

Session 2: The historical bases for theories of sentencing, punishment and deterrence and the deterrent value of sentencing.

Theories of sentencing: punishment and the deterrent value of sentencing.

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This is a daunting topic. The literature on the aims of punishment and sentencing is vast and includes writers from the fields of moral philosophy, jurisprudence, criminal law theory and criminology. In addition psychologists, behavioural economists and neuroscientists have contributed to the debate about rational choice theory – a basic assumption of deterrence.¹ From a historical perspective broad trends in the popularity of individual theories of punishment are discernible, but there has been and remains little consensus about which theory should dominate. The predominant philosophy in the 19th century and the first part of the twentieth century emphasised retribution and deterrence. This was challenged by the rehabilitative ideal with an emphasis upon individualisation of penalties to fit the needs of the offender to achieve reform. In the last three decades of the twentieth century, retribution underwent a revival under the guise of just deserts. In the academic literature, the challenge to just deserts has come from restorative theories, more complex social theories and hybrid or mixed theories such as empirical desert² and an expanded model of limiting-retributivism.³ The principle of proportionality tends to be central or at least an important aspect of most theories (whether forwards looking (consequentialist) or backward looking (deontological) however, it does have its critics.⁴

Typically Australian sentencing legislation includes a list of traditional sentencing purposes without according any priority to a single purpose. For example, in the *Sentencing Act 1991* (Vic) s 5(1) the only purposes for which a sentence may be imposed are punishment (“to punish the offender to the extent and in a manner which is just in all the circumstances”), denunciation, rehabilitation, community protection and deterrence or any combination of two or more of those purposes. A similar approach is taken in New Zealand, Canada and the United Kingdom.⁵ Clearly these rationales or purposes can conflict and “point in different directions”.⁶ To use Paul Robinson’s example, the public may not need protection from the elderly former Nazi concentration camp torturer, but he may well deserve substantial punishment. So incapacitation and protection of the public would not require a significant prison sentence, nor any imprisonment at all. However,

¹ See Donald Ritchie, ‘Does Imprisonment Deter? A Review of the Evidence’ *Sentencing Matters*, Sentencing Advisory Council, Victoria (2011) 7-10 for a discussion of decision making theories relevant to rational choice theory.

² Paul H Robinson, *Distributive Principles of Criminal Law: Who should be punished and how much?* (2008).

³ Richard Frase, *Just Sentencing. Principles and Procedures for a Workable System* (2013).

⁴ For example, Adam Kolber, ‘Against Proportional Punishment’ (2013) 66 *Vanderbilt Law Review* 141.

⁵ *Sentencing Act 2002* (NZ) s 7(1); *Criminal Justice Act 2003* (UK) s 142; Canadian Criminal Code s 718. Reparation is specifically mentioned in each of these jurisdictions.

⁶ *Veen* (1988) 164 CLR 465 at 476.

imposing a penalty that reflects the seriousness of the offence would. The approach of failing to declare a primary rationale where different rationales are in conflict or, failing this, a primary rationale for different classes of offenders or offences, or if more than one rationale is to be relied upon, a hybrid model which articulates the interrelation between the different purposes has been widely criticised by academics as one which is likely to lead to inconsistency. Ashworth argues that it amounts to giving judges and magistrates freedom to determine policy and a licence to determine their own penal philosophy and that it is well established that a major source of disparity in sentencing is the difference in penal philosophies among judges and magistrates. Judicial officers, on the other hand, regard it as a freedom to determine whatever approach is appropriate on the facts of the case.⁷ Robinson argues that the laundry list approach provides more illusion than guidance. 'It leaves the decision maker free to decide issues ad hoc and privately, and inconsistently, while portraying the decision making as being constrained by principle.'⁸ Whilst academics are critical of a 'cafeteria style' or a 'laundry list' approach to sentencing principles, there remains much debate about which rationale is to be relied upon and when or which hybrid theory best articulates the relationship between different purposes to determine the amount of punishment.

I don't presume to propose a new theory. Instead I will accept that having a list of conflicting purposes is something we appear to have to live with for the time being. Much more modestly, I want to focus on general deterrence and suggest how courts can modify their approach to this rationale in a way that might satisfy supporters and critics of this rationale of punishment. I will begin with a brief overview of the courts' use of general deterrence in sentencing decisions, then move on to discuss the evidence in relation to the effectiveness of penalty severity as a general deterrent and the implications of this. Then I will shift the focus from what academics, legislators and courts say about the purposes of punishment and sentences to what the public think. I will conclude by arguing that relying upon the general deterrent effect of the severity of a sentence comes at considerable expense and that there are no barriers in public preferences for sentencing purposes or in legislation for reducing if not abandoning reliance on general deterrence rationales in imposing individual sentences.

General Deterrence: absolute and marginal deterrence

Deterrence in the context of crime is the avoidance of or desistance from committing a criminal act through fear of the perceived consequences. Deterrence has two aspects, general and specific. General deterrence aims to reduce crime by imposing a sentence that will induce other persons who might be tempted to commit crime to desist out of fear of the penalty. Specific deterrence aims to impose a sentence that is sufficient to dissuade the convicted offender from reoffending. Within general deterrence, there is also a distinction, that is not always clearly made, between absolute and marginal deterrence. Absolute deterrence refers to the deterrent effect of a criminal prohibition backed up by a criminal justice system including policing and sanctions. Marginal deterrence refers to the effect of changes to the law such as increases in penalty (severity effects) or the risk

⁷ Andrew Ashworth, *Sentencing and Criminal Justice*, (5th ed, 2010) 76-77.

