SUSPENDED SENTENCES AND PREVENTIVE SENTENCES: ILLUSORY EVILS AND DISPROPORTIONATE PUNISHMENTS

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I. INTRODUCTION

A suspended sentence threatens future harm for criminal conduct that has already occurred. It is a term of imprisonment, the execution of which is wholly or partly suspended. Ostensibly, it is a heavy sanction. Available in most Australian jurisdictions and in the United Kingdom, it is frequently employed to punish serious breaches of the criminal law. For example, in 1996 there were over five thousand suspended sentences imposed in Victoria alone.[1] During this period, in the County and Supreme Courts of Victoria (which have jurisdiction over the most serious criminal offences) the suspended sentence was the second most commonly imposed sanction, comprising about 30 per cent of all sanctions.[2] On the face of it, such figures are unremarkable and are unlikely to prompt consternation, since the popularity of the suspended sentence among sentencers is matched by the enthusiasm for them among recipients. It has been noted that "a defendant who has committed an offence so serious as to merit imprisonment but who has had that sentence wrongly suspended is obviously

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1 There were 360 suspended sentences imposed in the County and Supreme Courts and 4760 in the Magistrates' Courts: Caseflow Analysis Section, Courts and Tribunal Services Division, Department of Justice, Victoria, *Sentencing Statistics: Higher Criminal Courts Victoria*, 1996 at 137; Caseflow Analysis Section, Courts and Tribunal Services Division, Department of Justice, Victoria, *Sentencing Statistics: Magistrates' Court Victoria*, 1996 at 242. In total there were 82 452 matters finalised in the Magistrates' Court during 1996 and 1205 in the County and Supreme Courts - all of the figures are based on the penalties imposed on persons sentenced based on the principal offence, as opposed to the penalty imposed for each offence charged.

2 More precisely the figure is 29.8 per cent (360 of a total of 1205 penalties that were imposed): *Sentencing Statistics: Higher Criminal Courts Victoria*, note 1 *supra* at 137. The most common sanction was an immediate term of imprisonment. In the Magistrates' Court during 1996 the suspended sentence was the fifth most frequently imposed sanction (behind a fine, licence order, bond and community based order). This equated to 6 per cent of the total sentences handed down: *Sentencing Statistics: Magistrates' Court Victoria*, note 1 *supra* at 242.

more likely to be out celebrating than dashing to the Court of Appeal".[3] It will be argued that there is good reason for offenders' enthusiasm towards suspended sentences; they do not constitute a recognisable form of punishment at all.

This paper considers the nature of the suspended sentence, particularly the pragmatic and conceptual difficulties with it. Following an analysis of the concept of punishment, it is contended that the suspended sentence is merely an illusory unpleasantness and should therefore be abolished as a sentencing option. Further, recent recommendations to reintroduce suspended sentences as a sentencing option in New South Wales,[4] the only jurisdiction in Australia where it is presently unavailable, should be rejected.

The suspended sentence will then be compared with the preventive (or protective)[5] sentence, which, it is argued, is the logical converse of the suspended sentence. A preventive sentence inflicts immediate harm on an 'offender', normally in the form of imprisonment, on account of threatened future criminal conduct; while the suspended sentence threatens a future evil (in the form of restoration of the term of imprisonment which has been suspended) for criminal conduct that has already occurred. Suspended and preventive sentences are also alike in that both violate the principle of proportionality, which forms another basis on which suspended sentences should be abolished. Despite this symmetry, suspended sentences are generally widely accepted, while preventive sentences are almost universally condemned.

II. BACKGROUND AND OVERVIEW OF SUSPENDED SENTENCES

Sanctions in the form of suspended sentences have a long history, their first use can be traced back to the ecclesiastical courts in the fourteenth century.[6] Today, the suspended sentence is available as a sentencing option in the United Kingdom and all Australian jurisdictions,[7] except New South Wales where it

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3 JQ Campbell, "A Sentencer's Lament on the Imminent Death of the Suspended Sentence" [1995] *Criminal Law Review* 293 at 294.

4 For example, see New South Wales Law Reform Commission Discussion Paper 33, *Sentencing*, 1996 at 354-5.

5 The terms preventive sentence and protective sentence are used interchangeably.

6 For a history of suspended sentences, see M Ancel, *Suspended Sentences*, Heinemann (1971). Despite the long history of suspended sentences there is a relative dearth of literature on them.

7 There are however variations regarding the circumstances in which they can be imposed and the consequences of breach. In Victoria a term of imprisonment may be suspended where the court is satisfied that it is desirable to do so in the circumstances (*Sentencing Act* 1991 (Vic), s 27(1)). The power to suspend sentences where drunkenness or alcohol contributed to the commission of the offence was abolished on 1 September 1997 due to the frequency with which such sentences were breached. In England, a term of imprisonment may only be suspended in exceptional circumstances (*Powers of Criminal Courts Act* 1973 (UK), s 22). As to the meaning of exceptional circumstances, see M Wasik, "The Suspended Sentence 'Exceptional Circumstances'" (1998) 162 *Justice of the Peace* 176. In relation to the circumstances in which a suspended sentence may be imposed in other jurisdictions, see: *Crimes Act* 1914 (Cth), s 20(1)(b), where the court has the power to attach a wide range of conditions to the suspension (such sentences are called recognisance release orders); *Criminal Law (Sentencing) Act* 1988 (SA), s 38; *Penalties and Sentences Act* 1992 (Qld), s 144; *Sentencing Act* 1997 (Tas), ss 7, 25;

was abolished in 1974.[8] Suspended sentences have been subject to the greatest amount of empirical analysis in Victoria and England, and hence this discussion will focus largely on their availability and use in these jurisdictions. They were introduced in Victoria in 1915,[9] but were not available in England until 1967.

In these jurisdictions, suspended sentences are regarded as heavy sanctions. For example, in Victoria they rank fourth in the hierarchy of gravity of sanctions behind immediate terms of imprisonment, combined custody and treatment orders,[10] and intensive corrections orders.[11] They are commonly described as a threat perched like the Sword of Damocles over the head of offenders during the period of operation.[12] All terms of imprisonment of not more than three years may be wholly or partly suspended in Victoria,[13] and the maximum operational period of a suspended sentence, the period during which the offender must not commit another offence, is three years.[14] The position is similar in England, where any sentence of imprisonment of two years or less may be wholly or partly suspended for a period of between one and two years.[15] The reason that suspension is allowed only in relation to relatively short sentences of imprisonment is because it is felt that any sentence beyond this would be for an offence that is so serious that it would be inappropriate to suspend punishment.[16]

Sentencing Act 1995 (WA), s 76; *Sentencing Act* 1995 (NT), s 40; *Crimes Act* 1900 (ACT), s 556B(1)(b).

8 Suspended sentences existed in New South Wales until 1974 (*Crimes Act* 1900 (NSW), ss 558-62). They only applied where the offender had not previously been convicted of an indictable offence and had not previously been sentenced to imprisonment. The execution of the sentence could only be suspended where the offender entered a recognisance to be of good behaviour for not less than 12 months. Suspended sentences were abolished following the recommendation of the New South Wales Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure*, 1973 at 15. The report concluded that the common law bond was a superior sentencing sanction in dealing with first time offenders and that the suspended sentence provisions were too restrictive regarding when they could be applied and what could be done in the event of a breach.

9 *Crimes Act* 1915 (Vic), s 532 (see *R v Richmond* [1920] VLR 9; *R v Timms* [1921] VLR 503, regarding the circumstances in which suspended sentences could be imposed); *Crimes Act* 1928 (Vic), s 532. Suspended sentences were not adopted in the *Crimes Act* 1958 (Vic), but were reintroduced by the *Penalties and Sentences Act* 1985 (Vic), ss 20-4.

10 *Sentencing Act* 1991 (Vic), ss 18Q, 5(4A).

11 *Ibid*, ss 19, 5(5).

12 For example, see *R v Locke and Paterson* (1973) 6 SASR 298 at 301-2; *R v Edwards* (1993) 67 A Crim R 486. In Victoria, a wholly suspended sentence is treated as one of immediate imprisonment for all statutory purposes except for "disqualification for, or loss of, office or the forfeiture or suspension of pensions or other benefits" (*Sentencing Act* 1991 (Vic), s 27(5)). See also *Sentencing Act* 1995 (NT), s 40(5). However, where a term of imprisonment is only partly suspended, the sentence is considered to be one of imprisonment for the whole term (*Sentencing Act* 1991 (Vic), s 27(8)). See also *Sentencing Act* 1995 (NT), s 40(8).

13 *Sentencing Act* 1991 (Vic), s 27(2A). In Queensland and the Northern Territory, the maximum term that may be suspended is five years (*Penalties and Sentences Act* 1992 (Qld), s 144(1); *Sentencing Act* 1995 (NT), s 40(1)), while in South Australia, Tasmania and the Australia Capital Territory no such limit exists.

14 *Sentencing Act* 1991 (Vic), s 27(2A).

15 *Powers of Criminal Courts Act* 1973 (UK), s 22(1). The offender must also be over the age of 20.

16 For example, see Victorian Sentencing Committee Report, *Sentencing Vol 1*, 1988 at 323. In Victoria and England where a suspended sentence is imposed the court does not have the power to impose additional conditions. A suspended sentence may be coupled with other sanctions, such as a fine, but these additional sanctions cannot form a condition of the suspended sentence. Thus a failure to pay a

Where a suspended sentence is breached there is a presumption favouring its restoration.[17] In the United Kingdom and Victoria, if the offender commits an imprisonable offence during the period of the suspended sentence the court must activate the suspended sentence and commit the offender to prison, unless it would be unjust to do so.[18] In Victoria, the presumption is even stronger because in determining if it would be unjust to activate the term of imprisonment only *exceptional* circumstances may be considered.[19]

On balance, suspended sentences are viewed favourably by courts and commentators. However, they have come under criticism in two respects. First, on the basis that the reasoning process leading to their imposition is logically unsound. Secondly, that they have been unsuccessful in achieving their (perceived) aim of reducing prison numbers. Although both these criticisms are of some merit, I will argue that neither constitutes a decisive attack on suspended sentences as a sentencing option. I will then discuss what I consider to be a far more persuasive objection to suspended sentences.

