THE PRINCIPLES OF SENTENCING VIOLENT OFFENDERS: TOWARDS A MORE STRUCTURED APPROACH

Ivan Potas
Research Director
Judicial Commission of New South Wales

IN ORDER TO ACHIEVE CONSISTENCY OF APPROACH IN SENTENCING, IT IS desirable to have a structure or theoretical framework in which that objective can be promoted. However, there are many competing philosophies and many judicial officers from diverse backgrounds, with differing attitudes, and this task of achieving consistency of approach is not a simple one.

For example, if one selects rehabilitation of the offender as the primary objective of a sentence then one would expect a different result from one where retribution or general deterrence is considered to be the dominant purpose. In the sentencing of offenders, retribution (variously referred to in this paper as the sentence which is regarded as being commensurate with, or proportionate to, the seriousness of the offence or the justly deserved sentence), protection of the community, specific and general deterrence, rehabilitation or reform of the offender, and incapacitation are amongst the most commonly cited justifications for the selection of the ultimate sentence.

Neither the courts, which have embraced the maxim that in sentencing 'the only golden rule is that there is no golden rule' (R v. Geddes [1936] 36 S R (NSW) 554, per Jordan CJ) nor leading commentators such as Walker (1980) who have endorsed an eclectic stance, have provided an adequate

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1 The views expressed in this paper are those of the author. They are not intended to reflect the views of the Australian Institute of Criminology or the Judicial Commission of New South Wales.
formula for indicating whether sentences are intended to be primarily utilitarian, and concerned with future crime prevention and community protection, or retributive, where the emphasis is on bringing the offender to account through an appropriate measure of punishment for the particular offence which he or she has committed.

Indeed, the yet to be commenced *Sentencing Act 1991* of Victoria reveals contemporary thought on this issue by listing some of the traditional objectives of sentencing offenders in section 5 of the Act. However the following guidelines are cited as the only purposes for which sentences may be imposed:

- to punish the offender to an extent and in a manner which is just in all of the circumstances; or
- to deter the offender or other persons from committing offences of the same or a similar character; or
- to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
- to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
- to protect the community from the offender; or
- a combination of two or more of those purposes.

Notice that the purposes listed are alternatives but may be used in combination and there is no single purpose which is said to predominate over any other. The fundamental point is that the choice of purpose or purposes of sentencing is a discretionary one for the sentencing judge.

This does not mean that the choice of purpose or purposes is an arbitrary one. Indeed Sir Laurence Street pointed out in one of his judgments, that the sentencing judge is not cast adrift on an uncharted sea for 'the judicial discretion underlying the formulation of a sentence must be exercised with due regard to principles of law deducible from authoritative decisions' (*R v. Rushby* [1977] 1 NSWLR 594, pp. 597–8).

Yet there remains something mysterious or magical about how the process of sentencing works. We are left with propositions such as 'sentencing is an art rather than a science' or that 'ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the sentencing process' (*R v. Williscroft* [1975] VR 292) or again, that the general principles of sentencing 'jostle one another for paramountcy'. One may seriously question whether the governing principles, and particularly those provided in the Victorian legislation will advance the cause of sentencing consistency. An attempt to rank these purposes in order of importance however, may have been a more effective strategy, and it is this theme the author wishes to explore later in this paper.
The Victorian Act goes further than simply listing the purposes for which sentences may be imposed. It also specifies certain considerations in respect of which a sentencing court is obliged to have regard, such as the maximum penalty prescribed for the offence, current sentencing practice the offender's culpability and degree of responsibility for the offence, the offender's previous character and various other aggravating and mitigating factors. It also contains guidelines which generally are intended to apply the principles of parsimony to the selection of the sentence. Apart from providing a comprehensive list of considerations, which may now have the advantage of clarity and focussing attention to them, the principles do not appear to alter the common law in any significant respect.

**Intuition and Reason**

In *Beavan* (unreported, NSW CCA, 22 August 1991) Hunt J, with whom Badgery-Parker and Abadee JJ agreed, was considering the extent to which a guilty plea may be taken into account in order to mitigate the sentence. His Honour said:

> Sentencing is largely an intuitive process. It does not lend itself to the application of rigid formulas. The influences of the different factors to be taken into account in each case are infinitely various. In many cases, the different factors overlap, and it would be almost impossible for a judge to identify the precise influence which any one factor has had upon the sentence ultimately imposed.