⁸ Robinson, above n 2, 5-6.

of detection (certainty effects), although it is sometimes reserved for changes in penalty severity only.⁹ In this paper the focus will be on severity effects.

General deterrence in sentencing decisions

In most Australian jurisdictions, general deterrence is specifically listed as a purpose of sentencing,¹⁰ as it is in England and Wales, Canada and New Zealand.¹¹ It appears to be the most frequently invoked justification for penalties in Australian sentencing decisions.¹² In *R v Harrison*¹³ Hunt CJ at CL went so far as to say:

Except in well-defined circumstances such as youth or the mental capacity of the offender ... public deterrence is generally regarded as the main purpose of punishment ...

Courts have recognised that general deterrence is more likely to be effective in preventing crime in some cases more than in others. For example, in cases of non-addicts engaged in the commercial importation of heroin where the costs and benefits of engaging in the crime are likely to be calculated, particular weight is placed on general deterrence on the grounds that very long prison sentences are likely to discourage such activity.¹⁴ It has also been said to be the primary consideration in cases of income tax fraud¹⁵ and social security fraud.¹⁶ However, deterrence is widely invoked for almost all crimes and well beyond those where the crime is deliberate, calculated and carefully designed such as commercial drug importation and tax fraud. Prevalence of a crime, for example, is frequently used as a reason for relying upon general deterrence.¹⁷ And the fact that an offence is difficult to detect is also relied upon as a reason for placing additional weight on general deterrence.¹⁸ This accords with the theory of general deterrence because if the probability of punishment is lower than average because of low detection rates, the amount of punishment threatened must be correspondingly higher to maintain the overall deterrent threat.¹⁹

⁹ For example, M Bagaric and T Alexander, '(Marginal) general deterrence doesn't work – and what it means for sentencing' (2011) 35 *Criminal Law Journal* 269 at 270.

¹⁰ It is not specifically mentioned in Western Australia. The *Sentencing Act 1995* (WA), s 6(1) merely provides that a sentence imposed on an offender must be commensurate with the seriousness of the offence. However, courts refer to the traditional purposes of sentencing including deterrence: *Aconi v The Queen* [2001] WASCA 211 at [18] (drug importation); *WA v Naumoski* [2013] WASCA 215 at [43] (serious domestic violence).

¹¹ *Sentencing Act 2002* (NZ) s 7(1)(f); *Criminal Justice Act 2003* (UK) s 142(1)(b); *Canadian Criminal Code* s 718(b).

¹² The New Zealand Court of Criminal Appeal decision of *R v Radich* [1954] NZLR 86 at 87 has been often cited in this context by courts of all states and territories.

¹³ (1997) 93 A Crim R 314 at 320.

¹⁴ For example, see *R v Perrier* [No 2] [1991] VR 717, McGarvie J at 721; *Aconi v The Queen* [2001] WASCA 211; *R v Riddell* (2009) 194 A Crim R 524 at [57].

¹⁵ E.g. *R v Ronen* (2006) 161 A Crim R 300 at [66]; *DPP (Cth) v Gregory* (2011) 250 FLR 169 at [53]-[54].

¹⁶ E.g. *Hrasky v Boyd* (2009) 9 Tas R 144 at [20].

¹⁷ *R v Williscroft* [1975] VR 292 at 299 (robbery); *Winch v The Queen* [2010] VSCA 141 at [43] (glassing offences).

¹⁸ *R v Hawkins* (1989) 45 A Crim R 430 at ?

¹⁹ Robinson, above n 2, 8.

Occasionally the courts have indicated scepticism about the effectiveness of deterrence. For example, in a South Australian armed robbery case, *R v Dube*,²⁰ King CJ acknowledged that there is no clear evidence that increased levels of punishment have any effect upon the prevalence of crime. However, he added

the criminal justice system has always proceeded upon the assumption that punishment deters and that the proper response to increased prevalence of a crime of a particular type is to increase the level of punishment for that crime. I think that courts have to make the assumption that the punishments which they impose operate as a deterrent.

Green CJ in *Pavlic v The Queen*²¹ was perhaps less willing to go along with the assumption that penalty increases will reduce crime. He said,

although a court is entitled to proceed on the basis that there is a general relationship between the incidence of crime and the severity of sentences, there is no justification for the view that there exists a direct linear relationship between the incidence of a particular crime and the severity of sentences which are imposed in respect of it such that the imposition of heavier sentences in respect of a particular crime will automatically result in a decrease in the incidence of that crime.

Occasionally courts have observed that punishment will not deter offenders who are “emotionally wrought or otherwise irrational”,²² and have acknowledged the limited effectiveness of deterrence in countering prevalent offences such as burglary.²³ And the Victorian Court of Appeal has recognised the difficulty of advancing general deterrence and that the effectiveness of general deterrence hinges on communication of the threat of punishment to a potential offender.²⁴

In general, however, courts uncritically embrace general deterrence as a main purpose of punishment. An analysis of Crown sentencing appeals undertaken by the Victorian Sentencing Advisory Council revealed that failure to give sufficient weight to general deterrence was raised as ground of appeal in 73.5% of appeals and was successful in 44% of cases.²⁵ On the basis of her interviews with Queensland judges, Geraldine Mackenzie²⁶ suggests general deterrence is the most frequently used aim in practice although a number of judges were ambivalent about its effectiveness in the absence of publicity of the details of sentences. Perhaps its intuitive/common sense appeal explains its continuing popularity despite widespread academic criticism of it as a sentencing objective. When

²⁰ (1987) 46 SASR 118 at 120; see also his comments in a similar vein in *R v Fern* (1989) 51 SASR 273 at 274 that courts are ‘obliged to assume’ that the punishments they impose will deter at least some people.