III. CRITICISMS OF SUSPENDED SENTENCES

A. The Reasoning Process Underlying Imposition of Suspended Sentences

(i) Conceptual Incongruity Underlying the Imposition of Suspended Sentences

A paradoxical aspect of suspended sentences is that, strictly speaking, they may be imposed only where it is felt that an immediate custodial sanction is appropriate.[20] The court must first reach the conclusion that an immediate term of imprisonment is warranted, fix the sentence and only then consider whether to suspend the sentence.[21] The absurdity in such an approach stems from the fact that an immediate term of imprisonment is a sanction of last resort; it can only be imposed if the sentencer is satisfied that the purpose or purposes for which the

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fine which is imposed in addition to a suspended sentence does not constitute a breach of the suspended sentence. The only condition which is imposed is that the offender not commit an offence during the operational period. This is the same as the position in Queensland (*Penalties and Sentences Act* 1992 (Qld), ss 4, 144(1)). In contrast, in South Australia, Tasmania, the Northern Territory, and under the Commonwealth legislation there is power to impose other conditions (*Criminal Law (Sentencing) Act* 1988 (SA), s 38(1)(b); *Sentencing Act* 1997 (Tas), ss 7, 25; *Sentencing Act* (NT), s 40(2); *Crimes Act* 1914 (Cth), s 20(1)(a)).

17 Where, however, a suspended sentence is not activated, other options include: extending the term of the suspended sentence; activating only part of the term; and taking no action at all (*Sentencing Act* 1991 (Vic), s 31(5); *Powers of Criminal Courts Act* 1973 (UK), s 23(1)).

18 *Sentencing Act* 1991 (Vic), s 31(5A); *Powers of Criminal Courts Act* 1973 (UK), s 23(1).

19 This is in contrast to the position in England where the court may consider *all* of the circumstances. It has been held that if the breaching offence is minor and not serious enough to justify a term of imprisonment in itself, this is a strong consideration against activating the suspended sentence (*Stacey v R* [1994] Crim L R 303). However, the fact that the breaching offence is of a different nature from the original one does not mean that it is unjust to activate the term (*R v Moylan* [1970] 1 QB 143; *Saunders v R* (1970) 54 Cr App R 247). In Victoria, the 'exceptional circumstances' requirement has not yet been the subject of authoritative judicial interpretation.

20 *Sentencing Act* 1991 (Vic), s 27(3); *Powers of Criminal Courts Act* 1973 (UK), s 22(2)(a).

21 See *Trowbridge* [1975] Crim L R 295.

sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.[22] If all of the factors in mitigation have been considered at the outset and an immediate custodial sentence is imposed, there is nothing left which can reduce the severity of the penalty.[23] Once sentences higher up in the sentencing hierarchy than a suspended sentence have been dismissed as too mild, it is farcical to claim that a suspended sentence is appropriate, particularly when there are no new variables to tip the scales further in favour of a more lenient disposition. It is an affront to both the laws of physics and logic to propose that vacuity can produce change.

However, the main purpose in suspending a sentence is to encourage reform of the offender,[24] and thus the main consideration in determining whether or not to suspend a sentence is the prospects of rehabilitation.[25] This accords with the historical aim of the suspended sentence which is to prevent criminal behaviour, rather than to match a penalty with the gravity of the offence.[26] In view of this, the reasoning process behind suspended sentences can be defended by arguing that while such sentences are only imposed where it is determined that an immediate sentence is appropriate, a softening in the sanction can occur where the offender has particularly good prospects for rehabilitation. However, this is unsound. Prospects of rehabilitation are, and should be, factored into the initial sentencing determination, rather than counted twice.

The confusion that the above approach encourages is illustrated by the comments of an English Magistrate, JQ Campbell, who in opposition to the changes placing stricter limits on the availability of suspended sentences in the United Kingdom since October 1992,[27] stated that "if I am dealing with a case where I would have suspended a custodial sentence prior to October 1992 but now feel prevented from doing so it would be fundamentally unjust to impose an immediate custodial sentence".[28] This sentiment is clearly erroneous. A suspended sentence should not have been imposed in the first place if it was unjust to impose an immediate term.

(ii) Practical Problems Stemming From the Reasoning Process Underlying Suspended Sentences

In light of the incongruity of the logical reasoning underlying the imposition of suspended sentences, it is hardly surprising that certain anomalies or unanticipated consequences have emerged regarding their use. Empirical studies reveal that only about half of suspended sentences imposed appear to represent a diversion from immediate custodial sentences, while the other half reflect net widening, that is, imposing a suspended sentence in circumstances where a less

22 *Sentencing Act* 1991 (Vic), ss 5(3), (4); *Criminal Justice Act* 1991 (UK), ss 1(2)(a), (b).
23 See DA Thomas, *Principles of Sentencing*, Heinemann (2nd ed, 1979) p 244.
24 See, for example, *R v Robinson* [1975] VR 816 at 828; *R v Davey* (1980) 50 FLR 57.
25 See, for example, *R v Gillan* (1991) 54 A Crim R 475; *Malvaso v R* (1989) 168 CLR 227; *Graham v Bartley* (1984) 57 ALR 193.
26 Note 6 *supra*, p 12.
27 These changes are discussed below.
28 Note 3 *supra* at 294-5.

severe penalty would otherwise have been imposed.[29] Suspended sentences have also resulted in a trend towards sentence inflation, whereby offenders are given extra time in light of the term being suspended. A survey by Tait regarding the use of suspended sentences in Victoria during the period 1985-91 showed that for Victorian magistrates the inflation rate was about 50 per cent.[30]

In terms of the main recipients of suspended sentences, evidence seems to support the view that they are used largely as a means of appearing tough on those who are normally treated leniently anyway: middle-class offenders and those with a settled life style.[31] A survey by Moxon in 1988 of Crown Courts disclosed that suspended sentences were common in breach of trust of cases, typically involving white collar workers.[32] Where they were imposed on those with a criminal record, this was generally in relation to those who appeared to have a more settled future.[33]

The absurdity associated with the reasoning process behind suspended sentences is not, however, a persuasive reason for their abolishment. For this is merely a contingent matter which has no bearing on the intrinsic character of the suspended sentence as a criminal sanction. For example, a necessary and sufficient precondition to a suspended sentence could just as easily be that it is the most appropriate sanction in light of its ranking in the sentencing hierarchy, whatever this might be. However, if suspended sentences are to remain a viable sentencing option the need for transparency and intellectual honesty requires revision regarding the circumstances in which they may be imposed.

B. The 'Success' of Suspended Sentences

(i) The Position in England

In England, the suspended sentence was introduced without detailed consideration of its use in other countries[34] as part of an effort to reduce prison numbers.[35] To this end it appears to have failed:

> the accumulated evidence is not encouraging. If the main object of the suspended sentence was to reduce the prison population, there are considerable doubts as to whether it has achieved this effect. It may have even increased the size of the prison population.[36]

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29 D Tait, "The Invisible Sanction: Suspended Sentences in Victoria 1985-1991" (1995) 28(2) *Australian and New Zealand Journal of Criminology* 143 at 149. Diversion, during the period of Tait's study, was largely confined to offenders with no or few prior convictions, whereas penalty escalation was targeted at those with an extensive criminal record (at 150-1).

30 For example, a six month suspended term was seen as equivalent to an immediate term of about four months: *ibid* at 153-4.

31 See D Moxon, *Sentencing Practices in the Crown Court*, HMSO Study 103 (1988) p 35.

32 *Ibid*, pp 34-6: it was noted that 29 per cent of sentences for theft in breach of trust were suspended, despite the principle that suspended sentences are rarely appropriate in such cases. See also, note 29 *supra* at 150-1.

33 Note 31 *supra*, pp 35-6.

34 AE Bottoms, "The Advisory Council and the Suspended Sentence" [1979] *Criminal Law Review* 437.

35 Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties*, HMSO (1978) at [263].

36 R Jenkins, Home Secretary, in HC Committee Debates, Standing Committee A (session 1966-67) Vol II, cols 544-5, as cited in AE Bottoms, note 34 *supra* at 438.

It is suggested that there were three reasons for this failure. First, on many occasions accused received suspended sentences where previously they would have received a non-custodial order such as a fine. Secondly, the term of a suspended sentence was generally longer than an immediate custodial sentence and upon breach the term was often implemented in full and consecutively. Finally, for the next offence committed after a suspended sentence, the natural penalty was a period of imprisonment.[37]

Other reasons advanced for the failure of the suspended sentence are that:

> [It was seen as a] convenient *via medium*, midway between the custodial and non-custodial penalties, so that courts previously hesitating between the two and coming down on the side of non-custodial penalties would now choose the suspended sentence as an obvious alternative; and *secondly*, that many [sentencers] did not share the official Government thinking behind the introduction of the suspended sentence, and saw it not as an alternative to prison but as an especially effective Sword of Damocles which would deter individual offenders much more surely than probation or the fine.[38]

Despite the apparent failure of suspended sentences to live up to expectations, the Advisory Council on the Penal System on Sentences of Imprisonment in its report in 1978 proposed no change in relation to suspended sentences.[39] It stated that one of the benefits of the suspended sentence was that it provided courts with a sanction allowing offenders to avoid actual imprisonment; "roughly three quarters of offenders given suspended sentences are not imprisoned for the offence for which the suspended sentences were given".[40] However, as Bottoms has pointed out, "it is the *ultimate* impact on the prison population of the whole effect of a suspended sentence, not just the apparent immediate impact, which really matters for penal analysis".[41]

The ineffectiveness of the suspended sentence in reducing the prison population is demonstrated by the fact that since it was abolished in England in 1982 for offenders under the age of 21, there is no evidence that this resulted in an increase in the number of immediate custodial sentences regarding such offenders.[42]

The dissatisfaction with the suspended sentence as a punitive measure in England culminated with measures being taken to reduce its use. As a result of changes introduced by the *Criminal Justice Act* 1991 (UK), which came into effect in October 1992, the use of suspended sentences, in terms of the overall number of penalties imposed, fell from ten per cent to one per cent for males and

37 Note 34 *supra* at 438-9. The breach rate for suspended sentences in England is about one-quarter (A Ashworth, *Sentencing and Criminal Justice*, Butterworths (1995) p 286).

