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Mirko Bagaric

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CONSISTENCY AND FAIRNESS IN SENTENCING – THE SPLENDOR OF FIXED PENALTIES

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Mirko Bagaric*

ABSTRACT

Sentencing law is so indeterminate that it has been labeled the ‘high point in anti-jurisprudence’.¹ The vast discretion left to judges when sentencing has resulted in widespread inconsistency in sentencing. The most obvious manner to attenuate judicial discretion is to introduce a comprehensive fixed penalty regime. Fixed penalties however, are almost universally condemned. They are regarded as unjust because they are universally too harsh and they fail to account for differences between individual defendants. This paper argues that both of these criticisms can be circumvented by adopting a primary rationale for sentencing, hence paving the way for a fixed penalty system which would constitute a significant improvement to the present sentencing system.

1 Introduction

The Need to Curtail Judicial Sentencing Discretion

¶1 Perhaps the most controversial area of sentencing law and practice is fitting the punishment to the crime. Due to the enormous number and range of aggravating and mitigating circumstances that have been held to be relevant to sentencing, judges in Australia and the United Kingdom generally enjoy wide discretion in imposing punishment in any particular case. This has resulted in a large amount of disparity in sentencing. It has been argued elsewhere, that the rule of law virtues of consistency and fairness have been trumped by the idiosyncratic intuitions of sentencers, and that accordingly there is a need to restructure the breadth of the sentencing discretion.² The unprincipled nature of sentencing practice has led to what Andrew Ashworth labels a ‘cafeteria system’³ of sentencing, which permits sentencers to pick and choose with little constraint a rationale which seems appropriate at the time. Another eminent commentator on sentencing has noted that ‘sentences sometimes reveal more about judges than

* BA LLB (Hons) LLM; Faculty of Law, Deakin University.

¹ J Smith, *Clothing the Emperor: Towards a Jurisprudence of Sentencing*, 30 AUSTL & N.Z. J. CRIMINOLOGY 168, 174 (1997).

² See Mirko Bagaric, 21 *Sentencing: The Road to Nowhere*, SYDNEY L. REV. 597 (1999) (discussing the current approach to sentencing and the need to curtail sentencing discretion, where the point is made that as a result of the imprecise state of sentencing law, the rule of law virtues of consistency and fairness are often trumped by the idiosyncratic intuitions of sentencers).

³ ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 331 (2nd ed.1995).

about offenders'.⁴ The most simple solution to curbing judicial discretion is to introduce mandatory or fixed penalties.⁵

¶2 The main reason for the ill-defined state of sentencing law and practice is that legislatures and courts have not adopted a primary rationale or coherent justification for punishment. And as with most endeavors, without a stated goal, one is unlikely to make any positive changes. As sentencing law currently stands, a wide-ranging fixed penalty system is not feasible. There are simply too many variables, which are 'relevant' to the sentencing calculus. Two separate studies, about twenty years ago, determined that there were between 200 and 300 factors that were relevant to sentencing.⁶ No guideline system could hope to be sufficiently flexible or sensitive to incorporate even a fraction of these.

¶3 But if a primary rationale for punishment is adopted, this would facilitate a far more coherent and exacting approach to sentencing; which along the way would provide a basis for distinguishing real from illusory sentencing considerations. This in turn may open the way for a broad based fixed penalty regime.

¶4 There are two broad justificatory theories of punishment: retributivism and utilitarianism. Although retributivism represents the current orthodoxy of punishment, I have previously argued that the utilitarian theory is the most sound and therefore should underpin sentencing policy and practice.⁷ Adoption of a utilitarian theory has drastic implications for the sentencing inquiry, the least of which is the ability to eliminate many of the widely used sentencing considerations due to redundancy. Against the background of a utilitarian theory of punishment, I argue that a fixed penalty system is not only plausible, but also desirable.⁸

¶5 There are two central advantages of adopting a widespread fixed penalty system. First, as discussed above, sentencing will become a more consistent and fair practice. Secondly, there will be considerable economic savings to the community. Valuable court time will no longer need to be spent ascertaining every minute detail concerning the offense and the offender.

¶6 The reforms proposed in this paper are particularly relevant in the American context. Although many parts of the United States already have mandatory sentences for some offenses,⁹ such determinate sentencing laws are devoid of an overarching guiding principle and

⁴ Michael Tonry, *Sentencing Reform Across Boundaries*, in THE POLITICS OF SENTENCING 267, 268 (Chris Clarkson and Rod Morgan eds, 1995).

⁵ For a discussion of other options, see Andrew Ashworth, *Four Techniques For Reducing Disparity*, in PRINCIPLED SENTENCING 227 (Andrew Von Hirsch and Andrew Ashworth eds., 2nd ed. 1998).

⁶ JOANNE SHAPLAND, BETWEEN CONVICTION AND SENTENCE 55 (1981) (identifying 229 factors); ROGER DOUGLAS, GUILTY, YOUR WORSHIP 1980) (identifying 292 relevant sentencing factors). The results of such studies were noted in *Pavlic* (1995) 5 TAS R 186, 202.

⁷ See Mirko Bagaric, *In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights*, 24 AUSTL J. LEGAL PHIL. 95 (1999); Mirko Bagaric and K. Amarasakera, *The Errors of Retributivism* MELBOURNE U. L. REV. (forthcoming Apr. 2000).

⁸ As is discussed below, even if an alternative justification is adopted the same conclusion follows. The main premise which my argument relies on is that *some* coherent rationale for punishment is adopted.

⁹ See discussion below and Tonry, *supra* note 4; J Austin et al, *The Impact of "three strikes and you're out*, 1 PUNISHMENT AND SOCIETY 131 (2000).

as a result of placing considerable emphasis on unjustifiable factors, invariably impose punishment that exceeds the gravity of the offense. It is argued that regimes of this nature are unjustifiable and a more principled fixed penalty system is suggested.

Overview of Attitude Towards (and Criticisms of) Fixed Penalties

¶7 Fixed penalties are widely despised. This is especially so in Australia and the United Kingdom, where judges 'in some sense [feel that they] own sentencing and that legislative encumbrances on that ownership are inherently inappropriate'.¹⁰ In the United States the introduction of mandatory penalties has been the main reform to sentencing over the past two decades, and judges have become accustomed to the notion that sentencing should be governed by rules.¹¹ One of the main catalysts for fixed sentencing in the United States was the stinging book by a Federal trial judge who described sentencing as a 'wasteland in the law'.¹² However, fixed penalties are still spurned by leading American sentencing commentators. Michael Tonry notes that:

The greatest gap between knowledge and policy in American sentencing concerns mandatory penalties. Experienced practitioners and social science researchers have long agreed, for practical and policy reasons...that mandatory penalties are a bad idea.¹³

¶8 It seems that such sentiments are widely held. In a recent forum devoted to the concept of mandatory sentencing legislation in a leading Australian law journal¹⁴ not one of eight separate papers on the topic made a positive comment about mandatory sentences. This paper presents the other side of the argument.

¶9 Apart from the objection that fixed penalties are unfair, the other main criticisms of fixed penalties are that they are too tough. This however, is not so much a criticism of the concept of fixed penalties per se, but more a comment on the harsh level at which such penalties are normally set. If softer fixed penalties were set, this and many other criticisms of fixed penalties could be circumvented.

¶10 These objections along with others that have been made against fixed penalties are discussed at length in the next part of this paper. In the third and final section, I outline what, I believe ought to be the essential features of a fixed penalty system.

Definitions - Mandatory Penalties and Presumptive Systems

¹⁰ Tonry, *supra* note 4, at 269.

¹¹ *Id.* at 274; MICHAEL TONRY, SENTENCING MATTERS 146 (1996).

¹² MICHAEL FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

¹³ TONRY, *supra* note 11, at 134 (1996).

¹⁴ See *Forum, Mandatory Sentencing Legislation: Judicial Discretion and Just Deserts*, 22 U. OF NEW S. WALES L. J. 256 (1999).

¶11 Fixed sentencing involves prescribing standard penalties to offenses or instances of particular offenses. Broadly there are two different types of fixed sentencing options: mandatory penalties and presumptive penalties.

