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# A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals

MIRKO BAGARIC†

## INTRODUCTION

Sentencing involves the intentional infliction of pain.<sup>1</sup> It is the legal domain where the state acts in its most forceful manner against individuals. It is important that the sentencing system is fair and effective. Unfortunately, this is not the case. In the sentencing arena there is a gulf between knowledge and practice. Sentencing is a politicized domain, and hence, law and practice are often detached from knowledge. This is evident in four key areas of sentencing policy and practice.

Most broadly, it relates to the ongoing uncertainty regarding which theory of punishment should underpin the system. Retributivism has replaced utilitarianism as the most popular contemporary theory of punishment;<sup>2</sup> however, the change has not heavily impacted legislative and judicial developments and certainly traditional utilitarian *aims* continue to heavily influence sentencing practice and policy. Secondly, a lack of empirical and scientific certainty remains regarding the efficacy of state-imposed punishment to achieve key (utilitarian) goals of sentencing in the form of incapacitation, general deterrence, specific deterrence, and rehabilitation.<sup>3</sup> Moreover, to the extent that convergence exists regarding the efficacy of sentencing to attain these

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1. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158-59 (J.H. Burns & H.L.A. Hart eds., 1970); C.L. TEN, CRIME GUILT, AND PUNISHMENT 2 (1987).

2. See Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 131-33 (2000) [hereinafter Bagaric & Amarasekara, *The Errors of Retributivism*].

3. See *infra* Part VI.

objectives, this knowledge generally has not been applied in a manner that shapes sentencing law and practice.

Thirdly, while there is a wide-ranging consensus that the principle of proportionality<sup>4</sup> should be the dominant criterion determining penalty nature and length, the content of the principle remains unstable and nebulous. In its most basic and influential form, proportionalism is the theory that the punishment should fit the crime.<sup>5</sup> However, the vagaries associated with the content of the principle are so pronounced that it is verging on doctrinal and intellectual fiction to suggest that an objective answer can be given to common sentencing dilemmas, such as how many years' imprisonment is equivalent to the pain felt by an assault or rape victim, or whether a burglar should be dealt with by way of imprisonment or fine, or the appropriate sanction for a drug trafficker. There is no demonstrable violation of proportionalism if a mugger, robber, or drug trafficker is sentenced to either ten months or ten years imprisonment.

Finally, the least developed and settled area of sentencing law relates to the considerations that operate to increase or decrease a penalty beyond the standard penalty for the relevant offense type. These factors are known as aggravating and mitigating considerations.

There are no standard definitions of what constitute aggravating or mitigating factors. However, as a matter of principle, an aggravating factor is a consideration that is not contained within the elements of the offense, which makes the offense worse or otherwise justifies a heavier penalty. A mitigating factor is a consideration that justifies a more lenient penalty.<sup>6</sup>

Common aggravating factors include prior criminal history and breach of trust. Widely accepted mitigating factors include cooperating with authorities and having a

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4. *See infra* Part VII (discussing that proportionality, in essence, is the view that the harshness of the punishment should match the severity of the seriousness of the crime).

5. *See infra* Part VII.

6. *Marker v The Queen* [2002] WASCA 282, ¶ 22 (Court of Criminal Appeal (Austl.)).

minor role in the crime. However, there is not even a loose consensus regarding the operation of most mitigating and aggravating considerations, despite the fact that the presence of an aggravating or mitigating consideration can have a profound impact on a penalty. For example, prior criminality can add ten years or more to the length of a prison term for some offenses in the United States.<sup>7</sup>

Most factors that serve to increase or decrease penalties have emerged in an ad hoc manner, not underpinned by a clear objective, and, normally, the weight and emphasis placed on them in determining penalty is unclear. This area of law is “under-researched”<sup>8</sup> and in need of extensive analysis. Current jurisprudence is so shallow and unsettled that some factors can be either mitigatory or aggravating.<sup>9</sup> Factors that tend to increase or decrease penalty have evolved impressionistically; so much so that Andrew Ashworth has commented that “this is a sphere in which discretion has led largely to anarchy.”<sup>10</sup> He adds that “[t]he role of aggravating and mitigating factors is . . . left largely . . . unbridled and untamed, a tendency that undermines the rationale of sentencing guidelines in providing common starting points and shared standards.”<sup>11</sup>

This Article attempts to address this gap in the literature and law and develops a coherent doctrinal rationale for aggravating and mitigating sentencing considerations<sup>12</sup> in

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7. See *infra* Part II.

8. JULIAN V. ROBERTS, *Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing*, in MITIGATION AND AGGRAVATION AT SENTENCING 1 (Julian V. Roberts ed., 2011).

9. *Id.* at 3.

10. Andrew Ashworth, *Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing*, in MITIGATION AND AGGRAVATION AT SENTENCING 17 (Julian V. Roberts ed., 2011).

11. *Id.* at 17 (citing Andrew Ashworth, *Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems*, 30-31 (1987) (unpublished manuscript) (Worcester College, Oxford), and Claire Corbett, *Magistrates' and Court Clerks' Sentencing Behaviour: An Experimental Study*, in THE PSYCHOLOGY OF SENTENCING: APPROACHES TO CONSISTENCY AND DISPARITY (Donald C. Pennington & Sally Llyod-Bostock eds., 1987)).

12. Allan Mason, *The Search for Principles of Mitigation: Integrating Cultural Demands*, in MITIGATION AND AGGRAVATION AT SENTENCING 40-41 (Julian V.

order to harmonize and justify this area of the body of law. It is a particularly important issue to resolve at this juncture. Recently the Federal Sentencing Commission in the United States has recognized the open-ended nature of aggravating and mitigating considerations<sup>13</sup> and hence there is now greater scope to influence the development of this area of the law.

By way of background and context, this Article focuses on existing sentencing law in the United States and Australia. Those jurisdictions are considered because they have contrasting approaches to mitigating and aggravating factors. With only a hint of exaggeration, in Australia nearly every consideration potentially aggravates or mitigates (there are several hundred such considerations);<sup>14</sup> while, in the United States, very few factors aggravate or mitigate (in most jurisdictions there are only two to three dozen factors approximately that increase or decrease a penalty).<sup>15</sup> The contrast between the richness and the dearth of aggravating and mitigating considerations in Australia and the United States provides a fertile and illuminating context to this continually evolving but jurisprudentially vacuous area of law. The conclusions reached in this Article are transferrable to all sentencing systems.

In the next Part of the Article, I provide an overview of the existing sentencing regimes in the United States and Australia with a focus on aggravating and mitigating considerations. In Part III, I argue that the approaches in both systems are logically, empirically, and jurisprudentially

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Roberts ed., 2011) (arguing that it is not tenable to find principles that define mitigating factors adequately because of the complex range of factors that impact on sentencing—which go beyond normative principles and include cultural factors).

13. See Amy Baron-Evans & Jennifer Niles Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines' Prohibitions and Restrictions on Mitigating Factors*, LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION (Defender Servs. Office Training Div., Washington, D.C.), Apr. 15, 2011, at i-iii.

14. Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349, 371 n.113 (2014) [hereinafter Bagaric, *From Arbitrariness to Coherency in Sentencing*].

15. See *infra* Part II.A.

flawed. The rest of the Article develops a unifying theory to cohere this area of law.

I conclude that considerations should only aggravate or mitigate a sentence if they: (i) advance an objective of sentencing (which itself is justifiable); (ii) are necessary to give effect to the proportionality principle; (iii) are justified by reference to broader objectives of the criminal justice system; or (iv) are supported by reference to the requirements of broader (concrete) principles of justice.

The application of this framework results in a clear demarcation of a small number of aggravating and mitigating considerations. It is recommended that legislative changes should be made to incorporate these considerations into the sentencing system, while, at the same time, abolishing all other aggravating and mitigating factors. Further research may increase or reduce the number of aggravating or mitigating factors. Accordingly, the list set out in this Article is neither set in stone nor conclusive. However, the rationale and methodology advanced in this Article set out a coherent procedure for assessing the validity of putative sentencing considerations.

Before dealing with the core issue in this Article, I elaborate on the importance and limits of the current discussion to the sentencing landscape as a whole.

#### I. THE IMPORTANCE OF GETTING AGGRAVATION AND MITIGATION “RIGHT”

Sentencing is a purposeful endeavor, and to operate fairly and efficiently it must be grounded in coherent and sound normative theory and have clear and attainable objectives, which are empirically validated. As noted above, broadly, there are four different levels of inquiry that exist in the sentencing realm. A model sentencing system can only be maintained if there is strategic clarity and alignment in all four areas. The broadest level of inquiry concerns the justification for state-imposed punishment.

There are two main theories of punishment. Utilitarianism is the view that punishment is inherently bad due to the pain it causes the wrongdoer but is ultimately justified because the pain is outweighed by the good

consequences stemming from it.<sup>16</sup> The main competing theory, and the one which enjoys the most contemporary support, is retributivism.<sup>17</sup> Potentially, the choice of the theory of punishment that underpins sentencing is important because it logically guides the sentencing objectives that should be pursued. Utilitarianism promotes the pursuit of deterrence, incapacitation, and rehabilitation, while retributivism is synonymous with “just deserts” and gives priority to proportionalism as the key sentencing objective.<sup>18</sup>

The next main level of inquiry relates to the concrete objectives that should be pursued by the sentencing system. Typically, the main objectives pursued are general deterrence, specific deterrence, incapacitation, and rehabilitation. The soundness of pursuing those goals, however, is logically contingent on the efficacy of criminal sanctions to achieve them. That is an empirical question.

The third level of inquiry attempts to match the seriousness of the crime with the harshness of the punishment. That is the proportionality requirement. The importance of proportionalism is impacted potentially by the theory of punishment chosen. Further, it can also be impacted by the pursuit of sentencing objectives. For example, attempts to achieve the goals of general deterrence or incapacitation could result in harsher penalties being imposed than are commensurate with the seriousness of the offenses.

In addition, and this is the fourth level of inquiry, it is necessary to differentiate when penalties should be adjusted from those that are deemed to be proportionate to the gravity of the crime (and which incorporate adjustments for any relevant sentencing objectives). It is at this point that aggravating and mitigating factors come into play. Aggravating factors operate to increase the severity of

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16. See Bagaric & Amarasekara, *The Errors of Retributivism*, *supra* note 2, at 130-31.

17. See TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 211 (rev. ed. 1984); David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 L. & PHIL. 507, 507 (1997).

18. See Bagaric & Amarasekara, *The Errors of Retributivism*, *supra* note 2, at 131 nn. 23-24.

punishment, while the effect of mitigating factors is to reduce the harshness of the appropriate sanction.<sup>19</sup> Thus, logically, aggravating and mitigating factors are the fourth and last tier of inquiry into an appropriate sentence.

However, bottom tier in this case does not equate to the least important. In fact, aggravating and mitigating factors are often the most influential and important considerations regarding the choice and length of penalty. The most powerful factor influencing penalty severity in many jurisdictions, apart from offense type, is the offender's prior criminal history.<sup>20</sup> Further, the most significant mitigating factor in some jurisdictions is cooperation with law enforcement officials which can reduce penalty length by up to fifty percent.<sup>21</sup> Thus, the discussion in this Article is relevant to all core aspects of sentencing law and practice, and the conclusions reached apply irrespective of which over-arching theory of punishment is applied.

The next Part of the Article discusses the existing law relating to aggravating and mitigating considerations. I then explain why the choice of the theory of the punishment which justifies sentencing practice does not, in fact, influence the validity of potential aggravating and mitigating factors, and why all sentencing objectives except incapacitation should not inform the identification of such considerations. I then establish an over-arching theory of aggravation and mitigation and set out the considerations that, on the basis of current learning, should properly reduce or increase a penalty.

## II. THE CURRENT STATE OF THE LAW

This Part of the Article focuses on current aggravating and mitigating considerations. I first consider the relevant law in the United States followed by the law in Australia. The analysis provides the context and backdrop to demonstrate the need for fundamental reform in this area.

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19. *See id.*

20. *See infra* Part II.

21. *See infra* Part IX.



A. *Aggravation and Mitigation in the United States*

Each state of the United States has its own sentencing system, and there is considerable divergence across the respective regimes.<sup>22</sup> The federal jurisdiction also has a discrete sentencing system, which is important because of the large number of offenders sentenced under that system and the considerable doctrinal influence it has at the state level.<sup>23</sup> Despite the sentencing variations across the United States, several key commonalities and themes exist.

The key distinguishing aspect of the United States sentencing system compared to that of Australia (and most other sentencing systems in the world) is the wide-ranging use of fixed or presumptive minimum penalties that exist, in some form, in all U.S. states.<sup>24</sup> As noted by Berman and Bibas, “[o]ver the last half-century, sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of rules.”<sup>25</sup>

None of these policies and practices emanates from a clear theoretical foundation, but rather stem from “back-of-an-envelope calculations and collective intuitive judgments.”<sup>26</sup> Despite this, there is a convergence of

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22. Sentencing (and, more generally, the criminal law) in the United States is mainly the province of states. See *United States v. Morrison*, 529 U.S. 598, 610-11 (2000). For more extensive analysis of the operation of sentencing in the United States and Australia, see Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 14.

23. See Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. OF CRIM. L. 37, 40-41 (2006).

24. See CTR. FOR LAW AND GLOBAL JUSTICE, UNIV. OF S.F. SCH. OF LAW, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 46-47 (2012) (noting that 137 of 168 surveyed countries had some form of minimum penalties but none of the others was as wide-ranging or severe as in the United States).

25. Berman & Bibas, *supra* note 23, at 40.

26. MICHAEL TONRY, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, in PREVIOUS CONVICTIONS AT SENTENCING 93 (Julian V. Roberts & Andrew von Hirsch eds., 2010). For criticism of the guidelines, see Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92-93 (2005); Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 173 (2010).

approach: “Modern sentencing reforms have repudiated rehabilitation as a dominant goal of sentencing. Many structured sentencing laws, including many guideline sentencing systems and severe mandatory minimum sentences, are designed principally to deter, incapacitate, and punish offenders.”<sup>27</sup>

Most prescribed penalties are set out in sentencing grids that typically use criminal history score<sup>28</sup> and offense seriousness to calculate an appropriate penalty. The grids have a heavy emphasis on incapacitation. Perhaps the greatest indication of the harshness of U.S. sentencing is the rapid increase in imprisonment numbers over the past twenty years.<sup>29</sup> The U.S. now imprisons more of its citizens than any other country; thus, its rate of imprisonment is also the highest on earth.<sup>30</sup> Presently, more than 1.5 million Americans are in state or federal prison facilities.<sup>31</sup> There are approximately 200,000 federal prisoners and 1.3 million state prisoners.<sup>32</sup> If one includes the 744,500 inmates in local jails, the total incarceration number is 2,240,600, which equates to over 700 people per 100,000 adult population.<sup>33</sup> This number peaked in 2009, after increasing more than 400% in three decades.<sup>34</sup> The prison population has dropped

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27. Berman & Bibas, *supra* note 23, at 48.

28. This is based mainly on the number, seriousness, and age of the prior convictions.

29. See BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991-2012, at 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

30. INT’L CTR. FOR PRISON STUDIES, WORLD PRISON BRIEF, <http://www.prisonstudies.org/world-prison-brief> (last visited Oct. 8, 2014).

31. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012, *supra* note 29.

32. See BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 10 (2013), available at <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.

33. *Id.* at 3.

34. On December 31, 1978, the number of prisoners was 294,000 and on December 31, 2009, it was 1,555,600. *Id.*; see also BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012, *supra* note 29, at 1.

for the past three years, but the reduction in overall terms has been small—42,600 inmates (i.e., less than 3%).<sup>35</sup>

Most developed countries have rates of imprisonment around five times less than the United States.<sup>36</sup> In terms of prisoners per 100,000 adult population, the rate in Canada is 118, Australia 143, and the United Kingdom 149.<sup>37</sup> The United States' imprisonment rate is approximately ten times that of Scandinavian countries.<sup>38</sup>

However, at least formally, incapacitation does not overwhelm the sentencing objectives in the United States. As noted by Traum, even in the federal system in 2008 only approximately 28% of offenders are convicted under a statute imposing a mandatory minimum.<sup>39</sup>

The most extensively analyzed and influential fixed penalty laws are those set out in the United States Sentencing Commission Guidelines Manual (the "Federal Sentencing Guidelines").<sup>40</sup> The Guidelines provide a useful context to the current range of considerations that can increase a penalty in the United States. They are important not only because they have had a considerable impact on state sentencing law but also because they stipulate a greater number of aggravating considerations than many state sentencing regimes.<sup>41</sup>

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35. See BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012, *supra* note 29, at 1. On December 31, 2012, there were, in fact, 1,574,000 prisoners.

36. See INT'L CTR. FOR PRISON STUDIES, *supra* note 30.

37. *Id.*

38. Per 100,000 adult population, the rate of imprisonment in Norway is 72, Finland 58, and Sweden 60. *Id.*

39. Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 451 (2012).

40. See U.S. SENTENCING COMM'N, UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL 394 (2013), available at [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013\\_Guidelines\\_Manual\\_Full.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf) [hereinafter U.S. SENTENCING COMM'N]; see also Baron-Evans & Coffin, *supra* note 13, at iii, for analysis and criticism of the Guidelines.

