainty means the likelihood of being detected and having a sanction imposed. See also Entorf, n 52.

been reproduced by numerous studies.⁷⁵ This point has not been totally missed by the courts:

The deterrent to an increased volume of serious crimes is not so much heavier sentences as much as the impression on the minds of those who are persisting in a course of crime that *detection is likely* and punishment is certain. The first of these factors is not within the control of the courts, the second is. Consistency and certainty of sentence must be the aim ... Certainty of punishment is more important than increasingly heavy punishment.⁷⁶

The strongest empirical evidence in support of absolute deterrence comes from the United States, which has over the past two decades seen a marked increase in police numbers⁷⁷ and a sharp decrease in crime. The near universal trend of data confirms that an increased police presence equates to an increased actual and perceived likelihood of detection; invariably resulting in a reduction in crime rates.⁷⁸

The connection is complex due to the number of changes that occurred concurrently during this period and which may also have had an effect on the crime rate. The changes include such things as better police methods, a generally improving economy, and other variables previously noted including abortion trends and the greater use of imprisonment. However, it has been noted that the greatest reduction in crime numbers occurs where police are highly visible.

This accords with the ostensible success of “zero tolerance”⁷⁹ policing, particularly in locations such as New York City, where the deployment of the greatest number of extra police resulted in the sharpest decline in crime in the metropolis.⁸⁰ This trend was evident well over a decade ago. In a period of only several years following the introduction of zero tolerance policing, the rates of violent and property crime fell by approximately 35%.⁸¹

After evaluating the large number of surveys analysing the connection between more police and the crime rate, Raymond Paternoster concluded:

What we are left with, then, is that clearly police presence deters crime, but it is probably very difficult to say with any degree of precision how much it deters. Let us take Levitt's estimate as a reasonable guess, that increasing the size of the police force by 10% will reduce crime by about 4% or 5%.⁸²

The causal link between lower crime rates and an increased perception of being caught supports the theory of absolute deterrence. Being detected acts as a retardant to crime because there is an

⁷⁵ For example, see Ross HL, “Law, Science and Accidents: The British Road Safety Act of 1967” (1973) 2 *The Journal of Legal Studies* 1 at 26 where road accident casualty rates were compared from 1961 to 1970 in order to determine the impact of the breathalyser in 1967. A significant drop in the casualty rate was noted after the introduction, thereby leading to the conclusion that this was due to an increased subjective probability of detection and punishment.

⁷⁶ *R v Griffiths* (1977) 137 CLR 293 at 327 (emphasis added).

⁷⁷ Levitt, n 46 at 177, where Levitt estimated the increase at about 14%.

⁷⁸ For a discussion, see Eck J and Maguire ER, “Have Changes in Policing Reduced Violent Crime?: An Assessment of the Evidence”, in Blumstein and Wallman, n 47, p 207.

⁷⁹ Zero tolerance policing is founded on “broken windows” theory which provides that strict enforcement of minor crime and restoring physical damage and decay, such as broken windows and graffiti, would prevent the fostering of an environment which was conducive to more serious offences being committed: see Wilson JQ and Kelling G, “Broken Windows” (1982) 249(3) *The Atlantic Monthly* 29.

⁸⁰ Zimring FE, *The Great American Crime Decline* (2007).

⁸¹ Grabosky P, “Zero Tolerance Policing” (1999) 102 *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice* 1 at 2. Grabosky noted that zero tolerance policing was not solely responsible for the drop in crime. He suggested that there were numerous contributing factors, including sustained economic growth; a reduction in the use of crack cocaine; the ageing of the baby-boomer generation beyond the crime-prone years; restricting the access of teenagers to firearms; and longer sentences for violent criminals. See also Nagin, n 57, pp 30-32; Sampson RJ and Cohen J, “Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension” (1988) 22 *Law & Soc’y Rev* 163; Corman H and Naci Mocan H, “A Time-series Analysis of Crime, Deterrence, and Drug Abuse in New York City” (2000) 90 *Am Econ Rev* 584. See also Marvell TB and Moody CE, “Specification Problems, Police Levels, and Crime Rates” (1996) 34 *Criminology* 609; See Williams KR and Hawkins R, “Perceptual Research on General Deterrence: A Critical Review” (1986) 20(4) *Law & Society Review* 545.

⁸² Paternoster, n 49 at 799. See also Levitt, n 46. But see Eck and Maguire, n 78, p 207, who argue that these conclusions are not valid, principally because of the incomplete nature of the data and cursory analysis involved.

underlying assumption that *if caught then* some hardship awaits. Vice versa, if rather than punishing offenders police handed out lollies or movie tickets, one assumes that more police would result in more crime.

Thus, absolute general deterrence does work, at least to the extent that if there was no real threat of punishment for engaging in unlawful conduct, the crime rate would soar. It follows that the threat of punishment discourages potential offenders from committing crime. This justifies the punishment of wrongdoers. However, the evidence does not support the view that this relationship operates in a linear fashion, that is, the deterrent effect of sanctions does not increase in direct proportion to the severity of sanctions.

While the objective of deterrence justifies imposing punishment, it is at best a remote consideration when it comes down to the question of how much punishment should be imposed. Absolute general deterrence provides a justification for imposing punishment but it does not justify the imposition of penalties that exceed the objective gravity of the offence. The precise duration of penalties must be determined by other sentencing considerations, such as proportionality.

As discussed above, it seems that people are not totally irrational when they contemplate committing crime. The evidence shows that to the extent that potential offenders do make a cost/benefit decision about committing crimes, they generally only weigh up the risk of being caught, not what will happen when they are apprehended. Thus, the best way to reduce crime is to increase the perception in people's minds that they will get caught if they break the law. The size of the penalty does not seem to impact on this decision.

NORMATIVE OBJECTION TO GENERAL DETERRENCE

The strongest theoretical criticism of general deterrence is that it involves inflicting additional pain on the individual in order to advance the interests of the community. This concept of sacrificing or harming the interests of one person to benefit others is a very persuasive criticism of the utilitarian theory of punishment (and morality in general).⁸³ It is regarded as being repugnant to the current moral orthodoxy which is the human rights ethic.⁸⁴ Within this ethic, each individual is regarded as being morally autonomous and complete and it is therefore inappropriate to aggregate interests to defeat the rights of personhood.

This objection to marginal general deterrence was noted by Andrew Ashworth who stated that giving weight to general deterrence involves treating "citizens merely as numbers to be aggregated in an overall social calculation".⁸⁵ At the core of this objection is the Kantian maxim that a person should always be treated as an ends, and never as a means.⁸⁶

The normative objection against marginal general deterrence is strong – but not necessarily insurmountable. Most human rights theorists accept that no right is absolute and can be defeated in order to promote the greater good.⁸⁷ Public rights can sometimes trump private rights. But in order to fall into this category, the offsetting benefit must be clearly established. In the case of marginal general deterrence, this balancing process does not even commence. This is because the evidence does not support the theory that increasing the severity of penalties (the offsetting benefit) leads to a reduction in crime. In other words, if harsher penalties do not equate to fewer crimes, then sacrificing individual rights for this objective is unjustifiable, and morally unconscionable.

⁸³ McCloskey HJ, *Meta-Ethics and Normative Ethics* (1969) pp 180-181; a similar example to McCloskey's is provided in Carritt EF, *Ethical and Political Thinking* (Oxford, 1947) p 65; Williams B, "A Critique of Utilitarianism" in Smart JCC and Williams B (eds), *Utilitarianism: For and Against* (1973) p 99.

⁸⁴ See, for example, Campbell T, *The Legal Theory of Ethical Positivism* (1996) pp 161-88, who discusses the near universal trend towards Bills of Rights and constitutional rights as a focus for political choice. See also Sumner LW, *The Moral Foundation of Rights* (Clarendon Press, Oxford, 1987); Cushman T, *Handbook of Human Rights* (2011).

⁸⁵ Ashworth A, "Deterrence" in von Hirsch A and Ashworth A (eds), *Principled Sentencing* (1999) pp 44, 47.

⁸⁶ For further discussion, see, for example, Honderich T, *Punishment: The Supposed Justifications* (1984) pp 60-62; Morris H, "Persons and Punishment" (1968) 52 *The Monist* 475.

⁸⁷ See Dworkin R, *Taking Rights Seriously* (4th ed, 1978) p 202; Nozick R, *Philosophical Explanations* (1981) p 95.

Accordingly, the normative objection remains sufficiently strong to justify rejecting marginal deterrence as a sentencing aim. Unless its effectiveness can be proven, then marginal deterrence should no longer be pursued by courts, particularly in light of its moral repugnance.

CONCLUDING REMARKS – REFORM PROPOSALS

A number of points emerge from the above discussion. The most important is that courts should no longer increase sentences to pursue the objective of marginal general deterrence. The practice of imposing harsher sentences to discourage other offenders from committing the same or similar offences does not work. The additional pain that is inflicted on offenders to pursue this objective has no positive social effects and is therefore pointless.

As a result there should follow a general reduction of penalty severity to the extent that marginal general deterrence currently drives sentencing outcomes. In relation to crimes such as revenue and drug offences, this would result in a considerable reduction in the tariff for such offences.

These reforms are best achieved by legislative change. This is unlikely to happen as the “law and order” agenda coalesces with a public perception that being “tough on crime” means increasing penalties for criminal offences or instigating mandatory sentencing regimes. Political leadership in this area is unlikely to risk the alienation that challenging, or even confronting, these perceptions would entail. This is especially true as long as arguments in favour of longer sentences appear, rightly or wrongly, more economically attractive than those in favour of more police.

These reforms can yet be achieved by judicial reassessment of the meaning and role of general deterrence in the sentencing process. General deterrence as an objective should be interpreted as confined to absolute general deterrence. This means that sentences that impose a hardship in the form of a deprivation that people would seek to avoid are seen as intrinsically satisfying the deterrent objectives of sentencing. Most sentencing options, such as fines, licence disqualifications and compulsory work orders would satisfy this criteria,⁸⁸ although a possible exception to this may be suspended sentences.⁸⁹ General deterrence could only justify the imposition of a more severe sentence where the sentence that would be imposed amounted to no hardship whatsoever. Thus, there is a need to rethink sanctions in the nature of bonds and the statutory equivalents thereto. Instead of imposing a bond, a fine would normally be a preferable disposition.

The authors do not suggest this reform because imprisonment, and even very long terms of imprisonment, is inappropriate. Rather, it is just that such dispositions will need to be justified by reference to other criteria. There are a number of other sentencing objectives which can be used to justify long jail terms, especially the principle of proportionality and the goal of incapacitation.

Finally, it is important to identify the qualifications or limits to the reforms in this article. The empirical evidence suggesting that marginal general deterrence does not work is weighty. But it is not definitive for the reasons set out earlier in this article – in particular the number of variables that impact on the crime rate. Further, most of the data is derived from the United States. Also, generally speaking, the data is not offence specific. It may be the case that certain forms of crimes are more amenable to deterrence by harsh penalties than others and that United States findings are not transferrable to the Australian setting.

However, the trend of the data against the efficacy of harsh punishment to deter crime is so strong that it should now be assumed that marginal general deterrence is an illusion. This should be the default position given that it is morally wrong to sacrifice the interest of individuals for the common good unless there is a demonstrable overall benefit to be attained. No such demonstrable benefit exists in the case of marginal general deterrence and it should be abandoned.

⁸⁸ For a discussion of the ambit of sentencing options throughout Australia, see Laws of Australia, Thomson Reuters service, *Sentencing*.

⁸⁹ It has been argued that suspended sentences constitute no punishment at all, see Bagaric M, “Suspended Sentences and Preventive Sentence: Illusory Evils and Disproportionate Punishments” [1999] UNSW Law JI 6.

The capacity of criminal sanctions to shape the behaviour of offenders: Specific deterrence doesn't work, rehabilitation might and the implications for sentencing

Mirko Bagaric and Theo Alexander*

There is a considerable gap between the law and knowledge regarding the efficacy of state-imposed sanctions to achieve several key sentencing objectives. Two sentencing objectives which often carry considerable weight in the sentencing calculus are rehabilitation and specific deterrence, despite the fact that neither has been proven to be attainable. This article examines the empirical data on whether specific deterrence and rehabilitation are attainable, and consequently whether they should be retained or abolished as sentencing objectives.

INTRODUCTION

The questions addressed in this article

Sentencing is a purposeful endeavour. It has a number of objectives. The key ones include denunciation, retribution, specific deterrence, general deterrence, community protection and rehabilitation.¹ While these objectives may in theory be desirable, it is not clear whether they are pragmatically achievable.

Legislatures and courts *assume* that sanctions can achieve such goals, despite the fact that there is little, if any, proof (or inquiry) into the efficacy of punishment to achieve them. This is somewhat ironic given the forensic, evidence-driven, criminal trial process which is a precursor to many sentencing hearings.

Sentencing is the area of law where there is arguably the greatest gap between theory and evidence. This article goes some way towards bridging the gap between assumption and knowledge in relation to two of the key sentencing objectives. It provides an analysis of the current empirical evidence regarding whether criminal sanctions are capable of (a) rehabilitating offenders; and (b) specifically discouraging offenders from future offending.

In short, the article seeks to provide answers to the questions: "Does rehabilitation work?" and "Does specific deterrence work?" If the answer is no, logically and normatively courts and legislatures should reform this area of the law. Previously, the authors undertook a similar analysis regarding general deterrence.²

The meaning of specific deterrence and rehabilitation

Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions, thereby convincing them that crime does not pay. In effect, it attempts to dissuade offenders from re-offending by inflicting an unpleasant experience on them (normally imprisonment) which they will seek to avoid in the future.

Rehabilitation, like specific deterrence, aims to discourage the commission of future offences by the offender. The main difference between the two lies in the means used to encourage desistance from

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¹ For a discussion of key sentencing principles, see Mackenzie G and Stobbs N, *Principles of Sentencing* (2010); Bagaric M and Edney R, *Australian Sentencing* (2011) at [1-3910]-[1-42001].

² Bagaric M and Alexander T, "(Marginal) General Deterrence Doesn't Work – and what it Means for Sentencing" (2010) 35 Crim LJ 269.

crime. While specific deterrence focuses on frightening an offender into not re-offending, rehabilitation seeks to alter the values of the offender so that he or she no longer desires to commit criminal acts: it involves the renunciation of wrong doing by the offender and the re-establishment of the offender as an honourable, law-abiding citizen.³ It is achieved by “reducing or eliminating the factors which contributed to the conduct for which [the offender] is sentenced”.⁴ Thus, it works through a process of positive internal attitudinal reform.⁵

Rehabilitation and specific deterrence both aim to alter the behaviour of offenders

Rehabilitation and specific deterrence generally operate to influence the sentencing discretion in different ways. Specific deterrence, where it is relevant, aggravates the penalty, whereas rehabilitation normally mitigates the penalty. Both are analysed in the same article because they have the commonality that they seek to evoke attitudinal change in the offender, albeit by different means. In relation to both goals, the court attempts to directly change the sentiments and behaviour of the particular offender (to make him or her more law-abiding), as opposed to striving to achieve wider goals such as denunciation and general deterrence which only incidentally relate to the offender.

It is difficult to establish conclusively the efficacy of punishment to attain the goals of rehabilitation or specific deterrence. This is because of the many variables that influence human decision-making, and the difficulty of establishing controlled experimental groups in the real environment that is the criminal justice system. Given that rehabilitative programs are often undertaken in the prison setting, there is also the real possibility that specific deterrence and rehabilitation may occur simultaneously, or that they may, in fact, counteract each other. Yet, as discussed below, it is possible to develop a clear picture of where the evidence currently stands and, in fact, this is necessary to properly direct future inquiry.

It is clear that criminal inclination can change – but can sentencing impact on this?

At the outset it is important to recognise that there is no question that people can change their attitudes and behaviour to become law-abiding. Few people commit offences for the duration of their lives. Thus, the process of self-reform is not only possible, but typical. The reasons that people stop committing crime are many and varied, but there are some well-established links between the human traits and crime, and logically it would seem that the most effective way to reduce recidivism is to attempt to dissociate the individual from the criminogenic influences.

However, this rarely presents itself as a viable option. Many factors that increase the risk of a person committing an offence are intrinsic and relate to immutable personal characteristics. As discussed further below, the main factors that fall into this category, in the Australian context, are being male, young and Indigenous.

