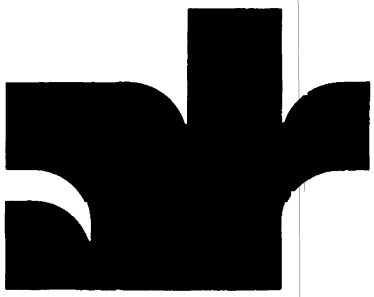

FORUM

Mirko Bagaric *

WHAT SORT OF MANDATORY PENALTIES SHOULD WE HAVE?

Fixed penalties are almost universally condemned. They are regarded as being too harsh and incapable of doing justice in individual cases. This paper argues that the criticisms that have been levelled against fixed penalties are misguided and unsound. It is also contends that a widespread fixed penalty regime is not only desirable, but necessary in order to circumvent the main problem with sentencing practice — the vast discretion reposed in sentencers.

I INTRODUCTION

This paper argues in favour of a widespread fixed penalty regime in an attempt to convince readers that the relevant question is not whether we should have fixed penalties, but rather what type of fixed penalty system should we have. First, a little on what is currently wrong with sentencing law and practice.

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A *The Need to Curtail Judicial Sentencing Discretion*

Fitting the punishment to the crime is probably the most difficult and controversial area of sentencing. Judges in Australia and the United Kingdom generally enjoy a wide discretion regarding the punishment that should be imposed in any particular case, due to the enormous number and range of aggravating and mitigating circumstances that have been held to be relevant to sentencing. This has resulted in significant disparities in sentencing. It has been argued elsewhere, that the rule of law virtues of consistency and fairness are trumped by the idiosyncratic intuitions of sentencers, and that accordingly there is a need to structure the breadth of the sentencing discretion.[1] Courts and legislatures appear to have largely ignored the need for sentencing principles and rules. As was noted by Kirby J in *Ryan*,

> a frequent complaint about the criminal justice system [is that] it concentrates its energies on the trial and tends to lose steam when it turns to the task, at least as important, of sentencing those who are convicted.[2]

The unprincipled nature of sentencing practice has led to what Andrew Ashworth labels a 'cafeteria system'[3] of sentencing, which permits sentencers to pick and choose a rationale which seems appropriate at the time with little constraint. The most obvious solution to curbing judicial discretion is to introduce mandatory or fixed penalties.[4]

The main reason for the ill-defined state of sentencing law and practice is that legislatures and courts have not adopted a primary rationale or coherent justification for punishment. As sentencing law currently stands, a wide-ranging fixed penalty system is not feasible. There are simply too many variables which are 'relevant' to the sentencing calculus. Two separate studies, conducted about twenty years ago, determined that there were between 200 and 300 factors that were relevant to sentencing.[5] No guideline system could hope to be sufficiently flexible or sensitive enough to incorporate even a fraction of these considerations.

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1 See my comments in M Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21 *Sydney Law Review* 587; *Punishment and Sentencing: A Rational Approach* (2001) ch 1.

2 *Ryan v The Queen* [2001] HCA 21 (Unreported, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 3 May 2001) [114].

3 A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995) 331.

4 For a discussion of other options, see A Ashworth, 'Four Techniques For Reducing Disparity', in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (2nd ed, 1998) 227.

5 J Shapland in *Between Conviction and Sentence* (1981) 55 identified 229 factors, while R Douglas in *Guilty, Your Worship* (1980), a study of Victorian Magistrates' Courts, identified 292 relevant sentencing factors. The results of such studies were noted in *Pavlic* (1995) 5 Tas R 186, 202.

However, adopting a primary rationale for punishment would facilitate a far more coherent and exacting approach to sentencing, so as to provide a basis for distinguishing real from illusory sentencing considerations. This in turn may open the way for a broad based fixed penalty regime.

B *Theories of Punishment*

There are two broad justificatory theories of punishment: retributivism and utilitarianism. Previously I have argued that the utilitarian theory is the soundest and should underpin sentencing policy and practice.[6] If a utilitarian theory is to be adopted, there will be drastic implications for sentencing policy and practice. Not the least of these is that most of the sentencing considerations we now perceive as important will become redundant. Against the background of a utilitarian theory of punishment, I argue that a fixed penalty system is not only plausible, but desirable. However, this is not a cue for non-consequentialists to stop reading. As is discussed below, even if a retributive justification is adopted the same conclusion follows. The main premise of my argument is that *some* (tenable) coherent rationale for sentencing should be adopted.

1 *Overview of Criticisms of Fixed Penalties*

Fixed penalties have few supporters. This is especially so in Australia and the United Kingdom, where judges 'in some sense [feel that they] own sentencing and that legislative encumbrances on that ownership are inherently inappropriate'.[7] In the United States the introduction of mandatory penalties has been the main reform to sentencing over the past two decades, and judges have become accustomed to the notion that sentencing should be governed by rules.[8] However, fixed penalties are still spurned by leading American sentencing commentators. Michael Tonry notes that:

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6 See M Bagaric, 'In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights' (1999) 24 *Australian Journal of Legal Philosophy* 95; M Bagaric & K Amarasekera, 'The Errors of Retributivism' (2000) 24 *Melbourne University Law Review* 124. More recently, I have argued that utilitarianism should underpin all legal principles: see M Bagaric 'A Utilitarian Argument: Laying the Foundation for a Coherent System of Law' (2001) 10 *Otago Law Review* 163.

7 M Tonry, 'Sentencing Reform Across Boundaries', in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (1995) 266, 268.

8 Ibid 272. Although on the whole they are still not supportive of the provisions: see further Tonry, *Sentencing Matters* (1996) 152, where he notes that in 1994, a survey showed that over 70 per cent of judges moderately or strongly supported changes to increase the sentencing discretion of a judge.

> The greatest gap between knowledge and policy in American sentencing concerns mandatory penalties. Experienced practitioners and social science researchers have long agreed, for practical and policy reasons .... that mandatory penalties are a bad idea.[9]

There is little question that such sentiments are widely held. In a (relatively) recent forum devoted to the concept of mandatory sentencing legislation in a leading Australian law journal,[10] there were eight separate papers on the topic, and there was not a single nice word to be had for mandatory sentences. Even more recently, 'three strikes laws' in the Northern Territory (which are outlined below), were subjected to intense criticism following the suicide of a 15 year old Aboriginal boy in a Darwin prison in February 2000, while serving time under the mandatory sentencing provisions for the theft of paint and stationery valued at $90. The intensity of the criticism was heightened when, several days later, an offender was sentenced to one year in jail for stealing $23 worth of biscuits. The former chief justice of the High Court, Sir Gerard Brennan, condemned the three strikes laws as immoral and Sir Ronald Wilson, another former High Court justice, also attacked the laws. In March 2000, the Senate Legal and Constitutional References Committee recommended that the Commonwealth Parliament pass a Bill overturning the mandatory sentencing laws in the Northern Territory (and Western Australia) — principally on the basis that the laws breached Australia's commitments pursuant to the United Nations Convention on the Rights of the Child.[11]

Apart from the objection that fixed penalties are unfair because they cannot incorporate all of the relevant sentencing variables, the other main criticism of fixed penalties is that they are too tough. In this paper it is argued that this attack can also be met. It is not so much a criticism of the concept of fixed penalties per se, but more so of the harsh level at which such penalties are normally set. If softer fixed penalties were set, this and many other criticisms of fixed penalties could be circumvented. The objections that have been made against fixed penalties are discussed at length in the next part of this paper. I then outline the essential features of a workable fixed penalty system. The last part of the paper considers possible objections to the proposed fixed penalty system.