His Honour then pointed out that sentencing is not the same as awarding damages for injuries where each step of reasoning is usually exposed, and continued:

> As sentencing appeals to this Court are not rehearings, it is unnecessary for a sentencing judge to expose the precise reasoning by which the ultimate sentence is reached. What is important for the parties and (if necessary) this Court to know are the judge's findings in relation to any facts upon which the sentence is based and which were in dispute and the various considerations which were taken into account in determining that sentence where it would be expected that reference should be made to them in that particular case. Where more than a judge's intuition is involved, the actual mathematics adopted by him or her need not be exposed. The very nature of the art of sentencing is such that it is usually simply not possible for judges to describe the often difficult processes by which the ultimate sentence is determined.

*Beavan*, therefore, is authority for the proposition that with the exception of discounts for assistance given to the authorities, it is both unnecessary and often unwise for a sentencing judge to identify the sentence thought to be appropriate to the particular case without reference to one factor and then to identify the discount which is thought to be appropriate with regard to that particular factor.

Ultimately then, provided the sentence is within range we need not attempt to dissect and apportion to each relevant sentencing factor a numerical value or
weight, in order to justify the sentence imposed. To do so would be artificial and not likely to reflect the actual thought processes involved.

Some Authoritative Decisions

When one turns to common law sentencing principles it is possible to find authoritative decisions which do attempt to explain and rank in order of priority some of the key principles. Thus the concept that the penalty should not be excessively lenient, that it must accord with the seriousness of the offence, emerges from the following well known extract from *R v. Radich* ([1954] NZLR 86), a passage which gives paramountcy to deterrence and the principle of proportionality and relegates characteristics personal to the offender and predictions relating to future conduct of the offender to a secondary and subsidiary level of significance (ibid., pp. 86–7).

... one of the main purposes of punishment, ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this fact is necessarily subsidiary to the main consideration that determine the appropriate amount of punishment [emphasis added]. (Note that the sentence italicised suggests that imposing retributive penalty has a preventative effect; cf. Ross 1975, pp. 37–8).

This concern for both proportionality in punishment, which is based on a retributive concept and protection of the community which is an utilitarian concept in sentencing is also well expressed in the following passage from the judgment of Herron CJ in *R v. Cuthbert* ([1967] 86 WN (Pt 1) NSW 272).

The sentence should be such as, having regard to all the proved circumstances, seems at the same time to accord with the general moral sense of the community and to be likely to be a sufficient deterrent both to the prisoner and others (Per Jordan CJ *R v. Geddes* 1936 (NSW) 554).

Courts have not infrequently attempted further analysis of the several aspects of punishment, (*R v. Goodrich* [1952] 70 WN (NSW) 42) where retribution, deterrence and reformation are said to be its threefold purposes. In reality they are but the means employed by the courts for the attainment of the single purpose of protection of society (ibid., p. 274).
Although the terminology is not used, the limiting principle of 'just deserts' or the recognition of a ceiling or roof above which a sentence should not go clearly emerges from the cases. Indeed, the leading cases on the proportionality principle are the High Court of Australia decisions of *R v. Veen (No. 1)* ([1979] 143 CLR 458) and *R v. Veen (No. 2)* ((1988) 164 CLR 465) (see also Fox 1988) but for present purposes, the following passage of the judgment of O'Brien J in the first New South Wales Court of Criminal Appeal decision in *R v. Veen* (Unreported decision, New South Wales Court of Criminal Appeal, 6 August 1977, pp. 17–18) provides a good description of the relevant considerations:

The court should reserve the maximum sentence for the worst examples of the offence concerned, and otherwise impose a term which, having regard to the maximum, is in all the circumstances in fair proportion to the gravity of the offence with which it is dealing. In reaching that proportion the court should have regard to the background of the offender in determining whether or not leniency is warranted and if so, in what degree. Included in that background are such matters as previous offences committed by the offender especially if they indicate he is a persistent offender in the same or similar kinds of offence, for then he would normally forfeit any claim to leniency. A sentence should not, however, inflict heavier punishment by way of sentence longer than bears a fair proportion to the gravity of the offence assessed against the background of the offender because of the likelihood of his commission of further such offences. Whether this likelihood be determined from his record of previous convictions or from a disposition otherwise shown to the further commission of such offences, a heavier punishment would be to punish him for offences for which he had already been punished or for offences he had not committed. All punishment for offences is fundamentally for the protection of the community and the court should not impose a longer sentence than is otherwise fairly proportionate to the gravity of the offence considered upon the background of the offender in order that the community will thereby be afforded greater protection from his crime [emphasis added].