¶12 A mandatory sentence is such when the sentencer is strictly given only one option. Few jurisdictions employ such mechanisms. Even in jurisdictions, which have mandatory life sentences for murder, there are many with an executive mechanism for mitigating the length of the sentence.¹⁵ The more common variants of mandatory sentences are mandatory minimum penalties. This is where the legislature sets a minimum threshold beyond which the court cannot fall, but leaves room for the court to impose a harsher sanction where it deems appropriate. Strictly speaking, the fact that an offense has a level beyond which the penalty cannot fall does not make it a mandatory sentence. This penalty structure is simply the converse of mandatory maximum penalties, which accompany all offenses. However, offenses carrying mandatory minimum sentences have aroused far more discussion than the concept of 'mandatory maximums', and in keeping with accepted nomenclature, for present purposes mandatory penalties also include regimes which impose mandatory minimum terms. An example of a mandatory minimum term is the 'three strikes' law in the Northern Territory, which prescribes minimum jail terms¹⁶ for certain property offenses, such as criminal damage, stealing (but not shoplifting), unlawful entry into buildings and unlawful use of a vehicle.¹⁷ For adults, the penalty is 14 days imprisonment for the first offense, 90 days for a second, and 12 months where the offender has two or more prior property offenses. For juveniles, aged 15 or 16, a mandatory term of 28 days in a detention center is applicable for second or subsequent property offenses. Despite the harshness of these provisions they only serve as minimum terms; sentencers are free to impose heavier penalties where this is thought appropriate.¹⁸

¶13 Presumptive sentences refer to the situation where a standard penalty is fixed and must be imposed unless there is a demonstrable reason not to do so is provided. Thus there is a rebuttable presumption that the fixed penalty is appropriate. Two of the most widely publicized presumptive penalty systems are the grid guideline systems operating in Minnesota and the

¹⁵ See Donna Spears, *Structuring Discretion: Sentencing in the Jurisic Age*, 22 U.OF NEW S. WALES L. J. 295, 304 (1999).

¹⁶ The sentence must be actual imprisonment, not home detention or a suspended sentence.

¹⁷ These provisions were introduced via amendments to the *Juvenile Justice Act* 1983 (NT); and the *Sentencing Act* 1995 (NT) and came into operation in March 1997.

¹⁸ However, not surprisingly, in no reported case to date has a court imposed a penalty beyond the minimum. These provisions have been subject to several criticisms, however, the most perplexing aspect of them is that what amounts to the sternest sentencing provisions in Australia are targeted at property offenses, as opposed to offenses against person. This clearly infringes the principle of ordinal proportionality (which is discussed below). Perhaps the strongest legalistic attack on mandatory sentences is that they are unconstitutional because they violate the independence of the judiciary. However this argument has been rejected on the basis that it is within the competence of parliament to impose a duty that deprives courts of a range of discretionary powers that would otherwise be available and a legislative direction to the courts that requires mandatory sentencing does not violate the separation of powers doctrine: *Wynbyrne v Marshall* (1997) 117 NTR 11. See also Martin Flynn, *One Strike and You're Out*, 22 ALTERNATIVE L. J. 72 (1999).

United States Federal Jurisdiction.¹⁹ In Minnesota, a judge can only depart from the presumptive sentence where there are substantial and compelling reasons for doing so. The guidelines provide a non-exhaustive list of factors, which may and may not be used as a basis for departure.²⁰ The Federal Sentencing Guidelines provide that departure from the nominated penalty can only occur when the court finds a particular aggravating or mitigating circumstance was not adequately taken into consideration in formulating the guidelines, justifying a sentence different to that prescribed.²¹ In determining whether a factor was taken into account in setting the standard penalty, the court is directed to look only at material related to the drafting of the guidelines²².

2 Criticisms of Fixed Penalties

¶14 Numerous objections have been leveled at fixed penalty regimes. In the end, they amount to two discrete criticisms. First, opponents argue fixed penalties are too tough. Second, they lead to unfairness. I now consider the persuasiveness of these criticisms.

(i) Penalties Too Severe

¶15 The most common criticism of fixed penalties is that they are too severe. Fixed penalties are regularly introduced as part of a 'get tough on crime' political agenda²³ and thus it is not surprising that such an objection would be forthcoming.²⁴ The harshness of fixed penalty systems has resulted in several law reform bodies, and the like, coming down firmly against introducing fixed penalties.²⁵

¶16 The claim that many fixed penalty regimes are too harsh is well founded. A good example is the three strikes law in California. This provides that an accused with one prior "serious" or "violent" felony conviction must be sentenced to double the term they would have otherwise

¹⁹ These guidelines are discussed in greater detail below.

²⁰ There is concern that the Minnesota Supreme Court is using this power to treat amenability to probation as a mitigating factor since this consideration is irrelevant to the rationale underpinning the guidelines. *See State v. Trog*, 323 NW 2d 28 (Minn. 1982); Andrew von Hirsch, *Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards* in *THE POLITICS OF SENTENCING REFORM* 149, 167 (Chris Clarkson and Rod Morgan, eds, 1995). *See generally* Richard Frase, *Sentencing Guidelines in Minnesota and Other American States: A Progress Report*, in *THE POLITICS OF SENTENCING REFORM* 169, 182 (Chris Clarkson and Rod Morgan eds., 1995).

²¹ An example of where a court has the power to impose a penalty that is lower than prescribed is where the offender has substantially assisted in the investigation or prosecution of another offender. *See generally* Anthony N. Doob, *The United States Sentencing Commission Guidelines: If you don't know where you are going, you might not get there*, in *THE POLITICS OF SENTENCING REFORM* 199, 226-233 (Chris Clarkson and Rod Morgan eds., 1995).

²² For a discussion and criticisms of this, see Doob, *id.* at 226-28

²³ See Neil Morgan, *Capturing Criminals or Capturing Votes? The Aims and Effects of Mandatories*, 22 U. OF NEW S. WALES L. J. 267, 270 (1999).

²⁴ Although, as is discussed below, some fixed penalty systems have been introduced to achieve more principled aims.

²⁵ *See* AUSTL. L. REFORM COMM'N, SENTENCING 29 (Report 44, 1987); NEW S. WALES L. REFORM COMM'N, SENTENCING 258 (Discussion paper No 33, 1996).

received for the instant offense.²⁶ Offenders with two or more such convictions must be sentenced to a term of life imprisonment with the minimum term being the greater of: (i) 25 years; (ii) three times the term otherwise provided for the instant offense; or (iii) the term applicable for the instant offense plus appropriate enhancements. The instant offense does not have to be for a serious and violent felony - any felony will do.²⁷

¶17 The criticism that fixed penalties are too severe has been advanced in several different ways. While these are normally put forward as discrete reasons for rejecting fixed penalties, in effect they are no more than an elucidation of the undesirable consequences that follow when unduly harsh criminal sanctions are imposed.

Perverse Verdicts and More Not Guilty Pleas

¶18 Two of the reasons that led the Australian Law Reform Commission to reject fixed penalties were that they tend to encourage technical defenses and invite perverse verdicts²⁸. The New South Wales Law Reform Commission in its report about a decade also adopted these views.²⁹ Although neither of these bodies invoked any empirical data supporting these contentions, it does appear that there is some basis for their concerns. Research evidence regarding the trial rates in the United States Federal Jurisdiction, shows that in response to the severe Federal Sentencing Guidelines `nearly 30 per cent of those convicted of offenses bearing mandatory minimums were convicted at trial, a rate two-and-a-half-times the overall trial rate for federal criminal defendants'.³⁰ There is also evidence that juries in England in the eighteenth century would refuse to convict offenders who were `guilty' of offenses carrying a mandatory death penalty.³¹

¶19 More trials and incongruous jury verdicts are no doubt undesirable, but they are not unavoidable side effects of fixed sentences. The only reason that offenders may be disposed to more strenuously resist offenses which carry mandatory sanctions and juries may try harder to acquit accused charged with such offenses is that the stakes are high - and indeed too high. It seems safe to assume that if fixed penalties were not overly severe then the motivation for both of these side effects would dissipate.³²

²⁶ There are 28 different `serious' felonies (including burglary) and 17 `violent' felonies (including robbery in an inhabited house). CAL. PEN. CODE §1192.7(c)(1)-(28), CAL. PEN. CODE §667.5(c)(1)-(17). *See generally* Mark Owens, *California's Three Strikes Laws: Desperate Times Require Desperate Measures - But Will it Work?* 26 PACIFIC LAW JOURNAL 881, 891(1995).

²⁷ Three strikes laws have now been implemented in over 20 states in the United States. *See* K McMurry, *Three-strikes laws Providing More Show Than Go*, 12 TRIAL (1997); Austin, *supra* note 21.

²⁸ AUSTL L. REFORM COMM'N, *supra* note 24, at 29.

²⁹ NEW S. WALES L. REFORM COMM'N, *supra* note 24, at 258.

³⁰ TONRY, *supra* note 13, at 150.

³¹ *Id.* at 142-4. *See also* Morgan, *supra* note 22, at 277-278.

³² The evidence certainly favors such a view. Where fixed penalties are not unduly severe there is no research or empirical evidence to support such matters. For example, there is nothing to suggest that the mandatory minimum penalties for drink driving, which are present in most Australian jurisdictions, have resulted in longer hearings or more not guilty pleas.

