

2016

Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties

Mirko Bagaric

Deakin University, mbagaric@swinburne.edu.au

Sandeep Gopalan

Deakin University, sandeep.gopalan@deakin.edu.au

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>

 Part of the [Law Commons](#)

Recommended Citation

Bagaric, Mirko and Gopalan, Sandeep (2016) "Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties," *Saint Louis University Law Journal*: Vol. 60 : No. 2 , Article 3. Available at: <https://scholarship.law.slu.edu/lj/vol60/iss2/3>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.

**SAVING THE UNITED STATES FROM LURCHING TO ANOTHER
SENTENCING CRISIS: TAKING PROPORTIONALITY SERIOUSLY
AND IMPLEMENTING FAIR FIXED PENALTIES**

MIRKO BAGARIC* AND SANDEEP GOPALAN**

I. INTRODUCTION

Bad policy is often only evident following its implementation. The weight of consequences invariably trumps bad ideas. But in order for this to occur, influential voices need to expose the falsehoods and their rewards. The enmity that many people in the community have towards criminals explains why the intellectually and normatively barren United States sentencing policy has remained unchallenged for the past few decades.¹ With only a hint of exaggeration, that policy comes down to one main approach: incarceration. This has resulted in the United States imprisoning more of its citizens than any other nation—and by an enormous margin.² It is an international outlier in the imprisonment stakes. Paradoxically, it is also the nation from which the most studies showing the ineffectiveness of imprisonment emanate.³ Americans more so than any other people ought to know that incarceration is an essentially flawed sentencing objective and that locking up ever more people provides diminishing returns.⁴ As the 2015 report by the Brennan Center for

* Professor, Deakin University, Australia.

** Professor, Deakin University, Australia.

1. The tough on crime strategy is often referred to as the “Southern Strategy,” which was effective in politicizing the law and order issues due to the parallel growth of a number of other movements, including those relating to victims’ rights and the women’s movement. In addition to this, the strategy was not heavily opposed because of the anxieties of “whites” about rising crime and concerns about diminishing economic opportunities. NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 116 (Jeremy Travis et al. eds., 2014).

2. *See infra* Part II.

3. *See infra* Part III.

4. *See* STEVEN RAPHAEL & MICHAEL A. STOLL, THE HAMILTON PROJECT: A NEW APPROACH TO REDUCING INCARCERATION WHILE MAINTAINING LOW RATES OF CRIME 9 (2014), http://www.brookings.edu/~media/research/files/papers/2014/05/01-reduce-incarceration-maintain-low-crime-raphaels-stollm/v5_thp_raphaelstoll-discpaper.pdf [<http://perma.cc/KST7-A726>] (“The crime-reduction gains from higher incarceration rates depend critically on the incarceration rate itself. When the incarceration rate is low, marginal gains from increasing the incarceration rate are higher. This follows from the fact that when prisons are used sparingly,

Justice notes, “incarceration in the U.S. has reached a level where it no longer provides a meaningful crime reduction benefit.”⁵

The considerable fiscal burden stemming from imprisoning over two million Americans is now weighing so heavily on the community that finally there is a groundswell of opposition to the phenomenon of ever-increasing prison numbers. This is backed up by research showing that crime can decrease alongside decreases in the numbers of those in jail.⁶

We agree that prison numbers must be reduced. But it is important to achieve this goal on the basis of empirically and normatively sound policies, otherwise other serious problems may be created. The response to the prison crisis thus far provides no foundation for confidence that a durable and principled response is forthcoming. This Article redresses this concern.

We make recommendations regarding how the United States can significantly lower its incarceration rate, while at the same time ensuring that community safety is not diminished. Moreover, we identify and recommend a consolidation and extension of the positive aspects of the current sentencing regime.

incarceration is reserved for the highest-risk and most-serious offenders. By contrast, when the incarceration rate is high, the marginal crime-reduction gains from further increases tend to be lower, because the offender on the margin between incarceration and an alternative sanction tends to be less serious. In other words, the crime-fighting benefits of incarceration diminish with the scale of the prison population.”).

5. OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 7 (2015), http://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf [<http://perma.cc/GM6X-GB7W>]. “The incarceration rate jumped by more than 60 percent from 1990 to 1999, while the rate of violent crime dropped by 28 percent. In the next decade, the rate of incarceration increased by just 1 percent, while the violent crime rate fell by 27 percent.” *Id.* The authors found that the decline in crime was attributable to “increased numbers of police officers, deploying data-driven policing techniques such as CompStat, changes in income, decreased alcohol consumption, and an aging population.” *Id.* at 10. The report did not have state level data on abortions and could not make any original findings on that theory. However, the authors ventured “[b]ased on an analysis of the past findings, it is possible that some portion of the decline in 1990s could be attributed to the legalization of abortion. . . . Even if the abortion theory is valid, it is unlikely that an increase in abortions had much effect on a crime drop in the 2000s. The first cohort that would have been theoretically affected by abortion, 10 years after the 1990s, would be well beyond the most common crime committing ages in the 2000s.” *Id.* at 61.

6. The Brennan Center Report found:

New York saw a 26 percent reduction in imprisonment and a 28 percent reduction in property crime. Imprisonment and crime both decreased by more than 15 percent in California, Maryland, New Jersey, New York, and Texas. These five states alone represent more than 30 percent of the U.S. population. In addition, eight states—Connecticut, Delaware, Massachusetts, Michigan, Nevada, North Carolina, South Carolina, and Utah—lowered their imprisonment rates by 2 to 15 percent while experiencing more than a 15 percent decrease in crime.

Id. at 27.

A distinguishing feature of the United States sentencing system is the heavy reliance on mandatory or presumptive penalties. Reliance on the grids in which these penalties are prescribed has contributed significantly to the incarceration crisis. It is not, however, adoption of grid sentencing per se that has caused the problem. Rather, it is the content of the grids that is misinformed. Grid sentencing is desirable. The key is *correctly* calibrating the content of the grid. We endorse the concept of standard penalties but suggest that they must be properly informed. The guiding determinant should be an old principle that has been glossed over in United States sentencing: proportionality.⁷ There is much confusion about what it means, and how it ought to be applied in sentencing policy and practice.⁸ This is a fundamental error. This Article argues that ensuring that the punishment fits the crime should be front and center of the sentencing regime.

The outcome of this approach is that there will be a considerable lowering in the sanctions imposed on nearly all offenders, except those who have committed violent and sexual offenses. Property, fraud, immigration, and drug criminals will still incur the enmity of the community, but this venting will no longer result in the community punishing itself by paying billions of dollars to warehouse them for no demonstrable, tangible benefit.

This Article proposes a new sentencing paradigm. The report by the United States National Academy of Sciences in 2014 into the failure of forty years of incarceration policy in the United States recommends that:

[F]ederal and state policy makers should revise current criminal justice policies to significantly reduce the rate of incarceration in the United States. In particular, they should reexamine policies regarding mandatory prison sentences and long sentences. Policy makers should also take steps to improve the experience of incarcerated men and women and reduce unnecessary harm to their families and their communities.⁹

7. Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 784 (2008) (“The idea that there should be some proportional relationship between a crime and the crime’s punishment dates back at least to the Code of Hammurabi and the Mosaic codes that appear in the Old Testament.”).

8. *Id.* at 804. Balmer writes that the Supreme Court’s inability to reach a majority in *Harmelin*

[H]ighlights the difficulty of attempting to establish an objective test for determining proportionality. States with their own proportionality clauses, like Oregon, are able to avoid the threshold issue the Court has faced—whether the Eighth Amendment contains a proportionality component at all. But once this threshold is crossed, the search for standards of proportionality in the Eighth Amendment is equally difficult.

Id. Further, “[o]nly time will tell whether litigants can propose or the courts can articulate tests for determining proportionality that are less subjective or that provide more analytical structure than the stark ‘shocks the moral sense’ standard . . .” *Id.* at 817; see also *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (“[O]ur precedents in this area have not been a model of clarity.”).

9. NAT’L RESEARCH COUNCIL, *supra* note 1, at 9.

We inject content into this recommendation. While the main focus of this Article is theoretical in nature, we undertake the ambitious but necessary task of setting out in concrete terms a new sentencing paradigm. This system should replace the sentencing process in all parts of the United States, including the federal jurisdiction. In short, the core aspects of our proposal are that:

1. There should be (only) twenty-two penalty levels,¹⁰ starting at zero to six months' imprisonment with the next level increasing to six to twelve months.
2. Each penalty level should then reflect an increase of twelve months. Thus, level twenty-one would equal twenty years' imprisonment. The next and highest level should be life imprisonment.
3. Each crime should have a standard penalty. This is determined by the extent to which the typical form of that crime sets back the flourishing of the typical victim.
4. The aim is to match the extent to which the interests of the victim have been set back with the reduction in flourishing that is inflicted on the offender by the sanction.
5. The only departures from the set penalty are seventeen aggravating and mitigating considerations (which are clearly defined) and which justify a predetermined deviation from the standard penalty in the order of ten percent to fifty percent.
6. Prior convictions would be irrelevant to sentencing, except in the case of serious sexual and violent offenders, but even then they should carry far less weight in the sentencing calculus.
7. The maximum penalty for any drug, migration, property, and fraud offenses should be ten years' imprisonment.

The above framework is a radical departure from the existing sentencing system. However, more radical is to maintain the current system or something approximating the existing regime. The current system based on the idea of mass incarceration is a failure: abjectly so.¹¹ It makes victims of many criminals by inflicting disproportionate punishments on them, and victims of the communities by crippling them with burgeoning imprisonment costs. Our proposal will cease inflicting gratuitous pain on criminals, drastically reduce the prison budget, make the community no less safe, and enhance the transparency and consistency of the sentencing process. This Article fills a

10. This is approximately half the number in some fixed penalty regimes. *See infra* Part III.

11. *See* David S. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 951 (2013) ("Much has been written about the long-term societal consequences of mass incarceration. These . . . include such phenomena as the promotion of racial stigma, poverty, absent parents, loss of economic mobility, distorted marriage markets for black women, detrimental effects on children, and increases in juvenile crime.").

void not only in the literature regarding the adoption of a new sentencing paradigm, but even more importantly it remedies a serious pragmatic institutional shortcoming. As has been noted recently, the last twenty years have been a “period of drift” in the United States sentencing reform.¹² During this period, no states have created new comprehensive sentencing systems.¹³

In developing our proposal, we draw on some aspects of Australian sentencing law. There are many shortcomings associated with Australian sentencing;¹⁴ however, it has one considerable advantage over the regime in the United States—its emphasis on proportionality as being a cardinal consideration in determining penalty type and severity. In contrast, while there is some recognition of the proportionality principle in the United States, in reality it has fallen “into neglect.”¹⁵

In Part II of the Article, we explain the magnitude of the incarceration burden. This is followed in Part III by an examination of the principal cause of the increased prison numbers and the contours of the United States sentencing system. Part IV analyses the principle of proportionality and establishes that it is the bedrock upon which the sentencing system should be grounded. In Part V of the Article, we discuss the reasons in favor of maintaining a fixed penalty system, albeit one that is fundamentally different to existing models. In the concluding remarks, we summarize our reform recommendations.¹⁶

12. NAT'L RESEARCH COUNCIL, *supra* note 1, at 73.

13. *Id.* at 74.

14. *See infra* Part V; *see generally* Mirko Bagaric, *Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain That Is the Instinctive Synthesis*, 38 U. N.S. WALES L.J. 76 (2015) [hereinafter Bagaric, *Sentencing: From Vagueness to Arbitrariness*].

15. NAT'L RESEARCH COUNCIL, *supra* note 1, at 86; *see* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1146 (2009) (“In noncapital cases . . . the Court has done virtually nothing to ensure that the sentence is appropriate.”); Christopher J. DeClue, Comment, *Sugarcoating the Eighth Amendment: The Grossly Disproportionate Test Is Simply the Fourteenth Amendment Rational Basis Test in Disguise*, 41 SW. L. REV. 533, 540–46, 572–79 (2012); Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1746 (2012) (noting that that Eighth Amendment proportionality principle was long viewed as dead); John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 80 (2010) (“It is time . . . to pronounce the body of Eighth Amendment quantitative proportionality dead”); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 681 (2005) (“[T]he body of law is messy and complex, yet largely meaningless as a constraint”).

16. A caveat to this is that we do not consider the desirability of capital punishment. The United States is the only developed nation apart from Japan that still imposes the death penalty. The literature and analysis regarding the desirability of the death penalty is voluminous. It can only be examined in the context of a stand-alone dissertation focusing on this issue. This is not a meaningful limitation to this paper given that not all states impose the death penalty (there are thirty-one states that still have the death penalty). *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>

II. THE INCARCERATION CRISIS

As of 2013, more than two million Americans were in jail, which equates to over 900 per one hundred thousand adults.¹⁷ This rate has more than doubled over the past two decades¹⁸ and has been steadily rising much of the past forty years.¹⁹ In its recent report, the United States National Research Council notes: “Current incarceration rates are historically and comparatively unprecedented. The United States has the highest incarceration rates in the world, reaching extraordinary absolute levels in the most recent two decades.”²⁰ By contrast, most developed countries have rates of imprisonment around five to ten times less than the United States.²¹

The main drawback of imprisonment from the community perspective of imprisonment is its costs.²² While this has been rising gradually over the past few decades, it is only in recent years that the tipping point in terms of sustainability and affordability has been reached. The money spent on prisons is now so large that it has become evident that every dollar spent on prisons is a dollar lost for spending on activities, such as healthcare and education. In terms of expenditure, it costs taxpayers in the United States on average \$31,286 in direct expenditures to house a prisoner for one year.²³ The total

[<http://perma.cc/EE7H-RPNY>] (last updated Sept. 23, 2015). Since 1976, there have been 1427 executions. *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> [<http://perma.cc/DRN2-XLJA>] (last updated Feb. 3, 2016). Only a relatively small number of criminals are executed in the United States. *Id.*

17. The exact number of prisoners is 2,220,300, which equates to 910 per 100,000 adults. LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 2, 4 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> [<http://perma.cc/FHL7-VTYZ>]. This number includes the approximately one-third of prisoners who are in local jails. *Id.* at 2.

18. Albert R. Hunt, *A Country of Inmates*, N.Y. TIMES (Nov. 20, 2011), <http://nyti.ms/1OeQHFF> [<http://perma.cc/VL2S-9NUB>].

19. In fact, during this period it has quadrupled. *See* NAT’L RESEARCH COUNCIL, *supra* note 1, at 1.

20. *Id.* at 68.

21. *Id.* at 2.

22. Of course, there is a high individual cost of imprisonment. As noted by the National Research Council of the National Academies, “incarceration imposes pain and loss on both those sentenced and, frequently, their families and others . . .” *Id.* at 22. However, as a result of the enmity towards offenders, these have not proven to be persuasive reasons in favor of reform. *See id.*

23. According to a study by the Vera Institute of Justice, the average cost of a prisoner is \$31,286 per year. *See* CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10 (2012), <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf> [<http://perma.cc/3VQW-TYCB>]. This is higher in some states and cities. In New York, the average cost is \$60,076 per year. *Id.*

spending on prisons is now over fifty billion dollars annually.²⁴ The scale of this, even for the world's largest economy, is considerable. California now spends more on prisons than higher education.²⁵ Spending on corrections ranks third, behind only Medicaid and education, in most state budgets:

Budgetary allocations for corrections have outpaced budget increases for nearly all other key government services (often by wide margins), including education, transportation, and public assistance. Today, state spending on corrections is the third highest category of general fund expenditures in most states, ranked behind Medicaid and education. Corrections budgets have skyrocketed at a time when spending for other key social services and government programs has slowed or contracted.²⁶

It is now widely accepted that the United States has an incarceration crisis.²⁷ Vivien Stern, secretary general of Penal Reform International, states: "Among mainstream politicians and commentators in Western Europe, it is a truism that the criminal justice system of the United States is an inexplicable deformity."²⁸

Similar sentiments are also expressed at home. The United States Attorney General Eric Holder said recently that "too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason. It's clear, at a basic level, that 20th-century criminal justice solutions are not

24. CONNIE DE LA VEGA ET AL., U. OF S.F. SCH. OF LAW, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 18 (May 2012), <http://www.usfea.edu/sites/default/files/law/cruel-and-unusual.pdf> [<http://perma.cc/YAJ5-LT3S>].

25. Hansook Oh, *California Budgets \$1 Billion More to Prisons Than Higher Education and Leaves Students Hanging*, SUNDIAL (Sept. 19, 2012), <http://sundial.csun.edu/2012/09/california-budgets-1-billion-more-to-prisons-than-higher-education-and-leaves-students-hanging/> [<http://perma.cc/M3EU-URET>].

26. NAT'L RESEARCH COUNCIL, *supra* note 1, at 314 (internal citation omitted).

27. It is widely accepted that the United States has a "serious over-punishment" and "mass incarceration" problem. Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 295–96 (2013); *see, e.g.*, SASHA ABRAMSKY, AMERICAN FURIES: CRIME, PUNISHMENT, AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT, at xiv–xv, xxiii (2007); Sharon Dolovich, *Creating the Permanent Prisoner, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 96, 96 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS 48–49 (2008); Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 307 (2009); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 27–28 (2011); Bernard E. Harcourt, *Keynote: The Crisis and Criminal Justice*, 28 GA. ST. U. L. REV. 965, 965–69, 983 (2012); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 133 (2011); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 423–25 (2013).

28. Vivien Stern, *The International Impact of U.S. Policies*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 279, 280 (Marc Mauer & Meda Chesney-Lind eds., 2002).

adequate to overcome our 21st-century challenges.”²⁹ In a later speech he stated:

Perhaps most troubling is the fact that this astonishing rise in incarceration—and the escalating costs it has imposed on our country, in terms both economic and human—have not measurably benefited our society. We can all be proud of the progress that’s been made at reducing the crime rate over the past two decades—thanks to the tireless work of prosecutors and the bravery of law enforcement officials across America. But statistics have shown—and all of us have seen—that high incarceration rates and longer-than-necessary prison terms have not played a significant role in materially improving public safety, reducing crime, or strengthening communities.

In fact, the opposite is often true. Two weeks ago, the Washington Post reported that new analysis of crime data and incarceration rates—performed by the Pew Charitable Trusts, and covering the period of 1994 to 2012—shows that states with the most significant drops in crime also saw reductions in their prison populations. States that took drastic steps to reduce their prison populations—in many cases by percentages well into the double digits—saw crime go down as well. And the one state—West Virginia—with the greatest increase in its incarceration rate actually experienced an uptick in crime.³⁰

29. Eric Holder, Attorney Gen., U.S. Dep’t of Justice, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> [<http://perma.cc/KM63-4BAY>]. He went on to note:

While the entire U.S. population has increased by about a third since 1980, the federal prison population has grown at an astonishing rate—by almost 800 percent. . . . [F]ederal prisons are operating at nearly 40 percent above capacity. Even though this country comprises just 5 percent of the world’s population, we incarcerate almost a quarter of the world’s prisoners. More than 219,000 federal inmates are currently behind bars. Almost half of them are serving time for drug-related crimes, and many have substance use disorders. Nine to 10 million more people cycle through America’s local jails each year. And roughly 40 percent of former federal prisoners—and more than 60 percent of former state prisoners—are rearrested or have their supervision revoked within three years after their release

Id.