38 Note 34 *supra* at 444. See also AE Bottoms, *The Suspended Sentence After Ten Years: A Review and Reassessment*, University of Leeds (1979); RF Sparks, "The Use of Suspended Sentences" [1971] *Criminal Law Review* 384.

39 Note 35 *supra* at [263].

40 *Ibid* at [266].

41 Note 34 *supra* at 439.

42 A Ashworth, note 37 *supra*, p 286.

from eight per cent to two per cent for females.[43] This change occurred primarily because it became a requirement that custodial sentences were to be suspended only in exceptional circumstances.[44] Obviously, the message that the suspended sentence "should be used far more sparingly than it has been in the past",[45] was clearly received by the courts.

(ii) The Experience in Victoria

The English experience of suspended sentences is in contrast to that in Victoria, where the overall impact of suspended sentences has resulted in a reduction in the prison population.[46] As I adverted to earlier, the suspended sentence is a widely utilised sanction in Victoria. For example, in 1991 it accounted for five per cent of all sanctions imposed in the Magistrates' Court and 20 per cent of sanctions imposed by the County and Supreme Court (the Higher Courts).[47] By 1996 this had grown to about six per cent and 30 per cent respectively.[48]

In Victoria the breach rate for suspended sentences in 1990 was 18 per cent, which was less than half the rate in England. The activation rate for those breaching suspended sentences was also significantly less in Victoria than in England: 54 per cent, compared to about 80 per cent.[49] The difference in the breach rates can be explained on the basis that the length of the operational period of suspended sentences in England was up to three years as opposed to one year in Victoria.[50]

Accordingly, to the extent that their objective is to reduce prison numbers, suspended sentences have succeeded in Victoria. In light of this, Tait concludes that:

> [Suspended sentences] are still something of a mystery. They threaten future pain to ensure present compliance. They depend for their success on the avoidance of certain behaviours rather than the performance of activities. They appear to be inconsistent with other forms of penalty which extract money, work, reporting

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43 *Ibid*, pp 10 and 287. These changes have not been universally welcomed. Some feel that they have lost a vehicle which allows them to signify the seriousness of offences, while showing mercy in particular cases (see note 3 *supra* and also M Wasik, note 7 *supra*).

44 *Powers of Criminal Courts Act* 1991 (UK), s 22(2)(b), as amended by the *Criminal Justice Act* 1991 (UK), s 5 (1). This has been interpreted very strictly. Circumstances which are normally considered mitigatory such as good character, remorse and a plea of guilty are not exceptional (*Okinikan v R* (1992) 14 Cr App R (S) 453). A similar view was endorsed in *R v Robinson* (1993) 14 Cr App R (S) 559. However, it has been held that depression could amount to exceptional circumstances (*R v French* [1993] Crim L R 893, but cf *R v Bradley* [1994] Crim L R 381); as could the need to rehabilitate an offender with a family (*R v Cameron* [1993] Crim L R 721); and as could terminal illness (see note 3 *supra*). See also M Wasik, note 7 *supra*.

45 *Lowery v R* (1993) Cr App R (S) 485.

46 Note 29 *supra* at 157-9.

47 *Ibid* at 149. The significantly greater proportion of suspended sentences imposed by the higher courts follows from the fact that about 70 per cent of all sentences passed in these courts involve a gaol term, compared to approximately only 10 per cent of the sentences passed in the Magistrates' Court.

48 See notes 1 and 2 *supra*.

49 See note 29 *supra* at 155.

50 This was extended to two years in April 1991 and three years in September 1997 *(Sentencing Act* 1991 (Vic), s 27(2)).

behaviour or loss of liberty. In a system which prides itself on proportionality and consistency, it is hard to make a case for an invisible, intangible, but frequently irresistible sanction. Except that it works.[51]

(iii) Evaluating Suspended Sentences by Reference to Reduction in Prison Numbers

However, Tait's argument is flawed. Sentencing options cannot be evaluated on the basis of their impact on the frequency with which other sentencing options are used. Otherwise it could be argued that mandatory prison sentences for road traffic offences are desirable because they would reduce the amount of fines issued. More particularly, the effect on the prison population is not a weighty, far less the sole, consideration by which the success of a criminal sanction may be assessed. If keeping people out of jail is the measure of success, absolute victory could be achieved by merely opening the prison gates. Less drastically, prisons would be almost totally emptied by converting every prison term of less than twelve months automatically into another sanction such as probation or a fine. But, as should be apparent by now, such suggestions totally miss the point. Indeed in many circumstances it may be that keeping people out of prison is undesirable.

The crucial, and indeed only, question in relation to the effectiveness of sentencing options is whether they fulfil the objectives of a properly considered and coherent system of punishment. Imprisonment is not an objective, but rather a means, of punishment. Unfortunately, a meaningful analysis of the extent to which the suspended sentence promotes the objectives of punishment is not possible, given that a primary sentencing rationale has not been adopted by any sentencing system in Australia or the United Kingdom. This is in keeping with a worldwide phenomenon: the sentencing codes of most countries do not expressly adopt a particular theory of punishment,[52] and where sentencing objectives are declared they are often inconsistent.[53] Good examples are the *Sentencing Act* 1991 (Vic) and the *Criminal Justice Act* 1991 (UK).

The *Sentencing Act* 1991 (Vic)[54] expressly adopts the utilitarian based goals of deterrence, rehabilitation and incapacitation on the one hand, while simultaneously promoting (apparently inconsistent) retributive objectives such as denunciation and just deserts, and then provides that these five purposes are exhaustive of the purposes for which sentences may be imposed. However, by failing to prioritise the respective importance of these objectives it seems that they were adopted in blissful ignorance of any inconsistency or tension between them. The *Criminal Justice Act* 1991 (UK) fares no better. The White Paper upon which the Act is based clearly supported a retributive theory of

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51 See note 29 *supra* at 159.

52 Note, though, that until relatively recently, the West German Code adopted a primarily retributive approach and the sentencing system in the former Yugoslavia was essentially utilitarian: see N Walker, *Why Punish?*, Oxford University Press (1991) p 8.

53 RG Fox and A Frieberg, *Sentencing State and Federal Offences*, Oxford University Press (1986) p 444 notes that at various times retribution, deterrence, rehabilitation, denunciation, incapacitation, education and community protection have all been advanced as the sole or main purpose of criminal sentencing.

54 Section 5(1).

punishment: "the first objective of all sentencing is denunciation and retribution for the crime".[55] In light of this it has been suggested that the Act gives desert and proportionality a primary role,[56] yet nowhere in the Act is this made express and in fact the Act states nothing about the rationales for sentencing. Indeed the only consideration which in certain circumstances can trump all others is incapacitation, which is clearly a utilitarian goal.[57]

The unprincipled nature of sentencing practice has led to what Andrew Ashworth labels a 'cafeteria system' of sentencing, whereby sentencers may pick and chose a rationale which seems appropriate at the time with little constraint. This is made significantly easier by the large number of discrete factors that the courts have identified as being relevant to sentencing. Two separate studies about twenty years ago determined that there were between 200 and 300 such factors.[58]

In any event, the failure of legislatures to develop a primary rationale for sentencing is not significant for the purposes of this discussion, since as is discussed below suspended sentences fail at the first hurdle: they do not constitute a form of punishment.

C. Whether Suspended Sentences Constitute Punishment

Despite the ostensible severity of suspended sentences, there have been some reservations expressed about their punitive impact. In *R v King*, Lord Parker stated that "in many cases [where a suspended sentence is imposed] it is quite a good thing to impose a fine, which adds a sting to what might otherwise be thought by the prisoner to be a let-off".[59] Even reports generally supportive of suspended sentences as a sentencing option have acknowledged that "excessive mitigation [is] inherent"[60] in them. The 1990 Home Office White Paper noted that:

> Many offenders see a suspended sentence as being a 'let off' since it places no restrictions other than the obligation not to offend again. If they complete the sentence satisfactorily, all they have felt is the denunciation of the conviction and

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55 Great Britain Home Office, *White Paper: Crime, Justice and Protecting the Public*, HMSO (1990) at 2 (White Paper).

56 A Ashworth, note 37 *supra*, p 81. The White Paper, upon which the 1991 Act is based, declared that proportionality was the primary consideration (ch 1 and 2), see *ibid.*

57 Section 1 makes it clear that the only reason for going beyond a proportionate sentence is where this is necessary to protect the public. There is also room for rehabilitation to serve as a mitigating factor: ss 4(1), 6, 8, 28(1).

58 J Shapland, *Between Conviction and Sentence*, Routledge & Kegan Paul (1981) p 55 identifies 229 factors, while R Douglas, *Guilty, Your Worship*, LaTrobe University (1982), a study of Victorian Magistrates' Courts, identified 292 relevant sentencing factors. The results of such studies were noted in *Pavlic v R* (1995) 5 Tas R 186 at 202 where it was stated that "it is impossible to allocate to each relevant factor a mathematical value, and from that, extrapolate a sum which determines the appropriate penalty".

59 [1970] 1 WLR 1016. The Advisory Council on the Penal System also thought that this would be desirable: note 35 *supra* at [288].

60 Note 35 *supra* at [268].

sentence, any subsequent publicity and, of course, the impact of acquiring a criminal record.[61]

Against this, the suspended sentence has been described as a significant punishment,[62] which carries a serious stigma.[63] Further, suspended sentences have been defended on the basis that the most effective way to prevent criminal behaviour is by internal restraints stemming from education and socialisation and that a threat of punishment is "just as 'real' as any of the other fears, expectations, obligations, and duties which populate the social world, ... and this threat is more individualised and immediate when a court imposes such a sentence".[64] It has also been suggested that the suspended sentence may be conceived as punishment since it "is not something which the offender welcomes in itself".[65]

To get to the bottom of whether a suspended sentence constitutes a form a punishment it is necessary to first investigate the essential nature of punishment and then to break down the suspended sentence into its constituent parts to ascertain how it squares with the concept of punishment.