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9 M Tonry, *Sentencing Matters* (1996) 134.

10 'Forum: Mandatory Sentencing Legislation: Judicial Discretion and Just Deserts' [1999] *University of New South Wales Law Journal* (1999).

11 *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999.* See Parliament of the Commonwealth of Australia, Senate Legal and Constitutional References Committee, (March 2000) <http://www.aph.gov.au/senate/committee/legcon_ctte/mandatory/index.htm>.

2 *Definitions — Mandatory Penalties and Presumptive Systems*

Before turning to substantive matters, it is necessary to first clear up some definitional matters. Fixed sentencing involves prescribing standard penalties to offences or instances of particular offences. Broadly there are two different types of fixed sentencing options: mandatory penalties and presumptive penalties.

Mandatory sentences describe the situation where the sentencer strictly has only one option. Few jurisdictions employ such mechanisms. Even in jurisdictions that have mandatory life sentences for murder, there is generally an executive mechanism for mitigating the length of the sentence.[12] The more common variant of the mandatory sentence is a mandatory minimum penalty. This is where the legislature sets a minimum threshold below which the court cannot fall, but leaves the court room to impose a harsher sanction where it deems appropriate. Strictly speaking, the fact that an offence has a level below which the penalty cannot fall does not make it a mandatory sentence. This penalty structure is simply the converse of mandatory maximum penalties, which accompany all offences. However, offences carrying mandatory minimum sentences have aroused far more discussion than the concept of 'mandatory maximums'. In keeping with accepted nomenclature, for present purposes, mandatory penalties are taken to include regimes which impose mandatory minimum terms. An example of a mandatory minimum term is the three strikes law in the Northern Territory, which prescribes minimum jail terms for certain property offences, such as stealing (but not shoplifting), unlawful entry into buildings and unlawful use of a vehicle. For adults the penalty for a first offence is 14 days imprisonment for a first offence (unless exceptional circumstances apply), 90 days for a second offence and 12 months where the offender has two or more prior property offences.[13] In Western Australia, there is a mandatory 12 month term of imprisonment (for adults) or detention (for juveniles) for repeat offenders convicted of burglary.[14] Despite the harshness of these provisions they only serve as

12 See D Spears, 'Structuring Discretion: Sentencing in the *Jurisic* Age' (1999) 22 *University of New South Wales Law Journal* 295, 304.

13 For a detailed discussion of the laws (including the exceptional circumstances clause) and their application to juveniles, see N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164, 166–8.

14 These provisions were introduced by the *Criminal Code Amendment Act (No2) 1996* (WA) and came into operation in November 1996. A repeat offender is essentially a person who has two convictions for a relevant offence committed in respect of a place ordinarily used for human habitation. For a discussion of the Northern Territory and Western Australian provisions, see K Warner, 'Sentencing Review 1997' (1998) *Criminal Law Journal* 282, 284; Editorial, 'Mandatory Sentences for Young Offenders' (1998) *Criminal Law Journal* 201; M Flynn, 'One Strike and You're Out' (1997) 22 *Alternative Law Journal* 72, where the Northern Territory provisions are criticised on the grounds that there is no distinction

minimum terms — sentencers are free to impose heavier penalties where this is thought appropriate.

Presumptive sentences refer to the situation where a standard penalty is fixed and must be imposed unless there is a demonstrable reason not to do so. Thus there is a rebuttable presumption that the fixed penalty is appropriate. Two of the most widely publicised presumptive penalty systems are the grid guideline systems operating in Minnesota and the United States Federal Jurisdiction. In Minnesota, a judge can only depart from the presumptive sentence where there are substantial and compelling reasons for doing so. The guidelines provide a non-exhaustive list of factors which may and may not be used as a basis for departure.[15] The Federal Sentencing Guidelines provide that departure from the nominated penalty can only occur where the court finds an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration in formulating the guidelines that would justify a sentence different to that prescribed.[16] The Federal and Minnesota Guidelines are discussed in greater detail below.

Throughout this paper, the term 'fixed penalties' refers to both mandatory and presumptive penalties, unless expressly indicated to the contrary.

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between trivial and serious types of breaches; they breach the principle of proportionality; there is no evidence that mandatory sentences are effective deterrents; discretion shifts from the judiciary to the police; and that because there is no reduction for a guilty plea, there will be more contested matters and court delays.

15 The Minnesota Supreme Court has been heavily criticised for using this power to treat amenability to probation as a mitigating factor (see *State v Trog*, 323 NW 2d 28 (Minn 1982), since this consideration is irrelevant to the rationale underpinning the guidelines: see A von Hirsch, 'Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards' in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (1995) 149, 167. For an overview of the relevant case law concerning departure from the guidelines, see R Frase, 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report', in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (1995) 169, 182.

16 In determining whether a factor was taken into account in setting the standard penalty, the court is directed to look only at material related to the drafting of the guidelines. An example of where a court has the power to impose a penalty that is lower that prescribed is where the offender has substantially assisted in the investigation or prosecution of another offender. For a discussion of the departure provision, see A N Doob, 'The United States Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You Might Not Get There' in Clarkson and Morgan, above n 15, 199.

II CRITICISMS OF FIXED PENALTIES

A *Penalties Too Severe*

The most common criticism of fixed penalties is that they are too severe. Fixed penalties are invariably introduced as part of a 'get tough on crime' political agenda[17] and thus it is not surprising that such an objection is forthcoming.[18] The harshness of fixed penalty systems has resulted in several law reform bodies, and the like, coming down firmly against introducing fixed penalties.[19] The claim that many fixed penalty regimes are too harsh is well founded. A good example is California's three strikes law, which provides that an accused with one prior serious or violent felony conviction[20] must be sentenced to double the term they would have otherwise received for the instant offence. Offenders with two or more such convictions must be sentenced to a term of life imprisonment with the minimum term being the greater of: (i) 25 years; (ii) three times the term otherwise provided for the instant offence; or (iii) the term applicable for the instant offence plus appropriate enhancements. The instant offence does not have to be a serious and violent felony — any felony will do.[21] The impact of these laws can be so great that the penalty for stealing a pizza can be as severe as that for rape or child molestation.[22]

The criticism that fixed penalties are too severe has been advanced in several different ways. While these are normally put forward as discrete reasons for rejecting fixed penalties, in effect they are no more than an elaboration of the undesirable consequences that follow when unduly harsh criminal sanctions (fixed or not) are imposed.

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17 See N Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22 *University of New South Wales Law Journal* 267, 270.

18 Although, as is discussed below some fixed penalty systems have been introduced to achieve more principled aims.

19 Australian Law Reform Commission, *Sentencing,* Report 44 (1987) 29; New South Wales Law Reform Commission, *Sentencing,* Discussion Paper No 33 (1996) 258.

20 There are 28 different 'serious' felonies (including burglary) and 17 'violent' felonies. 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.

21 Three strikes laws have now been implemented in over 20 states in the US: see K McMurry, 'Three-strikes Laws Providing More Show Than Go' (1997) *Trial* 12.