30. Press Release, U.S. Dep’t of Justice, One Year After Launching Key Sentencing Reforms, Attorney General Holder Announces First Drop in Federal Prison Population in More Than Three Decades (Sept. 23, 2014), <http://www.justice.gov/opa/pr/one-year-after-launching-key-sentencing-reforms-attorney-general-holder-announces-first-drop-0> [<http://perma.cc/WQ2U-PHQI>]. The Attorney General added:

As the Post makes clear: “To the extent that there is any trend here, it’s actually that states incarcerating people have seen *smaller* decreases in crime.” And this has been borne out at the national level, as well. Since President Obama took office, both overall crime *and* overall incarceration have decreased by approximately 10 percent. This is the first time these two critical markers have declined together *in more than 40 years*. And although we have a great deal of work to do—and although, last year, some states continued to record growth in their prison populations—this is a signal achievement. We know that over-incarceration crushes opportunity. We know it prevents people, and entire communities,

The perceived fallacy of mass incarceration has gone from being a mainstay of academic commentary to a common theme in the mainstream media. *Rolling Stone* magazine published a major report in October 2014, focusing on the injustice associated with long jail terms for drug offenders. The sentiment of the report is conveyed in the following passage: “Widely enacted in the Eighties and Nineties amid rising crime and racially coded political fearmongering, mandatory penalties—like minimum sentences triggered by drug weight, automatic sentencing enhancements, and three-strikes laws—have flooded state and federal prisons with nonviolent offenders.”³¹ The report adds: “For decades, lawyers, scholars, and judges have criticized mandatory drug sentencing as oppressive and ineffective. Yet tens of thousands of nonviolent offenders continue to languish behind bars.”³² A recent report in the *New York Times* notes that America now spends more on prisons than food stamps:

Few things are better at conveying what a nation really cares than how it spends its money. On that measure, Americans like to punish. The United States spent about \$80 billion on its system of jails and prisons in 2010—about \$260 for every resident of the nation. By contrast, its budget for food stamps was \$227 a person. In 2012, 2.2 million Americans were in jail or prison, a larger share of the population than in any other country; and that is about five times the average for fellow industrialized nations in the Organization for Economic Cooperation and Development. The nation’s unique strategy on crime underscores the distinct path followed by American social and economic institutions compared with the rest of the industrialized world.³³

Thus, there is now an increasing recognition that something needs to be done to reduce incarceration levels.³⁴ And it is happening—slowly but not surely. In 2010, 2011, and 2012, there was a drop in imprisonment numbers. But it was relatively small—approximately three percent.³⁵ However, in 2013, prison

from getting on the right track. And we’ve seen that—as more and more government leaders have gradually come to recognize—at a fundamental level, it challenges our commitment to the cause of justice.

Id. (emphasis in original).

31. Andrea Jones, *The Nation’s Shame: The Injustice of Mandatory Minimums*, ROLLING STONE (Oct. 7, 2014), <http://www.rollingstone.com/politics/news/the-nations-shame-the-injustice-of-mandatory-minimums-20141007> [<http://perma.cc/9A9C-CN5P>].

32. *Id.*

33. Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES, Apr. 30, 2014, at B1. The State of Maryland spends ten times more on corrections than it does on education. ROEDER ET AL., *supra* note 5, at 34.

34. See *U.S. Prison Population Declined for Third Consecutive Year During 2012*, BUREAU OF JUST. STAT. (July 25, 2013), <http://www.bjs.gov/content/pub/press/p12acpr.cfm> [<http://perma.cc/TZ79-C676>].

35. *Id.* The decline only focused on prisoners completing terms of one year or more in prison and fell from a high of 1,615,487 prisoners in 2009 to 1,571,013 in 2012. *Id.*

numbers again started rising.³⁶ The continuing high prison numbers has prompted the implementation of novel measures to reduce the prison population. In April 2014, the United States Sentencing Commission voted to reduce the sentencing guideline level for most federal offenses of drug trafficking.³⁷ These changes will apply retroactively, meaning that over 46,000 prisoners are eligible to have their cases reviewed for a penalty reduction, which on average is likely to be reduced by two years and one month, resulting in a savings of approximately 80,000 prison bed years (one bed year is equivalent to a prisoner being in jail for one year).³⁸ In November 2014, voters in California approved “California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014),”³⁹ which limited the operation of that state’s harsh mandatory penalty regime by reducing some nonviolent offenses from felonies to misdemeanors.⁴⁰

36. There was an increase of 4300 prisoners in 2013 compared to 2012. While the federal prison population decreased for the first time since 1980, this was more than offset by an increase in the state prison population (the first increase since 2009). E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2013 1 (Sept. 2014).

37. Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences: Commission Sends Amendments to Congress Including Provisions to Implement the Violence Against Women Reauthorization Act (Apr. 10, 2014), http://www.us.sc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/pressreleases/20140410_Press_Release.pdf [<http://perma.cc/37C7-4JMG>].

38. Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences: Commission Authorizes Judges to Reduce Drug Sentences for Eligible Prisoners Beginning November 2015 If Congress Allows Guidelines Change to Stand (July 18, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf [<http://perma.cc/X8V6-DG4X>].

39. In summary, the law:

- Requires misdemeanor sentence instead of felony for certain drug possession offenses.
- Requires misdemeanor sentence instead of felony for the following crimes when amount involved is \$950 or less: petty theft, receiving stolen property, and forging/writing bad checks.
- Allows felony sentence for these offenses if person has previous conviction for crimes such as rape, murder, or child molestation or is registered sex offender.
- Requires resentencing for persons serving felony sentences for these offenses unless court finds unreasonable public safety risk.
- Applies savings to mental health and drug treatment programs, K–12 schools, and crime victims.

CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 34 (Nov. 4, 2014), <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf> [<http://perma.cc/9U7M-3K78>].

40. The law was passed with a majority of fifty-nine percent of voters in favor of it. Kristina Davis, *Calif Cuts Penalties for Small Drug Crimes*, SAN DIEGO UNION-TRIBUNE (Nov. 4, 2014),

Even members of the community are softening in their views about criminals. The results of a poll published in October 2014 show that seventy-seven percent of Americans are in favor of abolishing mandatory minimum sentences for nonviolent drug offenses.⁴¹ The level of support for this proposal increased from seventy-one percent when the same question was polled in December 2013.⁴²

Prior to examining how to fix the incarceration problem, we first look at its causes.

III. WHERE IT WENT WRONG

A. *The Move to Harsh Fixed Penalties*

The National Research Council in its recent report examining the rapid escalation in the imprisonment rate⁴³ notes that changes to sentencing systems throughout the United States over the past few decades were precipitated by periods of rising crime and a growing politicization of the problem.

While each state of the United States and the federal jurisdiction has its own sentencing system,⁴⁴ there is now some convergence among the respective regimes. In particular, several key commonalities and themes exist, which explain the rapid growth in the incarceration rate.

In the 1980s, the United States Congress and most state legislatures enacted mandatory sentencing laws, which prescribed long prison terms for a large number of offenses.⁴⁵ Mandatory minimum or presumptive penalties⁴⁶ now operate to varying degrees in all states.⁴⁷ Prescribed penalties are typically set out in sentencing grids, which normally use criminal history scores⁴⁸ and offense seriousness to calculate the appropriate penalty.

<http://www.sandiegouniontribune.com/news/2014/nov/04/prop-47-misdemeanor-law-vote-election-drug/> [http://perma.cc/U9KY-W8UW].

41. REASON-RUPE, PUBLIC OPINION SURVEY: OCTOBER 2014 TOPLINE RESULTS 4 (Oct. 9, 2014), <http://reason.com/assets/db/14128084586864.pdf> [http://perma.cc/NMA2-Y4W2].

42. *Id.*

43. NAT'L RESEARCH COUNCIL, *supra* note 1, at 1–2.

44. 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).

45. NAT'L RESEARCH COUNCIL, *supra* note 1, at 3.

46. For the purposes of clarity, these both come under the terminology of fixed or standard penalties in this Article.

47. Mandatory minimums are also one of the key distinguishing aspects of the United States sentencing system compared to that of Australia (and most other sentencing systems in the world). *See* DE LA VEGA ET AL., *supra* note 24, at 45–47 (noting that 137 of 168 surveyed countries had some form of minimum penalties but none were as wide-ranging or severe as in the United States).

48. This is based mainly on the number, seriousness, and age of the prior convictions. U.S. SENTENCING GUIDELINES MANUAL 395 (U.S. SENTENCING COMM'N 2013), <http://www.ussc.gov>.

It has been contended that none of these policies leading to the increase in fixed penalties emanated from a clear theoretical foundation but rather stemmed from “back-of-an-envelope calculations and collective intuitive judgments.”⁴⁹ In a similar vein, Berman and Bibas state, “Over the last half-century, sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of rules.”⁵⁰ They add that “[m]odern 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.”⁵¹

The most extensively analyzed prescribed penalty laws are found in the United States Sentencing Commission Guidelines Manual (“Federal Sentencing Guidelines” or “Guidelines”).⁵² These Guidelines are important because of the large number of offenders sentenced under this system and the significant doctrinal influence they have exerted at the state level.⁵³

The Federal Sentencing Guidelines are no longer mandatory in nature, following the United States Supreme Court decision in *United States v. Booker*.⁵⁴ However, sentences within guideline ranges are still imposed in approximately sixty percent of cases.⁵⁵ The set penalties apply to most types of offenses, including drug, fraud, and immigration crime. A United States

gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf [http://perma.cc/T82Z-72YN].

49. Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, in PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 91, 93 (Julian V. Roberts & Andrew von Hirsch eds., 2010). For further criticism of the guidelines, see James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173, 176 (2010); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005).

50. Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40 (2006).

51. *Id.* at 48.

52. U.S. SENTENCING GUIDELINES MANUAL (2013), *supra* note 48, at 394.

53. Berman & Bibas, *supra* note 50, at 40. There are more than 200,000 federal prisoners. CARSON, *supra* note 36, at 1.

54. *United States v. Booker*, 543 U.S. 220, 222 (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*, 562 U.S. 476, 477 (2011); *Irizarry v. United States*, 553 U.S. 708, 708 (2008); *Greenlaw v. United States*, 554 U.S. 237, 239 (2008); *Gall v. United States*, 552 U.S. 38, 38 (2007); *Rita v. United States*, 551 U.S. 338, 338 (2007). For a discussion about the impact of *Booker*, see Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227 (2014).

55. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010).

Sentencing Commission Report in 2011 noted that the number of offenses with set terms are increasing and the terms were increasing.⁵⁶

As noted above, in terms of establishing the appropriate sentence, apart from the offense severity, the other key variable that determines the sanction in the Federal Sentencing Guidelines is the prior history of the offender.⁵⁷ In relation to most offenses, a criminal history can approximately double the presumptive sentence. For example, an offense at level fourteen⁵⁸ in the Federal Sentencing Guidelines carries a presumptive penalty for a first offender of imprisonment for fifteen to twenty-one months, which increases to thirty-seven to forty-six months for an offender with thirteen or more criminal history points.⁵⁹ For an offense at level thirty-six, a first offender has a presumptive penalty of 188 to 235 months, which increases to 324 to 405 months for an offender with the highest criminal history score. Thus, a bad criminal history can add between 136 to 170 months (over fourteen years) to a jail term.

Some of the harshest types of mandatory sentencing laws are the three-strikes laws, which have been adopted in over twenty states.⁶⁰ The California three-strikes laws⁶¹ are the most well known.⁶² Prior to these reforms, offenders convicted of any felony who had two or more relevant previous convictions were required to be sentenced to between twenty-five years to life imprisonment. The importance attributed to previous convictions was exemplified by the fact that the current offense did not have to be for a serious and violent felony—any felony would do. This meant that some offenders were sentenced to decades of imprisonment for relatively minor crimes.

56. Memorandum from the U.S. Sentencing Comm'n Office of Research and Data & Office of Gen. Counsel to Chair Saris, Comm'rs & Judith Sheon 24 (May 20, 2011), http://www.ussc.gov/sites/default/files/pdf/research/retroactivity-analyses/fair-sentencing-act/20110520_Crack_Retroactivity_Analysis.pdf [<http://perma.cc/77M3-LLV9>].

57. Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1109 (2008) (highlighting the importance of a defendant's criminal history in assessing his or her sentence).

58. U.S. SENTENCING GUIDELINES MANUAL (2013), *supra* note 48, at 394. The offense levels range from one (least serious) to forty-three (most serious). Examples of level fourteen offenses are criminal sexual abuse of a ward, failure to register as a sex offender, and bribery (if the defendant is a public official). *Id.* at 62, 66, 128.

59. *Id.* at 395. The criminal history score ranges from zero to thirteen or more (worst offending record). *Id.*

60. See James Austin et al., *The Impact of 'Three Strikes and You're Out'*, 1 PUNISHMENT & SOC'Y 131, 132 (1999); Kelly McMurry, *'Three-Strikes' Laws Proving More Show Than Go*, 33 TRIAL 12 (1997); Tonry, *supra* note 49, at 93.

61. CAL. PENAL CODE § 667 (2015).

62. The Supreme Court has held that California's three-strikes laws do not violate the Eighth Amendment prohibition against cruel and unusual punishment. See *Ewing v. California*, 538 U.S. 11, 30–31 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003).

Defendants have been sentenced to twenty-five years to life where their last offense was for a minor theft (which, prior to the three-strikes regime, would normally have resulted in a non-custodial sentence). For example, Jerry Dewayne Williams, a twenty-seven-year-old Californian, was ordered to be imprisoned for twenty-five years to life without parole, for stealing a slice of pepperoni pizza from a group of four youths, based on his previous convictions.⁶³ Gary Ewing was sentenced to twenty-five years to life for shoplifting three golf clubs, each of which was worth \$399.⁶⁴ Prior to that, he had been convicted for four serious or violent felonies.⁶⁵

The California three-strikes laws were softened somewhat in 2012, such that a term of at least twenty-five years would only be required where the third offense was a serious or violent felony.⁶⁶ In such cases, offenders continue to receive a significant premium—they must be sentenced to double the term they would have otherwise received for the instant offense.⁶⁷ Thus, despite the softening of the laws, they still provide severe penalties for serious and violent offender third-strikers. As noted above, amendments in 2014 have further reduced the harshness of this regime.

Perhaps the greatest indication of the harshness of United States sentencing is that life without parole is mandatory upon conviction for at least one specified offense in twenty-seven states.⁶⁸ There are over 40,000 prisoners in the United States serving life without parole.⁶⁹ This greatly exceeds the number of such prisoners in the rest of the world. In Australia, for example, there are only fifty-nine prisoners serving life without parole.⁷⁰

By any measure—even without the benefit of hindsight—most mandatory penalty regimes seem harsh. But it is not the case that the systems were

63. Phil Reeves, *'Life' for Pizza Theft Enrages Lawyers*, INDEPENDENT (Mar. 3, 1995), <http://www.independent.co.uk/news/world/life-for-pizza-theft-enrages-lawyers-1609876.html> [<http://perma.cc/Y5PQ-H6F9>].

64. *Ewing*, 538 U.S. at 18–19.

65. Ewing appealed his sentence to the Supreme Court, which upheld the validity of the legislation. *Id.* at 30–31. For a discussion of the case, see Sara Sun Beale, *The Story of Ewing: Three Strikes Laws and the Limits of the Eighth Amendment Proportionality Review*, in CRIMINAL LAW STORIES 427, 428 (Donna Coker & Robert Weisberg eds., 2013), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2953&context=faculty_scholarship [<http://perma.cc/DRD9-9M3S>].

66. See CAL. PENAL CODE § 667 (2015); CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 48 (Nov. 6, 2012), <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf> [<http://perma.cc/SLQ9-VWQY>].

67. *Id.* at 50.

68. Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 28 (2010).

69. *Id.* at 31.

70. DE LA VEGA ET AL., *supra* note 24, at 25. Thus, per capita, the incidence of life without parole is fifty-one times higher in the United States than in Australia.

implemented without considerable deliberation and research—simply, as is discussed below, the research was lacking in one crucial area: matching the severity of the crime to the harshness of the penalty.⁷¹

B. Fixed Penalty Regime Not Implemented in Ignorance of Main Rationales of Sentencing

Strong arguments can be made in favor of the view that penalties prescribed in most mandatory or presumptive penalty regimes are excessive. However, this is not necessarily because of a fundamentally flawed approach to sentencing or ignorance of the main competing tensions and relevant issues. To the contrary, the Federal Sentencing Guidelines are informed by a deep level of learning regarding the aims and objectives of sentencing.

To this end, the United States Sentencing Commission expressly notes that the guidelines aim to “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”⁷² Further, the Guidelines state that “[t]he [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.”⁷³ The Guidelines add that “[m]ost observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime.”⁷⁴

Most astutely, the Sentencing Commission noted that “[a] philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment.”⁷⁵ However, there was no need to delve into this potential quagmire because “[a]s a practical matter, . . . in most sentencing decisions the application of either philosophy will produce the same or similar results.”⁷⁶

Proportionality is pursued in the Guidelines “through a system that imposes appropriately different sentences for criminal conduct of differing severity.”⁷⁷ Moreover, 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, which had been imposed.⁷⁸

71. The move to higher penalties is the principal reason for the increase in prison numbers. However, it is not the sole cause. Another contributing factor was the “truth in sentencing laws,” which increased the actual time served by prisoners. NAT’L RESEARCH COUNCIL, *supra* note 1, at 79–83, 102.

72. U.S. SENTENCING GUIDELINES MANUAL (2013), *supra* note 48, at 1.

73. *Id.* at 2.

74. *Id.* at 4.

75. *Id.*

76. *Id.*

77. U.S. SENTENCING GUIDELINES MANUAL (2013), *supra* note 48, at 2–3.

78. *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

Thus, the Sentencing Commission was highly cognizant of the main challenges to sentencing. Despite this, the reforms failed for two key reasons. First, its recommendations were not sufficiently informed by the efficacy of sentencing to achieve the key orthodox objectives of sentencing in the form of incapacitation, specific deterrence, general deterrence, and rehabilitation. Secondly, proportionality was pursued in theory only. We now expand on these observations.