Evasion of Fixed Penalties and Shift in Discretion

¶20 Another objection to fixed penalties is that they lead to surreptitious avoidance tactics by criminal justice officials. There is evidence that in jurisdictions where harsh fixed penalties apply, police, prosecutors and judges devise all sorts of innovative ways to avoid the operation of such laws.³³ For example, prosecutors in the United States often circumvent the application of severe mandatory minimum sentences prescribed by the Federal Sentencing Guidelines, by charging offenders with different, offenses that are not subject to mandatory penalties.³⁴ Where offenders are charged under these provisions, judges sometimes side-step the mandatory minimums by techniques such as refusing to find facts (such as the use of a firearm) which would trigger their operation; or simply not invoking the applicable penalties on the assumption that neither of the parties will appeal the sentence.³⁵ There is also strong evidence that prosecutors use mandatory provisions in order to exert pressure on the accused to plead guilty to offenses similar to those charged that do not carry a mandatory sentence.³⁶ As a result, there is a significant shift in discretion from judges to prosecutors.³⁷

¶21 Again, these problems are no more than a rehash of the more fundamental objection that some fixed penalties are too tough. If the legislature does not go over the top in prescribing the penalty, and sets penalties that are proportionate to the seriousness of the offense,³⁸ prosecutors could not use the threat of mandatory penalties as a weapon to coerce guilty pleas and it is unlikely that criminal justice officials would seek to circumvent the operation of such laws - there would simply be no motivation for doing so.

Fixing the Problem of Harsh Penalties

¶22 If a fixed penalty system is founded on a coherent rationale and proportionate penalties are set, the contrast between the experiences in United States Federal System and Minnesota shows that all of the above problems (and others) can be avoided. The Federal Sentencing

³³ TONRY, *supra* note 10, at 147, 150.

³⁴ *Id.*

³⁵ U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS OF DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING (1991). See generally Ilene H. Nagel and Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Plea Bargaining Practices Under the Federal Sentencing Guidelines*, 66 SOUTHERN CAL. L. REV. 501(1992); Tonry, *supra* note 4, at 272. See also VICTORIAN SENTENCING COMM. REPORT, SENTENCING, 170-1 (1989).

³⁶ TONRY, *supra* note 13, at 150,151.

³⁷ *Id.* See also Kay A. Knapp, *Discretion in Sentencing*, in SENTENCING IN AUSTRALIA 95 (I. Potas ed., 1985); Michael Adams, *Launch of UNSW Law Journal Forum*, 22 U. OF NEW S. WALES L. J. 257, 259 (1999); Russel Hogg, *Mandatory Sentencing Law and the Symbolic Politics of Law and Order*, 22 U. OF NEW S. WALES L. J. 262, 266 (1999).

³⁸ See the discussion below concerning the principle of proportionality.

Guidelines were implemented without a primary rationale.³⁹ The only discernible policy was to get tough on criminals. This it has done, but in a manner where the costs clearly outweigh the benefits. In addition to the problems discussed above, there is little evidence that the guidelines have led to increased uniformity in sentencing (due to the complexity of the guidelines and avoidance techniques by criminal justice officials),⁴⁰ and the Federal prison population has exploded since the introduction of the guidelines.⁴¹ Not surprising then, the system has proved largely unworkable and has been labeled as the 'most controversial and reviled sentencing reform initiative in United States history'.⁴²

¶23 A starkly different picture emerges in relation to the Minnesota system which is built on the core principles of proportionality and restraint in the use of prison; including a shift in the use of imprisonment towards only the more serious crimes - mainly related to crimes against the person.⁴³ Although the principle of proportionality is not rigorously applied, due to the undue weight given to prior convictions,⁴⁴ the grid system has on the whole operated successfully.⁴⁵ Following an extensive evaluation of the system, Frase states that:

The Minnesota Sentencing guidelines have, with varying degrees of success, achieved all of the principal goals of this reform. More violent offenders, and fewer property offenders, were sent to prison (although these were not as dramatic as [the drafters of the guidelines] intended). Sentencing has become more uniform and racial disparities have been reduced.⁴⁶

The Level at Which Fixed Penalties Should be Set - Proportionality the Key

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

¶25 This is clearly the case. The concept of leniency is relative, and thus far it has been used by way of contrast to fixed penalty regimes which have been criticized for their harshness. In order

³⁹ For example, see ASHWORTH, *supra* note 3, at 232-3; Doob, *supra* note 21, at 212-216.

⁴⁰ See TONRY, *supra* note 4, at 272..

⁴¹ Doob, *supra* note 21, at 239. However, given the objective of getting tough on crime, this is not necessarily a failing of the system.

⁴² Michael Tonry, *Judges and Sentencing Policy - The American Experience*, in SENTENCING, JUDICIAL DISCRETION AND TRAINING 139 (Colin Munro and Martin Wasik eds., 1992).

⁴³ Von Hirsch, *supra* note 20, at 152.

⁴⁴ See the discussion below regarding the relevance of prior convictions.

⁴⁵ For example, see ASHWORTH, *supra* note 3, at 231-3.

⁴⁶ Frase, *supra* note 20, at 196.

for sanctions to be lenient compared to these systems they would merely need to be proportionate to the severity of the offense. The question then is, whether there is a justification for matching the severity of the punishment to the seriousness of the crime. To this the answer is obvious: the principle of proportionality is widely acclaimed by judges and (most) philosophers as the principal consideration in setting penalty levels.⁴⁷

Proportionality and the Common Law

¶26 The Australian High Court decisions of *Veen (No 1)*⁴⁸ and *Veen (No 2)*⁴⁹ even went so far as to stamp the principle of proportionality as 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.⁵⁰ Thus in the case of dangerous offenders, while community protection remains an important objective, at common law it cannot override the principle of proportionality. In *Chester*, the High Court held that 'the fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender'.⁵¹ And it is for this reason that it is 'firmly established that our common law does not sanction preventive detention'.⁵²

¶27 In many other jurisdictions the principle of proportionality is also rated highly. For example, in relation to the Canadian sentencing system it has been noted that: 'the paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offense and the degree of responsibility of the offender for the offense'.⁵³ Similar views were expressed in the White Paper forming the basis of the *Criminal Justice Act 1991* (UK), which declared that the aim of the reforms was to introduce a 'legislative framework for sentencing, based on the seriousness of the offense and just deserts'.⁵⁴

Proportionality and Punishment

¶28 In the philosophical domain, the cornerstone of many modern day retributive theories is that the punishment should fit the crime. Andrew von Hirsch, who is largely responsible for the

⁴⁷ This is the case whether one adopts a retributive or utilitarian theory of punishment; see further below.

⁴⁸(1979) 143 CLR 458.

⁴⁹(1988) 164 CLR 465.

⁵⁰For example, see *Chanmnon* (1978) 20 ALR 1; *Valenti* (1980) 48 FLR 616, 420; *Williscroft* [1975] VR 292, 298; *Radlich* [1954] NZLR 86,87; *El Karhani* (1990) 21 NSW 370, 377.

⁵¹*Chester* (1988) 165 CLR 611, 618. See also *Veen v. R* (Veen No. 2) (1988) 77 A.L.R. 385. For an overview of the High Court's approach to proportionality see, R G Fox, *The Killings of Bobby Veen: The High Court on Proportion in Sentencing* 12 CRIM. L. J. 339, 348 (1988). See also AUSTL. L. REFORM COMM'N, *supra* note 24, at 15-16; NEW S. WALES L. REFORM COMM'N, *supra* note 24, at 492.

⁵²*Chester* (1988) 165 CLR 611, 618. See also, *Chivers* [1993] 1 Qd R 432.

⁵³CANADIAN SENTENCING COMM., SENTENCING REFORM: A CANADIAN APPROACH 154 (Ottawa, 1987).

⁵⁴GREAT BRITAIN HOME OFFICE, WHITE PAPER: CRIMINAL JUSTICE AND PROTECTING THE PUBLIC 2.3 (1990). For judicial endorsement of the principle in the United Kingdom, see *Skidmore* (1983) 5 Cr App R (S) 17; *Moylan* [1970] 1 QB 143.

revival (and now dominance) of the retributive (or just deserts) theory of punishment, asserts that:

Sentences according to [the just deserts theory] are to be proportionate in their severity to the gravity of the defendant's criminal conduct. ... In such a system, imprisonment, because of its severity, is visited only upon those convicted of serious felonies. For non-serious crimes, penalties less severe than imprisonment are to be used.⁵⁵

¶29 Despite the natural association between proportionality and retributivism, it has been asserted that a utilitarian theory of punishment, not only is consistent with the principle of proportionality, but indeed best underpins this principle. Bentham argued in favor of the proportionality principle on the basis that if crimes are to be committed it is preferable that offenders commit less serious rather than more serious ones.⁵⁶ Therefore, he argued, that sanctions should be graduated commensurate to the seriousness of the offense so that those disposed to crime will opt for less serious offenses. Absent proportionality, potential offenders would not be deterred from committing serious offenses any more than minor ones, and hence would just as readily commit them.⁵⁷ More recently, another utilitarian justification for proportionality has been advanced.

¶30 There is yet another basis upon which proportionality may have a role in utilitarian punishment. Disproportionate sentences risk placing the entire criminal justice system into disrepute because such sentences would offend the principle, at the root of which is the broad concept of justice, that privileges and obligations ought to be distributed roughly in accordance with the degree of merit or blame attributable to each individual.⁵⁸ Clear violations of this principle lead to antipathy towards institutions or practices, which condone such outcomes.

Proportion in punishment is a widely found and deeply rooted principle in many penal contexts. It is...integral to many conceptions of justice and as such the principle of proportion in punishment seen generally acts to annul, rather than to exacerbate, social dysfunction.⁵⁹

⁵⁵ ANDREW HIRSCH, PAST OR FUTURE CRIMES 10 (1985). See also, J L Anderson, *Reciprocity as a Justification for Retributivism*, CRIMINAL JUSTICE ETHICS 13 (1997).

