

Proportionality in Sentencing: its Justification, Meaning and Role[†]

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Introduction

The principle of proportionality in sentencing is a splendidly simply and appealing notion. In its crudest, and most persuasive form, it is the view that the punishment should equal the crime. The proportionality principle strikes a strong intuitive cord, and probably for this reason is embodied not only in sentencing law, but transcends many other areas of the law. As Fox (1994) notes, the notion that the response must be commensurate to the harm caused, or sought to be prevented, is at the core of the criminal defences of self-defence and provocation. It is also at the foundation of civil law damages for injury or death, which aim to compensate for the actual loss suffered, and equitable remedies, which are proportional to the detriment sought to be avoided.

The proportionality principle is one of the main goals of sentencing. Despite this, sentences vary markedly not only across, but also within jurisdictions (Frankel 1973; Bagaric 1999a). Adoption of the principle has not facilitated uniform sanctions for like offences because it is poorly defined and understood. There is consensus only in abstract. The principle is so nebulous that it would be misleading to assert that it provides a meaningful guide to sentencers. In order to get to the bottom of proportionality it is necessary to determine the factors that are relevant to the seriousness of the offence and how offence severity should be gauged. This can only be done in light of an understanding of the justification for the principle. However, this, too, is the subject of intense debate. The main aim of this paper is to determine the rationale, if any, for the principle of proportionality. Once the justification for proportionality is ascertained, the narrower and more pragmatic issues concerning it, such as when, if ever, proportionality may be violated and the factors that are relevant to the seriousness of an offence fall into place.

The Role of Proportionality in Sentencing

A clear statement of the principle of proportionality is found in the High Court case of *Hoare v The Queen* (354):

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.

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measure up to the prime utilitarian objectives of deterrence and rehabilitation. Research findings relating to rehabilitation, in particular, were at one point so disappointing, that a 'nothing works' attitude was promulgated (Martinson 1974).

Given the relatively short period of dominance by retributive theories, it is perhaps not surprising that legislatures in many jurisdictions have already made significant incursions into the principle.

Statutory Incursions into the Proportionality Principle

In Victoria, serious sexual, drug, arson or violent offenders¹¹ 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',¹² where the court is satisfied 'to a high degree of probability' that the offender is a serious danger to the community.¹³ The Northern Territory has introduced mandatory jail terms for certain property offences.¹⁴ These provisions have been subject to several criticisms, however, the most perplexing aspect of the scheme is that what amount to the sternest sentencing provisions in Australia are targeted at property offences, as opposed to offences against the person.¹⁵

Similar provisions to those operating in Victoria regarding serious violent and sexual offenders have also been introduced in the United Kingdom.¹⁶ In the United States, three strikes laws operating federally and in over twenty states, require courts when imposing penalties for certain types of repeat offenders to look beyond the circumstances of the immediate offence, and impose harsh mandatory sentences (Henham 1997).

The desirability of such exceptions to the proportionality principle can only be determined in light of an understanding of the rationale for the principle. Before discussing this, I first consider the variables that are relevant to gauging offence seriousness.

11 See Part 2A; especially 6D(d). 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.

12 *Sentencing Act 1991* (Vic), s18A - 18P. Serious offences include certain homicide offenders, rape, serious assault, kidnapping and armed robbery (s 3). Indefinite sentence provisions are also found in other Australian jurisdictions, for example, see *Penalties and Sentences Act 1992* (Qld) Pt 10; *Sentencing Act 1995* (NT), s 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.

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

14 These provisions were introduced via amendments to the *Juvenile Justice Act 1983* (NT) and the *Sentencing Act 1995* (NT) and came into operation in March 1997.

15 For criticisms of the Northern Territory provisions, see Warner (1998); Flynn (1997). In 1996 New South Wales introduced mandatory life sentences for certain murder and drug offences: *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW), new *Crimes Act 1900* (NSW), s 431B. Mandatory and minimum custodial sentences (including life sentences) have also been introduced by the *Crime (Sentences) Act 1997* (UK) for certain offences, including drug offences and other 'serious offences'. Prior to this, mandatory sentences were absent from the United Kingdom since 1891. For a critique of the *Crime (Sentences) Act*, see Henham (1998); Thomas (1998).

16 Section 1(2)(b) of the *Criminal Justice Act 1991* (UK).

The Factors Relevant to the Seriousness of an Offence

The Approach by the Courts

The courts have not attempted to exhaustively define 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. Rather than positively defining these objective circumstances, it has proved easier to dismiss some considerations as being irrelevant. 'Good character, ... repentance, restitution, possible rehabilitation and intransigence' (*Veen v The Queen (No 2)*:491) have been excluded. 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 and the method of the offence; the offender's culpability, which turns on such factors as offender's mental state and his or her level of intelligence; the level of sophistication involved (Fox 1994:498-501); the protection of society (*Veen v The Queen (No2)*); and even the offender's previous criminal history (*R v Mulholland*).

The problem, though, with such a list is that despite its non-exhaustive character it is too particular, and is no more than a list of aggravating factors. Once considerations such as the method of the offence and a victim's vulnerability are included there appears to be no logical basis for not including other considerations that are typically thought to increase the severity of an offence, such as breach of trust, the prevalence of the offence, profits derived from the offence, and an offender's degree of participation. Such an approach would merely turn the inquiry full circle to about the point it is currently at: a system where certain considerations are commonly believed to be relevant to the seriousness of the offence, but absent a fundamental principle against which these largely intuitive variables can be assessed and weighed. A more reasoned approach is required.

Living Standard Approach

Von Hirsch and Jareborg (1991) have gone some way down this path, in what has been described by one eminent commentator as the 'foremost modern attempt to establish some parameters for ... proportionality' (Ashworth 1995:93). They start with the assumption that the:

seriousness of a crime has two dimensions: harm and culpability. Harm refers to the injury done or risked by the act; culpability to the factors of intent, motive and circumstances that determine the extent to which the offender should be held accountable for the act (1991:1).

In relation to the culpability component, they are content to import substantive criminal law doctrines of culpability, such as intention, recklessness and negligence; and excuses, such as provocation into the sentencing stage. But they contend that such an approach is not possible with respect to harm, where they claim that 'virtually no legal doctrines have been developed on how the gravity of harms can be compared' (von Hirsch & Jareborg 1991:3). Thus the focus of their inquiry is to give content to the harm component.

Von Hirsch & Jareborg (1991) approach this task by considering the seriousness of an offence against a background of important human concerns and confine their analysis to conduct that is (already) criminal and injures or threatens identifiable victims. Aggravating or mitigating considerations are not addressed due to the complexity that this would import. In a bid to gauge the level of harm caused by an offence, the starting point for von Hirsch and Jareborg is to use a broad based 'living standard' criterion where the gravity of criminal harm is determined 'by the importance that the relevant interests have for a person's standard of living' (von Hirsch & Jareborg 1991:12). The living standard focuses on the means or capabilities for achieving a certain quality of life, rather than actual life quality or goal achievement (von Hirsch & Jareborg 1991:10).