C. Empirical Data Regarding What Can Be Achieved in Sentencing

In order for sentencing to best facilitate the needs of the community, it needs to be evidence based. It is futile to pursue objectives that are unattainable. This obvious truth has carried surprisingly little weight in the sentencing realm. It is beyond the scope of this paper to consider at length the empirical findings, regarding the efficacy of punishment to achieve the objectives of incapacitation, deterrence, and rehabilitation.⁷⁹ However, the trend of the findings is relatively consistent, and hence it is possible to provide an overview of the relevant conclusions. In short, current empirical evidence provides no basis for confidence that punishment is capable of achieving the goal of specific deterrence.⁸⁰ General deterrence works only in the absolute sense,⁸¹ and the jury is still out on the capacity of the sentencing system to

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 presentence reports, the parole guidelines, and policy judgments.”)

79. One of us (Bagaric) has recently considered these at length in individual papers on each of these objectives, and the discussion immediately below is a summary of the findings in these papers: 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 (2012) [hereinafter Bagaric, *The Capacity of Criminal Sanctions*]; 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 (2012) [hereinafter Bagaric, *The Fallacy That Is Incapacitation*]; Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work—and What It Means for Sentencing*, 35 CRIM. L.J. 269 (2011) [hereinafter Bagaric, *(Marginal) General Deterrence*].

80. JOHN E. BERECOCHEA & DOROTHY R. JAMAN, CAL. DEP'T OF CORR., TIME SERVED IN PRISON AND PAROLE OUTCOME: AN EXPERIMENTAL STUDY REPORT NUMBER 2 16 (1981). This was a study based on an experiment involving the early release of felons in California in 1970. The authors found that “[w]ithin the first year and second year following release to parole, the experimentals and controls did not differ on the likelihood of their being returned to prison And there were no statistically significant differences between the experimentals and controls among those who were not returned to prison.” *Id.*

81. See David S. Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, 4 AM. ECON. J.: APPLIED ECON. 32, 32 (2012). Abrams conducted a study using

rehabilitate offenders. Incapacitation is effective to a minor degree, but it is only justified in relation to serious sexual and violent offenders. We now unpack these conclusions.

The success of incapacitation cannot be measured solely by the height of the prison wall. Incapacitation is only effective if the offender would have reoffended during the term of the prison sentence. Further, incapacitation has an admittedly crude cost-benefit aspect. It is self-defeating to imprison offenders in order to prevent them from committing minor or trivial offenses, whose costs clearly exceed the damage from their crimes.⁸²

There are no established models for determining with a high degree of accuracy offenders who will reoffend.⁸³ To the extent that sound predictions can be made about reoffending, this is in relation to relatively minor (especially property) offenses. However, the cost of imprisoning these offenders normally outweighs the seriousness of the offense.⁸⁴ In addition, research has demonstrated that incarceration might have “criminogenic” effects.⁸⁵ Lower level offenders interact with more serious criminals in prison and tend to commit graver crimes upon release. To be sure, there are complex reasons for this phenomenon, including socialization into a criminal culture, diminishment of lawful employment opportunities upon conviction, deterioration of relationships, and negative mental well-being.⁸⁶

add on gun laws passed by states enhancing sentences for offenders possessing firearms during the commission of the crime. He found that there was a decline in the number of gun robberies in the three years after the introduction of the laws. *Id.*

82. As noted in Part IV of this Article, this is not an accepted method for calibrating the cost of crime, and hence this criterion should only be relevant if the nature of the crime is manifestly minor.

83. Hence, the theory of selective incapacitation is flawed. See BERNADETTE MCSHERRY & PATRICK KEYZER, *SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE* 104, 104 (2009); Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, 6 J. APPLIED SECURITY RES. 317, 323–24 (2011). See generally Bernadette McSherry & Patrick Keyzer, “Dangerous” People: An Overview, in *DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE* 3 (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 brain 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. See ADRIAN RAINE, *THE ANATOMY OF VIOLENCE: THE BIOLOGICAL ROOTS OF CRIME* 373 (2013).

84. Bagaric, *The Fallacy That Is Incapacitation*, *supra* note 79, at 107.

85. Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002*, 6 CRIMINOLOGY & PUB. POL’Y 589, 593 (2007).

86. CHRISTY VISHER ET AL., URBAN INST. JUSTICE POLICY CTR., *LIFE AFTER PRISON: TRACKING THE EXPERIENCES OF MALE PRISONERS RETURNING TO CHICAGO, CLEVELAND, AND HOUSTON* 4–5 (May 2010), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/41>

It is essentially for these two reasons that the benefits of incapacitation appear to have been minor. The United States National Academy of Sciences notes: “The increase in incarceration [in the United States over the past four decades] may have caused a decrease in crime, but the magnitude of the reduction is highly uncertain and the results of most studies suggest it was unlikely to have been large.”⁸⁷

A recent report by the Brennan Center based upon an analysis of state imprisonment data between 1980 and 2013 concluded that:

Incarceration has been declining in effectiveness as a crime control tactic since before 1980. Since 2000, the effect on the crime rate of increasing incarceration . . . has been essentially zero. Increased incarceration accounted for approximately 6 percent of the reduction in property crime in the 1990s (this could vary statistically from 0 to 12 percent), and accounted for *less than 1 percent* of the decline in property crime this century. Increased incarceration has had little effect on the drop in violent crime in the past 24 years. In fact, large states such as California, Michigan, New Jersey, New York, and Texas have all reduced their prison populations while crime has continued to fall.⁸⁸

The Brennan Center Report elaborates that the ineffectiveness of incarceration as a crime fighting tool might be owed to the fact that a large percentage of “the increase in incarceration was driven by the imprisonment of nonviolent and drug offenders. Today, half of state prisoners are serving time for nonviolent crimes. Almost half of federal prisoners are serving time for drug crimes. Further, two-thirds of jail inmates are merely awaiting trial.”⁸⁹

The Sentencing Project noted that “[w]hile incarceration is one factor affecting crime rates, its impact is more modest than many proponents suggest, and is increasingly subject to diminishing returns.”⁹⁰

While serious sexual and violent offenders do not reoffend at manifestly high rates, it transpires that individuals with previous convictions for serious offenses⁹¹ commit crime at a greater frequency than the rest of the criminal population. Further, offenders with prior convictions for serious sexual and violent offenses reoffend more frequently than first-time offenders.⁹² Thus, to

2100-Life-after-Prison-Tracking-the-Experiences-of-Male-Prisoners-Returning-to-Chicago-Cleveland-and-Houston.PDF [<http://perma.cc/P6V7-RN22>].

87. NAT'L RESEARCH COUNCIL, *supra* note 1, at 4.

88. ROEDER ET AL., *supra* note 5, at 4 (emphasis in original).

89. *Id.* at 25.

90. RYAN S. KING ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 8 (2005), http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf [<http://perma.cc/DD9Q-U54S>].

91. *See infra* Part VII (arguing serious offenses are confined to sexual and assault offenses).

92. *See* NSW SENTENCING COUNCIL, HIGH-RISK VIOLENT OFFENDERS: SENTENCING AND POST-CUSTODY MANAGEMENT OPTIONS 20–25 (May 2012). Beyond this, there is no basis for

the extent that incapacitation can be effective, there is some theoretical basis for imposing harsher penalties on recidivist serious offenders. To this end, it seems that while incapacitation does not justify additional prison time for minor offenders, it can support a recidivist loading in the order of twenty to fifty percent for serious sexual and violent offenders.⁹³

“Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions, [and] thereby convincing them that crime does not pay.”⁹⁴ Specific deterrence “attempts to dissuade offenders from re-offending by inflicting an unpleasant experience on them (normally imprisonment) which they will seek to avoid in the future.”⁹⁵ The available empirical data suggests that specific deterrence does not work. There is nothing to suggest that offenders who have been subjected to harsh punishment are less likely to reoffend than identically-placed offenders who are subjected to lesser forms of punishment. Thus, there is no basis for pursuing the goal of specific deterrence.⁹⁶

The weight of evidence suggests that rehabilitation fares only slightly better. Certain rehabilitative techniques have some degree of success for some offenders, but there is no data to show that there are wide-ranging techniques to reform all offenders.⁹⁷ Rehabilitation should not drive sentencing outcomes

more accurately predicting future serious offending. See MCSHERRY & KEYZER, *supra* note 83, at 23–24; Black, *supra* note 83, at 317; McSherry & Keyzer, *supra* note 83, at 4–5.

93. See 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, 408–11 (2014) [hereinafter Bagaric, *The Punishment Should Fit the Crime*] (arguing that this is consistent with the rate of reoffending of these offenders).

94. Bagaric, *The Capacity of Criminal Sanctions*, *supra* note 79, at 159; see also Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 124 (Michael Tonry ed., 2009).

95. Bagaric, *The Capacity of Criminal Sanctions*, *supra* note 79, at 159.

96. See Nagin et al., *supra* note 94, at 115, 120; Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 CRIMINOLOGY 357, 383 (2010); DONALD RITCHIE, SENTENCING ADVISORY COUNCIL, SENTENCING MATTERS: DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE 22 (Apr. 2011); DON WEATHERBURN ET AL., AUSTRALIAN INST. OF CRIMINOLOGY, THE SPECIFIC DETERRENT EFFECT OF CUSTODIAL PENALTIES ON JUVENILE REOFFENDING 2 (2009); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 14 (1973); NEW S. WALES LAW REFORM COMM’N, SENTENCING: REPORT 139 33 (July 2013).

97. See generally KAREN HESELTINE ET AL., AUSTRALIAN INST. OF CRIMINOLOGY, PRISON-BASED CORRECTIONAL OFFENDER REHABILITATION PROGRAMS: THE 2009 NATIONAL PICTURE IN AUSTRALIA (2011), <http://www.aic.gov.au/documents/5/6/4/%7b564B2ECA-4433-4E9B-B4BA-29BD59071E81%7drpp112.pdf> [http://perma.cc/37J2-B2EX]; Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. OF L. & SOC. SCI. 297 (2007); NAT’L RESEARCH COUNCIL, *supra* note 1, at 152.

unless and until it is demonstrated that the technique or program in question is likely to produce positive attitudinal and behavioral reform in the offender. The findings regarding general deterrence are also relatively settled.⁹⁸ The existing data show that in the absence of the threat of *any* 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 the existence of some forms of criminal sanction and criminal conduct. However, there is insufficient evidence to support a direct correlation between higher penalties and a reduction in the crime rate.⁹⁹

The United States National Academy of Sciences notes: “The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.”¹⁰⁰

It follows that “[m]arginal general deterrence [which is the theory that there is a direct] correlation between the severity of the sanction and the prevalence of an offense” should be disregarded as a sentencing objective, at least unless and until there is proof that it works.¹⁰¹ The fallacy that is marginal general deterrence is highlighted by the fact that criminologists believe that it does not work. For example, nearly ninety percent of criminologists believe that the death penalty does not deter murder.¹⁰² That is comparable to scientific consensus relating to the causes of global warming,¹⁰³ yet legislatures and

98. See NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60–61 (1969); John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 129 (1994); Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569 (2001); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163 (2004); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 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, 178 (2004); Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 303 (2005); NAT'L RESEARCH COUNCIL, *supra* note 1, at 68, 90.

99. Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 BUFF. L. REV. 1159, 1202 (2014) [hereinafter Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*].

100. NAT'L RESEARCH COUNCIL, *supra* note 1, at 5.

101. See Bagaric, *(Marginal) General Deterrence*, *supra* note 79, at 270, 283.

102. Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 501 (2009).

103. Brian Evans, *A Clear Scientific Consensus That the Death Penalty Does NOT Deter*, AMNESTY INT'L (June 18, 2009), <http://blog.amnestyusa.org/us/a-clear-scientific-consensus-that-the-death-penalty-does-not-deter/> [<http://perma.cc/QR3S-5BEC>].

courts continue to fanatically use marginal general deterrence as a rationale for setting high penalties. This again highlights the disconnect in sentencing between fact and fiction.

It follows that based on the existing empirical data, the goal of incapacitation should be pursued more sparingly, specific deterrence and marginal general deterrence should be abolished as sentencing objectives, and rehabilitation should not influence sentencing outcomes unless and until it is demonstrated that it is possible to reform offenders while at the same time imposing hardships on them.¹⁰⁴

The biggest mistake by the Sentencing Commission is the failure to apply the principle of proportionality. The principle of proportionality in its most basic, and persuasive, form requires that the seriousness of the crime be matched by the harshness of the penalty.¹⁰⁵ A jurisdiction in which proportionality is prominent is Australia. 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.”¹⁰⁶

In *Veen (No 1) v [The Queen]*¹⁰⁷ and *Veen (No 2) v [The Queen]*,¹⁰⁸ the High Court of Australia stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which at various times has also been declared as the most important aim of sentencing.¹⁰⁹

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 been given statutory recognition in all Australian jurisdictions.¹¹⁰

104. MIRKO BAGARIC, PUNISHMENT AND SENTENCING: A RATIONAL APPROACH 128 (2001) (at the philosophical level, the act of state-imposed punishment is justified because, as noted above, absolute general deterrence theory is valid).

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

106. *Hoare v The Queen* (1989) 167 CLR 348, 354 (Austl.).

107. *Veen v The Queen* (1979) 143 CLR 458, 468 (Austl.).

108. *Veen v The Queen [No. 2]* (1988) 164 CLR 465, 472 (Austl.).

109. Mirko Bagaric, *Proportionality in Sentencing: The Need to Factor in Community Experience, Not Public Opinion*, in POPULAR PUNISHMENT: ON THE NORMATIVE SIGNIFICANCE OF PUBLIC OPINION 78 (Jesper Ryberg & Julian V. Roberts eds., 2014) [hereinafter Bagaric, *Proportionality in Sentencing*]; see, e.g., *Channon v The Queen* (1978) 20 ALR 1, 7 (Austl.).

110. *Sentencing Act 1991* (Vic) s 5(1)(a), 5(2)(c), 5(2)(d) (Austl.) (providing 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

Proportionality is also a requirement of the sentencing regimes of ten states in the United States,¹¹¹ and one of the few core sentencing principles that is adopted by both retributive and (some) utilitarian philosophers.¹¹² As noted above, it is also a core principle that informs (though it does not direct) the Federal Sentencing Guidelines.¹¹³

However, the reality is that proportionality exists in the abstract only: devoid of even the sparsest of detail. Its illusory nature and the unwillingness or incapacity of sentencing authorities to inject content into the principle, and to make it the lynchpin of determining sentence length and type is the fundamental reason for the unsatisfactory state of sentencing law and practice.¹¹⁴

The United States Supreme Court first considered proportionality under the Eighth Amendment in the case of *Weems*.¹¹⁵ The Court noted:

responsibility); *Sentencing Act 1995* (WA) s 6(1) (Austl.) (stating that the sentence must be commensurate with the seriousness of the offense); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a) (Austl.) (providing that the sentence must be just and appropriate); *Sentencing Act 1995* (NT) s 5(1)(a) (Austl.) (providing that the punishment imposed on the offender must be just in all the circumstances); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a) (Austl.) (stating that the punishment imposed on the offender must be “just in all the circumstances”); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j) (Austl.) (stating that the emphasis is upon ensuring that “the defendant is adequately punished for the offense”); *Crimes Act 1914* (Cth) s 16A(2)(k) (Austl.) (providing that the need for a sentencing court to adequately punish the offender is also fundamental to the sentencing of offenders for Commonwealth matters); *Crimes Sentencing Procedure Act 1999* (NSW) pt 1 s 3A(a) (Austl.) (stating that adequate punishment is fundamental to sentencing).

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

112. See Jami L. Anderson, *Reciprocity as a Justification for Retributivism*, 16 CRIM. JUST. ETHICS 13, 23 (1997); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 11–12 (1985) [hereinafter VON HIRSCH, PAST OR FUTURE CRIMES]; JESPER RYBERG, THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION 5 (2004); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165 (J.H. Burns & H.L.A. Hart eds., 1970); Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1832 (2007); Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1110 (2011).

113. See also NAT'L RESEARCH COUNCIL, *supra* note 1, at 23.

114. Cf. John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1038 (2009) (“[O]wing to the ways in which people do and do not adapt to various hardships, our current methods of punishment may be too blunt to fashion proportional punishments.”).

115. *Weems v. United States*, 217 U.S. 349, 366 (1910). The Court’s description of offender’s punishment:

Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no

“[T]he earliest application of the provision in England was in 1689, the first year after the adoption of the Bill of Rights in 1688, to avoid an excessive pecuniary fine imposed upon Lord Devonshire by the court of King’s Bench.” Lord Devonshire was fined thirty thousand pounds for an assault and battery upon Colonel Culpepper, and the House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine “was excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land.”¹¹⁶

Justice McKenna, who wrote the opinion of the Court, was of the view that it is “a precept of justice that punishment for crime should be graduated and proportioned to offense.”¹¹⁷ The Court held that the punishment violated the Eighth Amendment because of the excess of imprisonment and the “accessories.”¹¹⁸ The idea of proportionality as a component of the Eighth Amendment continued with *California v. Robinson*, where the Court explained that it “cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”¹¹⁹

participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts, there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the “authority immediately in charge of his surveillance,” and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.

Id.

116. *Id.* at 376 (internal citations omitted); see *Solem v. Helm*, 463 U.S. 277, 285 (1983) (Justice Powell quoted from a House of Lords decision) (“[F]ine of thirty thousand pounds, imposed by the court of King’s Bench upon the earl of Devon was excessive and exorbitant, against magna charta, the common right of the subject, and the law of the land.” *Earl of Devon’s Case*, 11 State Tr. 133, 136 (1689).”).

117. *Weems*, 217 U.S. at 367 (“Is this also a precept of the fundamental law? We say fundamental law, for the provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning.”).

118. *Id.* at 358, 377; see *Harmelin v. Michigan*, 501 U.S. 957, 992–93 (1991) (Justice Scalia’s explanation of *Weems*) (“If the proof of the pudding is in the eating, however, it is hard to view *Weems* as announcing a constitutional requirement of proportionality, given that it did not produce a decision implementing such a requirement, either here or in the lower federal courts, for six decades. . . . Opinions in the Federal Courts of Appeals were equally devoid of evidence that this Court had announced a general proportionality principle. Some evaluated ‘cruel and unusual punishment’ claims without reference to *Weems*. . . . Not until more than half a century after *Weems* did the Circuit Courts begin performing proportionality analysis.”).

119. *Robinson v. California*, 370 U.S. 660, 667 (1962).

The Eighth Amendment's proportionality principle was elaborated in *Solem v. Helm*.¹²⁰ In that case, the offender had been punished with imprisonment for life without parole for the crime of uttering a no-account check.¹²¹ The actual sentence for the crime was five years imprisonment and a fine of \$5000, but, based on South Dakota's recidivist statute, Helm's punishment was ratcheted up to the level described above.¹²² Justice Powell writing the majority opinion noted that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that 'amercements' may not be excessive."¹²³ He rejected the State's contention that proportionality does not apply to imprisonment pointing out that:

The constitutional language itself suggests no exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments. . . . It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms.¹²⁴

The Court went on to hold:

[C]ourt's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.¹²⁵

According to Justice Powell, the first element could be evaluated using "widely shared views as to the relative seriousness of crimes," the fact that

120. *Solem*, 463 U.S. at 285.