22 See 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 *Crime and Delinquency* 457.

1 *Perverse Verdicts and More Guilty Pleas*

Two factors that led the Australian Law Reform Commission to reject fixed penalties were that they tend to encourage technical defences and invite perverse verdicts.[23] These views were adopted by the New South Wales Law Reform Commission in its report a decade later.[24] Although neither of these bodies invoked any empirical data supporting these contentions, it does appear that there is some basis for their concerns. Research evidence regarding trial rates in the United States Federal Jurisdiction shows that, in response to the severe Federal Sentencing Guidelines, 'nearly 30 per cent of those convicted of offenses bearing mandatory minimums were convicted at trial, a rate two and a half times the overall trial rate for federal criminal defendants'.[25] There is also evidence that juries in England in the eighteenth century would refuse to convict offenders who were 'guilty' of offences carrying a mandatory death penalty.[26]

More trials and incongruous jury verdicts are no doubt undesirable, but they are not unavoidable side effects of fixed sentences. The only reason that offenders may be disposed to more strenuously resist offences which carry mandatory sanctions and juries may try harder to acquit accused charged with such offences is that the stakes are high — and indeed too high. If fixed penalties were set at more moderate levels, the motivation for both of these side effects would dissipate.[27]

2 *Evasion of Fixed Penalties and Shift in Discretion*

Another objection to fixed penalties is that they lead to surreptitious avoidance tactics by criminal justice officials. There is evidence that in jurisdictions where harsh fixed penalties apply, police, prosecutors and judges devise innovative ways to avoid the operation of such laws.[28] For example, United States prosecutors regularly circumvent the application of severe mandatory minimum sentences prescribed by the Federal Sentencing Guidelines by charging offenders with different, but roughly similar, offences which are not subject to mandatory penalties.[29] When offences which carry mandatory penalties are charged, judges

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23 Australian Law Reform Commission, above n 19, 29. See New South Wales Law Reform Commission, above n 19, 258.

24 See New South Wales Law Reform Commission, ibid.

25 Tonry, above n 9, 150.

26 Ibid 142–4.

27 The evidence certainly favours such a view. Where fixed penalties are not unduly severe there is no research or empirical evidence to support such matters. For example, there is nothing to suggest that the mandatory minimum penalties for drink driving which exist in most Australian jurisdictions have resulted in an increased level of not guilty pleas.

28 Tonry, above n 9, 147, 150.

29 Ibid.

may side step the mandatory minimums by techniques such as refusing to find facts (such as the use of a firearm) which would trigger their operation. On occasion, courts may simply ignore the applicable penalties on the assumption that neither of the parties will appeal the sentence.[30] There is also strong evidence that prosecutors use mandatory provisions in order to exert pressure on the accused to plead guilty.[31] As a result, there is a significant shift in discretion from judges to prosecutors.[32]

Again, these problems amount to a rehash of the more fundamental objection that some fixed penalties are too tough. If the legislature does not prescribe excessive penalties, prosecutors could not use the threat of mandatory penalties as a weapon to coerce guilty pleas. It is unlikely that criminal justice officials would seek to circumvent the operation of such laws — there would simply be no reason to do so.

3 *Fixing the Problem of Harsh Penalties*

If a fixed penalty system is founded on a coherent rationale and proportionate penalties are set, the contrast between experience in the United States Federal System and in the state of Minnesota shows that all of the above problems (and others) can be avoided. The Federal Sentencing Guidelines were implemented without a primary rationale.[33] The only discernible policy was to get tough on criminals. This it has done, but in a manner where the costs clearly outweigh the benefits. In addition to the problems discussed above, there is little evidence that the guidelines have led to increased uniformity in sentencing (due to the complexity of the guidelines and avoidance techniques by criminal justice officials),[34] and the Federal prison population has exploded since the introduction of the guidelines.[35] Not surprisingly then, the system has proved largely unworkable and has been

30 US Sentencing Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts of Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* (1991); I Nagel and S Schulhofer, 'A Tale of Three Cities: An Empirical Study of Charging and Plea Bargaining Practices Under the Federal Sentencing Guidelines' (1992) 66 *Southern California Law Review* 501; M Tonry, above n 8, 272. See also Victorian Sentencing Committee Report, *Sentencing* (Victorian Attorney General's Department, 1989) 170–1.

31 Tonry, above n 9, 150–1.

32 Ibid. See also K A Knapp, 'Discretion in Sentencing', in I Potas (ed), Sentencing in Australia 95; M Adams, 'Launch of UNSW Law Journal Forum' (1999) 22 *University of New South Wales Law Journal* 257, 259; R Hogg, 'Mandatory Sentencing Law and the Symbolic Politics of Law and Order' (1999) 22 *University of New South Wales Law Journal* 262, 266.

33 For example, see A Ashworth, above n 3, 232–3; A N Doob, above n 16.

34 See Tonry, above n 9, 150–2.

35 A N Doob, above n 16, 239–9. This may not be viewed as a failing of the system, if the accepted objective is to get tough on crime.

labelled the 'most controversial and reviled sentencing reform initiative in United States history'.[36]

A starkly different picture emerges in relation to the Minnesota system which is built on the core principles of proportionality and restraint in the use of imprisonment; including a shift towards the use of imprisonment only in the more serious crimes — primarily, crimes against the person.[37] Although the principle of proportionality is not rigorously applied, due to the undue weight given to prior convictions,[38] the grid system has on the whole operated successfully.[39] Following an extensive evaluation of the system, Frase states that:

> The Minnesota Sentencing guidelines have, with varying degrees of success, achieved all of the principal goals of this reform. More violent offenders, and fewer property offenders, were sent to prison (although these were not as dramatic as [the drafters of the guidelines] intended). Sentencing has become more uniform and racial disparities have reduced.[40]

4 *The Principle of Proportionality*

Thus the criticism that fixed penalties are too tough and lead to undesirable side effects can be answered if more 'lenient' fixed penalties are set. However, setting lower penalties *simply* in order to avoid the undesirable consequences flowing from harsh fixed penalties is not appropriate. The harm caused to the community by letting criminals off too lightly may outweigh any benefits flowing from improvements in the efficiency and consistency of the sentencing system. 'Softer' penalties should only be fixed if they are justifiable on the basis of more general criteria.

This is clearly the case. The concept of leniency is relative, and thus far it has been used by way of contrast to fixed penalty regimes which have been criticised for their harshness. In order for sanctions to be lenient compared to these systems they would merely need to be proportionate to the severity of the offence. If the question is how courts can match the severity of the punishment to the seriousness of the crime, the answer is obvious. The principle of proportionality is widely accepted by

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36 M Tonry, 'Judges and Sentencing Policy - The American Experience', in C Munro and M Wasik (eds), *Sentencing, Judicial Discretion and Training* (1992) 139.

37 A von Hirsch, above n 15, 152.

38 See my comments in M Bagaric, 'Double Punishment and Punishing Character — The Unfairness of Prior Convictions' (2000) 19 *Criminal Justice Ethics* 10.

39 For example, see A Ashworth, above n 3, 231–3.

40 R S Frase, above n 15, 196. Minnesota has a significantly lower prison rate than the United States as a whole, see R S Frase, above n 15, 174.

judges and (most) philosophers as the principal consideration in setting penalty levels.[41]

The Australian High Court decisions of *Veen (No1)*[42] and *Veen (No 2)*[43] declared that the principle of proportionality is the primary aim of sentencing.[44] In many other jurisdictions the principle of proportionality is rated equally highly. For example, the White Paper forming the basis of the *Criminal Justice Act* 1991 (UK) declared that the aim of the reforms was to introduce a 'legislative framework for sentencing, based on the seriousness of the offence and just deserts'.[45]

In the philosophical domain, the cornerstone of many modern day retributive theories is that the punishment should fit the crime. Andrew von Hirsch, who is largely responsible for the revival (and now dominance) of the retributive theory of punishment (under the banner of just deserts), asserts that:

> Sentences according to [the just deserts] theory are to be proportionate in their severity to the gravity of the criminal's conduct. ... In such a system, imprisonment, because of its severity, is visited only upon those convicted of serious felonies. For non-serious crimes, penalties less than severe imprisonment are to be used.[46]

Despite the natural association between proportionality and retributivism, it has been asserted that a utilitarian theory of punishment is not only consistent with the principle of proportionality, but indeed best underpins the principle.[47] Disproportionate sentences risk bringing the entire criminal justice system into disrepute because such sentences offend the fundamental principle of justice, that privileges and obligations ought to be distributed roughly in accordance with the degree of merit or blame attributable to each individual. Violations of this principle lead to antipathy towards institutions or practices that condone such outcomes.