41. For an overview of aggravating and mitigating factors in state legislative schemes, see Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1128-29 (2008). She notes that, like the Federal Scheme, state non-capital schemes generally have more aggravating than

In the Federal Sentencing Guideline system the range for an offense is determined by reference to two main considerations. The first is the offense level, which entails an assessment of the seriousness of the offense (this often includes a number of variables and, depending on the offense, can include the nature of any injury caused or monetary amount involved).<sup>42</sup> The second is the offender's criminal history score, which is based on the seriousness of the past offenses and the time that has elapsed since the prior offending.<sup>43</sup> These two calculations then operate to prescribe a sentencing range.<sup>44</sup> Thus, for example, an offense at level 20, for an offender with a criminal history score of 4, 5, or 6, has a range of forty-one to fifty-one months; an offense at level 36, for an offender with a criminal history score of 4, 5, or 6, has a range of 235 to 293 months.<sup>45</sup>

There are forty-three different levels, with the penalties increasing as the levels increase.<sup>46</sup> An increase of six levels approximately doubles the sentence.<sup>47</sup> Where the range includes a term of imprisonment, it is relatively narrow in that it cannot exceed the minimum penalty by more than the

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mitigating considerations. *Id.* There are seventeen states that set out both aggravating and mitigating factors and, of these, twelve have more aggravating considerations; two states have an equal number; three have more mitigating considerations; and six states only identify aggravating considerations. *Id.* The states with the highest number of combined aggravating considerations are: Alaska (51); Illinois (49); North Carolina (44); Tennessee (35); Washington (34); California (32); Louisiana (31); and Florida (29). States with low numbers are: Hawaii (16); Idaho (15); Kansas (13); and Ohio (12). *Id.* at 1128-32. The fact that there are generally more aggravating than mitigating considerations is consistent with public opinion, which suggests that aggravating factors bear more heavily on crime severity than mitigating considerations. See Julian V. Roberts & Mike Hough, *Exploring Public Attitudes to Sentencing Factors in England and Wales*, in MITIGATION AND AGGRAVATION AT SENTENCING 168, 183 (Julian V. Roberts ed., 2011).

42. See U.S. SENTENCING COMM'N, *supra* note 40, at 394-96.

43. *Id.* at 396.

44. *Id.*

45. *Id.* at 395-96.

46. *Id.* at 395.

47. *Id.* at 11.

greater of six months or twenty-five percent.<sup>48</sup> Proportionality is pursued “through a system that imposes appropriately different sentences for criminal conduct of differing severity.”<sup>49</sup> The sentencing ranges were not developed in abstract or against a purely theoretical model. They were influenced by an analysis of over 40,000 sentences that had been imposed.<sup>50</sup>

These Guidelines are no longer mandatory, following the United States Supreme Court decision in *United States v. Booker*.<sup>51</sup> The Guidelines are now advisory.<sup>52</sup> However,

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48. *Id.* at 2.

49. *Id.* at 3.

50. *See id.* at 11 (“The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied on pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented pre-sentence reports, the parole guidelines, and policy judgments.”).

51. 543 U.S. 220, 245 (2005). In *Booker*, the Supreme Court held that aspects of the guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial. *Id.*; *see also* *Pepper v. United States*, 131 S. Ct. 1229 (2011); *Greenlaw v. United States*, 554 U.S. 237, 265 (2008) (Alito, J., dissenting); *Irizarry v. United States*, 553 U.S. 708, 713 (2008); *Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007).

52. Consequently, District Courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. *See* 18 U.S.C. § 3553(a)(4)-(a)(5) (2012); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Gall*, 552 U.S. at 49 (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). *See Rita*, 551 U.S. at 338. The appellate court engages in a two-step process upon review:

[The appellate court] first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-

sentences within guideline ranges are still imposed in approximately sixty percent of cases.<sup>53</sup> Set penalties apply to most types of offenses, including drug, fraud, and immigration crime.

While criminal history score and offense severity are cardinal sentencing considerations, they do not exhaust all of the matters that influence the penalty. The considerations that impact a sentence are set out in 18 U.S.C. § 3553, which states:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE—The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

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discretion standard[,] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range.

*Gall*, 552 U.S. at 51.

53. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); see also Baron-Evans & Coffin, *supra* note 13. For a discussion regarding the potential of mitigating factors to have a greater role in federal sentencing, see William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in MITIGATION AND AGGRAVATION AT SENTENCING 247 (Julian V. Roberts ed., 2011).

(A) the applicable category of offense committed by the applicable category of defendant, as set forth in the guidelines— . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.<sup>54</sup>

As noted above, the Guideline range is heavily influenced by the offender's criminal history score.<sup>55</sup> The Guidelines also expressly set out over three dozen considerations that can affect the penalty and set out several considerations that should not have an impact on penalty.<sup>56</sup>

In order to determine a sufficient but not excessive sentence that is appropriate, the courts can factor in a number of mitigating and aggravating considerations. They come in two main forms. "Adjustments" are defined considerations that increase or decrease the penalty by a designated amount.<sup>57</sup> For example, a demonstration of remorse can result in a decreased penalty by up to two levels, which can increase to three levels if it is accompanied by an early guilty plea.<sup>58</sup> The main adjustments relate to the characteristics of the offender. As noted above, the prior

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54. 18 U.S.C. § 3553(a) (2012) (emphasis added). For a discussion of the operation of this provision, see Berry, *supra* note 53; Baron-Evans & Coffin, *supra* note 13.

55. U.S. SENTENCING COMM'N, *supra* note 40, at 388. Associated to this is that reliance on criminal activity for livelihood is also aggravating (§ 4B1.3). It is expressly stated that dismissed and uncharged conduct do not aggravate. *Id.* at 467.

56. For a historical overview of the development of aggravating and mitigating considerations in the Guidelines see Baron-Evans & Coffin, *supra* note 13, at 1-8.

57. These are set out in chapter 3 of the Guidelines. See U.S. SENTENCING COMM'N, *supra* note 40, at 336-68.

58. *Id.* § 3E1.1. However, § 5K2.0 (d)(4) provides that the court cannot depart from a guideline range as a result of "[t]he defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See § 6B1.2 (Standards for Acceptance of Plea Agreement)." *Id.*

criminal history of the offender can have a profound impact on the penalty. However, other than this consideration, most factors personal to the offender are intended to have only a relatively minor impact on penalty. To this end, the Guidelines provide:

Although the court must consider “the history and characteristics of the defendant” among other factors, see 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities, the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is *to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table*, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, see, 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), the guideline range, which reflects the defendant’s criminal conduct and the defendant’s criminal history, should continue to be “the starting point and the initial benchmark.” *Gall v. United States*, 552 U.S. 38, 49 (2007).<sup>59</sup>

The other main category of aggravating and mitigating considerations is known as a “departure.” If a departure is applicable, the court can more readily impose a sentence outside the applicable guideline range. Moreover, the Guidelines permit, in rare instances, considerations that are not set out in the Guidelines to justify departing from the guideline range.<sup>60</sup> This means the range of aggravating and mitigating considerations set out in the Guidelines is not exhaustive. Where a court departs from the applicable guideline range, it is required to state the reason for the departure.<sup>61</sup>

I first provide an overview of the main aggravating factors and then do the same in relation to the mitigating factors. Prior to doing so, it is pertinent to note that there has recently been a considered analysis of the operation of

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59. *Id.* ch. 5, pt. H, intro. comment (emphasis added).

60. *Id.* § 5K2.0(a)(B); *see also* *Pepper v. United States*, 131 S. Ct. 1229 (2011); *Gall v. United States*, 552 U.S. 38 (2007).

61. U.S. SENTENCING COMM’N, *supra* note 40, § 5K2.0(e).



mitigating and aggravating factors in the Guidelines.<sup>62</sup> However, this analysis is empirical and descriptive in that it collates data regarding the actual application of the considerations by the courts. This type of analysis is useful because it can expose failings in the law, for example, the courts not properly applying the Guidelines as intended. What is lacking is an attempt to inject coherency in the aggravating and mitigating system—which is the primary objective of this Article.

Apart from an offender's prior criminal history, the most wide-ranging aggravating factor is the offender's role in the offense. It is expressly stated that a sentence can be increased if the offender is an organizer or leader or manager of a criminal activity.<sup>63</sup>

The remaining aggravating factors can be divided into three broad categories. The first is the *manner in which the offense is committed*, which supposedly makes the crime worse. A crime is made more serious if it involves any of the following sixteen aspects:

- an abuse of a position of trust or use of special skill;<sup>64</sup>
- use of a minor to commit a crime;<sup>65</sup>
- the use of body armor in the course of drug trafficking crimes and crimes of violence;<sup>66</sup>
- terrorism;<sup>67</sup>
- a serious violation of human rights;<sup>68</sup>
- obstructing or impeding the administration of justice;<sup>69</sup>

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62. See Baron-Evans & Coffin, *supra* note 13.

63. U.S. SENTENCING COMM'N, *supra* note 40, § 3B1.1(a).

64. *Id.* § 3B1.3.

65. *Id.* § 3B1.4.

66. *Id.* § 3B1.5.

67. *Id.* § 3A1.4.

68. *Id.* § 3A1.5.

69. *Id.* § 3C1.1.

- reckless endangerment during flight;<sup>70</sup>
- committing an offense while on release;<sup>71</sup>
- false registration of a domain name;<sup>72</sup>
- extreme conduct (i.e., conduct that is unusually heinous, cruel, brutal, or degrading to the victim);<sup>73</sup>
- the use of weapons and dangerous instrumentalities;<sup>74</sup>
- the possession of a semi-automatic firearm in connection with a crime of violence or controlled substance offense;<sup>75</sup>
- being part of a violent street gang;<sup>76</sup>
- the crime was committed while the defendant wore an official, or counterfeit official, insignia or uniform;<sup>77</sup>
- abduction or unlawful restraint;<sup>78</sup> or
- the crime being committed to conceal another crime.<sup>79</sup>

There is no systematic attempt to explain the basis for these considerations. Some factors would seem to have a degree of intuitive appeal because they relate to conduct that is manifestly seriously damaging. However, the utility of many of the factors is unclear given that they relate to conduct that is a separate offense (e.g., terrorism, abduction, or the use of a firearm). In other cases it is unclear why the factor makes the offense worse; for example, registering a

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70. *Id.* § 3C1.2.

71. *Id.* § 3C1.3.

72. *Id.* § 3C1.4.

73. *Id.* § 5K2.8.

74. *Id.* § 5K2.6.

75. *Id.* § 5K2.17.

76. *Id.* § 5K2.18.

77. *Id.* § 5K2.24.

78. *Id.* § 5K2.4.

79. *Id.* § 5K2.9.

false domain would not seem to be especially heinous and, in some cases, the reference point of the consideration is curious. For example, in relation to the second aggravating factor—while it is tenable to argue that using a minor to commit a crime makes the crime worse—committing a crime against a minor is manifestly worse and consistency commands that the later consideration should also be included in the list.

There are four aggravating factors *relating to the victim*, namely where:

- the offense is motivated by hate;<sup>80</sup>
- the victim is vulnerable;<sup>81</sup>
- the victim is an official;<sup>82</sup> and
- the offense involved restraint of the victim.<sup>83</sup>

Once again, there is some intuitive appeal associated with these considerations, but that is where the appeal seems to end. It is not clear that a victim who is raped or assaulted at random is any less damaged than one who is targeted because of an attribute that prompts hatred by the offender. And, certainly from the community's point of view, apparently random crimes can be more disturbing than targeted offenses. Also, crimes against officials are undesirable but at least the victims have an institutional framework to support them. Hence, it is not clear that these offenses are worse than those against other members of the community.

The *outcome of the offense* can be aggravating. To this end, the Guidelines expressly provide that if any of the following six outcomes arise from an offense, an increase in penalty is justified (and, possibly, a departure from the presumptive range):

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80. *Id.* § 3A1.1(a).

81. *Id.* § 3A1.1(b)(1).

82. *Id.* § 3A1.2.

83. *Id.* § 3A1.3.

- death;<sup>84</sup>
- physical injury;<sup>85</sup>
- extreme psychological injury;<sup>86</sup>
- property damage or loss;<sup>87</sup>
- disruption of governmental function;<sup>88</sup> or
- endangerment of national security, public health, or safety.<sup>89</sup>

These harm-oriented aggravating circumstances are the least controversial. As we shall see, they are justified by reference to the principle of proportionality. While there are twenty-nine aggravating considerations set out in the Guidelines (including prior convictions and role in the offense), there are considerably fewer mitigating factors—in fact, only thirteen such factors exist. Partly the reason for this is that “mitigating and aggravating factors do not represent different sides of the same coin”.<sup>90</sup> Thus, for example, while a vulnerable victim increases the penalty, a robust and resilient victim does not reduce the sanction. The fact that there are more aggravating than mitigating factors is also consistent with the trend in other jurisdictions in the United States.<sup>91</sup>

The first mitigating category relates to the offender’s role in the offense. A minor role in the offense can result in a penalty reduction from two to four levels.<sup>92</sup> Several other considerations can mitigate because of the *circumstances of*

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84. *Id.* § 5K2.1.

85. *Id.* § 5K2.2.

86. *Id.* § 5K2.3.

87. *Id.* § 5K2.5.

88. *Id.* § 5K2.7.

89. *Id.* § 5K2.14.

90. Roberts & Hough, *supra* note 41, at 183.

91. Hessick, *supra* note 41, at 1128-29 (noting that, “of the seventeen systems that identify both aggravating and mitigating factors, twelve states identify more aggravating than mitigating factors; three states identify more mitigating than aggravating factors; and two states identify an equal number of aggravating and mitigating factors.”).

92. U.S. SENTENCING COMM’N, *supra* note 40, § 3B1.2.

*the offense*. In effect, these considerations relate to situations which are grounded in criminal defenses but are not so pronounced as to exculpate the offender. The considerations are:

- where the offender committed the crime to avoid a greater harm;<sup>93</sup>
- if the defendant committed the offense under serious coercion or duress;<sup>94</sup>
- if the crime was committed when the offender was experiencing reduced mental capacity;<sup>95</sup> and
- where the offender was provoked by the victim.<sup>96</sup>

As discussed in Part VII, there is doctrinal justification for most of these considerations but they need to be grounded in a coherent theory.

The other remaining mitigating factors can be divided into three categories. The first is the *offender's response to the charge*. Thus, the following considerations will reduce penalty:

- if the offender voluntarily discloses the offense, which was unlikely to be otherwise discovered;<sup>97</sup>
- if the offender provides substantial assistance to authorities;<sup>98</sup> and
- if the offender demonstrates remorse (which can result in a decrease of penalty by up to two levels, and can increase to three levels if it is accompanied by an early guilty plea).<sup>99</sup>

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93. *Id.* § 5K2.11.

94. *Id.* § 5K2.12. For a discussion of this consideration, see Baron-Evans & Coffin, *supra* note 13, at 164-67.

95. U.S. SENTENCING COMM'N, *supra* note 40, § 5K2.13. For a discussion of this consideration, see Baron-Evans & Coffin, *supra* note 13, at 164-74.

96. U.S. SENTENCING COMM'N, *supra* note 40, § 5K2.10.

97. *Id.* § 5K2.16.

98. *Id.* § 5K1.1. Thus, it can justify a departure from the guidelines. Refusal to assist authorities is not aggravating. *Id.* § 5K1.2.

99. *Id.* § 3E1.1. However, § 5K2.0(d)(4) provides that the court cannot depart from a guideline range as a result of

All of these considerations are widely endorsed. However, it is not apparent that remorse should reduce the penalty given that it is a reasonable minimum expectation of any citizen. This theme, as well as the appropriate reduction for assisting authorities and pleading guilty, is discussed at great length in Part IX of this Article.

Another category involves *matters personal to the offender*. The following factors can reduce a penalty:

- prior clean record, except in relation to offenses against children; and <sup>100</sup>
- military service.<sup>101</sup>

It is unclear why military service should be singled out as a mitigating consideration. While this is incontestably a desirable activity, it is not manifestly more virtuous than charity work or service as a nurse or other health professional.

There are a number of considerations that can mitigate *because of the impact of the sanction* on the offender. They are:

- age;<sup>102</sup>
- mental and emotional condition;<sup>103</sup> and/or
- physical condition.<sup>104</sup>

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[t]he defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court.

100. *Id.* § 5K2.20(a)-(b).

101. *Id.* § 5H1.11.

102. *Id.* § 5H1.1. For a discussion of this consideration factor being mitigatory, see Baron-Evans & Coffin, *supra* note 13, at 50-66.

103. U.S. SENTENCING COMM'N, *supra* note 40, § 5H1.3. For a discussion of this consideration see Baron-Evans & Coffin, *supra* note 13, at 70-84.

104. U.S. SENTENCING COMM'N, *supra* note 40, § 5H1.4. For a discussion of this consideration, see Baron-Evans & Coffin, *supra* note 13, at 84-106.

As discussed below, these factors are sound to the extent that they relate to the harshness with which the sanction impacts on the offender.

Factors in this category but expressly stipulated as *not* being mitigatory are:

- drug or alcohol dependence or abuse and gambling addiction;<sup>105</sup>
- employment record;<sup>106</sup>
- family ties and responsibilities;<sup>107</sup>
- race;<sup>108</sup>
- sex;<sup>109</sup>
- national origin;<sup>110</sup>
- creed;<sup>111</sup>
- religion;<sup>112</sup>
- socio-economic status;<sup>113</sup>
- civic, charitable, or public service; employment-related contributions;<sup>114</sup>

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105. U.S. SENTENCING COMM'N, *supra* note 40, § 5H1.4. For an argument in favor of these factors being mitigatory, see Baron-Evans & Coffin, *supra* note 13, at 95-102, 104-05.