None of the preceding three passages from *Radich*, *Cuthbert* or *Veen* ignores the application of utilitarian considerations, and all place considerable emphasis upon the need to protect the community from crime. However, the author believes these cases show that the utilitarian considerations are subsidiary to the retributive aspects of sentencing in so far as the latter define the range, that is the upper and (sometimes) the lower limits of a just sentence. Once the range has been identified utilitarian considerations may then be considered in order to fine tune the sentence.

There appears to be a general confusion between the role of the sentencing judge and the role of the legislature in this regard, for it is submitted that the primary role of the sentencing judge is to do justice, and not to concern himself or herself excessively with larger considerations of social policy. Indeed one of the aspects of the application of the principle of just deserts is that it need not be concerned with the effectiveness of sentencing at all. Provided that the sentence is just and fair in all the circumstances whether it achieves the aims of general deterrence or
rehabilitation is of no moment. Utilitarian principles on the other hand must concern themselves with effectiveness, and with effectiveness alone. These principles are intended to achieve more than simply punish the offender for the offence.

Some Philosophical Considerations

Can retributive and utilitarian considerations be reconciled? Dare we prioritise and select one above another, or are we forever to apply an eclectic approach and simply decide amongst the competing considerations on an ad hoc, or case by case basis?

Morris (1974) in The Future of Imprisonment, provides a key to this dilemma. According to Morris, the object of community protection, a utilitarian goal, may be pursued within the range permitted under the limiting principle of just desert (a retributive principle). Indeed Morris is prepared to sacrifice uniformity in sentencing when there are good utilitarian grounds for not treating like cases alike. He concedes that to exceed the upper limits of just punishment is morally objectionable. It is both cruel and tyrannical, to exceed the upper limit of deserved punishment. Yet he is prepared to tolerate a more flexible lower limit, even to the point of allowing some offenders to escape punishment altogether if no useful social purpose is gained by imposing deserved punishment. The latter course is sanctioned by application of his principle of parsimony, a principle which provides that the least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed and is consistent with the vague but nevertheless important maxim that imprisonment is a sanction of last resort.

It is erroneous to believe that the retributive principle of just deserts cannot contribute to the utilitarian goal of crime prevention. Sir Rupert Cross (1981, p. 203), for example, has expressed the opinion that 'the proper function of state punishment is to reduce crime by giving offenders their deserts' and that while this does not rule out leniency it does 'argue against the imposition of sentences going beyond the gravity of the offence'. On these views therefore there is little opposition between a system of punishment that is both preventive and punitive.

Ross in On Guilt, Responsibility and Punishment (1975, pp. 60–6) argues that the traditional debate—retribution versus prevention—is a pseudo-problem resting on a misunderstanding relating to the aims of punishment. According to Ross, the debate as to whether punishment as a judicial sanction is essentially retributive or preventive is a meaningless question because for him the two are not contraries. He argues that retribution is a form of censure, which in turn has a preventive function. He says inter alia, that:

Retribution, censure is an emotional, hostile reaction which in itself acts as a punishment, i.e. directly, preventatively.

Ross refers to 'revenge' (the retributive principle) as simply a delayed defence reaction. Thus he says that 'awareness that someone will avenge himself, just as much as awareness that he will defend himself, has a deterrent effect on the aggressive aims of others'. Ross' view of retribution, and in particular his
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insistence that disapproval manifested by the application of criminal punishment has a conduct influencing (preventive) function, is dismissed rather too lightly by Barbara Wootton (1978, p. 221). She simply asserts that 'the deterrent effect of social disapprobation strikes [her] as extremely naive, and . . . not borne out by the facts'. She refers to her personal contact with serious offenders, particularly the 'psychopaths' who appear 'insensitive to reproaches from any quarter' and concludes that while some offenders of 'respectable background' may be 'shamed into new attitudes by the disgrace of a conviction' such an approach is not sufficient for modern complex societies. She then returns to her theme which is critical of the principle of criminal responsibility, pointing out that the best solution in one case may be quite wrong in another.

Hence for Wootton, focussing on the offence as the basis for limiting punishment is of no value. What matters is the future behaviour of the offender and sentences should therefore be tailored to the treatment needs of the offender and to the protection of the community. Some will benefit from a relatively light sentence, while others may have to be detained for a considerable time, in order to protect society.