121. *Id.* at 281–82.

122. *Id.* at 281.

123. *Id.* at 284.

124. *Id.* at 288–89.

125. *Solem*, 463 U.S. at 292; see *Harmelin v. Michigan*, 501 U.S. 957, 989–90 (1991). Justice Scalia concedes that the third element could be applied with "clarity and ease" but dismisses it as irrelevant:

That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows a fortiori from the undoubted fact that a State may criminalize an act that other States do not criminalize at all. Indeed, a State may criminalize an act that other States choose to reward—punishing, for example, the killing of endangered wild animals for which other States are offering a bounty. What greater disproportion could there be than that? "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."

Id. (emphasis in original).

“nonviolent crimes are less serious than crimes marked by violence or the threat of violence,” and by reference to “accepted principles” utilized by courts to assess the “harm caused or threatened to the victim or society.”¹²⁶ “The absolute magnitude of the crime may be relevant,” recognizing that the “lesser included offense should not be punished more severely than the greater offense,” that “attempts are less serious than completed crimes,” and that “an accessory after the fact should not be subject to a higher penalty than the principal.”¹²⁷ The Court accepted that in order to apply its test, a court would have to compare prison terms:

For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area.¹²⁸

Applying its objective criteria, the Court found that the punishment imposed on Helm violated the Eighth Amendment.¹²⁹

126. *Solem*, 463 U.S. at 292–93; see *Harmelin*, 501 U.S. at 988. This first element was severely attacked by Justice Scalia in *Harmelin*:

[W]hether it is a “grave” offense merely to possess a significant quantity of drugs—thereby facilitating distribution, subjecting the holder to the temptation of distribution, and raising the possibility of theft by others who might distribute—depends entirely upon how odious and socially threatening one believes drug use to be. Would it be “grossly excessive” to provide life imprisonment for “mere possession” of a certain quantity of heavy weaponry? If not, then the only issue is whether the possible dissemination of drugs can be as “grave” as the possible dissemination of heavy weapons. Who are we to say no? The members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.

Id.

127. *Solem*, 463 U.S. at 293.

128. *Id.* at 294; see *Harmelin*, 501 U.S. at 988–89. Justice Scalia undermined this reasoning: One cannot compare the sentences imposed by the jurisdiction for “similarly grave” offenses if there is no objective standard of gravity. Judges will be comparing what *they* consider comparable. Or, to put the same point differently: When it happens that two offenses judicially determined to be “similarly grave” receive significantly *dissimilar* penalties, what follows is not that the harsher penalty is unconstitutional, but merely that the legislature does not share the judges’ view that the offenses are similarly grave. Moreover, even if “similarly grave” crimes could be identified, the penalties for them would not necessarily be comparable, since there are many other justifications for a difference. For example, since deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties.

Id. (emphasis in original).

129. *Solem*, 463 U.S. at 303. The Court wrote:

The Constitution requires us to examine Helm’s sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more

Matters got interesting in *Harmelin v. Michigan*, where Justice Scalia's opinion for the Court was scathing about the reasoning in *Solem*.¹³⁰ Engaging in an extensive historical analysis, he wrote:

[W]e think it most unlikely that the English Cruell and Unusuall Punishments Clause was meant to forbid "disproportionate" punishments. There is even less likelihood that proportionality of punishment was one of the traditional "rights and privileges of Englishmen" apart from the Declaration of Rights, which happened to be included in the Eighth Amendment.¹³¹

For Scalia, "to use the phrase 'cruel and unusual punishment' to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly." He relied upon the fact that proportionality was not unknown to Americans of the time, and the drafters had chosen not to incorporate the requirement specifically although they could have done so.¹³² In his view, the proscription was about the modes of punishment and not disproportionality.¹³³

Justice Kennedy wrote a separate concurring opinion, finding that the Eighth Amendment "encompasses a narrow proportionality principle."¹³⁴ According to the justice, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." He opined that a court's proportionality analysis under the Eighth Amendment should be guided

harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.

Id.

130. *Harmelin*, 501 U.S. at 965.

131. *Id.* at 974.

132. *Id.* at 977. ("In 1778, for example, the Virginia Legislature narrowly rejected a comprehensive 'Bill for Proportioning Punishments' introduced by Thomas Jefferson. Proportionality provisions had been included in several State Constitutions. There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them." (internal citations omitted)).

133. *Id.* at 979. Justice Scalia wrote:

While there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are "cruel and unusual," *proportionality* does not lend itself to such analysis. Neither Congress nor any state legislature has ever set out with the objective of crafting a penalty that is "disproportionate"; yet as some of the examples mentioned above indicate, many enacted dispositions seem to be so—because they were made for other times or other places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of penology. This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept.

Id. 985 (emphasis in original).

134. *Id.* at 997 (Kennedy, J., concurring).

by objective criteria, including the gravity of the offense and the harshness of the penalty;¹³⁵ the sentences imposed on other criminals in the same jurisdiction; and the sentences imposed for commission of the same crime in other jurisdictions.¹³⁶

This confusing state of affairs received fresh attention in *Ewing v. California*, where the Court affirmed the *Harmelin* test and reiterated the narrow proportionality principle contained in the Eighth Amendment.¹³⁷ Justice O'Connor elaborated on the application of the test to the facts:

In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." To give full effect to the State's choice of this legitimate penological goal, our proportionality review of Ewing's sentence must take that goal into account.¹³⁸

The Court noted that "Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality,'" and held that a sentence of twenty-five years for stealing three golf clubs was not grossly disproportionate.¹³⁹

135. *Harmelin*, 501 U.S. at 1000–01, 1005 (Kennedy, J., concurring) (For Justice Kennedy, "intra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality").

136. *Id.* at 1004–05 (Kennedy, J., concurring). Justice Kennedy wrote:

Although *Solem* considered these comparative factors after analyzing "the gravity of the offense and the harshness of the penalty," it did not announce a rigid three-part test. In fact, *Solem* stated that in determining unconstitutional disproportionality, "no one factor will be dispositive in a given case." . . . *Solem* is best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review. The Court stated that "it *may* be helpful to compare sentences imposed on other criminals in the same jurisdiction," and that "courts *may* find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." It did not mandate such inquiries.

Id. (internal citations omitted) (emphasis in original).

137. *Ewing v. California*, 538 U.S. 11, 11–12, 20 (2003).

138. *Id.* at 29 (internal citations omitted).

139. *Id.* at 30 (emphasis in original). This was a case under California's three-strikes law. Ewing, a parolee, stole three golf clubs worth about \$400 each and was sentenced to twenty-five years to life under the law. *Id.* at 11.

Justice Scalia was unimpressed and his dissent was scathing:

Proportionality . . . is inherently a concept tied to the penological goal of retribution. “[I]t becomes difficult even to speak intelligently of ‘proportionality,’ once deterrence and rehabilitation are given significant weight,” not to mention giving weight to the purpose of California’s three strikes law: incapacitation. In the present case, the game is up once the plurality has acknowledged that “the Constitution does not mandate adoption of any one penological theory,” and that a “sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.”¹⁴⁰

He went on to destroy the plurality’s reasoning:

Having completed [the first step of its test] (by a discussion which, in all fairness, does not convincingly establish that 25-years-to-life is a “proportionate” punishment for stealing three golf clubs), the plurality must then *add* an analysis to show that “Ewing’s sentence is justified by the State’s public-safety interest in incapacitating and deterring recidivist felons.”¹⁴¹

Justice Scalia correctly pointed out that under the plurality’s explanation, the Court is not actually undertaking a proportionality analysis but reading in a requirement that “all punishment should reasonably pursue the multiple purposes of the criminal law.”¹⁴² The majority’s inability to sustain its holding that twenty-five years’ imprisonment is a proportionate punishment for stealing three golf clubs on any intelligible logic illustrates the current state of judicial understanding of the concept.

In many respects, this case illustrates the problem with the test: it has essentially collapsed into just the first limb.¹⁴³ Courts rarely find that there is disproportionality between the gravity of the crime and the harshness of the punishment, meaning that there is no need to examine sentences imposed on other criminals or compare against sentences in other jurisdictions.¹⁴⁴

140. *Id.* at 31 (Scalia, J., concurring) (internal citations omitted).

141. *Id.* at 31–32 (Scalia, J., concurring) (commenting “why that has anything to do with the principle of proportionality is a mystery”).

142. *Ewing*, 538 U.S. at 32 (Scalia, J., concurring).

143. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (“In light of the gravity of petitioner’s offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed.”). Justice Kennedy wrote that “[p]ossession, use, and distribution of illegal drugs represent ‘one of the greatest problems affecting the health and welfare of our population.’ Petitioner’s suggestion that his crime was nonviolent and victimless is false to the point of absurdity. To the contrary, petitioner’s crime threatened to cause grave harm to society.” *Id.* at 1002 (internal citations omitted).

144. *See Graham v. Florida*, 560 U.S. 48, 88 (2010) (in evaluating this limb, the “analysis can consider a particular offender’s mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history.” Other factors are “past criminal conduct, alcoholism, and propensity for violence of the particular defendant” as

[T]he main elements of [the principle] are so indeterminate that they are incapable of providing meaningful guidance to sentencing courts [or legislatures]. There are no established criteria by which the severity of an offence is evaluated. It is accepted that the pain suffered by the victim of the crime is an important consideration. However, there is no existing methodology for measuring victim suffering. [The principle] is further clouded by the uncertainty regarding whether other variables, such as the offender's prior criminal history, should be incorporated into the principle. The uncertainty of the principle is also compounded by the fact that there is no common standard which can be used to match sanction hardship with offence gravity.¹⁴⁵

The vagaries 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 victim; or whether a burglar should be dealt with by way of imprisonment or fine; or the appropriate sanction for a drug trafficker. Certainly, there is no demonstrable violation of proportionality if a mugger, robber, or drug trafficker is sentenced to either twelve months' or twelve years' imprisonment. The fact that the principle can be so flexible leads to the suspicion that it is no principle at all and is simply an expedient that is invoked by courts (and legislatures) as a means to justify their intuitive sentencing impulse.

One commentator writes:

A number of state courts have examined factors similar to those that the U.S. Supreme Court identified in *Solem*—the gravity of the offense and severity of the punishment; the sentences imposed for other crimes in the same jurisdiction; and the sentences imposed for the same crime in other jurisdictions. Two states—Illinois and California—now appear to have abandoned the second *Solem* factor and no longer attempt to compare sentences imposed for unrelated crimes as part of deciding proportionality challenges.¹⁴⁶

We now explore the principle in greater detail and suggest how it can be developed into a coherent and concrete concept.

well as “specific details of the particular crime of conviction”); *United States v. Gurule*, 461 F.3d 1238, 1247 (10th Cir. 2006) (“[W]e are certain that we cannot conclude that the sentence is grossly disproportionate when the defendant had twice before been convicted of a serious violent felony.”).

145. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 79–80.

146. Balmer, *supra* note 7, at 811.

IV. DEVELOPING CONTENT INTO PROPORTIONALITY AS A BASIS FOR FAIR AND EFFECTIVE SENTENCING

The key aspect of the principle is that [proportionality] has two limbs. The first is the seriousness of the crime, and the second is the harshness of the sanction. Further, the principle has a quantitative component—the two limbs must be matched. For the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.¹⁴⁷

Before analyzing these two components in greater detail, we briefly discuss two forms of proportionality that have been advanced.¹⁴⁸

A. Cardinal and Ordinal Proportionality

It has been suggested that there are two forms of proportionality. “The first is *ordinal proportionality*, which concerns how offenders are punished relative to each other. It focuses on the relative seriousness of offenses and comes down to the view that offenders who commit graver offenses should receive sterner penalties.”¹⁴⁹ More fully, von Hirsch states that it has three features: parity, which requires that similar crimes deserve similar penalties;¹⁵⁰ ranking order, which means that more severe crimes are accorded more severe sanctions; and the last requirement concerns spacing of penalties and provides that the space between the seriousness of penalties should be commensurate with the difference in the seriousness of the offense.¹⁵¹

In order for the scaling to commence, a starting point is needed. This is determined by selecting a particular crime or crimes¹⁵² (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.”

Von Hirsch believes that cardinal proportionality is not absolute; it is a convention.¹⁵³ It too is essentially a relative concept; however, at the extremes there is a limit to the level of punishment, which can be imposed. “If suitable

147. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 77–78.

148. The examination of the proportionality principle below is derived from Mirko Bagaric, *Injecting Content Into the Mirage That Is Proportionality in Sentencing*, 25 N.Z. U. L. REV. 411, 424 (2013).

149. Mirko Bagaric, *Consistency and Fairness in Sentencing—The Splendor of Fixed Penalties*, 2 CAL. CRIM. L. REV. 1, ¶ 72 (2002) (emphasis added).

150. Except in the case of relevant prior convictions. ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 60 (1993) [hereinafter VON HIRSCH, *CENSURE AND SANCTIONS*].

151. He concedes that this is a matter upon which there is unlikely to be much exactness. VON HIRSCH, *PAST OR FUTURE CRIMES*, *supra* note 112, at 45.

152. *Id.* at 43. There is no specific crime, which should obviously be the starting point.

153. ANDREW VON HIRSCH, *Censure and Proportionality*, in *A READER ON PUNISHMENT* 112, 129 (R.A. Duff & David Garland eds., 1994).

reasons can be established for objecting to [a] convention (for example, on grounds that it depreciates the importance of the rights of those convicted of . . . low-ranking crimes[]) . . . a non-relative constraint is established.”¹⁵⁴ This serves to anchor the penalty scale. In earlier writings, von Hirsch states that cardinal proportionality may be breached where the sanction “fails to accord *respect* to the person punished,”¹⁵⁵ or where it “denigrates the importance of the defendant’s *right to liberty*.”¹⁵⁶

This anchoring point, however, is not absolute in the true sense. It is only absolute within the legal system under consideration since different jurisdictions have different starting points, which are generally determined without considered reflection, but are merely accepted as being intuitively correct.¹⁵⁷ This is a point accepted by von Hirsch (and Ashworth) in his more recent writings.¹⁵⁸

The distinction between ordinal and cardinal proportionality must be treated with some caution. While it is not illusory, it does not provide a meaningful distinction in terms of giving substance to the proportionality principle. All the hard work remains to be done.¹⁵⁹ The starting point is that the gravity of an offense depends on its seriousness, where seriousness is gauged on the basis of certain (albeit yet to be determined) criteria. Application of this standard to each offense will determine the seriousness of the offense. Logically, this task can be undertaken without one eye being kept on how other offenses have been graded in the same way that one grades mathematics papers: two times two is four, irrespective of what the other papers say.

Ordinal proportionality is no more than an appeal to internal consistency, which requires that the graver offenses are not treated less seriously than the comparatively more minor offenses. Thus, for example, murder must be treated

154. *Id.*; see also VON HIRSCH, CENSURE AND SANCTIONS, *supra* note 150, at 45 (making essentially the same point).

155. VON HIRSCH, PAST OR FUTURE CRIMES, *supra* note 112, at 44 (emphasis added).

156. *Id.* (emphasis added).

157. See, e.g., ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 70 (4th ed. 2005) (noting that differing demographics and differing availability of “stealable” goods might cause differing crime rates and sentencing in different areas).

158. ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 143 (2005) [hereinafter VON HIRSCH & ASHWORTH, PROPORTIONATE SENTENCING] (“How much guidance will our model give? Admittedly, it would provide only a limited degree of guidance on the setting of the penalty system’s anchoring points—that is, the system’s overall degree of punitiveness. But the model tells one considerably more (albeit not providing unique solutions) about the comparative scaling of penalties: about punishing equally reprehensible conduct approximately equally, and about scaling unequally serious conduct according to the conduct’s differing degree of seriousness.”).

159. In particular, the assertion that ordinal proportionality is all that is necessary is unsound. As noted by Jesper Ryberg, it logically permits for harsh punishments for minor offenses and soft punishments for serious offenses. RYBERG, *supra* note 112, at 148.

more harshly than robbery, which in turn must be punished more severely than theft. However, this appeal to consistency is not a defining characteristic of proportionality. It is merely an incidental feature that will follow if the seriousness of each offense is ranked properly according to the same indicia—to avoid circularity, one of the criteria for determining offense severity cannot include existing penalties.

Beyond this, ordinal proportionality may be used to act as a check on the outcome of applying the relevant indicia to each offense. If the result of such an analysis reveals disturbing rankings, for example, if it transpired that theft was more serious than murder, this breach of ordinal proportionality would suggest that the factors supposedly governing cardinal proportionality are incorrect or wrongly applied. However, this is not to set ordinal proportionality as a discrete, defining requirement of proportionality. It is merely to recognize it is a by-product of a correct application of the appropriate variables relevant to cardinal proportionality and a tool that may be used to loosely check estimates of cardinal proportionality.

The most controversial aspect of von Hirsch's analysis of cardinal proportionality is his claim that it is a relative concept. Although, the importance of certain interests vary across (and sometimes within) cultures, it may yet be possible to identify a sufficiently pervasive human concern or interest, which is sensitive to such variations, and, in this way, an objective formula for offense seriousness may be determined. This idea is developed below.

As we adverted to earlier, the enthusiasm for the principle of proportionality is not matched by its clarity. The key concept for proportionality is the objective seriousness of the offense; however, this concept is so vague that it dilutes the principle to practical nothingness. In order for proportionality to be of pragmatic guidance, it is necessary to give some content to the factors that are relevant to the gravity of the offense. After this, the commensurability between the offense and sanction is examined.

B. Factors Relevant to the Seriousness of the Offense

The most obscure and unsatisfactory aspect of proportionality is that there is no stable and clear manner in which the punishment can be matched to the crime.¹⁶⁰ As noted by Jesper Ryberg, one of the key criticisms of the theory is that it “presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.”¹⁶¹ As he further

160. As noted in Part II of this Article, the courts have not attempted to exhaustively define the factors that are relevant to proportionality. *See supra* Part II.

161. RYBERG, *supra* note 112, at 184.

notes, to give content to the theory, it is necessary to rank crimes, rank punishments, and anchor the scales.¹⁶²

“This is a challenge noted by numerous scholars.”¹⁶³ In relation to the first limb (at least), however, it has been noted that some approaches have been applied.¹⁶⁴ Yet in a pragmatic sense, the problem is not insurmountable.¹⁶⁵ Legislatures commonly set maximum penalties for offenses, and this is a crude method for ranking offense seriousness.¹⁶⁶ “While the maximum penalty is not a defining criterion regarding the sanction in any particular case, even when it comes to precisely prescribing a predetermined sanction for an offense type, this has often been undertaken with little difficulty.”¹⁶⁷

However, the fact that agreement can and has been reached regarding the seriousness of certain crimes (whether by government institutions or within the general community)¹⁶⁸ does not justify the outcome.¹⁶⁹ A doctrinally sound approach is needed to define the criteria by which offense severity is defined. It is to this that we now turn.¹⁷⁰

162. *Id.* at 185.

163. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 84.

164. VON HIRSCH & ASHWORTH, *PROPORTIONATE SENTENCING*, *supra* note 158, at 143 (“How is crime-seriousness to be assessed? Ordinary people, various opinion surveys have suggested, seem capable of reaching a degree of agreement on the comparative seriousness of criminal offences.”). Moreover, there seems to be a relatively high degree of consensus in relation to this. For an overview of Robinson’s approach, see Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007); Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089 (2011) [hereinafter Robinson, *The Ongoing Revolution in Punishment Theory*]. But for a counter to this, see Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77 (2013).

165. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 84.

166. *Id.*

167. *Id.*; see VON HIRSCH & ASHWORTH, *PROPORTIONATE SENTENCING*, *supra* note 158, at 143–44 (“The rulemaking bodies that have tried to rank crimes in gravity have not run into insuperable practical difficulties, moreover. Several US state sentencing commissions (including those of Minnesota, Washington, and Oregon) were able to rank the seriousness of offenses for use in their numerical guidelines. While the grading task proved time-consuming, it did not generate much dissension within these rule-making bodies.”).

168. Courts sometimes factor community sentiment into an assessment of offense severity. *E.g.*, *WCB v R* [2010] VSCA 230 (Austl.); *Stalio v The Queen* [2012] VSCA 120 (Austl.).

169. RYBERG, *supra* note 112, at 60. (“Even if it is correct that there is general agreement between people as to how the seriousness of different crimes should be rated, this does not of itself show that the rating should be morally accepted. This would require an independent argument. Moreover, it is generally agreed that there might be a divergence between popular judgements and what is morally well-grounded. The need for a theoretical enquiry clarifying what is morally relevant in the comparison of crimes is, therefore generally acknowledged among proportionalists.”).

170. The approach below is similar in approach to the notion of “empirical desert” advanced by Robinson, but we adapt different criteria for informing the content of the principle. For an

1. The Living Standard Approach

One of the most comprehensive examinations of the factors relevant to proportionality has been undertaken in the context of the “living standard” approach to proportionality. This was first advanced by Andrew von Hirsch and Nils Jareborg and refined more than a decade later by von Hirsch and Andrew Ashworth. [Andrew] von Hirsch and [Nils] Jareborg start with the assumption that the seriousness of a crime has two dimensions: *harm and culpability*. Harm refers to the injury done or risked by the act; culpability to the factors of intent, motive and circumstances that determine the extent to which the offender should be held accountable for the act.¹⁷¹

In relation to the culpability component, [they] import substantive criminal law doctrines of culpability such as intention, recklessness, and negligence and excuses such as provocation into the sentencing stage.¹⁷² But they contend that such an approach is not possible with respect to harm, where they claim that “virtually no legal doctrines have been developed on how the gravity of harms can be compared.”¹⁷³ Thus, the focus of their inquiry is giving content to the harm component.¹⁷⁴

[They] approach this task by considering the seriousness of an offense against a background of important human concerns, and confine their analysis to conduct that is (already) criminal and injures or threatens identifiable victims.¹⁷⁵ Aggravating or mitigating considerations are not addressed due to the complexity that this would import. In a bid to gauge the level of harm caused by an offence, the starting point for von Hirsch and Jareborg is to use a broad-based “living standard” criterion where the gravity of criminal harm is determined “by the importance that the relevant interests have for a person’s standard of living.”¹⁷⁶ The living standard focuses “on the means or capabilities for achieving a certain quality of life,” rather than actual life quality or goal achievement,¹⁷⁷ and is adapted from the criteria set out by Amartya Sen, which encompasses non-economic and economic interests.¹⁷⁸

overview of Robinson’s approach, see Robinson, *The Ongoing Revolution in Punishment Theory*, *supra* note 164; Slobogin & Brinkley-Rubinstein, *supra* note 164.

171. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 87; Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 2–3 (1991) [hereinafter von Hirsch & Jareborg, *Gauging Criminal Harm*].

172. Von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 3.

173. *Id.*

174. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 87.

175. Von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 3.

176. *Id.* at 12.

177. *Id.* at 10.

178. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 87; VON HIRSCH & ASHWORTH, *PROPORTIONATE SENTENCING*, *supra* note 158, at 144.

They formulate four living standard levels, which are used to determine the degree to which a particular crime affects a person's living standard.¹⁷⁹ The most important is subsistence, which equates to survival with no more than basic capacities to function and then follows minimal well-being and adequate well-being, which mean maintenance of a minimum and adequate level of comfort and dignity, respectively. Finally, there is enhanced well-being, which is defined as significant enhancement of quality of life.¹⁸⁰ The most grievous harms are those which most drastically diminish one's standard of well-being.¹⁸¹ Thus, a crime which violates the first level (subsistence) is the most serious, whereas one which infringes only enhanced well-being is the least serious.¹⁸²

Next, they determine the type of interests which are violated or threatened by the paradigm instances of particular offenses. They identify four basic types of interests. In descending order they are physical integrity, material support and amenity (ranging from nutrition and shelter to various luxuries), freedom from humiliating or degrading treatment, and privacy and autonomy.¹⁸³ Some interest dimensions such as physical integrity are applicable to all of the grades on the living-standard scale, depending on the level of intrusion, whereas other interests such as privacy and autonomy are confined to levels including and below minimum well-being.¹⁸⁴ After the interest violated by the typical instance of a particular offense is ascertained the effect on the living standard is then determined.¹⁸⁵

For example, in the case of a stock-in-trade burglary, physical integrity is not affected, and, assuming the item stolen is inexpensive and easily replaceable, material amenity is also scarcely affected. Privacy is more significantly affected; hence, on the living standard, it ranks at level four (as affecting enhanced well-being).¹⁸⁶

After the harm scale score is determined, discounts are accorded where crimes create only a risk or threat to a particular interest: the remoter the risk or less likely the threat, the greater the discount.¹⁸⁷ As such, attempted offenses

179. See von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 17.

180. These grades are further elaborated at von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 17–19. They make the obvious point that there will be variations within the four grades.

181. See *id.* at 17.

182. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 88.

183. For an elaboration of these concepts, see von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 19–21. In later analysis, autonomy and freedom from degrading treatment are not mentioned.

184. *Id.* at 21.

185. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 88; von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 20.

186. Von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 27.

187. *Id.* at 30.

are regarded as being less serious than completed ones. Von Hirsch and Jareborg do not address at length the issue of culpability but suggest that discounts should also be given for less blameworthy states of mind.¹⁸⁸ Thus, harm caused, say, negligently, does not rate as high as when it is caused intentionally.

In a nutshell, the argument is that the seriousness of an offense is gauged by the impact that the crime has on the living standard of the typical victim.¹⁸⁹

The approach is made more appealing by the fact that it applies to standardized measures for a good life, as opposed to that which is applicable to a particular victim.¹⁹⁰ A further advantage of the theory is that the same principal variables can also be used to assess sanction severity. Thus, as noted by von Hirsch and Ashworth: “Imprisonment thus qualifies as a severe penalty, because the interests in freedom of movement and privacy it takes away are normally so vital to a good existence.”¹⁹¹

To determine the seriousness of a crime, a logical starting point is to assess the level of detriment inflicted, where the level of detriment is viewed from the perspective of important human concerns. Von Hirsch and Jareborg identify what they regard as important human concerns and also go about ranking them—as they must do—to give some content to their formulation.¹⁹² The problem, however, with their ranking system is that, despite conceding that their analysis is normative, “since it is a theory on how harms ought to be rated,¹⁹³ it is devoid of an underlying rationale or an empirical or scientific foundation—it is built on armchair speculation.”¹⁹⁴

Intuition aside, we are not told why privacy and autonomy are any less important than, say, freedom from humiliation. In order to determine such issues, an underlying moral and scientific theory is needed.

Von Hirsch and Jareborg accept the need for a moral theory, however, they are content to rest their case on the basis that an “articulated moral theory”

188. *Id.* at 3. They accept that the substantive criminal law doctrines of culpability may be “drawn upon” at sentencing stage, and they imply that their analysis is sufficiently sensitive to compare harm caused intentionally as opposed to negligently.

189. *Id.* at 33.

190. VON HIRSCH & ASHWORTH, *PROPORTIONATE SENTENCING*, *supra* note 158, at 146.

191. *Id.* at 148. But it does not apply so clearly to other sanctions:

There remain, however, certain practical problems of applying an interest analysis approach to gauging the severity of sanctions: the exercise is much easier for terms of imprisonment and for financial penalties than it is for community penalties and other non-custodial measures, which can vary so much in their conditions and in the extent of their restrictions on liberty.

Id.

192. Von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 17–18.

193. *Id.* at 5–6.

194. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 88.

underpinning the living standard is beyond the scope of their discussion.¹⁹⁵ They go on to state that they are “not trying to develop an invariant harm-analysis but, instead to derive ratings applicable *here*, given certain prevailing social practices and also certain *ethical traditions*.”¹⁹⁶ Some of the social practices they assume are spelled out, such as the social convention that home is important for a comfortable existence. However, the detail we are not given is which “ethical traditions” have been assumed.¹⁹⁷

[They] state that the living standard for gauging harm is used because “it appears to fit the way one ordinarily judges harms.”¹⁹⁸ Further, the “living standard provides, not a generalized ethical norm, but a *useful* standard which the law can use in gauging the harmfulness of criminal acts.”¹⁹⁹ This, however, raises the questions: useful in what sense? And how useful?²⁰⁰

Any standard is useful because it will at least assist in achieving uniformity in sentencing. However, a standard based on spiritual or purely economic well-being will also achieve that. Von Hirsch and Jareborg attempt (unpersuasively) to turn the criticism that their theory lacks a justification into an advantage: “The living standard approach also has the advantage of a certain modesty; no ‘deep’ theory of preferred life-aims or appropriate social roles is presupposed.”²⁰¹

The selection and adoption of certain harms in preference to others can only be justified by reference to an underlying moral and social theory, which is informed by empirical data. To this end, an obvious candidate is utilitarianism, which offers a simple method for determining the types of interests that are relevant to harm seriousness: The reason that some interests are important and worthy of protection by the criminal law is because they are integral to the attainment of happiness. In fact, the approach adopted (and conclusions reached) by von Hirsch and Jareborg have much in common with a transparently utilitarian evaluation of harm analysis.²⁰²

The considerations they identify seem to map well onto a (tenable) utilitarian scale of the primacy of interests relevant to happiness. For example, it is feasible to suggest that the most essential requirement to the attainment of any degree of meaningful happiness is physical integrity and subsistence, followed by material support and minimal well-being, and so on. The next thing many seem to value most is material support. Freedom from humiliation and privacy

195. Von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 15.

196. *Id.* (emphasis added).

197. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 88.

198. Von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 11.

199. *Id.* at 11–12 (emphasis added).

200. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 88.

201. Von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 12.

202. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 88–89.

and autonomy, though not necessarily in that order, are seen to be important interests towards the road to happiness.

2. Studies Measuring the Variables Relevant to Happiness and Moving from “Happiness” to “Well-Being” as a Standard Measure

A more doctrinally consistent manner to gauge the seriousness of harm is to adopt a utilitarian primary rationale and then to prescribe weight to defined interests in accordance with empirical observations [about the interests that are valued most highly]. The potential disadvantage of this approach is that the notion of happiness is inherently vague. However, over the past few decades there has been an increase in the number of studies conducted into human happiness and well-being. Happiness has become a scientific rather than a purely theoretical concept. The overriding pursuit of happiness is now increasingly a psychological truism rather than an obscure aspirational objective. There is now a dedicated international journal (the *Journal of Happiness Studies*) which is devoted to articles [based on empirical studies of] what makes people happy (or indeed unhappy).²⁰³ Over the last few years there has been a number of important works looking at what makes people happy and, in particular, looking at whether there is a positive or negative correlation between happiness and wealth creation.²⁰⁴

While noting the diversity in the range of activities through which people choose to express themselves, the studies show that basically we are not that different after all. At the core, humans are wired pretty much the same. While some people prefer singing in a choir as opposed to boxing in a ring and others prefer repairing motor vehicles to writing poetry, we should not allow these superficial differences to divert us from the fact that we have the same basal needs and our well-being is promoted by the same type of things.²⁰⁵

203. JOURNAL OF HAPPINESS STUDIES: AN INTERDISCIPLINARY FORUM OF SUBJECTIVE WELL-BEING, <http://www.springer.com/social+sciences/wellbeing+%26+quality-of-life/journal/10902> [<http://perma.cc/KC6D-EAB7>] (last visited Sept. 20, 2015).

204. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 89; *see, e.g.*, Claudia Wallis et al., *The New Science of Happiness*, TIME, Jan. 17, 2005 (devoting the entire issue to this topic).

205. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 89; This is the trend of information emerging from the following works and extensive research data in these works: MICHAEL ARGYLE ET AL., *Happiness as a Function of Personality and Social Encounters*, in RECENT ADVANCES IN SOCIAL PSYCHOLOGY: AN INTERNATIONAL PERSPECTIVE 189 (Joseph P. Forgas & J. Michael Innes eds., 1989); TIM KASSER, THE HIGH PRICE OF MATERIALISM (2002); DAVID G. MYERS, THE PURSUIT OF HAPPINESS: DISCOVERING THE PATHWAY TO FULFILLMENT, WELL-BEING, AND ENDURING PERSONAL JOY (1992); Martin E. P. Seligman and Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 AMERICAN PSYCHOLOGIST 5 (2000); MARTIN E. P. SELIGMAN, AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT (2002).

The studies indicate that we can now, with a growing degree of confidence, identify the things that make people happy.²⁰⁶ People have the same basic wants and needs. In a nutshell, the things that are conducive to happiness are fit and healthy bodies, realistic goals, self-esteem, optimism, an outgoing personality, a sense of control, close relationships, challenging work, and active leisure, punctuated by adequate rest and a faith that entails communal support, purpose, and acceptance. Myths about happiness include that it is bought by money and that religious faith suppresses happiness.²⁰⁷

However, the relevant studies have not been conducted with a view to providing insight into calculations of offence seriousness or sanction severity. Nevertheless, a number of tentative conclusions can be made regarding the relevance of the studies to proportionalism.²⁰⁸

First, property offences [which deprive victims of a degree of wealth (as opposed to diminishing their personal security)] are . . . overrated in terms of their seriousness. Wealth has little effect on personal happiness; hence, the criminal justice system should view these offences less seriously. The only occasions where property offences make a *significant* adverse impact on victims is where they result in the victim living in a state of poverty.²⁰⁹

This argument is intuitively challenging. This is especially the case where an offense destroys wealth, which is emotionally important, even though no net financial loss occurs (for example, where artistic work is destroyed, but insurance is paid) or when an individual is reduced from high levels of wealth and resources to a considerably lower level (and hence loses the ability to act charitably to others). In these situations the studies do not debunk the view that the victim will not experience considerable unhappiness. First, the studies are not acute enough to evaluate the impact on well-being of loss of sentimental or emotional objects. However, the studies firmly establish²¹⁰ that if a considerable reduction in well-being does flow from such a loss, it is not because of deprivation of resources per se, but the incidental deprivations that stem from this (in the form of emotional separation and inability to confer generosity).

The second conclusion that follows from the above studies is that:

[O]ffences which imperil a person's sense of security or otherwise negatively affect a person's health and capacity to lead a free and autonomous life should

206. Mirko Bagaric & James McConvill, *Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law*, 10 DEAKIN L. REV. 1, 3–4 (2005).

207. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 89; Bagaric & McConvill, *supra* note 206, at 17. Also, generally see this edition of the *Deakin Law Review*, which is a thematic edition, regarding the link between law and happiness research.

208. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 90.

209. *Id.* (emphasis added).

210. See RONALD INGLEHART, *CULTURE SHIFT IN ADVANCED INDUSTRIAL SOCIETY* (1990); MYERS, *supra* note 205, at 36; KASSER, *supra* note 205, at 9–10.

be punished severely. These implications are of limited value for informing the proportionality principle because, as noted above, they do not directly examine the effects of crime. Further, the studies are not conclusive regarding the criteria that are relevant to happiness.²¹¹

However, the concept of developing an index of the variables that affect human prosperity is becoming increasingly mainstream. The indexes, however, generally use different nomenclature from that conventionally adopted by utilitarians. The key concept is normally defined as “well-being” as opposed to “happiness.” It is not clear whether this is a difference in substance. However, in principle, it is preferable because the notion of well-being appears, at least intuitively, to relate to enduring (as opposed to transient) traits and hence is likely to have wider appeal.²¹²

The concept of well-being is becoming so mainstream that in some contexts it is replacing or complementing conventional and widely accepted economic indicia for evaluating human progress and achievement. The Organisation for Economic Cooperation and Development [OECD] has developed a “Better Life Index,” which attempts to set out and prioritise the matters that are most essential for human well-being.²¹³ The index lists eleven criteria for measuring life quality that allows nations to develop their priorities and distinguishes between responses from men and women.²¹⁴ It transpires that men and women have near identical priorities.²¹⁵ The order from most to least important is life satisfaction, health, education, work-life balance, environment, jobs, safety, housing, community, income, and civic engagement.²¹⁶

3. Studies That Directly Measure the Impact of Crime

Even more relevant to an assessment of the severity of crime are studies that measure the impact of certain crime offence categories on victims. The best information available suggests that, typically, victims of violent and sexual crime suffer considerably and, in fact, more than is manifest from the obvious and direct effects of crime.²¹⁷

The problem with some studies is that they do not distinguish adequately between different types of crime to determine the relative impact of criminal offense types. However, the data available suggest that victims of violent crime

211. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 90.

212. *Id.*

213. *OECD Better Life Index*, OECD, <http://www.oecdbetterlifeindex.org/#/11111111111> [http://perma.cc/H6GQ-LHA5] (last visited Sept. 20, 2015).

214. *Id.*

215. Although, women rank income less highly and health more highly than men.

216. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 90; OECD, *supra* note 213. These measures are designed to be more informative than economic statistics, especially in the form of Gross Domestic Product (GDP).

217. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 90.

and sexual crime have their well-being more significantly set back than for other types of crime.