Then there are social or situational considerations that increase the risk a person will offend. Most of them are entrenched and difficult to surmount, and include lower socio-economic status and unemployment.⁶ Poor people are grossly over-represented in jails across the world.⁷ As people become more affluent, they commit less crime – apparently because they then have more to lose by being imprisoned. There are numerous other well-documented causes of crime. Empirical studies also

³ For example, see *Vartzokas v Zanker* (1989) 51 SASR 277 at 279; 44 A Crim R 243.

⁴ *Channon v The Queen* (1978) 33 FLR 433 at 438.

⁵ See further, Ten CL, *Crime, Guilt and Punishment* (1987) pp 7-8.

⁶ Weatherburn D, “What Causes Crime?” (2001) 54 *Crime and Justice Bulletin* 1 at 6.

⁷ For example, see Box S, *Recession, Crime and Punishment* (1987) p 96, who, after reviewing 16 major studies between income inequality and crime, concluded that income inequality is strongly related to crime; see also Carlen P, “Crime, Inequality and Sentencing” in Duff RA and Garland D (eds), *A Reader on Punishment* (1994) p 309. Prison numbers illustrate this quite graphically. In Australia, the rate of Indigenous imprisonment is 14 times higher than that of the general population: see ABS, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4512.0Dec%202006> viewed 22 May 2012.

show that there is a link between legal compliance and the content of law. Normative issues are closely linked to compliance with the law. People obey the law not only because it is in their self-interest to do so, but also because they believe it is morally proper to do so.⁸ As will be seen later in this article, it is on these attitudinal dimensions which many rehabilitative programs are focused.

Thus, there is no doubt that an individual's inclination to commit crime can be changed and reduced, and in fact most people voluntarily desist from crime at some point – although the general trend is that “those who start early in crime tend to finish late”.⁹ This article focuses on whether external measures *taken by the criminal justice system* can positively impact on the process.

Overview of conclusions reached

The authors conclude that there is no evidence that inflicting harsh sanctions on people makes them less likely to re-offend in the future. The evidence is, in fact, to the contrary. The level of certainty of this conclusion is very high – so high, that specific deterrence should be abolished as a sentencing consideration.

The evidence about rehabilitation is less conclusive, but on balance it seems that specific forms of interventions may be able to reduce recidivism. Importantly, it seems that offenders can even be rehabilitated in a custodial setting. This could potentially have an unexpected impact on the sentencing calculus. The pursuit of rehabilitation normally leads to less severe sanctions; however, if offenders could be effectively reformed while in prison, it could diminish the mitigatory role of rehabilitation. However, the current state of knowledge about the capacity to reform offenders is so rudimentary that it does not strongly support any change in the law or policy changes. All that can be said with confidence, at this stage, is that there is a pressing need for more empirical research relating to rehabilitation.

The role of specific deterrence and rehabilitation in current sentencing practice is considered in the next part of this article. Then the empirical evidence is examined regarding the efficacy of punishment to specifically deter offenders followed by the same inquiry made in relation to rehabilitation. Finally, the authors set out the implications of the findings in this article for law reform and further research.

THE ROLE OF SPECIFIC DETERRENCE AND REHABILITATION IN CURRENT SENTENCING LAW AND PRACTICE

Rehabilitation is expressly set out as a sentencing consideration in the sentencing statutes of all Australian jurisdictions¹⁰ and is an important objective recognised in common law.¹¹ Rehabilitation is normally given most weight in relation to young offenders and those with a little or criminal record.¹² It also has a strong role where the offender has voluntarily disclosed the crime;¹³ where the offender has favourably responded to previous court orders¹⁴ and where there is a considerable delay between the offence and sentencing during which the offender has not re-offended.¹⁵

⁸ See Tyler T, *Why People Obey the Law* (1990) pp 107, 175-176.

⁹ Weatherburn, n 6 at 3.

¹⁰ *Crimes (Sentencing) Act 2005* (ACT), s 7(1)(d); *Crimes Act 1914* (Cth), s 16A(2)(n); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 11; *Sentencing Act 1995* (NT), s 5(1)(b); *Sentencing Act 1991* (Vic), s 5(1)(c); *Penalties and Sentences Act 1992* (Qld), s 9(1)(b); *Criminal Law (Sentencing) Act 1988* (SA), s 10(m); *Sentencing Act 1997* (Tas), s 3(e)(ii); *Sentencing Act 1995* (WA), s 6(4)(b).

¹¹ *Yardley v Betts* (1979) 22 SASR 108 at 112 (King CJ); 1 A Crim R 329.

¹² *R v GDP* (1991) 53 A Crim R 112; *R v E (a child)* (1993) 66 A Crim R 14 at 28; *R v KT* (2008) 182 A Crim R 571; *R v MD* (2005) 156 A Crim R 372; *R v PP* (2003) 142 A Crim R 369.

¹³ *FJL v Western Australia* [2010] WASCA 8; *Skipworth v Western Australia* [2008] WASCA 64 at [13] (McLure J); *Cameron v The Queen* (2002) 209 CLR 339 at [65].

¹⁴ *R v Skilbeck* [2010] SASFC 35.

¹⁵ *R v Todd* [1982] 2 NSWLR 517 – but this is given less weight where the cause of the delay is attributable to the offender; *Scook v The Queen* (2008) 185 A Crim R 164; *Gok v The Queen* [2010] WASCA 185.

Offenders with a poor criminal history are not necessarily excluded from consideration of their prospects for rehabilitation, particularly where there is some evidence that the offender has taken steps to integrate him or herself into the community.¹⁶ In respect of very grave offences, rehabilitation is sometimes regarded as irrelevant – swamped by other considerations, in the form of community protection and general and specific deterrence.¹⁷

Basten J in *Elyard v The Queen* noted that in evaluating an offender's prospects of rehabilitation, the court will normally look to several sources, including:

- (a) evidence of the past conduct and behaviour of the offender
- (b) professional opinions, taking into account past conduct and behaviour and expressing views as to future prospects, and
- (c) at least in some cases, the opinions and expressions of intention of the offender himself or herself.¹⁸

There are a number of common indicators suggestive of good prospects for rehabilitation, including obtaining employment, completion of a drug rehabilitation program, attendance at a residential rehabilitation program,¹⁹ apology to the victim of the offence, compliance with onerous bail conditions,²⁰ rendering of compensation, evidence of abstinence from drug or alcohol use, remorse and support of family members.

Rehabilitation operates normally to reduce the severity of the sanction. Although there are many rehabilitative programs offered in prison, rehabilitation generally is advanced by defence lawyers as a basis for avoiding a custodial term, or at least reducing the length of the term that would otherwise have been imposed. This follows from the fact that a custodial sentence is not considered as rehabilitative.²¹

Specific deterrence is a central common law sentencing objective and is given express statutory recognition in all Australian jurisdictions.²² Specific deterrence applies most acutely in relation to serious offences²³ and to offenders with significant prior convictions,²⁴ since it is assumed previous sanctions have failed to stop their offending behaviour. Conversely, it has little application where an offender has voluntarily desisted from further offending²⁵ or where the offender was suffering from impaired intellectual or mental functioning at the time of the offence.²⁶

Where specific deterrence is applicable to the sentencing of an offender, it operates to increase the severity of the sanction. It is not feasible to ascertain the exact weight that is accorded to specific deterrence given the instinctive synthesis approach to sentencing (where only two considerations – pleading guilty and co-operating with authorities – are accorded specific weighting);²⁷ however,

¹⁶ *Vartzokas v Zanker* (1989) 51 SASR 277 at 279 (King CJ); 44 A Crim R 243.

¹⁷ *R v Hakeem* [2007] VSC 5; *R v Carroll* (2008) 188 A Crim R 253; *Gonzales v The Queen* (2007) 178 A Crim R 232.

¹⁸ *Elyard v The Queen* [2006] NSWCCA 43 at [19] (Basten JA).

¹⁹ *Miller v Burgoyne* (2004) 150 A Crim R 7.

²⁰ *Pappin v The Queen* [2005] NTCCA 2 at [16]-[18] (Martin CJ).

²¹ For example, see *R v Houston* (1982) 8 A Crim R 392 at 399; *Muldock v The Queen* (2001) 244 CLR 120 at [56]-[58].

²² *Crimes Act 1914* (Cth), ss 16A(2)(i); *Crimes (Sentencing) Act 2005* (ACT), s 7(1)(b); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A(b); *Sentencing Act* (NT), s 5(1)(c); *Penalties and Sentences Act 1992* (Qld), s 9(1)(c); *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(j); *Sentencing Act 1997* (Tas), s 3(e)(i); *Sentencing Act 1991* (Vic), s 5(1)(b).

²³ See, for example, *DPP v Zullo* [2004] VSCA 153; *DPP v Lawrence* (2004) 10 VR 125.

²⁴ See, for example, *Saunders v The Queen* [2010] VSCA 93.

²⁵ *R v Pickett* [2010] NSWCCA 273.

²⁶ *R v Verdins* (2007) 16 VR 269; 169 A Crim R 581; *Melham v The Queen* [2011] NSWCCA 121; *R v HBA* [2010] QCA 306 at [31]; *R v Goodger* [2009] QCA 377 at [21]; *Startup v Tasmania* [2010] TASCCA 5.

²⁷ See *Makarjian v The Queen* (2005) 228 CLR 357; *Hili v The Queen* (2010) 242 CLR 520; 204 A Crim R 434.

logically, it can operate to extend the length of a prison term or convert what would have otherwise been a non-custodial term into a term of imprisonment.²⁸

INEFFECTIVENESS OF SPECIAL DETERRENCE

As noted in the introduction to this article, it is difficult to obtain information regarding the effectiveness of sanctions in deterring offenders from committing offences at the expiry of a sanction. Offenders may not re-offend for numerous reasons, apart from the fear of being subject to more punishment.

In some cases the offending is aberrant conduct which would not have been repeated; a suitable opportunity may not again present itself (this obviously relates most acutely to opportunistic offences); rehabilitation may have occurred;²⁹ or the socio-economic status of the offender may improve for the better. Further, offenders are obviously always ageing, and, as discussed below, empirical evidence strongly supports the view that criminal behaviour is mainly a young man's endeavour.

However, the overwhelming weight of evidence available supports the view that severe punishment (namely imprisonment) does not deter offenders: the recidivism rate of offenders does not vary significantly regardless of the form of punishment to which they are subjected.

One of the rare studies which has been used to suggest that prison can deter offenders is a six-year follow-up study of a large sample of offenders sentenced in Wales and England in January 1972.³⁰ The study revealed that reconviction rates for imprisonment were lower than for suspended sentences. Nigel Walker suggested that this supports the capacity of imprisonment to specifically deter offenders. This hypothesis, though, is far from strong. As Walker noted:

Strictly speaking, all that this tells us is that the suspended sentence is less effective than an actual prison sentence. It is theoretically possible that the absolute efficacy of an actual prison sentence is nil (or even a minus quality) and that the absolute efficacy of a suspended sentence is even less: that is, that it *increases* the likelihood of reconviction.³¹

While Walker ultimately thinks that this explanation is unlikely, it is unsound to rely on comparisons involving the use of suspended sentences. The sting in the suspended sentence supposedly lies in the risk that the offender may be sent to jail if he or she transgresses during the term of the sentence. However, it is questionable whether such a risk is capable of comprising a punitive measure. Every person in the community faces the risk of imprisonment if he or she commits an offence punishable by imprisonment.³²

In this way the natural and pervasive operation of the criminal law casts a permanent Sword of Damocles over all our heads: each action we perform is potentially subject to the criminal law. Despite this, it is not tenable to suggest that we are all undergoing some type of criminal punishment. Accordingly, the suspended sentence is arguably not, in fact, a sanction in the proper sense. Walker further noted that the results of the same survey indicated that re-conviction rates for offenders dealt with by way of fine were about the same as that expected for the whole sample; "neither markedly better nor markedly worse than those for imprisonment".³³ Thus, when a hard form of treatment (imprisonment) is compared with the fine, which is a much softer sanction, there is no variation in the

²⁸ *Field v The Queen* [2011] NSWCCA 70; *Saunders v The Queen* [2010] VSCA 93.

²⁹ See Nagel D, "General Deterrence: A Review of the Empirical Evidence" in Blumstein A, Cohen J and Nagin J (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, Report by the Panel on Deterrent and Incapacitative Effects (Washington, 1978) p 95, where he alludes to the difficulty in distinguishing between rehabilitation and specific deterrence.

³⁰ See Walker N, *Why Punish?* (1991) p 44.

³¹ Walker, n 30, p 44.

³² Which are the only type of offences for which a suspended sentence can generally be restored.

³³ Walker, n 30, p 45.

re-conviction rate. However, if specific deterrence did work, one would expect the pain of imprisonment to be a more powerful regulator of future behaviour than a fine.³⁴

ABS study on reimprisonment casts doubt on specific deterrence

The crudest way to measure the effectiveness of specific deterrence is to measure the trajectories of offenders once they are released from prison, so far as their subsequent criminal offending is concerned. A comprehensive study into this was undertaken by the Australian Bureau of Statistics (ABS) in 2010.³⁵

The report is significant for a number of reasons. It is an Australian study; it was conducted over an extensive period; the sample size is very large; and it was conducted by an independent body. The report is based on a 14-year longitudinal study for the period 1 July 1994 to 30 June 2007. The study grouped prisoners into two cohorts. The first consisted of those released between 1 July 1994 and 30 June 1997. This consisted of 28,584 people. The second comprised prisoners released between 1 July 2001 and 30 June 2004. It consisted of 26,700 people.

The study compared recidivism rates from both cohorts within three years of release. It also examined the 10-year reimprisonment rate for the earlier cohort.

More generally, the report looked at the general profile of prisoners. In relation to the total prison numbers, 92% were male and 18% were Indigenous. The median age of prisoners for their first stint of imprisonment was 28 years old.³⁶

In terms of the general imprisonment rate during the study period, it was noted that from 1994 to 2007 the prison population grew on average at the rate of 3.7% annually and the number of prisoners with prior imprisonment grew at a rate of 3.2% each year, although this was not steady – with the rate ranging from 56% to 62%.³⁷ Thus, more than half of all the people sentenced to imprisonment during the survey period had previously served a term of imprisonment.

The data on the portion of released prisoners who return to imprisonment within the respective three-year periods are even more illuminating. The report noted that for the 1994 to 1997 cohort, about 20% were reimprisoned within two years; one-quarter was reimprisoned within three years, and 40% by the end of the 10-year survey period.³⁸

A surprising finding, given that rehabilitative measures had presumably improved in the decade to 2004-2007, was that prisoners released in the later cohort were more likely to be reimprisoned than the earlier cohort over an equivalent three-year follow up period.³⁹ The reimprisonment rate for the latter cohort was 17% higher than for the earlier one – the rate for 1994 to 1997 was 25.1% compared to 29.5% for the 2004 to 2007 cohort.⁴⁰

These findings are significant because in raw terms they provide firm evidence that imprisonment does not strongly diminish the likelihood of re-offending. Forty per cent of individuals who are sentenced to imprisonment are not sufficiently discouraged by the experience to ensure that they are not again imprisoned. The figure of 40% is conservative because the study only recorded reimprisonment rates; it did not record recidivism per se. Thus, released offenders who committed

³⁴ There is some evidence to show that offenders who are dealt with lightly are unlikely to re-offend. A study of shoplifters showed that those who were dealt with by simply being apprehended and interrogated by store police, and then set free, rarely re-offended: see Andenaes J, "Does Punishment Deter Crime?" in Ezorsky G (ed), *Philosophical Perspectives of Punishment* (1978) p 342.

³⁵ ABS, *An Analysis of Repeat Imprisonment Trends in Australia Using Prisoner Census Data from 1994 to 2007* (2010), [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/\\$File/1351055031_aug%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf) viewed 22 May 2012 (ABS Report).

³⁶ ABS Report, n 35, p 15.

³⁷ ABS Report, n 35, p 12.

³⁸ ABS Report, n 35, p 16.

³⁹ The implications of this are further discussed later in the article.