⁵⁶ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, 165-174 (James Burns and Herbert Hart eds., 1982).

⁵⁷ This argument, however, has been criticized by von Hirsch, who points out that there is no evidence that offenders make comparisons regarding the level of punishment for various offenses. VON HIRSCH, *supra* note 54, at 32.

⁵⁸ In essence here I am employing a concept of desert, however, unlike retributivist it is justified on the basis of forward looking considerations. A similar concept is employed by A. E. DUNCAN JONES, BUTLER'S MORAL PHILOSOPHY 137 (1952). But see, J KLEING, PUNISHMENT AND DESERT 56-7 (1973) (criticizing this notion of desert as being confused with usefulness).

⁵⁹ CHRISTOPHER HARDING AND RICHARD W. IRELAND, PUNISHMENT: RULE, RHETORIC AND PRACTICE 205 (1989).

¶31 Indeed it is felt that one of the main reasons for the success (in terms of low crime rates and low incarceration rates) of the Finish criminal justice system is the emphasis placed on the principle of proportionality: `principles of proportionality and perceived procedural fairness are key factors that influence the willingness of the people to conform to the law'.⁶⁰ The kind of mindset which may emerge if proportionality is ignored is demonstrated by reaction following the revelation that Kerry Packer, Australia's wealthiest individual whose personal wealth exceeds five billion dollars, paid no tax over the period 1989-1993.⁶¹ After a protracted investigation by the Australian Taxation Office into his financial affairs, the Federal Court ruled that according to the law which existed at the time, the zero tax paid by Packer correctly represented the full extent of his tax liability.⁶² This led to howls of community resentment and enmity, most notably in the form of countless calls to talk-back radio and letters to newspapers, towards the Taxation System in Australia. The credibility and legitimacy of the entire system was questioned because it failed to ensure that the level of tax paid by Packer was in proportion to his ability to pay. The same principle underlies the general community attitude towards punishing criminals. A legal system that condoned excessively harsh, or for that matter lenient, sentences would eventually lose the support of many members of the community. This may result in less co-operation with organizations involved in the detection and processing of criminals and thereby lead to less crimes being reported and solved and ultimately a diminution in community safety.⁶³ This would undermine the important role of the criminal law in promoting general happiness.

¶32 Thus it is clear that the principle of proportionality has a secure utilitarian foundation. Like all principles in a utilitarian ethic, however, it is not absolute and can be violated if this would maximize happiness.

Justifications For Departure From Proportionate Sentences

¶33 There have two main consequentialist reasons advanced in favor of disproportionate punishments: incapacitation and general deterrence. It has been argued that the imposition of harsh penalties will reduce the crime rate by confining likely offenders who have already offended and will dissuade would be offenders from offending in the first place. While this argument is logically valid, it is empirically flawed.⁶⁴

⁶⁰ T Lappi-Seppala, *Regulating the Prison Population: Experiences from a Long-Term Policy in Finland*, BACK TO BEYOND PRISONS SYMPOSIUM (Canada, 1998) <<http://www.csc.scc.ca/text/forum/bprisons/english/fine.htm>>. This paper also includes statistical data on the crime and incarceration rates in Finland.

⁶¹ See THE AGE (Melbourne), 15 October, 1998, p3.

⁶² Packer rejected an offer to settle the matter with the Taxation Office out of court on the basis that he pay \$30.55 for the three year period. Packer managed to minimize his tax essentially through the use of foreign tax shelters.

⁶³ Normative issues are closely linked with compliance with the law. See, e.g., ANDREW VON HIRSCH et al, CRIMINAL DETERRENCE AND SENTENCE SEVERITY 39-41 (1999).

⁶⁴ The failure of criminal sentencing to attain the objectives of incapacitation, marginal deterrence (as opposed to general deterrence), specific deterrence and rehabilitation is discussed at length in M Bagaric, *Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?* 24 CRIM. L. J. 21 (2000).

¶34 Incapacitation does not work because we are unable to distinguish with any degree of confidence offenders who will re-offend from those that will not. Studies have shown that in predicting dangerousness, psychiatrists are wrong about 70 per cent of the time.⁶⁵ Despite some initial optimism, there is also a low success rate using predictive techniques which draw on more concrete supposed risk factors such as employment history and the age at which a person first starts offending.⁶⁶

¶35 Deterrence theory has been shown to be only partly right. General deterrence works: there is a general connection between the existence of a criminal sanction and the crime rate. Natural social experiments concerning the effects of police strikes reveal that absent the threat of criminal punishment a far greater number of people would commit criminal offenses.⁶⁷ However, studies have failed to establish the validity of marginal deterrence: the claim that there is a link between higher penalties and the crime rate.⁶⁸ Thus deterrence theory justifies the existence of *some* form of criminal sanction, but not higher sanctions.

¶36 The most extensive research to date on the effect of the California three strikes laws provides strong evidence of the ineffectiveness of tough penalties to reduce crime. Stolzenberg and D'Alessio analyzed the effect of California's three strike laws in the 10 largest cities in the state.⁶⁹ California was chosen as an ideal location because it was one of the first places to implement mandatory three-strike laws (in March 1994); it has one of the toughest laws in the United States; and a large number of people have been charged under the law (over 3,000). The results of the study showed that the three strikes law had no observable influence on the serious crime rate and 'did not achieve its objective of reducing crime, through either deterrence

⁶⁵ J Monahan, *The Prediction of Violent Behaviour: Toward a Second Generation of Theory and Policy* 141(1) AM. J. PSYCH. 10 (1984). Another study revealed a false positive rate of about 65 percent for patients released against the advice of psychiatrists: see H Kozol, *Dangerousness in Society and Law* 13 U. TOLEDO L. REV. 241, 257 (1982).

⁶⁶ Greenwood claimed that it was possible to identify high risk robbers and burglars by identifying seven supposed risk factors (similar prior convictions, incarceration for over a year in the previous two years; convictions at a young age; time served in a juvenile facility; use of drugs in the past two years; drug use as a juvenile; and employed for less than a year in the last two years) and hence significantly reduce the number of such offenses by increasing the prison terms for the high risk offenders: PETER GREENWOOD, *SELECTIVE INCAPACITATION: REPORT PREPARED FOR THE NATIONAL INSTITUTE OF JUSTICE* (1982). However, it seems that the technique used was flawed. A reanalysis of the original data yielded less promising results: see Christy A. Visher, *The Rand Inmate Survey: A Reanalysis*, in *CRIMINAL CAREERS AND "CAREER CRIMINALS"* (A Blumstein, et al., eds., 1986). See also: A von Hirsch, *Selective Incapacitation: Some Doubts* PRINCIPLED SENTENCING, *supra* note 5, at 121, 122-3.

⁶⁷ For discussion regarding the widespread civil disobedience which occurred following the police strike in Melbourne in 1923, see K L MILTE and T A WEBER, *Police in Australia* 287-292 (1977). Similar civil disobedience followed the police strike in Liverpool in 1919 and the internment of the Danish police force in 1944. Andrew Ashworth, in *Deterrence* in PRINCIPLED SENTENCING, *supra* note 5, at 40, 44 -51, refers to the Liverpool strike. The Danish experience is discussed in N WALKER, *SENTENCING: THEORY, LAW & PRACTICE* 85 (1985).

⁶⁸ See National Academy of Sciences, *PANEL ON UNDERSTANDING AND CONTROL OF VIOLENT BEHAVIOUR* 6-7, 293-4, (A J Reiss & J Roth, eds., 1993); D Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century* 23 CRIME & JUSTICE 1 (1988). The results of much of the evidence regarding the concept of marginal deterrence are summarized in Bagaric, *supra* note 63.

⁶⁹ L Stolzenberg and S J D'Alessio, *Three Strikes and You're Out: The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates* 43(4) CRIME AND DELINQUENCY 457 (1997).

or incapacitation'.⁷⁰ Only one city (Anaheim) experienced a substantial reduction in the rate of serious crime, however, this was regarded as being a possibly aberrant finding.⁷¹

¶37 It follows that if fixed penalties are set for criminal offenses, they should not be set at a harsh or draconian level. The penalties should be set at a level, which is commensurate to the objective seriousness of the offense.⁷² This being so, all of the above objections to fixed penalties can be met.

(ii) *Inability to Accommodate Sentencing Variables*

¶38 The other main criticism of fixed penalties is that they are not sufficiently flexible to accommodate the full ambit of relevant sentencing variables, and as a result different cases are not treated differently. This violates what Tonry believes is the paramount objective of sentencing: fairness. Fixed sentences, he believes, are well equipped to achieve one aspect of the fairness equation; treating like cases alike, but are unable to adequately deal with the other limb: treating different cases differently.⁷³ In a similar vein, the New South Wales Law Reform Commission rejected fixed penalties partly because it believed they provide limited opportunity for addressing the subjective features of the offender or the offense, hence leading to injustice.⁷⁴

A More Sophisticated Fixed Penalty System

¶39 One way to respond to this criticism is to increase the number of variables that are relevant to the determination of the standard penalty. Fixed penalty systems can be as crude or as complex, in terms of the number of variables, which are taken into account, as is thought appropriate. At its simplest, a standard penalty, say a fine of \$1000, is set for all breaches of a particular offense, such as unlawful assault, and there is no variation or allowance made for the offender's personal circumstances (such as prior criminal history) or the seriousness of the particular offense compared to other offenses of that type.