Von Hirsch & Jareborg (1991) formulate four living standard levels which are used to determine the degree to which a particular crime affects a person's living standard. The most important is subsistence, which equates to survival with no more than basic capacities to function. Then follows minimal well-being and adequate well-being which mean maintenance of a minimum and adequate level of comfort and dignity, respectively. Finally, there is enhanced well-being, which is defined as significant enhancement in quality of life (von Hirsch & Jareborg 1991:17-9). The most grievous harms are those which most drastically diminish one's standard of well-being. Thus a crime which violates the first level (subsistence) is the most serious, whereas one which infringes on enhanced well-being is the least serious.

Next, von Hirsch & Jareborg (1991) determine the type of interests which are violated or threatened by the paradigm instances of particular offences. They identify four basic types of interests. In descending order they are physical integrity; material support and amenity (ranging from nutrition and shelter to various luxuries); freedom from humiliating or degrading treatment; and privacy and autonomy (von Hirsch & Jareborg 1991:20-1). Some interest dimensions, such as physical integrity, are applicable to all of the grades on the living-standard scale, depending on the level of intrusion, whereas other interests such as privacy and autonomy are confined to levels including and below minimum well-being.

After the interest (or interests) violated by the typical instance of a particular offence is ascertained, the effect on the living standard is then determined. For example, in the case of a burglary, physical integrity is not affected and, assuming the item stolen is inexpensive and easily replaceable, material amenity is also scarcely affected. Privacy is more significantly affected, hence on the living standard it ranks at level 4 (as affecting enhanced well-being).

A crime may violate more than one type of interest and therefore result in multiple living standard ratings in different dimensions. For example, an assault which causes only minor injury would rank lowly on the physical integrity dimension (thus possibly at level 4 on the living standard - as violating enhanced well-being), but highly in the freedom from humiliation component. This gives it an overall 3 rating on the living standard, since it is contended that a certain level of self-respect is part of minimal well-being (von Hirsch & Jareborg 1991:24-5). To account for such 'combinations' (and discounts) the affect on the living standard is mapped onto a harm scale, which has five graduations, ranging from the most grave to the least. As an example, living standard 1 (subsistence) maps onto the grave level and level 4 (enhanced well-being) equates to the second lowest level of harm: lower intermediate.

After the harm scale score is determined, discounts are accorded where crimes create only a risk or threat to a particular interest: the more remote the risk or less likely the threat, the greater the discount. As such, attempted offences are regarded as being less serious than completed ones. Von Hirsch and Jareborg (1991:3, 21) do not address at length the issue of culpability, but imply that discounts should also be given for less blameworthy states of mind. Thus harm caused, say, negligently does not rate as high as when it is caused intentionally.

Criticisms of the Living Standard Approach to Offence Seriousness

There appears to be considerable merit in the above type of approach to determining the factors that are relevant to the level of harm caused by an offence. In a nutshell, the argument is that the seriousness of an offence is gauged by the impact that the crime has on the living standard of the typical victim. To determine the seriousness of a crime, a logical starting point appears to be to assess the level of detriment that it inflicts, where the level of detriment is viewed from the perspective of important human concerns. Von Hirsch and Jareborg (1991:5) identify what they feel are important human concerns and also go about ranking them; as they must do. But the problem with their ranking system is that despite the fact that they concede that their analysis is normative, since it is a theory on how harms ought to be rated, it is devoid of an underlying rationale. Intuition aside, we are not told why privacy and autonomy are any less important than say freedom from humiliation. In order to determine issues such as this, an underlying moral theory is needed. Von Hirsch and Jareborg accept this, however, are content to rest their case on the basis that an 'articulated moral theory' underpinning the living standard, is beyond the scope of their discussion (1991:15). They go on to state that they are 'not trying to develop an invariant harm-analysis, but instead to derive ratings applicable *here*, given certain prevailing social practices and also certain ethical traditions' (von Hirsch & Jareborg 1991:15). Some of the social practices they assume are spelt out, such as that due to social convention the home is important for a comfortable existence. However the details we are not told are what 'ethical traditions' have been assumed.

We are informed that the living standard for gauging harm is used because 'it appears to fit the way one ordinarily judges harms' (von Hirsch & Jareborg 1991:11). Further, the 'living standard provides, not a generalized ethical norm, but a *useful* standard which the law can use in gauging the harmfulness of criminal acts (emphasis added)' (von Hirsch & Jareborg 1991:12). This, however, misses the point: useful in what sense? Any standard is useful because for one it will assist in achieving uniformity in sentencing, but so what; a standard based on spiritual, or purely economic well-being will also achieve this. Von Hirsch and Jareborg attempt to turn the criticism that their theory lacks a justification on its head: 'the living standard approach has the advantage of a certain modesty; no "deep" theory or preferred life-aims or appropriate social role is presupposed' (von Hirsch & Jareborg 1991:12). This provides no reason why their theory should not be readily overlooked in preference of a theory that has a 'deep' underlying rationale. They make the further point that the state should protect victimising harm, because people require certain 'resources to live decent lives' (1991:12). However, without an underlying theory, no justification is offered why the institution of punishment should be targeted as intrusions which frustrate the leading of 'decent' lives any more than those which interfere with the leading of rewarding, epicurean, or for that matter downright scurrilous lives.

A Utilitarian Theory of Offence Seriousness

The selection and adoption of certain harms in preference to others can only be justified by reference to an underlying moral theory. To this end, an obvious candidate is utilitarianism, which offers a simple method for determining the types of interests that are relevant to harm seriousness: the reason that some interests are important and worthy of protection by the criminal law is because they are integral to the attainment of happiness. In fact, the approach adopted and conclusions reached by von Hirsch and Jareborg have uncanny similarities with a transparently utilitarian evaluation of harm analysis. The considerations they identify are no more than a rough arm chair utilitarian scale of the primacy of interests relevant to happiness. For example, it seems evident that the most essential requirement to the

attainment of any degree of meaningful happiness is physical integrity and subsistence, followed by material support and minimal well-being and so on. The type of infringement which most seriously interferes with our capacity to attain happiness is our physical integrity. The next thing many seem to value most is material support. Freedom from humiliation and privacy and autonomy, though not necessarily in that order, are also important interests towards the road to happiness.

A far more persuasive manner to gauge the serious harm is to adopt such a primary rationale and then to prescribe weight to defined interests in accordance with empirical observations about the interests that are valued most highly. This may seem imprecise, given the immense diversity in lower order human aims and interests. However, such diversity does not present an insurmountable obstacle.

Promising research suggests that we are not all that different after all in respect to the things that make us happy. The results of a recent study, following eleven years of research based on thousands of questionnaires, have revealed a general convergence in the things that make us happy. For example, the study has shown that money does not guarantee happiness. People on middle incomes are just as happy as the rich, and only the very poor are less happy (happiness only increases with income, where people believe they are being paid more than they expect). In keeping with this, it is revealed that the purchase of luxury items, such as expensive clothes and oil paintings, does not increase our level of happiness. One of the main guarantees of happiness (especially for men) is marriage, largely due to the companionship and emotional support which it provides. The corollary of this is also true; divorced and separated people are the least happiest (even more so than people who have been widowed). Also, the more challenged a person is, whether by a job, hobby or sport, the happier he or she is likely to be (Reid 1998).