Wootton never really accepts the value of the preventive function of retributive punishment, and she appears not to fully appreciate the implications of Ross' argument. Ross at no time suggests that the preventive effect of retributive punishment need be as mild as suggested by Wootton. Indeed from the very same page of the extract which Wootton criticises, Ross (1975, p. 89) comments that the reaction from the reproach or censure (the consequences of a retributive punishment) can vary in strength over a wide range 'from a gentle snub to seething anger and indignation, which may be succeeded by violent aggression' (for example, lynching). Thus Ross' concept of social disapprobation can have considerably more force than is suggested by Wootton. Ultimately, however, the principle of retribution under the law ensures that penalties are not unjustly severe by placing an upper limit upon the coercive powers of the state. It ensures that 'the infliction of punishment although tending towards crime reduction is unjustified if it is not also morally deserved, a matter that is to be considered further' (Ross 1975, p. 118).

In the preceding pages care has been taken not to dismiss the application of utilitarian considerations from punishment, and it has been argued that retributive punishment itself has a preventive function.

However, another way of looking at the problem is to distinguish the judge's role from that of the legislators'. As Nowell-Smith (1954, p. 236) has observed, the judge's duty is to pronounce verdict and sentence in accordance with the law. He says the judge:

\[\ldots\text{is not concerned with the consequences, beneficial or harmful, of what he pronounces. Similarly, the question 'Was that a just sentence?' is one that cannot be settled by reference to its consequences, but solely by reference to the law.}\]

He adds that the probable effects of any sentence are relevant only in so far as judges are given discretion to take into account other considerations, such as reform or deterrence. However, the legislator's duty is quite different. Its
concern is not whether a particular application of the law is just or not, but it is concerned with deciding what laws ought to be adopted, and what penalties ought to be prescribed in respect of these laws. Nowell-Smith suggests that the judge's questions are different from the legislators, for . . . if we interpret the legislator's question as one to be settled by asking 'What does the law lay down for such a case?' we shall either be involved in an infinite regress, a hierarchy of laws in which the justice is determined by reference to a higher law, or we shall be forced to claim intuitive insight into a system of axiomatic laws, themselves requiring no justification, but providing the justification of all lower laws.

This is a useful insight for it shifts the burden of community protection from the shoulders of the sentencing judge to that of the legislator and ultimately (in a democratic society) to the community itself. The important point here is simply that the judge's primary duty is to do justice and he or she should not be overly concerned with community protection. An examination of the case law tends to demonstrate that judges do see their utilitarian role in sentencing as limited particularly in serious cases such as drug trafficking and those involving violence.

Limiting Rehabilitation

There is no doubt that the rehabilitation philosophy has contributed to a more humane and individualised sentencing system. Concerned as it was for the offender's welfare, rehabilitationists tended to ignore the offence itself and began to concern themselves with the offender's future behaviour. Indeterminate and semi-determinate systems of sentencing were seen as better placed to meet the offender's rehabilitative needs. Both the community and the offender would benefit—those who were regarded as more dangerous could be cured and released at the earliest opportunity—that is when they could be regarded as safe for release. If they could be cured quickly, they could be released quickly.

There would be no losers in such a system. All would benefit—the offender who would be treated, the community which would be protected, the judge who would be relieved of having to decide how long the prisoner should serve in custody. The failure of the rehabilitation ideal, the uncertainty and unreliability of clinical predictions, the finding that 'nothing works' in corrections, however, has turned attention back to what seems a fairer means of distributing justice—to the offence itself and to the culpability of the offender (Bailey 1966, p. 153).

Thus, in more recent times, the pendulum has swung back in favour of a justice model of sentencing, and the application of what is here described as the limiting principle of just deserts. This principle places a lid on what may be done by way of rehabilitative zeal and ensures that the penalty of imprisonment is not transformed into a benevolent disposition that can be

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2 Some of the following discussion is taken from I. Potas, Just Deserts for the Mad (1982, 186 ff).
extended for an indeterminate period for the good of the offender at the whim of administrative or executive decision-makers.

Perhaps the way in which the object of rehabilitation and community protection are circumscribed is best illustrated in cases where the offender has a psychiatric abnormality. Thus if what has been advanced in the preceding pages is correct, it is not appropriate for a sentencing court to impose extra punishment in order to afford the offender an opportunity for rehabilitation.

