

## REHABILITATING TOTALITY IN SENTENCING: FROM OBSCURITY TO PRINCIPLE

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### I INTRODUCTION

The totality principle applies in cases of multiple offending to reduce the total effective sentence that is imposed on offenders. This is normally achieved by either making some or all of the individual sentences concurrent, or by reducing the length of the individual sentences. Although totality is a well-established sentencing doctrine, its scope and its impact on the overall sentence are unclear. Current orthodoxy maintains that principles of proportionality and mercy underpin totality. This article argues that neither of these is capable of providing a solid foundation for totality, and that this area of law will remain unsatisfactorily indeterminate until a clear and defensible rationale is adopted. It is suggested that the main justification for the principle is that offenders who are sentenced for multiple offences have not had the opportunity to be rehabilitated through the imposition of earlier sanctions. While this provides a logical basis for distinguishing these offenders from those who have been sentenced for each offence separately, the size of the sentencing discount merited is not considerable given the relative importance of rehabilitation in the overall sentencing calculus.

#### A Totality in Sentencing

Sentencing is not an exact science, thus there is no single sentence that is objectively correct.<sup>1</sup> This view has resulted in suggestions that sentencing law is unprincipled and a jurisprudential wasteland.<sup>2</sup>

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1 *Freeman v The Queen* [2011] VSCA 214, [6]; *Hennessy v The Queen* [2012] NSWCCA 241, [35].

2 See Jeff Smith, 'Clothing the Emperor: Towards a Jurisprudence of Sentencing' (1997) 30 *Australian & New Zealand Journal of Criminology* 168, 170; Mirko Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21 *Sydney Law Review* 597, 608–26. Similar observations have been made in relation to sentencing systems in other jurisdictions. Leading scholar Andrew Ashworth has labelled United Kingdom sentencing law a 'cafeteria system' of sentencing: Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2<sup>nd</sup> ed, 1995) 331. In a similar vein, over 40 years ago United States federal judge Marvin Frankel described sentencing as a wasteland in the law: Marvin E Frankel, *Criminal Sentences: Law Without Order* (Hill and Wang, 1973).

The complexities and vagaries of sentencing law are compounded when an offender is sentenced for more than one offence. In such circumstances, the effective sentence is governed by several discrete sentencing considerations, the most important of which is the principle of totality.<sup>3</sup>

The totality principle is a ‘principle of sentencing formulated to assist a court when sentencing an offender for a number of offences.’<sup>4</sup> It operates to ensure that the sentence reflects the overall criminality of the offending behaviour, as opposed to a linear, mathematical cumulation of the penalty for each offence. This stance is to be contrasted with the position in other jurisdictions where consecutive sentences are common, the most obvious example being the United States,<sup>5</sup> where penalties exceeding imprisonment for over a century are sometimes imposed. Such hardships are not confined to offences that shock the community. It has been noted that ‘[t]he same wrong can be prosecuted as multiple offenses, resulting in decades- to centuries-long sentences for first-time non-violent offenders, sentences sometimes far surpassing those for murderers.’<sup>6</sup>

The effect of the totality principle is normally to reduce the overall sentence. Accordingly, offenders who are sentenced for a number of offences at the same time receive a reduced sentence compared to those who commit identical offences consecutively after the sentence for each offence has been served. An offender who commits a robbery on each of five consecutive days and is sentenced for all of the robberies at the one hearing will serve considerably less time in prison than an offender who commits five robberies several years apart, and is sentenced for each offence individually.

While, in theory, the totality principle can be stated with elegant simplicity, its scope and application are unclear. In particular, the manner in which the principle applies to offences of a different nature and those committed many years apart is uncertain. The logical reasoning process by which the totality computation is achieved remains obscure – verging on arbitrary. Moreover, the justification and rationale for totality remains unsettled and, in fact, there has been surprisingly little scholarly consideration of its foundation.