Von Hirsch and Jareborg, perhaps anticipating that they may be accused of merely reverting to a utilitarian doctrine of punishment and human interests, expressly reject this on the basis that a utilitarian theory of punishment is concerned only with future orientated goals, such as estimating how future harm may be reduced through certain penal strategies, unlike a retributive account which focuses only on the amount of harm which has been caused: 'we are assuming a past-oriented and retributive account for how much to punish ... , not a future-oriented and preventive one' (von Hirsch & Jareborg 1991:16).

This is a puzzling argument. It comes down to the view that because the seriousness of an offence is not exhaustive of the type of considerations that are relevant to the utilitarian sentencing calculus that, therefore, the underlying standards being used to gauge crime seriousness cannot be utilitarian. All theories of punishment accept that the harm caused by crime is at least one of the reasons why a punitive response is called for. Thus the determination of the amount of harm is central to all theories of punishment. The fact that an answer to this inquiry does not settle the issue of how much to punish, is irrelevant - one step at a time. Further, where an answer to a complex problem requires consideration of several distinct matters, surely the soundest approach is to determine each matter in keeping with an overarching theory or principle. This is precisely the view propounded by Ashworth (1995:147), another leading retributivist, who asserts that considerations which are relevant to proportionality should 'flow from the same source as the rationale(s) of sentencing'. This being so, it is clear why von Hirsch and Jareborg are keen to distance their analysis from any utilitarian overtones: if a utilitarian theory of harm is adopted, why not then adopt a utilitarian theory of punishment?¹⁷

The Law of Criminal Defences and Proportionality

Von Hirsch and Jareborg (1991:3) are also not completely correct in stating 'virtually no legal doctrines have been developed on how the gravity of harms can be compared' (1991:3). The courts, unwittingly, have gone some way towards weighing the relative importance of human concerns. However, this has not occurred in the field of sentencing law and practice. Sentencing principles which have evolved over the years are a poor guide to the relative seriousness of conduct because, as Ashworth notes (1995:126), disproportionate weight is often given to aggravating or mitigating factors in respect of particular offences. Additionally penalties are often imposed without regard to standard types of penalties for other types of offences. To the extent that courts in sentencing do make across the broad comparisons with other types of offences, the ranking is not authoritative because it is hypothetical; there is no conflict between one type of interest which has been violated and another. A further problem is that many offences capture a wide range of conduct with vastly different degrees of culpability. For example, the offence of theft encompasses both a spur of the moment taking of a chocolate bar and a meticulously planned dishonest appropriation of millions dollars from a charity. Accordingly, it is difficult to make meaningful comparisons of offence seriousness based on the range of penalties imposed.

The key to the present inquiry is to broaden the horizons a little beyond sentencing and focus on the law of criminal defences. This is the area of law which most directly involves the clashing of competing interests and where the courts have been forced to consider in a real sense the relative importance of these interests and thereby, albeit inadvertently, provide a ranking of them. Admittedly, this exercise too has been performed without an underlying rationale. Criminal defences have not been developed with an eye to any overarching principle. However this process, which has ranked important human interests, has one distinct and enormous advantage over other approaches: it is practical; at the end of each decision were real rights and interests. And nothing is more likely to sharpen and focus the intellect more than the realisation that at stake are important real rights and interests.

The most significant defences (in terms of the breadth of conduct to which they apply) are necessity and duress. Necessity has three elements:

First, 'the criminal act or acts must have been done only in order to avoid certain *consequences* which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect. ... [Secondly], the accused must honestly believe that he or she was placed in a situation of immediate peril. ... [Finally], the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided (emphasis added)' (*R v Loughnan*:448).

In short, the defence will apply to excuse otherwise harmful (criminal) conduct where the reason for the conduct is to avoid greater harm occurring: 'it is justifiable in an emergency to break the letter of the law if breaking the law will avoid a greater harm than obeying it' (O'Connor & Fairfall 1996:103). Necessity is a defence to all conduct except murder (*R v Dudley & Stephens*; *R v Howe*). This is due to the fear that if necessity could

17 The other point that von Hirsch and Jareborg may be seeking to make is that proportionality is not relevant at all to the utilitarian sentencing calculus (earlier in the paper they also state that crime seriousness in utilitarian punishment is only relevant to the outer bounds of the sentence, within which matters related to rehabilitation, risk and deterrence should determine punishment (1991:4). As is discussed below, this argument is untenable; indeed proportionality has been invoked by utilitarians for centuries. Further, even if proportionality is totally irrelevant to the utilitarian theory of punishment, this is no reason why the living standard analysis is not actually a reversion to utilitarianism.

excuse murder it 'might be made the legal cloak for unbridled passion and atrocious crime' (*R v Dudley & Stephens*:285). Although such sentiment is probably more emotive than real, this is the legal position which has prevailed for well over a century, and shows that the interest the courts rate most highly is human life. One's physical integrity and property interests are also rated highly. The risk to life or property justifies breaches of laws aimed to regulate and coordinate human affairs (*Johnson v Phillips*); and it is permissible to violate laws protecting physical integrity of property in order to prevent greater interferences with these interests. Thus, for example, it is permissible to sterilise a person who is incapable of consenting where this may save the persons' life or prevent deterioration in his or her mental or physical health [*In re F (Mental Patient: Sterilisation)*].

The defence of duress exculpates otherwise criminal behaviour which is committed in response to threats of immediate death or serious personal violence, to the accused or another, that are so great to overbear the will of the ordinary person (*R v Whelan*; *R v Lawrence*). As with necessity, it does not excuse murder (*R v Morley and Brown*; *Abbot v The Queen*). Duress is, however, a defence to all other offences, including the serious offences of escape from custody (*R v Dawson*), drug importation (*R v Lawrence*) and fraud (*Osborne v Goddard*).

There are several illuminating general matters to emerge from a consideration of the above two defences. First, an approximate hierarchy of important human concerns has been developed. At the top is human life, then physical integrity, followed by property rights and then comes mental integrity. Thus in order to protect one's physical safety it is permissible to destroy or damage the property of others (for example, to avoid being burnt in a fire it is justifiable to damage the property of others) or to threaten others and such threats may also be made in order to protect our property.

Secondly, the law of criminal defences has essentially a consequentialist foundation. The basic pattern to emerge is that all behaviour which would otherwise be criminal is justified if it is committed in order to avoid a more harmful, real or threatened, outcome. When the law is required to determine in a concrete manner, important competing interests, intellectual niceties such as rights and other deontological considerations (which are typically at the foundation of retributive theories of punishment) are swept aside; consequences being the only relevant currency.