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41 This is the case whether one adopts a retributive or utilitarian theory of punishment; see further below.

42 (1979) 143 CLR 458.

43 (1988) 164 CLR 465.

44 Similar sentiments were expressed more recently in *Ryan v The Queen* [2001] HCA 21 (Unreported, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 3 May 2001).

45 Great Britain, Home Office, White Paper: *Criminal Justice and Protecting the Public* (1990) [2.3]. For judicial endorsement of the principle in the United Kingdom, see *Skidmore* (1983) 5 Cr App R (S) 17; *Moylan* [1970] 1 QB 143. Ultimately, however, the Act did not expressly endorse a just deserts rationale: see Ashworth, above n 3.

46 A Hirsch, *Past or Future Crimes* (1985) 10. See also J L Anderson, 'Reciprocity as a Justification for Retributivism' (1997) *Criminal Justice Ethics* 13.

47 See my comments in M Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12 *Current Issues in Criminal Justice* 142.

> 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.[48]

Indeed it is felt that one of the main reasons for the success[49] of Finland's criminal justice system is the emphasis placed on the principle of proportionality: 'principles of proportionality (and perceived procedural fairness) are key factors that influence the willingness of the people to conform to the law'.[50] A legal system that condones excessively harsh or excessively lenient sentences risks losing 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, thereby leading 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.

It follows — at least prima facie — that fixed penalties should be set at levels which are proportionate to the objective seriousness of the offences. In a utilitarian ethic the principle of proportionality, like all principles, is not absolute and can be trumped by other considerations if this would maximise happiness. Thus there may yet be a case for the imposition of severe fixed penalties.

5 *Justifications for Departure from Proportionate Sentences*

There are two main reasons advanced in favour of disproportionate punishments: incapacitation and general deterrence. It has been argued that the imposition of harsh penalties will reduce the crime rate by confining offenders who are likely to offend again and dissuading would-be offenders from offending in the first place. While this argument is logically valid, it is empirically flawed.[51]

Incapacitation does not work, because we are unable to distinguish with any degree of confidence between offenders who will re-offend and those who will not. Studies

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48 C Harding and R W Ireland, *Punishment: Rule, Rhetoric and Practice* (1989) 205.

49 Where success is measured in terms of a low crime rate and low prison numbers. For the relevant data, see T Lappi-Seppala, 'Regulating the Prison Population: Experiences from a Long-Term Policy in Finland' (Paper delivered at the *Back to Beyond Prisons Symposium,* Canada, 1998): <http://www.csc.scc.ca/text/forum/bprisons/english/fine.htm>.

50 Ibid.

51 The failure of criminal sentencing to attain the objectives of incapacitation, marginal deterrence (as opposed to general deterrence), (and specific deterrence and rehabilitation) is discussed at length in M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21.

have shown that in predicting dangerousness, psychiatrists are wrong approximately 70 per cent of the time.[52] Despite some initial optimism, there is also a low success rate using predictive techniques which draw on such supposed risk factors such as employment history and the age at which a person first starts offending.[53]

Deterrence theory has been shown to be only partly right. General deterrence works in the sense that there is a general connection between the existence of *a* criminal sanction and the crime rate. Natural social experiments concerning the effects of police strikes (and the like) reveal that in the absence of the threat of criminal punishment a far greater number of people would commit criminal offences.[54] However, studies have failed to establish the validity of marginal deterrence — the claim that there is a link between *higher* penalties and the crime rate.[55] Thus deterrence theory justifies the existence of some form of criminal sanctions, but not higher sanctions.

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52 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 *Toledo Law Review* 241.

53 P Greenwood claimed that it was possible to identify high risk re-offenders among 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* (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, and C Visher, *Criminal Careers and 'Career Criminals'* (1986); A von Hirsch, 'Selective Incapacitation: Some Doubts' in von Hirsch and A Ashworth (eds), *Principled Sentencing* (1998) 121.

54 For discussion regarding the widespread civil disobedience which occurred following the police strike in Melbourne in 1923, see K L Milte and T A Weber, *Police in Australia* (1977) 287–292. Similar civil disobedience followed the police strike in Liverpool in 1919 and the internment of the Danish police force in 1944. A Ashworth, in 'Deterrence' in von Hirsch and Ashworth, above n 3, 44–51 refers to the Liverpool strike, and the Danish experience is discussed in N Walker, *Sentencing* (1985) 85.

55 See National Academy of Sciences, *Panel on Understanding and Control of Violent Behaviour*, (eds) A J Reiss and J Roth (1993) 6–7, 293–4; D Nagin, 'Criminal Deterrence Research at the Outset of the Twenty-First Century' (1988) 23 *Crime and Justice* 1; A von Hirsch, et al, *Criminal Deterrence and Sentence Severity* (1999). The results of much of the evidence regarding the concept of marginal deterrence are summarised in Bagaric, above n 51.

It follows that if fixed penalties are set for criminal offences, they should not be set at a harsh or draconian level. The penalties should be set at levels which are commensurate to the objective seriousness of the offences.[56] This being so, all of the above objections to fixed penalties can be met.

B *Inability to Accommodate Sentencing Variables*

The other main criticism of fixed penalties is that they are not sufficiently flexible to accommodate the full ambit of relevant sentencing variables, and as a result different cases are not treated differently. This violates what Tonry believes is the paramount objective of sentencing: fairness. Fixed sentences, he believes, do satisfy one aspect of the fairness equation; treating like cases alike. He suggests, however, that they are unable to adequately deal with the other requirement: treating different cases differently.[57]

1 *A More Sophisticated Fixed Penalty System*

One way to address this criticism is to increase the number of variables that are considered relevant to the determination of the standard penalty. Fixed penalty systems can be as crude or as complex, in terms of the number of variables which are taken into account, as is thought appropriate. At its simplest, a standard penalty — say a fee of $1000 — is set for all offences of a particular type, such as drink driving, and there is no variation or allowance made for the offender's personal circumstances (such as prior criminal history) or the seriousness of the particular offence compared to other offences of that type.

A more sophisticated system would be sensitive to at least some aspects of both the personal circumstances of the offender and the relative seriousness of the offence compared to other offences of that type. An example of such a system is the Minnesota grid system.[58] The vertical axis of the grid lists ten different severity

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56 The features of proportionality are discussed below.

57 M Tonry, above n 8, 272. In a similar vein, the New South Wales Law Reform Commission rejected fixed penalties partly because it believed they provide limited opportunity for addressing the subjective features of the offender or the offence, hence leading to injustice: New South Wales Law Reform Commission, *Sentencing,* Discussion Paper 33 (1996) 257.