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3 Totality is a commonly invoked sentencing principle. A recent report, published by the Victorian Sentencing Advisory Council, analysed the sentencing appeals determined by the Victorian Supreme Court of Appeal for two calendar years (2008 and 2010): Sentencing Advisory Council, ‘Sentence Appeals in Victoria: Statistical Research Report’ (Report, Sentencing Advisory Council, March 2012). In 2008, there were 114 offender appeals and totality was invoked as a ground in 21 of these appeals – making it the fifth most utilised appeal ground: at 92. In 2010, there were 153 offender appeals and totality was again invoked as an appeal ground on 21 occasions – making it the fifth most frequently utilised ground for that year as well: at 95. Totality was invoked as an appeal ground less commonly in relation to Crown sentencing appeals: at 93, 96. Although in 2010, the approach to cumulation was invoked by the Crown as a ground of appeal in seven of the 27 cases.

4 *Mill v The Queen* (1988) 166 CLR 59, 62 [8] (‘*Mill*’).

5 For a good overview of the position in the United States, see Soo-Ryun Kwon, Amanda Solter and Dana Marie Isaac, ‘Cruel and Unusual: US Sentencing Practices in a Global Context’ (University of San Francisco School of Law, Center for Law and Global Justice, 2012) 36–42.

6 *Ibid* 37. The totality principle discussed in this paper focuses on Australian case law and legislation. However, it operates similarly in the United Kingdom: see Sentencing Council, ‘Offences Taken into Consideration and Totality: Definitive Guideline’ (2012).

## B Overview of Article: Key Findings and Reform Proposals

In this article we provide a rationale for the totality principle and discuss the extent to which totality should operate to mitigate sentences.

In the next section, we examine the current operation of the principle and argue that its scope is vague. We also examine the mechanics by which totality is given effect and the circumstances in which it applies.

In section three, we discuss the rationale and justification for the principle. It emerges that there is no accepted, stand-alone jurisprudential or normative justification for totality. On the basis of the current approach, the only ideal that potentially justifies totality is the principle of proportionality. However, this alone cannot justify substantial reductions in sentences. In the end, the totality principle seems to be based on an innate desire not to impose sanctions that crush offenders. It is not clear whether this merciful tendency should outweigh the dictates of a rational system of punishment and sentencing.

In section four we make reform proposals. To the greatest extent possible, luck should not define much of what is meaningful in people's lives.<sup>7</sup> Whether or not *an offender guilty of multiple offences* or *a repeat offender* happens to get sentenced consecutively or at the same time for all or some of the offences, is often a matter of fortuity. Thus, a principled reason is necessary to justify totality. On a closer analysis there is, in fact, a tenable basis for punishing less severely offenders who are sentenced for multiple offences than those who commit identical offences and are sentenced consecutively.

Two aspects of sentencing aim to dissuade offenders from reoffending: specific deterrence and rehabilitation. Offenders who are sentenced for multiple offences are denied the advantages of such interventions in relation to each offence – had they been sentenced consecutively they may have been deterred from reoffending or rehabilitated. This sets them apart from offenders who commit offences consecutively. Potentially, this different treatment supports lower sentences for offenders sentenced for multiple offences.

However, logically, the validity of this justification is contingent on the efficacy of sentencing to achieve the goals of specific deterrence and rehabilitation. The current state of the relevant empirical data provides some support for this proposition so far as rehabilitation is concerned,<sup>8</sup> but not so in the case of specific deterrence.<sup>9</sup>

Totality applies not only to sentences of imprisonment, but also to other sentencing dispositions such as fines and civil penalties.<sup>10</sup> However, in the context of imprisonment it applies most acutely and has been subject to the most extensive analysis. In this article, the focus is on its application in relation to

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7 See generally Bernard Williams, *Moral Luck* (Cambridge University Press, 1982); Mirko Bagaric, *How to Live: Being Happy and Dealing with Moral Dilemmas* (University Press of America, 2006) ch 1.