A consideration of criminal defences has shown that as far as the courts are concerned, the most important consideration to the availability and scope of a defence is the consequences flowing from the otherwise criminal act compared to the likely consequences which would have resulted if the act was not committed. From this, it follows that in defining the seriousness of an offence a central consideration is the level of harm caused by the offence. This analysis sits most comfortably with a utilitarian rationale of punishment, although, as we have seen, retributivists are also not slow to invoke such considerations.

The law of criminal defences reveals that an offender's level of blameworthiness is also a relevant consideration regarding the seriousness of an offence. This is evident from defences such as insanity, provocation, mistake and intoxication. Generally, where a person engages in conduct which is otherwise criminal, and harms another, however does so without being aware of the wrongness of his or her actions, the person is not criminally liable for his or her actions. Similar considerations apply in relation to the substantive criminal law, where reckless and negligent offences are (typically) not regarded as grave as deliberate ones. Thus it is apparent that according to established legal doctrine, culpability is also relevant to the seriousness of the offence.

Recapping the points that have emerged from a consideration of the law of criminal defences: both consequences and culpability may serve to either totally or at least partially (in the case of provocation) excuse otherwise criminal conduct and are the only factors which can obviate the criminality of conduct. The corollary of this is that when one is attempting to determine the factors that are relevant to the seriousness of an offence, that these factors are the only ones that are relevant.

Proportionality and Aggravating and Mitigating Circumstances

As we saw earlier, the courts in gauging the seriousness of an offence, have permitted a wide range of variables other than the harm caused and the offender's culpability, for example the need to protect society, to come into play. However, there are several problems with allowing factors not directly related to the offence to have a role in evaluating offence seriousness.

First, as I discuss further below, many of the sentencing variables which are currently regarded as key considerations in the sentencing calculus, such as the offender's prospects of rehabilitation and the need for specific deterrence are in fact misguided.

Secondly, it is contradictory to claim that the principle of proportionality means the punishment should be commensurate with the seriousness of *the offence*, and then to allow considerations external to the offence to have a role in determining how much punishment is appropriate. Once the inquiry extends to matters not even remotely connected with the crime, such as the offender's upbringing or previous convictions, the parameters of *the offence* have been clearly exhausted.

Finally, by allowing such considerations a look in, much of the splendour of the principle of proportionality dissipates. The principle then cannot be claimed as being indicative of anything: to ascertain how much to punish the simplistically appealing idea of looking only at the *objective* seriousness of the offence is abandoned and the inquiry must move elsewhere: and indeed everywhere. Giving content to the principle of proportionality would become unworkable. In each particular sentencing inquiry, the principle would need to be flexible enough to not only factor in the objective circumstances concerning the offence, but also the mitigating circumstances. Given the uniqueness of each offender's personal circumstances and the vast number of variables which are supposedly relevant to such an inquiry,¹⁸ and the fact that mitigating factors often pull in a diametrically opposite direction to the objective factors relevant to the offence, any attempt to provide a workable principle of proportionality must fail. It was for this reason that von Hirsch and Jareborg (1991:4), when elaborating on the matters that are relevant to gauging the seriousness of the offence, declined to consider aggravating and mitigating circumstances. A non-tautologous definition of proportionality would be impossible if the proportionality principle must accommodate the full range of supposed sentencing considerations.

Thus the picture regarding the offence seriousness limb of proportionality is now clear. It acts as a limiting principle by setting the maximum penalty commensurate to the seriousness of the offence as determined by the harm caused and the culpability of the offender. Although the courts have yet to acknowledge this, the harm/intention approach to proportionality has been adopted in some jurisdictions. In Finland, article 6 of the *Penal*

18 The principle would need to be so extensive to include all of the 300 or so factors that the courts have recognised as being relevant sentencing considerations: Shapland (1981) identified 229 factors, while Douglas (1980) in a study of Victorian Magistrates' Courts identified 292 relevant sentencing factors. The results of such studies were noted in *Pavlic v The Queen*: 202.

Code provides that punishment shall be proportionate to the damage and danger caused by the offence and to the guilt of the offender manifested in the offence. In Sweden, chapter 29 of the *Penal Code* provides that sentences shall be based on the penal value of the offence which is determined 'with regard to the harm, offence or risk which the conduct involved, what the accused realised or should have realised or should have realised about it, and the intentions and motives of the accused'.

However, as has been noted, the principle of proportionality is not always observed. In order to ascertain the desirability of incursions into the principle it is necessary to determine the absoluteness of the principle. This can only be done by considering its underlying rationale. An inquiry into the justification of proportionality will also assist in checking the conclusions reached above. To properly establish the considerations that are relevant to the seriousness of an offence, it is necessary to determine the justification for the principle of proportionality itself.¹⁹

The Justification of Proportionality

Retributivism and Proportionality

Proportionality is most naturally associated with a retributive account of punishment. If the retributive theory can justify the principle, and a retributive system of punishment is adopted, it follows that the principle cannot be violated²⁰ in order to achieve other objectives of punishment. I shall consider whether the link between these two ideals is as firm as is generally felt. Given the vast array of retributive theories it is not possible to consider every retributive argument for proportionality. I will thus focus on the most influential accounts that have been advanced.

Censure and Proportionality

Von Hirsch believes that the following three steps justify the proportionality principle:

1. The State's sanctions against the proscribed conduct should take a punitive form; that is, visit deprivations in a manner that expresses censure or blame.
2. The severity of a sanction expresses the stringency of the blame.
3. Hence, punitive sanctions should be arrayed according to the degree of blameworthiness (i.e. seriousness) of the conduct (von Hirsch & Jareborg 1993:15).

The major problem with this argument is the second part of the first premise. The claim that a sanction should express blame stems from von Hirsch's underlying theory of punishment, however, by his own light this tells only part of the story. Von Hirsch's theory of punishment focuses heavily on the claim that the aim of punishment is to express censure (von Hirsch 1993:ch 2); that is, to convey condemnation or blame directed at a responsible wrongdoer. However, more fully, for von Hirsch the purpose and function of punishment is actually twofold. He states that punishment of criminal acts should serve two distinct purposes: '(1) to discourage conduct of that sort, and (2) to express disapproval of the conduct and its perpetrators' (von Hirsch 1985:53).

19 As Ashworth has noted, sentencing principles 'should flow from the same source as the rationale(s) of sentencing' (1995: 147).

20 Or at least the proportionality principle cannot be significantly violated. While some retributive theories defer at times to consequential considerations (for example, see the discussion regarding von Hirsch's theory), they do not permit such considerations to totally trump proportionality.

Von Hirsch attempts to gain much mileage from the deterrent justification. He utilises it to address the issue of why hard treatment (such as imprisonment and fines) should be imposed on offenders if the purpose of punishment is *only* to express condemnation. He accepts that criminal sanctions are too severe to be justified on the basis of censure alone: 'had punishment *no* usefulness in preventing crime ..., there should not be a criminal sanction' (von Hirsch 1985:53). Similarly, he states that 'in the absence of a preventive purpose, it is hard to conceive of [criminal sanctions] ... as having the sole function of showing that the State's disapproval [of criminal conduct] is seriously intended' (von Hirsch 1993:12). For von Hirsch, this preventive function provides a prudential reason for desistence, which supplements the normative reason conveyed by censure.