106. U.S. SENTENCING COMM'N, *supra* note 40, § 5H1.5. For an argument in favor of these factors being mitigatory, see Baron-Evans & Coffin, *supra* note 13, at 106-09.

107. U.S. SENTENCING COMM'N, *supra* note 40, § 5H1.6. For an argument in favor of these factors being mitigatory, see Baron-Evans & Coffin, *supra* note 13, at 109-17.

108. U.S. SENTENCING COMM'N, *supra* note 40, § 5H1.10.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* For a discussion of this consideration, see Baron-Evans & Coffin, *supra* note 13, at 124-27

114. U.S. SENTENCING COMM'N, *supra* note 40, § 5H1.11. For a discussion of this consideration, see Baron-Evans & Coffin, *supra* note 13, at 127-39.

- record of prior good works;<sup>115</sup> and
- lack of guidance as a youth and similar circumstances.<sup>116</sup>

While the Guidelines stipulate that these factors should not reduce a penalty, post-*Booker* this is not an obligatory stipulation and, where relevant, judges can mitigate a penalty for these reasons.<sup>117</sup> As noted above, this list of departures is not exhaustive. The Guidelines expressly state: “The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.”<sup>118</sup>

Moreover, while in theory the express stipulation that these factors should not mitigate is, in principle, desirable for the purposes of clarity, the negation of several of these factors as being capable of reducing penalty is questionable. In particular, as is discussed in Parts VI to IX below, a sound case can be made for socio-economic status and family ties to mitigate.

#### B. *Aggravation and Mitigation in Australia*

In Australia, the situation is more expansive as far as the number of aggravating and mitigating considerations is concerned. Sentencing in each of the nine Australian jurisdictions (i.e., the six states, the Northern Territory, the Australian Capital Territory and the Federal jurisdiction) is governed by a combination of legislation and the common law. While sentencing law differs in each Australian jurisdiction, considerable convergence exists in key areas.

For the purposes of this Article, the important point regarding sentencing in Australia is that it is largely a

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115. U.S. SENTENCING COMM’N, *supra* note 40, § 5H1.11. For a discussion of this consideration, see Baron-Evans & Coffin, *supra* note 13, at 127-39.

116. U.S. SENTENCING COMM’N, *supra* note 40, § 5H1.12. For a discussion of this consideration, see Baron-Evans & Coffin, *supra* note 13, at 139-47.

117. *Rita v. United States*, 551 U.S. 338, 364-65 (2007) (Stevens, J. concurring).

118. U.S. SENTENCING COMM’N, *supra* note 40, § 1A1.4(b).



discretionary process, in which judges process potentially hundreds of aggravating and mitigating considerations.

In contrast to the United States, fixed penalties for serious offenses in Australia are rare.<sup>119</sup> However, the overarching methodology and conceptual approach that sentencing judges undertake in making sentencing decisions is the same in each jurisdiction. This approach is known as “instinctive synthesis.” The term originates from the forty year-old Full Court of the Supreme Court of Victoria decision of *R v Williscroft*.<sup>120</sup> Justices Adam and Crockett stated: “Now, ultimately every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.”<sup>121</sup>

The process of instinctive synthesis is a mechanism whereby sentencers make a decision regarding all the considerations relevant to sentencing and give due weight to each of them (and, in the process, incorporate considerations that incline to a heavier penalty and off-set against them factors that favor a lesser penalty), then set a precise penalty. The hallmark of this process is that it does not require (nor permit) judges to set out with any particularity<sup>122</sup> the weight (in mathematical terms) accorded to any particular consideration. A global judgment is made without recourse to a step-wise process that demarcates the precise considerations that influence the judgment. The general methodology for reaching sentencing decisions has been considered by the High Court of Australia on several occasions. The Court has consistently adopted the instinctive synthesis approach and rejected the alternative, which is normally referred to as the two-step approach, which involves setting an appropriate sentence commensurate with the severity of the offense and making allowances up and

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119. An example is people smuggling offenses. See, e.g., *Migration Act 1958* (Cth), ss 233A–233C (Austl.).

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

121. *Id.* at 300.

122. With minor exceptions discussed in Part IV below.

down in light of relevant aggravating and mitigating circumstances.<sup>123</sup>

The proportionality principle is adopted in all jurisdictions. In *Veen (No 1) v R*<sup>124</sup> and *Veen (No 2) v R*<sup>125</sup> the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection which, at various times, has also been declared as the most important aim of sentencing.<sup>126</sup>

Another important commonality in all Australian jurisdictions is that aggravating and mitigating factors operate relatively uniformly throughout the country, despite the different ways in which they are dealt with by statute. The considerations stem mainly from the common law and are continually evolving. There are between 200 and 300 such factors.<sup>127</sup> The large number of aggravating and mitigating factors is a key reason why it is not possible to predict with confidence the exact sentence that will be imposed in any particular case.<sup>128</sup> The unfettered discretionary nature of Australian sentencing calculus is similar to the largely uncontrolled sentencing process in parts of the United States approximately fifty years ago, which led Justice Marvel Frankel to describe the system as “lawless.”<sup>129</sup>

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123. See, e.g., *Barbaro v The Queen* [2014] HCA 2, 28 (Austl.).

124. *Veen v The Queen* (1979) 143 CLR 458, 467.

125. See generally *Veen v The Queen (No. 2)* (1988) 164 CLR 465 (discussing all factors properly considered to reach a proportionate sentence).

126. See, e.g., *Channon v The Queen* (1978) 33 FLR 433, 438.

127. See, e.g., Roger Douglas, *Sentencing*, in *GUILTY, YOUR WORSHIP: A STUDY OF VICTORIA'S MAGISTRATES' COURTS* 62 (1980), in a study of Victorian Magistrates' Courts, identified 292 relevant sentencing factors.

128. A similar regime exists in the United Kingdom. See generally Ashworth, *Re-evaluating the Justifications for Aggravation and Mitigating at Sentencing*, *supra* note 11, at 21-38.

129. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 48 (1972). For a critique of Frankel's impact, see Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 *BERKLEY J. CRIM. L.* 239, 254-57 (2009).

Like the situation in the United States, there is no established or accepted theory of what should constitute mitigating and aggravating consideration. Most of these factors are defined by the common law, and some legislative schemes set out a number of mitigating and aggravating considerations. The most expansive scheme to this end, is that in New South Wales pursuant to section 21A(2) of the *Crimes (Sentencing Procedure) Act 1999*.<sup>130</sup> The list here provides a useful comparison to those in the U.S. Federal Sentencing Guidelines.<sup>131</sup> Broadly, the considerations can be divided into the same categories as those discussed in the United States context.

I again consider aggravating factors first. The offender's prior criminality is, once again, an aggravating factor, and it is expressly stated that it is especially the case in relation to serious personal violence offenses.<sup>132</sup>

The first broad category of aggravation is the *manner in which the offense is committed*. A crime is made more serious if it involves any of the nineteen following aspects:

- the offense involved the actual or threatened use of violence;<sup>133</sup>
- the offense involved the actual or threatened use of a weapon;<sup>134</sup>
- the offense involved the actual or threatened use of explosives or a chemical or biological agent;<sup>135</sup>
- the offense was committed in company;<sup>136</sup>
- the offense was committed in the presence of a child under 18 years of age;<sup>137</sup>

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130. *Crimes (Sentencing Procedure) Act 1999*, (NSW) s 21A(2)(d) (Austl.).

131. U.S. SENTENCING COMM'N, *supra* note 40.

132. *Crimes (Sentencing Procedure) Act 1999*, *supra* note 130, s 21A(2)(d).

133. *Id.* s 21A(2)(b).

134. *Id.* s 21A(2)(c).

135. *Id.* s 21A(2)(ca).

136. *Id.* s 21A(2)(e).

137. *Id.* s 21A(2)(ea).

- the offense involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance;<sup>138</sup>
- the offense was committed in the home of the victim or any other person;<sup>139</sup>
- the offense involved gratuitous cruelty;<sup>140</sup>
- the offense was motivated by prejudicial hate;<sup>141</sup>
- the offense was committed without regard to public safety;<sup>142</sup>
- the offense involved a risk to national security;<sup>143</sup>
- the offense involved a grave risk of death to another person;<sup>144</sup>
- the offense was committed while the offender was on conditional liberty;<sup>145</sup>
- the offender abused a position of trust or authority in relation to the victim;<sup>146</sup>
- the offense involved multiple victims or a series of criminal acts;<sup>147</sup>
- the offense was committed for financial gain;<sup>148</sup>
- the offense was a traffic offense and was committed with a passenger under sixteen years of age;<sup>149</sup>

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138. *Id.* s 21A(2)(cb).

139. *Id.* s 21A(2)(eb).

140. *Id.* s 21A(2)(f).

141. *Id.* s 21A(2)(h).

142. *Id.* s 21A(2)(i).

143. *Id.* s 21A(2)(ia).

144. *Id.* s 21A(2)(ib).

145. *Id.* s 21A(2)(j).

146. *Id.* s 21A(2)(k).

147. *Id.* s 21A(2)(m).

148. *Id.* s 21A(2)(o).

149. *Id.* s 21A(2)(p).

- the offense was planned;<sup>150</sup> or
- the offense was committed in the course of organized criminal activity.<sup>151</sup>

There are two aggravating factors *relating to the victim*, namely:

- the victim was a public official;<sup>152</sup> and
- the victim was vulnerable.<sup>153</sup>

The *outcome of the offense* can also be aggravating;<sup>154</sup> however, no such considerations are set out in the legislation.

Unlike the situation in the United States, there are roughly the same number of mitigating considerations as aggravating factors in Australia. The first mitigating category relates to the *circumstances of the offense*. In effect, these considerations relate to situations which are grounded in criminal defenses but were not so extreme as to exculpate the offender. The considerations are:

- the offender was provoked by the victim;<sup>155</sup>
- the offender was acting under duress;<sup>156</sup> and
- the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability.<sup>157</sup>

The second mitigating category is the *offender's response to the charge*. Thus, the following considerations will reduce penalty:

- remorse shown by the offender;<sup>158</sup>

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150. *Id.* s 21A(2)(n).

151. *Id.*

152. *Id.* s 21A(2)(a).

153. *Id.* s 21A(2)(l).

154. MIRKO BAGARIC & RICHARD EDNEY, SENTENCING IN AUSTRALIA 231-36 (2013) [hereinafter BAGARIC & EDNEY, SENTENCING IN AUSTRALIA].

155. *Crimes (Sentencing Procedure) Act 1999* s 21A(3)(c).

156. *Id.* s 21A(3)(d).

157. *Id.* s 21A(3)(j).

158. *Id.* s 21A(3)(i).

- a plea of guilty;<sup>159</sup>
- meaningful pre-trial disclosure (which attenuates the duration of any trial);<sup>160</sup> and
- assistance to law enforcement authorities.<sup>161</sup>

Another category is *matters personal to the offender*. The following factors can reduce penalty:

- the offender does not have significant previous convictions;<sup>162</sup>
- the offender was a person of good character;<sup>163</sup>
- the offender is unlikely to re-offend;<sup>164</sup> or
- the offender has good prospects of rehabilitation.<sup>165</sup>

Unlike the United States Federal Sentencing Guidelines, there is greater alignment between aggravating and mitigating factors. In some cases, the absence of an aggravating factor is mitigating. Thus, mitigation is warranted where:

- the injury, emotional harm, loss, or damage caused by the offense was not substantial;<sup>166</sup> and
- the offense was not part of a planned or organized criminal activity.<sup>167</sup>

The factors, while relatively extensive, do not come close to exhausting the range of mitigating and aggravating considerations. Other mitigating factors include: voluntary cessation of offending;<sup>168</sup> voluntary disclosure of crime;<sup>169</sup>

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159. *Id.* s 21A(3)(k).

160. *Id.* s 21A(3)(l).

161. *Id.* s 21A(3)(m).

162. *Id.* s 21A(3)(e).

163. *Id.* s 21A(3)(f).

164. *Id.* s 21A(3)(g).

165. *Id.* s 21A(3)(h).

166. *Id.* s 21A(3)(a).

167. *Id.* s 21A(3)(b).

168. *R v Pickett* [2010] NSWCCA 273 (Austl.).

169. *DPC v The Queen* [2011] VSCA 395 (Austl.).

onerous prison conditions related to the personal factors of the offender (e.g., nature of the offense and mental condition);<sup>170</sup> poor health;<sup>171</sup> and public opprobrium directed towards the offender as a result of the offense.<sup>172</sup> Additional aggravating considerations are: being part of a gang;<sup>173</sup> committing a well-planned offense;<sup>174</sup> and committing a crime which is prevalent.<sup>175</sup>

Moreover, the list of aggravating and mitigating considerations in Australia is never closed. It is constantly developing as more are continually added to the list, and often there is a lack of clarity regarding the status of emerging considerations. A few examples illustrate the point. Offenders who are not Australian citizens risk deportation if they fail a “character test”, which occurs, among other circumstances, if a person is sentenced to imprisonment for a year or more.<sup>176</sup> Deportation is an additional burden that would be faced by the offender and hence, arguably, it should be mitigatory. That was the position taken in *Valayamkandathil v The Queen*;<sup>177</sup> *Guden v The Queen*<sup>178</sup> and *Director of Public Prosecutions v Yildirim*.<sup>179</sup> However, a different position was taken in *Ponniah v The Queen*.<sup>180</sup>

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170. *Tognolini v The Queen* [2012] (No. 2) VSCA 311 (Austl.); see also *R v Puc* [2008] VSCA 159 (Austl.); *Western Australia v O’Kane* [2011] WASCA 24.

171. *Dosen v The Queen* [2010] NSWCCA 283 (Austl.); *AWP v The Queen* [2012] VSCA 41 (Austl.).

172. *Ryan v The Queen* [2001] 206 CLR 267 (Austl.)

173. *R v Quin* [2009] NSWCCA 16 (Austl.).

174. *R v Yildiz* [2006] 160 A Crim R 218 (Austl.); *R v Douglas* [2004] 146 A Crim R 590 (Austl.).

175. *Braslin v Tasmania* [2010] TASCCA 1 (Austl.). For recent discussions about key mitigating factors, see BAGARIC & EDNEY, SENTENCING IN AUSTRALIA, *supra* note 154, at 273-75, 310-51.

176. *Migration Act* 1958 (Cth), s 501; JOHN VRACHNAS ET AL., MIGRATION AND REFUGEE LAW 160 (3d ed., 2012).

177. [2010] VSCA 260 [28] (Austl.).

178. [2010] VSCA 196 [29] (Austl.).

179. [2011] VSCA 219 (Austl.).

180. [2011] WASCA 105 [48] (Austl.).

In Victoria, it has been held that the consent of a child sex victim does not mitigate a penalty in relation to child sex cases.<sup>181</sup> A different approach is taken in Western Australia.<sup>182</sup>

In *Avdic v The Queen* the Victorian Court of Appeal held that an offender who was pregnant at the time of sentence with her first child was not entitled to a sentencing discount on account of the fact that she would be required to raise the child in the prison setting.<sup>183</sup> To this end, the Court simply stated:

The evidence on the plea was that she would be accommodated in a special unit for mothers of young children. I am not satisfied that the evidence before the sentencing judge demonstrated that her pregnancy would render imprisonment more burdensome than for other prisoners. This is not a case where the appellant will be separated from her child by reason of imprisonment.<sup>184</sup>

In *Hancock v The Queen* the same Court recognized that pregnancy could be a mitigating factor.<sup>185</sup> The decisions are barely a year apart. In *Hancock* there is no reference to *Avdic*, underlining the lack of rigor in this area of law.<sup>186</sup>

### C. *Overview of Comparison of Aggravation and Mitigation in the United States and Australia*

The above discussion highlights the range and, in the case of Australia, the near limitless number of considerations that aggravate and mitigate penalty. There is some overlap in relation to these considerations; however, the dissimilarities are profound and at several different levels.

The first is the contrast in the type of considerations that impact sentence. The prominent considerations in Australia that affect sentence which are not recognized in the United

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181. *Clarkson v The Queen* [2011] VSCA 157 (Austl.).

182. *R v SJH* [2010] WASCA 40 (Austl.).

183. [2012] VSCA 172 [21] (Austl.).

184. [2012] VSCA 172, [21] (Austl.).

185. [2013] VSCA 199 (Austl.).

186. *Id.*



States include: burdensome prison conditions; a significant delay between the time of charging and sentence;<sup>187</sup> incidental hardships stemming from the crime, such as public opprobrium;<sup>188</sup> an injury sustained while committing the offense;<sup>189</sup> forgiveness of the victim;<sup>190</sup> and pleading guilty (even when not associated with remorse).

The contrast is so stark in some cases that considerations which positively mitigate penalty in Australia are expressly repudiated as being capable of reducing penalty in the United States. Examples of this relate to social and economic deprivation, the cultural background of the offender,<sup>191</sup> and the impact of the sentence on the offender's family. The converse is also true—using a domain name to commit an offense or previous military service are not recognized sentencing factors in Australia.

The second dissimilarity is not so obvious, but is perhaps more significant. While there is a degree of overlap between some of the sentencing considerations, the weight accorded to them and, hence, their capacity to impact sentence is profoundly different. A clear illustration of this relates to prior convictions. As noted above, in the United States they can drastically increase penalty severity—by over a decade.<sup>192</sup> However, in Australia, prior convictions are only relevant to the extent of denying an offender a discount that would be associated with prior good behavior and, hence, cannot be used as the basis for increasing a penalty above that which is proportionate to the seriousness of the offense.<sup>193</sup> Other examples include discounts associated with pleading guilty and assisting authorities. In Australia, they are generally

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187. *R v Todd* [1982] 2 NSWLR 517, 522 (Austl.).