8 See discussion in section IV C below.

9 See discussion in section IV B below.

10 See *Camilleri's Stock Feeds Pty Ltd v Environmental Protection Agency* (1995) 32 NSWLR 683, 704; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560, 581 [94].

sentences of imprisonment. The recommendations made in the last part of the article, however, apply to all applications of totality.

## II EXISTING LAW

### A Common Law Doctrine

#### 1 *Circumstances in Which Totality Applies*

Totality is a common law construct. It applies in cases of multiple offending by the one offender. More specifically, the circumstances in which it applies are: (i) when an offender is being sentenced for more than one offence; (ii) when an offender is already undergoing a prison term and is being sentenced for a separate offence or offences; and (iii) when an offender has completed a sentence and is being sentenced for an offence which was committed before or during the period of the initial sentence.

While totality has a statutory basis or recognition in all Australian jurisdictions, the common law remains highly relevant.

#### 2 *The Totality Principle*

The totality principle can be stated in concise terms: it ‘requires a sentencing judge to impose a sentence or sentences which reflect the overall criminality of the offending for which the offender has been convicted.’<sup>11</sup>

In a more expansive form, the totality doctrine is set out in the following passage by David Thomas in *Principles of Sentencing*,<sup>12</sup> which is regularly cited by Australian courts as being explanatory of the principle:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong[’]; ‘when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences’.<sup>13</sup>

Thus, the effect of the principle is to reduce the sentence which an offender would have otherwise received.<sup>14</sup> In *R v MAK* (‘*MAK*’) the Court stated that the

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11 *Contin v The Queen* [2012] VSCA 247, [38]. See also *Johnson v The Queen* (2004) 78 ALJR 616, 623 [18] (‘*Johnson*’); *R v Richardson* [2010] SASC 88, [24].

12 David Thomas, *Principles of Sentencing* (Heinemann, 2<sup>nd</sup> ed, 1979) 56–7 (citations omitted).

13 For example, see *Mill* (1988) 166 CLR 59, 62; *R v Bagnato* (2011) 112 SASR 39, 61 [84] (‘*Bagnato*’); *Einfeld v The Queen* (2010) 266 ALR 598, 638 [181]; *Hankin v The Queen* (2009) NTLR 110, 129–30 [83].

14 A good overview of the workings of the principle is provided by Howie J in *Cahyadi v The Queen* (2007) 168 A Crim R 41.

totality principle should not be applied in a manner that gives the impression that there ‘is some kind of discount for multiple offending’.<sup>15</sup> However, pragmatically, there is no limit at all, given that the effect of the principle is precisely to reduce the total effective sentence in cases of multiple offending. The statement in *MAK* is, however, defensible if it is interpreted to mean that totality should not be applied to the extent that it confers an unjust penalty reduction in cases of multiple offending.<sup>16</sup>

It is settled that the totality principle is a final step in the sentencing process, which requires the sentencer to reflect on the entire gravamen of the offending and impose an appropriate penalty. In *R v Creed*, Chief Justice King stated that ultimately a sentencing judge has to ‘stand back and look at the overall picture and decide whether the total of what would otherwise be the appropriate sentence is a fair and reasonable total sentence to impose.’<sup>17</sup> In a similar vein, in *Postiglione v The Queen*, Justice Kirby described the principle of totality as being in the nature of a check to be applied after reaching a conclusion as to the appropriate sentence, having regard to the objective criminality of the conduct and matters of mitigation.<sup>18</sup>

## B Mechanics of the Totality Process

Offenders are ultimately concerned with the total effective sentence that is to be served, rather than with the mechanism by which it is arrived at. However, the courts have stated that the methodology for invoking the totality principle is important. The preferred approach in sentencing an offender for a number of offences is to determine the exact penalty for each offence and then set an effective term. In *Pearce v The Queen* (*‘Pearce’*), McHugh, Hayne and Callinan JJ noted one way to give effect to the proportionality principle:

To an offender, the only relevant question may be ‘how long’, and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.<sup>19</sup>

However, there are in fact a number of ways to apply the totality principle.<sup>20</sup> The first is to adopt the approach in *Pearce* and impose a proportionate sentence

15 (2006) 167 A Crim R 159, [18]. This notion has been approved of in numerous cases, see, eg, *Baghdadi v The Queen* [2012] NSWCCA 212, [43] (*‘Baghdadi’*); *Paxton v The Queen* [2011] NSWCCA 242, [212]; *R v Hay* [2009] NSWCCA 228, [124].