²¹ (1995) 5 Tas R 186 at [6].

²² *Glascott v The Queen* [2011] VSCA 109 at [152].

²³ *Krijestorac v WA* [2010] [2010] WASCA 35, Wheeler J at [30] and [32] doubted whether prevalence is a reason for emphasising deterrence.

²⁴ *Winch v The Queen* [2010] VSCA 141 at [43] cited by Ritchie, n1, at 4.

²⁵ Ritchie, above n 1, 3.

²⁶ G Mackenzie (2005) *How Judges Sentence*, Sydney: The Federation Press, at 113 .

the *Crimes Act 1914* (Cth) s 16A(2)(k) referred only to specific deterrence because the Australian Law Reform Commission had deliberately rejected general deterrence as a sentencing goal, the courts refused to read the provision as excluding it, relying upon the fact that the list of factors in s 16A(2) is not exhaustive.²⁷ A degree of discomfort with the vengeful overtones of retribution and just deserts may also explain reliance on general deterrence as a fall-back position. Paul Robinson argues that much of the use of deterrence as a justification is mere ‘deterrence speak’. In other words deterrence can be invoked without necessarily engaging in deterrence reasoning but rather it has become a form of standard expression to say that the conduct must be deterred instead of saying that it is harmful or wrong.²⁸

Where general deterrence is of little or no weight

As Hunt CJ in *Harrison* indicated in the quote above, it is a well-established sentencing principle that no, little, or at least less weight should be given to general deterrence in cases where the offender is mentally ill or disabled.²⁹ This does not logically follow from the theory of general deterrence. For general deterrence the individual offender does not matter. Whether or not they are blameless because of a mental disability is irrelevant to whether or not and how much they are punished. The goal is to send a message to potential offenders and a mentally ill person can be useful in deterring others and perhaps particularly useful as it may suggest that there is little one can do to escape punishment. In fact failure to punish or to mitigate punishment for the mentally ill tends to undermine the effectiveness of the prohibition. Why then have courts declined to invoke general deterrence in the case of mentally disordered offenders?

R v Verdins is a leading Australian appellate sentencing decision on the relevance of mental disorder. It explains the five ways in which impaired mental functioning will mitigate punishment. One way is that general deterrence may be moderated or eliminated as a sentencing consideration depending on the nature and severity of the symptoms exhibited by the offender and, and the effect of the condition of the offender, whether at the time of offending or sentence or both. This has been explained on the basis that a person suffering from a mental disorder or abnormality “is not an appropriate vehicle for general deterrence”³⁰ or “an inappropriate medium for making an example to others”.³¹ This was explained by Lush J in *R v Mooney* in retributive terms:

A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the offender.³²

²⁷ *El Karhani* (1990) 21 NSWLR 370 at 376-9.

²⁸ Robinson, above n 2, 83-85.

²⁹ *R v Verdins* (2007) 16 VR 269.

³⁰ *R v Tsiaris* [1996] 1 VR 398, at 400 ‘whether or not the illness played a part in the commission of the offence’.

³¹ Young CJ in *R v Mooney* (unreported 1978) cited in *R v Verdins* (2007) 16 VR 269 at [18]

³² Cited in *R v Verdins* (2007) 16 VR 269 at [19]; see also to similar effect Hunt CJ in *Wright* (1997) 93 A Crim R 48 at 51.

In *R v Matthews*, the New South Wales Court of Criminal Appeal gave as a reason for giving less weight to general deterrence in such cases the community's understanding that a person with a mental disorder had limited appreciation of the moral culpability and wrongfulness of their conduct.³³ At least one attempt has been made to justify more lenient sentences in terms of general deterrence, namely that a sentence on a person with a mental disability may have no impact at all on others. In *Engert*, Allen J (with whom Sully J agreed) said:

It must be emphasised the general deterrence is to deterring others. So one must look at the impact upon others. Even in the case where an offender has a mental disability which is unrelated to the commission of the crime the sympathy which his condition must attract in the eyes of others in the community generally may be such that to sentence him with full weight given to general deterrence might have no impact at all upon others. Human sympathy would say: "Well, you would not expect him to get the same sentence as someone else."³⁴

It could also be argued that a sentence will only have a deterrent effect on others if the lesson from the sentence is perceived as being applicable to them and it is unlikely that a person without a disability will so regard the sentence. However, the counter argument, adverted to earlier is stronger. Those with a mental disability or disorder could be a useful vehicle for general deterrence because punishment of them suggests that there is little likelihood of avoiding punishment. Justice and fairness seem a more convincing explanation for why mentally disordered offenders are an inappropriate vehicle for general deterrence than arguments based on deterrence theory and its ineffectiveness in such cases.