58 In the US, over twenty other states also utilise sentencing grids. For an outline of the essential features of the respective systems, see R Frase, 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report', in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (1995) 171. There are no grid sentencing systems in operation in the United Kingdom or Australia. However, in Western Australia a bill (the *Sentencing Legislation Amendment and Repeal Bill 1998* (WA)) which provided the framework for a grid system was introduced. For a discussion of this, see N Morgan, 'Accountability, Transparency,

levels of offences in descending order of severity. The horizontal axis provides a seven level criminal history score, which reflects the offender's criminal record. The presumptive sentence is the sentence which appears in the cell of the grid at the intersection of the offence score and offender score. Where the sentence is one of imprisonment the sentence is not expressed precisely, but rather within a small range to allow for the operation of aggravating or mitigating circumstances — apart from the offender's prior criminal history.

Obviously, even more complex systems could be constructed. For example, using the Minnesota model as a base, the presumptive sentence could be reduced by, say one third, where the offender pleads guilty. A practical example of a more sophisticated fixed penalty system is the United States Federal guidelines.[59] Like the Minnesota guidelines, the Federal guidelines also utilise a sentencing grid. On one axis, there are 43 offence levels (as opposed to 10 in Minnesota) and on the other there are six criminal history categories. For each type of offence the guidelines stipulate a 'base level' penalty. The sensitivity of the system is greatly increased by the fact that there are then adjustments which can increase or decrease the penalty level.[60] The types of considerations which will result in an increased penalty include abuse of a position of trust, or targeting a vulnerable victim or a law enforcement officer. The base penalty is reduced where, for example, the offender's role in the offence is minor or the offender is clearly remorseful. A consideration of all of these factors leads to the appropriate cell in the sentencing grid, where the penalty is stipulated within a relatively narrow range.

While theoretically there is no end to the range of variables which could be included in the mix, pragmatism suggests the fewer variables the better, to avoid compromising the main advantages of a fixed penalty system, its simplicity and efficiency.[61] Another governing consideration in designing a fixed penalty system is that the variables adopted should be as readily ascertainable as possible. Considerations such as the offender's criminal history, the level of injury caused, and the value of the items stolen are suitable in this regard, but the time and resources spent in determining subjective considerations such as whether the offender is remorseful may cut too deeply across the simplicity and efficiency of the system.[62] Thus while the unfairness criticism can to some extent be offset by

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and Justice: Do We Need a Sentencing Matrix?' (2000) 28 *University of Western Australia Law Review* 259.

59 These were introduced by the *Sentencing Reform Act 1984*, and commenced operation in 1987.

60 For detailed discussion of these, see A N Doob, above n 16.

61 For example, see some of the criticisms outlined earlier regarding the Federal Sentencing Guidelines.

62 As a general rule, considerations relating to the seriousness of the offence are easier to determine than factors involving the personal circumstances of the offender.

increasing the number of factors that go to setting the fixed penalty, this is at best only part of the answer.

2 *A More Fundamental Approach — Identifying Genuine Sentencing Considerations*

A more whole-hearted response involves challenging the relevance of many of the factors which are now assumed to be an integral part of the sentencing inquiry. If there are only a small number of considerations that are properly relevant to the sentencing calculus, a fixed penalty system becomes far more tenable.

To ascertain which considerations are properly relevant to the determination of how much to punish, we need to go back to the rationale for punishing in the first place. I have argued that the only justification for punishment is the common good.[63] The negative consequences of punishment, consisting essentially of the pain experienced by offenders and the distress that this may cause to their friends or relatives, are outweighed by the benefits stemming from the imposition of criminal sanctions. Traditional utilitarian punishment theory stipulates that the positive effects of punishment come in three different forms: incapacitation, rehabilitation and deterrence (specific and general). However, as has been discussed above, there is insufficient evidence to support the efficacy of punishment to achieve the goals of marginal general deterrence or incapacitation. The same applies in relation to specific deterrence. The available evidence supports the view that the recidivism rate of offenders does not vary significantly regardless of the form of punishment or treatment to which they are subjected.[64] Rehabilitation is also a flawed rationale. There are no rehabilitative techniques which have been shown to have far-reaching success.[65] Even more telling is the fact that the goals of punishment and rehabilitation may be internally inconsistent: the rehabilitative techniques which seem to work best are more akin to social service measures (such as cognitive-behavourial programs which focus on the needs of offenders),[66] than practices designed to punish offenders.[67]

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63 M Bagaric, above n 6.

64 The Panel on Research on Deterrent and Incapacitative Effects, 'Incapacitation' in A Blumstein, J Cohen, and J Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Report by the Panel on Deterrent and Incapacitative Effects) (1978) 66.

65 A von Hirsch and L Maher, 'Should Penal Rehabilitation be Revived' in A von Hirsch and A Ashworth (eds), above n 4, 26, 27.

66 For a discussion of the features of these programs and some promising results from them, see K Howells and A Day, '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.

67 See M Bagaric, above n 51.

The only verifiable good arising from punishment is that it deters a great many people from committing crime. It follows that sentencing practices and rules aimed at securing other objectives should be discarded. We should forget about punishing offenders for the purposes of rehabilitation, specific deterrence and incapacitation. Accordingly, all sentencing considerations which are primarily directed towards assessing the need and relevance of such objectives should be disregarded.

On this basis, many considerations which are currently thought to be relevant to sentencing become redundant. The most obvious of these is previous criminal record. The courts normally place enormous weight on an offender's previous history as being relevant to specific deterrence, the prospects of rehabilitation and the need for incapacitation.[68] Given that these are all flawed sentencing rationales, the prior convictions factor falls along with them.

Many will be alarmed at the thought of ditching prior convictions as a sentencing consideration — it currently assumes about as much importance in the sentencing calculus as the seriousness of the offence. However, one response might be to ask: 'what is wrong with saying to offenders, OK you get the light stick this time; but next time its going to be different — I promise'.[69] The most basic problem with such a response is that it is reflexive, not reasoned. Sentencing is, or at least ought to be, a purposive practice — it is done with some ends in mind. In evaluating any existing or proposed sentencing rule or practice the critical question is whether it is capable of promoting the objectives of a properly developed sentencing system. To justify a sentencing practice or rule one must (i) state the sentencing aim(s) that is being invoked; and (ii) show how the practice or rule will assist in promoting the aim(s).

There is enormous controversy about the appropriate objectives of sentencing and still more about how they can be fulfilled. But progress will only be made in the sentencing domain once commentators clarify the particular objectives that they are advocating and demonstrate how a certain practice will fulfil the relevant objective(s). Thus, there is a need for commentators to 'come clean' and express the unstated premises underlying their sentiments concerning sentencing practices and proposed reforms. Until this is done, we will continue to punish offenders on the basis of what 'feels' right, as opposed to what 'is' right.

In relation to the narrower point of why it is wrong to punish recidivists more severely, there are several reasons that can be advanced to rebut the above counter. First, there is simply no evidence that any verifiable good consequences come from punishing recidivists more harshly — there is no sentencing objective that will be

68 For example, see *Veen (No 2)* (1988) 164 CLR 477.

69 I thank the referee for this point.

advanced by such a practice.[70] In particular, there is no evidence to show that the 'threat of a bigger whack next time around' will act as an effective specific deterrent — the recidivism rate of offenders does not vary significantly, regardless of the form of punishment or treatment to which they are subjected.[71] On a more theoretical level, punishing recidivists more severely is repugnant because it violates the proscription against punishing twice for the one offence and involves punishing people for their character rather than their acts. In a system governed by the rule of law it is unacceptable to invoke such an arbitrary and nebulous notion as character to provide a criterion for criminal punishment.[72]

There are numerous other sentencing considerations which also fall by the wayside. Some of them, like remorse, are no less entrenched than prior criminal history.[73] Rather than going through each of the assumed relevant sentencing variables and picking them off incrementally, it is far quicker to approach the issue from the other end; positively stating the factors which are properly relevant to the sentencing calculus.