16 As discussed later, the difficulty of this construction lies in the fact that there is no basis for ascertaining the size of the discount that is appropriate.

17 (1985) 37 SASR 566, 568.

18 (1997) 189 CLR 295, 340–1 (*‘Postiglione’*). The same view was taken by Doyle CJ and Olssen J in *R v Major* (1998) 70 SASR 488, 490 and in *R v Place* (2002) 81 SASR 395, 426. See also *Johnson* (2004) 78 ALJR 616.

19 (1998) 194 CLR 610, 623–4 [45]. See also *Johnson* (2004) 78 ALJR 616, 624 [26].

20 For a discussion of the degree of flexibility that is available, see *Yeonata v The Queen* [2012] NSWCCA 211.

for each offence and then to make some or all of the discrete sentences concurrent – either wholly or in part.<sup>21</sup> The second way, which was expressly endorsed by the High Court in *Mill*, is to lower the sentence for each offence or for some of the offences below that which would otherwise have been imposed.<sup>22</sup> This approach is used less commonly. However, it is sometimes the only method by which the principle of totality can be given effect – for example, when the offender has already served a sentence for a relevant offence.<sup>23</sup>

A middle course is referred to as ‘moderate and cumulate’.<sup>24</sup> The difference between this approach and the first is discussed in *Director of Public Prosecutions (Vic) v Grabovac*, where the Court expressed disapproval of a moderate and cumulate technique. The Court stated:

In general a court should avoid imposing artificially inadequate sentences in order to accommodate the rules relating to cumulation. In other words, ... where practicable when applying accepted rules of sentencing as to totality, proportionality and the like and in order to fashion an appropriate total effective head term in relation to a series of offences, it is preferable to achieve a satisfactory result by passing appropriate individual sentences and to make those sentences wholly or partially concurrent, rather than by an order or orders for the cumulation of unnecessarily reduced individual sentences. Nevertheless, a rule of this kind can only be a precept or guideline to be applied as and when practicable.<sup>25</sup>

Subsequent decisions have not rejected the moderate and cumulate approach, and it has been suggested that there is no meaningful distinction between this and the first approach.<sup>26</sup> This is correct from the perspective of the total effective sentence that is arrived at, but the ‘moderate and cumulate’ approach does

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21 It has been noted that there is a some leeway accorded in fixing each individual sentence and that an appeal court will not scrutinise each sentence too finely. In *Hennessy v The Queen* [2012] NSWCCA 241, the Court stated at [23]–[24]:

While it may have been better for his Honour to have fixed different sentences for each offence, there is a point at which the criticism is one of form rather than substance. As long as each sentence is within the range applicable for the criminal conduct and the level of accumulation and concurrency is such that there is no error in totality, it is imposing too strict a regime on sentencing judges to require them to fix a different sentence for each offence charged. Ultimately, as the High Court has made clear in *Pearce*, the task is one of fixing an appropriate sentence duration for each offence and thereafter considering the degree of concurrence or accumulation that reflects the totality of criminal conduct.

See also *KC v Western Australia* [2008] WASCA 216, [31]; *Warner (AKA Jeremy Pachenko) v The Queen* [2013] NSWCCA 10, [46].