In Channon v. R ([1979] 20 ALR 1, p. 9; cf R v. Veen above, p. 178) Brennan J said that 'the limits of a proper sentence' are determined 'without taking into account the treatment of psychiatric abnormality'. A sentence within those limits, said his Honour, would constitute proper punishment, being neither excessive nor referable merely to the treatment of the abnormality. Thus once the penalty was set within those limits . . . 'to enable a cure to be undertaken', the various objectives of sentencing are properly evaluated, including the interests which society and the offender have in his psychiatric rehabilitation. A proper balance is struck, and punishment is limited accordingly.

Brennan J considered that psychiatric treatment could be taken into account for the purposes of determining sentence where:

- the offender suffers from a mental abnormality which contributed to the relevant offence;
- psychiatric treatment for that abnormality is likely to be made available to the offender during imprisonment;
- the offender is likely to avail himself of that treatment; and
- there is a reasonable prospect that the treatment will reduce or eliminate the abnormality (ibid, p. 10).

These factors may be seen as constituting some of the considerations involved in 'fine-tuning' a sentence once the limits are determined. However, it is submitted that the first factor would more properly be relevant for determining the upper limits of just punishment, because this consideration more properly relates to the offender's moral culpability in the commission of the offence. The other factors may affect both the quantum and the kind of sentence within the permissible range, and therefore both humanitarian and utilitarian considerations may be taken into account. Where, for example, the object of community protection is considered relevant, other factors relevant to sentencing which do not bear on culpability, may be prevented from functioning so as to mitigate the sentence. Sometimes rehabilitation or treatment objectives may allow mitigation particularly where the risk to the community is not serious, or where there are strong humanitarian reasons for following a lenient course.

Sometimes a penalty may be reduced below the range dictated by the principle of just deserts. In such a situation, assuming that the sentence is not erroneous, the result may be described as involving an act of mercy. Mercy
should also play a part in the sentencing process but its overuse by judicial officers may lead to a weakening of the just deserts principle. It should be used sparingly and always with good reason (Potas 1980, pp. 69–74).

Deane J in *Channon* expressed the view that it was not part of a criminal court's function to impose 'either within or outside' the permissible limits of a sentence a longer term of imprisonment than would otherwise be appropriate merely on the basis that it would benefit the mental health of the accused ([1979] 29 ALR 1, p. 21). His Honour added that:

> A sentence of imprisonment must be regarded as a punishment (*Power v. R* [1974] 131 CLR 623 at 627; subnom *Lyons v. R* [1974] 3 ALR 553 at 555–6). It can only properly be imposed on the basis that it is the appropriate punishment for the particular offence in the particular circumstances.

Similarly, Toohey J said that it was an improper exercise of sentencing discretion 'to impose a sentence solely for holding a prisoner for psychiatric treatment'. However, his Honour went on to qualify this by stating that where the offender, by reason of abnormality, constituted a danger to the community, then this would be a relevant consideration for the purposes of determining the proper sentence. He referred to the passage from *Cuthbert* (p. 178) and observed that the purpose of community protection did not make it inappropriate for the court to take into account the availability of a cure for the accused. However, such a consideration could not be used to justify a sentence of imprisonment 'longer than would otherwise be a proper sentence' ([1979] 20 ALR 1, pp. 27–8). He then referred to the need to identify 'the limits of a proper sentence' adding that it is improper to increase a sentence beyond the appropriate range for the offence itself 'merely in order to provide an opportunity to cure' the offender (ibid. *R v. Moylan* [1970] 53 Cr App R 594).

Toohey J also observed what he described as a logical difficulty in first excluding from consideration the curative element, and then bringing it into account. However, he expressed the opinion that only on pragmatic grounds was such an approach justified and that it provided a desirable solution and one likely to safeguard the prisoner's interests ([1979] 20 ALR 29).

These days, the non-rehabilitative nature of imprisonment is acknowledged and it is almost a daily occurrence in the criminal courts to hear counsel for the prisoner contend that his or her client has good prospects for rehabilitation and therefore should not be visited with a custodial sentence.