Rochelle Hanson, Genelle Sawyer, Angela Begle, and Grace Hubel (2010) reviewed the existing literature regarding the effects of violent and sexual crimes on key quality of life indices.²¹⁸ The crimes examined included rape, sexual assault, aggravated assault, survivors of homicide (i.e. relatives of those killed), and intimate partner violence. The key quality of life indicia examined were role function (i.e. capacity to perform in the roles of parenting and intimate relationships and to function in the social and occupational domains), reported levels of life satisfaction, and, well-being and social-material conditions (i.e. physical and mental health conditions).²¹⁹ The report demonstrated that many victims suffered considerably across a range of well-being indicia, well after the physical signs had passed.²²⁰ The report concluded:

In sum, findings from the well-established literature on general trauma and the emerging research on crime victimization indicate significant functional impact on the quality of life for victims. However, more research is necessary to understand the mechanisms of these relationships and differences amongst types of crime victimization, gender, and racial/ethnic groups.²²¹

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

- Difficulty in being involved in intimate relationships and far higher divorce rates;²²²
- Diminished parenting skills (although this finding was not universal);²²³
- Lower levels of success in the employment setting (especially in relation to victims who had been abused by their partners) and much higher levels of unemployment;²²⁴
- Considerable impairment and dysfunction in social and leisure activities, with many victims retreating from conventional social supports;²²⁵ and
- High levels of direct medical costs associated with violent crime (over \$US24,353 for an assault requiring hospitalisation).²²⁶

218. Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189, 189 (2010).

219. *Id.* at 190.

220. *Id.* at 194–95.

221. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 91; Hanson et al., *supra* note 218, at 194.

222. Hanson et al., *supra* note 218, at 191.

223. *Id.* at 190.

224. *Id.* at 191.

225. *Id.* at 191–92.

226. *Id.* at 193; Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 91.

A study published in 2006, focusing on victims in the United Kingdom, found that:

- Victims of violent crime were 2.6 times as likely as non-victims to suffer from depression and 1.8 times as likely to exhibit hostile behavior five years after the original offense;²²⁷ and,
- For fifty-two percent of women who had been seriously sexually assaulted in their lives, their experience led to either depression or other emotional problems, and for one in twenty it led to attempted suicide (64,000 women living in England and Wales today have tried to kill themselves following a serious sexual assault).²²⁸

Chester L. Britt, in a study examining the effects of either violent or property crime on the health of 2430 respondents,²²⁹ noted: “Victims of violent crime reported lower levels of perceived health and physical wellbeing, controlling for measures of injury and for sociodemographic characteristics.”²³⁰

These findings were not confined to violent crime. Victims of property crime also reported reduced levels of perceived well-being, but it was less profound than in the case of violent crime.²³¹

4. The Irrelevance of Other Factors to Crime Severity

The ranking of crime is made complicated by the fact that, typically, it is thought to involve consideration of both the harm caused by the offence and the culpability of the offender and, according to some theorists, certain aggravating and mitigating considerations (and, in particular, the prior criminality of the offender).²³² There is, however, no principled reason for infusing either of these into an assessment of offence severity.²³³

This variable-rich approach to offence severity is consistent with the manner in which courts have often interpreted the proportionality principle. However, it is flawed. There are several problems with allowing factors not directly related to the offence to have a role in evaluating offence seriousness.²³⁴

227. MIKE DIXON ET AL., *CRIMESHARE: THE UNEQUAL IMPACT OF CRIME* 25 (2006).

228. *Id.* at 17; Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 91.

229. Chester L. Britt, *Health Consequences of Criminal Victimization*, 8 INT’L REV. VICTIMOLOGY 63, 65 (2001).

230. *Id.* at 63.

231. *Id.* at 69–70; *see also* 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). This is not necessarily inconsistent with the findings noted earlier that financial resources cannot produce happiness. Money and resources are relevant to well-being but are not cardinal considerations.

232. RYBERG, *supra* note 112, at 185.

233. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 92.

234. *Id.*

First, it is contradictory to claim that the principle of proportionality means the punishment should be commensurate with the *objective* seriousness of *the offence* and then allow considerations external to the offence to have a role in determining how much punishment is appropriate. Once the inquiry extends to matters not even remotely connected with the crime, such as the offender's upbringing or previous convictions, the parameters of *the offence* have been clearly exhausted.²³⁵

Second, by importing other considerations (especially aggravating and mitigating factors) into proportionalism, much of the splendour of the principle of proportionality is dissipated. The principle then cannot be claimed as being indicative of anything: To ascertain how much to punish, the appealing idea of looking only at the objective seriousness of the offence is abandoned and the inquiry must move elsewhere—and, indeed, everywhere.²³⁶ Giving content to the principle of proportionality would become unworkable—as is currently the case. In each particular sentencing inquiry the principle would need to be flexible enough to accommodate not only the objective circumstances of the offence but also the mitigating [and aggravating] circumstances. Given the uniqueness of each offender's personal circumstances and the vast number of variables which are supposedly relevant to such an inquiry and the fact that mitigating factors often pull in a diametrically opposite direction to the objective factors relevant to the offence, any attempt to provide a workable principle of proportionality must fail. It was for this reason that von Hirsch and Jareborg, when elaborating on the matters that are relevant to gauging the seriousness of the offence, declined to consider aggravating and mitigating circumstances.²³⁷

A non-tautologous definition of proportionality would be impossible if the proportionality principle must accommodate the full range of supposed sentencing considerations.²³⁸

The above analysis provides some guidance regarding measuring offence seriousness. Further clarity will emerge if the focus on graduating offences commences with offences that have identifiable victims. Once a degree of consensus is obtained in that context, assessments should then be made in relation to offences that have less identifiable and more remote forms of harm,

235. *Id.* (emphasis in original).

236. As noted below, in Australia there are nearly 300 different aggravating and mitigating considerations.

237. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 92; von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 4.

238. However, as discussed below, there is some scope to overlay the assessment of the severity of the crime with a relatively small adjustment for the offender's culpability. *See infra* Part IV.

such as drug and motor traffic offences [and offences that potentially undermine important institutional structures and processes, such as perjury].²³⁹

5. Evaluating the Hardship of Sanctions

While there has been some consideration of measuring crime severity, there has been less attention given to the other side of the proportionality equation: measuring punishment severity. Ryberg contends this is because of the underlying belief that the “answer is pretty straightforward”²⁴⁰—with imprisonment being clearly the harshest disposition. As Ryberg notes, the answer would seem to rest on “the negative impact on the well-being of the [punished].”²⁴¹ Von Hirsch and Ashworth (2005) also believe that it is less complex to rank punishments because the appropriate reference point seems to be the degree of suffering or inconvenience caused to the offender.²⁴²

Other criteria have been invoked, including community views about the hardship of a penalty. To this end, a number of opinion surveys have been undertaken.²⁴³

[W]hile community attitudes are a tool that can be used to assess penalty severity, they are an inadequate measure because of the lack of practical knowledge of the survey participants. To this end, the relevant insight can only come from those who have experienced the relevant sanction.²⁴⁴

The starting point is to evaluate the adverse impact of imprisonment, given that it is the harshest sanction and the one which probably has the least amount of diversity in its application. In all societies it minimally involves physical confinement. It is surprising how little research has been conducted into the extent to which this sanction actually sets back well-being.²⁴⁵

239. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 93. George Fletcher notes the lesser evident role of proportionality in relation to such offenses:

Just punishment requires a sense of proportion, which in turn requires sensitivity to the injury inflicted. . . . The more the victim suffers, the more pain should be inflicted on the criminal. In the context of betrayal, the gears of this basic principle of justice, the *lex talionis*, fail to engage the problem. The theory of punishment does not mesh with the crime when there is no tangible harm, no friction against the physical welfare of the victim.

GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 43 (1993). However, more accurately, it is not that proportionality has no role in relation to such offenses; rather, in such cases it must focus on generalizing the harm involved in that *type* of behavior and is hence more difficult to apply.

240. RYBERG, *supra* note 112, at 102.

241. *Id.* at 102–03

242. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 93; VON HIRSCH & ASHWORTH, *PROPORTIONATE SENTENCING*, *supra* note 158, at 140.

243. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 94; VON HIRSCH & ASHWORTH, *PROPORTIONATE SENTENCING*, *supra* note 158, at 148.

244. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 94.

245. *Id.*

The direct adverse impact of prison conditions has been well documented. And it has been known for several decades that the “pains” of imprisonment extend far beyond the deprivation of liberty. Other negative consequences of imprisonment are:

- The deprivation of goods and services,²⁴⁶
- The deprivation of heterosexual relationships;²⁴⁷
- The deprivation of autonomy;²⁴⁸ and
- The deprivation of security.²⁴⁹

In addition to this, more recent data notes violence continues to be a major hazard in jail, with a recent survey showing that nearly one-third of state prisoners reported injuries that were either violence-related or accidental.²⁵⁰

What is less well understood is how these deprivations affect the life trajectories of prisoners. The evidence available indicates that it has a considerable negative impact which transcends the actual term of imprisonment. Imprisonment seems to have an adverse effect on well-being measures after the conclusion of the sentence, even to the point of significantly reducing life expectancy.²⁵¹

A study which examined the 15.5-year survival rate of 23,510 ex-prisoners in the US state of Georgia, found much higher mortality rates for ex-prisoners than for the rest of the population.²⁵² There were 2,650 deaths in total, which was a 43 per cent higher mortality rate than normally expected (799 more ex-prisoners died than expected).²⁵³ The main causes for the increased mortality rates were homicide, transportation accidents, accidental poisoning (which included drug overdoses) and suicide.²⁵⁴

The period immediately following release is especially precarious for offenders, with studies showing that in the two weeks following release, ex-

246. GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 67, 68 (2007).

247. *Id.* at 70, 71.

248. *Id.* at 73.

249. *Id.* at 76, 77; Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 94; *see also* Robert Johnson & Hans Toch, *Introduction to THE PAINS OF IMPRISONMENT* (Robert Johnson & Hans Toch eds., 1982).

250. Hung-En Sung, *Prevalence and Risk Factors of Violence-Related and Accident-Related Injuries Among State Prisoners*, 16 J. CORRECTIONAL HEALTH CARE 178, 179 (2010).

251. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 95.

252. Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 481–82 (2011); *see also* NAT’L RESEARCH COUNCIL, *supra* note 1, at 220, 226.

253. Spaulding et al., *supra* note 252, at 482.

254. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 95; Spaulding et al., *supra* note 252, at 484. The higher mortality rates for ex-prisoners were consistent with findings in other reports, which are cited in the Spaulding article. *Id.*

prisoners are more than thirteen times more likely to die than people in the general population.²⁵⁵

Many offenders released from prison continue to have their well-being set back in more ways than increased mortality rates. A recent New Zealand study²⁵⁶ showed that post-release offenders displayed vulnerabilities associated with financial matters, drug temptations, decision-making, and social interactions.²⁵⁷

Former prisoners without strong social networks were especially vulnerable and often had difficulty meeting their own basic needs, including experiencing hunger and homelessness, and being unable to access health care.²⁵⁸ Imprisonment also has a profoundly negative effect on the families of prisoners. Married men who have served time in jail are three times more likely to divorce than those who had not been incarcerated but had been convicted of an offense,²⁵⁹ and the families of prisoners have higher rates of homelessness.²⁶⁰ Moreover, studies report that “fathers’ incarceration is stressful for children, increasing both depression and anxiety as well as antisocial behavior.”²⁶¹ Most studies also find that ex-prisoners find it more difficult to secure employment, and they have also have a considerably lower rate of lifetime earnings.²⁶²

The data, although only cursory, suggests that imprisonment is a more painful disposition than appears at face value. It is even more complex to make an assessment of the severity of other sanctions such as probation, community work orders, and fines because of their variability. But at least, in theory, the problem is not insurmountable. The severity of sanctions would be evaluated by reference to their level of “onerousness.” Ryberg uses similar terminology in suggesting that the answer would seem to rest on “negative impact on the well-being of the [punished].”²⁶³ This requires the same types of considerations as those involved in the assessment of the other limb of the proportionality thesis.²⁶⁴

255. NAT’L RESEARCH COUNCIL, *supra* note 1, at 226.

256. MICHAEL ROGUSKI & FLEUR CHAUVEL, THE EFFECTS OF IMPRISONMENT ON INMATES’ AND THEIR FAMILIES’ HEALTH AND WELLBEING (Nov. 2009). A limitation of this research is that it had a small sample size—consisting only of sixty-three participants. *Id.* at 3.

257. *Id.* at 61.

258. *Id.*

259. NAT’L RESEARCH COUNCIL, *supra* note 1, at 265.

260. *Id.* at 267.

261. *Id.* at 270.

262. *Id.* at 247. One study estimated the earnings reduction to be as high as forty percent. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 13 (2010).

263. RYBERG, *supra* note 112, at 103.

264. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 95.

It has been suggested that one cannot grade the severity of penalties because painfulness is a subjective concept.²⁶⁵ A taxidriver who is deprived of his or her licence feels the pain more severely than a person who works from home. This is no doubt true, but the same applies regarding the harm caused by criminal offences. Pickpocketing US\$5 from Bill Gates is hardly likely to cause him even the slightest angst, whereas stealing the last US\$5 from a hungry, homeless person may have a devastating effect upon him or her. Despite the enormous difference in the impact of these offences, the law has no difficulty in making theft an offence, and [secondly], it has not resiled from evaluating the general seriousness of such conduct.²⁶⁶ This is because in relation to any branch of law, generalisations must be made about the things that people value and the typical effect of certain behaviour on those interests.²⁶⁷

6. Matching the Punishment to the Offense: Worst Crimes to the Worst Forms of Punishment

The final problem regarding proportionality is how to match the severity of the punishment with the seriousness of the offence. The relative brevity of this discussion is not a reflection of the importance or the level of controversy in this area. Rather, given the discussion above, the answer is straightforward. The type and degree of punishment imposed on offenders should cause them to have their well-being set back to an amount equal to that which the crime sets back the well-being of the victim.²⁶⁸

This is in keeping with the approach of some other theorists. Von Hirsch asserts that an interests analysis, similar to the living-standard analysis he adopts for gauging crime seriousness, should be used to estimate the severity of penalties.²⁶⁹ Ashworth states that proportionality at the outer limits

265. NIGEL WALKER, *WHY PUNISH?* 99 (1991). The same observation is made by von Hirsch and Ashworth who note that a complicating factor is individuals will suffer differently from imprisonment, especially when mental harm is also factored into the assessment. VON HIRSCH & ASHWORTH, *PROPORTIONATE SENTENCING*, *supra* note 158, at 185; *see also* RYBERG, *supra* note 112, at 102–03. However, this subjective variability is not an insurmountable problem. Law by its nature must regulate all human conduct and involves making estimates according to the sensibilities and impact on the typical person; hence, we see that bright lines are drawn around gray areas, such as voting and driving ages.

266. At least in terms of setting maximum, and sometimes fixed, penalties for such conduct.

267. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 95–96; 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, 408 (2014). Another potential problem is whether the incidental effects of punishment, such as loss of employment and reputation, should be factored into the assessment. RYBERG, *supra* note 112, at 110. They can be overcome if one adopts an objectivist approach and takes into account the net punishment. Mirko Bagaric, *The Disunity of Employment Law and Sentencing*, 68 J. CRIM. L. 329, 332 (2004).

268. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 96.

269. Von Hirsch & Jareborg, *Gauging Criminal Harm*, *supra* note 171, at 34–35.

“excludes punishments which impose far greater hardships on the offender than does the crime on victims and society in general.”²⁷⁰

The above approach “assesses both the hardship of punishment and the severity of crime from the perspective of the extent to which they set back typical human well-being. This enables a theoretical matching at least to be made. There are insufficient data currently to allow a precise ranking.”²⁷¹

In order for proportionality to play a more definitive role in sentencing, there is a need for further relevant empirically-validated research. It is beyond the realm of lawyers, criminologists, and jurists to complete this task, which requires drawing on findings in other disciplines, in particular, sociology and psychology. There is a need to tailor the research to focus on victims of crime and, in particular, offenders who have been subjected to criminal sanctions.

While development of the proportionality doctrine is in its early stages, there are some tentative observations that can be made, which can provide concrete guidance to legislators and judges. First, the crimes that have the most serious adverse consequences for victims are assault and sexual offenses. Secondly, the adverse effects of imprisonment seem to have been underrated and often extend to more distant forms of serious harms, including significantly reduced life expectancy. In light of this, a reasonable starting point is that, generally, imprisonment should be imposed only for sexual and violent offenses, and most prison terms should be reduced compared to those currently imposed. Of course, this says nothing about the length of imprisonment that is appropriate for certain categories of sexual and violent offenses. Yet, this crude empirically-based technique is preferable to the randomness that currently exists in relation to offense and sanction matching.

V. RETAINING THE POSITIVE ASPECTS OF THE CURRENT SYSTEM

Despite the large number of fixed penalties in the United States, they are widely despised by commentators in the United States and beyond. It has been noted that this is especially the case 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.”²⁷² In the United States context, 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.”²⁷³

270. ASHWORTH, *supra* note 157, at 97.

271. Bagaric, *Proportionality in Sentencing*, *supra* note 109, at 96.

272. Michael Tonry, *Sentencing Reform Across National Boundaries*, in *THE POLITICS OF SENTENCING REFORM* 267, 269 (Chris Clarkson & Rod Morgan eds., 1995).

273. MICHAEL TONRY, *SENTENCING MATTERS* 134 (1996).

Such sentiments are widely held. In a forum devoted to the concept of mandatory sentencing legislation in a leading Australian law journal,²⁷⁴ there were eight separate papers on the topic, and there was not a single nice word to be had for mandatory sentences. Despite this, all of the criticisms are overstated; they can all be surmounted by the implementation of proportionate fixed penalties. Before we analyze the key criticisms of fixed penalties, we discuss their main benefit.

A. Fixed Penalties Are Necessary for Transparent and Consistent Sentencing

While fixed penalties are unpopular, they are less bad than the alternative: wide-ranging penalty ranges whereby it is left to the discretion of the sentencing judge to implement the exact penalty. This is the process that previously prevailed in the United States and led Justice Marvel Frankel to describe the system as lawless.²⁷⁵ It is the current system that operates in Australia and is responsible for a largely unpredictable and inconsistent sentencing system.

The overarching methodology and conceptual approach that [Australian] sentencing judges undertake in making sentencing decisions is [known as the] “instinctive synthesis.” The term originates from the Full Court of the Supreme Court of Victoria decision of *R v Williscroft*, where Adam and Crockett JJ stated: “Now, ultimately every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process[.]”²⁷⁶

The process of instinctive synthesis is a mechanism whereby sentencers make a decision regarding all of the considerations that are relevant to sentencing, and then give due weight to each of them (and, in the process, incorporate considerations that incline to a heavier penalty and offset against them factors that favour a lesser penalty), and then set a precise penalty. The hallmark of this process is that it does not require (nor permit) judges to set out with any particularity²⁷⁷ the weight (in mathematical terms) accorded to any particular consideration.²⁷⁸

274. 22 U. N.S. WALES L.J. (1999).

275. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 8 (1972). For a critique of his impact, see Lynn Adelman & Jon Deitrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239 (2008).

276. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 79; *R v Williscroft* [1975] VR 292 (Austl.).

277. With minor exceptions discussed in Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at Part VI.

278. *Id.* at 79–80.

Patent subjectivity is incorporated into the sentencing calculus.

Current orthodoxy maintains that there is no single correct sentence,²⁷⁹ and that the “instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ[.]”²⁸⁰ Under this model, courts can impose a sentence within an “available range” of penalties. The spectrum of this range is not clearly designated.²⁸¹

Predicting or anticipating the likely outcome of this process is made much harder by the fact that it is for the court to determine the weight to be accorded to any particular aggravating or mitigating factor.²⁸² There is no effective fetter to prevent courts from giving, say, 40 per cent or 2 per cent weight to a particular consideration, such as remorse,²⁸³ in order to mitigate a penalty, or an aggravating factor such as prior criminality in order to increase the penalty.²⁸⁴ As noted in *DPP (VIC) v Terrick*: “The proposition that too much—or too little—weight was given to a particular sentencing factor is almost always untestable. This is so because quantitative significance is not to be assigned to individual considerations.”²⁸⁵

In *Pesa v The Queen*, the Court acknowledged that the absence of the attribution of weight to considerations in sentencing decisions made them “opaque”:

[So far as weight is concerned] the ultimate sentencing decision is entirely opaque. While the sentencing reasons record the judge’s consideration of the various matters relevant to sentence, the sentencing decision itself is a conclusion arrived at by the process of intuitive synthesis, without the attribution of weight to any individual factor.²⁸⁶

A key problem with the instinctive synthesis is that it leads to inconsistent sentences. There is considerable evidence to support this proposition.

279. *Markarian v The Queen* [2005] HCA 25 (Austl.).

280. *Hudson v The Queen* (2010) 205 A Crim R 199, 206 (Austl.).

281. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 80.

282. *Pesa v The Queen* [2012] VSCA 109 (Austl.).

283. See Mirko Bagaric, *An Argument for Uniform Australian Sentencing Law*, 37 AUSTRALIAN B. REV. 40, 58 (2013). For an example of where a considerable amount of weight was given to remorse, see *CD v The Queen* [2013] VSCA 95 (Austl.).

284. The amount of weight given to a sentencing factor is only erroneous if it results in a sentence being manifestly excessive or inadequate. *DPP (Vic) v Terrick* [2009] VSCA 220 (Austl.).

285. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 91; *DPP v Terrick* [2009] VSCA 220 (Austl.).

286. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 91; *Pesa v The Queen* [2012] VSCA 109 (Austl.).

[T]he Australian Law Reform Commission report, *Same Crime, Same Time: The Sentencing of Federal Offenders*,²⁸⁷ looked at sentences across Australia involving the same offences (focusing on drug and fraud offences where the courts were all applying the federal sentencing regime),²⁸⁸ and noted considerable differences in penalties across the jurisdictions.²⁸⁹

For example, the report looked at 63 instances of trafficking a commercial quantity of MDMA (3,4-Methylenedioxy-N-methamphetamine, or Ecstasy) during the five-year period 2000–2004.²⁹⁰ The jurisdictions where most cases occurred were New South Wales, Western Australia and Victoria. Overall, the mean terms (maximum and minimum) combined for all three states were 136 and 66 months, respectively, while for each individual state they were as follows: in New South Wales: 154: 72; Western Australia: 132: 69; Victoria: 66: 39.²⁹¹

For a commercial quantity of heroin there were 155 cases, of which 86 per cent involved this charge only.²⁹² The mean term for these three states combined was 87: 48, but, once again, there were considerable regional differences for each state; i.e., in New South Wales: 81: 48; Western Australia: 169:70; Victoria: 65:43.²⁹³

The level of inconsistency is also demonstrated by research reports which compare similarly placed offenders who are subjected to vastly different penalties. The most recent example of this is a 2013 report by the Victorian Advisory Council entitled *Reoffending Following Sentencing in the Magistrates' Court of Victoria*.²⁹⁴ One of the purposes of this report was to ascertain whether offenders who were sentenced to imprisonment reoffended at different rates from those sentenced to other sanctions.²⁹⁵ To this end, the empirical data show that harsh punishment does not discourage offenders from

287. AUSTRALIAN LAW REFORM COMM'N, SAME CRIME, SAME TIME REPORT: SENTENCING OF FEDERAL OFFENDERS (Apr. 2006), <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC103.pdf> [<http://perma.cc/3BK9-26MS>].

288. *Id.* at 512.

289. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 84.

290. AUSTRALIAN LAW REFORM COMM'N, *supra* note 287, at 877.

291. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 84; AUSTRALIAN LAW REFORM COMM'N, *supra* note 287, at 877.

292. AUSTRALIAN LAW REFORM COMM'N, *supra* note 287, at 878.

293. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 84; AUSTRALIAN LAW REFORM COMM'N, *supra* note 287, at 880. In 2008, the High Court in *Adams v R* [2008] HCA 15 (Austl.) ruled that there is no difference in drug seriousness for sentencing purposes. Thus, the disparity between sentences for MDMA and heroin is no longer justified. *R v Robertson* (1989) 44 A Crim R 224, 229 (Austl.).

294. SENTENCING ADVISORY COUNCIL, REOFFENDING FOLLOWING SENTENCING IN THE MAGISTRATES' COURT OF VICTORIA (June 2013), <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Reoffending%20Following%20Sentencing%20in%20the%20Magistrates'%20Court%20of%20Victoria.pdf> [<http://perma.cc/8HXT-YY45>].

295. *Id.* at 4.

further offending and, in fact, may even result in a higher incidence of future offending.²⁹⁶ The theory of specific deterrence is false. The report supported this finding—i.e., offenders sentenced to imprisonment generally reoffended at a higher rate than those subjected to more lenient dispositions.²⁹⁷ This information is not new.²⁹⁸

The most illuminating aspect of the report for the purposes of this article is the manner in which the conclusion was derived. The methodology involved comparing the recidivism rates of offenders who had been sentenced to imprisonment with those who were subjected to more lenient dispositions, including wholly suspended sentences.²⁹⁹ This involved controlling the respective samples for factors that could influence the result (eg, prior criminal record, age, offence type and sex).³⁰⁰ Thus, the methodology involved using matched sub-samples.

It is striking that identically situated offenders could be subjected to such vastly different outcomes. This can only occur against the backdrop of a largely unfettered judicial sentencing discretion, without adequate regard to the need for consistency in the outcome of sentences.³⁰¹

B. Fixed Penalties Are Necessary to Minimize Subconscious Bias in Sentencing

The key problem with a largely unfettered sentencing discretion is that it invariably leads to the sentences based on the personal predispositions of judges; the process is inherently non-transparent and inconsistent.

Judges are understandably outcome driven, but what often makes the outcomes unacceptable are the hidden influences which underpin them. All humans have preferences and biases. The most difficult to negate are those of which the holder is unaware. Judges, like all people, view themselves as being objective and fair while having a bias blind spot when it comes to their own decision-making.³⁰² Judge Richard Posner in his seminal work, *How Judges Think*, states: “We use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others.”³⁰³ The default position of people “is to assume that their judgments are

296. *Id.* at 31.

297. *Id.* at 29.

298. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 84–85; *see supra* Part III.

299. SENTENCING ADVISORY COUNCIL, *supra* note 294, at 10.

300. *Id.* at 8.

301. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 85.

302. Jennifer K. Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 *MONITOR ON PSYCHOL.* 24 (2010).

303. RICHARD A. POSNER, *HOW JUDGES THINK* 121 (2008).

uncontaminated”³⁰⁴ with implicit bias and that “judges are inclined to make the same sorts of favourable assumptions about their own abilities that non-judges do[.]”³⁰⁵ The truth is otherwise. All people are influenced by their life journey and “are more favourably disposed to the familiar, and fear or become frustrated with the unfamiliar[.]”³⁰⁶

The evidence regarding the impact of implicit judicial bias is considerable. The range of traits that influence the outcome of decisions is wide-ranging. Thus, we see that attractive offenders receive more lenient penalties than other accused—except when the attractive appearance is used to facilitate the crime.³⁰⁷ In one study, 77 per cent of unattractive defendants received a prison term, while only 46 per cent of attractive defendants were subjected to the same penalty.³⁰⁸ Thus, unattractive people are approximately 50 per cent more likely to be imprisoned than attractive people.³⁰⁹

Gender also influences sentences, with a United States study examining over [20,000] records showing that females are treated more leniently than males.³¹⁰

There is firm evidence of judicial bias on the basis of race. Jeffrey Rachlinski [and Sheri Johnson] show that white judges display a strong white preference in their decisions, while black judges display no overall preference.³¹¹ They note that a key way to deal with this is to bring the biases to the surface: “[W]hen judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so[.]”³¹²

304. Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 185, 190 (Thomas Gilovich et al. eds., 2002).

305. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *NOTRE DAME L. REV.* 1195, 1228 (2009).

306. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 105–06; Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, 24 *JUDGES’ J.* 6, 53 (1985).

307. Birte Englich, *Heuristic Strategies and Persistent Biases in Sentencing Decisions*, in *SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME* 295, 304 (Margit E. Oswald et al. eds., 2009).

308. John E. Stewart, II, *Defendant’s Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 *J. APPLIED SOC. PSYCHOL.* 348, 354 (1980).

309. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 106.

310. Darrell Steffensmeier & Stephen Demuth, *Does Gender Modify the Effects of Race-Ethnicity on Criminal Sanctioning? Sentences for Male and Female White, Black, and Hispanic Defendants*, 22 *J. QUANTITATIVE CRIMINOLOGY* 241, 249, 257 (2006); *see also* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 *J. L. & ECON.* 285, 300 (2001) (females receive a twelve percent shorter penalty than males).

311. Rachlinski et al., *supra* note 305, at 1210.

312. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 106; Rachlinski et al., *supra* note 305, at 1221.

Racial discrimination in sentencing has been long documented.³¹³ In one of the most wide-ranging surveys, using data from over 77,000 offenders that were sentenced, the data revealed that a black defendant who is sentenced in the same court and who commits the same offence and has the same criminal history as a white accused, will receive a 12 per cent longer prison term than a white offender.³¹⁴

Judicial bias extends well beyond race to matters such as socioeconomic background. A recent analysis of child custody cases showed that judges favour wealthy litigants to those who are impoverished, leading to worse case outcomes for people of low incomes.³¹⁵

Victim traits also impact sentencing outcomes. Black offenders who harm white victims were found to receive heavier penalties than when the victim was black, presumably because “the judges were also White, and their in-group or worldview was more threatened by criminal conduct against persons from their in-group[.]”³¹⁶

The mindset of a judge also influences the outcome of criminal cases. In one study, a mock file (where the offender was charged with prostitution) was assigned to judges who were requested to set bail. Half of the judges were instructed to think about their own death before setting bail. It transpired that they set bail at a much higher amount (US\$455) compared to the control group (US\$50).³¹⁷

The comfort level of a judge affects case outcome. In a recent study, offenders were better treated after, rather than before, a judicial meal break. A study examining the decisions of a parole court in Israel over a 10 month period, and taking into account over 1000 rulings, ascertained that the single biggest influence on whether a prisoner was granted parole was the length of time that had passed since the judge had a meal break.³¹⁸ After the meal breaks, judges would grant parole at the rate of 65 per cent and it would drop

313. Ochi, *supra* note 306, at 7–8.

314. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 106; Mustard, *supra* note 310, at 292, 300.

315. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 106–07; Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 158–60 (2013).

316. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 107; Siegfried L. Sporer & Jane Goodman-Delahunty, *Disparities in Sentencing Decisions*, in SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME, *supra* note 307, at 379, 390.

317. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 107; Abram Rosenblatt et al., *Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCHOL. 681, 682 (1989).

318. Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889, 6889–90 (Apr. 26, 2011), <http://www.pnas.org/content/108/17/6889.full.pdf> [<http://permacc/8SE5-NXM2>].

to between 0 and 10 per cent as time wore on.³¹⁹ The researchers speculated that the reason for this was because:

[A]ll repetitive decision-making tasks drain our mental resources. We start suffering from “choice overload” and we start opting for the easiest choice. . . . And when it comes to parole hearings, the default choice is to deny the prisoner’s request. The more decisions a judge has made, the more drained they are, and the more likely they are to make the default choice. Taking a break replenishes them.³²⁰

A type of bias that has potentially important implications for sentencing . . . is what is known as the “anchoring effect[.]” Research shows that judges, like all people, are affected by the requests and demands of others, including prosecutors and even inexperienced people regarding their expectation of sentence.³²¹

[T]he anchoring effect³²² . . . is a bias people form towards evaluating numbers by focusing on a numerical reference point and making adjustments from that point. Most people place disproportionate emphasis on the initial anchor, so far as it impacts their final figure.³²³ One study showed that experienced judges were influenced by submissions regarding sentence, even if they were not made by experts. In the study, a computer science student who was acting in the role of a prosecutor made either a demand for a high sentence (34 months) or low sentence (12 months) for the identical crime (rape).³²⁴

The judges who received the high demand gave a sentence, which, on average, was eight months longer than those who received the demand for the lower sentence. This study confirms results in other studies focusing on damages awards in civil cases and in non-legal settings that show that even arbitrary and irrelevant numbers have an anchoring effect.³²⁵

319. *Id.* at 6890.

320. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 107–08; Ed Yong, *Justice Is Served, but More so After Lunch: How Food-Breaks Sway the Decisions of Judges*, DISCOVER MAG. (Apr. 11, 2011, 3:00 PM), <http://blogs.discovermagazine.com/notrocket/science/2011/04/11/justice-is-served-but-more-so-after-lunch-how-food-breaks-sway-the-decisions-of-judges/#.UyA57YUt18F> [<http://perma.cc/UL99-DQ94>].

321. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 108.

322. Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1669 (2013).

323. Thomas Mussweiler et al., *Anchoring Effect*, in COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGEMENT AND MEMORY 183, 185 (Rüdiger F. Pohl ed., 2004).

324. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 108; Birte Enough & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. OF APPLIED SOC. PSYCHOL. 1535, 1541–42 (2001).

325. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 108. For a discussion of the relevant studies, see Miller, *supra* note 322, at 1697; see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2518 (2004) (observing that anchoring gives prosecutors great power to influence judges’ sentences).

More subtle studies undertaken in the criminal law setting suggest that prosecution sentencing submissions have a considerable influence on judges, which are only partly moderated by contrary defense submissions. This may be partly because “defense attorneys assimilate their sentencing demand to the demand from the prosecutor[.]”³²⁶ and that is an “unintended process[.]”³²⁷ The suggested reason for this is the sequence in the courtroom:

By granting the defense attorney the right of the last word, the legal system simultaneously grants the prosecutor the right of the first word. This allows the prosecution to introduce a judgmental anchor that determines the final sentence, by influencing the judge not only directly, but also (and predominantly) indirectly via its influence on the defense attorney’s demand.³²⁸

The way to negate judicial subconscious bias is to limit the ambit of the judicial discretion.

As noted by Posner, judges, like all people, are utility maximizers and gain satisfaction from different aspects of their role, including its prestige and influence.³²⁹ In making decisions, judges give effect to their own preferences, which are contingent upon their “background, temperament, training, experience, and ideology, which shape his [or her] preconceptions and thus his [or her] response to arguments and evidence[.]”³³⁰

[Absent legislative curtailment of the sentencing discretion,] [j]udges are unlikely to make the sentencing determination process more clear and in the process reduce their capacity to craft a decision affirming what they believe is the appropriate result. This would be inconsistent with human nature. Individuals have a preference to shape the world in light of their preferences and beliefs. There is an innate desire for people to influence their surroundings. From the perspective of judges, it means retaining as much capacity as possible to impose their views on cases before them. This desire is understandable but should not be accommodated in a system governed by rules instead of by men and women.³³¹

It is for this reason that sentencing outcomes should be guided by clear, transparent, and prescriptive rules. This is best achieved by a fixed penalty regime.

326. Birte English et al., *The Last Word in Court—A Hidden Disadvantage for the Defense*, 29 LAW & HUM. BEHAV. 705, 717 (2005).

327. *Id.*

328. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 108–09.

329. POSNER, *supra* note 303, at 35–36.

330. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 110; POSNER, *supra* note 303, at 249.

331. Bagaric, *Sentencing: From Vagueness to Arbitrariness*, *supra* note 14, at 110–11.

C. *Fixed Penalties Are Not Necessarily Too Severe*

The most common criticism of fixed penalties is that they are too severe. As noted above, fixed penalties are invariably introduced as part of a tough-on-crime agenda,³³² and thus it is not surprising that such an objection would be forthcoming.³³³ The harshness of fixed penalty systems has resulted in several law reform bodies, and the like, coming down firmly against introducing fixed penalties.³³⁴

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 (fixed or not) are imposed. We now examine the supposed negative unintended consequences of fixed penalties.

Research regarding trial rates in the United States federal jurisdiction shows that in response to the severe Federal Sentencing Guidelines more offenders pleaded guilty and the acquittal rate in relation to fixed penalty matters was lower.³³⁵ This is consistent with evidence that juries in England in the eighteenth century would refuse to convict offenders who were “guilty” of offenses carrying a mandatory death penalty.³³⁶

More trials and incongruous jury verdicts are no doubt undesirable, but they are not unavoidable side effects of fixed sentences. The reason that offenders may be disposed to more strenuously resist offenses that carry mandatory sanctions and juries may try harder to acquit the accused charged with such offenses is that the stakes are high—and indeed too high. If fixed penalties were set at more moderate levels, the motivation for both of these side effects would dissipate.³³⁷

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

332. See Neil Morgan, *Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories*, 22 U. N.S. WALES L.J. 267, 267–69 (1991) (stating that fixed penalties are introduced because judges are not being tough enough on crime).

333. See *infra* Part V(D) (discussing that some fixed penalty systems have been introduced to achieve more principled aims).

334. NEW S. WALES LAW REFORM COMM’N, DISCUSSION PAPER 33: SENTENCING 258 (Apr. 1996); see THE LAW REFORM COMM’N, REPORT NO. 44: SENTENCING, at xviii–xxxi (1988).

335. TONRY, *supra* note 273, at 148–50.

336. *Id.* at 142–44.

337. 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 drunk driving, which are present in most Australian jurisdictions, have resulted in longer or more not guilty pleas.

devise innovative ways to avoid the operation of such laws.³³⁸ For example, it has been established that some prosecutors in the United States circumvent the application of severe mandatory minimum sentences prescribed by the Federal Sentencing Guidelines by charging offenders with different, but roughly similar, offenses that are not subject to mandatory penalties.³³⁹ 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.³⁴⁰ There is also evidence that prosecutors use mandatory provisions in order to exert pressure on the accused to plead guilty to similar offenses to those charged but which do not carry a mandatory sentence.³⁴¹ As a result, there is a significant shift in discretion from judges to prosecutors.³⁴²

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 set excessively high penalties and gets it about right in terms of equating the level of the penalty to the seriousness of the offense, 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 be no reason to do so.