⁴⁰ ABS Report, n 35, p 25.

crimes for which they were not imprisoned were not recorded. Of course, this information alone does not present a knock-down argument against specific deterrence – it is possible that the rate of offending that resulted in imprisonment would have been higher had the cohorts not had a first stint of imprisonment.

However, drilling into the data raises further concern about the efficacy of specific deterrence. The report identified several statistically relevant key factors that affected reimprisonment. The most important were:

- *Age*: Prisoners aged 17-19 years old were 2.6 times more likely than the general cohort to be reimprisoned; whereas those aged 35 and above were less than 0.5 times likely to be reimprisoned;⁴¹
- *Indigenous background*: Prisoners with this profile were twice as likely to be reimprisoned within 10 years;
- *Offence type*: Prisoners who were released after being sentenced for burglary or theft had the highest rate of reimprisonment, whereas those serving time for drug or sex offences had the lowest reimprisonment rates;
- *Prior imprisonment*: An offender who has been in jail previously was nearly three times more likely to be imprisoned within 10 years than a first-time prisoner; and
- *Length of imprisonment*: The reimprisonment rate for prisoners over a 10-year period who served 0 to six months was 0.8, but increased to 1.2 times for those who served more than 18 months.⁴²

The last consideration is illuminating. If imprisonment did actually deter future offending, it is to be expected that a longer period of imprisonment would be more effective at achieving this objective. The fact that the opposite occurs casts considerable doubt on the plausibility of specific deterrence.

This is reinforced by studies that compare re-offending rates of prisoners with similar profiles and backgrounds, with adjustments made for factors which are known to influence re-offending. A limitation of this type of analysis is that it is most often undertaken overseas, and in particular in the United States. However, a relatively recent analysis was undertaken in Australia.

Australian study involving matched pairs of offenders

Don Weatherburn, in a study for the New South Wales Bureau of Crime Statistics and Research, which was also released in August 2010, titled *The Effect of Prison on Adult Re-offending*,⁴³ compared re-offending rates for people convicted of burglary and non-aggravated assault. The study compared 96 “matched pairs” of burglars and 406 matched pairs of offenders convicted of non-aggravated assault. Offenders were matched by reference to offence type, previous convictions, prior prison terms, number of concurrent offences and bail status at final hearing. A regression process was undertaken to control factors such as gender, race, age, plea and legal representation. One member of each pair received a non-custodial term for the relevant offence, the other was sentenced to prison.

The study looked at offenders who were convicted in the years 2003 and 2004 and each matched pair was followed up for five years or until he or she was convicted of another offence (whichever came first).⁴⁴

The study noted that “prison exerts no significant effect on the risk of recidivism for burglary ... [and] ... the effect of prison on those who were convicted of non-aggravated assault seems to have been to increase the risk of further offending”.⁴⁵ The report concluded that:

⁴¹ ABS Report, n 35, p 21. Studies in the United States have shown that the peak age for violent offences is 18 and the peak age for property offences is 16 and the rate of offending then typically declines at the age of 30. See Farrington D, “Age and Crime” in Tonry M and Morris N (eds), *Crime and Justice: An Annual Review of Research*, Vol 7 (1986) p 189; Nagin D, Farrington D and Moffitt T, “Life Course Trajectories of Different Types of Offenders” (1995) 33 *Criminology* 111.

⁴² See ABS Report, n 35, pp 23, 30.

⁴³ Weatherburn D, *The Effect of Prison on Adult Re-offending* (2010), [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb143.pdf/\\$file/cjb143.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb143.pdf/$file/cjb143.pdf) viewed 22 May 2012.

⁴⁴ ABS Report, n 35, p 5.

⁴⁵ ABS Report, n 35, p 10.

There is no evidence that prison deters offenders convicted of burglary or non-aggravated assault. There is some evidence that prison increases the risk of offending amongst offenders convicted of non-aggravated assault but further research with larger samples is needed to confirm the results.⁴⁶

This conclusion is limited by the fact that it relates to only two offence categories, but is made more compelling by the fact that it is consistent with the overwhelming trend of international research and literature reviews in this area.⁴⁷

Wide-ranging international studies also suggest specific deterrence is a fallacy

One of the most wide-ranging studies that has been conducted regarding the effectiveness of special deterrence was a literature review by Gendreau et al⁴⁸ published in 1999 involving a review of 50 different studies, which related to a sample of 336,052 offenders – dating back to 1958 – which provided 325 comparisons. The study compared the recidivism rate of people who were sentenced to imprisonment as opposed to community service and those who were sentenced to longer and shorter terms of imprisonment.

The review established that recidivism rates for offenders who were sent to jail were similar to those who received a community sanction. Longer terms of imprisonment also did not reduce re-offending and, in fact, resulted in a 3% increase in recidivism. The authors concluded:

The data in this study represents the only quantitative assessment of the relationship between time spent in prison and offender recidivism. The database consisted of 325 comparisons involving 336,052 offenders. On the basis of the results, we can put forth one conclusion with a good deal of confidence. None of the analysis conducted produced any evidence that prison sentences reduce recidivism. Indeed, combining the data from the more vs. less and incarceration vs. community groupings resulted in 4% and 2% increases in recidivism.⁴⁹

This is confirmed by more recent empirical analysis. Nagin et al provided the most recent extensive literature review regarding specific deterrence.⁵⁰ They reviewed separately the impact of custodial sanctions versus non-custodial sanctions and the effect of the length of sentence on re-offending. The review examined six experimental studies where custodial versus non-custodial sentences were randomly assigned; 11 studies which involved matched pairs; 31 studies which were regression based; and seven other studies which did not neatly fit into any of those three categories, and included naturally occurring social experiments which allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.⁵¹

The last category included a study based on clemency granted to over 20,000 prisoners in Italy in 2006. A condition of release was that if those who were released re-offended within five years they would be required to serve the remaining (residual) sentence plus the sentence for the new offence. It was noted that there was a 1.24% reduction in re-offending for each month of the residual sentence. This observation can be explained on the basis that the threat of future imprisonment discouraged imprisonment. However, it was also noted that offenders who had served longer sentences prior to

⁴⁶ ABS Report, n 35, p 1.

⁴⁷ In the Australian context, the same conclusions have been reached in relation to juvenile offenders in the following reports: Kraus J, "A Comparison of Corrective Effects of Probation and Detention on Male Juvenile Offenders" (1974) 49 *British Journal of Criminology* 49; Weatherburn D et al, "The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending" (2009) (2009) 33 *Australian Institute of Criminology Reports: Technical and Background Paper* 10.

⁴⁸ Gendreau P, Goggin C and Cullen F, *The Effects of Prison Sentences on Recidivism*, Department of the Solicitor General Canada (1999), <http://www.prisonpolicy.org/scans/e199912.htm> viewed 22 May 2012.

⁴⁹ Gendreau et al, n 48.

⁵⁰ Nagin DS, Cullen FT, and Johnson CL, "Imprisonment and Reoffending" (2009) 38 *Crime & Justice* 115 at 145. The main studies are summarised in Weatherburn, n 43 and in Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (2011).

⁵¹ Nagin et al, n 50, pp 144-155.

being released had higher rates of re-offending, supporting the view that longer prison terms reduce the capacity for future imprisonment to shape behaviour.⁵²

Nagin et al concluded that offenders who are sentenced to imprisonment do not have a lower rate of recidivism than those who are not and, in fact, some studies show that the rate of recidivism is higher:

Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.⁵³

The review suggests that not only do longer jail terms not deter, but neither do tougher jail conditions. Studies also show that offenders who are sentenced to maximum security prisons as opposed to minimum security conditions do not re-offend less.

These general findings are supported by a more recent experimental study by Green and Winik⁵⁴ who observed the re-offending of 1003 offenders who were initially sentenced for drug-related offences between June 2002 and May 2003, by a number of different judges whose sentencing approaches varied significantly (some were described as “punitive”, others as “lenient”), resulting in differing terms of imprisonment and probation. The study concluded that the length of imprisonment or probation had no effect on the rate of re-offending during the four-year follow-up period.

Speculation regarding the reasons for the failure of specific deterrence

Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment is unlikely to increase the prospect that they will become law-abiding citizens in the future. This conclusion is so well established that in some circles the debate has moved on from whether specific deterrence works, to identifying the reasons that it does not and why it probably increases recidivism rates. Nagin et al suggested a number of reasons including that prison culture normalises and fosters criminal orientations; prison stigmatises people and reduces their opportunities to integrate into the normal community through employment and other activities; and prison fails to address the reasons for the offending.⁵⁵

However, the search for the reasons for the failure of specific deterrence is arguably misplaced. It assumes that there ought to be a link between the experience of imprisonment and crime reduction. There is no necessary basis for this assumption. Imprisonment is the most severe sanction in our system of justice. It is unpleasant. It necessarily involves a deprivation of liberty and a consequential inability to engage in and pursue many of the activities that are central to living a prosperous life, such as family relationships, career opportunities, shaping one’s environment and so on. These deprivations are obvious to all members of the community. It is not clear that the experience of these denials should be more determinative than the threat of them. In any event, from the perspective of law reform, the important inquiry is whether specific deterrence works, not the reasons for this – and on this matter, the issue is resolved.

REHABILITATION: NO CLEAR EVIDENCE WHETHER IT WORKS

Overview of historical context and conflicting evidence

The effectiveness of rehabilitation as a way of reducing repeat offending has been the subject of a large number of studies. The most damaging objection to rehabilitation as a suitable goal of sentencing has been that it does not work. Following extensive research conducted between 1960 and 1974, Robert Martinson concluded in an influential paper that empirical studies had not established that any

⁵² Nagin et al, n 50, pp 155.

⁵³ Nagin et al, n 50, p 145.

⁵⁴ Green D and Winik D, “Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders” (2010) 48 *Criminology* 357.

⁵⁵ Nagin et al, n 50, pp 126, 128. See also Jacobs B, “Deterrence and Deterrability” (2010) 48 *Criminology* 417.

rehabilitative programs had worked in reducing recidivism.⁵⁶ Several years after this work, the Panel of the National Research Council in the United States also noted that there were no significant differences between the subsequent recidivism rates of offenders regardless of the form of punishment. “This suggests that neither rehabilitative nor criminogenic effects [that is, the possible corrupting effects of punishment] operate very strongly.”⁵⁷

However, several years later, Martinson softened his position, stating that some types of rehabilitation programs, particularly probation parole, may be effective and that generally “no treatment ... is inherently either substantially helpful or harmful. The critical factor seems to be the *conditions* under which the program is delivered”.⁵⁸ And indeed there is now mounting evidence that rehabilitation works for some in some circumstances. Stephen Brody made the following cautionary observations slightly more than a decade ago:

Research so far has on the whole confirmed what one would expect: that individual success may sometimes be claimed by routine psychotherapy or counselling with intelligent, articulate, neurotic offenders; by guidance in personal, social, and domestic matters among those hampered by incompetence in these spheres; by sympathy and encouragement for those unsure of their limits and capabilities; and by direct assistance and support for those weighed down by practical difficulties. But none of these approaches is appropriate for other than a minority of the offender population, whose misdemeanours reflect some real psychological maladjustment and not just their social “deviance”.⁵⁹

That there is some level of success with rehabilitative techniques in relation to the least dysfunctional offenders does not strongly support the rehabilitative ideal. It is equally consistent with the proposition that crime is an aberrant act for people with this profile.

However, further support for the rehabilitative ideal started occurring approximately 20 years ago. Following a wide-ranging review of the published studies in rehabilitation (which compared the recidivism rate of offenders who were subject to rehabilitative treatment to those who were not), Howells and Day in 1999 suggested that certain programs appeared to reduce recidivism. In particular, success had been observed in relation to cognitive-behavioural programs. These programs target factors that are (presumably) changeable and are directed at the criminogenic needs of offenders, that is, factors which are directly related to the offending, such as anti-social attitudes, self-control, and problem-solving skills.⁶⁰ Promising programs have been developed in the areas of anger management, sexual offending and drug and alcohol use. These appear to be more successful than programs based on, for example, confrontation or direct deterrence, physical challenge, or vocational training.⁶¹

Some more recent studies have tended to debunk the view the rehabilitative techniques are finally starting to make positive inroads. The most commonly used rehabilitation program in the United Kingdom is known as the Reasoning and Rehabilitation (R&R) Program. It is grounded in the theory that many people commit crime because of deficits in their “social intelligence”. To remedy this, the program uses cognitive-behavioural and educational methods to tackle the deficiency. Initially, there were a number of surveys that showed positive outcomes associated with this technique.

However, the optimism regarding the effectiveness of R&R programs has been questioned. In 1995, Wilkinson noted:

⁵⁶ Martinson RM, “What Works? Questions and Answers about Prison Reform” (1974) 35 *Public Interest* 22 at 25.

⁵⁷ Blumstein et al, n 29, p 66.

⁵⁸ Martinson R, “New Findings. New Views: A Note of Caution Regarding Sentencing Reforms” (1979) 7 *Hofstra Law Review* 243 at 254.

⁵⁹ Brody S, “How Effective are Penal Treatments?” in von Hirsch A and Ashworth A (eds), *Principled Sentencing* (1999) pp 9, 11.

⁶⁰ Howells K and Day A, “The Rehabilitation of Offenders: International Perspectives Applied to Australian Correctional Systems” (1999) 112 *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice* 1.

⁶¹ Howells and Day, n 60 at 3. See also Lipsey M and Cullen F, “The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews” (2007) 3 *Annual Review of Law and Social Science* 297; Wexler D, “Therapeutic Jurisprudence and Readiness for Rehabilitation” (2006) *Florida Coastal Law Review* 111; King M, “Therapeutic Jurisprudence Initiatives in Australia and New Zealand and Overseas” (2011) 21 *JJA* 19.

How effective the programme is seen as being in reducing offending depends on the outcome measure chosen and on how comparisons are made. Considering that 67% of the R&R group were reconvicted within two years compared to 56% of offenders sentenced to custody from time of sentence, it would seem R&R did not reduce offending. Alternatively, the fact that 5% fewer of the R&R group were reconvicted than predicted on the basis of age and previous convictions, compared to 14% more of the custody group after release, could be taken as indicating success.⁶²

It concluded that the evidence did not support the hypothesis that the programs reduce recidivism by promoting pro-social attitudes.

Enhanced commitment to rehabilitation in Australia

Australian jurisdictions have been devoting increased resources into rehabilitation over the past decade. The rehabilitative methods employed in Australian are set out in a detailed study of the programs in a paper written by Heseltine et al for the Australian Institute of Criminology and published in 2011.⁶³ The paper focused only on rehabilitation programs in the custodial environment, particularly changes and improvements to prison-based correction rehabilitation programs since 2004 – when the previous report was issued.

In relation to the overall national picture, the report noted:

Each jurisdiction, without exception, has attempted to respond to the challenges that were identified in the 2004 program review. In particular, recent years have seen the development of a number of more intensive programs ... Furthermore, each jurisdiction has demonstrated an ongoing commitment to the delivery of custodial offender treatment programs in ways that are congruent with current conceptions of “good practice”. There is an increased confidence in being able to move from theory through to policy and practice, especially in relation to the development of programs for sex and violent offenders. In conclusion, the overall quality of Australian offender rehabilitation programs appears to be improving, although ongoing evaluations have yet to establish the effectiveness of these programs on criminal justice outcomes.⁶⁴

A variety of the programs are delivered in Australian prisons. The precise programs are catalogued in the above report.⁶⁵ The main programs are:

- *Cognitive skills programs*, which use cognitive behavioural methods to improve decision-making and problem-solving skills, teach moral thinking and self-regulation, and equip offenders to understand the antecedents of offending and develop plans to prevent relapse;
- *Drug and alcohol programs*, which explain the effects of drugs and alcohol, the link between substance abuse and offending, teaching techniques to cease using drugs and alcohol, and restructure cognition related to substance use and work on techniques to improve interpersonal skills;
- *Anger management programs*, which use cognitive behavioural and interpersonal methods in an attempt to improve insight into angry responses, reduce stress, restructure anger cognition and develop problem-solving and interpersonal skills and a plan to prevent relapse;
- *Sex offender programs*, which use behavioural and cognitive methods to assist offenders better understand the effects on the victims, develop relationship skills and alter deviant arousal responses and develop a plan to prevent relapse;
- *Violent offender programs*, which, like sex offender programs, also principally employ behaviour and cognitive behavioural strategies to prevent re-offending;

⁶² Wilkinson J, “Evaluating Evidence for the Effectiveness of the Reasoning and Rehabilitation Programme” (2005) 44 *The Howard Journal of Criminal Justice* 70 at 81.