22 (1988) 166 CLR 59, 66–7 [16]. This approach is appropriate despite the seemingly prescriptive preference for the first approach by the High Court in *Pearce*. The supposed tension between the approaches in *Mill* and *Pearce* was reconciled by Gummow, Callinan and Heydon JJ in *Johnson* (2004) 78 ALJR 616, 624 [26], as follows:

[T]he joint judgment in *Pearce* recognises the currency of *Mill* by referring to the principle of totality which it reiterates. The joint judgment in *Mill* expresses a preference for what should be regarded as the orthodox, but not necessarily immutable, practice of fixing a sentence for each offence and aggregating them before taking the next step of determining concurrency. *Pearce* does not decree that a sentencing judge may never lower each sentence and then aggregate them for determining the time to be served.

23 See *Mill* (1988) 166 CLR 59, 66–7 [18].

24 This approach was endorsed in *R v Izzard* (2003) 7 VR 480, 485–6 [21]–[23].

25 [1998] 1 VR 664, 680.

26 See *DHC v The Queen* [2012] VSCA 52, [98] (Weinberg JA).

involve a different mathematical computation to the first approach. This can be a difference in substance, as opposed to merely form. If an offender is acquitted on appeal on some charges but not others, the first approach is likely to attract a higher remaining sentence – although it could then be adjusted on appeal.

The fourth technique to give effect to proportionality is not to specify the sentence for each offence, but to impose an aggregate sentence. In *DHC v The Queen*, it was noted that where there is a large number of individual offences, it is appropriate to confer an aggregate sentence.<sup>27</sup> As noted below, statutory provisions in several jurisdictions expressly permit sentence aggregation. The final method by which the totality principle is applied is by manipulation of the commencement time for sentences.<sup>28</sup>

### C Statutory Recognition of the Principle

Aspects of the totality principle or the mechanics by which totality can be given effect have a statutory foundation in most Australian jurisdictions. However, the totality principle per se has not been systematically developed or enshrined in any of the relevant statutory schemes. The complexities and nuances associated with the principle are not addressed in the sentencing legislation and, hence, prior to considering the detail of the principle, it is appropriate to briefly discuss the relevant legislative provisions.

The only jurisdiction to expressly endorse the totality principle is Western Australia. Section 6(3)(b) of the *Sentencing Act 1995* (WA) provides that a sentence can be reduced because of ‘any rule of law as to the totality of sentences.’ This is complemented by section 88 which creates a presumption of concurrency.

In the Commonwealth jurisdiction, the totality principle is recognised by section 16B of the *Crimes Act 1914* (Cth) which requires a court sentencing an offender to have regard to any other sentence yet to be served for any other state or federal offence.<sup>29</sup> Further, pursuant to section 19AD of the *Crimes Act 1914* (Cth), a court, when sentencing an offender for a federal offence who is already the subject of a non-parole period for a federal offence, is to have regard to a number of factors in deciding whether to impose a new parole period and, if so, the length of the period. The relevant factors are the existing non-parole period, the prior criminal history of the offender and the nature and circumstances of the offence.

Sections 9(2)(k)–(m) of the *Penalties and Sentences Act 1992* (Qld) incorporate the totality principle by prescribing that in sentencing an offender a court is to have regard to:

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27 [2012] VSCA 52, [77], [85]–[88], [98]. See also *Bagnato* (2011) 112 SASR 39, [56]–[60] (Gray and Sulan JJ).

28 See, eg, *Baghdadi* [2012] NSWCCA 212.

29 See *Postiglione* (1997) 189 CLR 295.

- (k) sentences imposed on, and served by, the offender in another State or a Territory for an offence committed at, or about the same time, as the offence with which the court is dealing; and
- (l) sentences already imposed on the offender that have not been served; and
- (m) sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender ...

Section 155 of the *Penalties and Sentences Act 1992* (Qld) creates a presumption of concurrency when an offender is sentenced to imprisonment for more than one offence or is already undergoing a sentence of imprisonment, however, discretion is provided in section 156 to order cumulative sentences in such circumstances.