(i) The Nature of Punishment

An enormous number of definitions of punishment have been advanced over the ages. Many incorporate somewhat controversial aspects into the definition, for example, by confining punishment to the guilty.[66] Thus, Herbert Morris defines punishment as "the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person's guilty behaviour".[67] Duff defines punishment as "the infliction of suffering on a member of the community who has broken its laws";[68] and similarly McTaggart defines punishment as "the infliction of pain on a person because he has done wrong".[69]

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61 Note 55 *supra* at [3.20]-[3.21].

62 For example, see *R v H* (1993) 66 A Crim R 505 at 510; *Elliott v Harris (No 2)* (1976) 13 SASR 516 at 527; *Patterson v Stevens* (1992) 57 SASR 213 at 217; *R v Voegeler* (1988) 36 A Crim R 174.

63 *R v Gillian* (1991) 54 A Crim R 475 at 480.

64 Note 29 *supra* at 146. See also AE Bottoms, "The Suspended Sentence in England 1967-1981" (1981) 21 *British Journal of Criminology* 1.

65 C L Ten, *Crime, Guilt and Punishment*, Clarendon Press (1987) p 2.

66 Ostensibly, confining punishment to the guilty might appear to be uncontroversial. However, one of the strongest objections which has been levelled against a utilitarian theory of punishment is that in some circumstances the utilitarian is indeed required to punish the innocent: see HJ McCloskey, *Meta-Ethics and Normative Ethics*, Martinus (1969) pp 180-1. As far as punishing the innocent is concerned, the correct position would appear to be that advanced by Walker, who provides that while punishment generally requires that the offender has voluntarily committed the relevant act, it is sufficient that the punisher believes or pretends to believe that he or she has done so: note 52 *supra*, p 2.

67 H Morris, "Persons and Punishment" in SE Grupp (ed), *Theories of Punishment*, Indiana University Press (1971) 76 at 83.

68 RA Duff, *Trials and Punishments*, Cambridge University Press (1985) p 267. See also p 151 where Duff states that punishment is suffering inflicted on an offender for an offence by a duly constituted authority.

69 JME McTaggart, *Studies in Hegelian Cosmology*, Cambridge (1901) p 129.

Other definitions include the purported requirement that punishment must be inflicted by an appropriate authority.[70] For example, Hobbes provides that

> a punishment is *evill inflicted by ublique Authority*, on him that hath done, or omitted that which is judged by the same Authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience... The aym of punishment is not revenge, but terrour.[71]

Honderich defines punishment as "*an authority's infliction of a penalty*, something involving deprivation or distress, *on an offender*, someone found to have broken a rule, for an offence, an act of the kind prohibited by the rule".[72] And in the postscript to the same book, written over a decade later, as "that practice whereby *a social authority* visits penalties on offenders, one of its deliberate aims being to do so".[73]

For the purposes of the present discussion it is not necessary to resolve timeless disputes about matters such as by whom punishment must be imposed and whether or not punishment is confined to the guilty. For present purposes, what is telling is that an indispensable feature of any tenable definition of punishment is that it must constitute some inconvenience to the offender.

Thus Bentham simply declared that "all punishment is mischief, all punishment is itself evil".[74] Ten states that punishment "involves the infliction of some unpleasantness on the offender or it deprives the offender of something valued".[75] Others have placed somewhat emotive emphasis on the hurt that punishment seeks to secure. Punishment has been described as simply pain delivery,[76] and similarly it has been asserted that "the intrinsic point of punishment is that it should *hurt* - that it should inflict suffering, hardship or burdens".[77] Walker is somewhat more expansive regarding the type of evils which can constitute punishment: he describes punishment as

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70 Walker takes the view that punishment can be ordered by anyone who is regarded as having the right to do so, such as certain members of a society or family, not merely a formal legal authority, and that punishment stems not only from violation of legal rules, but extends to infringements of social rules or customs: note 52 *supra*, p 2. This would seem to accord with general notions regarding punishment, and indeed there would appear to be many parallels between, for example, family discipline and legal punishment: see also note 67 *supra*. As Walker points out, punishment need not be by the state: it has different names depending on the forum in which it is imposed. "When imposed by the English-speaking courts it is called 'sentencing'. In the Christian Church it is 'penance'. In schools, colleges, professional organisations, clubs, trade unions, and armed forces its name is 'disciplining' or 'penalizing'": note 52 *supra*, p 1. For all this I shall not get weighed down on the identity of the punisher. This discussion is concerned with the social institution of punishment as authorised by the state and for the purposes of this paper I will assume that punishment is imposed by a person in legal authority.

71 T Hobbes, *Leviathan*, Washington Square Press (1969) ch xxviii, emphasis added.

72 T Honderich, *Punishment: The Supposed Justifications*, Penguin Books (1984) p 15, emphasis added. This definition is shortened at p 19 to include only the words in italics.

73 *Ibid*, p 208.

74 J Bentham, *Principles of Morals and Legislation* (1789) ch 13.2.

75 Note 65 *supra*, p 2.

76 N Christie, *Limits to Pain*, Martin Robertson (1981).

77 RA Duff, "Punishment, Citizenship & Responsibility" in H Tam (ed), *Punishment, Excuses and Moral Development*, Avery Aldershot (1996) 1 at 2.

> the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases death.[78]

Finally, von Hirsch states that "punishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong, under circumstances and in a manner that conveys disapprobation of the offender for his wrong".[79]

The requisite inconvenience flowing from punishment has been described in numerous ways, including evil, pain, suffering, or hurt. Linguistic creativity aside, the important point to emerge is that despite continuing unresolved issues about the nature of punishment, one settled feature is that punishment involves an unpleasantness imposed on the offender.[80] This incontrovertible and seemingly innocuous truth is fatal to the continuation of the suspended sentence as a sentencing option.

(ii) The Components of the Suspended Sentence

The suspended sentence has two components. The first is the term of imprisonment which is imposed. Clearly, it cannot be argued that this constitutes a form of unpleasantness since by the very nature of the sanction it is suspended precisely in order to avoid its effective operation. The other aspect of the suspended sentence is the possibility that the period of imprisonment may be activated if a condition related to the sentence, namely that the offender not re-offend, is breached during its operation.[81] And it is this feature of the suspended sentence which supposedly carries the sting. Accordingly, although the suspended sentence contains no tangible inherent unpleasantness, a real unpleasantness is imposed since the people undergoing it face the *risk* of activation in the event of a breach.

However, it is erroneous to describe such a risk as being capable of comprising a punitive measure. Every person in the community faces the risk of imprisonment if they commit an offence which is punishable by imprisonment.[82] In this way the natural and pervasive operation of the criminal law casts a permanent Sword of Damocles over all our heads: each action we perform is subject to the criminal law. Despite this it has never been seriously asserted that we are all undergoing some type of criminal punishment. It follows logically that the risk of imprisonment in the event of a future commission of a criminal

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78 Note 52 *supra*, p 1.

79 A von Hirsch, *Past or Future Crimes*, Manchester University Press (1986) p 35. See also Ten who states that punishment is not merely the imposition of unpleasantness on the offender: "the imposition is made to express disapproval or condemnation of the offender's conduct which is a breach of what is regarded as a desirable and obligatory standard of conduct" (note 65 *supra*, p 2).

80 For the sake of completeness, in my view punishment is an unpleasantness; the taking away of something of value for a wrong actually or perceived to have been committed: see M Bagaric, "The Disunity of Sentencing and Confiscation" (1997) 21(4) *Criminal Law Journal* 191 at 197.

81 The fact that a conviction also must normally be recorded when a suspended sentence is imposed is not an integral part of the suspended sentence. This association is merely contingent; there is nothing to prevent a sentencing system making a conviction optional where a suspended sentence is imposed.

82 Which are the only type of offences for which a suspended sentence may be restored: *Sentencing Act* 1991 (Vic), s 31(1); *Powers of Criminal Courts Act* 1973 (UK), s 23(1).

offence is not a criminal sanction; it is a nullity in terms of punitive effect. The situation is obviously somewhat more precarious for those undergoing suspended sentences: in addition to the risk faced by all of us of imprisonment if we commit a criminal offence, they have the more specific risk that commission of an offence may also result in them being imprisoned by virtue of restoration of the sentence which is suspended. But this additional risk is of precisely the same *nature*[83] (the possibility of imprisonment in the event of committing an offence) as that borne by all members of the community. It is irrelevant that for those undergoing suspended sentences the likely level of unpleasantness is greater should the risk eventuate; the difference is one of degree, not nature. It is important to note that this conclusion follows not from a 'mere' value judgement, but is rather an irresistible mathematical truth: two times zero is still zero.

The illusory punitive nature of the suspended sentence is emphasised, in that not only offenders who breach suspended sentences receive a greater penalty than is warranted by the immediate offence. Offenders with prior convictions are also typically dealt with more harshly than those without a criminal record. Though offenders are not punished again for their previous crimes,[84] the earlier offending may disentitle them from leniency by not allowing a reduction in sentence for good character.[85] Despite this it cannot be contended that offenders who have 'served their time' are still undergoing punishment.

Thus the true picture seems to be that the suspended sentence suffers from the fundamental flaw that it does not constitute a discernible unpleasantness. Rather it merely signifies a possible future unpleasantness: if there is no breach, there is no evil.[86] Moreover, given that avoidance of the unpleasantness for those undergoing suspended sentences is totally within their control, during the period of 'sentence' they are in the identical position as the rest of the community, in so far as being subject to criminal sanctions is concerned. The equation is the same: offend and risk jail; abide by the law and suffer no unpleasantness.

(iii) Community Attitudes Regarding Suspended Sentences

Surveys regarding community attitudes about the ranking of penalties have shown that few are deceived by the superficial punitive veneer of the suspended sentence. A survey conducted in Philadelphia and Pennsylvania asked respondents (consisting of a group of police officers, a group of inmates, a group of probation officers and an undergraduate criminology class) to rank 36

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83 The individualised nature of the risk of imprisonment which stems from a suspended sentence, as opposed to the risk of imprisonment faced by the community generally which follows from laws with universal application is also irrelevant. This is evident from the fact that criminal laws applying to only a relatively small section of the community (such as workplace safety laws which apply only to employers, or laws which apply only to lawyers, police, estate agents and the like) are not considered by their nature to be more severe.