⁶³ Heseltine K, Day A and Sarre R, *Prison-based Offender Rehabilitation Programs: The 2009 National Picture in Australia* (2011), <http://www.aic.gov.au/documents/5/6/4/%7B564B2ECA-4433-4E9B-B4BA-29BD59071E81%7Drpp112.pdf> viewed 22 May 2012.

⁶⁴ Heseltine et al, n 63, p x.

⁶⁵ Heseltine et al, n 63, pp 15-33.

- *Domestic violence programs*, which use cognitive behavioural techniques to assist offenders to develop understanding of the nature of abuse, improve their ability to manage negative emotion, change attitudes about violence, learn about the impact of their offending on victims and improve relationship skills; and
- *Special programs for female and Indigenous offenders*, both of which modify elements of more general programs to the needs of those offenders.

The report noted that: there are well-established programs in the Australian Capital Territory; an increasing number of programs in New South Wales; substantial development of programs in the Northern Territory; an increasing suite of programs in Queensland; South Australia had delivered on its 2004 plan to develop intensive sex offender and violent offender programs; Tasmania had developed numerous new intensive offender rehabilitation programs since 2004; in Victoria more than 5,000 offenders participated in rehabilitation programs and retention rates for those undertaken in custody exceeded 90%; and in Western Australia a lack of experienced staff compromised the delivery of therapeutic programs for several years, although this had considerably improved in the last two years of the reporting period.⁶⁶

More rehabilitative programs, yet higher reimprisonment rates

From the perspective of this article, the most interesting part of the report was the effectiveness of the increased commitment to the rehabilitative ideal. Unfortunately, no information was available about whether this additional commitment to rehabilitation had proven to be effective – the necessary data and information were simply not available. The report stated:

The current study aimed to review the effectiveness of prison-based offender rehabilitation programs. This was not possible given the paucity of research reports/evaluations and research reports that are currently available.⁶⁷

While there was no direct evaluation of the programs, it is possible to make an indirect, albeit crude assessment, of their effectiveness. As noted above, a parallel study was undertaken by the ABS on prisoner recidivism over the 14-year period 1994 to 2007, and most relevantly for current purposes, the study looked at two cohorts of prisoners for the years 1994 to 1997 and 2004 to 2007. The study noted that over a three-year follow-up period the rate of reimprisonment increased – and in fact considerably – for the *latter cohort*.

Tellingly, this was during the period when rehabilitative methods had become *more* sophisticated and *more widely used* in the prison environment. This suggests a failure of these programs. This conclusion, however, is tentative and is subject to a number of caveats. There is no data on the exact number of offenders in the respective cohorts who underwent rehabilitative programs, and there is no data on the completion rate of those who participated in such courses.

The trend of recent evidence suggests rehabilitation is possible for some offenders

The report by Heseltine et al, while being unable to evaluate the effectiveness of rehabilitation programs currently operating in Australian prisons, summarised recent studies into the effectiveness of certain rehabilitation programs, and noted that while there were mixed results, there were some programs that reported positive outcomes.

This was especially the case in relation to sexual offender programs, where some studies showed that the recidivism rate of offenders completing the program was less than half of that of other offenders.⁶⁸ The results of programs directed towards violent offenders were less positive, but a wide-ranging review of studies focusing on United Kingdom programs noted that reductions in

⁶⁶ See Heseltine et al, n 63, pp 46, 51, 58, 61, 63, 67, 71.

⁶⁷ Heseltine et al, n 63, p 37.

⁶⁸ Heseltine et al, n 63, p 14.

offending for violent offences by around 7%-8% had occurred.⁶⁹ Overseas studies reported some success with anger management programs, but an Australian study (a shorter program of 20 hours) showed no positive outcomes related to program completion. There is no cogent evidence supporting the effectiveness of domestic violence programs or victim awareness programs. However, drug and alcohol programs have been shown to be effective at reducing substance abuse and re-offending.

This assessment is consistent with the findings of Mitchell et al, who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison.⁷⁰ The studies they focused on related to drug users and compared re-offending patterns of offenders who completed a drug rehabilitation program with those who did not complete a program, or completed only a minimum program between the years 1980 to 2004. They analysed 66 studies in total. The report concluded that:

Overall, this meta-analytic synthesis of evaluations of incarceration-based drug treatment programs found that such programs are modestly effective in reducing recidivism.⁷¹

Moreover, it was noted that programs which involve dealing with the multiple problems of drug users (termed “therapeutic communities”) were the most successful, whereas there was no evidence to support good outcomes associated with “boot camp” programs.

Forum sentencing, circle sentencing and drug courts

The sentencing process has also been used in a bid to decrease re-offending. A number of different initiatives have been used, including forum sentencing, drug courts and circle sentencing. These have had mixed results.

Forum sentencing is based on restorative justice. It is conducted in two courts in New South Wales and involves offenders being dealt with by way of “community conference” as opposed to the normal criminal justice process. A study by the New South Wales Bureau of Crimes Statistics and Research compared re-offending rates of 264 offenders who were dealt with by way of forum sentencing, to those dealt with by the conventional sentencing process.⁷² The study concluded that there was no evidence that forum sentencing reduced the likelihood of re-offending, the amount of time before re-offending occurred, or the seriousness of any subsequent reoffending.⁷³

A variant of forum sentencing is “circle sentencing” which is used in relation to eligible Indigenous offenders.⁷⁴ A 2008 study into its effectiveness indicated similar negative results to forum sentencing:

Taken as a whole, the evidence presented here suggests that circle sentencing has no effect on the frequency, timing or seriousness of offending.⁷⁵

More success has been attained by drug courts, whose processes involve judicial supervision of offenders and compulsory drug treatment. There are also rewards and sanctions to encourage compliance with programs. A study published in 2008 examined the recidivism rate of offenders who were dealt with by the drug court in New South Wales, and found that those who completed the drug court program were 37% less likely to be reconvicted of offences than a comparison group.⁷⁶ The findings of the study led the researchers to recommend expanding the operation of drug courts.

⁶⁹ Heseltine et al, n 63, pp 18, 20, 22, 27 30.

⁷⁰ Mitchell O, Wilson D and Mackenzie D, *The Effectiveness of Incarceration-based Drug Treatment on Criminal Behaviour*, Campbell Collaboration Criminal Justice Review Group (2006), <http://www.campbellcollaboration.org/lib/download/98> viewed 22 May 2012.

⁷¹ Mitchell et al, n 70, p 17.

⁷² Jones C, “Does Forum Sentencing Reduce Re-offending?” (2009) 129 *Crime and Justice Bulletin* 1, [http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB129.pdf/\\$file/CJB129.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB129.pdf/$file/CJB129.pdf) viewed 22 May 2012.

⁷³ Jones, n 72 at 12.

⁷⁴ A form of this type of sentencing is used in all Australian jurisdictions, except Tasmania.

⁷⁵ Fitzgerald J, “Does Circle Sentencing Reduce Aboriginal Offending?” (2008) 115 *Crime and Justice Bulletin* 1, [http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb115.pdf/\\$file/cjb115.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb115.pdf/$file/cjb115.pdf) viewed 22 May 2012.

⁷⁶ Weatherburn D et al, “The NSW Drug Court: A Re-evaluation of its Effectiveness” (2008) 121 *Crime and Justice Bulletin* 1 at 11.

Thus, the most that can be confidently said at this point regarding the capacity of criminal punishment to reform is that there is some evidence that it will work for a portion of offenders and that there is no firm evidence showing that it cannot work for the majority of offenders.

Overall, the jury is still out on the ability of criminal sanctions to reform offenders. In 1992, one commentator stated: "our understanding ... of what works, with which offenders and under what conditions, in reducing offending ... [is] still embryonic".⁷⁷ Twenty years later, that remains the case.

CONCLUSION

Sending offenders to jail does not reduce the likelihood that they will re-offend. This is established by numerous studies which find no link between increased legal compliance and experience in jail and the length of the jail term. The evidence is so powerful and pointed, that this finding can be expressed with a very high degree of certainty. It follows that the legislature should abolish specific deterrence as a sentencing objective.

The weight of evidence, in fact, suggests that sentencing offenders to imprisonment may marginally increase the chance of recidivism. However, the evidence pointing to this conclusion is not definitive and, hence, no policy or legal changes should be made on the basis of this assertion.

These changes should result in more lenient sentences in cases where the offender has a considerable criminal history and therefore where specific deterrence would normally have loomed large in the sentencing determination.

The evidence relating to rehabilitation is less clear. A striking aspect of rehabilitation is how little is known about its effectiveness, especially in the Australian context where considerable (and increasing) resources are directed in the hope of rehabilitating offenders. The weight of empirical data (though it is far from uniform or consistent) suggests that rehabilitative programs can reduce the likelihood of recidivism, especially for certain forms of offences, such as sex-offenders. Moreover, it seems that this can be achieved with programs that are administered in a custodial setting.

If this is proven to be correct, it entails that, paradoxically, the goal of rehabilitation should lose its mitigatory impact, insofar as being a basis for not imprisoning offenders or reducing the length of prison terms is concerned (if effective rehabilitation programs become widespread in prisons). However, the actual level of knowledge regarding the impact of rehabilitative programs on recidivism rates is so small that no policy or legal changes should be made at this point.

There is a pressing need for detailed and wide-ranging research to be undertaken first on the effectiveness of rehabilitative programs in the custodial setting; secondly, outside the custodial setting; and thirdly, comparing the effectiveness of these programs. This research will have strong implications for the desirability of continuing to pursue the rehabilitative ideal and the manner in which it should be pursued, and, in particular, the extent to which rehabilitation should mitigate the punitive aspects of a sentence.

⁷⁷ McIvor G, *Sentenced to Serve: Evaluative Studies in Social Work* (1992) p 13.

THE FALLACY THAT IS INCAPACITATION: AN ARGUMENT FOR LIMITING IMPRISONMENT ONLY TO SEX AND VIOLENT OFFENDERS

MIRKO BAGARIC*
THEO ALEXANDER†

ABSTRACT

Incapacitation theory claims that because certain offenders pose a serious risk of further offending, imprisoning them will eliminate that risk for the duration of the imprisonment. It therefore punishes offenders for crimes that it is assumed or anticipated they will commit. The efficacy of sentencing to achieve the goal of incapacitation is challenged by empirical evidence relating to the capacity to predict which offenders will re-offend and by the high economic cost of imprisonment. This article makes four recommendations regarding the legitimacy of incapacitation as an objective sentencing and the circumstances in which imprisonment should be used as a sanction for crime: (i) the emphasis placed on incapacitation as a sentencing objective in general should be reduced; (ii) to the extent that incapacitation is pursued, it should incorporate restrictions other than imprisonment and including modern monitoring techniques; (iii) imprisonment should be confined to offenders who commit serious sexual and violence offences; and (iv) future research needs to examine more closely the life trajectories of victims of crime and offenders who have spent time in gaol, so that the principle of proportionality may be applied more precisely.

I. INTRODUCTION

Sentencing has a number of objectives. The main objectives include community protection, retribution, specific deterrence, general deterrence and rehabilitation.¹ These objectives are often in conflict and there are no settled principles regarding their relative importance.²

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¹ -011) [1-3910] – es to footnoteske your point, but why, if you have shown it merely renders them more likely to reoffend?11111111For a discussion of key sentencing principles, see: G. Mackenzie and N. Stobbs, *Principles of Sentencing* (Federation Press 2010); M. Bagaric and R. Edney, *Australian Sentencing* (Thomson Reuters 2011) [1-3910]-[1-42001].

² For example, the goal of rehabilitation is normally achieved by not imposing a custodial sanction, whereas specific deterrence and general deterrence often favour a harsh sanction, such as a lengthy term of imprisonment. Sentencing decisions are not governed by strict protocols but rather are discretionary. The methodology

Theoretically at least, these objectives are desirable. However, it is unclear whether, pragmatically, they are achievable. In the realm of sentencing, there is often a gap between legal doctrine, criminological theory, and evidence-based knowledge.

This article (like a number of others³) aims to bridge the gap between sentencing theory, evidence and practice. It focuses on the goal of incapacitation. The harshest penalty in all developed countries, except the United States and Japan, is imprisonment. This is widely regarded as the most effective means of protecting the community. Apart from capital punishment, no sanction can ever hope totally to prevent offenders from re-offending. Most sanctions involve a degree of supervision or interference with the freedom of the offender. Sanctions in the form of probation, licence cancellation, and community work orders curtail, at least to some extent (if merely by reducing the hours left in the day), the opportunity for further offending. Imprisonment is the sentencing option that most significantly curtails the liberty of the offender.

Even imprisonment, however, is not a guaranteed method for preventing crime. While in prison, offenders have the opportunity to damage property, assault other inmates and guards, buy and sell drugs, and so on. The offending behaviour is at least confined (geographically) to within the prison walls, and the likelihood of offences being committed is significantly reduced by the high level of scrutiny and control. Thus, while we can never be sure that imprisonment will totally prevent criminal behaviour, imprisonment renders offenders incapable of re-offending outside of prison – apart from when they direct or encourage criminal behaviour outside prison. This discussion focuses on imprisonment as the paradigm incapacitative sanction.

In short, we seek to answer the question: “Is imprisonment an effective means of protecting the community from crime?” The term “effective” is admittedly value-laden. As explained below, it is used in this article to incorporate both a normative and economic dimension.

is termed the “instinctive synthesis,” which enables sentencing judges to set a penalty without stating how much weight is given any particular consideration (see *R. v. Willisroft* [1975] V.R. 292 (Supreme Court of Victoria); *Markarian v. R.* [2005] HCA 25, (2006) 228 C.L.R. 357; *Hilli v. R.* [2010] HCA 45, (2010) 242 C.L.R. 520).

³ See M. Bagaric, T. Alexander, “(Marginal) general deterrence doesn’t work – and what it means for sentencing” (2011) 35 *Criminal Law Journal* 269; and M. Bagaric, T. Alexander, “The capacity of criminal sanctions to shape the behaviour of offenders: specific deterrence doesn’t work, rehabilitation might and the implications for sentencing” (2012) *Criminal Law Journal* (forthcoming).

The efficacy of imprisonment to attain the goal of incapacitation has been considered at reasonable length in the literature. There is a relatively settled body of knowledge questioning the effectiveness or desirability of incapacitation, mainly because there are no accurate techniques for distinguishing offenders who will reoffend from those who will not.⁴ This argument is often supplemented by economic conservatism that suggests the high cost of imprisonment often makes incapacitation undesirable.

This article builds on these sentiments. The conclusion that the goal of incapacitation is undesirable logically leads to the (second) question: should imprisonment *per se* be abolished?⁵ This is especially so given that other sentencing objectives commonly advanced in support of imprisonment, in the form of general and specific deterrence, are also demonstrably false.⁶

Section four of this article focuses on this second question. It argues that, although several justifications for imprisonment are misconceived, imprisonment is still a desirable and necessary disposition in some cases. However, it is argued that imprisonment is currently greatly overused as a response to crime. There is a pressing need fundamentally to re-think how, and in what circumstances, imprisonment should be employed. It concludes with reasoned recommendations, and the qualifications and limitations thereto.

The proposed reforms are ambitious. They are not attainable in the short term – too much entrenched reflexive thinking and too much political capital are at stake to allow change to occur too readily. But there is some basis for believing that, ultimately, reason and empirical knowledge will overcome orthodoxy – and the failure and subsequent abolition of capital punishment in much of the common law world gives hope for such reforms.

This article focuses chiefly on principle and practice within Australia; however, the discussion and conclusions are transferrable to all jurisdictions with similar sentencing regimes, especially the United Kingdom.

⁴ See, for example, Kris Gledhill, “Preventive Sentences and Orders: the Challenges of Due Process” [2011] *Journal of Commonwealth Criminal Law* 78.

⁵ This question logically arises most acutely pursuant to a utilitarian theory of punishment. It also arises in the context of several retributive theories, though not the *lex talionis* theory (“an eye for an eye”). For a discussion of the various forms of retributive theories, see M. Bagaric, K. Amaresakara “The Errors of Retributivism” (2000) *Melbourne University Law Review* 125.