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, which flow 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

338. TONRY, *supra* note 273, at 147, 150; Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, in 38 CRIME AND JUSTICE: A REVIEW OF RESEARCH 65, 65–67 (Michael Tonry ed., 2009) [hereinafter Tonry, *The Mostly Unintended Effects*].

339. Tonry, *The Mostly Unintended Effects*, *supra* note 338, at 65–67.

340. U.S. SENTENCING COMM’N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 29, 226 (Dec. 1991) [hereinafter U.S. SENTENCING COMM’N, THE FEDERAL SENTENCING GUIDELINES]; Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 509 (1992); VICTORIAN SENTENCING COMM., SENTENCING REPORT 169 (Apr. 1988).

341. TONRY, *supra* note 273, at 150.

342. *Id.* at 151; Russell Hogg, *Mandatory Sentencing Legislation and the Symbolic Politics of Law and Order*, 22 U. N.S. WALES L.J. 262, 263–64 (1999).

basis of more general criteria. As noted in Part VI, this in fact follows from application of the principle of proportionality.³⁴³

D. Fixed Penalties Can Accommodate Validated Mitigating and Aggravating Factors

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.³⁴⁴ 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.³⁴⁵

This criticism is not insurmountable. It can be met by identifying all possible justifiable fixed penalties and ascribing a pre-determined weight to each of them. To ascertain which considerations are properly relevant to the determination of how much to punish, it is necessary to develop and apply a coherent theory of mitigation and aggravation. One of us has undertaken this recently.³⁴⁶

[C]onsiderations 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 dependants. 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.³⁴⁷

While that is the conventional manner in which aggravating and mitigating considerations are categorised, 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.³⁴⁸

343. *See infra* Part VI.

344. Tonry, *supra* note 272, at 272, 278.

345. NEW S. WALES LAW REFORM COMM'N, REPORT 79: SENTENCING 10 (1996).

346. Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 99, at 1161.

347. *Id.* at 1195.

348. *Id.*

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.³⁴⁹

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. [We] commence this inquiry by focusing on the sentencing system.³⁵⁰

From this perspective a consideration should only operate to increase or decrease penalty if it promotes a sentencing objective which itself is justified.³⁵¹

As we have seen:

[C]urrent empirical evidence provides no basis for confidence that sentencing is capable of achieving most of the goals of sentencing [in the form of specific deterrence, marginal general deterrence, and rehabilitation] and hence they should not drive the selection of aggravating and mitigating considerations. The one exception to this is the incapacitation of serious sexual and violent offenders.³⁵²

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.³⁵³

Incapacitation serves to justify a prison term for serious sexual and violent offenders. Moreover, as noted earlier, recidivist offenders who commit serious violent or sexual offenses should receive a penalty loading, albeit one that is lighter than is currently the situation. The premium that should be imposed for these types of offenses on recidivists is twenty to fifty percent.³⁵⁴ Also, first time offenders (for all forms of offenses) are less likely to recidivate than

349. *Id.*

350. *Id.*

351. Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 99, at 1196.

352. *Id.* at 1199.

353. *Id.* at 1215.

354. Bagaric, *The Punishment Should Fit the Crime*, *supra* note 93, at 411.

repeat offenders. This justifies mitigation being accorded to offenders without a prior history.

An especially controversial issue relating to mitigating factors is the extent to which the character and past deeds of an offender (beyond merely their past criminal history) should impact the sentence. Past positive contributions should not mitigate criminal sanctions because they do not bear on the objectives of the sentencing system. There is no evidence that charity workers, for example, recidivate less frequently than other offenders. Further, there are no wider principles of law and justice that support punishing offenders who have committed commendable acts less harshly. In a market-based system, many good acts are rewarded financially, and, where there is no financial benefit, people often receive non-tangible rewards in the form of feelings of satisfaction and accomplishment. Thus, to confer a sentencing discount for past acts would be to ‘double-dip’ when it comes to acknowledging such behavior. Thus, no good acts should mitigate penalty.

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 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 [our] approach. Rather, these principles are accommodated within a different sentencing layer: proportionality, as opposed to the objectives of sentencing.³⁵⁵

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.³⁵⁶

While, as we have seen, the content of the proportionality principle is not firmly established:

[I]t 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

355. Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 99, at 1215–16.

356. *Id.* at 1216.

impairment—whether physical or mental—also rate highly, as do sexual offenses. Culpability is also an entrenched aspect of this limb of the proportionality thesis.³⁵⁷

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.³⁵⁸

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 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 less than a victim of a \$10,000 theft who receives no restitution.³⁵⁹

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.³⁶⁰

Offenders who are subjected to this form of punishment for reasons not of their doing, should receive a shortened prison term.

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

357. *Id.* at 1219.

358. *Id.*

359. *Id.* at 1219–20.

360. Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 99, at 1220. They have 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 & SOCIETY 163, 170 (1999); *see also* Chase Riveland, NAT’L INST. OF CORR., SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 1 (Jan. 1999).

defenses to those acts. Each criminal act has a maximum penalty, and, as we saw [earlier] often a presumptive penalty.³⁶¹

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. 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.³⁶²

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. . . . Once these parameters are set and accommodated, the impact of the substantive criminal law on sentencing is arguably exhausted.³⁶³

However, on closer reflection, an area of substantive criminal law which 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 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. 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 which can be accommodated by adjusting the level of punishment.³⁶⁴

Thus, circumstances that are similar to those which 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

361. Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 99, at 1223.

362. *Id.*

363. *Id.* at 1223–24.

364. *Id.* at 1224.

satisfied in order to excuse what is otherwise criminal behavior. The exact content of these defenses varies slightly across jurisdictions. However, the justification and rationale for the defenses are universal.³⁶⁵

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.³⁶⁶

Intoxication is also a defense to crime in limited situations 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-fuelled. 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 Thus, it follows that alcohol consumption should not reduce penalties.³⁶⁷

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 not be 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

365. *Id.* at 1224–25.

366. Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 99, at 1225.

367. *Id.*

accused who kills in anger should be convicted of the lesser crime of voluntary manslaughter?³⁶⁸

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.³⁶⁹ The view that anger is a natural human feeling that reduces self-control, making law-abiding behavior more difficult, is flawed. It has been noted that humans have a far greater capacity to control emotions than is suggested by the provocation defense.³⁷⁰

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.³⁷¹

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. While this idea has not influenced the operation of the substantive criminal law, [however], 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. 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 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

368. *Id.* at 1226.

369. Law Reform Commissioner Victoria, *Provocation as a Defence to Murder* (Working Paper No. 6, 1979), <http://www.ncjrs.gov/pdffiles1/Digitization/62008NCJRS.pdf> [<http://perma.cc/ZN8B-KHQJ>].

370. Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 99, at 1226–27.

371. *Id.* at 1227.

reflected in a discount for impoverished non-violent and non-sexual offenses.³⁷²

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.³⁷³

However, there are some particular pragmatic and doctrinal aspects of the legal system which 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. 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.³⁷⁴

Thus, a strong argument can be mounted for according a discount to offenders who plead guilty.³⁷⁵

Absent the guilty plea discount, there is no incentive for accused persons to plead guilty, no matter how compelling the case against them.³⁷⁶

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. . . . 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. This is especially apposite given that it often places the offender in personal danger.³⁷⁷

It follows that the discount for cooperating with authorities should be considerable given its importance to the legal system as a whole.

An even more wide-ranging objective of criminal justice is that the innocent should not be punished. 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

372. *Id.* at 1227–28.

373. *Id.* at 1228.

374. *Id.*

375. Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 99, at 1228.

376. *Id.* at 1229.

377. *Id.* at 1231.

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.³⁷⁸

This hardship should be acknowledged in the form of a reduced sentence.

[Thus,] considerations should only aggravate or mitigate sentence 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.³⁷⁹

Pursuant to the discussion above, there are seventeen considerations that aggravate or mitigate penalty.³⁸⁰ They are set out in tabulated form below with the amount of weight they should respectively carry.

VI. THE MODEL SENTENCING SYSTEM

In light of the above discussion, we are now in a position to set out a model sentencing system. The starting point to a model sentencing system is to determine which factors are relevant to sentencing. As we saw earlier, the level at which criminal sanctions should be set is governed by the principle of proportionality. In addition to this, all relevant aggravating and mitigating considerations need to be incorporated.

Due to the broadness with which most criminal offenses are defined,³⁸¹ 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 \$10,000 should be treated more harshly than a theft of a lower amount.

In essence, the fixed penalty system should be structured along the lines of the Federal Sentencing Guidelines to the extent that offenses are compartmentalized into more and less serious instances of each type of offense. However, three significant departures should be made from this system. First, the penalty levels should be generally reduced. Secondly, far less weight should be accorded to an offender's criminal history. Thirdly, there

378. *Id.* at 1232.

379. *Id.* at 1235.

380. *Cf.* Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 99, at 1183 (contrasting the 200 to 300 mitigating and aggravating considerations in existence in Australia); *Cf.* U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES, *supra* note 340, at 15 (contrasting forty-three levels of consideration in the Federal Sentencing Guidelines).

381. *See* CANADIAN SENTENCING COMM'N, SENTENCING REFORM: A CANADIAN APPROACH 79, 186 (Feb. 1987) (stating broadness of criminal offenses was one of the reasons that the Commission rejected the notion of mandatory penalties).

should only be seventeen aggravating and mitigating factors (instead of the forty that currently are recognized).

The ultimate upshot of our sentencing model is that the core variables in sentencing should be reduced to the following considerations:

- There should be twenty-two penalty levels: starting at zero to six months' imprisonment with the next level increasing to twelve months.
- Each penalty level should then reflect an increase of twelve months. Thus, level twenty-one would equal twenty years' imprisonment. The next and highest level should be life imprisonment.
- Each crime should have a standard penalty. This is determined by the extent to which the typical form of that crime sets back the flourishing of the typical victim.
- The only departures from this should arise from the list of seventeen aggravating and mitigating considerations set out above.

In order to determine any particular sentence, there are only four considerations that a judge needs to evaluate.

The first is the fixed penalty for the offense. The fixed level for every offense should be set out by reference to penalty level, which are as follows.

A. The First Reference Point: The Penalty Level

<i>Penalty level</i>	<i>Duration of term of imprisonment</i>
1	0-6 months
2	One year
3	Two years
4	Three years
5	Four years
6	Five years
7	Six years
8	Seven years
9	Eight years
10	Nine years
11	Ten years
12	Eleven years
13	Twelve years
14	Thirteen years
15	Fourteen years
16	Fifteen years
17	Sixteen years
18	Seventeen years
19	Eighteen years
20	Nineteen years
21	Twenty years
22	Life imprisonment

Offenses that do not entail an imprisonment penalty will have a rating of zero. This means that the judge is restricted to imposing a lesser type of sanction, such as probation or a fine. The quantum of these sanctions should also be set by reference to maximum levels.³⁸²

B. The Second Reference Point: The Standard Penalties for Certain Crimes

The next consideration for a judge is to ascertain the fixed penalty level for the relevant offense. There are more than a thousand offenses or variants of an offense. The table below provides examples of the fixed penalty for twelve well-known offenses and contrasts the penalty with the current penalty in the Federal Sentencing Guidelines.

<i>Offense</i>	<i>Penalty level</i>
Theft	0 ³⁸³
Theft of more than \$10,000	1 (0-6 months' imprisonment) ³⁸⁴
Insider trading	1 (0-6 months' imprisonment) ³⁸⁵
Trafficking small quantities of drugs (e.g. less than 50 grams cocaine)	1 (0-6 months' imprisonment) ³⁸⁶
Burglary of a residence	1 (0-6 months' imprisonment) ³⁸⁷
Robbery (without the use of a weapon)	2 (1 years' imprisonment) ³⁸⁸
Robbery with a weapon	3 (2 years' imprisonment) ³⁸⁹

382. These levels are beyond the scope of this Article.

383. *Cf.* U.S. SENTENCING GUIDELINES MANUAL 81, 588 (U.S. SENTENCING COMM'N 2014), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> [<http://perma.cc/5PU5-RXDX>] (contrasting this as a level six offense, which carries a penalty range of zero to eighteen months' imprisonment).

384. *Cf. Id.* (contrasting this as a level ten offense, which carries a penalty range of six to thirty months' imprisonment).

385. *Cf. Id.* at 104, 588 (contrasting this as a level eight to fourteen offense, which carries a penalty range of zero to forty-six months' imprisonment).

386. *Cf. Id.* at 150, 588 (contrasting this as a level twelve offense, which carries a penalty range of ten to thirty-seven months' imprisonment).

387. *Cf. Id.* at 111, 588 (contrasting this as a level seventeen offense, which carries a penalty range of twenty-four to sixty-three months' imprisonment).

388. *Cf.* U.S. SENTENCING GUIDELINES MANUAL (2014), *supra* note 383, at 115, 588 (contrasting this as a level twenty offense, which carries a penalty range of thirty-three to eighty-seven months' imprisonment).

Aggravated assault	6 (5 years' imprisonment) ³⁹⁰
Trafficking large quantities of drugs (e.g. more than 450kg of cocaine)	6 (5 years' imprisonment) ³⁹¹
Kidnapping with ransom demand	8 (7 years' imprisonment) ³⁹²
Criminal sexual abuse (i.e. rape)	11 (10 years' imprisonment) ³⁹³
First degree murder	21 (20 years' imprisonment) ³⁹⁴

C. *The Third Reference Point: Aggravating and Mitigating Considerations*

The third step is to identify the aggravating and mitigating considerations. These are confined to the seventeen considerations below.

AGGRAVATING CONSIDERATIONS

<i>Consideration</i>	<i>Maximum Weight</i>	<i>Rationale</i>
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)

389. *Cf. Id.* (contrasting this as a level twenty-three to twenty-seven offense, which carries a penalty range of 46–162 months' imprisonment).

390. *Cf. Id.* at 53, 588 (contrasting this as a level fourteen to twenty-four offense, which carries a penalty range of 15–125 months' imprisonment).

391. *Cf. Id.* at 145, 588 (contrasting this as a level thirty-eight offense, which carries a penalty range of 235 months' imprisonment to life imprisonment).

392. *Cf. Id.* at 70, 588 (contrasting this as a level thirty-two to thirty-eight offense, which carries a penalty range of 125 months' imprisonment to life imprisonment).

393. *Cf.* U.S. SENTENCING GUIDELINES MANUAL (2014), *supra* note 383, at 57, 588 (contrasting this as a level thirty to thirty-eight offense, which carries a penalty range ninety-seven months' imprisonment to life imprisonment).

394. *Cf. Id.* at 48, 588 (contrasting this as a level forty-three offense, which carries a penalty of life imprisonment).

MITIGATING CONSIDERATIONS

<i>Consideration</i>	<i>Maximum Weight</i>	<i>Rationale</i>
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
Socioeconomic deprivation—only for nonsexual and nonviolent offenses	25%	Proportionality (culpability)
Restitution of property	25%	Proportionality (harm to victim)
No prior convictions	25%	Incapacitation
Harm to dependents of the offender	20%	Innocent should not suffer
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)

D. The Fourth Reference Point: The Calibration (The Exact Sentence)

In terms of calibrating the penalty, the standard penalty needs to be moderated by reference to the applicability of any relevant aggravating and mitigating considerations. 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 or elevated sentence, following application of the previous consideration. Thus, pleading guilty and assisting authorities does not lead to a fifty percent discount of the entire sentence. Rather, the discount is forty-three percent (i.e. twenty-five percent plus seventy-five percent, the remaining part of the sentence, multiplied by twenty-five percent). Once the calibration of the aggravating and mitigating factors is ascertained, these are then operationalized against each other to produce a clear figure. Thus, if, for example, the aggravating factors arrive at thirty percent and the mitigating factors are fifty percent, the sentence should be reduced by twenty percent from the standard penalty.

VII. CONCLUSION

The sentencing system is broken. This is no surprise to any person with even a cursory knowledge of the manner in which the system operates and the limits of the state-operated system in actually attaining key sentencing objectives. The gulf between sentencing practice and actual knowledge is considerable. The refusal or failure of government to base sentencing practice on sentencing information is the key reason for the current incarceration crisis. The crisis has continued unabated because the government was not required to critically examine the shortcomings of the system because criminals do not engender meaningful empathy within the community.

The runaway train that is overly harsh penalties has finally turned full circle to crash into the institution, which set it in on its ruinous journey. Governments can no longer bear the crippling cost of mass incarceration.

Yet there is no indication that the response to the crisis will put in place a durable, efficient, and fair solution. This Article attempts to remedy this shortcoming. Sentencing is too important to continue getting wrong. It is the process in which the state acts in its most coercive manner against its citizens. This not only potentially damages individual citizens but, as is now manifest, also the wider community.

The Article suggests that the key to improving the sentencing systems rests in implementing proportionate sentences. This is a view shared by others, including the United States National Research Council and the United Sentencing Commission, which too endorse the proportionality principle. The difference in our position is that we believe that proportionality in its current form is an illusion. It is devoid of coherent content and this is partly the reason

for its theoretical universal endorsement. No one has an interest in debunking a principle, which is so malleable that it can be used to justify virtually any sentencing stance. In reality, a principle, which stands for nothing, is no principle at all: it is an expedient. And that is the current state of knowledge regarding proportionality. This Article seeks to develop it from an expedient to a principle.

We have provided a tentative account of the current state of learning regarding the content of proportionality and the implications from this so far as sentencing outcomes are concerned. We have also indicated the areas where future research is necessary. This approach entails a vastly different sentencing paradigm: one which is best pursued through a fixed penalty system.

All of the supposed shortcomings of fixed penalties can be overcome by setting penalty ranges at proportionate levels. The benefit of fixed penalties is that they will serve to maintain transparency, consistency, and predictability in sentencing. There will be no curtailment of the need for individualized justice given that pursuant to our model all relevant mitigating and aggravating factors can be readily factored into any penalty calibration.

Implementation of our proposal will significantly lower prison numbers, reduce racial disparity in sentencing, make the community no less safe, and inject normative and doctrinal coherency into the sentencing system, while retaining transparency and consistency. In short, prisons will be reserved for those whom have damaged us and whom we have reason to fear: serious violent and sexual offenders. We may still dislike and even hate other offenders, such as drug distributors, fraudsters, and immigration offenders, but (in normal circumstances) that dislike will no longer operate to unjustifiably damage them and harm us in the form of public expenditure we cannot readily afford.

Moreover, this Article has set out in concrete terms the penalties that should be operated for key offenses and the exact mechanism by which key sentencing considerations should be incorporated into the sentencing calculus. The approach varies markedly from existing fixed penalty systems, but at the minimum we hope that the framework will form the foundation for a genuinely more enlightened age in sentencing.