The arguments against marginal deterrence

The principled arguments against general deterrence are well known - it is unfair to impose a disproportionately harsh sentence on one offender in order to deter others from committing a similar offence.³⁵ This is in part conceded by the principle that mentally disordered offenders are an inappropriate vehicle for general deterrence, referred to in the discussion above. What of the empirical evidence? Does deterrence work? First, it should be acknowledged that it is not disputed that the absence of a punishment structure (police, courts, and sentences) would lead to an increase in crime. The overall system deters many offences that would otherwise be committed. Similarly, the absence of a specific offence, such as exceeding the prescribed quantity of alcohol or using a mobile phone whilst driving could have an impact on the incidence of the proscribed behaviour. Accordingly, general deterrence can be accepted as part of the justification for the criminal justice system that includes the institution of state punishment and as a justification for the creation of some crimes. Additionally, it is not suggested that if offences were punished by minimal sentences, such as punishing robbery with a small fine, that robberies would not increase. It is just not known what effect living in a community where a first offence would be dealt with by a restorative process rather than the conventional criminal justice system would have on potential offenders. So deterrence

³³ *R v Matthews* (2004) 145 A Crim R 445 at [22].

³⁴ *R v Engert* (1995) 84 A Crim R 67 at 72.

³⁵ Ashworth, above n 7 at 81-83;

in the sense of system (or absolute) deterrence is generally agreed to be effective. The Melbourne Police strike of 1923 which led to over one third of the entire Victorian Police Force being sacked is commonly cited to support the effectiveness of absolute deterrence. It has been reported that once news of the strike spread, thousands poured into the city centre and engaged in widespread property damage, looting of shops and other acts of civil unrest. This lasted two days until the government managed to enlist thousands of citizens, including ex-servicemen to act as special law enforcement officers.³⁶ Roberts and Ashworth cite a police strike in Liverpool in 1919 and the imprisonment of the Danish police in 1944 which had similar consequences.³⁷ It has been argued that support for absolute deterrence also comes from research that suggests that increasing police presence leads to an increased actual and perceived likelihood of detection and a reduction in crimes rates.³⁸ The evidence that increased police numbers reduces crime supports the point that increases in the certainty of punishment show a positive general deterrent effect. However, it should also be acknowledged that recent research has qualified the strength of the findings of a significant positive deterrent effect of increases in the certainty of punishment by suggesting that studies should separate and compare deterrable and non-deterrable populations.³⁹ Certainty of detection aside, the issue I wish to address is whether harsher sanctions - in the sense of sentence increases within plausible limits - reduce crime rates.

Is there a relationship between sentence severity and crime levels?

There have been many reviews of the deterrence literature which purport to summarise large numbers of studies and draw general conclusions from them about the relationship between sentence severity and crime levels. The majority of these reviews do not support the claim that harsher sentences deter.⁴⁰ Those which claim that variation in sentencing severity affects levels of crime⁴¹ have been criticised for being selective, incomplete and for relying on studies that can be explained by mechanisms other than general deterrence such as incapacitation or specific deterrence.⁴²

³⁶ R Edney and M Bagaric, *Australian Sentencing* (2007) 62.

³⁷ J V Roberts and A Ashworth, in A von Hirsch, A Ashworth and J V Roberts, *Principled Sentencing* (3rd ed, 2009) 46.

³⁸ Bagaric and Alexander, above n 9.

³⁹ Ritchie, above n 1, 17.

⁴⁰ Daniel S Nagin, 'General Deterrence: A Review of the Empirical Evidence' in A Blumstein, J Cohen and D Nagin (eds) *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978); Philip Cook, 'Research in Criminal Deterrence: Laying the Groundwork for the Second Decade' in N Morris and M Tonry (eds) *Crime and Justice: An Annual Review of Research* (1980); Daniel S Nagin 'Criminal Deterrence: Research at the Outset of the Twenty-First Century' in M Tonry (ed) *Crime and Justice: A Review of Research*, vol 23 (1998); Andrew von Hirsch et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); The Halliday Report (2001); Antony Doob and Cheryl Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143. My paper relies heavily on Doob and Webster's review of the research.

⁴¹ Donald E Lewis, 'The General Deterrent Effect of Longer Sentences' (1986) 26 *British Journal of Criminology* 47-62; Steven Levitt, 'Deterrence' in James Q Wilson and Joan Petersilia (eds), *Public Policies for Crime Control* (2002).

⁴² Doob and Webster, above n 40.

Reviews examining specific offences as well as specific types of punishment have found little or no support for the proposition that harsher sentences reduce crime. Criminologists are agreed that there is no evidence that capital punishment is more effective than life imprisonment.⁴³ The introduction of three-strikes legislation in the US and in the Northern Territory and Western Australia provided an opportunity to test the hypothesis that harsher sentences reduce crime. Reviews of the US studies of three-strikes laws have provided no evidence that increases in penalty severity lead to reductions in crime.⁴⁴ And in Australia, initial claims that the laws would operate as a general deterrent were dropped when it became apparent that this could not be substantiated.⁴⁵ The introduction of breathalyser offences has been widely accepted as having an impact on road traffic casualties. However, it seems that this is due to an increased perception of the likelihood of getting caught rather than increases in the severity of sanctions.⁴⁶ Moreover, a new offence was introduced rather than simply a penalty increase for an existing offence.