84 For example, see *R v Ottewell* [1970] AC 642 at 650.

85 For example, see *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 487-9. See also note 23 *supra*, p 197.

86 In fact, as we have seen, even where there is a breach it is not mandatory that the term be restored.

different penalties, ranging from death to a $10 fine in order of severity.[87] These penalties included suspended sentences of three years, 12 months and six months.[88] The mean rank orders for these from the four groups[89] were 27, 30 and 32 respectively. All of the suspended sentences ranked in order of severity below a fine of $500[90] and above a fine of $250.[91] It was concluded that "a suspended sentence involving the prospect of a *possible* prison sentence for a specified term is less burdensome than the *immediate* inconvenience of probation supervision or a financial penalty".[92]

In England, a survey revealed that members of the public viewed the suspended sentence as the least punitive sanction of seven common penalties. The suspended sentence was considered more lenient than probation and even softer than a small fine.[93] Such a view appears to be widespread. A survey of lay justices found that suspended sentences of six months were regarded as more lenient than probation of two years and both of these sanctions were below a one hundred pound fine.[94] The conclusion to be drawn is that suspended sentences are regarded as more lenient than almost any sentence of peremptory punishment, and "although apparently second only to immediate imprisonment on the sentencing hierarchy, [the suspended sentence] is treated in practice as an option much lower down the ladder".[95]

The inadequacy of suspended sentences as a punitive measure is further illustrated by comparing them with their converse: protective (or preventive) sentences.

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87 See L Sebba and G Nathan, "Further Explorations in the Scaling of Penalties" (1984) 24 *British Journal of Criminology* 221 at 229. The most severe sanction was rated one.

88 There was also a suspended sentence coupled with a $1000 fine, which ranked 23rd: *ibid* at 228.

89 There was a strong correlation from the results of each group, hence it was legitimate to average the scores of the four groups.

90 Which was ranked 26th: note 87 *supra* at 228.

91 Which was ranked 33rd: *ibid*.

92 *Ibid* at 231. An earlier survey conducted by Sebba revealed that a $250 fine was regarded as more severe than a six month suspended sentence: L Sebba, "Some Explorations in the Scaling of Penalties" (1978) 15 *Journal of Research in Crime and Delinquency* 247.

93 N Walker and C Marsh, "Do Sentences Affect Public Disapproval?" (1984) 24 *British Journal of Criminology* 27 at 31. A suspended sentence was regarded as the least punitive of the penalties which respondents were requested to place in order of most to least punitive. The rankings which occurred were: 12 months imprisonment, one month imprisonment, $100 fine, $40 fine, community service, probation and, finally, the suspended sentence.

94 A Kapardis and DP Farrington, "An Experimental Study of Sentencing by Magistrates" (1981) 5 *Law and Human Behaviour* 107.

95 A Freiberg and RG Fox, "Sentencing Structures and Sanction Hierarchies" (1986) 10 *Criminal Law Journal* 216 at 228 and 220.

IV. BACKGROUND AND OVERVIEW OF PREVENTIVE SENTENCES

A. The Nature of Preventive Sentences

A preventive sentence is a sanction that is imposed in response to some future harm that it is anticipated the 'offender' may commit. Morris neatly encapsulates the essence of preventive sentences by comparing them to pre-emptive strikes: "in the criminal law, if not in international relations, the pre-emptive strike has great attraction; to capture the criminal before the crime is committed is surely an alluring idea".[96]

Thus the protective sentence imposes a present evil, normally in the form of imprisonment, for criminal behaviour which has not as yet occurred and may in fact never occur.[97] It is aimed at people whose perceived propensity for engaging in violent[98] behaviour is so high that they are an unacceptable risk to the community.

Two other types of sentences have also loosely been referred to as protective sentences: indefinite sentences and additional fixed sentences.[99] Indefinite sentences are penalties imposed without a termination date. They can be imposed at the outset or as an extension of a normal sentence. Indefinite sentences are typically reviewable at defined intervals by a court and are now available in many Australian jurisdictions.[100] Additional sentences are sanctions that are imposed beyond that which is appropriate for the particular offence, normally due to previous offences which have been committed by the offender.[101] The main difference between preventive sentences on the one hand and indefinite and additional sentences on the other is that preventive sentences

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96 N Morris, "Dangerousness and Incapacitation" in A Duff and D Garland (eds), *A Reader on Punishment*, Oxford University Press (1994) 241 at 241.

97 See also PA Fairall, "Violent Offenders and Community Protection in Victoria - The Gary David Experience" (1993) 17 *Criminal Law Journal* 40 at 50. Fairall defines a preventive sentence as "the incarceration of individuals so as to incapacitate or prevent them from committing crimes in the future".

98 The economy of dangerousness was not always the risk to physical integrity. In the early part of this century it was the risk to one's property: J Pratt, *Governing the Dangerous: Dangerousness, Law and Social Change*, Federation Press (1997) pp 8-70. Pratt provides a thorough analysis of the evolution of the concept of dangerousness. Pratt states that the focus of dangerousness mainly relates to violence, offences against children and sexual offences, and that the focus on habitual offenders has disappeared, p 100.

99 Note 4 *supra* at 125.

100 For example, see *Sentencing Act* 1991 (Vic), ss 18A-P (see *Moffat v R* (1997) 91 A Crim R 557, where an indefinite sentence was imposed); *Penalties and Sentences Act* 1992 (Qld), Pt 10 (see *R v Eather* (unreported, District Court (Qld), Daly DCJ, 26 October 1993) where an application for an indefinite sentence was refused); *Sentencing Act* 1995 (NT), ss 65-78; *Sentencing Act* 1995 (WA), ss 98-101; *Criminal Law (Sentencing) Act* 1988 (SA), Pt 2, Div III; *Criminal Code* 1924 (Tas), s 392 (see *Read v R* (1997) 94 A Crim R 539). The most extreme indefinite sentence provision which relies on predictions of future dangerousness is found in Texas, where capital punishment can follow instead of life imprisonment where "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (*Texas Code* Crim Proc Ann s 37.071).

101 For example, see *Crimes Act* 1900 (NSW), ss 115, 443; *Criminal Law (Sentencing) Act* 1988 (SA), s 22; *Sentencing Act* 1991 (Vic), Pt 2A; *Criminal Justice Act* 1991, ss 1(2)(b), 2(2)(b). For an analysis of such provisions, see RJ Henham, "Dangerousness, Rationality and Sentencing Policy" (1997) 26 *Anglo-American Law Review* 493.

relate solely to anticipated future harm, rather than, at least partly, to conduct which has already occurred.[102] It is for this reason that only protective sentences are properly the inverse of suspended sentences. Accordingly, I will focus only on them.

B. Preventive Sentence Legislation

In Australia there have been two separate pieces of legislation which have provided for protective sentences: the *Community Protection Act* 1990 (Vic)[103] and the *Community Protection Act* 1994 (NSW).[104] Both were *ad hominem* in nature: each was directed at a particular 'dangerous' individual.[105] The Victorian Act targeted Garry Webb (also known as Garry David) and the New South Wales legislation applied only to Gregory Kable.

The Victorian Act allowed for the preventive detention of Garry David for up to 12 months if the Supreme Court was satisfied that he presented a risk to the safety of any member of the public and that it was likely that he would commit any act of personal violence to any other person.[106] The NSW legislation provided that a court could order the preventive detention of Gregory Kable for up to six months where it was satisfied on the balance of probabilities that Kable was more likely than not to commit a serious act of violence.[107] This legislation was enacted in response to concerns that Kable, who was due for release after serving a sentence for the manslaughter of his wife, would harm relatives of the deceased whom he had sent threatening letters from jail. Multiple applications could be made for the detention of Kable; thus effectively he could be detained indefinitely.

The Victorian Act was repealed in 1993 following the suicide death of Garry David.[108] In *Kable v DPP (NSW)*,[109] the New South Wales Act was ruled invalid by the High Court. By a four to two majority[110] it was held that the Act violated

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102 Indefinite and additional sentences also violate the principle of proportionality, see *Chester v R* (1988) 165 CLR 611 at 619 where indefinite sentences were described as stark and extraordinary.

103 As amended by the *Community Protection (Amendment) Act* 1991 (Vic). For background leading to the passing of the Act, see D Greig, "The Politics of Dangerousness" in S Gerull and W Lucas (eds), *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform, Conference Proceedings*, Australian Institute of Criminology (1993) 47 at 56-8. The Community Protection (Violent Offenders) Bill 1992 (Vic), which was a more generalised form of the *Community Protection Act* 1990 (Vic), was ultimately not passed following heavy criticism by the Parliament of Victoria Social Development Committee, *Inquiry into Mental Disturbance and Community Safety: Third Report: Response to the Draft Community Protection (Violent Offenders) Bill*, 1992.

104 See also *Criminal Justice Amendment Act* 1993 (NZ), s 34(1)(b) which provides for preventive detention where the court is satisfied "that there is substantial risk that the offender will commit a [relevant] offence upon release".

105 For a discussion regarding the perceived difficulties in defining dangerousness: see P Mullen, "Mental Disorder and Dangerousness" (1984) 18 *Australia and New Zealand Journal of Psychiatry* 8; P Scott, "Assessing Dangerousness in Criminals" (1977) 131 *British Journal of Psychiatry* 140; D Greig, note 103 *supra* at 53.

106 *Community Protection Act* 1990 (Vic), ss 4, 8.

107 *Community Protection Act* 1994 (NSW), s 5(1).

108 *Sentencing (Amendment) Act* 1993 (Vic), s 17.

109 (1997) 189 CLR 51 (*Kable*).

110 Toohey, Gaudron, McHugh, Gummow JJ; Brennan CJ and Dawson J dissenting.

the separation of powers doctrine[111] embodied in Chapter III of the Commonwealth Constitution because it conferred a non-judicial function on the Supreme Court by requiring the Court to participate in a process which was "far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person",[112] and was so repugnant that it exceeded the outer limits of judicial power.