¶40 A more sophisticated system would be sensitive to at least some aspects of both the personal circumstances of the offender and the relative seriousness of the offense compared to other offenses of that type. An example of such a system is the Minnesota grid system.⁷⁵ The

⁷⁰ *Id.* at 467.

⁷¹ For further discussion regarding the failure of harsh mandatory penalties to reduce crime see Tonry, *supra* note 4, at 139-142; Morgan, *supra* note 22, at 271-6.

⁷² The features of proportionality are discussed below.

⁷³ See, e.g., M Tonry, *supra* note 13, at 272.

⁷⁴ New South Wales Law Reform Commission, *Sentencing* (Discussion Paper, 33, 1996) 257.

⁷⁵ In the United States, over a dozen other states also utilize sentencing grids. For an outline of the essential features of the respective systems, see R Frase, *Sentencing Guidelines in Minnesota and Other American States: A Progress Report*, in THE POLITICS OF SENTENCING REFORM 171 (CHRIS CLARKSON & ROD MORGAN, eds., 1995). There are no grid sentencing systems in operation in the United Kingdom or Australia. However, in Western Australia a bill (the Sentencing Legislation Amendment and Repeal Bill 1998 (Austl.)) which provides the framework for a grid system was introduced. For a discussion of the proposed changes, see N Morgan, *Accountability, Transparency, and Justice: Western Australia's Proposed Sentencing Matrix*, (1999) UWALR.

vertical axis of the grid lists the severity levels of offenses in descending order of severity (there are ten different levels). The horizontal axis provides a (seven level) criminal history score, which reflects the offender's criminal record. The presumptive sentence is the sentence, which appears in the cell of the grid at the intersection of the offense score and offender score. Where the sentence is one of imprisonment the sentence is not expressed precisely, but rather within a small range to allow for the operation of aggravating or mitigating circumstances - apart from the offender's prior criminal history.⁷⁶

¶41 Obviously, even more complex systems could be constructed. For example, using the Minnesota model as a base, the presumptive sentence could be reduced, by say one third, where the offender pleads guilty. A practical example of a more sophisticated fixed penalty system is the United States Federal guidelines.⁷⁷ Like the Minnesota guidelines, the Federal guidelines also utilize a sentencing grid. On one axis, there are 43 offense levels (as opposed to 10 in Minnesota) and on the other there are six criminal history categories. For each type of offense the guidelines stipulate a 'base level' penalty. The sensitivity of the system is greatly increased by the fact that there are then adjustments, which can increase or decrease the penalty level.⁷⁸ The type of considerations which will result in an increased penalty include where the crime involves an abuse of a position of trust, or targets a vulnerable victim or a law enforcement officer. The base penalty is reduced where, for example, the offender's role in the offense is minor or the offender is clearly remorseful. A consideration of all of these factors leads to the appropriate cell in the sentencing grid, where the penalty is stipulated within a relatively narrow range.

¶42 While theoretically there is no end to the range of variables, which could be included in the mix, pragmatically, the fewer the better otherwise some of the main advantages of a fixed penalty system (its simplicity and efficiency) are compromised.⁷⁹ Another governing consideration regarding the variables, which can be taken into account in a fixed penalty system, is that the more readily ascertainable they are the better. Considerations such as the offender's criminal history, the level of injury caused, and the value of the items stolen are suitable in this regard, but the time and resources spent in determining subjective considerations such as whether the offender is remorseful may cut too deeply across the simplicity and efficiency of the system.⁸⁰ Thus while the unfairness criticism can to some extent be offset by increasing the number of factors that go to setting the fixed penalty, this is at best only part of the answer.

A More Fundamental Approach - Distinguishing Genuine Sentencing Considerations

⁷⁶ For a more detailed explanation of the Minnesota grid system, see R Fox, *Controlling Sentencers* 20 AUSTL. & N. Z. J. CRIMINOLOGY 218, 235-240 (1987); von Hirsch, *supra* note 20.

⁷⁷ These were introduced by the Sentencing Reform Act of 1984, and commenced operation in 1987.

⁷⁸ For detailed discussion of these, see Doob, *supra* note 21.

⁷⁹ For example, see some of the earlier criticisms outlined earlier regarding the Federal Sentencing Guidelines.

⁸⁰ As a general rule, considerations relating to the seriousness of the offense are easier to determine than factors involving the personal circumstances of the offender.

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

¶44 To ascertain which considerations are properly relevant to the determination of how much to punish, one must return to the rationale for punishing in the first place. The utilitarian theory of punishment contends that the only justification for punishment is the common good. The bad consequences of punishment, consisting essentially of the pain experienced by the offender and the distress that this may cause to his or friends or relatives, is outweighed by the benefits stemming from the imposition of criminal sanctions. Traditional utilitarian punishment theory stipulates that the good effects of punishment come in three different forms: incapacitation, rehabilitation and deterrence (specific and general). However, as has been discussed above, there is insufficient evidence to support the efficacy of punishment to achieve the goals of marginal general deterrence or incapacitation. Specific deterrence fares no better. The evidence that is available supports the view that the recidivism rate of offenders does not vary significantly regardless of the form of punishment or treatment that they are subjected to.⁸¹ This only leaves rehabilitation.

The Increasing Success of Rehabilitation

¶45 The evidence concerning rehabilitation is more promising. Following a recent wide-ranging review of the published studies in rehabilitation – which compared the recidivism rate of offenders who were subject to rehabilitative treatment to those who were not – Howells and Day conclude that there has been a significant degree of success with cognitive-behavioral programs. These programs target factors that are (presumably) changeable, and are directed at the ‘criminogenic needs’ of offenders – that is, those factors which are directly related to the offending, such as anti-social attitudes, self-control, and problem-solving skills.⁸² Promising programs have been developed in the areas of anger management, sexual offending and drug and alcohol use. These appear to be more successful than programs based on confrontation or direct deterrence, physical challenge or vocational training.⁸³

¶46 Despite such developments, the most that can be confidently said at this point regarding the capacity of criminal punishment to reform is that there is some evidence that it will work for a small portion of offenders and that there is no firm evidence that it cannot work for the majority of offenders. However,

⁸¹ The Panel on Research on Deterrent and Incapacitative Effects, *Incapacitation* in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 66 (Report by the Panel on Deterrent and Incapacitative Effects) (A Blumstein, et al., eds., 1978).

⁸² K Howells and A Day, *The Rehabilitation of Offenders: International Perspectives Applied to Australian Correctional Systems* 112 AUSTRALIAN INSTITUTE OF CRIMINOLOGY: TRENDS AND ISSUES IN CRIME AND CRIMINAL JUSTICE 1 (1999).

⁸³ *Id.* at 3.

treatments do not...exist...that can be relied upon to decide sentences routinely - that can inform the judge, when confronted with the run-of-the-mill robbery, burglary, or drug offense, what the appropriate sanction should be, and provide even a modicum of assurance that the sanction will contribute to the offender's desistance from crime.⁸⁴

Inconsistency Between Rehabilitation and Punishment

¶47 A more fundamental problem with invoking rehabilitation as an objective of punishment is that rehabilitation (at least of the type which appears to be having some success) and punishment may be inconsistent. As we saw earlier, punishment by its very nature must hurt. There seems to be an inherent contradiction between deliberately subjecting one to pain and at the same time trying to get him or her to see things your way. The more tolerant, understanding and educative we are in trying to facilitate attitudinal change in others, the closer we come to providing them with a social service.⁸⁵ For example, cognitive-behavioral programs focus on the *needs* of offenders and attempt to meet these needs by education and counseling aimed to reshape offenders' beliefs, attitudes and values and improve their problem-solving capacity, in order that they no longer engage in criminal behavior.⁸⁶ Such programs seem to work best in community settings rather being delivered in institutions.⁸⁷ There is very little difference between such programs and educational courses within the community, (which are enthusiastically undertaken by many law-abiding members of the community). This all the more so, given that it is a feature of many rehabilitative 'sanctions' that they cannot be 'imposed' unless the offender consents to them. By making the interests of the offender paramount, modern rehabilitative programs are more akin to welfare services than punitive sanctions. In order for the goal of rehabilitation to justify punishment, at the minimum, it must be shown that reform is attainable in a setting that is primarily directed to imposing unpleasantness on the offender. There is no evidence in support of this. Whether this tension between rehabilitation and punishment is irreconcilable remains to be seen, but one suspects that it will be.⁸⁸

¶48 The only verifiable good from punishment is that it deters a great many people from committing crime. It follows, that sentencing practices and rules aimed at securing other objectives should be discarded. We should forget about punishing offenders for the purposes of rehabilitation, specific deterrence and incapacitation. Accordingly, all sentencing considerations,

⁸⁴ Andrew von Hirsch and Lisa Maher, *Should Penal Rehabilitation be Revived?* in PRINCIPLED SENTENCING, *supra* note 5, at 26, 27.