Given that punishment, according to von Hirsch, has two purposes, it is untenable to then claim that the amount of punishment which is deserved is determined solely by its censoring goal. This, in turn, undermines the credibility of the second premise, since logically both rationales for punishment must affect the inquiry of how much to punish. This being the case, it may be necessary to impose sanctions that are significantly more severe than is required to match the blameworthiness of criminal conduct.

Von Hirsch (1993:16) is alert to this criticism, and responds by stating that despite his bifurcated account of punishment, prevention cannot be invoked in deciding how much to punish, because proportionality would then be undermined. But this misses the point that proportionality is not a justification for punishment, merely a restraint on it; derived from the rationale for punishment. Further, if one wishes to remain true to his or her theory, as von Hirsch clearly does, dissatisfaction with an outcome of the theory, calls for a re-appraisal of the appropriateness of the outcome; it does not justify expedient application of the theory. In a second counter, von Hirsch (1993:17) provides that sterner sanctions in order to satisfy the deterrent role of punishment are unjustified because this amounts to 'tiger control' (1993:17) which fails to address the offender as a moral agent. However, this fails to side-step my initial criticism. It only confirms that von Hirsch believes that a consequence of his theory is unpalatable; yet he still wishes to embrace his theory.

Lex Talionis

The oldest retributive theory is the *lex talionis*: an eye for an eye, a tooth for a tooth, theory. Here the appeal to proportionality is self-evident, the sanction should equal the harm caused by the offender. However, there are numerous shortcomings of the theory. The *lex talionis* has no role in the case of most offences: 'what penalty would you inflict on a rapist, a blackmailer, a dope peddler, a multiple murderer, a smuggler, or a toothless fiend who has knocked somebody else's tooth out' (Kleinig 1973:120).

It has been suggested that a more plausible interpretation of the *lex talionis* is that the punishment and the crime should be equal or equivalent (Ten 1987:153). However, the difficulty with this approach is that it merely provides a formula for how much to punish, and thus it re-states the proportionality principle, without addressing the issue of why we ought to punish.

Intuitive Appeal of Proportionality

Retributivists may seek to capitalise on the self-evident appeal of the proportionality principle. However, on a post-philosophical level this charm readily dissipates. Followed to its logical conclusion, the proportionality principle requires punishment even when no good would stem from it. It seems wrong to impose a heavier sanction if an offender could be reformed by a lesser sanction: 'retributive justice may be a very good thing, but the saving of souls is a much better thing' (Ewing 1929:18).

The intuitive appeal of the proportionality principle is also challenged by claims that it is too soft. Duhring asserts that the origin of the concept of justice lies in the notion of revenge: a desire which occurs naturally to retaliate against those who have done wrong, and that ultimately criminal justice is simply the public organisation of revenge (Duhring 1865, as cited in Small 1997:40-1). He dismisses the proportionality principle (in the form of the *lex talionis*) not because it is too barbaric, but rather because it does not go far enough; more harm than that corresponding to the crime is necessary to restore equality, since the natural desire 'for revenge does not limit itself to the magnitude of the offence: it normally goes further than, and rightly so' (Duhring 1865, as cited in Small 1997:42).

With its emphasis on revenge, this argument may appear to represent an overly emotive response to punishment and criminality. However, it does highlight the fact that intuition often cuts both ways and is nearly always a poor substitute for reason. I now turn to what I consider to be the most convincing rationale for the principle of proportionality.

Utilitarianism and Proportionality

Proportionality has traditionally been thought to have no role in a utilitarian theory of punishment. However, Bentham outlined a general argument which provides a utilitarian justification for proportionality: 'the greater the mischief of the offence, the greater is the expense, which it may be worthwhile to be at, in the way of punishment' (Bentham 1970:168). Thus the greater the harm caused by an offence, the more severe the punishment may be before it outweighs the suffering caused by the offence. Rather than focusing squarely on retrospective considerations to do with the nature of an offence to determine how much to punish, utilitarians place greater emphasis on prospective matters, such as the need for deterrence, rehabilitation and so on. Given this, it is understandable that criticisms of utilitarianism have been made to the effect that it justifies substantial punishment for minor offences, where this is necessary to reform the offender (Armstrong 1969:152). Such objections are, however, misguided since they over-emphasise one utilitarian purpose of punishment. It cannot be forgotten that the utilitarian regards punishment as inherently bad, and thus it is unsupportable where the overall bad consequences outweigh its good effects. And it is hardly contentious that the harm caused by, say, the theft of a loaf of bread is less than the pain of jailing the offender for many years in order to stop similar behaviour (Ten 1987:141-2).

Bentham also argued in favour of the proportionality principle on the basis that if crimes were to be committed it would be preferable that offenders commit less serious rather than more serious ones (Bentham 1970:165). Therefore, he argued that sanctions should be graduated to commensurate with the seriousness of the offence so that those disposed to crime would opt for less serious offences. Absent proportionality, potential offenders would not be deterred from committing serious offences any more than minor ones, and hence would just as readily commit them. This argument, however, has been persuasively criticised by von Hirsch (1985:32), who pointed out that there was no evidence that offenders make comparisons regarding the level of punishment for various offences.

However, there is yet another basis upon which proportionality may have a role in utilitarian punishment. Disproportionate sentences risk placing the entire criminal justice system into disrepute because such sentences would offend the principle, at the root of which is the broad concept of justice, that privileges and obligations ought to be distributed roughly in accordance with the degree of merit or blame attributable to each individual. Clear violations of this principle lead to antipathy towards institutions or practices which condone such outcomes.

Proportion in punishment is a widely found and deeply rooted principle in many penal contexts. It is ... integral to many conceptions of justice and as such the principle of proportion in punishment seen generally acts to annul, rather than to exacerbate, social dysfunction (Harding and Ireland:205).

For example, recently it has emerged that Kerry Packer, Australia's wealthiest individual whose personal wealth exceeds five billion dollars, paid no tax over the period 1989-1993.²¹ Following a protracted investigation by the Australian Taxation Office into his financial affairs, the Federal Court ruled that according to the law which existed at the time, the zero tax paid by Packer correctly represented the full extent of his tax liability. This led to howls of community resentment and enmity, most notably in the form of countless calls to talk-back radio and letters to newspapers, towards the taxation system in Australia. The credibility and legitimacy of the entire system was questioned because it failed to ensure that the level of tax paid by Packer was in proportion to his ability to pay. The same principle underlies the general community attitude towards punishing criminals. A legal system that condoned excessively harsh, or for that matter lenient sentences would eventually lose the support of many members of the community. This may result in less co-operation with organisations involved in the detection and processing of criminals and thereby lead to less crimes being reported and solved and ultimately a diminution in community safety. This would undermine the important role of the criminal law in promoting general happiness.