3 *Interlude – Sentencing Considerations Already Irrelevant to Most Offences*

Before doing so, a brief interlude. The contention that age-old sentencing vestiges such as previous convictions and remorse are irrelevant to the sentencing calculus may seem so revisionary as to be implausible. But a more lateral consideration of current practice reveals that this is in keeping with the way in which most matters are already treated. What is being proposed is not a revolution, but a call for uniformity.

In the United Kingdom, United States and Australia there is a growing trend towards the disposition of criminal matters by way of 'on-the-spot' fines.[74] This involves serving a notice on the offender which sets a fixed penalty, normally in the form of a monetary fee. Payment of the fee within the prescribed time expiates the

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70 See M Bagaric, 'Double Punishment and Punishing Character — The Unfairness of Prior Convictions' (2000) 19 *Criminal Justice Ethics* 10.

71 See M Tonry, *Sentencing Matters* (1996) 102.

72 Ibid.

73 Remorse is also often expressly referred to as a relevant sentencing consideration: for example, see *Sentencing Act 1991* (Vic); *Crimes Act 1914* (Cth) s 16A(2)(f); *Penalties and Sentences Act 1992* (Qld) s 9(4)(i). A remorseful offender is supposedly in less need of specific deterrence and rehabilitation and less likely to engage in criminal conduct again, thereby diminishing the need for incapacitation. But given that none of these are appropriate objectives of sentencing, the inquiry into remorse is superfluous.

74 For a comprehensive discussion regarding the use of on-the-spot fines, see R Fox, *Criminal Justice on the Spot* (1995). In some United States jurisdictions on-the-spot infractions are treated as civil infractions (Fox, 18–20).

offence and effectively finalises the matter. Notably, the penalty that is imposed, in all but a few instances,[75] is identical for all offenders. Considerations such an offender's criminal history or whether they regret the incident are irrelevant to the amount of punishment. Disposition of criminal offences in this way is so widespread that in Victoria, for example, over 85 per cent of all criminal offences are dealt with 'on-the-spot'.[76]

'On-the-spot' treatment is mainly reserved for minor offences,[77] and is largely motivated by expedience, due to the cost involved in prosecuting matters via traditional methods. However, the important point is that for the vast majority of criminal offences, the amount of punishment is determined solely by the objective features of the offence. Considerations personal to the offender are totally irrelevant. This is so despite the considerable scope for differentiated treatment of offenders who are typically dealt with on-the-spot. For example, in many Western countries motorists detected with a blood alcohol content beyond a certain limit (in Victoria the level is 0.1 per cent)[78] face a mandatory loss of licence. It could be argued that a 40 year old career taxi driver with three children who is the sole bread winner detected for drink driving should be treated differently to the 25 year old who exceeds the blood alcohol limit by the same amount, but who has no dependants, works from home and uses the car only to get around on weekends. Despite this, the legislature (and apparently the community) have accepted that matters extraneous to the seriousness of the offence are irrelevant to the question of how much to punish.[79]

The increasing use of on-the-spot penalties has not resulted in adverse side-effects (such as an increase in crime) and at the theoretical level, has occurred without significant adverse comment. Arguably, this demonstrates implicit rejection of the view that fairness in sentencing requires evaluation and detailed consideration of an almost endless array of variables.

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75 In some cases offenders with a prior criminal history are dealt with more severely. For example, the United Kingdom and Victoria have a penalty point system for traffic offenders — when they accumulate 12 points a licence cancellation may follow: Fox, ibid; Ashworth, above n 3, 154.

76 M Bagaric, 'Instant Justice: The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot' (1998) 24 *Monash University Law Review* 231.

77 For discussion of more serious offences which can be the subject of on-the-spot fines, see ibid.

78 See *Road Safety Act 1966* (Vic), ss 49–50.

79 Although in South Australia, disqualified drivers can appeal against the disqualification: see *Motor Vehicles Act 1959* (SA) 98BF.

III OUTLINE OF A FIXED PENALTY REGIME

I now consider the essential features of a fixed penalty system. The starting point is to determine which factors are properly relevant to sentencing. This requires clarity concerning what justifies the practice of state imposed punishment. As we saw earlier, criminal punishment is justified because it deters many people from engaging in criminal conduct. Although there is a connection between criminal sanctions and crime rate, there is no link between increased penalties and crime rate. Thus the objective of general deterrence provides no justification for increasing the severity of penalties beyond proportionate levels. The level at which criminal sanctions should be set is governed by the principle of proportionality. This has two components; the harm caused by the offence and the offender's level of culpability.[80]

On the face of it, culpability may seem to have no role in the determination of offence seriousness — especially in the context of a utilitarian theory of punishment, which must always yield to consequences as the ultimate consideration. However, culpability assumes an indirect relevance in the proportionality calculus. There is a very close connection between our intentions and actions (we are normally successful in implementing our intentions), and as a general observation it is undeniable that more unhappiness is caused by intentionally harmful acts than unintentional harmful conduct. Hence, even though when viewed in isolation an unintentional wrong can cause just as much misery as one committed intentionally, it is deliberately harmful behaviour that we as a community fear most and must meet with a sterner response. Accordingly, although personal culpability is not intrinsically relevant to offence seriousness it assumes a derivative importance because of the immense unhappiness caused by deliberately harmful conduct.

Considerations which do not affect either the level of harm caused by the offence or offender's level of culpability are irrelevant to sentencing. This makes for a small list of relevant factors. Not only is it small, but each of the factors can be determined quite easily from the objective circumstances pertaining to the offence. This makes it possible to develop a fixed penalty system that is not only consistent, but also fair.

A *Presumptive or Mandatory?*

There remains the difficult question of whether fixed penalties should be mandatory or presumptive. Human foresight has its limits and, accordingly, a mandatory system, no matter how well designed, will at times lead to unfairness. However, the danger with making the guidelines presumptive, and incorporating a clause along

80 M Bagaric, above n 47.

the lines that the fixed penalty must be imposed unless 'exceptional' or 'special' circumstances exist, is that this leaves the door ajar for the splendour of a fixed penalty regime to be readily diminished, as more and more supposedly rare circumstances are discovered.[81]

In my view, a compromise is the best solution to this dilemma. Where the fixed penalty does not involve a term of imprisonment it should be mandatory.[82] No doubt this will at times mean that offenders will be dealt with too severely, but this is not too high a price, given that the nature of the sanction involved (for example, a fine or loss of licence) is not inherently harsh. The costs in the form of unfitting sanctions[83] are likely to be outweighed by the advantages stemming from a more efficient sentencing process, one which will avoid the time consuming and expensive exercise of uncovering minutiae relating to the offender and the offence.

However, where the fixed penalty involves a period of incarceration (however short), the penalty should only be presumptive. It is one matter to fine a person or take away their privilege to drive, but a far greater evil to deprive the person of their freedom. Imprisonment is the most oppressive measure that the state (in our system of law) utilises against its citizens. It is fitting in making decisions concerning the appropriateness or the length of a prison term, that some concession should be made for human foresight.