⁶ See further Part III.A., *post*.

II. THE RELEVANCE OF INCAPACITATION TO SENTENCING LAW AND PRACTICE

Community protection is the ultimate aim of sentencing and has been recognised as such in Australia for several decades. Brennan J. in *Channon v. R.*⁷ stated:

“The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. ... Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose. ... Courts have not infrequently attempted further analysis of the several aspects of punishment (*R. v. Goodrich* (1952) 70 W.N. (N.S.W.) 42, where retribution, deterrence and reformation are said to be its threefold purposes). In reality they are but the means employed by the courts for the attainment of the single purpose of the protection of society.”⁸

The most effective (albeit not guaranteed) way of stopping offenders from re-offending is by sending them to prison. Most sentencing statutes in Australia refer to incapacitation as an objective of sentencing.⁹ Incapacitation is particularly relevant to sentencing where there is a significant risk (real or perceived) of recidivism.¹⁰

In the United Kingdom, incapacitation is one of the rationales most evident on the face of the *Criminal Justice Act 2003* (U.K.).¹¹ In the United States, while incapacitation is generally not expressly invoked as a discrete sentencing objective, it is nonetheless the

⁷ [1978] FCA 16, (1978) 20 A.L.R. 1.

⁸ *ibid.*, 5 (emphasis added). See also *R. v. Valenti* (1980) 48 F.L.R. 416; *El Karbani v. R.* (1990) 21 N.S.W.L.R. 370 (N.S.W. Court of Criminal Appeal), 377.

⁹ For example, the *Sentencing Act 1991* (Vic.), s.5(1)(e); *Penalties and Sentences Act 1992* (Qld), s.9(1)(e); *Criminal Law (Sentencing) Act* (S.A.), s.10(i); *Sentencing Act 1995* (N.T.), s.5(1)(e); and *Sentencing Act 1997* (Tas.), s.3(b), (which stipulates community protection as the main purpose of sentencing). The term normally used is “protection of the community,” rather than incapacitation, but since the other goals of sentencing, such as denunciation, deterrence, rehabilitation and just punishment (which, it is often said, are merely means to achieve community protection) are normally also expressly mentioned, it seems that in this context community protection means incapacitation.

¹⁰ *R. v. Brewster* [1997] EWCA Crim. 1609, (1980) 2 Cr.App.R.(S.) 191, 192.

¹¹ See the *Criminal Justice Act 2003* (U.K.), ss.225-228, which allow for the imposition of extended terms of imprisonment in relation to serious offences and specific sexual and violent offences where the offender presents a significant risk to members of the public. For a discussion of these provisions, see Andy Bickle, “The dangerous offender provisions of the *Criminal Justice Act 2003* and their implications for psychiatric evidence in sentencing violent and sexual offenders” (2008) 19 *Journal of Forensic Psychiatry and Psychology* 603.

cornerstone and primary rationale¹² underlying the increasingly harsh sentencing regimes that have resulted in an explosion in the number of United States inmates.¹³ For the first three-quarters of the last century, the U.S. imprisoned about 110 persons per 100,000 of adult population;¹⁴ the rate is now nearly 750 per 100,000 of adult population (the highest in the world) – which has produced a near doubling of the U.S. prison population in the past 20 years.¹⁵

In Australia, the rate of imprisonment has also approximately doubled in the past 25 years.¹⁶ Currently, the imprisonment rate is 165 per 100,000 of adult population. However, this is by no means uniform. The highest rate of imprisonment is in the Northern Territory (719 prisoners per 100,000 adult population), followed by Western Australia (262). The lowest is the Australian Capital Territory (83).¹⁷

The rate of imprisonment in the United Kingdom is slightly less than in Australia, at around 150 per 100,000 population. The total number of U.K. prisoners in 2011 was slightly more than 88,000. The average prison population has increased by about 3.7 *per cent* each year over the past 25 years.¹⁸

¹² See the discussion in L. Stolzenberg and S.J. D'Alessio, "Three Strikes and You're Out: The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates" (1997) 43(4) *Crime and Delinquency* 457; R. Henham, "Anglo-American Approaches to Cumulative Sentencing and Implications for U.K. Sentencing Policy" (1997) 36(3) *Howard Law Journal* 263, 270.

¹³ F.E. Zimring, G. Hawkins, *Incapacitation* (Oxford University Press 1995), 3, goes further: they claim that incapacitation is the "principal justification for imprisonment in American criminal justice".

¹⁴ A. Blumstein, "U.S. Criminal Justice Conundrum: Rising Prison Populations and Stable Crime Rates" (1998) 44(1) *Crime and Delinquency* 127, 129.

¹⁵ This reflects a near doubling in the past 20 years; see Bureau of Justice Statistics, *Correctional Population* <<http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>> accessed May 1, 2012.

¹⁶ This data is for the period 1984 to 2010: see *Australian crime: Facts & figures: 2011* (Australian Institute of Criminology 2012), ch. 6, "Corrections" <http://www.aic.gov.au/en/publications/current%20series/facts/1-20/2011/6_corrections.aspx> accessed May 1, 2012. The trend has not been linear: there have been significant fluctuations over this period.

¹⁷ See Australian Bureau of Statistics, *Corrective Services, Australia* (cat.no. 4512.0, March Quarter 2011), <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/9A0865837AEBACA9CA2578AF0011B147/\\$File/45120_mar%202011.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/9A0865837AEBACA9CA2578AF0011B147/$File/45120_mar%202011.pdf)> accessed March 1, 2012.

¹⁸ Social and General Statistics, *Prison Population Statistics*, 23 February 2012. Twenty eight *per cent* of prisoners were sentenced for violent offences. More wide ranging comparisons are found in this publication. Weekly population figures for the United Kingdom are updated at <<http://www.justice.gov.uk/statistics/prisons-and-probation/prison-population-figures>> accessed March 1, 2012.

III. DOES INCAPACITATION WORK?

Given that disabling offenders by confinement prevents them from causing further harm in the community, it may seem that enough has already been said to justify incapacitation. As Jeremy Bentham noted, “*for a body to act in a place it must be there*”.¹⁹ When imprisoned “for a given time: he will neither pick a pocket, nor break into a house, nor present a pistol to a passenger ... within that time”.²⁰ While this may be so, the efficacy of incapacitation is not directly related to the height of the prison wall. It is necessary to look not only to the immediate and direct consequences, but also the indirect and connected consequences of a practice to assess its overall efficacy.

Viewed from this perspective, the picture becomes more complex. It may well be that incapacitation is pointless because the offenders who are being imprisoned would not have re-offended in any event. Moreover, there is the danger that incapacitation may lead to *more* crime due to the possibly brutalising experience of gaol – making it more likely offenders will commit serious offences when they are released. The deleterious effect of imprisonment on the inmate was recognised in the White Paper which formed the basis of the *Criminal Justice Act 1991* (U.K.): “imprisonment provides many opportunities to learn criminal skills from other inmates”.²¹

It follows then, that while the efficacy of incapacitation as an objective of sentencing can be assessed by reference to its ability to render an offender incapable of re-offending, this is a necessary, but not sufficient, requirement. Whether the ultimate goal of protecting the community can be achieved through incapacitation, as has been alluded to above, depends strongly on two main considerations. Firstly, what is the likelihood that an offender would have offended during the term of imprisonment if he or she was in the community instead of prison? Secondly, what is the possible corrupting effect of prison, to the extent that it may increase the propensity of offenders to commit offences when released? If offenders are more prone to commit offences when they come out of prison than before they went in, then any good arising from the physical prevention of offending during the term of imprisonment is actually offset by that increase.

¹⁹ J. Bentham, “Panopticon *versus* New South Wales”, in J. Bowring (ed.), *The Works of Jeremy Bentham* (Russell and Russell, New York 1962), vol. 4, 173.

²⁰ *ibid.*, 183. See also H.L. Packer, “Theories of Punishment and Correction: What is the Function of Prison?” in L. Orland (ed.) *Justice, Punishment, Treatment: The Correctional Process* (Free Press 1973), 183, 187: “so long as we keep a man in prison he will have no opportunity at all to commit certain kinds of crime”.

²¹ United Kingdom Home Office, *White Paper: Crime, Justice and Protecting the Public* (HMSO 1990), [3.2].

A. Does imprisonment backfire by leading to more crime?

Many commentators have suggested that prisons harden offenders by concentrating maladaptive, socially destructive and rebellious attitudes, thereby leading to a greater inclination to commit crime. But this hypothesis is not supported by empirical data.

There have been a large number of studies looking at the impact of imprisonment on re-offending. Most of them have been undertaken in the context of measuring whether specific deterrence is achievable. They also incidentally provide data regarding whether imprisonment increases re-offending.

In a recent analysis,²² Don Weatherburn compared re-offending rates for people convicted of burglary and non-aggravated assault. The study compared 96 “matched pairs”²³ of burglars and 406 matched pairs of offenders convicted of non-aggravated assault. The study looked at offenders who were convicted in the years 2003 and 2004, and each matched pair was followed up for five years, or until he or she was convicted of another offence (whichever came first).²⁴

The study noted that “prison exerts no significant effect on the risk of recidivism for burglary”²⁵ and “the effect of prison on those who were convicted of non-aggravated assault seems to have been to increase the risk of further offending.”²⁶ However, this increase was only minor and not conclusive. The study found that:

“There is no evidence that prison deters offenders convicted of burglary or non-aggravated assault. There is some evidence that prison increases the risk of offending amongst offenders convicted of non-aggravated assault but further research with larger samples is needed to confirm the results.”²⁷

This conclusion can only be tentative, because it relates to only two offence categories; however, it is consistent with the overwhelming trend of international research and literature reviews in this area.²⁸

²² D. Weatherburn, *The effect of prison on adult re-offending* (NSW Bureau of Crime Statistics and Research 2010), <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb143.pdf/\\$file/cjb143.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb143.pdf/$file/cjb143.pdf)> accessed March 1, 2012.

²³ Matched pairs are individuals who share all relevant variables (such as the number of prior court appearances and bail status) except for the outcome that is being tested, *i.e.* the rate of recidivism.

²⁴ Weatherburn (n.**Error! Bookmark not defined.**),5.

²⁵ *ibid.*, 10.

²⁶ *ibid.*, 10.

²⁷ *ibid.*, 1.

²⁸ In the Australian context, the same conclusions have been reached in relation to juvenile offenders in the following reports: J. Kraus, “A comparison of corrective effects of probation and detention on male juvenile offenders” (1974) 49 *British*

One of the most wide-ranging studies that has been conducted regarding the effectiveness of specific deterrence is a literature review by Gendreau, Goggin and Cullen²⁹ published in 1999 involving a review of 50 different studies, which related to a sample of 336,052 offenders – dating back to 1958 – which provided 325 comparisons. The study compared the recidivism rate of people who were sentenced to imprisonment as opposed to community service, and of those who were sentenced to longer and shorter terms of imprisonment.

The review established that recidivism rates for offenders who were sent to prison were similar to those who received a community-based sanction. Longer terms of imprisonment also did not reduce re-offending and, in fact, resulted in a very small increase in recidivism. The authors concluded:

“The data in this study represents the only quantitative assessment of the relationship between time spent in prison and offender recidivism. The database consisted of 325 comparisons involving 336,052 offenders. On the basis of the results, we can put forth one conclusion with a good deal of confidence. None of the analysis conducted produced any evidence that prison sentences reduce recidivism. Indeed, combining the data from the more *vs.* less and incarceration *vs.* community groupings resulted in 4 *per cent* and 2 *per cent* increases in recidivism.”³⁰

This is confirmed by even more recent empirical analysis. Nagin, Cullen and Johnson³¹ provide the latest extensive literature review regarding specific deterrence.³² They reviewed separately the impact of custodial sanctions versus non-custodial sanctions, and the effect of the length of sentence on re-offending. The review examined six experimental studies where custodial *versus* non-custodial sentences

Journal of Criminology 49; D. Weatherburn, S. Vignaendra, A. McGrath, “The specific deterrent effect of custodial penalties on juvenile reoffending” (AIC Reports: Technical and Background Paper 33, Australian Institute of Criminology 2009).

²⁹ Paul Gendreau, Claire Goggin, Francis Cullen, *The Effects of Prison Sentences on Recidivism* (Public Works and Government Services Canada, 1999), <<http://www.prisonpolicy.org/scans/e199912.htm>> accessed March 1, 2012.

³⁰ *ibid.* The suggestion that some of the increased recidivism rate might be attributable to the possibility that offenders serving longer sentences are “career” criminals is debunked by more acute studies, involving controls such as matched pairs. The study by Daniel Nagin *et al.*, which is now discussed, is one such study.

³¹ Daniel S. Nagin, F.T. Cullen, C.L. Johnson, “Imprisonment and Reoffending” (2009) 38 *Crime and Justice* 115, 145.

³² The main studies are summarised in Weatherburn *et al.* (n.28), and in *Does Imprisonment Deter? A Review of the Evidence* (Sentencing Advisory Council 2011), <https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/does_imprisonment_deter_a_review_of_the_evidence.pdf> accessed March 1, 2012.

were randomly assigned;³³ eleven studies which involved matched pairs;³⁴ 31 studies which were regression-based;³⁵ and seven other studies which did not neatly fit into any of those three categories, and included naturally occurring social experiments which allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.

Nagin *et al.* concluded that imprisoned offenders do not exhibit a lower rate of recidivism than those who are not imprisoned. Some studies in fact show that the rate of recidivism is higher, suggesting a criminogenic effect of spending time in prison. Thus,

“Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.”³⁶

Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment, imprisonment in particular, is unlikely to increase the prospect that they will become law-abiding citizens in the future. Indeed, the studies suggest that sentencing offenders to imprisonment may marginally increase the chance of recidivism. However, to the extent that there may be criminogenic effects of imprisonment, they are minor, and the evidence leading to this conclusion is not definitive. Therefore, no policy or legal changes should be made on the basis of this claim – the evidence does not undermine the goal of community protection through incapacitation.

*B. Can we identify offenders who are likely to re-offend?
The failure of selective incapacitation*

As has been noted, imprisonment as a means of community protection is only effective if, *but for* being imprisoned, the offender would have committed a further offence. With this in mind, two forms of incapacitation have been advanced. The first is selective incapacitation. This form focuses on the individual offender, and its success is contingent upon distinguishing offenders who will reoffend from those who will not.

³³ Nagin *et al.* (n.31), 144-45.

³⁴ *ibid.*, 145-54.

³⁵ *ibid.*, 154-55. Regression analysis is used to understand the cause and effect relationship between variables, and is undertaken by analysing data where certain known variables are kept constant and then estimating the relationship between other variables. In the studies analysed by Nagin *et al.*, the variables that were kept constant normally included age, sex, race, prior criminal history and offence type.

³⁶ *ibid.*, 145.

The existing evidence suggests that there are no techniques that can accurately predict the likelihood that a particular offender will commit another serious crime in the foreseeable future.³⁷ In the context of attempting to predict future criminal behaviour, people who commit serious violence and sex offences are often labelled as “dangerous” offenders.³⁸

That a person has previously committed a serious offence is a particularly poor guide to identifying future serious offending. A study in the late 1990s tracked the offending behaviour of 613 offenders released from prison in New Zealand for a two and a half year period. The study revealed that those who were classified as serious offenders³⁹ were no more likely to be again convicted of a serious offence within two and a half years of release than other (ordinary) offenders, and were in fact less likely to be imprisoned within that period of time.⁴⁰ It was also found that, of the total number of serious offences committed by the sample group, the vast majority of offences were committed by offenders who were imprisoned for non-serious (or ordinary) offences.⁴¹ In total, only 30 of the sample of 613 offenders committed a serious offence within the follow up period. It was also noted that altering the definition of a “serious offence” provided little hope as a way to achieve crime control.⁴²

These findings were consistent with earlier studies in the 1980s that employed other techniques for predicting criminal behaviour. Predictions based on psychiatric data were shown to be wrong as often as 70 *per cent* of the time.⁴³ Thus, theoretically, tossing a coin

³⁷ It is possible to predict that offenders who have a long history of minor offending will recidivate, but, as is discussed *post*, it is not economically viable to imprison offenders with this profile.