Notwithstanding consistently negative findings of an effect on crime of increased penalties, criminologists and sentencing scholars have been cautious in claiming that there is no such relationship, preferring instead to say that the research has failed to demonstrate an effect on crime of increased penalties and that the effect of sentencing severity is less impressive than that of certainty of punishment.⁴⁷ Doob and Webster explain why social scientists have been somewhat cautious in accepting the null hypothesis – namely that there is no relationship between sentence severity and crime levels. Logically a failure to find a relationship does not mean that there is no relationship. Just as the failure to find a missing sock does not mean the sock does not exist, so the failure to find a deterrent effect does not mean there is not one. ‘In a technical sense, all that can be demonstrated is that the effect was not to be found within the methods that were employed at the particular time and space in which one looked.’⁴⁸ However, Doob and Webster have argued that the time has come to accept the null hypothesis – ‘the present (always rebuttable) conclusion that sentencing severity does not affect levels of crime.’⁴⁹ More recent reviews support Doob and Webster’s conclusion that increases in the severity of punishment particularly of imprisonment have no increased deterrent effect on offending.⁵⁰ For general deterrence to have any chance of being effective the conditions must be favourable: the risk of detection must not be too

⁴³ Nigel Walker, *Why Punish?* Oxford (1991) 16; Roger Hood, *The Death Penalty: A World-Wide Perspective* (3rd ed, 2002) chapter 7; W Bailey and R Peterson, ‘Capital Punishment, Homicide and Deterrence: An Assessment of the Evidence’ in M Dwayne Smith and M Zahn (eds) *Studying and Preventing Homicide: Issues and Challenges* (1999); Janet Chan and Deborah Oxley, ‘The deterrent effect of capital punishment: A review of the research evidence’, (2004) 84 *Contemporary Issues in Crime and Justice*, New South Wales Bureau of Crime Statistics and Research.

⁴⁴ Doob and Webster, above n 40, 173-177.

⁴⁵ Neil Morgan, ‘Mandatory Sentences in Australia’ (2000) 24 *Criminal Law Journal* 164.

⁴⁶ H Lawrence Ross *Deterring the Drinking Driver: Legal Policy and Social Control* (1982); Ross Homel ‘Penalties and the Drink Driver: A Study of 1000 offenders’ (1981) 14 *ANZJ Crim* 225; D Riley, ‘Drink Drivers and the Limits of Deterrence’ (1985) 24 *Howard J CJ* 241.

⁴⁷ von Hirsch et al, above n 37, 40, 61, 63; Ashworth *Sentencing and Criminal Justice* (4th ed, 2005) 76.

⁴⁸ Doob and Webster, above n 40, 143.

⁴⁹ *Ibid* 146.

⁵⁰ Ritchie, above n 1, 12-17; Bagaric and Alexander, above n 9, 276.

remote; the penalty should be publicised adequately; the penalty should be perceived as a deterrent and potential offenders must consider the risks rationally. For many offenders the clear up rates are so low that the risk of detection is quite remote; few know what the penalties are; we do not know what is perceived as a deterrent and in any event many crimes are committed without the offender addressing the risks rationally.

What are the implications of accepting the null hypothesis?

The first point is that increases in penalty severity cannot be justified by governments or judicial officers on the basis of general deterrence. Does it follow that judicial officers cannot justify imposing a meaningful punishment in a particular case on grounds of general deterrence? It could be argued that unless some kind of meaningful sanction is imposed upon conviction, the deterrent effect of the criminal justice system as a whole would be undermined and therefore a sentencer would always be free to justify a sentence on the ground of general deterrence. However, many would argue there are more principled reasons for individual sentences than deterrence and that when it comes to determining the length of a prison sentence or the amount of a fine, general deterrence gives no guidance and other reasoning has to be resorted to. In other words general deterrence is little help in calculating the amount of punishment. A strong argument against general deterrence is that ‘it makes false promises to the community. As long as the public believes that crime can be deterred by judges through harsh sentences, there is no need to consider other approaches to crime reduction’.⁵¹ One could add that reliance on general deterrence by sentencers encourages public punitiveness - the public is encouraged to believe that harsher sentences reduce crime and so calls for increases in penalties are not surprising.

Of course it may be that sentences are not actually increased for deterrent purposes but that the use of the general deterrence rationale is ‘deterrence speak’ – rhetoric in support of a proportionate sentence. Whether or not it is the case, it has the undesirable consequences mentioned above – false promises and encouragement of the belief that harsher sentences deter. I would argue that courts should think and speak carefully before invoking general deterrence as a justification for a sentence. This is not inconsistent with sentencing legislation which lists general deterrence as a purpose of punishment. Listing general deterrence as one of the purposes of punishment does not mean that general deterrence has to be resorted to in almost every case. And it does not mean that courts are obliged to assume that changes to the severity of punishment will have an impact on reducing crime. When then, should general deterrence reasoning be relied upon in justifying a sentence? First, it can be used in the sense of absolute deterrence, so that courts can indicate that a meaningful penalty is necessary to deter a particular type of criminal offence. In doing so courts should be careful not to suggest that increases in the severity of penalty will reduce crime. Secondly, it can be used very selectively when the circumstances are favourable to its effectiveness but in cases where they are not, it should not be relied upon. So if potential offenders know about the severity of the probable sentence, take the risk of incurring the sanction into account when deciding to offend, believe there is non negligible risk of being caught, believe that the penalty will be applied to them if caught, deterrence could work. A stern penalty

⁵¹ Doob and Webster, above n 40, 191.

which will be well publicised for a director convicted of insider trading may be an example. This means that general deterrence should not be relied upon in most cases where it currently is. In most cases consideration of the conditions necessary for effective general deterrence will trip up a general deterrent effect.