⁸⁵ The distinction between punishment and a social service is employed by von Hirsch and Maher, *id.* at 26, 30.

⁸⁶ Howells and Day, *supra* note 81.

⁸⁷ *Id.* at 4,5.

⁸⁸ This point was alluded to by Herbert Packer over a quarter of a century ago. Packer believed that the task of creating a society where the advent of crime was significantly reduced is beyond the compass of the practice of punishment or the criminal law; it would require us to 'remake society itself'. The process of rectifying inadequate social conditions is not one that can be accomplished in the context of processes that are devoted to apprehending, trying and sentencing offenders: Herbert L. Packer, *Theories of Punishment and Correction: What is the Function of Prison?*, in L. Orland (ed), JUSTICE, PUNISHMENT AND TREATMENT 183, 189 (L. ORLAND, ed., 1973).

which are primarily directed towards assessing the need and relevance of such objectives, should be disregarded.

The Relevance of Prior Criminal History

¶49 Accordingly, many considerations, which are currently thought to be central to sentencing, are irrelevant. The most important of these is previous criminal record. Ignoring prior convictions would drastically change the sentencing calculus. As was discussed earlier, prior convictions are often as important as the seriousness of the offense in the determination of offense severity. The courts normally place enormous weight on an offender's previous history as being relevant to specific deterrence, the prospects of rehabilitation and the need for incapacitation.⁸⁹ Given that these are all flawed sentencing rationales, prior convictions fall along with them. In particular, there is no evidence that any verifiable good consequences stem from punishing recidivists more harshly.⁹⁰

Doctrinal Basis for the Prior Convictions - Progressive Loss of Mitigation Theory

¶50 It could be countered that consequential reasons do not exhaust the reasons in favour of punishing recidivists more harshly. It has been claimed that such a practice has a theoretical rationale in the form of the 'progressive loss of mitigation theory'. The theory claims that recidivists should be punished more harshly because they are disentitled from leniency that is accorded to first time offenders or offenders with minor records. The theory extends limited patience to wrongdoers. After the offender accumulates several convictions,⁹¹ the mitigation is used up and he or she is sentenced to the penalty which reflects the ceiling for the offense. Further transgressions are met with the same penalty. After the mitigation is used up, so the theory goes, it would be wrong to continue to impose increasingly severe penalties for each new offense, because this would give too much weight to persistence, and violate the principle of proportionality.

¶51 Andrew Von Hirsch, the main proponent of the progressive loss of mitigation theory, claims that going soft on first timers is justified by the notion of *lapse*, which is supposedly part of our everyday moral judgments. He believes that this has its genesis in the fallibility of human nature and the view that a temporary breakdown of human control is the kind of frailty for which some understanding should be shown. Von Hirsch notes that in sentencing the lapse is an infringement of the criminal law, rather than a more commonplace moral failure, but argues that 'the logic of the first offender discount remains the same – that of dealing with a lapse more tolerantly'.⁹²

⁸⁹ See, e.g., *Veen v. R* (Veen No 2) (1988) 77 A.L.R. 385.

⁹⁰ See Mirko Bagaric, *Double Punishment and Punishing Character - The Unfairness of Prior Convictions in CRIMINAL JUSTICE ETHICS* (2000, forthcoming).

⁹¹ In terms of exactly how many prior convictions it takes to exhaust the mitigation, von Hirsch frankly admits he has no answer: "how many repetitions may occur before the discount is lost entirely? I have no ready answer, as this seems a matter of judgment even for everyday acts of censure". ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES* 87 (1985).

⁹² The lapse argument is made by von Hirsch in *Criminal Records Rides Again* (1991) 10(2) CRIM. JUSTICE ETHICS 55. See also: *Desert and Previous Convictions*, in *PRINCIPLED SENTENCING* *supra* note 5, at 191.

¶52 Thus the concept of lapse has the virtue of understanding or forgiveness at its core, and von Hirsch claims that this moral norm ought to be reflected in our sentencing system. Further, he believes that the practice of partial and temporary tolerance for human frailty is particularly appropriate in the area of criminal punishment due to the onerous nature of criminal sanctions and capacity for the law to formalize such judgments.⁹³ However, this argument fails for several reasons: including that it misrepresents the nature of tolerance and forgiveness for misdeeds; and tolerance for human frailty has no role in a system of law which aims to protect important human interests.⁹⁴

Forgiveness Discretionary Not Mandatory

¶53 Von Hirsch is right that we often accord some level of forgiveness to those who infrequently transgress. However, this is a discretionary, not a mandatory moral practice. People can seek forgiveness, but are never entitled to it. This is the reason that few would condemn the wife who leaves her husband after he has cheated on her 'only' once, and why those who break friendships following a single instance of betrayal are not criticized. The practice of forgiveness is simply not as pervasive or obligatory as von Hirsch suggests. In order for a moral norm to form the foundation of a legal *imperative* (such as, all first offenders should get a discount), it must first have almost universal acceptance in the moral domain. 'Virtues' that can be disregarded with total impunity are hardly the stuff that demand legal recognition. This is evident when the supposed ideal of tolerance for human frailty is compared to ideals such as respecting the property and freedom of others.⁹⁵

No Tolerance For Serious Offenses

¶54 Even if one takes the view that, socially, forgiveness towards people who have not previously breached moral norms is widespread; this is generally only the case in relation to breaches of relatively minor prescriptions. The less serious the violation, the more likely it is that forgiveness will be forthcoming. People are rarely ostracized for their first white lie or breaking their first minor promise, but it can be quite a task breaking back into the group after being caught cheating in a serious card game or playing around with your friend's wife. And the key distinction between criminal law prescriptions and moral prescriptions is precisely that the former relates to more important and precious human interests, such as the right to life, liberty and property. In the social sphere, where a friend intrudes on these rights he or she is unlikely to be showered with personal understanding. Why then should the law be *more* lenient? The reason that the state is justified in imposing the gross interventions that follow from breaches of the criminal law is because the criminal law is concerned with guarding important human concerns. Once this threshold has been crossed there is no room for subjective judgments

⁹³ PAST OR FUTURE CRIMES, *supra* note 90, at 85.

⁹⁴ I consider this argument at length in Bagaric, *supra* note 89.

⁹⁵ An insistence that tolerance for human frailty is indeed a settled moral prescription would run head on into the objection that this entails that we are born with a certain amount of credit points which we progressively lose. If this were so, there would be no logical reason why tolerance should only kick in at the sentencing stage. Surely, it would apply to give each of us immunity from prosecution and guilt in the first place.

between the types of breaches that are bad and those that are *really* bad. They are all really bad; if they are not, they should not be criminal offenses.⁹⁶ The opportunity of making such fine distinctions is lost in the decision to make certain conduct a crime.⁹⁷

¶55 In *Turner*, Lord Lane CJ stated that “the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration where the court is dealing with cases of this gravity.”⁹⁸ This is a point also endorsed by von Hirsch: “where the gravity of the offense is great enough, even a first offense would seem to fall outside the scope of human frailty.”⁹⁹ While these comments recognize that there should be no allowance for human frailty for serious missteps, they draw the line too far. Of course there are less and more serious criminal offenses, but this is irrelevant to the issue of where tolerance ceases. All criminal offenses have in common the fact that they are thought to be sufficiently serious to violate (or threaten to infringe upon) an important personal or community interest and hence are more serious than the type of behavior that commonly precludes forgiveness in other contexts, even for first timers.

Given the failure of the progressive loss of mitigation theory to justify punishing recidivists more severely, it has been argued that such a practice is objectionable at the theoretical level because it amounts to either punishing a person twice for the one offense or punishing a person for his or her (bad) character as opposed to his or her actions.¹⁰⁰

¶56 In light of the above discussion, there are numerous other sentencing considerations which also fall by the wayside. Some of them are as entrenched as prior criminal history. For example, an inquiry into whether an offender is remorseful or not,¹⁰¹ is irrelevant. A remorseful offender

⁹⁶ This follows from the claim that the purpose of the criminal law is to prevent people doing acts which cause, or seriously threaten, harm to others. There is no doubt that there is a distinction between offenses that violate fundamental human concerns and those that impinge less significantly on other human interests, but most conduct which is proscribed by the criminal law involves a minimum threshold of invasiveness upon the interests of others. Thus the criminal law in most Western jurisdictions is becoming less concerned with regulating the self-regarding conduct of individuals or enforcing public standards of decency. See M Bagaric, *Sentencing: The Road to Nowhere* 21(4) SYDNEY L. REV. 597, 614-5 (1999). In most jurisdictions there are still obviously exceptions to this, but in my view such conduct should not be prohibited by the criminal law.