Culpability in a Utilitarian Theory of Punishment

In order to press home the utilitarian case for proportionality, there remains the obstacle of justifying the role for culpability in the determination of offence seriousness. Ultimately utilitarianism defers to the weight of consequences, and allocating a pivotal focus on other considerations seems to sit uncomfortably with this. This is in contrast to the relative ease with which retributivists enlist considerations relating to an offender's degree of wrongdoing. Non-consequentialist theories of morality, which typically underpin retributive theories of punishment, assert that intentions have intrinsic moral relevance: the intention to help others is worthy of moral praise, while the intention to harm justifies moral condemnation.

However, the utilitarian can also justify the relevance of culpability to offence seriousness; although some explanation is needed. As far as the utilitarian is concerned, culpability is an important consideration regarding offence seriousness. It is just that it has a secondary role in the utilitarian calculus, which must always yield to consequences as the ultimate determinant. The reason that culpability is important is that offenders who intend the harm caused by their crimes are a greater threat than those who merely harm others through say accident, or even negligence or recklessness. But it is important to emphasise that intention²² has no intrinsic relevance. This, however, is not a weakness of the theory, and accords with the actual significance of intentions. This is illustrated by considering the case of 'Jack'.

Jack is generally a good person; more often than not he intends to assist others whom he believes are not as fortunate as he is. But he is not very bright. Unknown to Jack, his parents are very wealthy and have always been extremely paranoid and untrusting of others; believing that others wish to exploit their wealth. Accordingly, they have been extremely

21 See the *Age* (Melbourne), 15 October, 1998, p3.

22 It should be noted that I do not equate culpability only with intention. It can also be manifested in terms of recklessness, negligence, and carelessness. Intention is merely the most serious form of culpability.

vigilant to ensure that Jack is sheltered from the outside world, to the extent that Jack, despite being an adult, has never attended school (or received any other form of meaningful education) and, accordingly, has a very poor understanding of the empirical cause and effects systems which operate in the world. So poor, that he never manages to succeed in implementing his intentions so far as they affect his relationships with others, and in fact he always produces the morally opposite result. Thus when he wants to harm people, instead of robbing them, he gives them money (because he believes money is a cause of unhappiness) and when he wants to help he punches them (believing this to be a form of affection). Given that Jack's beliefs are so entrenched that they are beyond revision, even the most ardent non-consequentialist would prefer the 'nasty' Jack and would agree that it would be far better to live in a world of 'nasty' rather than 'nice' Jacks.

The only reason that we generally view intentions as being inherently worthy of praise or blame is that most of us have sufficient factual knowledge about the empirical processes in the world to set in train the appropriate causal processes to achieve our intentions, hence there is a *very close connection* between intentions and consequences. If it transpired that intentions generally had no connection with consequences they would promptly become morally irrelevant. The above account of Jack may seem far-fetched, but the point that the example seeks to drive home, is already entrenched in the context of other mental states we experience. We are not responsible or culpable for other mental states we experience which do not produce harmful consequences. We are not condemned for the aspirations or intentions we experience while dreaming; or for our private wishes which we do not act upon. To the extent that we may be criticised when our dark private wishes become public, this is merely because it is assumed that they reflect upon sinister personal traits which may in the future guide our conduct and lead to undesirable consequences. But without the possible connection between our private wishes and ultimate consequences, they are not objects of praise or blame. Thus the only basis for ascribing moral relevance to intentions is because of their close link with consequences. When this link is severed, it becomes apparent that at the bottom, the only thing which really matters is consequences, and the appeal of distinctions or doctrines which bank on the purported significance of intentions readily dissipates.

The point I wish to make here is not as revisionary as might first appear. It is not contended that intentions and other types of mental states, such as recklessness and negligence, are irrelevant and that we ought to abandon the heavy reliance generally placed on them, and thereby, for example, implement a strict liability system of law.²³ As an empirical fact, as I have stated, there is a close connection between our intentions and actions and therefore the person who intentionally brings about a harmful act is more blameworthy than one who does so due to, say, indifference or mistake. Even though the immediate and direct consequences are identical, the person who deliberately sets in train a causal process which results in harm to another deserves greater blame and punishment because such behaviour in general is likely to lead to more suffering long term and thus stern measures must be implemented to deter similar behaviour in the future.

Intentions and the Substantive Criminal Law

Mental states do have a role, however they are not the ultimate considerations which are relevant in evaluating moral responsibility or the seriousness of an offence. And despite the general significance attached to mental states by our legal system, whereby substantial emphasis is attached to precise mental states; such as recklessness, negligence and

23 Especially of the type proposed by Wootton (1981). For criticism of her views, see Ten (1987:115-22).

carelessness, ultimately the law recognises that mental states per se are irrelevant. No matter how pervasively wicked a person may be or how resolutely they may intend that a certain harmful state of affairs should eventuate, no legal responsibility is ascribed until and unless such mental states are accompanied by actions. The only possible exception to this is the law relating to attempted criminal offences. However, even here the degree of intrusion into the principle that intentions are per se irrelevant is only marginal, if at all. For liability to occur it is necessary for the offender, as well as possessing the requisite mental state, to perform *actions* which are very close to committing the substantive offence: the actions must be immediately, and not merely remotely, connected with the completed offence.²⁴

While the bottom line regarding a utilitarian ranking of seriousness merely comes down to one variable: the consequences of the offence (essentially the harm done or risked), one need not be short-sighted. Accordingly there is room for intention to play an important role regarding offence seriousness. Even where an offender attempts to commit an offence, however fails to cause any harm, the utilitarian is still justified in punishing the offender, since he or she has demonstrated a predisposition which may lead to undesirable consequences if not retrained or discouraged.

Commensurability Between the Offence and the Sanction

The other side of the proportionality equation relates to the calculation of penalty severity and matching the sanction to the crime. The utilitarian response to this issue is straightforward: the type and degree of punishment imposed on the offender should cause him or her to experience a level of pain commensurate with the amount of unhappiness caused by the offence. The harm caused by crime and the unpleasantness inflicted through punishment are calculated by reference to the same variable, happiness.

Admittedly, this approach involves significant practical empirical difficulties, but at least there is a formula which we can work towards implementing. Retributivists, on the other hand, when attempting to weigh the severity of the punishment against the seriousness of the crime, have no obvious variable to start with. Not surprising then, that some of them come close to adopting this utilitarian calculus. Von Hirsch and Jareborg (1991:34-5) assert that an interests analysis, similar to the living standard analysis they adopt for gauging crime seriousness, should be used to estimate the severity of penalties. Ashworth (1995:97) states that proportionality at the outer limits 'excludes punishments which impose far greater *hardships* on the offender than does the crime on victims and society in general (emphasis added)'.

Proportionality and Sentencing Consistency

Thus it is contended that the utilitarian theory of punishment provides the soundest justification for the principle of proportionality and against this background we are able to identify the factors that are relevant to gauging offence and penalty severity. This construction of the principle of proportionality has the potential to play a significant role in remedying one of the most objectionable aspects of sentencing law and practice: sentencing disparity. Due to the large degree of discretion reposed in sentencers, sentencing law has been widely criticised as being unprincipled and lacking in consistency, thereby compromising the fairness of the sentencing process (Frankel 1973; Bagaric 1999a).