Alcohol fuelled violence and deterrence

I would argue it is neither necessary nor desirable to rely upon general deterrence in cases of alcohol fuelled violence in public places. On 6th January this year a rugby league player, Russell Packer, was sentenced to 2 years imprisonment for assault occasioning bodily harm. The assault occurred in Martin Place in the Sydney CBD after Packer, who had been evicted from a hotel for drunkenness, punched a man in the face during a dispute about cigarettes. The man fell to the ground, Packer punched him as he lay there and then 'stomped on his head'. The victim suffered two fractured bones. The magistrate said the public was sick and tired of behaviour such as that showed by Packer that night. He accepted that the assault was not a king hit, but said that alcohol related violence was a serious concern for the community. He said Packer's behaviour was 'cowardly and deplorable' and the result could have been much worse.⁵² The sentence apparently surprised Packer's counsel who asked the magistrate to re-open the sentence and said he had no idea that a prison sentence was being considered. An appeal against the severity of the sentence has been lodged.

Given the media coverage of this case, general deterrence reasoning would suggest that the punishment in this case would give a greater general deterrent pay-off justifying an increased or exemplary penalty. The severity of the penalty is likely to attract publicity and so satisfy one of the conditions of effective deterrence, namely the legal knowledge hurdle'. However, even if the sanction is known to potential offenders, because of intoxication they are unlikely to weigh the risk of incurring the sanction or be able to alter their choice in the light of it. Instead, the two year sentence could be justified as a proportionate sentence given the seriousness of the offence, its sustained nature and its potential for even more serious harm than was actually inflicted given the nature of the attack and the strength of the offender (a 112kg rugby player). I would argue that resort to deterrence reasoning is both unnecessary and undesirable in such a case. As explained above, a focus on prevention through increased penalties suggests that the problem of alcohol related violence can be addressed by tough sentences and distracts attention from more effective means of addressing the problem.⁵³

Prevalence

⁵² Stephen Ryan, 'Russell Packer of the Newcastle Knights sentenced to two years' jail' *Sydney Morning Herald*, January 7, 2014, <http://www.smh.com.au/rugby-league/league-news/russell-packer-of-the-newcastle-knights-sentenced-to-two-years-jail-20140106-30crw.html>.

⁵³ There is currently much debate about reducing alcohol related violence, which may not be increasing but is claimed by some commentators to be having more devastating consequences: see Don Weatherburn, 'Violence in Sydney: Young men, alcohol and hot summer nights', *Sydney Morning Herald*, 2 Jan 2014. The federal government has announced a parliamentary inquiry into alcohol fuelled violence.

As indicated above, the prevalence of an offence, or increased prevalence of an offence has commonly been relied upon as justifying a general deterrent sentence or a sentence in which greater weight is given to general deterrence and less weight to mitigating factors.⁵⁴ If an offence is prevalent, increasing the severity of the punishment is seen as a way of reducing it. Courts do on occasions acknowledge the limitations of deterrence in these circumstances but nevertheless refuse to renounce it. For example in *Krijestorac v Western Australia*,⁵⁵ in a thoughtful judgment in a burglary sentencing appeal, Wheeler J said in relation to the limitations of deterrence:

A very significant number of offenders do not appear to think about possible consequences at all when they offend. Their offending is impulsive, opportunistic, and aims to meet what is perceived by them as some immediate need or desire. ... Of those who do think about consequences, most confidently expect that they will not be caught. Of those who do consider the possibility of being caught and advert to possible punishment, it is unlikely that any but a small number of recidivists would be able to predict with any degree of accuracy the length of custodial term which is likely to be imposed. That is not to say that deterrence is not a relevant factor. It remains an important sentencing principle but its limitations must always be kept in mind.

Given its limitations and the fact that the evidence fails to support marginal deterrence, I would argue that courts should not use deterrence reasoning to justify increasing penalties or placing less weight on mitigating factors in cases of prevalence. So in a glassing case, for example, which causes serious disfiguring injuries, deterrence reasoning does not conflict with desert and proportionality and there is no need to emphasise general deterrence to impose a significant sentence.⁵⁶

White collar crime

Courts have consistently emphasised that general deterrence is a particularly significant consideration in relation to white collar crime.⁵⁷ In the case of taxation fraud general deterrence is given special emphasis in order to protect the revenue and because such offences are often difficult to detect and if undetected produce significant rewards.⁵⁸ In the case of white collar crime such as income tax evasion, the arguments in favour of general deterrence are more convincing than in relation to most other offences. The offender is likely to be rational and to weigh the benefits of committing the crime against the costs of being caught and punished. Particularly if the offender is of relatively high

⁵⁴ *R v Peterson* [1984] WAR 329 at 332; *R v Downie* [1998] 2 VR 517 at 522.

⁵⁵ [2010] WASCA 35 at [32].

⁵⁶ See *Powell v Tickner* (2010) 203 A Crim R 421 at [14], [123] where the Court of Appeal of Western Australia found that frequency of glassing justified giving increased weight to general deterrence. See also *Winch v The Queen* [2010] VSCA 141 at [32].