³⁸ There is no generally accepted definition of this term, but a suitable definition is “the repetitively violent criminal who has more than once committed, or attempted to commit, homicide, forcible rape, robbery or assault” advanced by S. Dinitz, J.P.P. Conrad, “Thinking about dangerous offenders” (1978) 10 *Criminal Justice Abstract* 99, 100.

³⁹ On the basis of the definition in the *Criminal Justice Act* 1985 (N.Z.), s.2. This essentially relates to crimes of serious violence, such as manslaughter, wounding and robbery.

⁴⁰ See M. Brown, “Serious Violence and Dilemmas of Sentencing: A Comparison of Three Incapacitation Policies” [1998] *Criminal Law Review* 710, 713.

⁴¹ *ibid.*, 714.

⁴² *I.e.* there was no definition of “serious offence” which would have resulted in a meaningfully higher prediction rate in relation to future offending: *ibid.*, 714-15.

⁴³ J. Monahan, “The Prediction of Violent Behaviour: Toward a Second Generation of Theory and Policy” (1984) 141 *American Journal of Psychiatry* 10. Another study revealed a false positive rate of about 65 *per cent*: see K. Kozol, “Dangerousness in Society and Law” (1982) 13 *University of Toledo Law Review* 241, 267.

might have more accurately predicted whether an offender would reoffend. Despite some initial optimism, other predictive techniques utilising more concrete risk factors – such as employment history or the age of commencement of offending – were also shown to yield a low success rate.⁴⁴

A wide-ranging analysis in the 1990s of the data regarding the capacity of any discipline to predict future criminal behaviour noted that predictive techniques⁴⁵ “tend to invite overestimation of the amount of incapacitation to be expected from marginal increments of imprisonment”.⁴⁶ In fact, the ability to predict which offenders will likely re-offend is so poor that some academics have estimated the increase in the crime rate from the reduction or abolition of imprisonment to be as low as five *per cent*.⁴⁷

The inability accurately to predict recidivism, and in particular dangerousness, was noted by Kirby J. (in dissent) in the High Court decision of *Fardon v. Attorney-General (Qld)*:

“Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. In a recent comment, Professor Kate Warner remarked:

[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50 *per cent* success rate. While actuarial predictions have been shown to be better than clinical predictions – an interesting point as

⁴⁴ Greenwood claimed that it was possible to identify high risk robbers and burglars by identifying seven supposed risk factors (similar prior convictions, incarceration for over a year in the previous two years; convictions at a young age; time served in a juvenile facility; use of drugs in the past two years; drug use as a juvenile; and employed for less than a year in the last two years) and hence significantly reduce the number of such offences by increasing the prison terms for the high risk offenders: P. Greenwood, *Selective Incapacitation: Report Prepared for the National Institute of Justice* (RAND Corp. 1982). However, it seems that the technique used was flawed. A reanalysis of the original data resulted in less promising results: see A. Blumstein, J. Cohen, C. Visher, *Criminal Careers and “Career Criminals”* (National Academies Press 1986); A. von Hirsch, “Selective Incapacitation: Some Doubts” in A. von Hirsch and A. Ashworth (eds), *Principled Sentencing* (Oxford University Press 1998), 121, 122-23.

⁴⁵ Including those which go beyond simply looking at prior criminality to such things as employment history and so on.

⁴⁶ Zimring, Hawkins (n.13), 86.

⁴⁷ J. Cohen, “The Incapacitative Effect of Imprisonment: A Critical Review of the Literature” in A. Blumstein, J. Cohen, J. Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (National Academies Press 1978), 209.

psychiatric or clinical predictions are central to continuing detention orders – neither are accurate.”⁴⁸

The heightened terrorism threat over the past decade has resulted in an enormous increase in the literature relating to our capacity to predict dangerousness and the associated issue of the desirability of preventive detention. Despite this, more recent attempts to accurately predict dangerousness have not proved successful, although it has been noted that, “at present, although error rates are lower for actuarial tools than for clinical assessments, they are high when violent and sexual offences are being predicted”.⁴⁹

The fact that there are so many false positives in any process of selective incapacitation does not necessarily mean that it is flawed. Even if the practice is only – say – one-third accurate, this still thwarts a large number of crimes in absolute terms. It is an attractive proposition to the utilitarian eye. However, the cost in terms of unnecessarily imprisoning the innocent is almost certainly too high: imprisoning three (or two) people to prevent one person from committing a crime offends against deeply- and widely-held libertarian beliefs. There is a moral repugnance about both collective punishment, and any systematic violation of the principle of protecting the innocent before punishing the guilty.⁵⁰

It is certainly easier to identify people who are likely to commit minor offences in the future.

If one focuses solely on the total *number* (as opposed to type) of previous convictions, there is a far greater ability to predict future offenders. Studies in the United Kingdom have shown that offenders with five or more previous convictions have an 87 *per cent* chance of being convicted of another offence within six years.⁵¹ However, high rates of recidivism are essentially restricted to minor

⁴⁸ [2004] HCA 46, [124] (footnotes in original omitted). Kirby J. quotes from K. Warner, “Sentencing review 2002-2003” (2003) 27 *Criminal Law Journal* 325, 338.

⁴⁹ See Jessica Black, “Is the Preventive Detention of Dangerous Offenders Justifiable?” (2011) *Journal of Applied Security Research* 317, 322-323. The most thorough treatment of the subject matter is B. McSherry and P. Keyzer (eds), “*Dangerous People: Policy, Prediction and Practice* (Routledge 2011). See also B. McSherry and P. Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Federation Press 2009).

⁵⁰ This is illustrated most profoundly by the maxim that “it is better that ten guilty men walk free than one innocent person is convicted”. But, for arguments in support of limited forms of preventive detention, see Black, *ibid.*, 322-23. See also A. Von Hirsch and A. Ashworth, *Proportionate Sentencing* (Oxford University Press 2005), ch. 4.

⁵¹ G.J.O. Philpotts, L.B. Lancucki, *Previous Convictions, Sentence and Reconvictions*, (Home Office Research Study no. 53, HMSO 1979), 16.

offenders.⁵² Similar findings have also been reported in Australia, where approximately two-thirds of sentenced offenders received into prison have already served a sentence of imprisonment.⁵³ However, the results confirmed that previous detention is not a strong indicator regarding future propensity to commit serious offences. About half of those convicted of serious offences had not previously served a prison term. However, about ninety *per cent* of those sent to prison for “other good order” offences, and almost eighty *per cent* of those sent to prison for “justice / security offences” (mainly breaches of court orders), were serving a repeat term.

Prioritising the goal of incapacitation for minor repeat offenders is, however, misguided. Certainly, we can predict with a high degree of confidence that such offenders will continue to cause a nuisance to the community. But detaining them for a period significantly longer than is commensurate with the seriousness of the offence violates the principle of proportionality.⁵⁴ And, from a pragmatic perspective, it is probably self-defeating given the high cost of imprisonment. A recent study by the Australian Productivity Commission has highlighted this high cost. In Australia, the cost to the community of detaining each prisoner each day amounts to \$216,⁵⁵ which equates to \$79,000 *per year*. It is illogical for any community to expend so much a year to punish a minor offence.⁵⁶

⁵² See A. Ashworth, *Sentencing and Criminal Justice* (2nd edn, Butterworths 1995) 331. Other factors (apart from a previous criminal history) which have been shown to lead to a slightly higher rate of recidivism are unemployment and drug history: see von Hirsch (n.44).

⁵³ John Walker, *Prison Sentences in Australia* (Trends and Issues in Crime and Criminal Justice no. 20, Australian Institute of Criminology 1989), 5. See, more recently, Jessica Zhang, Andrew Webster, *An Analysis of Repeat Imprisonment Trends in Australia* (Research paper, Australian Bureau of Statistics 2010), <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/\\$File/1351055031_aug%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf)> accessed March 1, 2012, which noted that an offender who has been in jail previously was nearly three times more likely to be imprisoned within ten years than a first-time prisoner.

⁵⁴ It was essentially for this reason that the Australian Law Reform Commission (ALRC) rejected the use of incapacitation (and general deterrence) as a proper objective of sentencing: ALRC, *Sentencing* (Report no. 44, 1988), xxviii, 18. About a decade later, however, the New South Wales Law Reform Commission (NSWLRC) regarded incapacitation as an appropriate rationale of sentencing: NSWLRC, *Sentencing* (Report no. 79, 1996), 332.

⁵⁵ This is for the 2010 / 2011 financial year: Productivity Commission, *Government Report on Services 2012* (Steering Committee for the Review of Government Service Provision 2012), <http://www.pc.gov.au/_data/assets/pdf_file/0019/114940/24-government-services-2012-chapter8.pdf> accessed March 1, 2012.

⁵⁶ See M. Bagaric, “Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot” (1998) *Monash University Law Review* 231, 270.

C. General incapacitation does work – but the price might be too high

While selective incapacitation does not work, general incapacitation is more effective in reducing crime.⁵⁷ This involves imprisoning large numbers of offenders simply because they have committed a criminal offence – the crime need not be particularly serious and the likelihood of re-offending will be irrelevant. This is termed general (or collective) incapacitation. Little or no effort is normally made to predict future offending patterns, whether on the basis of previous criminal history or other considerations.⁵⁸

There are two theoretical reasons why general incapacitation should work. First, the more people there are in prison, the fewer people there will be who could commit crime in the general community. Accordingly, it must follow that this will reduce the crime rate in absolute terms. However, crime rates are generally measured in a relative sense, based on population size. In this relative sense, increasing the rate of imprisonment should also reduce crime. This is because people who commit crime are disproportionately from one sector of the community: the lower socio-economic group.

Poor people are grossly over-represented in gaols across the world.⁵⁹ As people become more affluent, they commit less crime – it appears that is because they then have more to lose by being imprisoned. Thus, imprisoning large numbers of poor people should reduce crime in the relative sense as well.

Most of the research into the testing of the general incapacitation model has been undertaken in the United States, presumably because of the unprecedented increase in the prison population over the past 30 years. Early findings suggested, however, that even general incapacitation did not work.

Following the introduction of tougher sentencing laws, the prison population in California in the 10-year period from 1980 to 1990 quadrupled (representing an increase of 120,000 prisoners),⁶⁰ such an

⁵⁷ For a discussion regarding the distinction between special and collective incapacitation see Zimring, Hawkins (n.13), 60-79.

⁵⁸ An exception is the Dutch law discussed below which is aimed at recidivists with ten prior convictions.

⁵⁹ For example, see S. Box, *Recession, Crime and Punishment* (Macmillan 1987), 96. After reviewing sixteen major studies between income inequality and crime, Box concluded that income inequality is strongly related to crime. See also P. Carlen, "Crime, Inequality and Sentencing" in R.A. Duff, D. Garland (eds), *A Reader on Punishment* (Oxford University Press 1994), 309. Prison numbers illustrate this quite graphically. In Australia, the rate of indigenous imprisonment is 14 times higher than the general population's: Australian Bureau of Statistics (n.17).

⁶⁰ It may be argued that three strikes statutes in fact pursue a policy of selective incapacitation, in that they attempt to take out of circulation the small percentage of the criminal population whom it is assumed commit most of the crimes. However,

increase being “without precedent in the statistical record of imprisonment in the Western World”.⁶¹ Zimring and Hawkins compared California’s movements in crime rates⁶² and incarceration levels between 1980 and 1990 with those of sixteen other American states that contain metropolitan areas with populations in excess of 350,000, to control for trends in California unconnected to changes in incarceration policy. The data failed to show a general causal connection between an increased use of incarceration and a reduction in crime, and in particular there was no meaningful evidence of such a connection in California.⁶³ It was found that the “correlation between variations in incarceration and in aggregate crime is -0.09 , a minute (and statistically insignificant) negative correlation”.⁶⁴

Findings of this nature did not, however, hamper the pursuit of the incapacitative ideal.

In the mid-1990s, California embarked on a three-strikes sentencing policy (which swept through much of the United States).⁶⁵ The policy created mandatory, long gaol terms for repeat offenders. It has resulted in the incarceration of even greater numbers of offenders. In extensive research conducted on the effects of such laws, Stolzenberg and D’Alessio analysed the impact of California’s three-strikes laws in the 10 largest cities in the state. California was chosen as an ideal location because: (a) it was one of the first places to implement mandatory three-strikes laws (in March 1994); (b) a large number of people have been charged under the law (over 3,000); and (c), it has one of the toughest such laws in the United States. In California, an accused with one prior serious or violent felony conviction⁶⁶ must be sentenced to double the term they would

as is discussed below, the net is cast so widely that in effect they represent a system of general incapacitation. See also L.S. Beres and T.D. Griffith, “Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation” (1998) 87 *Georgetown Law Review* 103, 129-33.

⁶¹ Zimring, Hawkins (n.13), 104.

⁶² Which were downward.

⁶³ Zimring, Hawkins (n.13), 104-8.

⁶⁴ *ibid.*, 107.

⁶⁵ Three strikes laws were first introduced in Washington in 1993, and have now been adopted in more than 20 states. For a discussion of these laws, see K. McMurry, “Three-strikes Laws Proving More Show Than Go” (1997) *Trial* 12. For a good overview of such laws, see Beres, and Griffith (n.60), 110-113; J. Austin *et al.*, “The Impact of ‘three strikes and you’re out’” (1999) 1 *Punishment & Society* 131, 134-42; E. Chen, “Impacts of ‘Three strikes and you’re out’ on crime trends in California and throughout the United States” (2008) *Journal of Contemporary Criminal Justice* 345.

⁶⁶ Initially, there were 28 different “serious” felonies (including burglary) and 17 “violent” felonies (including robbery in an inhabited house). For further discussion, see M.W. Owens, “California’s Three Strikes Laws: Desperate Times Require Desperate Measures – But Will it Work?” (1995) 26 *Pacific Law Journal* 881, 891.

otherwise have received for the instant offence. Offenders with two or more such convictions must be sentenced to life imprisonment with the minimum term being the greater of 25 years, three times the term otherwise provided for by the instant offence, or the term applicable for the instant offence plus appropriate enhancements. The instant offence does not have to be for a serious and violent felony – any felony will do. In fact, world-wide publicity followed from the sentencing of Jerry Dewayne Williams, a 27 year old Californian who was ordered to be imprisoned for 25 years to life without parole for stealing a slice of pepperoni pizza from a group of four youths, based on his previous convictions.⁶⁷

It was anticipated that these laws, by effectively removing career criminals from society, would result in a significant reduction in crime. The 1994 RAND study, for example, predicted that serious crime in California would drop by 28 *per cent*, reaching a peak reduction of 400,000 crimes in 2000.⁶⁸ However, California's three-strikes law has since been shown to have had no observable influence on the serious crime rate, and "did not achieve its objective of reducing crime, through either deterrence or incapacitation".⁶⁹ Only one city (Anaheim) exhibited a substantial reduction in the serious crime rate. But even that was regarded as a possibly aberrant finding.

"Most studies of incapacitation suggest that prison exerts a significant suppression effect on crime; however, the estimated effects appear to vary markedly from study to study. Blumstein *et al.*, for example, cite evidence that the level of imprisonment prevailing in the United States (U.S.) during the 1970s would have had an incapacitation benefit of 20 *per cent*.⁷⁰ A study of incapacitation in the United

⁶⁷ Phil Reeves, "‘Life’ for pizza theft enrages lawyers" *The Independent* (London, March 4, 1995) <<http://www.independent.co.uk/news/world/life-for-pizza-theft-enrages-lawyers-1609876.html>> accessed March 1, 2012.

⁶⁸ It was estimated that most of the drops would be in burglary and assault: P.E. Greenwood *et al.*, *Three Strikes and You're Out: Estimated benefits and Costs of California's New Mandatory Sentencing Law* (The RAND Corp, Santa Monica, 1994); but cf. J. Austin, "Three Strikes and You're Out: The Likely Consequences on the Courts, Prisons, and Crime in California and Washington State" (1994) 14 *Saint Louis University Public Law Review* 239, 257, where he predicts that the laws will be ineffective due to mis-prediction, and will result in prison costs unheard of in western civilised democracies.