The focus on a just deserts policy in sentencing frees the sentencing judge from being overly concerned with the effectiveness of his or her decisions. Provided the decisions are fair and just there can be no ground for complaint. Rehabilitation has never really replaced the principle of proportional punishment, and some commentators have suggested that it has never really been tried. Frankel (1973, p. 93), for example, has said that the sentence of imprisonment that purportedly is 'tailored to the cherished needs of the individual turns out to be a crude order for simple warehousing'. Others have found also that characteristically there are no treatment facilities of any substantial nature in prisons (New South Wales. Royal Commission into New South Wales Prisons 1978; Braithwaite 1980).
Application of Utilitarian Principles to Just Deserts

If, as has been suggested, the principle of just deserts is a limiting rather than a defining principle (it does not indicate what the precise sentence should be), then the sentencing judge may, in the exercise of his or her discretion, apply utilitarian considerations to determine where, within the acceptable range, the ultimate penalty should lie. Normally a sentence may be reduced below the ceiling indicated by the gravity of the offence and the culpability of the offender in order 'to reflect the presence of mitigating factors in the offender's character or personal circumstances' although, in general, no penal objective justifies the imposition of a sentence that exceeds that ceiling (Thomas 1979).

Thomas (1979) has identified a number of special cases in which the English courts have refused to make allowances for mitigating factors. These include cases where the courts have made use of the exemplary sentence\(^3\), where the prisoner is labelled a dangerous offender\(^4\), where the prisoner is considered to be a social nuisance\(^5\), or a persistent offender, or in circumstances in which it is considered that the prisoner is likely to benefit from treatment in prison.

It has been held, for example, that the fact that the offender is a social nuisance, for whom the health and social service authorities are unable or unwilling to provide, is no justification in itself for a long sentence (R v. Tolley [1979] Crim Law Review 118). In R v. Clarke ([1975] 61 Cr App R 320, 323) Lawton LJ, when dealing with an offender who was sentenced to eighteen-months imprisonment for breaking a flower pot worth one English pound in a violent fit of temper, said 'very firmly indeed' that:

> Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their sentencing powers to dispose of those who are socially inconvenient. If the courts became disposers of those who are socially inconvenient the road ahead would lead to the destruction of liberty. It should be firmly understood that Her Majesty's judges stand on the road barring the way. The courts exist to punish according to the law those convicted of offences. Sentences should fit crimes.

While these special cases constitute examples of where the court may refuse to take into account the usual mitigating factors, they have not been held to justify increasing the severity of a sentence beyond that required by application of the proportionality principle. This general principle is consistent also with the passages quoted from R v. Veen above and is

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3 The 'exemplary sentence' refers to a sentence which serves the purpose of general deterrence by being referable strictly to the facts of the offence and makes no allowance for mitigating factors.

4 The dangerous offender is one who by virtue of his offence, his prior history and his mental condition, is considered likely to commit violent crimes in the future.

5 The social nuisance is one who has a long history of minor offences and suffers from a mild form of personality disorder with 'a history of intermittent stays in mental hospitals'. He will generally have shown himself to be unresponsive and uncooperative with social welfare and criminal justice agencies.
supported by the recent High Court decision of *R v. Veen* below. In the USA it is usual to challenge disproportional punishment on the basis that it constitutes cruel and unusual punishment in violation of the eighth amendment to the United States Constitution. In *Weems v. United States* ([1910] 217 US 349), the court held that it was a ‘precept of justice that punishment for crime should be graduated and proportioned to the offense’. In *R v. Langley* ([1970] 70 SR (NSW) 403), for example, the New South Wales Court of Criminal Appeal reduced a sentence of six-years imprisonment to one of three-years because the original sentence was held to contain an element of preventive detention for which there was no legislative mandate. Similarly, as recently as November 1990 in *Roadly* ([1990] 51 A Crim R 336), the Court of Criminal Appeal in Victoria, substituted a common law bind-over for a sentence of imprisonment of six years, on the ground that the court went beyond the sentence which was proportionate to the crime and instead had imposed a sentence of preventive detention.

**Preventive Detention**

It might be thought that Wootton's social defence objective could be achieved in part at least, by providing the courts with added power to detain those who pose a threat to community safety. Under the present system, this requires legislative provisions that enable the bad risks to be identified and isolated from the community for extended periods.

It has long been recognised that the probability of future imprisonment increases with each term of imprisonment, and therefore the logical course for reducing crime is to detain the recidivist for extended terms. In 1895, the Gladstone Committee (C.7702, para 28) published statistics showing how the probability of further imprisonment increases with the number of prior sentences. Within a decade, New South Wales introduced its *Habitual Criminals Act 1905* and shortly afterwards other Australian jurisdictions followed suit (Potas 1982, pp. 191–6). However, the history of recidivist provisions shows that while such laws are often approached with enthusiasm they gradually lose judicial favour as it becomes recognised that the petty offender rather than the so-called dangerous criminal recidivist bears the brunt of such legislation.