The above model merely spells out some essential characteristics of a wide-ranging fixed penalty system. Given that this paper is primarily concerned with the threshold issue of the desirability of a fixed penalty system, the precise mechanics of such a system are somewhat peripheral to the purpose at hand. But for the sake of completeness, I will now discuss briefly what I believe ought to be some of the finer features of such a scheme.

1 *The Level at which Fixed Penalties Should be Set*

The main issue in any fixed system is the level at which the penalties should be set. As was discussed earlier, the harshness of the penalty should be proportionate to gravity of the offence. There are numerous methods that could be employed to determine the harshness of the penalty, the seriousness of the crime or the

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81 This was a point noted by the New South Wales Law Reform Commission, above n 19.

82 I have also argued that offences which do not carry the risk of imprisonment should be dealt with on the spot: M Bagaric, 'Instant Justice: The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot' (1998) 24 *Monash University Law Review* 231.

83 This assumes that if a fixed penalty approach is adopted that it will result in an increased number of unfitting sanctions. However, given the unprincipled state of current sentencing practice this is unlikely.

punishment that fits the crime. These include everyday common sense judgements, public opinion research, surveys of professional opinion, and current sentencing tariffs.[84] In my view, the seriousness of the offence and the severity of the sanction should both be determined by reference to the one common variable: happiness — the level of pain caused by the sanction, should, as closely as possible, match the unhappiness occasioned by the offence.[85] This requires ranking important human interests, such as physical integrity and property rights, and then mapping them against other interests, such as freedom, which are commonly targeted by criminal sanctions. Critics will say this is impossible — happiness is simply too subjective. There are three responses I would make to this.

First, any variable is infinitely better than none at all — and this is the position in which we currently find ourselves. According to what criterion do we equate the pain and humiliation experienced by a rape victim with approximately four to eight years imprisonment? What justifies the link between a bank robbery and two to five years imprisonment? The answer is nothing. Secondly, promising research suggests that we are not all that different with respect to the things that make us happy. The results of a recent study, following 11 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 in instances where people believe they are being paid more than they expect). In keeping with this, it was revealed that the purchase of luxury items, such as expensive clothes and oil paintings, makes us no happier. 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 happy (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.[86] In light of such findings, it is not surprising that some commentators have already managed to go some way towards developing a coherent and plausible ranking of human interests.[87] Finally, even if one is unimpressed by the idea of

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84 RG Fox and A Freiberg, 'Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties' (1990) 23 *Australia and New Zealand Journal of Criminology* 165, 166. More recently, see also Parliament of Victoria, A Freiberg, *Sentencing Review*, Discussion Paper (August 2001) 81–3.

85 See further Bagaric, above n 47.

86 The study was conducted by Professor M Argyle, and is due to be published shortly. One quirky result was that people who watch television soaps were happier than those who did not, but watching lots of soaps was counter-productive to happiness. See T Reid, 'Some Research That May Bring You a Degree of Happiness' *The Age*, 6 October 1998, p10.

87 Most notably, see A von Hirsch and N Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1 —

invoking human happiness as the barometer of the harm caused by an offence and therefore penalty severity, my general point is not lost. So long as *a* deliberative systematic process is used, pre-determined penalties could be set for all criminal offences.

An important aspect of any fixed penalty regime is that it does not simply adopt pre-existing offence classifications. Due to the breadth of definition of most criminal offences,[88] offences should be fragmented in order to distinguish more and less serious instances of the same offence and treat them accordingly. Thus, for example, a household burglary should carry a greater penalty than a burglary of commercial premises and a theft of property valued, say, in excess of $1,000 should be treated more harshly than a theft of a lesser amount.

In essence, the fixed penalty system should be structured along the lines of the Federal Sentencing Guidelines in the United States to the extent that offences are compartmentalised into more and less serious instances of each type of offence. However, two significant departures should be made from the US model.

(i) The level at which the penalties are set should be significantly reduced, given that the weight of empirical evidence does not justify disproportionate penalties to deter or incapacitate. Von Hirsch's suggestion that incarceration should be limited to serious offences (such as violent crimes and serious white collar crimes) and that the duration of confinement for these offences should not be longer than three years, except for homicide where the duration should be up to five years,[89] appears to be far closer to the mark than the draconian penalties that are employed in many parts of the United States. As a corollary, few (if any) property offences should result in imprisonment. In passing, it is noteworthy that the opposition to the three strikes laws in the Northern Territory and Western Australia, has less to do with their mandatory nature than their disproportionate severity.

(ii) Considerations relating to the personal circumstances of the offender should be ignored. This includes the offender's previous criminal history.

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although the criterion used was not happiness. However, I have argued that a similar ranking system can be formulated on the basis of happiness: see Bagaric, above n 47.

88 The breadth of criminal offences was one of the reasons that Report of the Canadian Sentencing Commission: *Sentencing Reform: A Canadian Approach* (1987) 186, rejected the notion of mandatory penalties.

89 A von Hirsch, 'Doing Justice: The Choice of Punishments' (1976) ch 16, *Censure and Sanctions* (Clarendon Press, Oxford New York) 43.

B Other Objections To Fixed Penalties

In light of the above discussion, it is opportune to briefly consider some further objections which may be levelled at the proposed scheme.

1 *Fixed Penalties Do Not Work*

Fixed penalties have been heavily criticised on the basis that they do not work. As we have seen, there is no evidence that they act as effective deterrents to crime. But this criticism has no force where the aim is not necessarily to reduce crime, but rather to have a fairer and more consistent system of sentencing.

2 *Whether Fixed Penalties Violate Judicial Independence*

Another criticism of fixed penalties is that they violate the independence of the judiciary.

> That persons are deprived of their liberty only in a public process by an officer of the state conducting himself or herself independently and able to bring an objective and disinterested judgment to bear on the facts free of political pressure seems ... to be the very essence of the rule of law.[90]

There are two possible parts to this argument. The first is the assertion that it is unlawful for Parliament to prescribe fixed penalties. This has been flatly rejected by the courts. In *Palling v Corfield*, Barwick CJ stated that while it is usual and desirable for the courts to be vested with a discretion regarding the punishment to be imposed:

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty.[91]

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90 M Adams, 'Launch of UNSW Law Journal Forum' (1999) 22 *University of New South Wales Law Journal* 257, 259.

91 (1970) 123 CLR 52, 58. See also *Re S (A Child)* (1995) 12 WAR 392, where the Supreme Court of Western Australia upheld the *Crimes (Serious and Repeat Offenders) Sentencing Act 1992* (WA); and *Wynbyne v Marshall* (1997) 117 NTR 11, where the Northern Territory Supreme Court upheld the validity of the Northern Territory three strikes laws discussed above. A special leave application to the High Court was rejected on the basis of insufficient prospects of success (High Court of Australia, 21 May 1998). I have argued that (following *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51) one limit to emerge from the separation of powers doctrine is that parliament

The second is the normative argument that Parliament should not be permitted to tamper with the sentencing discretion of the court because this violates judicial independence. This, however, exaggerates the parameters of judicial independence. As Ashworth points out, the principle of judicial independence protects the impartiality of judges and their freedom from influence and pressure; it does not confer supremacy on sentencing matters.[92] Tonry, who labels as 'silly' the view that it is an unjustifiable incursion into the independence of the judiciary to limit judicial sentencing discretion,[93] makes the further point that if judicial independence required sentencing supremacy, that requirement would apply equally to impugn legislative codification of other bodies of law that evolved under the common law, such as torts and contract.