188. *Ryan v The Queen* [2001] 206 CLR 267 (Austl.).

189. *R v Hannigan* [2009] 193 A Crim R 399 (Austl.).

190. *Marsh v The Queen* [2011] VSCA 6 (Austl.).

191. See e.g., *Bugmy v The Queen* [2013] HCA 37 (Austl.).

192. Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343 [hereinafter Bagaric, *The Punishment Should Fit the Crime*].

193. *R v Baumer* [1988] 166 CLR 51, 58 (Austl.).

regarded as the most compelling sentencing considerations and can lead to discounts in the order of twenty-five percent and fifty percent, respectively.<sup>194</sup> By contrast, in the United States, they are given far less weight. In Australia, as a general rule, the impact of aggravating and mitigating considerations is far more discretionary and unpredictable than in the United States. Apart from the discounts for pleading guilty and assisting authorities, the courts do not specify the weight accorded to any aggravating or mitigating considerations. That is a matter for the judge and hence any consideration can be given, say, 5% or 40% emphasis without the judge falling into error.

There are, of course, differences to be expected when comparing any sentencing systems. Sentencing is a complex dynamic which is deeply influenced by political, social, cultural and economic situations. However, the United States and Australia are flourishing, wealthy, highly-educated countries with the capacity to make informed, intelligent and evidence-based public policy decisions. Moreover, the systems of both countries have the same fundamental aims: to reduce crime, impose proportionate penalties and achieve the goals of deterrence, rehabilitation and incapacitation. Thus, a degree of convergence in relation to fundamental sentencing considerations would be expected. It does not exist, however, in relation to aggravating and mitigating considerations because of the absence of doctrinal coherency in this area. The remainder of this Article attempts to remedy the existing intellectual and policy deficit.

### III. CURRENT METHODOLOGY REGARDING AGGRAVATING AND MITIGATING CONSIDERATIONS IS FLAWED

The jurisprudence on the explanation and justification of aggravating and mitigating factors is sparse and weak. There are few cases or commentaries that attempt anything approaching a detailed or serious evaluation of the nature or meaning of aggravating or mitigating factors. Typically,

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194. BAGARIC & EDNEY, SENTENCING IN AUSTRALIA, *supra* note 154, at 287-95, 304-10.

when judges apply such considerations, they assume their existence and when the concepts are discussed in a wider context they are done so in a perfunctory manner.<sup>195</sup>

In particular, the United States Supreme Court has not developed an over-arching theory of mitigation. To the extent that it has considered these concepts, the emphasis has been on mitigation and, to this end, it has mainly been in relation to capital cases.<sup>196</sup> The concept has been applied in a broad manner (without any attempt to define the term).<sup>197</sup> For example, in *Penry v. Lynaugh*, Justice O'Connor simply stated that mitigating factors are considerations which reduce the culpability of a defendant.<sup>198</sup>

In a similar vein are the comments of Justice Basten in the New South Wales Court of Criminal Appeal decision of *Elyard v R*, where he stated:

Terms such as “aggravating factors” and “mitigating factors”, have a long history of use in this area of the law. Depending on context, usage may vary, but one common intention is to identify those circumstances which may tend to place a particular offense towards the upper or lower ends of a range of moral culpability.<sup>199</sup>

One of the few cases that examined the concept of aggravation or mitigation in any detail is the *Director of Public Prosecutions v England*.<sup>200</sup> The offender pleaded guilty to murder in circumstances where, after the killing, he

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195. See Ashworth, *Re-evaluating the Justifications for Aggravation and Mitigating at Sentencing*, *supra* note 11, at 27-28; ALLAN MASON, *The Search for Principles: Integrating Cultural Demands*, in MITIGATION AND AGGRAVATION AT SENTENCING 40, 40-43 (Julian V. Roberts ed., 2011).

196. See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 346-48 (1998).

197. This is reflected in the comment by Justice O'Connor in *California v. Brown*, 479 U.S. 538, 544 (1987).

198. 492 U.S. 302, 337-38 (1989); *see also Lockett v. Ohio*, 438 U.S. 586, 597-608 (1978) (noting that relevant mitigating factors must be considered to meet constitutional requirements for death penalty statutes).

199. [2006] NSWCCA 43 [4] (Austl.).

200. [1999] 2 VR 258 (Austl.). The decision was relied upon in *R v Quarry* [2005] 11 VR 337, 346 per Batt JA (Austl.).

defiled the body.<sup>201</sup> On appeal, a central matter for the Victorian Court of Appeal was whether the post-offense conduct could be an aggravating factor.<sup>202</sup>

In resolving the issue, Justice Brooking first noted that, “aggravating circumstances point towards greater severity of sentence.”<sup>203</sup> The complexity in this case was that the aggravating conduct had occurred after the offense had been completed. To justify this conduct as an independent aggravating factor, Justice Brooking relied upon the notion of a “common sense” or “moral sense.” His Honor held:

Long before the Sentencing Act rose above the horizon judges drew on their common sense and their moral sense, as representing that of the community, in deciding what things about a crime could be said to make it more or less serious.<sup>204</sup> They still do; nothing in the Act stops them from doing this. *Common sense and moral sense*, which are and must ever be the essential foundation of sentencing principles and practices, unite in rejecting the notion that “the circumstances of the offense”, for sentencing purposes, are neatly marked out by two lines, one at the technical beginning and the other at the technical end of the crime.<sup>205</sup>

This approach is singularly unhelpful. In a system governed by rules, standards developed on the basis of common sense or (an undisclosed) moral sense are repugnant to basal rule of law virtues.<sup>206</sup>

Thus, the Courts have provided little doctrinal guidance regarding the concept of mitigation or aggravation. The same

201. *Director of Public Prosecutions* [1999] 2 VR 258.

202. *Id.*

203. *Id.* A similar approach to that of Justice Brooking in *Director of Public Prosecutions*, which also relied upon “common sense,” was evident in *R v Basso* [1999] 108 A Crim R 392 [24 (Austl.)], where Justice Chernov opined that in respect of offenses committed while on bail: “In my view, as a matter of common sense, the commission of an offense in breach of such a condition constitutes an aggravating factor, which can be taken into account by the sentencing judge in determining the appropriate sentence.”

204. *Basso* [1999] 108 A Crim R 392 [23].

205. *Id.* (emphasis added).

206. See JOEL FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270-76 (1980); JOSEPH RAZ, *THE AUTHORITY OF THE LAW* 210-29 (1979).

applies in relation to scholarly works. In relation to mitigating factors, Hyman Gross<sup>207</sup> has noted that:

It is no easy matter to decide what shall count as a good reason in mitigation of sentence [in fairness to him, what a man has done that rebounds to his credit ought sometimes to be admitted to counterbalance the crime that now rebounds to his discredit] . . . Because we are civilized . . . our moral life includes many different sorts of things, and in meting out punishment for crime we need to go beyond the simple justice of desert and show respect as well for other things of value.

In the first place there are sometimes larger considerations of justice whose influence makes itself felt. . . . The acts of a good citizen and even a virtuous human being often have a proper place and count in his favour in deciding on his sentence. Still, not every kind of creditable activity is properly taken into account or consideration and we find it difficult to decide where to draw the line.

Apart from justice there is mercy. . . . Sometimes compassion is not a matter of mercy but a matter of right. When suffering would be cruel, the sentence must be mitigated to prevent that. . . . Finally, there are reasons of expediency that seem to warrant mitigation. We wish to encourage those apprehended to cooperate in bringing others to justice, and so we reward their co-operation with lighter sentences than they would otherwise receive.<sup>208</sup>

The problem with this approach is that it is too obscure. Reliance on broad and obscure concepts such as “fairness”, “virtue”, “mercy”, and “justice” provides no scope for guidance in distinguishing considerations which are genuinely mitigatory (or aggravating) from those which are not.

#### IV. TOWARDS A RATIONAL THEORY

In order to understand the scope and nature of aggravating and mitigating considerations, it is necessary to develop a top-down theory.<sup>209</sup>

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207. HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 451-52 (1978).

208. *Id.*

209. The most informative examination of this issue is by Ashworth, *Re-evaluating the Justifications for Aggravation and Mitigating at Sentencing*, *supra* note 11, at 21; however, his discussion focuses on the extent to which existing aggravating and mitigating factors fit within current orthodoxy as opposed to

As noted above, according to existing orthodoxy, considerations which lower a penalty can be divided into four categories: the circumstances of the offense; the offender's response to a charge; matters personal to the offender; and the impact of the sanction on the offender and his or her dependents. As far as factors that increase penalty, the categories are: the offender's criminal history; the manner in which the offense was committed; the nature of the victim; and the outcome of the offense.<sup>210</sup>

While that is the conventional manner in which aggravating and mitigating considerations are categorized, it stems from a desire for expediency rather than an approach derived from conceptual interrogation. The existing classifications provide a neat and orderly methodology for lawyers and judges who need to identify and catalogue established aggravating and mitigating considerations; however, they do not give any insight into the possible rationale and foundation for the considerations.

The more illuminating pathway to explaining and justifying aggravating and mitigating considerations is to place them in the multi-dimensional institutional construct within which they operate. In terms of the increasing breadth of operation, there are three such institutions. The first is the sentencing system. This system does not exist in a vacuum and is subsumed within the broader system of criminal justice and the over-arching system of law and justice. Hence, the second perspective is the criminal justice system, and the third is the legal system in general. As we shall see, the objectives of these systems are not always identical.

The starting point in grounding aggravating and mitigating considerations is that they should be abolished unless a cogent justification is given in light of the objectives of these three institutions. I commence this inquiry by focusing on the sentencing system.

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whether they are justifiable against the backdrop of an over-arching coherent theory.

210. See *supra* Part II.A.

V. AGGRAVATING AND MITIGATING FACTORS STEMMING FROM  
THE SENTENCING SYSTEM

The most narrow reference point in developing aggravating and mitigating factors is the sentencing system. From this perspective a consideration should only operate to increase or decrease penalty if it promotes a sentencing objective which itself is justified. In order to ascertain which sentencing aims are valid, it is necessary to contextualize the analysis against a slightly broader doctrinal backdrop. Punishment is a study of the connection between wrongdoing and state-imposed sanctions. The main issue raised by the concept of punishment is the basis upon which the evils administered by the state to offenders can be justified. Thus, sentencing and punishment are inextricably linked, with punishment being the logically prior inquiry. In order to properly decide how, and how much, to punish, it must first be established on what basis punishment is justified and why we are punishing.<sup>211</sup>

A. *Both Theories of Punishment Incline to the Same  
Sentencing Objectives*

As noted earlier, there are two main theories of punishment.<sup>212</sup> Utilitarians argue that punishment is justified because the pain stemming from the sanction is outweighed by the good consequences stemming from it.<sup>213</sup> The consequences are traditionally thought to come in the form of incapacitation (i.e., imprisoning offenders and thereby preventing them from further offending), deterrence (i.e., discouraging further offending), and rehabilitation (i.e., inducing positive attitudinal reform).<sup>214</sup> The utilitarian

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211. See HERBERT L. PACKER, *Theories of Punishment and Correction: What is the Function of Prison?*, in JUSTICE, PUNISHMENT, TREATMENT: THE CORRECTIONAL PROCESS 183, 183-89 (Leonard Orland ed., 1973).

212. See *supra* Part I.

213. MIRKO BAGARIC, PUNISHMENT AND SENTENCING: A RATIONAL APPROACH 43 (2001) [hereinafter BAGARIC, PUNISHMENT AND SENTENCING].

214. See Mirko Bagaric and Kumar Amarasekara, *The Errors of Retributivism*, *supra* note 2, at 134-39.

theory of punishment has fallen out of favor for two main reasons. The first is the perceived inability of the sentencing process to achieve the utilitarian penal objectives of incapacitation, deterrence, and rehabilitation.<sup>215</sup> The second is the view that utilitarianism could lead to abhorrent practices, such as punishing the innocent.<sup>216</sup>

The main competing theory, and the one which enjoys the most contemporary support, is retributivism. Retributive theories of punishment are not clearly defined and it is difficult to isolate a common thread running through theories carrying this label.<sup>217</sup> All retributive theories assert that offenders deserve to suffer, and that the institution of punishment should inflict the suffering they deserve. However, they provide divergent accounts of why criminals deserve to suffer.<sup>218</sup>

While retributivism is the orthodox theory of punishment, I have previously argued that it is doctrinally flawed principally because it can only justify punishment by reference to consequential benefits stemming from punishment, mainly in the form of deterring crime.<sup>219</sup> I have also argued that the criticisms of a utilitarian theory of punishment have been over-stated and that, in fact, utilitarianism is the most persuasive theory of punishment.<sup>220</sup>

Irrespective of which theory is the most sound, it is important to note that the practical implications from each of the theories are theoretically not as significant as may seem to be the case. As a result of the empirical data regarding the efficacy of punishment to achieve stated utilitarian objectives

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215. See A.E. BOTTOMS, *An Introduction to the Coming Crisis, in THE COMING PENAL CRISIS: A CRIMINOLOGICAL AND THEOLOGICAL EXPLORATION* 8-15 (A.E. Bottoms & R.H. Preston eds., 1980).

216. See EDGAR FREDERICK CARRITT, *ETHICAL AND POLITICAL THINKING* 65 (1947); HENRY JOHN McCLOSKEY, *META-ETHICS AND NORMATIVE ETHICS* 181 (1969).

217. See HONDERICH, *supra* note 17, at 211; David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 *L. & PHILOSOPHY* 507, 515 (1997).

218. See Anthony Duff & Andrew Von Hirsch, *Responsibility, Retribution and the "Voluntary": A Response to Williams*, 56 *CAMBRIDGE L.J.* 103, 107 (1997).

219. See BAGARIC, *PUNISHMENT AND SENTENCING, supra* note 213, at 158.

220. *Id.*



of punishment, it emerges that, in fact, there is no meaningful pragmatic difference between retributivism and utilitarianism so far as the design of a rational sentencing system is concerned. As noted below, the key focus of retributivism is to ensure there is proportionality between the punishment and the crime. Such matching is potentially distorted in a utilitarian calculus by the need to achieve other objectives, namely, general deterrence, specific deterrence, and rehabilitation. However, as is noted shortly, punishment is largely incapable of achieving these objectives and hence the amount of punishment should not be influenced by those considerations. Both theories endorse the pursuit of proportionate sentences as a principle sentencing requirement.<sup>221</sup> The potential theoretical divergence between the key theories of punishment has been negated by what the empirical data show can be achieved through sentencing. Accordingly, it is unnecessary to explore this philosophical realm further for the purposes of this Article.

The overlap between the retributive and utilitarian aims was noted by the United States Federal Sentencing Commission, which stated:

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of “just deserts.” Under this principle, punishment should be scaled to the offender’s culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical “crime control” considerations. This theory [utilitarianism] calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant. Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in

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221. Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 N.Z.U.L. REV. 411, 419, 423-24 (2013) [hereinafter Bagaric, *Injecting Content*].

most sentencing decisions the application of either philosophy will produce the same or similar results.<sup>222</sup>

B. *The Objectives of Punishment Do Not Have a Significant Impact on the Development of Aggravating and Mitigating Factors*

While the choice of punishment theory does not impact heavily on the selection of aggravating and mitigating factors, the decision regarding which objectives of sentencing to pursue can potentially strongly influence the development of such factors. For example, if rehabilitation is a valid aim of sentencing, considerations such as youth and remorse could reduce penalty severity.<sup>223</sup> In order to ascertain the appropriateness of established sentencing objectives to guide the sentencing landscape, it is necessary to determine the validity of these objectives.

There is a mass of empirical data focusing on the efficacy of sentencing to achieve the main goals of sentencing. Fortunately, the trend of the findings has been analyzed recently and is relatively consistent, hence it is possible to provide an overview of conclusions in the recent literature. In short, current empirical evidence provides no basis for confidence that sentencing is capable of achieving most of the goals of sentencing and hence they should not drive the selection of aggravating and mitigating considerations.<sup>224</sup> The one exception to this is the incapacitation of serious sexual and violent offenders. I now consider each of the objectives more closely.

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222. U.S. SENTENCING COMM'N, *supra* note 40, ch. 1, pt. A, intro. cmt. (2013).

223. This, of course, assumes that younger offenders and those who are contrite are less likely to re-offend.

224. See generally Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 14.

1. *Specific Deterrence Does Not Work*. Specific deterrence aims to reduce the incidence of crime by punishing offenders and thereby illustrating to them the negative effects of crime.<sup>225</sup> It is assumed that this experience will be so adverse that they will seek to avoid it in the future.<sup>226</sup> The available empirical data suggest that specific deterrence does not work, so inflicting less severe sanctions on offenders than imprisonment will not make them more likely to re-offend in the future. The level of certainty of this conclusion is very high, so high that specific deterrence should be abolished as a sentencing consideration so it cannot influence the development of aggravating and mitigating considerations.

There are numerous studies across a wide range of jurisdictions and different time periods that have come to this conclusion.<sup>227</sup> Daniel S. Nagin, Francis T. Cullen and Cheryl L. Jonson provide the most recent extensive literature review regarding specific deterrence.<sup>228</sup> They reviewed the impact of custodial sanctions versus non-custodial sanctions and the effect of sentence length on re-offending.<sup>229</sup> The review examined six experimental studies where custodial versus non-custodial sentences were randomly assigned;<sup>230</sup> eleven studies which involved matched pairs;<sup>231</sup> thirty-one studies which were regression based;<sup>232</sup> and seven other studies which did not neatly fit into any of those three

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225. Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159, 159 (2012).