24 This is termed the proximity test; see *R v Mohan*; *R v Smith*. See also *Crimes Act 1958* (Vic), s 321N.

In response to such criticisms, the courts in some Australian jurisdictions have recently attempted to curtail the sentencing discretion by laying down 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 suggest an appropriate sentencing tariff for the offence.

In 1999, a specially constituted bench of the New South Wales Court of Criminal Appeal in *R v Jurisic* for the first time issued a guideline judgment. Spigelman CJ (217), accepted that some limits must be imposed on the judicial sentencing discretion.

The existence of multiple objectives in sentencing – rehabilitation, denunciation and deterrence – permits individual judges to reflect quite different penal philosophies. This is not a bad thing in a field in which ‘the only golden rule is that there is no golden rule’ (*Geddes* (1936) 365 SR (NSW) 554 at 555 per Jordan CJ). Indeed, judges reflect the wide range of differing views on such matters that exist in the community. *However, there are limits to the permissible range of variation.* The courts must show that they are responsive to public criticism of the outcome of sentencing (emphasis added).

Guideline judgments are a positive step forward in terms of achieving greater consistency in sentencing. But ultimately they do not go far enough. Guideline judgments have been a feature of the sentencing landscape in the United Kingdom for several decades and have not prevented what Ashworth (1995:1) describes as a ‘cafeteria system’ of sentencing, which permits sentencers to pick and choose a rationale which seems appropriate at the time with little constraint. This is largely because they are only directional. This point has not been missed in the case of *R v Henry* (114), where several months after *R v Jurisic*, the same court laid down another guideline judgment:

A guideline judgment on the subject of sentencing should not lay down a requirement or anything in the nature of a rule. The failure to sentence in accordance with a guideline is not itself a ground of appeal. Guidelines are not rules of universal application. They may be departed from when the justice of a particular case requires such departure.²⁵

Further, guideline judgments do not involve the courts taking a top down approach to sentencing. Rather than focusing on why we should be punishing offenders in the first place and developing suitable sentencing considerations (and penalties) to meet such objectives, typically guideline decisions simply adopt existing sentencing practices and try to make them as consistent as possible.²⁶

The extent to which the above approach to the principle of proportionality is able to set more principled and definite penalty levels depends on the range of factors apart from culpability and the harm caused by the offence that are relevant to the sentencing calculus. The greater the number of other variables that are properly relevant to the sentencing inquiry, the less decisive will be the principle of proportionality. If one adopts a utilitarian theory of punishment, departures from proportionate sentences are only justified where this is necessary to satisfy other utilitarian objectives of punishment. As we saw earlier, there are supposedly three good consequences of punishment: incapacitation, rehabilitation and (special and general) deterrence.

25 Spigelman J (1999). The same applies in relation to the guideline judgments in the United Kingdom: *De Havilland; Johnson*.

26 Spigelman JJ (1999:881) makes a distinction between top down guideline judgements, where the court establishes a guideline of a prescriptive character, and bottom-up guidelines, by which he means where the court attempts to derive a range or tariff for actual sentences imposed by lower courts. However, in both cases the appellate court is influenced heavily by existing sentencing ranges (for example, this is evident from the heavy reliance on sentencing statistics) in *Henry* and sentencing objectives and rationales are rarely considered in depth.

However, on the basis of the current empirical evidence, the objectives of incapacitation, specific deterrence and rehabilitation cannot be invoked by the utilitarian to justify punishment. Incapacitation is flawed since we are very poor at predicting which offenders are likely to commit serious offences in the future (Bagaric 1999c; 2000a). The weight of evidence does not suggest that offenders who have previously been punished are less likely to re-offend, thus there is no basis for pursuing the goal of specific deterrence (Bagaric 2000a). Rehabilitation also appears to be a misguided sentencing goal, since there are no far-reaching punitive techniques which have proven to be successful (Bagaric 2000a).

The evidence relating to deterrence is more promising, however, only to a point. Experience shows that absent the threat of some form of punishment for criminal conduct, crime would escalate and overwhelmingly frustrate the capacity of people to lead happy and fulfilled lives.²⁷ While punishment does act as general deterrence in the absolute sense, the evidence does not support a direct correlation between higher penalties and a reduction in the crime rate.²⁸ As a result, the penal ideal of marginal deterrence appears flawed. This means that while general deterrence justifies punishing offenders, it is of little relevance in fixing the amount of punishment. The quantum of punishment must be determined by reference to other utilitarian ideals, and to this end the principle of proportionality is the only guiding determinant. Accordingly, in determining how much to punish, the principle of proportionality is paramount and observance of it will result in more consistent sentencing practices. This will obviously require the courts and legislators to abandon reliance on other sentencing ideals, many of which are currently regarded as cardinal objectives of our sentencing process (such as rehabilitation and incapacitation). The strong intuitive appeal of such sentencing goals means that they will not be readily forsaken, but one assumes that the mounting empirical evidence against them cannot be ignored indefinitely.

Conclusion

The principle of proportionality requires that the severity of the sanction is equal to the seriousness of the offence. This concept has proved difficult to implement. There have been two main reasons for this. First, there is no true appreciation of what factors are relevant to the seriousness of an offence. It has been suggested that this is gauged solely by reference to the amount of unhappiness caused by the offence. Secondly, there is no principled method for ascertaining the severity of punishment. This too has been addressed, by employing the same common denominator: happiness. These conclusions flow from the fact that a utilitarian theory of punishment best underpins the principle of proportionality. A consideration of the law of the criminal defences has shown that the courts over the ages have employed essentially consequential considerations in evaluating the seriousness of 'criminal' behaviour. This adds weight to the theory that, at the bottom, offence seriousness is solely a variable of the amount of harm caused by the offence. Harm includes culpability; not because culpability is intrinsically relevant, but because of the close connection between intentions, actions and consequences.

27 Where the threat of any form of punishment for criminal conduct is effectively removed, empirical evidence shows a massive increase in crime. A good example is the events following the police strike in Melbourne in 1923. For details of this see Milte & Weber (1977:287-292).

28 For an overview of the most recent evidence, see von Hirsch et al (1999); Bagaric (2000b).

A utilitarian approach to the proportionality principle entails that proportionality is the principal consideration in fixing penalty levels. Departures from proportionate penalties are permissible only in order to pursue more pressing utilitarian objectives of punishment. However, given the serious questions raised by recent empirical evidence regarding the efficacy of punishment to attain the objectives of incapacitation, rehabilitation, specific deterrence and marginal general deterrence, the principle of proportionality will generally be decisive in setting the penalty level. The imposition of penalty levels that are proportionate to the severity of the offence, and are not corrupted by considerations related to other (misguided) penal objectives, would lead to significant improvements in the consistency and fairness of the sentencing process.