⁹⁷ See also JOHN KLEINIG, PUNISHMENT AND DESERT 91-2 (Martinus Nijoff, The Hague, 1973), where he argues that punishing (to the full extent on one's desert) is not inconsistent with forgiveness: “to forgive is to refuse to nurse resentment, to perpetuate the anger, to allow the matter to constitute a barrier in our relationships, to take pleasure in the punishment. That is why it is quite appropriate for a person to ask, after he has been punished, ‘Will you forgive me?’” . *Id.* at 92.

⁹⁸ (1975) 61 Crim. App. 67, 91. Here the offense was armed robbery. The Australian courts have adopted a similar position, see R FOX AND A FREIBERG, SENTENCING 272-3 (1999).

⁹⁹ M Wasik and A von Hirsch, *Section 29 Revised: Previous Convictions in Sentencing* [1994] *Criminal Law Review* 408, 415-6. See also: von Hirsch, *Desert and Previous Convictions*, *supra* note 91, at 196; von Hirsch, *Criminal Record Rides Again*, *supra* note 91, at 56. Henham, argues that an approach that regards the absence of mitigating factors as an aggravating factor, that disappears totally where serious crimes are concerned, is logically inconsistent: R Henham, *Cumulative Sentencing and Penal Policy* 59(4) J. CRIM. L. 420, 426 (1995).

¹⁰⁰ *Id.*

¹⁰¹ Remorse is also often expressly referred to as a relevant sentencing consideration. See, e.g., Sentencing Act, 1991 (Austl.); Crimes Act, 1914 (Austl.) s 16A(2)(f); Penalties and Sentences Act, 1992 (Austl.), s 9(4)(i).

is supposedly in less need of specific deterrence and rehabilitation and less likely to engage in criminal conduct again, thereby diminishing the need for incapacitation. But given that none of these are appropriate objectives of sentencing, the inquiry into remorse is superfluous.

¶57 Rather than going through each of the assumed relevant sentencing variables and picking them off incrementally, it is far quicker to approach the issue from the other end; positively stating the factors which are properly relevant to the sentencing calculus.

Interlude - Most Offenses Already Dealt With Without Regard to Sentencing Considerations

¶58 But before doing so, first a brief interlude. The contention that age-old sentencing vestiges such as previous convictions and remorse are irrelevant to the sentencing calculus may for some seem so revisionary to be implausible. But a more lateral consideration of the way in which most criminal offenses are currently dealt with reveals that this is in keeping with the manner most offenses are presently treated. What is being proposed here is not a revolution, but a call for uniformity.

¶59 In the United Kingdom, United States and Australia there is a growing trend towards the disposition of criminal matters by way of on the spot fine.¹⁰² This involves serving a notice on the offender, which sets a fixed penalty, normally in the form of a monetary fine. Payment of the fine within the prescribed time expiates the offense and this effectively finalises the matter. Notably, the penalty that is imposed, in all but a few instances,¹⁰³ is identical for all offenders. Considerations such as an offender's criminal history or whether he or she regrets the incident is irrelevant to the amount of punishment. Disposition of criminal offenses in this way is so widespread that in Victoria, for example, over eighty-five per cent of all criminal offenses are dealt with on the spot.¹⁰⁴

¶60 On the spot treatment is mainly reserved for minor offenses,¹⁰⁵ and is largely motivated by expedience, due to the cost involved in prosecuting matters via traditional methods. However, the important point is that for the vast majority of criminal offenses, solely the objective features of the offense determine the amount of punishment. Considerations personal to the offender are totally irrelevant. This is despite the fact that on the basis of contemporary sentencing practices there is considerable scope for different treatment of the types of offenses, which are typically dealt with on the spot. One might think that a person who speeds on a clear day to make it to his or her first job interview in two years, should be treated differently to the speeder "dragging"

¹⁰² For a comprehensive discussion regarding the use of on the spot fines, see R FOX, CRIMINAL JUSTICE ON THE SPOT (1995). In some United States jurisdictions on the spot infractions are treated as civil infractions. *Id.* At 18-20.

¹⁰³ In some cases offenders with a prior criminal history are dealt with more severely. For example, the United Kingdom and Victoria have a penalty point system for traffic offenders - when they accumulate 12 points a license cancellation may follow: FOX, *id.*; Ashworth, *supra* note 3, at 154.

¹⁰⁴ M Bagaric, *Instant Justice: The Desirability of Expanding the Range of Criminal Offenses Dealt With on the Spot* 24(2) MONASH U. L. REV. 231 (1998).

¹⁰⁵ Although this is not necessarily the case. There are some relatively serious offenses, such as drink driving, that can be dealt with on the spot. *Id.*

on a rainy day in busy traffic.¹⁰⁶ The increasing use of on the spot penalties has not resulted in adverse side effects (such as an increase in crime) and at the theoretical level has gone by without significant adverse comment. Arguably, this demonstrates implicit rejection of the view that fairness in sentencing requires an evaluation and detailed consideration of an almost endless array of variables.

¶61 It could be argued that the on the spot analogy is weak because such treatment is normally reserved for minor offenses which do not require a mens rea. However, this overstates the importance of mens rea in the *sentencing* calculus. Broadly there are three different levels of culpability recognized by the criminal law: intention, recklessness and negligence. Generally, the different levels of culpability reflected in these mental states are incorporated into the definition of a particular offense or the maximum penalty for the offense. For example, intentional homicides are punished more severely than negligent killings. The offender's mens rea is not, however, an important part of the sentencing inquiry; otherwise double weight would be attributed to this consideration. Accordingly, for the purpose of this discussion there is no relevant distinction between more serious offenses and the type of offenses, which are normally dealt with on the spot.

¶62 The analogy could also be criticized on the grounds that most on the spot penalties are not fixed because the offender normally has the option to proceed to a court hearing, in which case the sentencer has discretion regarding the appropriate penalty. However, for the most part this is a distinction in theory only. Practical realities associated with the time and cost of taking such matters to court militate heavily against this form disposition.

3 Outline of Fixed Penalty Regime

¶63 I now consider the essential features of a fixed penalty system. The starting point is to determine which factors are properly relevant to sentencing. This requires clarity concerning what justifies the practice of state imposed punishment. As we saw earlier, criminal punishment is justified because it deters many people from engaging in criminal conduct. Although there is a connection between criminal sanctions and crime rate, there is no link between increased penalties and crime rate. Thus the objective of general deterrence does not justify imposing harsher penalties; only some type of harm in the form of state imposed sanctions. The level at which criminal sanctions should be set is governed by the principle of proportionality. This has two components. The harm caused by the offense and the offender's level of culpability. Considerations, which do not affect either of these two matters, are therefore irrelevant to sentencing.

Proportionality - The Harm Component

¶64 The factors that are relevant to determining how much harm has been caused by an offense are straightforward. This is determined by assessing the degree of unhappiness typically caused to the victim as a direct result of the offense. Each of us is different, thus there is no objective measure of the standard degree of suffering caused by, say, a burglary, and one might think that

¹⁰⁶ In Victoria, not only is speeding dealt with on the spot, but as with many other jurisdictions, exceeding the speed limit by a certain threshold (30km/h) results in a mandatory loss of license. *Id.*

this militates against the prospect of standard penalties. However, all legal standards and norms apply universally, hence by their very nature involve generalizations and approximations about human nature. It is for this reason that the concept of maximum penalties is unobjectionable. One can imagine an extreme case where a minor assault may cause long-term fear and paranoia, totally impairing the victim's capacity to flourish and lead a productive life. Even if the offender was sentenced to the maximum term of imprisonment available for this offense (three months)¹⁰⁷ one might be left with the feeling that the punishment was still far too soft.

¶65 This, however, does not reveal a defect in the rule. Given that legal rules must apply generally, extreme situations must be ignored in their development, otherwise we open the way for bad law. The same types of generalizations involved in setting maximum penalties should be used in determining the harm caused by each particular offense. There has already been much promising work in the development of a ranking order of harm caused by different criminal offenses. For example, Von Hirsch and Jareborg have proposed that the most important human interests are as follows: physical integrity; material support and amenity (ranging from nutrition and shelter to various luxuries); freedom from humiliating or degrading treatment; and privacy and autonomy.¹⁰⁸

Proportionality - The Culpability Component

¶66 The other consideration that is relevant to the seriousness of an offense is the culpability of the offender. The central consideration here is whether the crime was committed intentionally or recklessly (or in some cases negligently). For most offenses this will be obvious after the finding of guilt, given that mens rea is normally an integral part of offense classification.

¶67 In determining how much to punish all other considerations are irrelevant. This obviously only makes for a small list. Not only is it small, but each of the factors can be determined quite easily from the objective circumstances pertaining to the offense. This makes it possible to develop a fixed penalty system, which is not only consistent, but also fair.

Presumptive or Mandatory?

¶68 There remains the difficult question of whether fixed penalties should be mandatory or presumptive. Human foresight has its limits and accordingly a mandatory system, no matter how well designed, will at times lead to unfairness. However, the danger with making the guidelines presumptive, and incorporating a clause along the lines that the fixed penalty must be imposed unless 'exceptional' or 'special' circumstances exist is that this leaves the door ajar for the splendor of a fixed penalty regime to be readily diminished, as more and more supposedly rare circumstances are discovered.¹⁰⁹

¹⁰⁷ Summary Offenses Act, 1966 (Austl.), s23. In some other jurisdictions, higher maximums are available.