226. *Id.*

227. *See id.*

228. *See* Daniel S. Nagin et al., *Imprisonment and Re-offending*, 38 CRIME AND JUSTICE: A REVIEW OF RESEARCH 115, 143-77 (2009); *see also* DONALD RITCHIE, SENTENCING ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE (2011); DON WEATHERBURN ET AL., AUSTL. INST. OF CRIMINOLOGY, THE SPECIFIC DETERRENT EFFECT OF CUSTODIAL PENALTIES ON JUVENILE RE-OFFENDING (2009).

229. Nagin et al., *supra* note 226, at 143.

230. *Id.* at 144-47.

231. *Id.* at 145, 148-53.

232. *Id.* at 154-62.

categories and included naturally occurring social experiments which allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.<sup>233</sup>

Nagin et al. suggest that offenders who are sentenced to imprisonment do not have a lower rate of recidivism than those who receive a non-custodial penalty and, in fact, that some studies show the rate of recidivism among offenders sentenced to imprisonment to be higher. They conclude that:

Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic [that is, the possible corrupting effects of punishment] rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.<sup>234</sup>

Recent studies are consistent with this conclusion.<sup>235</sup> Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment is unlikely to increase the prospect that they will become law-abiding citizens in the future. It follows that the goal of specific deterrence cannot be achieved by the imposition of criminal sanctions and should not influence sentencing practice and, in particular, the choice of aggravating factors. It is futile to increase penalties with the aim of decreasing the likelihood that offenders will re-offend in the future—any aggravating factors based on this objective should be abolished. In particular, it is commonly regarded that offenders with criminal histories should receive increasingly heavier penalties in order to emphasize with greater force that crime is inappropriate. The empirical evidence debunks this approach.

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233. *Id.* at 155, 163-67.

234. *Id.* at 145.

235. See Donald P. Green and Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 *CRIMINOLOGY* 357, 357-58 (2010); see also FRANKLIN ZIMRING & GORDON HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 245 (1973) [hereinafter ZIMRING & HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL*].

2. *General Deterrence (Also) Does Not Work.* The main form of deterrence used to justify harsher penalties is general deterrence. General deterrence seeks to dissuade potential offenders from committing similar offenses with the threat of anticipated punishment by illustrating the harsh consequences of offending.<sup>236</sup>

There are two forms of general deterrence. *Marginal* general deterrence concerns the correlation between the *severity* of the sanction and the *prevalence* of an offense.<sup>237</sup> It is a commonly-invoked objective used to justify heavier sanctions being invoked, especially for crimes that are planned and have a profit motive, such as drug trafficking and white collar offending.<sup>238</sup> *Absolute* general deterrence concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct.<sup>239</sup> The evidence suggests that marginal deterrence does not work, while absolute general deterrence does work.<sup>240</sup>

The findings regarding general deterrence are relatively settled.<sup>241</sup> The existing data show that in the absence of the threat of punishment for criminal conduct, the social fabric of society would readily dissipate; crime would escalate and overwhelmingly frustrate the capacity of people to lead happy and fulfilled lives. Thus, general deterrence works in the absolute sense: there is *a connection* between criminal sanctions and criminal conduct. However, there is insufficient evidence to support a direct correlation between higher penalties and a reduction in the crime rate.<sup>242</sup> It

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236. See ZIMRING & HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL, *supra* note 235.

237. See Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work—and What it Means for Sentencing*, 35 CRIM. L.J. 269, 270 (2011) [hereinafter Bagaric & Alexander, *General Deterrence Doesn't Work*].

238. *Id.* at 271.

239. See ZIMRING & HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL, *supra* note 235, at 14.

240. For an overview of the literature, see RITCHIE, *supra* note 228.

241. For an overview of the literature, see *id.*

242. See NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60-61, 191 (1969); see also Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A*

follows that marginal deterrence should be disregarded as a sentencing objective, at least unless and until there is proof that it works.<sup>243</sup>

It is counter-intuitive to suggest that higher penalties will not reduce the crime rate. However, the evidence is relatively definitive. Several reasons have been advanced to explain this reality. The most obvious explanation is that the risks of hardship and pain occasioned by criminal offending are not adequately transmitted to potential offenders.<sup>244</sup> In other words, there is a failure of “threat communication” as it affects risk perception and negatively impacts crime rates.<sup>245</sup> Yet, studies repeatedly show that awareness of potentially severe sanctions does not produce less crime. In one of the most wide-ranging studies of its type, 1,500 respondents in fifty-four large urban countries were interviewed to assess whether respondents had higher estimates of the certainty and severity of punishment and its timeliness (celerity) in jurisdictions where the levels were, in

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*Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569, 569 (2001); John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 129 (1994); Dieter Dölling et al., *Is Deterrence Effective? Results of Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL'Y & RES. 201, 201 (2009); John J. Donohue III, *Assessing the Relative Benefits of Incarceration: The Overall Change over the Previous Decades and the Benefits on the Margin*, in DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM 269, 303 (Steven Raphael & Michael A. Stoll eds., 2009); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 143, 143 (Michael Tonry ed., 2003); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 177-179 (2004); William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 CRIME AND JUSTICE: A REVIEW OF RESEARCH 419, 422 (Michael Tonry ed., 2000); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 163 (2004); see generally THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman eds., 2000).

243. See Bagaric & Alexander, *General Deterrence Doesn't Work*, *supra* note 235.

244. For a discussion of the obstacles confronting this level of knowledge, see Paul H. Robinson and John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003).

245. See Daniel Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 15-19 (Michael Tonry ed., 1998).

fact, higher.<sup>246</sup> No such link was established.<sup>247</sup> The authors of the study noted that this is irrespective of whether the respondents had prior convictions or no prior experience with the criminal justice system.<sup>248</sup> They concluded that:

There is generally no significant association between perceptions of punishment levels and actual levels that CJS [criminal justice system] agencies work hard to achieve, implying that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms. Increases in punishment might do so through incapacitative effects, the effects of treatment programs linked with punishment, or other mechanisms, but are not likely to do so in any way that depends on producing changes in perceptions of risk. . . . Thus, increased punishment levels are not likely to increase deterrent effects, and decreased punishment levels are not likely to decrease deterrent effects.<sup>249</sup>

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

[M]uch of the criminological literature has demonstrated that there are a variety of motivations that shape criminal activity ranging from *biological predispositions, psychological personality traits, social learning, cognitive thinking, geographical location and the ecology of place, relative deprivation and the strain of capitalist society, political conflict and social and sub-cultural meaning.*<sup>250</sup>

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246. Gary Kleck et al., *The Missing Link in General Deterrence Research*, 43 CRIMINOLOGY 623, 623 (2005).

247. *Id.*

248. *Id.* at 654-55.

249. *Id.* at 653-54; see also Christopher Watling et al., *Applying Stafford and Warr's Reconceptualization of Deterrence Theory to Drug Driving: Can it Predict Those Likely to Offend?* 42 ACCIDENT ANALYSIS AND PREVENTION 452, 456-57 (2010).

250. Stuart Henry, Professor and Chair of Interdisciplinary Studies, Coll. of Urban, Labor, and Metro. Affairs, Wayne State Univ., *On the Effectiveness of Prison as Punishment*, Paper Presented at the Conference: Incarceration Nation: The Warehousing of America's Poor (Oct. 24, 2003) (emphasis added).

In any event, irrespective of the reasons for the failure of marginal general deterrence, it follows that penalties should not be increased with the aim to deter potential offenders from committing crime.

Thus, deterrence properly informs sentencing only to the extent that it requires a hardship to be imposed for criminal offending. It does not require a particularly burdensome penalty, merely one that people would seek to avoid. That aim could be satisfied by a fine or a short prison term. There is no foundation for increasing penalties to reduce the crime rate.

3. *Rehabilitation—Evidence Not Conclusive Enough to Justify Its Pursuit.* Unlike the other key sentencing goals analyzed above, rehabilitation serves normally to decrease rather than increase penalty severity<sup>251</sup> and, hence, is a mitigating factor. If rehabilitation is a valid objective, intuitively, it would justify reducing penalties in circumstances where offenders are young, remorseful or have taken active and positive steps to overcome the influences that underpinned their offending.

Following extensive research conducted between 1960 and 1974, Robert Martinson, in an influential paper, concluded that empirical studies had not established that any rehabilitative programs had worked in reducing recidivism.<sup>252</sup> The Panel of the National Research Council in the United States, several years after this work, also noted there were no significant differences between the subsequent recidivism rates of offenders regardless of the form of punishment.<sup>253</sup> They concluded, “[t]his suggests that neither rehabilitative nor criminogenic effects operate very strongly.”<sup>254</sup>

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251. This generalization is not necessarily correct. As noted below, it seems that rehabilitation programs can, in some instances, be effective in a custodial setting.

252. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974).

253. See DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 66 (Alfred Blumstein et al. eds., 1978).

254. *Id.*



The most recent wide-ranging Australian study regarding the effectiveness of rehabilitation is a report by Karen Heseltine, Andrew Day and Rick Sarre for the Australian Institute of Criminology, published in 2011.<sup>255</sup> The report focused on changes and improvements to prison-based correction rehabilitation programs in the custodial environment since 2004, when the previous report was issued.<sup>256</sup> The report summarized recent cross-jurisdictional studies into the effectiveness of certain rehabilitation programs.<sup>257</sup> It noted that while there were mixed results, there were some programs that reported positive outcomes.<sup>258</sup>

This was especially the case in relation to sexual offender programs, where some studies showed that the recidivism rate of offenders completing the program was about half that of other offenders.<sup>259</sup> The results of programs directed towards violent offenders were less positive, but a wide-ranging review of studies focusing on United Kingdom programs noted reductions in violent offenses of around seven to eight percent had occurred.<sup>260</sup> There is no cogent evidence supporting the effectiveness of domestic violence or

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255. KAREN HESELTINE ET AL., AUSTR. INST. OF CRIMINOLOGY, PRISON-BASED CORRECTIONAL OFFENDER REHABILITATION PROGRAMS: THE 2009 NATIONAL PICTURE IN AUSTRALIA (2011), available at <http://www.aic.gov.au/documents/5/6/4/%7b564B2ECA-4433-4E9B-B4BA-29BD59071E81%7drpp112.pdf>; see also DORIS LAYTON MACKENZIE, WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS (2006).

256. HESELTINE ET AL., *supra* note 255, at 2.

257. *Id.* at ix.

258. *See id.* at 14-31.

259. *See* LEON BAKKER ET AL., N.Z. DEP'T OF CORRECTIONS, AND THERE WAS LIGHT . . . EVALUATING THE KIA MARAMA TREATMENT PROGRAMME FOR NEW ZEALAND SEX OFFENDERS AGAINST CHILDREN 2 (2007), available at [http://www.corrections.govt.nz/\\_data/assets/pdf\\_file/0004/665635/kiamarama.pdf](http://www.corrections.govt.nz/_data/assets/pdf_file/0004/665635/kiamarama.pdf); R. Karl Hanson et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders*, 14 SEXUAL ABUSE 169, 169 (2002).

260. DARRICK JOLLIFFE & DAVID P. FARRINGTON, U.K. MINISTRY OF JUSTICE, A SYSTEMATIC REVIEW OF THE NATIONAL AND INTERNATIONAL EVIDENCE ON THE EFFECTIVENESS OF INTERVENTIONS WITH VIOLENT OFFENDERS, at iii (2007), available at <http://webarchive.nationalarchives.gov.uk/20100505212400/http://www.justice.gov.uk/publications/docs/review-evidence-violent.pdf>.

victim awareness programs.<sup>261</sup> However, drug and alcohol programs have been shown to be effective at reducing substance abuse and re-offending.<sup>262</sup>

This assessment is consistent with the findings of Ojmarrh Mitchell, David B. Wilson and Doris L. MacKenzie, who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison.<sup>263</sup> The studies they focused on related to drug users and compared re-offending patterns of offenders who completed a drug rehabilitation program with those who did not complete a program, or completed only a minimum program, between the years 1980 and 2004.<sup>264</sup> They analyzed sixty-six studies in total.<sup>265</sup> The report concluded, “[o]verall, this meta-analytic synthesis of evaluations of incarceration-based drug treatment programs found that such programs are modestly effective in reducing recidivism.”<sup>266</sup> Moreover, it noted that programs that dealt with the multiple problems of drug users (termed therapeutic communities) were the most successful, whereas there was no evidence to support good outcomes associated with “boot camp” programs.<sup>267</sup>

A mechanism which seems to reduce recidivism is undergoing a program of formal education.<sup>268</sup> A RAND Corporation study published in 2013<sup>269</sup> concluded that inmates who undertook correctional education programs had a thirteen percent reduced risk of recidivating and that this

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261. HESELTINE ET AL., *supra* note 255, at 22, 30.

262. *Id.* at 26-27.

263. OJMARRH MITCHELL ET AL., THE CAMPBELL COLLABORATION, THE EFFECTIVENESS OF INCARCERATION-BASED DRUG TREATMENT ON CRIMINAL BEHAVIOR (2006), *available at* <http://www.campbellcollaboration.org/lib/download/98>.

264. *Id.* at 6.

265. *Id.* at 11.

266. *Id.* at 17.

267. *Id.* at 17-18.

268. LOIS M. DAVIS ET AL., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION (2013).

269. *Id.*

increased to thirty percent for participants of high school/GED programs.<sup>270</sup>

Thus, the weight of empirical data (though it is far from uniform or consistent) suggests that rehabilitative programs can reduce the likelihood of recidivism for certain types of offenses, such as sex-offenders. However, the level of knowledge regarding the impact of rehabilitative programs on recidivism rates is so small that no policy or legal changes should be made at this point as far as rehabilitation is concerned.

Accordingly, no practices should be adopted to further this rationale. Mitigating factors that are grounded in the objective of rehabilitation should be abolished. Rehabilitation is a worthwhile social objective. The community should continue to invest in programs that facilitate positive attitudinal reform in offenders. However, unless there is evidence of the success of these programs, the objective of rehabilitation needs to be ignored in developing mitigating considerations.

One consideration, in particular, which is impacted by this proposal is remorse. It is widely accepted that remorse should reduce penalty. However, this should only be the case if there is evidence to show that remorseful offenders are less likely to re-offend than those who do not feel contrition. No such evidence exists. It could be suggested that remorse has instrumental benefits extending beyond rehabilitative considerations; however, it is not clear this is the case. People who commit crime should be contrite: minimum decency requires such a response.<sup>271</sup> People should not get credit for satisfying an expectation. Rather than being mitigating, there is an equally strong argument for remorse aggravating if it is absent—indeed, that is the position in Delaware.<sup>272</sup>

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270. *Id.* at 57.

271. Mirko Bagaric & Kumar Amaraskera, *Feeling Sorry? Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing*, 40 HOW. L.J. 364, 364 (2001).

272. DELAWARE SENTENCING ACCOUNTABILITY COMM'N, BENCHBOOK 123, 125 (2013).

4. *Incapacitation—Justified in Relation to Serious Sexual and Violent Offenders.* Incapacitation aims to protect the community by confining offenders to imprisonment during which time they can no longer commit offenses. The effectiveness of incapacitation cannot be judged by the height of the prison wall. Imprisonment as a means of community protection is only effective if, but for being imprisoned, the offender would have committed a further offense.<sup>273</sup>

There are two forms of incapacitation. The first is selective incapacitation which focuses on the individual offender, and its success is contingent upon distinguishing offenders who will re-offend from those who will not.<sup>274</sup> Most of the research in this area has been directed towards predicting which serious offenders will re-offend.<sup>275</sup> In this regard, the focus has been on offenders who commit violent and sexual offenses.

A wide-ranging analysis in the 1990s of the data regarding the capacity of any discipline to predict future criminal behavior noted that predictive techniques “tend to invite overestimation of the amount of incapacitation to be expected from marginal increments in imprisonment.”<sup>276</sup>

More recent actuarial tools have been developed to score a person’s level of risk by mapping their profile to variables

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273. See Kevin Bennardo, *Incarceration’s Incapacitative Shortcomings*, 54 SANTA CLARA L. REV. 1, 14-15 (May 7, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2191128](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191128) (noting that some incapacitative models assume that prison is not part of society); see also Colin Murray, *To Punish, Deter and Incapacitate: Incarceration and Radicalisation in UK Prisons after 9/11*, in PRISONS, TERRORISM AND EXTREMISM 16, 18 (Andrew Silke ed., 2013) (noting that for incapacitation to work, it is important that inmates do not corrupt other prisoners).

274. Alex R. Piquero et al., *The Criminal Career Paradigm*, 30 CRIME & JUST. 359, 381 (2003).

275. See, e.g., Mirko Bagaric & Theo Alexander, *The Fallacy that is Incapacitation: An Argument for Limiting Imprisonment Only to Sex and Violent Offenders*, 2 J. COMMONWEALTH CRIM. L. 95, 104-05 (2012) (discussing research predicting which serious offenders will re-offend) [hereinafter Bagaric & Alexander, *The Fallacy that is Incapacitation*].