3 *Guideline Judgments Better than Mandatory Penalties?*

It could be argued that guideline judgments are a far more measured and appropriate means than mandatory penalties of achieving consistency and fairness in sentencing. While guideline judgments are a positive step forward in terms of achieving greater consistency in sentencing, they are ultimately unlikely to improve sentencing practice. First, they are merely hortatory in their effect. This point was not missed by the New South Wales Court of Criminal Appeal in *Henry*:

> 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.[94]

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cannot pass retrospective criminal laws: see M Bagaric and T Lakic, 'Victorian Sentencing Turns Retrospective: The Constitutional Validity of Retrospective Criminal Legislation After *Kable*' (1999) 23 *Criminal Law Journal* 145. In the United States and United Kingdom there is no question that the legislature can mandate a fixed penalty.

92 Ashworth, above n 3, 45–7; Ashworth, 'Changes in Sentencing Law' [1997] *Criminal Law Review* 1.

93 M Tonry, above n 9, 173. See also A Ashworth, above n 3, 104.

94 See *R v Henry* (1999) 46 NSWLR 346, Spigelman CJ, Wood CJ at CL, Newman, Hulme and Simpson JJ, 12 May 1999) [29] (Spigelman CJ). See also CJ Spigelman, 'Sentencing Guideline Judgments' (1999) 73 *Australian Law Journal* 876, 877. The same applies in relation to guideline judgments in the United Kingdom, see *De Havilland* (1983) 5 Cr App R (S) 109, 114; *Johnson* (1994) 15 Cr App R (S) 827, 830. For a discussion on the use of guideline judgments, see D Spears, 'Structuring Discretion: Sentencing in the *Jurisic* Age' (1999) 22(1) *University of New South Wales Law Journal* 295.

Secondly, guideline judgments do not involve the courts taking a top down approach to sentencing. Rather than focusing on why we should punish offenders in the first place and developing suitable sentencing considerations (and penalties) to meet such objectives, typically, guideline decisions simply adopt (possibly flawed) existing sentencing practices and try to make them as coherent as possible.[95]
Thirdly, there is persuasive empirical evidence contradicting the claim that guideline judgments serve to make sentencing more consistent and predictable. Guideline judgments have been a feature of the sentencing landscape in the United Kingdom for several decades. A relatively recent study has found enormous disparities in sentencing outcomes among courts which are meant to be applying the same sentencing laws and practices. A report by the Prison Reform Trust[96] in 1997 found a fundamental lack of consistency in Magistrates' courts decisions throughout England and Wales. The report showed that the chances of an offender going to prison depend far more upon the court where they are sentenced than upon the crime of which they are charged.

The report shows that markedly different sentencing cultures have developed in towns in close proximity to each other. For example, defendants in Sunderland are twice as likely to be imprisoned for driving while disqualified and theft, and are more than five times more likely to be imprisoned for car related thefts than defendants in nearby Newcastle.

In Brighton the imprisonment rate (13 per cent) was more than double that in Southampton (six per cent). There are also large discrepancies in relation to the length of sentence passed. The average in Southampton (4.4 months) was nearly 40 per cent higher than in Brighton (3.2 months).

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95 *R v Henry,* ibid 357 (Spigelman CJ). See also CJ Spigelman, 'Sentencing Guideline Judgments' (1999) 73 *Australian Law Journal* 876, 881 makes a distinction between top down guideline judgments, where the court establishes a guideline of a prescriptive character, and 'bottom up' guidelines, where the court attempts to derive a range or tariff for actual sentences imposed by lower courts. In both cases the appellate court is influenced heavily by existing sentencing ranges (for example, this is evident from the reliance on sentencing statistics in *R v Henry* [1999] NSWCCA 111 (Unreported, Spigelman CJ, Wood CJ at CL, Newman, Hulme and Simpson JJ, 12 May 1999) [110]) and sentencing objectives and rationales are rarely considered in depth.

96 *R v Henry*, ibid 368–70 (Spigelman CJ), and *Sentencing: A Geographical Lottery* (1997) <http://www.penlex.org.uk/pages/prtlotte.html>. The report used figures from the Criminal Statistics England and Wales, Supplementary Tables 1995, Vol 4, Proceedings in Magistrates' Courts – data for individual Petty Sessional Divisions, HMSO, November 1996.

Similar discrepancies were found in the four Yorkshire towns of Leeds, Bradford, Huddersfield and Wakefield. The incarceration rate for defendants in Bradford and Huddersfield was nearly twice that in Leeds and Wakefield. The average prison sentence in Bradford was 2.2 months, compared to 3.4 months in Leeds.

Magistrates in Wolverhampton were more than 70 per cent more likely to imprison offenders convicted of burglary offences, nearly 40 per cent more likely to imprison disqualified drivers and twice as likely to impose prison sentences for actual bodily harm, than magistrates in Coventry. In North Wales, the incarceration rate in Merthyr Tydfil was more than three times that in Llanelli.

Overall, offenders in London were 25 per cent more likely to receive a prison sentence than nationwide. However, this overall figure is very crude and glosses over significant disparities across the 43 courts in London which are as pronounced as in other regions of the country. For example, defendants in Croydon were half as likely to be imprisoned as defendants in Sutton and defendants in Brent were twice as likely to be imprisoned as defendants in Ealing and Haringey.

4 *What if the Utilitarian Theory of Punishment is Not Adopted*

The utilitarian theory of punishment has been used as the backdrop to the proposed fixed penalty system, not because of its inherent amenability to such a system, but because in my view it is the soundest justificatory theory of punishment. It should be noted, however, that the retributive theory of punishment also provides a foundation for the imposition of standard penalties. Indeed some would argue that it is even more compatible with such a system.

As we have seen, the key feature of a justifiable fixed penalty system is that the penalty should be commensurate with the seriousness of the offence, and there is a sound basis for disregarding factors personal to the offender in the sentencing calculus. As pointed out previously, due to the wide diversity of retributive theories, it is questionable whether there is a single unifying principle they share. However, a key hallmark of most retributive theories is that the justification of punishment does not depend on the possible attainment of consequential goals. Retributive theories are backward looking — punishing criminals is itself just. Considerations relating to why an offender commits an offence are at best remotely relevant, the emphasis being on the commission of the crime itself. Moreover, the cornerstone of many retributive theories, especially von Hirsch's just deserts theory, is that the amount of punishment should be in proportion to the severity of the offence. It is not surprising then that the Minnesota matrix is founded on a retributive ideal.

It follows that the arguments made in favour of fixed penalties cannot be side-stepped by simply rejecting the utilitarian theory. Fixed penalties present as a desirable sentencing reform, in the context of most top down approaches to

sentencing which search for a coherent justification of punishment and critically evaluate the proper relevance of existing sentencing considerations.

IV CONCLUSION

Two central objections have been made against fixed penalties. The first is that they are too severe. The second is that they lead to unfairness because they cannot incorporate all of the relevant sentencing variables. Upon adopting a utilitarian ethic as the primary rationale for punishment, both of these problems are readily circumvented.

There is no utilitarian justification for disproportionate punishment, hence penalties should not be set which exceed the seriousness of the offence. Further, there is no foundation for most of the sentencing considerations which are commonly regarded as sacrosanct. Upon disregarding the irrelevant considerations, the ones remaining can readily be incorporated into a fixed penalty system. Accordingly, there is no merit in the claim that fixed penalties lead to unfairness.

This leaves the way open for a coherent sentencing law system in which criminal justice is governed by pre-determined rules and principles, as opposed to the mysterious idiosyncratic intuitions of sentencers.