¹⁰⁸ A von Hirsch & N Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis* 11 OXFORD J. LEGAL STUDIES 1, 20-1 (1991).

¹⁰⁹ This was a point noted by the New South Wales Law Reform Commission, *supra*, note 24.

¶69 In my view, a compromise is the best solution to this dilemma. Where the fixed penalty does not involve a term of imprisonment it should be mandatory.¹¹⁰ No doubt this will at times mean that offenders will be dealt with too severely, but this is not too high a price to be paid, given the nature of the sanctions involved (for example a fine or loss of license) are not inherently oppressive. The costs in the form of unfitting sanctions, are likely to be outweighed by the advantages stemming from a more efficient sentencing process; one which will avoid the time consuming and expensive exercise of discovering every possible miniature relating to the offender and the offense. This balancing process seems to accord with prevailing sentiment. This is exactly the same system we currently have in place (and which operates without significant criticism) for some offenses. For example, in many Western countries, motorists detected with a blood alcohol content beyond a certain limit (in Victoria the level is 0.1%)¹¹¹ face a mandatory loss of license. It could be argued that a 40 year old career taxi driver with three children who is the sole bread winner detected for drink driving should be treated differently to the 25 year old who exceeds the blood alcohol limit by the same amount, but who has no dependants, works from home and uses the car only to get around on weekends. Despite this, the legislators (and apparently the community) have accepted that matters extraneous to the seriousness of the offense are irrelevant to the question of how much to punish.

¶70 However, where the fixed penalty involves a period of incarceration (however short), the penalty should only be presumptive. It is one matter to fine a person or take away his or her privilege to drive, but a far greater evil to tamper with his or her freedom of movement.¹¹² Imprisonment is the most oppressive measure that the state (in our system of law) utilizes against its citizens.¹¹³ It is fitting in making decisions concerning the appropriateness or the length of a prison term, that some concession should be made for human foresight.

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

The Level at Which Fixed Penalties Should be Set

¶72 The main issue in any fixed system is the level at which the fixed penalties should be set. This has been alluded to above: the penalties should be proportionate to the gravity of the offense. There are two different senses of proportionality.¹¹⁴ The first is ordinal proportionality,¹¹⁵ which concerns how offenders are punished relative to each other. It

¹¹⁰ I have also argued that offenses which do not carry the risk of imprisonment should be dealt with of the spot. Bagaric, *supra* note 103, at 231.

¹¹¹ See Road Safety Act, 1966 (Austl.).

¹¹² See my comments in Bagaric, *supra* note 103.

¹¹³ The glaring exception being capital punishment which is still imposed in many parts of the United States.

¹¹⁴ For a detailed discussion, see A VON HIRSCH, *CENSURE AND SANCTIONS* (1993).

¹¹⁵ This is similar to what Ten calls a thick version of proportionality C L TEN, *GUILT, CRIME AND PUNISHMENT*

focuses on the relative seriousness of offenses and comes down to the view that offenders, who commit graver offenses, should receive sterner penalties.

¶73 In order for the scaling to commence, a starting point is needed. This is determined by selecting a particular crime or crimes (benchmark crimes) and setting an appropriate sanction. Sanctions are then selected for all other crimes by comparing their seriousness with the benchmark crime and adjusting the penalty up or down accordingly. This process of anchoring the penalty scale is termed cardinal proportionality.

¶74 It does not particularly matter which offense is chosen as the benchmark, so long as it can be used as a basis for comparison with other offenses. As a suggestion, armed robbery might be a good starting point given that it is an offense against the person as well as property. In determining the appropriate penalty level for this offense one is not necessarily constrained by existing tariffs. However, it would be remiss to totally ignore broad sentencing trends. Thus, as a starting point, it is illuminating to look at sentencing statistics to see whether there is any such thing as a typical penalty (both in nature and duration) imposed for the offense under consideration. This is precisely the process undertaken by the Court of Criminal Appeal of New South Wales in laying down a guideline judgment concerning armed robbery in *Henry*.¹¹⁶

¶75 In *Henry*, the Court looked at the statistics concerning the sentences imposed over nearly a four year period for armed robbery and robbery in company. During this period there was a total of 835 cases. The Court noted the `statistics strongly suggest both inconsistency in sentencing practice and systematic excessive leniency in the level of sentences.'¹¹⁷ The statistics did, however, show that most offenders were imprisoned for the type of offense under consideration, and they were used as a basis for setting a guideline judgment.

¶76 The benchmark period set by the court for an armed robbery of the type under consideration (that is, an armed robbery committed by a young offender with a weapon on a vulnerable victim and involving a small amount of money and a plea of guilty) was 4 to 5 years imprisonment. In my view this seems harsh. But in any event, once such a point is fixed, the standard penalty for other offenses then becomes easier to set, given that there is now a point of reference. For example, burglary and theft are not as serious as armed robbery, and hence are treated more leniently. Murder and rape, however, should be treated more seriously.

¶77 An important aspect of any fixed penalty regime is that it does not simply adopt pre-existing offense classifications. Due to the broadness with which most criminal offenses are defined,¹¹⁸ offenses should be fragmented in order to distinguish more and less serious instances of the same offense and treat them accordingly. Thus, for example, a household burglary should carry a greater penalty than a burglary of commercial premises and a theft of property valued in excess of \$1,000 should be treated more harshly than a theft of a lower amount.

158-160 (1987).

¹¹⁶ *Henry* [1999] NSWCCA 111 (12 May 1999).

¹¹⁷ The most important single aspect of the statistics is that of the 835 cases, a total of 688 (eighty-two percent) resulted in a full-time custodial sentence. *Id.* at 26..

¹¹⁸ The breadth of definitions of criminal offenses was one of the reasons that Report of the Canadian Sentencing Commission: SENTENCING REFORM: A CANADIAN APPROACH 186 (1987), rejected the notion of mandatory penalties.

¶78 In essence, the fixed penalty system should be structured along the lines of the Federal Sentencing guidelines in the United States to the extent that offenses are compartmentalized into more and less serious instances of each type of offense. However, two significant departures should be made from this system:

- (i) The level at which the penalties are set should be significantly reduced. The weight of empirical evidence does not support the efficacy of punishment to attain the objectives that are typically invoked to justify disproportionate penalties, such as incarceration and marginal general deterrence. Von Hirsch's suggestion that incarceration should be limited to serious offenses (such as violent crimes and serious white collar crimes) and that the duration of confinement for these offenses should not be longer than three years, except for homicide where the duration should be up to five years,¹¹⁹ appears to be far closer to the mark than the draconian penalties that are employed in many parts of the United States. Although, in my view, few (if any) property offenses should result in imprisonment.
- (ii) Considerations relating to the personal circumstances of the offender should be ignored. This includes the offender's previous criminal history.¹²⁰

What if the Utilitarian Theory of Punishment is not Adopted

¶79 It should be noted that proposed fixed penalty system is not only feasible in the context of a utilitarian theory of punishment. The utilitarian theory has been used as the backdrop to the proposed fixed penalty system, not because of its inherent amenability to such a system, but because in my view it is the soundest justificatory theory of punishment.

¶80 The retributive theory of punishment, which is the main rival theory, also provides a foundation for the imposition of standard penalties. Indeed some would argue that it is even more compatible with such a system. As we have seen the key features of a justifiable fixed penalty system are that the penalty should be commensurate with the seriousness of the offense and that there is a sound basis for disregarding factors personal to the offender in the sentencing calculus. Due to the wide diversity of retributive theories, it is questionable whether there is a single unifying principle, which they share. However, a key hallmark of most retributive theories is that the justification of punishment does not depend on the possible attainment of consequential goals.¹²¹ Retributive theories are backward looking - punishing criminals is in-and-of itself "just". Considerations relating to why an offender commits an offense are at best remotely relevant, (the emphasis being on the commission of the crime itself). Further, the cornerstone of many retributive theories, especially von Hirsch's just deserts theory, is that the

¹¹⁹ Andrew von Hirsch, *Doing Justice: The Choice of Punishments* in CENSURE AND SANCTIONS, *supra* note 113, at 43 (1976).

¹²⁰ This will obviously mean that the grid (which has an offender's criminal history on one axis) now turns into a chart.

¹²¹ See M Bagaric, *supra* note 7.

amount of punishment should be in proportion to the severity of *the* offense. It is not surprising then that the Minnesota matrix is founded on a retributive ideal.¹²²

¶81 It follows, that the arguments made in favor of fixed penalties cannot be sidestepped by simply rejecting the utilitarian theory upon which they are founded. Fixed penalties present as a desirable sentencing reform, in the context of most top down approaches to sentencing which search for a coherent justification of punishment and critically evaluate the proper relevance of existing sentencing considerations.

5 Conclusion

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

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

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

¹²² Although, as is discussed above, a consistent retributivist would not accord any weight to prior convictions in setting the penalty.