Each member of the majority had different reasons for striking down the Act. However, there were several features of the Act which the Court found particularly offensive. For one, it removed the ordinary protections inherent in the judicial process by permitting the deprivation of liberty without a finding of guilt for an offence,[113] and enabling an opinion to be formed on the basis of material that may not be admissible in legal proceedings.[114] Also, the outcome of any application appeared to be pre-determined by the Legislature, since it clearly was not envisaged that an order to detain Kable would be refused, and thereby the Act seemed to make the court an instrument of the Legislature.[115] Finally, there was the *ad hominem* nature of the legislation.[116]

Thus the legislation in *Kable* was struck down by the High Court due to unique features of the Act which the Court believed infringed the separation of powers doctrine embodied in the Constitution.[117] However, in my view, there is a more general objection to protective sentences, which stems from their incompatibility with the principle of proportionality. Before discussing the application of the principle of proportionality to protective (and suspended) sentences, I shall first consider the arguments which are normally levelled against protective sentences.

V. OBJECTIONS TO PREVENTIVE SENTENCES

A. Punishment For Crimes Not Yet Committed

The most common objection to protective sentences relates to the notion of punishing people for crimes that have not been committed. This line of

111 The separation of judicial power from executive and legislative power imposes two broad limits on governmental power. First, Parliament cannot usurp judicial power and, secondly, functions cannot be conferred on courts which are incompatible with the exercise of judicial power (it was this latter limit which was violated in *Kable*). Although *Kable* concerned state legislation, and the separation of powers doctrine was not a feature of the constitution of any of the states, the High Court nevertheless held that the doctrine was applicable to state courts because state courts are invested with and exercise federal jurisdiction (see note 109 *supra* at 143, per Gummow J; at 114-15, per McHugh J).

112 Note 109 *supra* at 122, per McHugh J.

113 For example, see *ibid* at 106-7, per Gaudron J; at 98, per Toohey J; at 122, per McHugh J; at 132-4, per Gummow J.

114 For example, see *ibid* at 106-7, per Gaudron J; at 122, per McHugh J.

115 *Ibid* at 122, per McHugh J.

116 *Ibid* at 134, per Gummow J; at 98, per Toohey J.

117 For comment regarding the legality of the Victorian Act see note 97 *supra* at 40, 46-9; D Wood, "A One Man Dangerous Offenders Statute - *The Community Protection Act* 1990 (Vic)" (1990) 17 *Monash University Law Review* 497 at 501-5. For an analysis of *Kable*, see J Miller, "Criminal Cases in the High Court of Australia" (1997) 21 *Criminal Law Journal* 92.

reasoning has been developed in several ways. It has been claimed that it is simply inherently unfair to punish in such circumstances.[118] And, it has been argued that protective sentences are intuitively antagonistic to the notion of punishment: "one may promise punishment (or reward) for a future action, but to award it in advance would somehow seem to make it something else; a deterrent or incentive".[119] Despite the common sense appeal of such arguments, closer scrutiny reveals that their persuasiveness depends largely on which theory of punishment one adopts.

The first point to note is that a sound argument can be mounted that protective sentences are not intrinsically wrong, and that any intuitive unease towards them stems not from their perceived unfairness but from an underlying acknowledgement that human conduct can never be accurately determined in advance. If human conduct could be accurately predicted the intuitive disquiet about preventive sentences would in many instances readily dissipate. For example, if a person who was aware of the tragic events in Port Arthur, Tasmania, on 28 April 1996 when Martin Bryant killed 35 people went back in time to a moment shortly before the incident and had the opportunity to impose a protective sentence upon Bryant, it is doubtful whether many informed people would raise the slightest protest at the decision to imprison Bryant. Predictions about human behaviour will of course never become so accurate that such tragedies could be precisely forecast. However, fantastic examples such as this are helpful since they sharpen and illuminate the real premises and assumptions underlying our sentiments and conclusions.[120]

(i) Utilitarian and Retributive Approaches to Protective Sentences

The suggestion that the above example shows that protective sentences are not inherently wrong is perhaps somewhat premature, since it may depend on which theory of punishment is being invoked. There are two main contemporary theories of punishment: utilitarianism and retributivism.[121] The utilitarian theory of punishment regards punishment in itself as bad because it causes unhappiness to the offender. Punishment is only justified because of the wider contingent benefits it produces, which it is felt on balance outweigh the bad consequences. The suffering it inflicts on the offender is outweighed by the good consequences it produces by discouraging both the offender from re-offending and potential offenders from committing crimes in the first place, and thereby leading to a reduction in the frequency in which socially desirable laws are violated. If there are alternative forms of punishment which produce the same good consequences

118 See Victoria Law Reform Commission Report 31, *The Concept of Mental Illness in the Mental Health Act 1986*, 1990 where it is argued that preventive sentences are an affront to civil liberties.

119 Note 52 *supra*, p 69.

120 For a discussion regarding the use of fantastic examples, see note 65 *supra*, pp 18-25.

121 Retributivism (under the banner of just deserts) has replaced utilitarianism, at least ostensibly, as the prime philosophical theory justifying punishment. However, I have previously argued that in reality a utilitarian theory of punishment still best fits the relevant sentencing variables: see note 80 *supra*. For an overview of the academic and social trends in punishment, see A Duff and D Garland, "Thinking about Punishment" in A Duff and D Garland (eds), note 96 *supra* 1 at 8-16; A von Hirsch, note 79 *supra*, ch 1; note 52 *supra*, ch 1; A Ashworth, note 37 *supra*, ch 13.

we must chose the one which imposes the least unpleasantness on the offender. On this view, the main benefit of punishment is the reduction of crime by deterring the criminal and others in the community and rehabilitating the offender, thereby reinforcing the wrongness of criminal behaviour providing a tangible sanction. Thus the utilitarian theory of punishment is forward looking: the commission of a criminal act does not justify punishment, instead punishment is only warranted because some good can flow from this. Clearly, from an utilitarian perspective there is no absolute obstacle to protective sentences; they are justified where this will increase net happiness. Thus, if we could be certain that a person would in the future commit an act resulting in immense suffering then net happiness would be advanced by imprisoning the potential offender.[122]

However, this conclusion does not follow as surely from a retributive theory of punishment. It has been noted that retributivists are committed to the position that preventive sentences are necessarily wrong:

> once an offender has undergone his 'just deserts' sentence, he has 'paid his debt to society' and is fully entitled to be released. To subject him to a further period of imprisonment is to punish him not for past offences, but for possible (and only possible) future offences.[123]

Morris claims that preventive sentences are wrong even if we could be certain that the offender will offend in the future. He contends that people should be punished for what they have done, not for what they will or might do. People should be treated as responsible moral agents who can choose whether or not to commit future crimes, rather than treating them as 'unexploded bombs'.[124]

Wood rejects the proposition that the retributivist is necessarily committed to the inherent wrongness of preventive sentences, on the basis that retributivism only offers a theory of punishment, not a complete account of circumstances in which people can be forcibly detained. Wood argues that while protective sentences are unjustified, civil detention of dangerous offenders may be permissible on retributivist grounds as this has nothing to do with questions of desert but rather with social protection.[125] However, the distinction between a protective sentence and civil detention appears illusory. *Civil* detention still amounts to deprivation of liberty against one's will. This constitutes a form of punishment on the basis of the definition adopted earlier: an unpleasantness imposed on a person. A feathered bird with a bill that quacks is a duck irrespective of what one chooses to call it. Lewis makes the point somewhat more eloquently:

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122 See also J Floud and W Young, *Dangerousness and Criminal Justice*, Heinemann (1981) p 60. This observation is supported by Farrington who states that "the use of prediction within criminal justice decision making might be justifiable within a utilitarian approach to penal treatment": D Farrington, "Predicting Individual Crime Rates" in D Gottfredson and M Tonry (eds), *Prediction and Classification*, University of Chicago Press (1987) 1 at 5.

123 D Wood, "Dangerous Offenders and Civil Detention" (1989) 13 *Criminal Law Journal* 324 at 343.

124 Note 96 *supra* at 238.

125 D Wood, "Dangerous Offenders, and the Morality of Protective Sentencing" [1988] *Criminal Law Review* 424 at 425-6; note 123 *supra*.

> To be taken without consent from my home and friends, to lose my liberty, to undergo all those assaults on my personality which modern psychotherapy knows how to deliver ... to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success - who cares whether this is *called* punishment or not.[126]

Thus, given that it cannot be tenably asserted that forcible detention is not punishment, it may seem that the retributivist may be committed to denouncing protective sentences per se. This conclusion is, admittedly, complicated by the plethora of different retributive theories that have been advanced.[127] Retributive theories of punishment are not clearly delineated and it is difficult to isolate a common thread running through them.[128] All retributive theories assert that offenders deserve to suffer, and that the institution of punishment should inflict the suffering they deserve. However, they provide vastly divergent accounts of why criminals deserve to suffer.[129] Despite this, there are three broad similarities shared by retributive theories.[130]

The first is that only those who are blameworthy deserve punishment and that this is the sole justification for punishment. Thus, punishment is only justified, broadly speaking, in cases of deliberate wrongdoing.[131] The second is that the punishment must be equivalent to the level of wrongdoing.[132] Finally, punishing criminals is just in itself:[133] it does not turn on the likely achievement of consequentialist goals. Punishment is justified even when "we are practically certain that attempts [to attain consequentialist goals, such as deterrence and rehabilitation] will fail".[134] Thus is it often said that retributive theories are backward looking, merely focusing on past events in order to determine whether punishment is justified, in contrast to utilitarianism which is concerned only with the likely future consequences of imposing punishment.

The first of these similarities may appear to constitute a decisive argument against protective sentences in a retributive system of punishment. However, this is not necessarily the case if the concept of criminality is expanded slightly. While dangerousness in itself does not amount to a criminal offence, it does imperil the security of the community and because of this threat it could be argued that punishment is warranted. Viewed in this light the dangerous person

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126 CS Lewis, "The Humanitarian Theory of Punishment" in S E Grupp (ed), note 67 *supra* 301 at 304. Further, it should be noted that, a sanction does not cease to constitute punishment merely because psychiatric treatment is offered: see *Power v R* (1974) 131 CLR 623.

127 For an overview of the different theories see note 65 *supra*, pp 38-65; J Cottingham, "Varieties of Retributivism" (1979) 29 *Philosophical Quarterly* 238.

128 See also note 71 *supra*, p 211.

129 For example, see A Duff and A von Hirsch, "Responsibility, Retribution and the 'Voluntary': A Response to Williams" [1997] *Cambridge Law Review* 103 at 107.