⁵⁷ *Director of Public Prosecutions (Cth) v Thomas* [1998] 3 VR 188 at [47]; *Emms v Barr* (2008) 187 A Crim R 390 at [33]-[35] (Porter J); *R v Jones* (2010) 76 ATR 249 at [13] (Rothman J).

⁵⁸ *Director of Public Prosecutions (Cth) v Gregory* (2011) 250 FLR 169 at [53] (Warren CJ, Redlich J and Ross AJA).

professional status or well known in the community, the prospects of conviction and incarceration are likely to be feared and the punishment is likely to be well publicised. Taking into account the possibility that the gravity of the offence may not always be recognised in the public consciousness and that courts have acknowledged that the seriousness of income tax fraud has not always been sufficiently reflected in sentences imposed for it,⁵⁹ there is a case for arguing that general deterrence can provide a rationale for imposing a sentence that is a meaningful punishment for serious tax fraud offenders and for accountants and lawyers who facilitate such schemes. This can be done in a way which invokes absolute deterrence rather than marginal deterrence, stressing that tax fraud is a serious criminal offence and that those who evade tax are criminals and not simply people who have failed to pay a debt.

Even in such cases where the arguments in favour of deterrence are stronger, it could be argued the same results could be achieved by avoiding deterrence language. Rather than justifying a sentence in terms of general deterrence, the objective seriousness of tax fraud could be emphasised. Income tax evasion is fraud and theft. It is not a victimless crime but has an impact on revenue which affects the whole community. Censuring tax fraud satisfies the need to reaffirm basic community values that all citizens have an obligation to share the burden of taxation according to their means so that the government can provide services to the community. Courts do use such language in denouncing tax fraud.⁶⁰ However, it can be done effectively without resorting to deterrence rationales.

Would avoiding deterrence and ‘deterrence speak’ undermine public confidence in sentencing?

Courts frequently make comments to the effect that the public demands a sentence that will protect the community and that therefore a punishment which deters others is needed. This raises the question of whether this is really what the public want from a sentence. Public opinion research can shed some light on this question.

The first Australian study to look at public support for various sentencing purposes was conducted by Indermaur in 1990.⁶¹ Western Australian respondents were asked to indicate the main purposes of sentencing in two different scenarios – a young property offender and an offender convicted of a serious violent offence. General deterrence was not a prominent choice. Incapacitation and retribution accounted for almost two thirds of the responses to the violent crime scenario. For the young property offender, over two thirds of the respondents selected either individual deterrence (45%) or rehabilitation (24%). In a more recent national survey of 800 randomly selected Australians,⁶² preferences for sentencing purposes were examined in response to brief crime scenarios where offender age (adult and young offender), offence type (burglary and serious

⁵⁹ Ibid at [54]-[55].

⁶⁰ For example, ibid at [57].

⁶¹ David Indermaur, *Crime Seriousness and Sentencing: A comparison of court practice and the perceptions of a sample of the public and judges*. Criminology Research Council of Australia, 1990.

⁶² Caroline Spiranovic et al, ‘Public preferences for sentencing purposes: What difference does offender age, criminal history and offence type make?’ (2011) 12 *Criminology and Criminal Justice* 289, 297.

assault) and offender history were systematically varied producing 8 scenarios. In each scenario general deterrence rated only fourth or fifth in a list of five purposes and was endorsed as the most important purpose for less than 10 percent of respondents. Rehabilitation was the most important purpose for first offenders and punishment the most important purpose for repeat offenders. The authors suggest that the low levels of support for general deterrence may be accounted for by the possibility that the respondent did not interpret ‘make an example of them’ as referring to general deterrence. Rather it could have been interpreted as a form of shaming.⁶³

The Tasmanian Jury Sentencing Study provided an opportunity to test jurors’ preferences of sentencing purposes.⁶⁴ This study surveyed jurors from 138 trials returning guilty verdicts. At Stage 2 jurors were asked, in relation to the sentence for the offender in their trial, to rank the goals of punishment in a list of seven purposes from the most important to the least important. The seven purposes were: punishing the offender, separating the offender from society, expressing community disapproval, assisting the offender’s rehabilitation, deterring others from committing similar crimes, deterring the offender from re-offending and compensating the victim or the community. In this study general deterrence was perhaps more clearly explained than in the national study. Punishing the offender was the most important sentencing goal with 40 percent selecting it as the most important goal, followed by specific deterrence (22%) and expressing community disapproval (11%). General deterrence, rehabilitation and separating the offender from society all ranked under 10 percent. Even for drug offences only 11 percent ranked general deterrence as the most important purpose, for these offences specific deterrence (39%) and punishment (27%) ranked ahead.

There are many international studies exploring the public’s level of support for the various purposes of punishment. Paulin et al.’s investigation of the sentencing preference of a sample of the New Zealand public used almost the same list of purposes as was used in the Tasmanian jury sentencing study.⁶⁵ Respondents were asked to select the most appropriate sentence in each of six scenarios involving different crimes. They were then asked to select up to three purposes that were the most important and to indicate which was the single most important purpose. Retribution (providing punishment that reflects the seriousness of the offence) was considered an important aim across all scenarios, with the exception of the possessing cannabis scenario. In comparison, only a small proportion considered general deterrence (‘discouraging others from committing crimes’) to be the most important aim in sentencing offenders in any of the scenarios. The proportion mentioning it as the most important aim ranged from 2 percent for the partner assault scenario to 15 percent for the heroin smuggling scenario. Less than a third mentioned general deterrence as one of three most important aims across all scenarios with the exception of heroin smuggling where 34 percent mentioned it – for partner assault it was

⁶³ Ibid 303.