In New South Wales, section 55(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) creates a presumption of concurrency when an offender is sentenced to imprisonment for more than one offence or is already undergoing a sentence of imprisonment. However, this is displaced in relation to certain offences committed while in custody. Section 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides for aggregate sentences in certain circumstances, which (as we have seen above) can be used to facilitate the totality principle.

In the Northern Territory, section 50 of the *Sentencing Act 1995* (NT) creates a presumption of concurrency when an offender is sentenced to imprisonment for more than one offence or is already undergoing a sentence of imprisonment. However, section 51 also expressly permits discretion to accumulate sentences in such circumstances. Section 52 allows for aggregate sentences to be imposed where two or more sentences are handed down at the one time, thereby facilitating the totality principle.

Section 18A of the *Criminal Law (Sentencing) Act 1988* (SA) is similar to section 52 of the *Sentencing Act 1995* (NT). It expressly permits aggregate offences, stating:

If a person is found guilty by a court of a number of offences, the court may sentence the person to the one penalty for all or some of those offences, but the sentence cannot exceed the total of the maximum penalties that could be imposed in respect of each of the offences to which the sentence relates.

To similar effect are section 57(3) of the *Crimes (Sentencing) Act 2005* (ACT) and section 11(2) of the *Sentencing Act 1997* (Tas).

In Victoria, section 9(2) of the *Sentencing Act 1991* (Vic) provides that if an aggregate sentence is imposed by a court for one or more offences, the sentence cannot exceed that which would have been imposed if a separate sentence was imposed for each offence. Section 16(1) creates a presumption in favour of all sentences being concurrent, but this is displaced in relation to certain offences and forms of offending, including where the offence is a prison or escape offence,<sup>30</sup> the offender is a serious offender,<sup>31</sup> or the offence is committed while

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30 *Sentencing Act 1991* (Vic) ss 16(1A)(b), 16(3).



the offender is on parole<sup>32</sup> or while on bail.<sup>33</sup> Thus, a number of circumstances are set out where the principle is displaced, and concurrency is only permitted in cases where exceptional circumstances exist. The importance of the totality doctrine is underlined by the preparedness of the courts to find exceptional circumstances and their willingness to reduce the total effective sentence (by applying the totality principle), even in the absence of such circumstances.<sup>34</sup>

Justice of Appeal Redlich in *Director of Public Prosecutions (Vic) v Johnson* stated that in situations where the legislature has indicated a preference for cumulative sentences, the totality principle can still apply by adopting the second technique for lowering the overall sentence (ie, by lowering the individual sentences). His Honour indicated that:

while some approaches to applying the principle of totality may be inconsistent with the requirements of s 16(3B) of the *Sentencing Act 1991*, others may not. A sentencing court is not entitled to set its face against the clear wording of s 16(3B) and pursue an application of the principle of totality that may call for orders of concurrency or only partial cumulation in developing a head sentence that reflects the total criminality of the accused. However, a sentencing court may be entitled to tailor the application of the principle to avoid contravening the section ... Nothing in the language of s 16(3B) suggests, in terms, that it is intended to diminish the totality principle.<sup>35</sup>

#### D Circumstances in Which Totality Operates

The most straightforward situation where totality applies is when an offender is sentenced for a number of similar offences committed within a relatively short period of time. In such circumstances, concurrent sentences are normally imposed.<sup>36</sup> However there is no strict rule to this effect. In *Koncurat v Western*

31 *Sentencing Act 1991* (Vic) s 16(1A)(c). For comments on this see *McL v The Queen* (2000) 203 CLR 452, where McHugh, Gummow and Hayne JJ stated at 476–7 [76]:

The need for judges not to compress sentences is especially important where the accused person is a ‘serious sexual offender’ within the meaning of s 16(3A) of the *Sentencing Act*, and similar provisions. Section 16(3A) gives effect to a legislative policy that serious offenders are to be treated differently from other offenders. It was plainly intended to have more than a formal effect, which is the effect it would frequently have if its operation was subject to the full effect of the totality principle. Given the terms of s 16(3A), the scope for applying the totality principle must be more limited than in cases not falling within that section. The evident object of the section is to make sentences to which it applies operate cumulatively rather than concurrently. The section gives the judge discretion to direct otherwise. But the object of the section would be compromised and probably defeated in most cases if the ordinary application of the totality principle was a sufficient ground to liven the discretion. Since the relationship between s 16(3A) and the totality principle does not arise in this appeal, it is enough to say that sentencing judges need to be astute not to undermine the legislative policy inherent in s 16(3A) by applying the totality principle to the sentences as if that section (or s 6E which replaced it) was not on the statute book.