276. FRANK E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 86 (1995) [hereinafter ZIMRING & HAWKINS, INCAPACITATION].

that are known risk factors. Structured professional judgment and criminogenic needs tools also use a range of variables<sup>277</sup> which are designed to be more nuanced than actuarial tools because they aim to not only predict the likelihood of violence, but also the imminence, severity, and possible targets of the risk.<sup>278</sup> These more recent attempts to accurately predict dangerousness in the context of violent and sexual offenses have also proven to be deficient.<sup>279</sup>

While selective incapacitation does not work, general incapacitation is more effective at reducing crime.<sup>280</sup> General incapacitation involves imprisoning offenders simply because they have committed a criminal offense on the basis that, while in prison, they cannot inflict harm in the general community.<sup>281</sup> Little or no effort is normally made to predict future offending patterns, whether on the basis of previous criminal history or other considerations. There is no clear line between selective and general incapacitation and the difference is often simply one of degree. Once large numbers

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277. The LSI-R assessment model, which is used in New South Wales, has fifty-four variables. See *New South Wales Sentencing Council, High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* at 23 (2012), available at <http://www.sentencingcouncil.lawlink.nsw.gov.au/agdbasev7wr/sentencing/documents/pdf/online%20final%20report%20hrvo.pdf>.

278. For a discussion of these tools, see *id.* at 20-24.

279. See BERNADETTE MCSHERRY & PATRICK KEYZER, *SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE* 107-08 (2009); Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, 6 J. APPLIED SEC. RES. 317, 322-23 (2011); see also David J. Cook & Christine Michie, *Violence Risk Assessment: Challenging the Illusion of Certainty*, in *DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE* (Bernadette McSherry & Patrick Keyzer eds., 2011). Most recently, it has been suggested that habitual criminals and serious offenders have a different brain anatomy compared to other people. Neuroimaging of the brain showed that such offenders have less activity in certain areas of the brain, including the ventromedial prefrontal cortex and the dorsolateral prefrontal cortex, which are associated with self-awareness, learning from past experiences and emotions. ADRIAN RAINE, *ANATOMY OF VIOLENCE: THE BIOLOGICAL ROOTS OF CRIME* 266-70 (2013).

280. For a discussion regarding the distinction between special and collective incapacitation see generally ZIMRING & HAWKINS, *INCAPACITATION*, *supra* note 276, at 60-75 (1997) (discussing the distinction between special and collective incapacitation).

281. Bagaric & Alexander, *The Fallacy that is Incapacitation*, *supra* note 275.

of offenders are imprisoned on the basis of predictive criteria, which are inaccurate, a process that may have initially had the appearance of selective incapacitation turns into a system of general incapacitation. All jurisdictions punish recidivists more severely than first time offenders.<sup>282</sup> Often the extent of the premium is so significant that it has effectively evolved into a process of general incapacitation.<sup>283</sup>

Most of the research into the testing of the general incapacitation model has been undertaken in the United States, presumably because of the unprecedented increase in the prison population over the past thirty years. The weight of evidence supports the view that general incapacitation works.

In the United States between 1993 and 2010:

(a) the rate of violent victimization rates decreased by 76%; and

(b) the decline in total household property crime victimization was 64%.<sup>284</sup>

During this period, the imprisonment rate rose from 1.365 million to 2.27 million prisoners.<sup>285</sup> At face value, these figures suggest a causal link between imprisoning greater numbers of offenders and an effective reduction in the crime rate.

William Spelman has calculated that up to 21% of crime reduction is attributable to the increased rate of

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282. See Bagaric, *The Punishment Should Fit the Crime*, *supra* note 192, at 345.

283. *Id.* at 402.

284. JANET L. LAURITSEN AND MARIBETH L. REZEY, NCJ241656, U.S. DEP'T OF JUST., MEASURING THE PREVALENCE OF CRIME WITH THE NATIONAL CRIME VICTIMIZATION SURVEY 1 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/mpncvvs.pdf>.

285. BUREAU OF JUSTICE STATISTICS, NCJ156241, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1993 3 (Oct. 1995), *available at* <http://www.bjs.ojp.usdoj.gov/content/pub/pdf/cpop93bk.paf> (stating the 1.365 million figure includes inmates in local jails (456,000) and State and Federal Prisons (909,000)); BUREAU OF JUSTICE STATISTICS, NCJ 236319, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, 3 (Dec. 2011), *available at* <http://www.bjs.gov/content/pub/pdf/cpus10.pdf> (stating the 2.27 million figure also includes inmates in local jails (749,000) and State and Federal Prisons (1,518,000)).

imprisonment.<sup>286</sup> Other studies support the success of incapacitation, but remain equally unclear about its precise impact. According to literature examined by Roger Warren, a ten percent increase in imprisonment rates produces a two to four percent reduction in the crime rate; however, most relates to non-violent offenses.<sup>287</sup>

While general incapacitation seems to have some validity, one constant finding is that it is usually most effective in relation to minor crime (although some success can also be achieved in relation to more serious forms of offending).<sup>288</sup> This is because minor offenders re-offend more frequently than serious offenders. However, while confining repeat minor criminals clearly disables them from committing further offenses in the community for a period of time, it almost certainly does not justify the unrestrained use of imprisonment to combat non-serious crime.<sup>289</sup> The cost of

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286. See Spelman, *supra* note 242, at 484-85.

287. Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 594 (2009).

288. See, e.g., BEN VOLLAARD, TILBURG LAW & ECON. CTR., CENTER, PREVENTING CRIME THROUGH SELECTIVE INCAPACITATION 34-35 (TILEC Discussion Paper No. 2011-001, CentER Discussion Paper No. 2010-141, Jan. 2011), available at [http://www.papers.ssrn.com/5013/papers.cfm?abstract\\_id=1738900](http://www.papers.ssrn.com/5013/papers.cfm?abstract_id=1738900); Don Weatherburn, Jiuzhao Hua & Steve Moffatt, *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary*, 93 NSW CRIME & JUST. BULL. 8-9 (Jan. 2006), available at <http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/cjb93.pdf>.

289. It is notoriously difficult to undertake an accurate cost-benefit analysis of imprisonment given the large number of speculative figures involved. See, e.g., David S. Abrams, *The Prisoner's Dilemma: A Cost Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 954 (2012). The variables include the efficacy of imprisonment to achieve the goals of general deterrence, specific deterrence and incapacitation. *Id.* at 955-58. The variables associated with the cost of crime are even cruder and involve numerous methodologies with no agreed variables. *Id.* Even Abrams concedes that “[f]urther research will make such cost-benefit calculations even more useful” and “[m]ore studies that estimate crime costs, elasticities, prison costs and other parameters for different regions, age groups, and types of crime are needed.” *Id.* at 969. Abrams further notes that, “[g]oing forward, the cost-benefit approach should be expanded to other areas of criminal justice, including policing, alternate sanctions, and prisoner re-entry programs.” *Id.*; see KYM DOSSETOR, AUSTRALIAN INST. OF CRIMINOLOGY, COST-BENEFIT ANALYSIS AND ITS APPLICATION TO CRIME PREVENTION AND CRIMINAL JUSTICE

imprisonment probably outweighs the damage non-serious crimes inflict on the community.<sup>290</sup>

While the link between re-offending and prior criminality is strongest in relation to minor offenses, it is not negligible in relation to serious offenses. The most wide-ranging study of the trajectory of offenders in Australia was undertaken by the Australian Bureau of Statistics and released in August, 2010, in a report titled, “An Analysis of Repeat Imprisonment Trends in Australia.”<sup>291</sup>

The report noted that for prisoners released between 1994 and 1997, about 20% were re-imprisoned within two years, one-quarter were re-imprisoned within three years, and 40% by the end of the ten-year survey period.<sup>292</sup> Thus, most of the prison population examined was made up of people who had been in prison before. Moreover, the data showed that prisoners with prior imprisonment were twice as likely as first-timers to return to prison.<sup>293</sup>

In terms of re-imprisonment trends by offense type, it was noted that by June 30, 2007, the offenders who were most commonly re-imprisoned were those sentenced for burglary (58%), theft (53%), robbery (45%), assault offenses (44%), and sexual assault (21%).<sup>294</sup>

Given the limits of predicting serious offending on the basis of prior convictions, selective incapacitation for serious offenses seems to be flawed. However, there is stronger evidence that general incapacitation does work in relation to such offenses. While most serious offenders do not re-offend,

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RESEARCH 7 (2012), available at <http://www.aic.gov.au/documents/A/4/F/%7bA4FA76DE-535E-48C1-9E60-4CF3F878FD8D%7dtbp042.pdf>.

290. See Bagaric & Alexander, *The Fallacy that is Incapacitation*, *supra* note 275, at 114.

291. See JESSICA ZHANG & ANDREW WEBSTER, AUSTRALIAN BUREAU OF STATISTICS, AN ANALYSIS OF REPEAT IMPRISONMENT TRENDS IN AUSTRALIA USING PRISONER CENSUS DATA FROM 1994 TO 2007, 2 (2010), available at [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/\\$File/1351055031\\_aug%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf).

292. *Id.* at 16.

293. *Id.* at 19.

294. *Id.* at 30.



individuals with previous convictions for serious offenses<sup>295</sup> commit crime at a greater frequency than the rest of the criminal population. Further, offenders with prior convictions for serious offenses re-offend more frequently than first-time offenders.

There is insufficient empirical data to enable accurate and forensic choices to be made about how much extra prison time should be imposed on recidivists. However, at some point, there is a diminishing marginal return in terms of offenses prevented for each year of prison time. In addition, in any decision-making calculus, certain consequences (in the form of additional prison time) need to carry more weight than speculative outcomes (in the form of whether or not a particular offender would have actually re-offended). Therefore, while a recidivist loading for serious offenses is justified, it should be relatively minor, say, twenty to fifty percent.

Accordingly, the goal of incapacitation can justify a penalty increase, but only in relation to serious offenses and where the offender has prior convictions.

The converse also applies in relation to first time offenders. As noted above, first-time offenders, and those with a minor criminal record, reoffend at a considerably lower rate than offenders with a significant criminal history.<sup>296</sup> All offenders with a good criminal record should receive a sentencing discount. The definition of a good criminal record is admittedly obscure. For reasons of clarity a good prior track record should be confined to first offenders. The reduction to this end, should be in the order of 25%, an order that is meaningful, but at the same time does not result in disproportionately low sentences.

In Part II of this Article, I noted that in all sentencing systems there is a heavy loading that is applicable to recidivists. I have recently argued that this premium is too

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295. For reasons discussed in Part VI of this Article, serious offenses are confined to sexual and assault offenses.

296. Mirko Bagaric & Theo Alexander, *First-Time Offender; Productive Offender; Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing*, 78 ALB. L. REV. (forthcoming Dec. 2014).

weighty.<sup>297</sup> However, victimology studies establish that sexual and violent offenses (unlike other offenses) often have a lasting destructive impact on the lives of victims.<sup>298</sup>

5. *Overview of Aggravating and Mitigating Considerations Stemming from Sentencing Objectives.* Thus, from the perspective of the aims of the sentencing system, very few considerations should increase or decrease penalty. The objective of absolute deterrence is satisfied merely by ensuring that the penalty invoked is something that offenders would seek to avoid, that is, they find it unpleasant. It does not have to be particularly harsh. It is satisfied by a prison term—long or short—or, for that matter, probation or a non-trivial fine.

Incapacitation is a valid sentencing aim. However, it only serves to justify a prison term for serious sexual and violent offenders. No other aggravating or mitigating considerations are justified by reference to the objectives of sentencing. The obvious caveat here are considerations that relate to rehabilitation. If rehabilitation is established as an achievable sentencing aim then considerations such as remorse, prior good record, and spontaneous offending would be appropriate mitigating considerations, if it is shown that these traits are consistent with positive attitudinal reform and lead to reduced rates of recidivism.

The above analysis supports a very limited number of aggravating or mitigating factors. Intuitively, this runs counter to entrenched sentencing methodology where many variations in the manner in which a crime is committed and the consequence of a crime can be important aggravating considerations. One seemingly novel conclusion stemming from the above analysis is that it runs counter to the view that premeditated criminal acts and those which cause grave harm to victims should be treated more harshly than substantive offenses of the same nature which are committed

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297. Bagaric, *The Punishment Should Fit the Crime*, *supra* note 192.

298. See Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189, 191-92 (2010); *see also* MIKE DIXON ET AL., INST. FOR PUB. POLICY RESEARCH, CRIMESHARE: THE UNEQUAL IMPACT OF CRIME 25 (2006); Adriaan J.M. Denkers & Frans Willem Winkel, *Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT'L REV. VICTIMOLOGY 141, 155-56 (1998).

spontaneously and cause little harm to a victim. Moreover, offenders who are solely responsible for a criminal act or who have a key role in an offense are currently treated more severely than those who have a minor role. However, this discord does not, in fact, follow from my approach. Rather, these principles are accommodated within a different sentencing layer, proportionalism, as opposed to the objectives of sentencing. It is to this doctrine that I now turn.

#### VI. AGGRAVATING AND MITIGATING FACTORS STEMMING FROM PROPORTIONALISM

Unlike the objectives of sentencing considered thus far, proportionalism is concerned with how much to punish as opposed to the logically prior issue of why we should punish. The content of the proportionality principle means, logically, that several mitigating and aggravating considerations are embedded within its construct.

The principle of proportionality in its most basic, and persuasive, form requires that the seriousness of the crime is matched by the harshness of the penalty.<sup>299</sup> The proportionality principle is adopted in all Australian jurisdictions. A clear statement of the principle of proportionality is found in the Australian High Court case of *Hoare v The Queen*: “[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.”<sup>300</sup>

In *Veen (No 1) v The Queen*<sup>301</sup> and *Veen (No 2) v The Queen*<sup>302</sup> the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which at various times has also been declared as

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299. See Richard G. Fox, *The Meaning of Proportionality in Sentencing*, 19 MELB. U. L. REV. 489, 492 (1994).

300. [1989] 167 CLR 348, 354.

301. [1979] 143 CLR 458, 467.

302. [1988] 164 CLR 465, 472.

the most important aim of sentencing.<sup>303</sup> Thus, in the case of dangerous offenders, while community protection remains an important objective, at common law it cannot override the principle of proportionality. Proportionality has also been given statutory recognition in all Australian jurisdictions.<sup>304</sup>

Proportionality is also a requirement of the sentencing regimes of ten states in the United States.<sup>305</sup> It is also a core principle that informs the Federal Sentencing Guidelines. The Guidelines Manual states that one of the three objectives underpinning the Sentencing Reform Act is “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.”<sup>306</sup>

Broken down to its core features, proportionality has two limbs. The first is the seriousness of the crime and the second

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303. See, e.g., *Channon v The Queen* [1978] 20 ALR 1.

304. The *Sentencing Act 1991* provides that one of the purposes of sentencing is to impose a just punishment, and that in sentencing an offender the court must have regard to the gravity of the offense and the offender’s culpability and degree of responsibility. *Sentencing Act 1991* (Vict.) SS 5(1)(a), 5(2)(c), 5(2)(d). The *Sentencing Act 1995* states that the sentence must be commensurate with the seriousness of the offense. *Sentencing Act 1995* (W. Austl.) s 6(1). The *Crimes (Sentencing) Act 2005* provides that the sentence must be just and appropriate. *Crimes (sentencing) Act 2005* (Austl. Cap. Terr.) s 7(1)(a). In the Northern Territory and Queensland, the relevant sentencing statute provides that the punishment imposed on the offender must be just in all the circumstances. *Sentencing Act 1995* (N. Terr.) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld.) s 9(1)(a). In South Australia, the emphasis is upon ensuring that the defendant is adequately punished for the offense. *Criminal Law (Sentencing) Act 1988* (S. Austl.) s 10(1)(k). The need for a sentencing court to adequately punish the offender is also fundamental to the sentencing of offenders for Commonwealth matters. See *Crimes Act 1914* (commonwealth) s 16A(2)(k). The same phrase is used in the New South Wales. See *Crimes Sentencing Procedure Act 1999* (N.S.W.) pt 1 s 3A(a).

305. See Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 250-58 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington and West Virginia).

306. The most basic objective is to “combat crime through an effective, fair sentencing system” through (i) “honesty in sentencing” (i.e., removing the power of the parole commission to reduce the term to be served); (ii) “reasonable uniformity in sentencing—by reducing the wide disparity of sentences for similar offenses”; and (iii) “proportionate sentences.” U.S. SENTENCING COMM’N, *supra* note 40, § 1.3.

is the harshness of the sanction. Further, the principle has a quantitative component—the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

Some commentators have argued that proportionality is so vague as to be meaningless in light of the fact that there is no stable and clear manner in which the punishment can be matched to the crime. Jesper Ryberg notes that one of the key and damaging criticisms of proportionality is that it “presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.”<sup>307</sup> The most obscure aspect of proportionality is that there is no established and clear manner in which the punishment can be matched to the crime. Jesper Ryberg further notes that to give content to the theory it is necessary to rank crimes, rank punishments, and anchor the scales.<sup>308</sup>

There is some merit in Ryberg’s critique. And, as noted by Ian Leader-Elliott and George Fletcher, the application of the proportionality principle is especially difficult in the case of offenses such as drug offenses, where there is no direct, clear and observable harm caused by the crime.<sup>309</sup> The principle of proportionality applies to offenders who traffic in drugs no less than it does to offenders who inflict injury or death. In the trafficking offenses, however, there is not the same intuitive, retributive ground for determining a punishment to fit the offense. There is no natural measure of proportionality in offenses that are supposed to secure the common good. The American theorist, George Fletcher, makes the point in his discussion of crimes of *lese majeste*:

Just punishment requires a sense of proportion, which in turn requires sensitivity to the injury inflicted. . . . The more the victim suffers, the more pain should be inflicted on the criminal. In the context of betrayal, the gears of this basic principle of justice, the

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307. JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT* 184 (2004).