⁶⁴ The results of jurors sentencing preferences for sentencing purposes are reported in K Warner et al, *Jury sentencing survey*, Final Report, Criminology Research Council (2010) 117. <www.criminologyresearchcouncil.gov.au/reports/0607-4.pdf>, accessed 8 January 2014.

⁶⁵ Judy Paulin, Wendy Searle and Trish Knaggs, *Attitudes to Crime and Punishment: A New Zealand Study*, Ministry of Justice, New Zealand, 2003.

only mentioned by 13 percent.⁶⁶ The authors conclude that general deterrence ‘did not feature strongly in any of the sentencing aims’.⁶⁷

Whilst there is not a great deal of consistency in the findings in the studies exploring public preferences for sentencing purposes because of the diversity of method used, retribution seems to be the most popular choice, at least for adult offenders and for crimes like burglary and robbery.⁶⁸ However, not all studies have included explicit reference to retribution as a goal. For example, a Canadian study used the list of purposes from the Canadian Criminal Code.⁶⁹ This list does include making offenders acknowledge and take responsibility for the crime, making offenders repair the harm caused by the offence and satisfying the victim that ‘justice was done’ as well as the traditional purposes of individual deterrence, general deterrence, denunciation and rehabilitation. The two restorative goals, namely promoting a sense of responsibility and reparation, attracted the highest level of support as the single most important purpose from 27% and 13% of respondents respectively. General deterrence did not feature strongly in the public’s preferences as the single most important purpose although half of the respondents thought that it was still very important.

A recent English study,⁷⁰ which examined sentencing attitudes to offences associated with the riots of August 2011, shows more support for general deterrence than previous studies and general deterrence was rated (according to mean importance rankings) as slightly more important than just deserts (imposing a sentence which reflects the seriousness of the offence) but less important than specific deterrence for a riot related non-domestic burglary.⁷¹ For the same offence in a normal context, general deterrence was rated equally with just deserts behind specific deterrence. Comparing the importance ratings between the riot related burglary group with the normal burglary group, the mean ratings were quite similar and statistically significantly different only for general deterrence.

On the basis of the Australian and New Zealand studies at least, it may be concluded that general deterrence is not as strongly endorsed by the public as by the courts. From the public’s perspective, it is by no means ‘the main purpose of punishment’.⁷²

Conclusion

⁶⁶ Ibid 56-60.

⁶⁷ Ibid 64.

⁶⁸ Nigel Walker and Mike Hough, *Public Attitudes to Sentencing. Surveys from five countries* (1988) ; J Gerber and S Engelhardt-Greer, ‘Just and painful: Attitudes towards sentencing criminals’ in T Flanagan and DR Longmire, *Americans View Crime and Justice*, 1996, 62-74.

⁶⁹ JV Roberts, N Crutcher and P Verburgge, ‘Public attitudes to sentencing in Canada: Exploring recent findings’ (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 75, 86.

⁷⁰ JV Roberts and Mike Hough, ‘Sentencing Riot-Related Offending. Where do the Public Stand?’ (2013) 53 *British Journal of Criminology* 234.

⁷¹ Ibid 249.

⁷² *R v Harrison* (1997) 93 A Crim R 314, Hunt CJ at CL at 320.

Given that the evidence fails to support a relationship between sentence severity and crime reduction and that reliance upon general deterrence as a justification for a particular sentence comes at the expense of distracting attention from more effective ways of reducing crime and encourages the public misconception that increasing sentences will optimise deterrence and reduce crime, I would argue that courts should dramatically curtail their reliance on the rationale of general deterrence in justifying punishment. Instead of the standard vocabulary of deterrence such as the conduct X or crime Y should be deterred, language which emphasises the seriousness of the offence and a punishment that reflects this can be used. Whilst some of traditional purposes of punishment point in different directions, in practice it is rare that general deterrence conflicts with desert reasoning. In cases where it does, such as in cases of offenders with a mental disorder or disability, intuitions of justice lead courts to resist giving weight to general deterrence. In cases such as a prevalent offence, or a serious offence such as armed robbery or rape, there is no need to rely upon general deterrence, desert and denunciation will do. This is unlikely to have an impact on the length of sentence. General deterrence is subject to the principle of proportionality and so the work that general deterrence does is to reduce the weight that can be given to personal mitigation such as good character and an absence of prior convictions. In the case of serious offences, these factors count for little in desert reasoning.

I have argued that dramatically reducing reliance on general deterrence in justifying sentences does not conflict with a statutory requirement to have regard to general deterrence as a purpose of punishment. General deterrence in the sense of absolute deterrence and the imposition of a meaningful sentence for the particular offence will always be relevant but courts need not and should not go further and suggest that the severity of the sentence will reduce crime. Because relying upon general deterrence comes at considerable expense, suggesting the severity of the offence has an impact on crime reduction should only be done when the conditions for effectiveness of deterrence are present – the penalty is well advertised and known, the likely offenders are rational, the circumstances allow for rational calculation and risk of detection is reasonably high. In the light of what we know about public preferences, reducing reliance on general deterrence as a sentencing goal is unlikely to be contrary to public expectations about the purpose of sentences.