⁶⁹ Stolzenberg, D'Alessio (n.12), 467. The failure of three strikes laws to reduce crime is also demonstrated in L.S. Beres, T.D. Griffith, "Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation" (1998) 87 *Georgetown Law Review* 103. See also J. Austin *et al.*, "The Impact of 'three strikes and you're out'" (1999) 1(2) *Punishment and Society* 131.

⁷⁰ Blumstein *et al.* (n.44), 123.

Kingdom by Tarling,⁷¹ however, put the incapacitation effect of prison in that country in the mid-1980s at between 7.3 and 9.0 *per cent*. Although the estimates reported by Blumstein and Tarling differ significantly, most incapacitation studies conclude that large increases in the prison population only produce fairly modest reductions in crime. Research in the United States,⁷² for example, suggests that in most U.S. states to obtain a 10 *per cent* reduction in crime, the prison population would have to be more than doubled.⁷³

However, more recent studies have suggested that the unabated practice of draconian sentencing (increasingly severe penalties and increasing rates and lengths of imprisonment) can reduce crime. This is especially in relation to studies undertaken over a longer period. In the United States between 1990 and 2009:

- (a) the rate of violent crime in the United States dropped by more than 60 per cent, with most of the decline being recorded after 1996; and
- (b) the violent victimization rates *per* 1,000 people aged 12 years or older dropped from 44 to 17.⁷⁴

During this period, the imprisonment rate rose from 1.15 million to 2.3 million prisoners.⁷⁵ At face value, these figures suggest a causal link between imprisoning greater numbers of offenders and an effective reduction in the crime rate.

Consequently, a number of detailed studies were undertaken to examine and explain the apparent causal link between crime and imprisonment rates. Following an extensive review of the literature, William Spelman stated that up to 21 *per cent* of crime reduction is attributable to the increased rate of imprisonment.⁷⁶ However, Spelman is unclear whether the reduction is attributable to the incapacitation of offenders (who are thereby prevented from committing crimes whilst they are imprisoned) or to the salutary effects of marginal general deterrence. However, as has been noted (*ante*), the theory of specific deterrence has been debunked; therefore,

⁷¹ R. Tarling, *Analysing Offending: Data, models and interpretations* (HMSO 1993).

⁷² See J. Chan, *The Limits of Incapacitation as a Crime Control Strategy* (Crime and Justice Bulletin no. 25, N.S.W. Bureau of Crime Statistics and Research 1995), 6.

⁷³ Don Weatherburn, Jiuzhao Hua, Steve Moffatt, *How much crime does prison stop? The incapacitation effect of prison on burglary* (2006), 4 (in-line references in original converted to footnotes).

⁷⁴ Bureau of Justice Statistics, *National Crime Victimization Survey Violent Crime Trends, 1973-2008*: <<http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm>> accessed March 1, 2012. The rate of decline in other forms of crime was similar.

⁷⁵ Bureau of Justice Statistics, *Correctional Populations* <<http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>> accessed March 1, 2012.

⁷⁶ W. Spelman, "What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime" (2000) 27 *Crime & Justice* 419, 485. See also A. Blumstein, J. Wallman, *The Crime Drop in America* (Cambridge University Press 2000).

at least some of the drop in crime should be attributed to the higher use of imprisonment.⁷⁷

Other studies support the success of incapacitation, but remain equally unclear about its precise impact. According to literature examined by Roger Warren, a 10 *per cent* increase in imprisonment rates produces a 2 to 4 *per cent* reduction in the crime rate; however most of this relates only to non-violent offences.⁷⁸

A number of other explanations have been offered for the reduced crime rate; including greater police presence and some other, seemingly remote, explanations. Steven Levitt attributes the drop in the crime rate in 1990s in the United States to four factors: increased police numbers (there was a 14 *per cent* increase in police numbers during the 1990s, which was thought to explain between 10 to 20 *per cent* of the decrease);⁷⁹ the waning of the crack-cocaine epidemic; the legalization of abortion (which resulted in a greater number of people from deprived social backgrounds terminating pregnancies); and, finally, the increased use of imprisonment. In relation to the growing prison population he noted that:

“Using an estimate of the elasticity of crime with respect to punishment of 2.30 for homicide and violent crime and 2.20 for property crime, the increase in incarceration over the 1990s can account for a reduction in crime of approximately 12 *per cent* for the first two categories and 8 *per cent* for

⁷⁷ Some of this reduction is also attributable to more police (see *post*).

⁷⁸ See R. Warren, “Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy” (2009) 43 *University of San Francisco Law Review* 585, 594, and the references cited therein.

⁷⁹ S.D. Levitt, “Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not” (2004) 18 *Journal of Economic Perspectives* 163, 177. Levitt contends that this was a good financial investment:

“Whether this investment in police has been a cost-effective approach to reducing crime is a different question. As noted above, annual expenditures on police are approximately \$60 billion, so the cost of the 14 *per cent* increase in police (assuming marginal cost is equal to average cost, which is likely to be a reasonable approximation) is \$8.4 billion a year. The benefits of crime reduction are more difficult to quantify. The most commonly used estimates of the cost of crime to victims (for example, Miller, Cohen and Rossman, 1993) places the costs of crime at roughly \$500 billion annually in the early 1990s. Given the sharp declines in crime, today’s estimates would likely be substantially lower – perhaps \$400 billion in current dollars. If the increase in police reduced crime by 5-6 *per cent*, then the corresponding benefit of crime reduction is \$20–25 billion, well above the estimated cost. Thus, at least to a crudest approximation, the investment in police appears to have been attractive from a cost-benefit perspective.”

ibid., 177, quoting T. Miller, M. Cohen and S.B. Rossman, “Victim Costs of Violent Crime and Resulting Injuries” (1993) 12(4) *Health Affairs* 186.

property crime, or about one-third of the observed decline in crime. Annual expenditures on incarceration total roughly \$50 billion annually.

“Combining this spending figure with the cost of crime to victims and elasticities noted above, expenditures on prisons appear to have benefits that outweigh the direct costs of housing prisoners, subject to three important caveats. First, a dollar spent on prisons yields an estimated crime reduction that is 20 *per cent* less than a dollar spent on police, suggesting that on the margin, substitution toward increased police might be the efficient policy. Second, it seems quite plausible that substantial indirect costs are associated with the current scale of imprisonment, such as the adverse societal implications of imprisoning such a large fraction of young African American males. Finally, given the wide divergence in the frequency and severity of offending across criminals, sharply declining marginal benefits of incarceration are a possibility. In other words, the two-millionth criminal imprisoned is likely to impose a much smaller crime burden on society than the first prisoner. Although the elasticity of crime with respect to imprisonment builds in some declining marginal returns, the actual drop off may be much greater. We do not have good evidence on this point. These caveats suggest that further increases in imprisonment may be less attractive than the naive cost benefit analysis would suggest.”⁸⁰

The success of general incapacitation is, however, disputed by parallel studies in neighbouring Canada, where similar crime reduction trends occurred over approximately the same period. During that period, the imprisonment rate in Canada actually fell.⁸¹

One constant finding to emerge regarding the success of general incapacitation is that it is usually effective only in relation to minor crime.

The effectiveness of general incapacitation for relatively minor offences is supported by an Australian study that measured the impact of imprisonment on burglary rates, concluding that:

“[A]t least so far as burglary is concerned, prison does seem to be an effective crime control tool. Our best estimate of the incapacitation effect of prison on burglary (based on the assumption that burglars commit an average of 38 burglaries per year when free) is 26 *per cent*. This estimate does not appear to be overly sensitive to the value of offending frequency we assume. ... These percentage effects might not

⁸⁰ Levitt, (n.79).

⁸¹ R. Paternoster, “A century of criminal justice: crimes and punishment: So, how much do we really know about criminal deterrence?” (2010) *Journal of Criminal Law and Criminology* 765, 803.

seem large but in absolute terms an incapacitation effect of 26 *per cent* is equivalent to preventing over 44,700 burglaries per annum...

“The fact that prison is effective in preventing a large number of burglaries raises the question of whether increased use of imprisonment would be an effective way of further reducing the burglary rate. Our findings on this issue, like those of incapacitation studies in Britain and the United States,⁸² are not that encouraging. They suggest that a doubling of the sentence length for burglary would cost an additional \$26 million per annum but would only reduce the annual number of burglaries by about eight percentage points. A doubling of the proportion of convicted burglars would produce a larger effect (about 12 percentage points) but only if those who are the subject of our new penal policy offend as frequently as those who are currently being imprisoned. Given what we know about the frequency of offending amongst burglars who do not currently receive a prison sentence, this seems highly unlikely...”⁸³

Similar findings are reported regarding sentence enhancements imposed on offenders in the Netherlands.⁸⁴ A law passed in 2001 required increased sentence severity (by up to three years’ imprisonment) for offenders who had ten or more prior convictions.⁸⁵ By 2007, 1,400 offenders were sentenced under this regime, most of them non-violent offenders.⁸⁶ The result was a dramatic drop in the rate of burglary and car theft in the ten cities in which the law operated. The report concluded:

“We find that in a situation of a relatively low rate of incarceration sentence enhancements for a carefully selected group of prolific offenders can dramatically reduce the crime rate.... Although the group of offenders sentenced under the law accounted for only five *per cent* of the prison population six years after its introduction, the sentencing policy lowered the rate of burglary and theft from car by an estimated 40 *per cent* through the incapacitation effect alone.

...

⁸² Cohen (n.47), Tarling (n.71).

⁸³ Weatherburn *et al.* (n.73), 7-8 (in-line reference in the original converted to a footnote).

⁸⁴ B. Vollaard, *Preventing Crime Through Selective Incapacitation* (CentER Discussion Paper no. 2010-141, 2010) <<http://arno.uvt.nl/show.cgi?fid=113525>> accessed March 1, 2012.

⁸⁵ In absolute terms the increase was not drastic. The habitual offender law allowed for sentences of imprisonment of two to three years to be imposed in most cases: *ibid.*, 33.

⁸⁶ *ibid.*, 6.

“When comparing the cost of enhanced prison sentences with the social benefits of lower crime rates, we find the benefits of the policy to exceed the costs. Even for this highly selective sentencing policy that only affected 1,400 offenders in the period 2001-2007 we find evidence for rapidly decreasing returns to scale. The marginal crime-reducing effect of incapacitating another prolific offender declines by more than half from the lowest to the highest rate of application of the law. The benefit-cost ratio drops sharply when more offenders are serving time under the habitual offender law. ...

“The Dutch policy of selective incapacitation started from a low base [in terms of the length of sentences and imprisonment rate]. ... To compare: an enhanced prison sentence for burglary of two to three years based on the Dutch habitual offender law is comparable to the default sentence for burglary in the United States.⁸⁷ Our finding that the habitual offender law adopted in the Netherlands had a large incapacitation effect should therefore not be interpreted as evidence that all policies of selective incapacitation are likely to have a similarly favourable cost-benefit ratio.”⁸⁸

D. Conclusion on incapacitation

Incapacitation aims to protect the community. While selectively confining individuals disables them directly from committing further offences in the community for a period of time, it in itself does not justify the unrestrained use imprisonment as a prophylactic against crime. Particularly in relation to serious offending, the weight of evidence provides no justification for routinely committing such offenders to prison because of the failure of any method to predict (with sufficient certainty or accuracy) which offenders are likely to commit serious offences again, in the future.⁸⁹

While we can (and do) know that recidivistic minor offenders are likely to reoffend, in probably minor ways, the social utility of their confinement may be outweighed by the direct economic cost and the consequent social cost stemming from the misallocation of limited resources.

⁸⁷ Lance Lochner, *Education Policy and Crime* (NBER Working Paper no. 15894, National Bureau of Economic Research 2010), table 1.

⁸⁸ *ibid.*, 33-34 (in-line reference in the original converted to a footnote).

⁸⁹ It could be argued that offenders who commit an offence of a violent or sexual nature should be required to bear the risk of being a false positive in order to secure the imprisonment of the true positives. However, as has been seen, the likelihood of an inaccurate assessment of future serious offending is so significant that it is not tenable to provide a normative justification for this approach.

At the more general level, there is some stronger evidence that general incapacitation does work. Casting the imprisonment net very widely does seem to reduce crime. However, the total number of people that must be imprisoned in order to achieve a relatively small percentage decrease in the crimes rate is considerable, and it is therefore doubtful whether, on a cost / benefit analysis, this can be justified. To the extent that it does work, the Dutch experience shows that it operates most effectively in a context where there the rate of imprisonment is low and sentences are not overly punitive. These conditions do not prevail in Australia.

IV. THE JUSTIFICATION FOR THE ONGOING USE OF IMPRISONMENT

A. The principle of proportionality

Incapacitation does not exhaust the sentencing objectives that seek to justify the use of imprisonment. Other than incapacitation, the two most common objectives that are invoked to justify imprisonment are general deterrence and specific deterrence. It is beyond the scope of this article to consider these objectives at length. However, the empirical data suggests that harsh punishment cannot secure these objectives.⁹⁰

The analysis above does not, however, mean that imprisonment should be entirely discarded as a criminal sanction. Some offences are so serious that, arguably, they demand such a response. The key determinant in sentencing is (properly) the principle of proportionality.⁹¹ In crude terms, this means that the punishment must fit the crime.⁹² This principle is underpinned by the basic idea

⁹⁰ Bagaric, Alexander, 2011 (n.3); M. Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish 2000), ch. 5.

⁹¹ Preserving proportionality between the seriousness of the offence and the severity of the sentence is a principle adhered to by all western legal systems: see R.S. Frase, "Comparative Perspectives on Sentencing Policy and Research", in M. Tonry, R. Frase (eds), *Sentencing and Sanctions in Western Countries*, (Oxford University Press 2001), 259, 261, cited in Ruth Kannai, *Preserving Proportionality in Sentencing: Constitutional or Criminal Issue* (paper for the International Society for the Reform of Criminal Law, 2004) <<http://www.isrcl.org/Papers/2004/Kannai.pdf>> accessed March 1, 2012. On the primacy of proportionality as a sentencing guide, see von Hirsch, Ashworth, *Proportionate Sentencing* (n.50).

⁹² Proportionality does not fit neatly in relation to some offences. As noted in George Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford University Press 1993), 43:

"Just punishment requires a sense of proportion, which in turn requires sensitivity to the injury inflicted. ... The more the victim suffers, the more pain should be inflicted on the criminal. In the context of betrayal, the gears of this basic principle of justice, the *lex talionis*, fail to engage the problem. The theory of punishment does

that benefits and burdens should be distributed with regard to, and commensurate with, a person's merit or blame.

The proportionality principle is a key determinant regarding the appropriate sentence that should be imposed. It does not of itself justify the infliction of punishment. Most clearly, it is consistent with a retributive (or just-deserts) theory of punishment; however, it has been argued that it also consistent with a utilitarian approach to punishment.⁹³

A clear statement of the principle of proportionality is found in the High Court case of *Hoare v. R.*:⁹⁴

“A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.”⁹⁵

The proportionality principle has two limbs: the harm caused by the offence and the level of pain inflicted by the punishment. The principle is satisfied if these limbs are matched.

In *Veen (No. 1) v. R.*⁹⁶ and *Veen (No. 2) v. R.*,⁹⁷ the High Court of Australia stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which, at various times, has also been declared as the most important objective of sentencing.⁹⁸ Thus, in the case of dangerous offenders, whilst community protection remains an important objective, at common law it cannot override the principle of proportionality. It is for this reason that preventive detention is not sanctioned by the common law.⁹⁹ Proportionality operates to restrain not only sentences that are too heavy, but also those that are too light.¹⁰⁰

Proportionality has also been given statutory recognition in most Australian jurisdictions. For example, in Victoria, the *Sentencing Act 1991 (Vic.)* provides that one of the purposes of sentencing is to impose just punishment,¹⁰¹ and that in sentencing an offender the

not mesh with the crime when there is no tangible harm, no friction against the physical welfare of the victim.”

⁹³ M. Bagaric, “Proportionality in Sentencing: Its Justification, Meaning and Role” (2000) 12 *Current Issues in Criminal Justice* 143.

⁹⁴ [1989] HCA 33, (1989) 167 C.L.R. 348.

⁹⁵ *ibid.*, 354.

⁹⁶ [1979] HCA 7, (1979) 143 C.L.R. 458, 467.

⁹⁷ [1988] HCA 14, (1988) 164 C.L.R. 465, 472.