308. *See id.* at 185. Even retributivists have been unable to invoke the proportionality principle in a manner which provides firm guidance regarding appropriate sentencing ranges. *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING* 122 (2005).

309. Ian Leader-Elliott, *Sentencing by Weight: Proposed Changes to the Commonwealth Code Serious Drug Offenses*, 36 *CRIM. L.J.* 265, 278 (2012).

lex talionis, fail to engage the problem. The theory of punishment does not mesh with the crime when there is no tangible harm, no friction against the physical welfare of the victim.<sup>310</sup>

While, doctrinally, it has been argued that there is a manner in which firmer content could be accorded to the proportionality doctrine,<sup>311</sup> an exact matching of offense severity and penalty harshness is not feasible in light of the current understanding of proportionalism.

However, this is not an issue that needs to be settled and resolved for current purposes. Irrespective of the precise manner in which harmfulness is assessed, it is clear that a cardinal criterion is the extent to which it sets back the interests and flourishing of victims. Accordingly, homicide offenses are the most serious. Offenses causing considerable degrees of permanent impairment—whether physical or mental—also rate highly, as do sexual offenses.<sup>312</sup> Culpability is also an entrenched aspect of this limb of the proportionality thesis.<sup>313</sup> Andrew Von Hirsch and Nils Jareborg contend 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 circumstance that determine the extent to which the offender should be held accountable for the act.”<sup>314</sup>

Thus, it follows that considerations that relate to culpability are capable of aggravating or mitigating penalty. For this reason, planned offenses are more serious than those committed spontaneously, and offenders who have a central role in a crime are more blameworthy than peripheral players.

Further, the impact of the crime on victims and the effect of the sanction on offenders should also impact the penalty. Acts by offenders which reduce the level of the harm stemming from the offense should be mitigatory. This

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310. *Id.* (quoting GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 43 (1993)).

311. *See* Bagaric, *Injecting Content*, *supra* note 221, at 412.

312. *See id.* at 433.

313. Andrew Von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 *OXFORD J. LEGAL STUD.* 1, 2-3 (1991).

314. *Id.*

consideration applies most acutely in relation to property offenses because the value of the loss can be measured precisely (apart from where the property has sentimental value). It is manifest that a victim who has \$10,000 stolen from him or her which is returned by the offender suffers far less than a victim of a \$10,000 theft who receives no restitution.

On the other side of the proportionality equation, the same reasoning applies. The main criterion regarding penalty severity is the extent to which the penalty sets back the interests and flourishing of offenders. Prison is damaging because human beings have an innate desire for freedom and the capacity to shape their activities and lives according to their preferences. Moreover, certain prison conditions are considerably harsher than those typically designated by this type of sanction. The harshest prison conditions are those found in super-maximum prisons.<sup>315</sup> These prisons normally consist of “jails within prisons.”<sup>316</sup> There is no uniformity to such conditions but, in general, they involve “incarcerating inmates under highly isolated conditions with severely limited access to programs, exercise, staff, or other inmates.”<sup>317</sup>

It is generally accepted that the first super-maximum prison was the rock fortress Alcatraz in San Francisco Bay, which was operated by the U.S. Federal Bureau of Prisons from 1934 until its closure in 1963.<sup>318</sup> However, this prison bears little semblance to modern super-maximum prisons. The conditions which typically manifest in current super-

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315. See RUTGERS UNIV. PRESS, *THE GLOBALIZATION OF SUPERMAX PRISONS* 9 (Jeffrey Ian Ross ed., 2013) (discussing operations of supermax prisons in each of nine countries).

316. U.S. DEPT OF JUSTICE NAT'L INST. OF CORR. *SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS* 1 (1999).

317. *Id.* They have also been defined as “. . . a free-standing facility, or a distinct unit within a facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated. . . . [T]heir behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.” Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 PUNISHMENT & SOC'Y 163, 170 (1999).

318. King, *supra* note 317, at 165-66.

maximum conditions can be traced back over forty years to the lockdown which occurred in the U.S. Prison at Marion, Illinois, following increasing prisoner misbehavior, including the killing of two prison officers.<sup>319</sup> More than thirty U.S. states now have super-maximum prisons.<sup>320</sup>

Super-maximum prisons are now part of the landscape in a large number of countries, including Great Britain, Canada, New Zealand, South Africa, Brazil and the Netherlands.<sup>321</sup> There is no consistency regarding the exact daily regimes of prisoners, but it can include being locked in their cells for up to twenty-three hours per day.<sup>322</sup> Inmates often do not have access to fresh air, direct sunlight, or educational facilities, and have limited visiting rights and access to communications facilities.<sup>323</sup> In some circumstances, the regime is less restrictive, but it always involves being warehoused in a concrete room and the time spent out of a cell is, in effect, spent in a slightly larger concrete cell.

This type of incarceration is far harsher than mainstream prison conditions. It should be reflected in the sanction limb of the proportionality thesis and, hence, result in a reduction of penalty in the order of fifty percent.<sup>324</sup>

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319. *Id.* at 165.

320. *Id.* at 163.

321. *See generally* RUTGERS UNIV. PRESS, *supra* note 315 (discussing the operations in each of these countries).

322. *See R v Benbrika & Ors (Ruling No. 20)* [2008] VSC 80 [30] (Austl.).

323. NSW COUNCIL FOR CIVIL LIBERTIES, *Inquiry into Issues Relating to the Operations and Management of the Department of Corrective Services 2* (Jan. 30, 2006), available at <http://parliament.nsw.gov.au/prod/parlment/committee.nsf/0/6F44CC02AA91917CCA25711700015742> (Austl.); *see also* DAVID BROWN, *The Effect of Terrorism and Terrorist Trails on Australian Prison Regimes*, in PROCEEDINGS OF THE 2ND AUSTRALIAN AND NEW ZEALAND CRITICAL CRIMINOLOGY CONFERENCE 64-65 (Chris Cuneen & Michael Salter eds., 2008).

324. This limb of the proportionality principle is also reflected in the view that sanctions should be structured so that they have the same impact on offenders who are deserving of the same punishment. As noted by Andrew Ashworth, the need for equal impact of sanctions minimally entails that, “the system should strive to avoid grossly unequal impacts on offenders. . . .” ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 80 (2d ed., 1995). A 50% reduction is the amount that previously has been accorded by Australian courts for harsh prison conditions. *See* Mirko Bagaric et al., (*Particularly*) *Burdensome Prison Time*



The impact on the offender is not always confined to the immediate deprivation stemming from the crime. Offending can have collateral but real deprivations in the form of public opprobrium, reduction of opportunities, and injury by the offender during the commission of the offense. In Australia, the balance of authority indicates that shame can be a mitigating factor but that it generally carries little weight. In *Kenny v The Queen* the court stated that public shame could be given some weight if it was so significant as to damage the person physically or psychologically.<sup>325</sup> In *R v Nuttall; Ex parte Attorney-General (Qld)* the view was taken that “the respondent’s loss of employment and lack of job prospects on his release are relevant considerations” in sentencing.<sup>326</sup> Further, where an offender is harmed in the course of committing an offense, it can reduce the penalty. In *R v Hannigan*, Justice Chesterman stated:

[T]he theory which underlies the relevance of extra-curial punishment to sentence is that it deters an offender from re-offending by providing a reminder of the unhappy consequence of criminal misconduct, or it leaves the offender with a disability, some affliction, which is a consequence of criminal activity. In such cases one can see that a purpose of sentencing by the court, deterrence or retribution, has been partly achieved.<sup>327</sup>

All of these deprivations are directly related to the crime. They are not imposed by the sentencing judge; however, the pain is just as real and hence they should be capable of reducing the sentence. Further, unintended harm caused to victims by offenders—such as emotional distress—is capable of aggravating penalty, and, to enable unintended harm—so far as the sentencing court is concerned—caused to offenders as a result of the offense to reduce penalty, injects a degree of coherency into this area of sentencing law.

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*Should Reduce Imprisonment Length—and Not Merely in Theory*, 38 MELB. U. L. REV. (forthcoming 2014) (manuscript at 6).

325. [2010] NSWCCA 6 [49] (Austl.); see also *Ryan v The Queen* [2001] 206 CLR 267 (Austl.).

326. [2011] QCA 120 [59] (Fraser and Chesterman JJA agreeing) (Austl.).

327. [2009] 193 A Crim R 399 [25].

VII. AGGRAVATING AND MITIGATING FACTORS STEMMING  
FROM THE SUBSTANTIVE CRIMINAL LAW

Having ascertained the mitigating and aggravating factors that stem from the objectives of sentencing and proportionalism, it is necessary to widen the examination to determine whether the substantive criminal law underpins any such considerations. Ostensibly, the answer is no. The substantive criminal law demarcates the distinction between behavior that is a crime and that which attracts no criminal liability. This distinction is done by setting out the nature of criminal acts, each of which is separated into distinct elements, and defining defenses to those acts. Each criminal act has a maximum penalty, and, as we saw in Part III of this Article in the case of offenses committed in the United States, often a presumptive penalty.

The objectives of the substantive criminal law are reflected in the designation of the type of behavior which is categorized as a crime and the parameters as defined by the elements of the offense. Complex policy decisions inform the decisions regarding which type of behavior to criminalize. All western nations, with varying degrees of specificity, proscribe conduct that involves deliberate infringements on the right to life, bodily integrity, sexual autonomy, liberty and property. Criminalization often extends well beyond these parameters to include behavior such as drug use and road traffic compliance.<sup>328</sup> Once these decisions have been made, there seems to be no further scope for the elements of the crime to influence sentence, beyond the sentence that has already been designated for the offense.

Thus, it might appear that a premeditated murder is more serious than a spur-of-the-moment killing, and a \$100,000 theft is worse than a theft of \$10; however, if these differences are meaningful, they should presumably be reflected either in the different substantive classification of the offenses or maximum or presumptive penalties. In fact, this often is the case. Thus, for example, the Federal Sentencing Guidelines create a higher penalty for thefts in

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328. Mirko Bagaric, *The "Civil-isation" of the Criminal Law*, 25 CRIM. L.J. 184, 188 (2005).

excess of \$10,000.<sup>329</sup> Once these parameters are set and accommodated, the impact of the substantive criminal law on sentencing is arguably exhausted.

However, on closer reflection, an area of substantive criminal law that can influence mitigating and aggravating considerations is criminal defenses. In general, the substantive criminal law draws strict lines relating to the applicability of defenses. All criminal law systems have narrow and often technical defenses to crime. They are often based on general over-arching excuses and justifications<sup>330</sup> which are recognized in some form by most western criminal justice systems. The key excuses which can exculpate otherwise criminal conduct are self-defense, duress or coercion, necessity and insanity.<sup>331</sup> The criteria for legal excuses are necessarily narrow due to the binary nature of criminal law, that is, offenders are either guilty or innocent and, if the latter, they are beyond the bounds of legal censure or punishment. Sentencing, on the other hand, is not so clear-cut and there is potential scope for degrees of blame and wrongdoing that can be accommodated by adjusting the level of punishment.

Thus, circumstances that are similar to those that could attract a legal defense, but fall short of constituting a criminal defense should potentially, at least, constitute mitigating considerations. This approach has the additional advantage of injecting a degree of coherency and consistency throughout the criminal law system. All of the defenses have discrete elements that need to be satisfied in order to excuse what is otherwise criminal behavior.<sup>332</sup> The exact content of

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329. U.S. SENTENCING COMM'N, *supra* note 40, § 2B1.1(b)(1).

330. The difference between excuse and justification is not relevant for the purposes of broader observations regarding the distinction, *see* Mirko Bagaric, *Australia*, in ALAN REED & MICHAEL BOHLANDER, *GENERAL DEFENSES IN CRIMINAL LAW—DOMESTIC AND COMPARATIVE PERSPECTIVES* (2014) [hereinafter Bagaric, *Australia*].

331. *See* TEN, *supra* note 1, ch. 5 (discussing the justification of criminal excuses).

332. *See* Stephen S. Schwartz, *Is there a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259 (2008) (discussing the elements of necessity and its divergence in some United States jurisdictions). For a discussion of the elements of duress, *see* Monu Bedi, *Excusing Behavior:*

these defenses varies slightly across jurisdictions.<sup>333</sup> However, the justification and rationale for the defenses are universal.<sup>334</sup>

Failed criminal defenses have a link to exculpatory criminal behavior, and, hence, should logically attract mitigation. However, if they are to operate in this way, their impact should be minor given that the substantive law has determined that they fall short of meeting the elements of the defense. In mathematical terms, such considerations warrant no more than, say, a ten percent discount.

Intoxication is also a defense to crime in limited situations<sup>335</sup> and, hence, can potentially operate as a mitigating factor when the extent of intoxication is not sufficient to constitute a defense. However, on balance, it should not operate in this manner. The conceptual basis for intoxication operating as a defense is disputable and there is a clear link between intoxication and crime. In particular, a large amount of violence is alcohol-fueled.<sup>336</sup> The link between alcohol and crime is well-known and it is foreseeable to most people that consumption of alcohol may increase the likelihood of engaging in crime. There is in fact a powerful argument for making intoxication an aggravating factor—as is generally the case in Australia.<sup>337</sup> Thus, it follows that alcohol consumption should not reduce penalties.

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*Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 575 (2011).

333. See Schwartz, *supra* note 332, at 1260; see also Bedi, *supra* note 332, at 579, 591-92. The differences are irrelevant for the purposes of this discussion, given that any argument for extending a legal excuse to a mitigating sentencing consideration is necessarily based on the fact that elements of the defense have not been fully satisfied.

334. The justifications are discussed in Bagaric, *Australia*, *supra* note 330.

335. *Id.*

336. Anthony Morgan & Amanda McAtamney, *Key Issues in Alcohol-Related Violence*, AUSTRALIAN INST. OF CRIMINOLOGY, <http://www.aic.gov.au/publications/current%20series/rip/1-10/04.html> (Dec. 2009).

337. See *R v Currie* [1988] 33 A Crim R 7 (Austl.); see also *Baumer v The Queen* [1987] 27 A Crim R 143 (Austl.); *R v Laffey* [1998] 1 VR 155, 160-62 (Austl.); *Director of Public Prosecutions v Martin* [2009] VSCA 316 [6] (Austl.); *R v Henry* [1999] 106 A Crim R 149 [192] (Austl.).

Similar considerations apply in relation to provocation which is a defense in some jurisdictions. Once again, the doctrinal underpinnings of the defense are dubious. The main flaw in provocation as a defense is that it assumes that people who lash out because of a loss of self-control are assumed to be less blameworthy than those who harm others for other reasons. This presumption assumes that anger is an emotion that should be accommodated by the law. This rationale is flawed for two key reasons. First, anger should be not rewarded more than other demonstrably less objectionable emotions. As noted by Arenson et al.:

[T]here is no reason in logic or principle for allowing anger alone to serve as an excuse. As noted by J. Horder,

why do we regard anger as an excusing condition but not killings motivated by spite, greed, and lust? Or for that matter, if the current defense of provocation is used as a benchmark for the development of legal principle, why do we not allow emotions that are palpably desirable to be similarly excusatory when they manifest an intention to kill? Is it justifiable that a person who kills another out of love and kindness in a euthanasia scenario should be guilty of murder, yet an accused who kills in anger should be convicted of the lesser crime of voluntary manslaughter?<sup>338</sup>

The other flaw with the provocation defense is that it relies on the assumption that anger should exculpate crime because it is unavoidable. Thus, provocation is viewed as a concession to the frailty of human nature.<sup>339</sup> The view that anger is a natural human feeling that reduces self-control, making law-abiding behavior more difficult,<sup>340</sup> is flawed. It has been noted that humans have a far greater capacity to

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338. KEN ARENSON ET. AL., *AUSTRALIAN CRIMINAL LAW IN THE COMMON LAW JURISDICTIONS: CASES AND MATERIALS* ch. 4 (2011) (internal citations omitted) (quoting JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* 194, 197 (Clarendon Press 1992)).

339. See Stanley Yeo, *Peisley: Case and Comment*, 16 CRIM. L.J. 197, 198-99 (1992).

340. Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 1001 (2002).

control emotions than is suggested by the provocation defense.<sup>341</sup>

Anger is an undesirable and damaging emotion. It is not a mindset that should be accommodated by the law. Individuals need to take responsibility for their conduct. Any legal principle that departs from this premise on the basis of speculation (i.e., people cannot control their emotions) is flawed and should be abolished and, hence, provocation should not be a mitigating factor in sentencing.

While intoxication—and, in some cases, provocation—is a recognized defense that should not be a mitigating consideration, there is one consideration in which the reverse applies, in that it cannot provide a defense to a criminal act but should be a mitigating factor. Several theorists have argued that poverty should exculpate crime in some circumstances.<sup>342</sup> While this idea has not influenced the operation of the substantive criminal law, it is clear that wealth confers choice and opportunity, while poverty is restrictive and often leads to frustration and resentment. Rich people who commit crime are, arguably, more blameworthy than the poor who engage in the same conduct because the capacity of the rich to do otherwise is greater. Yet, it has been argued that we cannot allow poverty to mitigate criminal punishment.<sup>343</sup> Otherwise, we potentially license or encourage people to commit crime. There is considerable force in this latter perspective. There is a non-reducible baseline standard of conduct that is expected of all individuals, no matter how poor. It is never tolerable to inflict serious bodily or sexual injury on another person. Deprived background should not mitigate such crimes. However, a stronger argument can be made in favor of economic deprivation mitigating other forms of offenses, such as drug

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341. Luke Neal & Mirko Bagaric, *Provocation: The Ongoing Subservience of Principle to Tradition*, 67 J. CRIM. L. 237, 246-47 (2003).

342. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 51 (3d prtg. 1973); see also Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9, 85-90 (1985).

343. See generally Mirko Bagaric, *Rich Offender, Poor Offender: Why it (sometimes) Matters in Sentencing*, LAW & INEQ. (forthcoming 2015).

and property crimes. In relation to these offenses, the impact on victims is generally less severe, and hence, the burden of poverty is the more compelling consideration. It should be reflected in a discount for impoverished non-violent and non-sexual offenses.<sup>344</sup>

#### VIII. AGGRAVATING AND MITIGATING FACTORS STEMMING FROM THE GENERAL LEGAL SYSTEM

The third point of reference that affects the choice of aggravating and mitigating considerations is the legal system as a whole. Most of the objectives of the legal system in general are too broad to drive any particular sentencing considerations. At the broadest level, the objectives of the legal system involve the need to co-ordinate, control and regulate human behavior by establishing binding norms that comply with the cardinal rule of law virtues in the form of clarity, certainty and fairness.<sup>345</sup>

However, there are some particular pragmatic and doctrinal aspects of the legal system that are capable of directing sentencing law and practice. The main consideration of this nature is the need for efficiency in the disposition of criminal matters. Justice should be swift.<sup>346</sup> Accordingly, the state has an interest in reducing the delay between the time of charge, verdict and sentence. There is also a preference to minimize the cost of the legal system. Hence, measures should be put in place to reduce the number of criminal trials. Offenders who plead guilty are less of a financial burden on the community than those who contest matters, and a guilty plea generally finalizes such matters faster.

Thus, a strong argument can be mounted for according a discount to offenders who plead guilty. As noted earlier, the guilty plea discount is one of the two most important mitigating considerations in Australia. The rationale for the discount is summarized by Justices Gaudron, Gummow and

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344. *See id.* at 19-26.

345. *See RAZ, supra note 206, at 214-17; FINNIS, supra note 206, at 270-71.*

346. *See Speedy Trial Act 1974, 18 U.S.C. §§ 3161-3171; Barker v. Wingo, 407 U.S. 514, 530 (1972); United States v. Ewell, 383 U.S. 116, 120 (1966); Jago v District Court [NSW] [1989] 168 CLR 23 [32] (Austl.).*

Callinan in a decision by the High Court of Australia in *Cameron v The Queen*:

Australian courts have enthusiastically embraced the proposition that a person who pleads guilty should receive a lesser sentence than one who pleads not guilty and is convicted. In so far as a plea of guilty indicates remorse and contrition on the part of the defendant, the courts have long recognised it as a mitigating factor of importance. But in recent years, under the pressure of delayed hearings and ever increasing court lists, Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present. They *have taken the pragmatic view that giving sentence “discounts” to those who plead guilty at the earliest available opportunity encourages pleas of guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses and prevents the misuse of legal aid funds by the guilty.*<sup>347</sup>

The time and cost-savings stemming from guilty pleas provide powerful arguments in favor of maintaining the discount. Absent the guilty plea discount, there is no incentive for accused persons to plead guilty, no matter how compelling the case against them. It would, in fact, be contrary to the best interests of the accused to plead guilty. This was a point noted in *R v Shannon*:

If a plea of guilty . . . cannot be regarded as a factor in mitigation of penalty, there is no incentive . . . for an offender to admit . . . guilt . . . if the offender has nothing to gain by admitting guilt, he will see no reason for doing so.<sup>348</sup>

Apart from time and cost-savings—and the consequential reduction in court delays—it has also been suggested that another reason in support of the guilty plea discount is that it avoids inconvenience to witnesses. In *R v Thomson* the court noted:

A plea permits the healing process to commence. A victim does not have to endure the uncertainty of not knowing whether he or she will be believed, nor the skepticism sometimes displayed by friends

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347. *Cameron v The Queen* [2002] HCA 6 [39] (Austl.) (emphasis added).

348. *R v Shannon* [1979] 21 SASR 442, 451 (Austl.).



and even family prior to a conviction. A victim will also be spared the personal rumination of the events . . . .<sup>349</sup>

The persuasiveness of this justification involves a degree of speculation. The court in *R v Thomson* recognized that this “is a consideration which varies to a significant degree with the nature of, and circumstances of, an offence.”<sup>350</sup> Nevertheless, at least in some circumstances, the avoidance of inconvenience and distress to witnesses may have a value worth rewarding through a guilty plea discount.

The legal system also has a preference for substantive accuracy over pragmatic expedience, and hence, the discount should not be so large as to entice the innocent to plead guilty.<sup>351</sup> In Australia, the normal range of the discount is between ten percent and about thirty percent, depending on the circumstances of the case. In several jurisdictions it is either conventional or a statutory requirement to indicate the size of the discount.<sup>352</sup> The discount range seems to have

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349. [2000] 49 NSWCCA 309, 386 (Austl.).

350. *Id.*

351. See Mirko Bagaric & Julie Brebner, *The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea—I’m Pleading Guilty Only Because of the Discount*, 30 INT’L J. SOC. LAW 51, 51 (2002).

352. In New South Wales and Queensland, the Court must indicate if it *does not* award a sentencing discount in recognition of a guilty plea. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2); *Penalties and Sentences Act 1992* (Qld) s 13(3). In South Australia, Western Australia and New South Wales, the courts often specify the size of the discount given. In Victoria, section 6AAA of the *Sentencing Act 1991* (Vic) states that when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. *Sentencing Act 1991* (VIC) s 6AAA. The rationale and size of the typical discount in Victoria is discussed in *Phillips v The Queen* [2012] VSCA 140 [26-31]. There has been some judicial comment as to the artificiality of section 6AAA given the instinctive synthesis that produces the actual sentence. See *Scerri v The Queen* [2010] VSCA 287 [23]–[25]; *R v Flaherty (No 2)* [2008] 19 VR 305; see also RICHARD FOX & ARIE FREIBERG, SENTENCING: STATE AND FEDERAL OFFENDERS 326-27 (2d ed., 1999); GERALDINE MACKENZIE & NIGEL STOBBS, PRINCIPLES OF SENTENCING 90-91 (2010). In Western Australia, section 9AA of the *Sentencing Act 1995* (WA) permits a court to reduce a sentence by up to 25% for a plea entered into at the first reasonable opportunity. In South Australia, recent legislative changes allow for a guilty plea reduction of up to 40% for an early guilty plea. See *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA) (introducing sections 10B and 10C into the section *Criminal Law (Sentencing) Act 1988* (SA)).

struck an effective balance between all of the respective considerations.

Another aim of the law is to encourage legal observance and achieve effective enforcement when the law is violated. Thus, a key aim of the legal system is to reduce crime and make offenders accountable for their crimes. This broad aim is also, arguably, an aim of the sentencing system. The Federal Sentencing Guidelines state that “the [Sentencing Reform] Act’s basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.”<sup>353</sup> The Guidelines add that “most observers of the criminal law argue that the ultimate aim of the law itself, and of punishment in particular, is the control of crime.”<sup>354</sup>

Thus, as a matter of public policy, the law should encourage those involved in criminal behavior to betray the confidence reposed in each other by providing a significant discount at the sentencing stage of the criminal justice system.<sup>355</sup> This is especially apposite given that it often places the offender in personal danger.<sup>356</sup>

The discount for co-operating with authorities should be considerable given its importance to the legal system as a whole. Indeed, in Australia, it is already one of the most compelling mitigating factors.<sup>357</sup> In terms of the size of the discount that is available, it has been held that the discount for a plea of guilty and assistance to authorities should be up to fifty percent.<sup>358</sup> As with the guilty plea discount, this

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353. U.S. SENTENCING COMM’N, *supra* note 40, at 2.

354. *Id.* at 4.

355. *Malvaso v The Queen* [1989] 168 CLR 227, 239 (Deane and McHugh, JJ).

356. *R v Barber* [1976] 14 SASR 388, 390 (Bray CJ); *see also Director of Public Prosecutions (Cth) v AB* [2006] 94 SASR 316.

357. *See Penalties and Sentences Act 1992* (Qld) s 9(2)(h); *Crimes (Sentencing) Procedure Act 1999* (NSW) s 23; *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(h), 10A; *Sentencing Act 1995* (NT) s 8(5); *Crimes (Sentencing) Act 2005* (ACT) s 36. There are also similar provisions at the Commonwealth level. *See Crimes Act 1914* (Cth) s 16(2)(h) (Austl.).

358. For an example of where a fifty percent discount was allowed, *see R v Johnston* [2008] 186 A Crim R 345 [15]-[21] (Nettle JA). For an application of these principles, *see Dan Ning Wang v The Queen* [2010] NSWCCA 319 [31]-[32];

benefit is given independent of any reasons or remorse that might be demonstrated by assisting the authorities.

An even more wide-ranging objective of criminal justice is that the innocent should not be punished.<sup>359</sup> Accordingly, the impact of the penalty visited on others is a relevant consideration. The impact of a sentence on individuals other than the offender comes in degrees. Nearly every individual is socially connected. However, some people are cardinal to the flourishing of others. Offenders are sometimes the financial, social, and emotional cornerstones to the lives of other individuals. Their confinement could have a devastating impact on those closely associated to them; typically, their children or spouse. It is accepted in Australia that hardship to others can constitute a mitigating factor. However, the hardship on others must reach a level that is exceptional in order to be relevant to sentence.<sup>360</sup> In *R v Berlinsky*<sup>361</sup> Justice Doyle stated: “The effect of an order of imprisonment on the dependents and immediate family of the imprisoned person is often a sad feature of the sentencing process. A court can make some allowance for it, but usually only in exceptional cases.”

It could be countered that the consequence of a sanction reduction on the basis of the impact on the relatives of the offender provides a license for the well-connected to commit crime. The reality is that the utility of this supposed license is greatly reduced by capping the weight for this consideration to, say, a maximum of ten percent.

Thus, mitigating factors stemming from this wider context are:

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*Yue Ma v The Queen* [2010] NSWCCA 320. This contrasts with the decision in *R v Sahari* [2007] VSCA 235 [16]-[17], where it was held undesirable to specify a discount for co-operating with authorities.

359. See McCLOSKEY, *supra* note 216, at 180.

360. The basis for the test of exceptional hardship to translate into a mitigating factor that may lead to the offender avoiding an immediate term of imprisonment was established in the seminal case of *R v Wirth* [1976] 14 SASR 291, 295.

361. [2005] SASC 316 [28]; see also *R v Day* [1998] 100 A Crim R 275 at 277-78 per Wood J.

- pleading guilty;
- providing assistance to authorities; and
- considerable hardship to dependents.

#### IX. SUMMARY OF AGGRAVATING AND MITIGATING CONSIDERATIONS

Overall, there should only be seventeen considerations that aggravate or mitigate penalty. The relevant aggravating factors are:

- prior criminal record;
- high degree of involvement in crime;
- high degree of planning; and
- high level of harm.

The relevant mitigating considerations are:

- spontaneous offense;
- severe impact from punishment;
- incidental punishment;
- restitution of property;
- self-defense;
- necessity;
- duress or coercion;
- mental illness (falling short of insanity);
- plea of guilty;
- assistance to authorities;
- harm to dependents;
- deprived socio-economic background (in relation to non-violent and non-sexual offenses only); and
- clean criminal record.

In order to ensure consistency and transparency, it is important to attribute weight to each of the considerations. There is no accepted theory regarding the respective weight

of aggravating or mitigating factors<sup>362</sup> and, obviously, the exact weight accorded to the considerations involves a degree of approximation. However, this is less desirable than leaving the matters to the discretion of individual sentencing judges<sup>363</sup> and allows for informed revision of any weightings if practice uncovers any errors or unintended consequences stemming from the stated position.

The weightings that should be attributed to some of the considerations have been disclosed above; however, for the sake of comprehensiveness, a maximum weighting should be attached to all considerations. To this end, all of the mitigating factors which are, in effect, failed criminal defenses should attract a minor departure from penalty of, say, more than 10%. In a similar vein, the harm caused by the offense and the level of involvement in a crime are often reflected in the substantive nature of the crime, hence, these too should only attract a 10% variation. The degrees of planning, or lack of it, associated with the commission of a crime are two sides of the same coin and do not reflect strongly on the outcome of the crime, hence, they should also carry no more than a 10% loading.

For reasons set out above, a criminal record should attract a loading of up to 50%. The current loading given to a plea of guilty in Australia seems to strike the balance between encouraging offenders not to take matters to trial, while not being significant enough to coerce them into pleading guilty even if they have a tenable defense. Thus, a 25% reduction for pleading guilty is suitable. A similar discount should be granted for assisting the authorities.

The difference in the level of hardship between normal and super maximum prison conditions is profound, and hence, attracts up to a 50% loading. The incidental

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362. Jessica Jacobson & Mike Hough, *Personal Mitigation in England and Wales*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 146, 154 (Julian V. Roberts ed., 2011). In an empirical study of mitigating factors based on interviews with sentencers, it was noted that the factors accorded most weight were clinical depression, support from victim's family, drug treatment, remorse, regret, and moment of madness; and those with lesser weight were partner and children, illiterate, and abused as a child.

363. See Mirko Bagaric, *Sentencing: From Vagueness to Arbitrariness – The Need to Abolish the Stain that is the Instinctive Synthesis*, 38(1) U.N.S.W. L.J. (forthcoming 2015).

punishment experienced by an offender in terms of loss of employment and profession can be considerable in terms of its impact on life flourishing, as it can be in terms of the impact on the flourishing of dependents. These two considerations should be capable of attracting a loading in the order of 20%.

These factors do not operate in a simple cumulative manner; otherwise, a combination of mitigating factors could potentially amount to a discount of 100% or more. Instead, the discounts or additions are to be applied individually to the contracted sentence following application of the previous consideration. Thus, pleading guilty and assisting authorities does not lead to a 50% discount of the entire sentence. Rather, the discount is 43% (i.e., 25% plus the remaining part of the sentence [75%] multiplied by 25%).

#### CONCLUSION

Aggravating and mitigating considerations can have a profound effect on the sentence imposed on an offender. Yet, there is no accepted doctrinal theory which underpins and justifies those factors. The law is a complex inquiry, and it is not unusual for there to be an absence of consensus regarding the theoretical underpinning and practical application of a body of law. However, it is rare for the law to be in a state of confusion such as is the case relating to aggravating and mitigating considerations. There has not even been a considered attempt to cohere and justify this area of law, resulting in a jurisprudential wasteland. This Article attempts to provide a unifying theory.

I conclude that considerations should only aggravate or mitigate sentences if they are justified by reference to one of four broader objectives, namely: (i) the sentencing system; (ii) the proportionality principle; (iii) the criminal justice system; or (iv) the wider well-established principles of justice.

In summary, there should only be seventeen considerations that aggravate or mitigate penalty. They are now summarized.

<b>Consideration</b>	<b>Maximum weight</b>	<b>Rationale</b>
Prior criminal record for serious sexual and violent offenses	50%	Incapacitation
High degree of involvement in crime	10%	Proportionality (culpability)
High degree of planning	10%	Proportionality (culpability)
High level of harm	10%	Proportionality (harm to victim)

Table 1: Aggravating Factors

<b>Consideration</b>	<b>Maximum weight</b>	<b>Rationale</b>
Severe impact from punishment (e.g., harsh prison conditions)	50%	Proportionality (harm to offender)
Plea of guilty	25%	Reduce delay and cost of criminal justice system
Assisting authorities	25%	Reduce crime
Socio-economic deprivation—only for non-sexual and non-violent offenses	25%	Proportionality (culpability)
Restitution of property	25%	Proportionality (harm to victim)
Harm to dependents of the offender	20%	
Incidental punishment	20%	Proportionality (harm to offender)
Spontaneous offending	10%	Proportionality (culpability)
Self-defense	10%	Failed criminal defense (coherency of the criminal law)
Necessity	10%	Failed criminal defense (coherency of the criminal law)
Duress or coercion	10%	Failed criminal defense (coherency of the criminal law)
Mental illness	10%	Failed criminal defense (coherency of the criminal law)

Table 2: Mitigating Considerations

A limitation of the analysis in this Article is the uncertain nature regarding the efficacy of criminal punishment to achieve popular sentencing objectives. If the empirical data concerning the efficacy of the sentencing system to achieve key sentencing goals changes, it will affect the choice and development of aggravating and mitigating considerations. This is especially the case in relation to rehabilitation. The current empirical evidence is inconclusive regarding the capacity of criminal sanctions to reform offenders. Accordingly, mitigating factors, which are sought to be justified by reference to the rehabilitative ideal, should not be pursued. If it is established that rehabilitation is effective, the considerations that have an impact on the rate of re-offending should appear on the mitigating side of the ledger. Moreover, irrespective of the success of rehabilitation, if other considerations are established as being consistent with lower rates of recidivism, such as remorse, youth, and good character, they should also reduce penalty.

Thus, the aggravating and mitigating factors set out in this Article are not necessarily determinative or fixed. However, this Article has sought to enshrine the methodology for ascertaining the validity of aggravating and mitigating considerations, and to clearly articulate considerations which, on the basis of current knowledge, are justifiable. The Article also sets out the relative importance of these mitigating factors. In this way, the contours and structure of sentencing law and procedure are manifestly clearer.