130 J Anderson, "Reciprocity as a Justification for Retributivism" (1997) 16 *Criminal Justice Ethics* 13. As Anderson points out, all of these factors are present in what Hart refers to as "crude Retributivism". See HLA Hart, *Punishment and Responsibility*, Oxford University Press (1963) pp 231-7.

131 J Anderson, note 130 *supra* at 13, 14.

132 *Ibid.*

133 *Ibid.*

134 Note 68 *supra*, p 7.

is not innocent: through his or her behaviour he or she has caused social evil.[135] Such an approach is supported by the fact that retributivists have no difficulty with punishing people who engage in other types of conduct where the harm consists solely of threatening to violate the security of others. In this way, exhibiting tendencies, by words or conduct, which are viewed as potentially likely to lead to aggressive or harmful behaviour towards others could be classified as criminal behaviour and would be akin to offences such as stalking,[136] threats to kill or inflict serious injury,[137] and conduct endangering life or persons.[138] Thus even the retributivist is not necessarily logically committed to denouncing protective sentences and may therefore be willing to punish people purely on account of their dangerousness.[139]

It should be noted that the above analysis applies irrespective of whether or not the person has committed previous acts of violence. To the contrary, Gross contends that protective sentences are only justified for those who have already committed offences, because by doing so they have breached their supposed social contract with the rest of society which provides that once a person commits an offence they forfeit certain rights and society can deal with them as it sees fit.[140] Not only is the existence of such a contract highly dubious, but it is unclear why the focus of the inquiry should be solely on past conduct, when the aim of protective sentences is to prevent future harm and/or curtail existing community unease about the prospect of such harm. Previous conduct is only one of many factors that may lead to a diagnosis of dangerousness - if one was aware in advance of the events of the Port Arthur massacre, whether or not Bryant had prior convictions would be totally irrelevant to a decision regarding the appropriateness of a protective sentence.

B. Inability to Predict Dangerousness

Thus it would appear that whichever theory of punishment one adopts, there is no fundamental objection to punishing people for crimes that they have not committed. Despite this, in my view, protective sentences are unjustified. The real objection to protective sentences lies not in their premature character (this is merely a matter of timing) but in our inability to confidently predict future

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135 N Morris, note 96 *supra* at 250 suggests that diagnoses of dangerousness should be regarded as a statement about a person's present condition, as opposed to a prediction of future conduct. The continuing offence concept is also adverted to by D Wood, note 125 *supra* at 429.

136 For example, *Crimes Act* 1958 (Vic), s 21A.

137 For example, *Crimes Act* 1958 (Vic), ss 20, 21.

138 For example, *Crimes Act* 1958 (Vic), ss 22, 23.

139 This would of course require an offence of 'dangerousness' to be created. This would best be achieved by making 'dangerousness' a continuing offence which only ceases upon the person appropriately attenuating his or her threatening behaviour. Duff, a leading retributivist, contends that punishment must be for an offence, and an offence is something which the "law prohibits and condemns as a moral wrong": note 68 *supra*, p 153. It is arguable that the social unease created by dangerous people means that such a propensity is immoral, and thus there would not appear to be any fundamental retributive objection to creating an offence of dangerousness.

140 H Gross, "Proportional Punishment and Justifiable Sentences" in H Gross and A von Hirsch (eds), *Sentencing*, Oxford University Press (1981) 272 at 272. See also J Floud and W Young, note 122 *supra*, p 138.

human conduct. Given the complexity and unpredictability of human nature it is impossible to forecast future behaviour with any degree of certainty. Future promises, undertakings and declared intentions are one guide, but are far from conclusive. People change for the worse, but for the better as well. Behaviour is not only contingent upon fundamental values and beliefs, but also on the circumstances in which we find ourselves.

Although past conduct may be regarded as a powerful indicator of future propensities,[141] and arguably basic values and predispositions are pervasive,[142] current empirical evidence reveals that there is no reliable method for predicting dangerousness. Parke and Mason have noted that:

> There is a wealth of material on the assessment of risk and the prediction of dangerous behaviour. But despite these vast outpourings, there are no reliable actuarial and statistical devices as yet that can predict with any degree of certainty the likelihood of dangerous behaviour.[143]

The empirical evidence which does exist reveals a tendency to greatly over exaggerate the probability of future dangerous behaviour.[144] Few serious offenders commit other serious offences[145] and studies have shown that in predicting dangerousness, psychiatrists are wrong about 70 per cent of the time.[146] In *Kable*, Gaudron J described the prediction of dangerousness as "the making of a guess - perhaps an educated guess, but nonetheless a guess"[147] and McHugh J stated that it is "a prediction which can at best be but an informed guess".[148] Curiously, while the psychiatric profession has repeatedly stressed the unreliability of psychiatric predictions of dangerous behaviour, the courts appear to be increasingly relying on them.[149]

Thus it is impossible to be confident that a court which undertakes an inquiry into the dangerousness of an individual, using the best possible resources available, is likely to come to the correct decision.

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141 See comments in *Kennan v David [No 2]* (unreported, Supreme Court of Victoria, Hedigan J, 15 November 1991) at 33.

142 See CR Williams, "Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the Gary David Case" (1990) 16 *Monash University Law Review* 161 at 181-2, where he argues that in relation to people convicted of serious violent offences reliable predictions can be made regarding their future conduct. However, as was pointed out by PA Fairall, note 97 *supra* at 51, Williams offers no empirical evidence in support of such an assertion.

143 J Parke and B Mason, "The Queen of Hearts in Queensland: A Critique of Part 10 of the *Penalties and Sentences Act* 1992 (Qld)" (1995) 19 *Criminal Law Journal* 312 at 322.

144 See notes 96 and 125 *supra*; J Floud, "Dangerousness and Criminal Justice" (1982) 22 *British Journal of Criminology* 213; SR Brody and R Tarling, *Taking Offenders Out of Circulation*, HMSO, Research Study No 64 (1981); J Monahan and HJ Steadman (eds), *Violence and Mental Disorder: Developments in Risk Assessment*, University of Chicago Press (1994).

145 J Floud, note 144 *supra* at 217.

146 J Monahan, "The Prediction of Violent Behaviour: Toward a Second Generation of Theory and Policy" (1984) 141(1) *American Journal of Psychiatry* 10. Another study revealed a false positive rate of about 65 per cent: see K Kozol, "Dangerousness in Society and Law" (1982) 13 *Toledo Law Review* 241. For an extensive discussion on the research into dangerousness see P Shea, *Psychiatry in Court*, Saunders (1996) pp 155-63; note 98 *supra*, pp 171-7.

147 Note 109 *supra* at 106.

148 *Ibid* at 123. See also *Veen v R [No 1]* (1979) 143 CLR 458 at 462-7, 494.

149 Note 96 *supra* at 244.

Given this, the unease towards protective sentences stems not necessarily from the conviction that people should not be punished for crimes that they have not committed, but from the fact that we cannot predict with any degree of confidence that left to their own devices they would in fact commit serious offences in the future. This objection to protective sentences has a strong foundation in sentencing law: the principle of proportionality.

VI. THE PRINCIPLE OF PROPORTIONALITY

A. Statement of the Principle

In short, the principle of proportionality is that the punishment should fit the crime. It operates to restrain excessive, arbitrary and capricious punishment by requiring that punishment must not exceed the gravity of the offence,[150] even where it seems certain that the offender will immediately re-offend.[151] Proportionality is not a justification for punishment, but rather a restraint on it.[152] It is a principle which generally strikes a strong intuitive cord, and probably for this reason is found not only in sentencing law, but transcends many other areas of the law as well. As Fox notes, the notion that the response must be commensurate to the harm caused or sought to be prevented is at the core of the criminal defences of self-defence and provocation. It is also at the foundation of civil law damages for injury or death, which aim to compensate for the actual loss suffered, and equitable remedies, which are proportional to the detriment sought to be avoided.[153]

Proportionality is one of the main objectives of sentencing[154] and the High Court decisions in *Veen v R [No 1]*[155] and *Veen v R [No 2]*[156] even went as far as declaring it to be the predominant objective of sentencing in Australia. In other jurisdictions it is treated just as importantly. For example, in relation to the Canadian sentencing system it has been noted that "the paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence".[157] In a similar vein, the White Paper forming the basis of the *Criminal Justice Act* 1991 (UK) declared that the aim of the reforms was to introduce a

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150 For a good overview of the proportionality principle, see A Ashworth, note 37 *supra*; RG Fox, "The Meaning of Proportionality in Sentencing" (1994) 19 *Monash University Law Review* 489 at 492.

151 For example, in *R v Jenne* [1956] Crim L R 495 the court reduced a term of imprisonment despite the fact that the court believed that "it is certain that the defendant will reoffend as soon as he leaves jail".

152 RG Fox, note 150 *supra* at 491. See also A Von Hirsh, "Censure and Proportionality" in A Duff and D Garland (eds), note 96 *supra* 115 at 115.

153 RG Fox, note 150 *supra* at 491. For a historical overview of the proportionality principle, see RG Fox, "The Killings of Bobby Veen: The High Court on Proportionality in Sentencing" (1988) 12 *Criminal Law Journal* 339 at 350-1.

154 Australian Law Reform Commission Report 44, *Sentencing*, 1988 at 15-16; note 4 *supra* at 492; note 55 *supra* at 5.

155 Note 148 *supra*.

156 Note 85 *supra*.

157 Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, 1986 at 154.

"legislative framework for sentencing, based on the seriousness of the offence and just deserts".[158] Ultimately the Act did not expressly adopt these goals,[159] however the message was received in relation to the lengths of custodial sentences, the obligations of community sentences and the quantum of fines.[160]

B. Proportionality and Protective and Suspended Sentences

The importance attributed to proportionality is evident from the fact that it cannot even be trumped by what many believe to be the most important aim of sentencing: community protection.[161] In the case of dangerous offenders, while community protection remains an important objective, at common law it cannot override the principle of proportionality. A sentence cannot be increased beyond that which is commensurate with the gravity of the offence in order to increase the period for which the community is protected: "an extension [in sentence] by way of preventive detention ... is impermissible, [however] an exercise of the sentencing discretion having regard to the protection of society among other factors ... is permissible".[162] Even more pointedly, in *Chester v R*, the High Court held that "the fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender".[163] And it is for this reason that it is "firmly established that our common law does not sanction preventive detention".[164]

It follows that sanctions must be commensurate with the gravity of the offence in light of its objective circumstances. Except where legislation provides to the contrary, a sentence cannot exceed the gravity of the seriousness of the offence in order to fulfil some other objective such as protection of the community or deterrence.[165]

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158 Note 55 *supra* at [2.3].