Thus in England, the typical preventive detainee has been described as 'an incompetent, petty swindler or pilferer, whose dishonesties cost society little more—and in some cases less—than his maintenance in prison' (Potas 1982). These laws have failed to catch the type of offender for which they were designed (Great Britain. Advisory Council on the Penal System 1978, paras 84–115). Where legislation is directed specifically at an individual person, as apparently is the case with Garry David in Victoria, one cannot help feeling that such a person would have a 'justifiable sense of grievance' (Wood 1990). However while such a selective approach may appear unfair and sets a dangerous precedent, this may be preferable to a preventive detention statute which applies across the board.

In view of the difficulty of predicting who may properly be designated as dangerous, and particularly due to the lack of hard evidence supporting its
benefits, preventive detention is a highly selective and potentially discriminatory strategy of dubious efficacy and morality. The only saving grace is that in Australia, and particularly in New South Wales, it has generally fallen into disuse (Biles 1979).

**Structuring the Discretion**

Indermaur (1991) recently completed a study comparing judicial and public attitudes on crime seriousness and sentencing in Perth and has found that the majority of the public did not think that sentences received by offenders were fair and consistent. He also found that while there was a general consensus about the relative seriousness of crimes, sentencers placed more emphasis on rehabilitation, while the public favoured greater use of imprisonment or incapacitation—particularly in relation to violent crime. He comments:

> The fact that there always tends to be a combination of purposes associated with both individual sentences in general reflects the vagueness and the uncertainty regarding sentencing (Indermaur 1991).

The eclectic approach, he suggests, leads to confusion, and fuels the antagonism and dissatisfaction of the public.

It is not merely that sentencers have a smorgasbord of purposes from which they may select—they also have different styles or approaches to sentencing (Lawrence & Howell 1986). If at least some structure or direction were articulated—a structure which would provide a rational basis for resolving how to select amongst the competing objectives of sentencing, the prospect for achieving greater consistency in sentencing and community satisfaction with sentencing would surely be enhanced.

In *R v. Young, Dickensen and West* ([1990] 45 A Crim R, 147, 149), the Victorian Court of Criminal Appeal considered that a two-step approach to determining sentence was such a departure from long-established practice in Victoria that its adoption was likely to lead to sentencing error.

The two-step approach means first making a decision upon the outer limit of the sentence, usually by reference to the objective circumstances of the offence, and then applying the recognised aggravating and mitigating factors to that determination in order to arrive at the appropriate sentence.

The Victorian Court of Criminal Appeal held that to hold sentencers to such a rigid formula would work injustice, and cited a passage from *Williscroft* ([1975] VR 292, at 299) where the majority of the court had stated that it 'is profitless . . . to attempt to allot the various considerations their proper part in the assessment of the particular punishments presently under examination' (*R v. Young, Dickensen & West* [1990] A Crim R 147 at 151–2).

If this two-stage process means that the sentencing judge must spell out what the ceiling is, and how much discount is to be given for each of the various considerations, then the author would agree with the views expressed in *Young, Dickensen and West*. This criticism is similar to the views expressed by Hunt J, discussed at the beginning of this paper.

What the author is advocating, however, is a rational and consistent approach to the task of sentencing—a framework for the thought-processes
within which the various elements of sentencing can be considered in a logical or sequential order by the sentencing judge. This still leaves room for the 'instinctive synthesis' to occur, but at the same time ensures a uniformity of approach to the task at hand. It provides the climate, in the author's opinion, for promoting a consistency of approach which is regarded as vital to the administration of sentencing justice.

A Consistent Approach to the Sentencing of Offenders

This paper will now briefly outline in more concrete terms how a more consistent approach to the sentencing of offenders might be achieved.

Stage one would require the sentencing court to give careful consideration to the objective circumstances of the offence. This primary analysis involves an assessment of the seriousness of the criminal conduct under review. Here seriousness would include an analysis of such factors as the offender's motives, intent, the degree of premeditation, as well as the extent of harm (or threatened harm) resulting from the offence. In order to assess the degree of criminality the author would also include an assessment of the offender's mental capacity, or degree of insight or appreciation of the possible consequences of the act, as such factors may bear on the culpability or degree of blameworthiness which may properly be attributed to the offender.

In addition to taking into account these objective factors, other considerations—such as the statutory maximum penalty and the penalties imposed in like cases—would need to be considered. These then, should assist the sentencer to assess the degree of criminality of the offender and notionally derive the upper limit of a just sentence for the offence.