⁹⁸ For example, see *R. v. Channon* (n.7); *R. v. Valenti* (1980) 48 F.L.R. 416, 420; *R. v. El Karhani* (1990) 21 N.S.W.L.R. 370, 377.

⁹⁹ *R. v. Chester* [1988] HCA 62, (1988) 165 C.L.R. 611, 618.

¹⁰⁰ *R. v. Hernando* [2002] NSWCCA 203, (2002) 136 A.Crim.R. 451, 459.

¹⁰¹ Section 5(1)(a).

court must have regard to the gravity of the offence¹⁰² and the offender's culpability and degree of responsibility.¹⁰³ The *Sentencing Act 1995* (W.A.) states that the sentence must be "commensurate with the seriousness of the offence",¹⁰⁴ and the *Crimes (Sentencing) Act 2005* (A.C.T.) provides that the sentences must be "just and appropriate".¹⁰⁵ In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be just in all the circumstances,¹⁰⁶ while in South Australia the emphasis is upon ensuring that "the defendant is adequately punished for the offence".¹⁰⁷ The need for a sentencing court to ensure that the offender is "adequately punished" is also fundamental to the sentencing of offenders for Commonwealth matters.¹⁰⁸ The same phrase is also used in New South Wales.¹⁰⁹

The courts have not attempted to define exhaustively the factors that are relevant to proportionality. The broad approach taken to this problem is to adopt the principle that the upper limit for an offence depends on its objective circumstances. However, some factors have been positively identified as relevant to offence seriousness. These include the consequences of the offence (including the level of harm), the victim's vulnerability, the method of the offence, the offender's culpability (which turns on such factors as the offender's mental state¹¹⁰), and the level of sophistication involved in the commission of the offence.¹¹¹

The key to injecting content into the proportionality thesis is to ascertain, in practical terms, the actual pains and burdens of crime and punishment (and in particular imprisonment). The hardship stemming from the deprivation of liberty (*i.e.* imprisonment) is of a wholly different character to the hardship of having one's physical or sexual integrity stripped, or of having one's life savings taken away. Much research is still needed in this area.

As noted by von Hirsch and Jareborg, in developing their "living standard approach" to offence seriousness,¹¹² "virtually no legal

¹⁰² Section 5(2)(c).

¹⁰³ Section 5(2)(d).

¹⁰⁴ Section 6(1)(a).

¹⁰⁵ Section 7(1)(a). The *Sentencing Act 1997* (Tas.), however, does not refer to the principle of proportionality.

¹⁰⁶ *Sentencing Act 1995* (N.T.) s.5(1)(a); *Penalties and Sentences Act 1992* (Qld) s.9(1)(a).

¹⁰⁷ *Criminal Law (Sentencing) Act 1988* (S.A.) s.10(1)(k).

¹⁰⁸ *Crimes Act 1914* (Cth) s.16A(2)(k).

¹⁰⁹ *Crimes (Sentencing Procedure) Act 1999* (N.S.W.), s.3A(a).

¹¹⁰ For example, whether it was intentional, reckless or negligent.

¹¹¹ New South Wales Law Reform Commission, *Sentencing* (Discussion Paper no. 33, 1996), 62-64.

¹¹² A. von Hirsch and N. Jareborg, "Gauging Criminal Harm: A Living-Standard Analysis" (1991) 11 *Oxford Journal of Legal Studies* 1.

doctrines have been developed on how the gravity of harms can be compared”.¹¹³

The real-world interests affected by the sentencing process are too important to be left to armchair speculation or intuitive hunches: these should not be allowed to continue to define the lives of victims and offenders. On the basis of the current empirical data, however, it is possible to reach some tentative but valid conclusions about the impact of crime on individual well-being – both as a victim, and as a perpetrator sentenced to imprisonment.

B. *The evidence regarding the effects of crime*

1. *Victims*

The best information available suggests that victims of crime typically suffer considerably – in fact, more than is manifest from the obvious and direct effects of crime. The problem with some studies is that they do not distinguish adequately between different types of crime to determine the relative impact of criminal offence types. However, the available data suggests that victims of violent crime and sexual crime have their prosperity and well-being set back more significantly than victims of other types of crime.

A recent article reviewed the existing literature regarding the impact of violent and sexual crimes on key quality of life indices.¹¹⁴ Among others, it examined victims of rape, sexual assault, aggravated assault, intimate partner violence, and survivors of homicide (*i.e.* relatives of those killed). The key quality of life *indicia* examined were: role function (*i.e.* the capacity to perform in the roles of parenting and intimate relationships, and to function in social and occupational domains); reported levels of life satisfaction; and well-being and social-material conditions (*i.e.* physical and mental health conditions). The report demonstrated that many victims suffered considerably across a range of well-being *indicia*, well after the physical signs of the harm suffered had passed. The report concluded:

“In sum, findings from the well-established literature on general trauma and the emerging research on crime victimization indicate significant functional impact on the quality of life for victims. However, more research is necessary to understand the mechanisms of these

¹¹³ *ibid.*, 3.

¹¹⁴ Rochelle F. Hanson, Genelle K. Sawyer, Angela M. Begle, Grace S. Hubel, “The Impact of Crime Victimization on Quality of Life” (2010) 23(2) Journal of Traumatic Stress 189.

relationships and differences among types of crime victimization, gender, and racial / ethnic groups.”¹¹⁵

Findings showed that victims of violent crime and sexual crime in particular have:

- difficulty in being involved in intimate relationship and far higher divorce rates;¹¹⁶
- diminished parenting skills (although this finding was not universal);¹¹⁷
- lower levels of success in the employment setting (especially in relation to victims who had been abused by their partners) and much higher levels of unemployment;¹¹⁸
- considerable impairment and dysfunction in social and leisure activities, with many victims retreating from conventional social supports;¹¹⁹ and
- high levels of direct medical costs associated with violent crime (over \$24,353 for an assault requiring hospitalization).

Surprisingly, the literature did not report a considerable reduction in self-reported life satisfaction.¹²⁰

A study published in 2006 focusing on victims in the United Kingdom found that:

- victims of violent crime were 2.6 times as likely as non-victims to suffer from depression, and 1.8 times as likely to exhibit hostile behaviour five years after the original offence;¹²¹ and
- for 52 *per cent* of women who had been seriously sexually assaulted in their lives, their experience led to either depression or other emotional problems, and, for one in 20, it led to attempted suicide (64,000 women living in England and Wales to-date have tried to kill themselves following a serious sexual assault).¹²²

In a study examining the effects of either violent or property crime on the health of 2,430 respondents,¹²³ Britt notes:

¹¹⁵ *ibid.*, 194.

¹¹⁶ *ibid.*, 191-92.

¹¹⁷ *ibid.*, 191.

¹¹⁸ *ibid.*, 192.

¹¹⁹ *ibid.*, 193.

¹²⁰ *ibid.*

¹²¹ M. Dixon, H. Reed, B. Rogers, L. Stone, *The Unequal Impact of Crime* (Institute for Public Policy Research 2006), 25.

¹²² *ibid.*, 39.

¹²³ Chester L. Britt, “Health Consequences of Criminal Victimization” (2001) 8 *International Review of Criminology* 163.

“Victims of violent crime reported lower levels of perceived health and physical well being, controlling for measures of injury and for sociodemographic characteristics.”¹²⁴

These findings were not confined to violent crime. Victims of property crime also reported lower levels of perceived well-being. But this was less profound than in the case of violent crime.¹²⁵

2 *Perpetrators: the ongoing adverse impact of imprisonment*

For imprisoned perpetrators, similar conclusions seem to follow. The negative effects of imprisonment appear to continue long after the immediate hardship has ceased. The depravity of prison conditions has been well documented, even in relation to modern democracies,¹²⁶ and the “pains” of imprisonment extend far beyond the immediate deprivation of liberty, including:

- the deprivation of goods and services;¹²⁷
- the deprivation of heterosexual relationships;¹²⁸
- the deprivation of autonomy;¹²⁹ and
- the deprivation of security.¹³⁰

How these deprivations actually affect the life trajectories of prisoners is not well known, but the evidence indicates that it has a considerable negative impact which transcends the actual term of imprisonment. Research shows that imprisonment impacts adversely on prosperity measures after the conclusion of the sentence, even to the point of significantly reducing life expectancy.

A study which examined the 15.5-year survival rate of 23,510 ex-prisoners in the U.S. state of Georgia found much higher mortality rates for ex-prisoners than the rest of the population.¹³¹ There were 2,650 deaths in total, which was a 43 *per cent* higher mortality rate than

¹²⁴ *ibid.*

¹²⁵ See also A.M. Denkers, F.W. Winkel, “Crime Victims’ Well-Being and Fear in a Prospective and Longitudinal Study” (1998) 5 *International Review of Victimology* 141.

¹²⁶ For an overview of the prison conditions in Greece, see Leonidas K. Cheliotis, “Suffering at the Hands of the State Conditions of Imprisonment and Prisoner Health in Contemporary Greece” (2012) 9(1) *European Journal of Criminology* 3. Greece is an interesting case analysis because, in a relatively short period of time, it has gone from a low imprisonment rate country to one which imprisons relatively high numbers of offenders.

¹²⁷ Gresham Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press 1958), chapter 4: “The Pain of Imprisonment”, 285, 287.

¹²⁸ *ibid.*, 289

¹²⁹ *ibid.*, 290

¹³⁰ *ibid.*, 292. See also J. Tosh, *The Pains of Imprisonment* (Sage Publications 1982).

¹³¹ Anne C. Spaulding *et al.*, “Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning” (2011) 173(5) *American Journal of Epidemiology* 479, <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3044840/>> accessed March 1, 2012.

normally expected (*i.e.* 799 more ex-prisoners died than expected).¹³² The main causes for the increased mortality rates were homicide, transportation accidents, accidental poisoning (which included drug overdoses) and suicide.¹³³

Most offenders released from prison continue to have their well-being set back in more ways than increased mortality rates. A recent New Zealand study¹³⁴ showed that post-release offenders displayed vulnerabilities associated with:

- financial stressors;
- drug or alcohol temptations;
- social interactions;
- re-learning how to make decisions; and
- deciding whether or not to tell people of their incarceration history.¹³⁵

The report further noted that post-release offenders who lacked strong networks were extremely vulnerable. Where, for example, they could not find work, or their income was delayed, participants reported:

- hunger and homelessness due to insufficient funds;
- an inability to afford health and mental health care;
- failures to fill prescriptions; and
- little support in attempting to rectify the problems they faced, and little advocacy for the improvement of their circumstances.¹³⁶

C. Matching the worst crimes to the worst forms of punishment

The above data indicates that the effects of being either a victim of a serious sexual or violent crime, or an inmate of a prison, may both previously have been underestimated. Both experiences seem to have profoundly negative impacts on life trajectories, which continue

¹³² However, this and other studies reported lower mortality while in prison. It was postulated that this could be because of:

“access to health care that many persons lack on the outside; a controlled environment, with fewer hazards and a more regular sleep schedule and diet; compassionate release of moribund inmates just prior to death; and selection of already-healthy persons based on their ability to commit crime”.

¹³³ The higher mortality rates for ex-prisoners was consistent with findings in other reports, which are cited in the article.

¹³⁴ Michael Roguski, Fleur Chauvel, *The Effects of Imprisonment of Inmates' and their Families' Health and Wellbeing* (New Zealand National Health Committee 2009). The value of this research is limited by its small sample size – consisting of only 63 participants.

¹³⁵ *ibid.*, 61.

¹³⁶ *ibid.*, 61.

well after the immediate event has ceased. On this crude measure, they are matched in terms of the relative negative impacts, and hence satisfy the test for proportionality. Of course, this says nothing about the length of imprisonment that is appropriate for certain categories of sexual and violent offences. However, this crude empirically based technique is preferable to the theoretical hypothesising that is currently used for offence and sanction matching.

A general principle of sentencing that imprisonment should be reserved for serious and violent offenders, would constitute a profound change to prison demographics, and result in a large reduction in prison numbers. In Australia, in 2010, only 50 *per cent* of people were in prison for committing a “serious violence offence” (defined as homicide, a sexual offence, or robbery). In the other 16 *per cent* of cases, the most serious offence was a property offence. In the remaining 34 *per cent* of cases, imprisonment was the result of some other offence type (defined as either fraud offences, justice offences, offences against government, driving offences, or drug offences).¹³⁷ Aside from the immediate socio-economic benefits, adopting a new paradigm for the circumstances in which imprisonment is a suitable disposition will result in greater coherency between the empirical evidence, sentencing theory and judicial practice.

This, of course, raises the question of how to deal with non-serious and non-violent offenders, especially given the higher recidivism rate in respect of those offenders. The answer does not lie in totally abandoning the incapacitative ideal. The community should still strive to protect itself by preventing offenders from re-offending.

Descriptively, the word “incapacitation” means more than just imprisonment. Criminal justice should embrace new technologies and cast aside the centuries old adherence to imprisonment as the mainstay of community protection. The default incapacitative sanction should be an existence monitored round-the-clock by use of electronic bracelets and, if necessary, CCTV. Electronic monitoring is already possible under curfew orders imposed under the *Criminal Justice Act* 1991 (U.K.), ss.12 and 13. While this is a promising first step, these orders cannot be made for periods exceeding six months.¹³⁸

¹³⁷ *Australian crime: Facts & figures: 2011* (n.16).

¹³⁸ A review in 2006 of the electronic monitoring of offenders found that its cost is about one-fifth that of imprisonment, and that it is “robust” in detecting violations of the term of the order: U.K. National Audit Office, *The Electronic Monitoring of Adult Offenders* (HMSO 2006) <http://www.nao.org.uk/publications/0506/the_electronic_monitoring_of_a.aspx> accessed March 1, 2012.

V. CONCLUSION

Because there are no reliable techniques for predicting which offenders will commit serious crime in the future, selective incapacitation as a means of community protection is a fallacy. Moreover, while many minor offenders do re-offend, the social cost of their offending does not outweigh the economic burden of choosing to incarcerate them. Similarly, imprisoning massive numbers of people would undoubtedly reduce crime, but it would also offend against our intrinsic notions of justice. Nor would such an approach be justifiable on a global cost / benefit analysis. Thus, general incapacitation and selective incapacitation are equally flawed.

However, the failure of incapacitation does not mean that imprisonment should be abolished. It is the only proportionate response to those offences that set back the interests of victims in a significant way. It is apparent that serious violations of physical and sexual integrity have the most enduring and adverse effects upon individual victims. Similarly, the adverse consequences of imprisonment on inmates also endure beyond the duration of the prison term. In light of this correlation, imprisonment is a justifiable punishment for those convicted of a “serious violence offence” – homicide, a sexual offence, or robbery. Equally, because imprisonment is not the only form of incapacitation, it may still play a role in the sentencing process – if its content is re-defined. It remains desirable to attempt to stop re-offending in relation to less serious offences, where incapacitation by means other than imprisonment may prove highly successful. The use of monitoring devices, which cost approximately one-fifth as much as imprisonment, and are potentially more effective in reducing recidivism and avoiding the deleterious effects of imprisonment, should be part of that new content. Where offenders fail to observe such orders, a breach should result in some, or all, of the remaining sentence being served in prison.

Finally, it is important to identify the qualifications or limits to the reforms suggested in this article. The empirical evidence suggesting that victims of sexual and violent offences have the poorest life trajectories is weighty, but not definitive. More research needs to be undertaken regarding the effects of these crimes on victims. In addition, further studies are needed to understand better the effects of other forms of crime on victims. If it transpires that other forms of crimes also devastate the lives of victims in such a significant way, a strong case can be made for expanding imprisonment to such offences.

Existing research into the effects of imprisonment is rudimentary. We know that imprisonment causes considerable negative effects on well-being subsequent to release from prison, but the precise nature, gravity and duration of these effects remain speculative. Only once this information is obtained can something close to accurate modelling occur – modelling which must match the pain caused by crime to the hardship emanating from imprisonment, in order to satisfy the cardinal sentencing objective of proportionality. Until this can be done, one should err on the side of economic conservatism and of civility, and desist from unnecessarily brutalising increasing numbers of offenders for little gain. This is achieved by confining imprisonment only to those who do the most brutal harm: that inherent in sexual and violent offences.