159 See A Ashworth, note 37 *supra*, pp 81-4.

160 *Criminal Justice Act* 1991 (UK), ss 2(2)(a), 6(2)(b), 18.

161 For example, see *Channnon v R* (1978) 20 ALR 1; *R v Valenti* (1980) 48 FLR 616 at 620; *R v Williscroft* [1975] VR 292 at 298; *R v Radlich* [1954] NZLR 86 at 87; *R v El Karhani* (1990) 21 NSWLR 370 at 377.

162 Note 85 *supra* at 473. This distinction appears somewhat unclear. Fox suggests that it means that community protection is relevant to the fixing of a sentence within the outer limits established by other criteria by the notion of proportionality, as opposed to the view that community protection is a factor in determining a proportionate sentence: RG Fox, "The Killings of Bobby Veen: The High Court on Proportion in Sentencing", note 153 *supra* at 348.

163 *Chester v R* (1988) 165 CLR 611 at 618.

164 *Ibid.* See also *Chivers v R* [1993] 1 Qd R 432.

165 The principle is also given legislative recognition, for example *Sentencing Act* 1991 (Vic), ss 5(1)(a), (c) and (d); but cf s 6D(b), which provides that when a court is sentencing a serious offender (as defined in s 6B) it may impose a sentence longer than that which is proportionate to the gravity of the offence. See RG Fox, "Legislation Comment: Victoria Turns to the Right in Sentencing Reform: The *Sentencing (Amendment) Act* 1993 (Vic)" (1993) 17 *Criminal Law Journal* 394; *Criminal Justice Act* (UK), ss 2(2)(a), 6(2)(b), 18(2)(a). See also *Crimes Act* 1900 (NSW), s 442B which allows disproportionate sentences in certain circumstances, so long as the sentence is not 'unreasonably' disproportionate: *Veen v R [No 1]*, note 148 *supra*; *Veen v R [No 2]*, note 85 *supra*.

C. The Theoretical Basis for the Principle of Proportionality

Traditionally, proportionality is thought to sit most comfortably with a retributive theory of punishment. This is because the criterion for determining the amount of punishment is retrospective, namely, the seriousness of the offence. Indeed, Andrew von Hirsch (perhaps the leading contemporary retributivist) argues that proportionality should be the main goal of sentencing.[166] He contends that the basis for proportionality is essentially that "punishment is the vehicle for condemnation and as a matter of fairness punishment must be proportionate since the severity of the sanction expresses the stringency of the blame".[167] If this were not the case, that is, "were penalties ordered in severity inconsistently with the comparative seriousness of the crime, the less reprehensible conduct would, undeservedly, receive the greater reprobation".[168]

Utilitarians on the other hand place greater emphasis on prospective matters, such as the need for deterrence, rehabilitation and so on, when deciding what punishishment is appropriate. Indeed, it has even been contended that proportionality has no role in a utilitarian system of punishment. Bentham, however, has argued that proportionality in fact has a central role in a utilitarian theory of punishment. Bentham asserted that crimes should be punished in proportion to the harm done to the life and security of others in society.[169] If crimes are to be committed it is preferable that offenders commit less serious rather than more serious ones. Therefore, he argued, sanctions should be graduated commensurate with the seriousness of the offence so that those disposed to crime will opt for less serious offences. Absent proportionality, potential offenders would not be deterred from committing serious offences any more than minor ones, and hence would just as readily commit them. This argument has been persuasively criticised by von Hirsh, who points out that there is no evidence that offenders make comparisons regarding the level of punishment for various offences.[170]

However, there is an alternative argument for recognising the principle of proportionality in a utilitarian theory of punishment. Disproportionate sentences risk bringing the entire criminal justice system into disrepute because such sentences offend the apparently pervasive intuitive belief, at the root of which is the broad concept of justice, that privileges and obligations ought to be distributed roughly in accordance with the degree of merit or blame attributable to each individual. Clear violations of this principle lead to antipathy towards institutions or practices which condone such outcomes. For example, recently it has emerged that Kerry Packer, Australia's wealthiest individual whose personal wealth exceeds five billion dollars, paid no tax over the period 1989-1993.[171]

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166 A von Hirsch, *Censure and Sanctions*, Oxford University Press (1993).

167 See A von Hirsch, "The Politics of 'Just Deserts'" (1990) 32 *Canadian Journal of Criminology* 397 at 398. See also A Von Hirsch, note 152 *supra* at 125.

168 A von Hirsch, note 152 *supra* at 125.

169 Note 74 *supra*, pp 165-74.

170 A von Hirsch, note 79 *supra*, p 32.

171 See M Maiden, "How Does a Man Worth More than $5 Billion Get Away with Paying No Tax?" *Age*, 15 October 1998, p 3.

Following a protracted investigation by the Australian Taxation Office into his financial affairs, the Federal Court ruled that according to the law which existed at the time, the zero tax paid by Packer correctly represented the full extent of his tax liability.[172] This led to howls of community resentment and enmity, most notably in the form of countless calls to talk-back radio and letters to newspapers, directed against the Australian taxation system. The credibility and legitimacy of the entire system was questioned because it had failed to ensure that the level of tax paid by Packer was in proportion to his ability to pay. The same principle underlies the general community attitude towards punishing criminals. A legal system that condoned excessively harsh, or for that matter lenient, sentences would eventually lose the support of many members of the community.[173] This could result in less co-operation with organisations involved in the detection and processing of criminals and thereby lead to less crimes being reported and solved and ultimately a diminution in community safety.[174] This would then undermine the important role of the criminal law in promoting general happiness.

The difference between a utilitarian and retributive justification for proportionality is that in the case of the former proportionality is not absolute; it can be violated where this will maximise happiness. However, for the purposes of this discussion this distinction is not significant. While the retributivist may have a more absolute argument for rejecting protective sentences, the utilitarian need only seriously consider protective sentences if the accuracy of predictions of dangerousness improved such that liberty (which has enormous weight in the utilitarian calculus[175]) is outweighed by the amount of harm a person may cause and the likelihood of the harm eventuating. It is unclear whether violence prediction will ever reach a sufficiently advanced state that the utilitarian need even contemplate such a balancing task.

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

173 It was for this reason that in 1996 the Victorian Parliament, concerned about the community outrage caused by a series of apparently lenient sentences imposed by courts, sanctioned a community sentencing survey. The survey was in "Crime & Punishment Insight: The Sentencing", *The Herald Sun*, 29 July 1996. The results revealed that respondents wanted significantly tougher sentences to be imposed for numerous offences ("Crime and Punishment: Your Verdict", *The Herald Sun*, 13 September 1996, pp 1, 4, 12-15). This led to a significant increase in the maximum penalty for many indictable offences, see *Sentencing and Other Acts (Amendment) Act* 1997 (Vic).

174 See T Tyler, *Why People Obey the Law*, Yale University Press (1990) pp 107, 175-6. Following a 1984 study of approximately 1500 people who lived in Chicago about their contact with legal authorities, Tyler noted that normative issues are closely linked with compliance with the law. People do not merely obey the law because it is in their self-interest to do so, but also because they believe it is proper to do so. See also E Lind and T Tyler, *The Social Psychology of Procedural Justice*, Plenum Press (1988); M Bagaric, "Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot" (1998) 24 *Monash University Law Review* 231.

175 JS Mill, "On Liberty" in M Warnock (ed), *Utilitarianism*, Fontana Press (1986) 126 at 135: "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant".

While the incompatibility of the proportionality principle with protective sentences is clear, it should also be noted that this incompatibility extends to suspended sentences. This follows from an aspect of proportionality which is often overlooked: that it is a double-edged sword. A sentence which does not give sufficient weight to the seriousness of the offence violates the proportionality principle[176] in the same way as a sentence overstating the gravity of the offence. "Logically, proportionality operates to define the lower, as well as the upper reaches of punishment, thus containing excessively lenient as well as overly severe responses to crime".[177] Although, pragmatically, it is rare for the principle of proportionality to be invoked as a basis for increasing a sanction, if the principle is to be treated seriously there is no basis for selective application. A sanction which is a nullity in terms of the amount of unpleasantness it imposes clearly infringes this other limb of the proportionality principle.

VII. CONCLUSION

Suspended sentences should be abolished as a sentencing option. This is primarily because they do not constitute a recognisable form of punishment. They also violate the important sentencing objective of proportionality. This is apparent from the symmetry between suspended sentences and preventive sentences. Whereas preventive sentences inflict immediate harm on an 'offender', normally in the form of imprisonment, on account of threatened future criminal conduct, suspended sentences threaten future evil (restoration of the term of imprisonment) for criminal conduct that has already occurred. This symmetry may be questioned on the basis that while preventive sentences generally prompt intuitive unease, suspended sentences are widely accepted. However, this divergence of sentiment is explicable on the basis of the victims of the unfairness in the respective cases. In the case of the protective sentence, the aggrieved party is the accused, whereas with suspended sentences the aggrieved party is the entire community, which foregoes its entitlement to appropriately punish an offender. Thus, the reason that intuitively we find suspended sentences far less repugnant than protective sentences is the same reason we assume that it is worse to punish the innocent, than to acquit the guilty: with the former the apparent harshness is directed at a particular identifiable individual who must bear the entire brunt of the injustice, real or perceived, whereas in the case of the suspended sentence the unfairness is diluted by being spread amongst each member of the community. In principle, this distinction is irrelevant and cannot be permitted to subvert the conclusion that suspended sentences infringe the principle of proportionality in the same manner as protective sentences. Both

176 *R v Dodd* (1991) 57 A Crim R 349.

177 RG Fox, note 150 *supra* at 495; A Von Hirsh, *Doing Justice*, Hill and Wang (1976) p 73; A von Hirsch, note 79 *supra*.

are inappropriate sentencing options. Moreover, this conclusion follows irrespective of which theory of punishment one adopts.