By the upper limit of a just sentence the author means the penalty which is commensurate with or proportionate to the seriousness of the offence. To impose a sentence beyond that limit would be unjust or morally objectionable having regard to the circumstances of the offence.

It is not necessary, and indeed may not be desirable, for the sentencer to expressly state what he or she considers to be the upper limit of the proportionate or justly deserved sentence. Indeed, what the sentencer may have in mind at this stage is a range within which the appropriate penalty should fall.

Having derived the upper limit or ceiling of the penalty—and possibly also a lower limit—other considerations relating to the offender, that is the subjective consideration, should be taken into account.

The most important of these is the offender's prior criminal record. A bad criminal record may diminish the effect of factors which operate in mitigation of sentence, while a clear record (or prior good character) may indicate that a more lenient sentence should be considered.

At this stage also, we can call upon the utilitarian considerations of sentencing. Thus if the offender is mentally disordered and the disorder is of a temporary nature and amenable to treatment, then this factor may operate so as to mitigate the penalty. On the other hand if the offender's condition is such that the prognosis of a cure is poor, and that, on the best evidence available, there remains a significant risk of the offender committing serious crime in the future, then it may not be appropriate to mitigate the sentence on
account of the offender's mental condition. The point is that the fine-tuning of the sentence involves an application of utilitarian considerations (such as deterrence, rehabilitation, protection of the community).

In *Roadly* ([1990] 51 A Crim R 336), for example, the offender was a forty-year-old intellectually disabled paedophile with a mental age of a six-year-old child. He had pleaded guilty to the sexual penetration of an eight-year-old boy while the latter was bending over picking up some lollies behind some shops. There was evidence that the offender had committed similar offences in the past, had minimum appreciation of the consequences of his behaviour and had limited, perhaps non-existent, impulse control. The Victorian Court of Criminal Appeal regarded imprisonment in this case as going beyond the sentence proportionate to the crime and, in view of the offender's mental condition, considered that little weight should have been given to the principle of general deterrence.

The author believes it is this kind of case which illustrates the primary position of the principle of proportionality and the secondary or subsidiary place of utilitarian considerations. It also illustrates, and in the author's respectful opinion properly, the limited scope of court's role in protecting the community from crime. Certainly the legislature proscribes certain forms of behaviour and prescribes penalties for their breach in an effort to discourage criminal behaviour, and this is done for utilitarian purposes. However, it has been argued in this paper that the sentencing judge's role is, first and foremost, to ensure that the sentence that is imposed is fair and just having regard to the seriousness of the offence and the background of the offender.

Finally then, the author would add a third stage to the sentencing process. Having derived what is regarded as an appropriate sentence, the sentencing judge, prior to pronouncing the sentence, should consider whether the sentence so derived but not yet articulated is fair and reasonable in all the circumstances. This involves a reconsideration or further consideration of the pattern of sentences imposed in similar cases, a consideration of whether in the opinion of the sentencing judge the resultant sentence would be acceptable to the community (it should accord with their moral sense). The principle of parsimony should also be considered to ensure that the penalty under consideration is not unduly severe.

Special considerations may also apply in the case of the multiple offender, where concurrent and consecutive sentences are involved. In these circumstances the court should be satisfied that the aggregate sentence is neither too lenient nor too severe in all the circumstances. The 'totality principle' and the practical significance of the sentencing order should also be assessed with care (*R v. Holder & Johnston* [1983] 3 NSWLR 245 per Street CJ at 260).

Any of these policy considerations may necessitate an adjustment of the sentence which the sentencing judge has in mind before it is finally imposed by the court.

**Concluding Remarks**

If consistency of approach in sentencing is a desirable objective, it seems sensible that an attempt be made to prioritise the general principles or purposes of
sentencing. Further, some attempt to structure the judicial discretion by providing guidance as to how information relevant to sentencing should be considered or processed must surely be a positive step forward.

Although reasons for judgment should be given and all appropriate principles referred to, it is not suggested that the sentencer should be required to articulate each step in the process. Nor should the sentencer be required to indicate what precise weights are to be given to the oft competing considerations that arise in the decision-making process. It is simply that if the method for arriving at the appropriate sentence is approached in a uniform way by all judicial officers there is likely to be more consistency in sentencing itself. In turn this must lead to an improvement in the respect and confidence of the community in the administration of criminal justice.

References


Braithwaite, J. 1980, Prisons, Education and Work, Australian Institute of Criminology, Canberra.