List of Cases

- Abbot v The Queen* [1977] AC 755
- Attorney-General v Whelan* [1934] IR 518
- Channon v The Queen* (1978) 20 ALR 1
- Chester v The Queen* (1988) 165 CLR 611
- De Havilland v The Queen* (1983) 5 Cr App R(S) 109
- Hoare v The Queen* (1989) 167 CLR 348
- In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1
- Johnson v Phillips* [1976] 1 WLR 65
- Johnson v The Queen* (1994) 15 Cr App R (S) 827
- Osborne v Goddard* (1978) 21 ALR 189
- Pavlic v The Queen* (1995) 5 Tas R 186
- R v Dawson* [1987] VR 536
- R v Dudley & Stephens* (1884) 14 QBD 273
- R v El Karhani* (1990) 21 NSW 370
- R v Henry* [1999] NSWCCA 111
- R v Howe* [1987] AC 417
- R v Jurisic* (1998) NSWLR 209
- R v Lawrence* (1980) 32 ALR 71
- R v Loughnan* [1981] VR 443

***R v Mohan* [1976] QB 1**

***R v Morley and Brown* [1968] SASR 467**

***R v Mulholland* (1991) 1 NTLR 1**

***R v Smith* [1975] AC 476**

***R v Valenti* (1980) 48 FLR 616**

***R v Whelan* [1934] IR 518**

***R v Williscroft* [1975] VR 292**

***Veen v The Queen (No 1)* (1979) 143 CLR 458**

***Veen v The Queen (No 2)* (1988) 164 CLR 473**

REFERENCES

Armstrong, KG (1969) 'The Retributivist Hits Back', in Grupp, SE (ed) (1971) *Theories of Punishment*, Indiana University Press, London.

Ashworth, A (1995) *Sentencing and Criminal Justice*, 2nd ed, Butterworths, London.

Bagaric, M (1999a) 'Sentencing: The Road to Nowhere', *Sydney Law Review*, vol 21, no 4, pp 587-626.

Bagaric, M (1999b) 'In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and Utilitarianism and Rights', *Australian Journal of Legal Philosophy*, vol 24, pp 95-144.

Bagaric, M (1999c) 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishment', *UNSW Law Journal*, vol 22, no 2, pp 535-564.

Bagaric, M (2000a) 'Double Punishment and Incapacitation: the Unfairness of Prior Convictions', *Criminal Justice Ethics*, vol 19, no 1.

Bagaric, M (2000b) 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals', *Criminal Law Journal*, vol 24, no 1.

Bentham, J (1970 edn) *An Introduction to the Principles of Morals and Legislation*, Burns, J & Hart, HLA (eds), Athlone Press, London.

Canadian Sentencing Commission (1987), *Sentencing Reform: A Canadian Approach*, Ottawa.

Douglas, R (1980) *Guilty, Your Worship*, LaTrobe University, Melbourne.

Duff, RA (1986) *Trials and Punishment*, Cambridge University Press, Cambridge.

Ewing, AC (1929) *The Morality of Punishment and Some Suggestions For a General Theory of Ethics*, Kegan Paul, London.

- Flynn, M (1997) 'One Strike and You're Out', *Alternative Law Journal*, vol 22, no2, pp 72-78.
- Fox, RG (1994) 'The Meaning of Proportionality in Sentencing', *Melbourne University Law Review*, vol 19, pp 489-511.
- Fox, RG (1988) 'The Killings of Bobby Veen: The High Court on Proportionality in Sentencing', *Criminal Law Journal*, vol 12, pp 339-366.
- Frankel, M (1973) *Criminal Sentences: Law Without Order*, Hill & Wang, New York.
- Frase R (1995) 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report', in Clarkson, C & Morgan, R (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford.
- Great Britain Home Office, White Paper (1990), *Criminal Justice and Protecting the Public*.
- Harding, C & Ireland, RW (1989) *Punishment, Rhetoric, Rule and Practice*, Routledge, London.
- Henham, R (1997) 'Dangerousness, Rationality and Sentencing Policy', *Anglo-American Law Review*, vol 26, no 4, pp 493-525.
- Henham, R (1998) 'Making Sense of the Crime Sentences Act (1997)' *Modern Law Review*, vol 61, pp 223-235.
- Kleinig, J (1973) *Punishment and Desert*, Martinus Nijhoff, The Hague.
- Martinson, R (1974) 'What Works? - Questions and Answers About Prison Reform', *The Public Interest*, vol 35, pp 22-54.
- Milte, KL & Weber TA (1977) *Police in Australia*, Butterworths, Melbourne.
- O'Connor, D & Fairfall, PA (1996) *Criminal Defences*, 3rd ed, Butterworths, Sydney.
- Ried, T (1998) 'Some Research That May Bring You a Degree of Happiness', *The Age*, 6 October 1998, p 10.
- Rosen, F (1997) 'Utilitarianism and the Punishment of the Innocent', *Utilitas*, vol 9, no 1, pp 23-38.
- Sadurski, W (1985) *Giving Desert its Due: Social Justice and Legal Theory*, Kluwer Academic Publishers, Boston.
- Shapland, J (1981) *Between Conviction and Sentence*, Routledge & Kegan Paul, London.
- Sher, G (1997) *Approximate Justice: Studies in Non-Ideal Theory*, Rowman & Littlefield, London.
- Small, R (1997) 'Resentment, Revenge and Punishment: Origins of the Nietzschean Critique', *Utilitas*, vol 9, no 1 pp 39-58.
- Spiegelman J (1999) 'Sentencing Guideline Judgments', *Australian Law Journal*, vol 73, pp 876-884.

- Ten, CL (1987), *Guilt, Crime and Punishment*, Clarendon Press, Oxford.
- Ten, CL (1990) 'Positive Retributivism', *Social Philosophy & Policy*, vol 7, no 2, pp 194-208.
- Thomas, DA (1998) 'The Crime (Sentences) Act 1997', *Criminal Law Review*, pp 83-92.
- Tyler, T (1990) *Why People Obey the Law*, Yale University Press, New Haven.
- Von Hirsch, A (1976) *Doing Justice: The Choice of Punishments*, Hill and Wang, New York.
- Von Hirsch, A (1985) *Past or Future Crimes*, Rutgers University Press, New Jersey.
- Von Hirsch, A (1993) *Censure and Sanctions*, Clarendon Press, Oxford
- Von Hirsch, A & Jareborg, N (1991) 'Gauging Criminal Harm: A Living-Standard Analysis', *Oxford Journal of Legal Studies* vol 1, no 1, pp1-38.
- Von Hirsch et al (1999) *Criminal Deterrence and Sentence Severity*, Hart Publishing, Oxford.
- Walker, N (1991) *Why Punish?*, Oxford University Press, Oxford.
- Warner, K (1998) 'Sentencing Review 1997', *Criminal Law Journal*, vol 22, pp 282-295.
- Wootton, B (1981) *Crime and the Criminal Law*, 2nd edn, Stevens & Sons, London.

Legislation

Criminal Justice Act 1991 (UK)

Sentencing Act 1991 (Vic)

Sentencing Act 1995 (WA)

Crimes Act 1900 (ACT)

Penal Code 1976 (Finland)

Penal Code 1988 (Sweden)

Crimes Act 1958 (Vic)