32 *Sentencing Act 1991* (Vic) ss 16(1A)(d), 16(3B). The principle is applied even when there are no exceptional circumstances: *R v Warwick (Sentence)* [2012] VSC 382.

33 *Sentencing Act 1991* (Vic) ss 16(1A)(e), 16(3C).

34 *Arnautovic v The Queen* [2012] VSCA 112.

35 (2011) 213 A Crim R 262, 276–7 [68]–[69]. See also *Waugh v The Queen* [2013] VSCA 36, [29]; *Arnautovic v The Queen* [2012] VSCA 112.

36 See, *Dicker v Ashton* (1974) 65 LSJS 150, 151; *R v Faithfull* (2004) 142 A Crim R 554; *DPP (Vic) v Grabovac* [1998] 1 VR 664.

*Australia* the court noted that the ‘so-called “one transaction rule” or “continuing episode rule”<sup>37</sup> is ‘not a rule at all. It is merely a guideline.’<sup>38</sup> A degree of cumulation may be ordered in relation to offences committed over a similar period where the offences violate different interests or cannot be regarded as part of the single criminal enterprise, or where concurrency would not reflect the gravity of the overall offending.<sup>39</sup>

The totality principle becomes more complicated where the offences are committed over a longer period of time, are committed in different jurisdictions, where the offender has served part of a sentence or the offender commits offences of a different nature.

Several complexities associated with the principle were clarified in the seminal High Court decision dealing with totality. *Mill* concerned a situation where the offender committed two armed robberies in Victoria and one in Queensland within the space of about six weeks over the period 8 or 9 December 1979 to 19 January 1980. On 1 September 1980 he was sentenced in Victoria for armed robberies committed in Victoria to an effective term of ten years’ imprisonment, with a non-parole period of eight years. On his release, he was returned to Queensland and in March 1988 he was sentenced to eight years imprisonment with a recommendation that he be eligible for parole after three years, in light of the sentence he had completed in Victoria. The High Court, in allowing the appeal, made several important points about the scope of the totality principle.

First, it applies when the offences are committed in different jurisdictions. Secondly, it applies not only to setting the non-parole period, but also the head sentence.<sup>40</sup> Thirdly, the principle also applies in relation to offences where the sentence has been partially or totally served.<sup>41</sup> This last point was emphasised by McHugh J in the subsequent High Court decision of *Postiglione*, where his Honour stated that: ‘in order to comply with the totality principle, a sentencing judge must consider the total criminality involved not only in the offences for which the offender is being sentenced, but also in any offences for which the offender is currently serving a sentence.’<sup>42</sup>

In the circumstances, the High Court in *Mill* held that the proper approach that should have been taken to the Queensland sentence is: ‘to ask what would be likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time’.<sup>43</sup>

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37 [2010] WASCA 184, [40], citing Steytler P in *State of Western Australia v Miller* (2005) 30 WAR 38, [14]–[17].

38 Ibid, citing *Dicker v Ashton* (1974) 65 LSJS 150, 151.

39 *Royer v Western Australia* (2009) 197 A Crim R 319.

40 *Mill* (1988) 166 CLR 59, 65–6 [14].

41 See also *R v Suckling* (1983) 33 SASR 133.

42 (1997) 189 CLR 295, 308. See also *R v Hunter* (2006) 14 VR 336.

43 (1988) 166 CLR 59, 66 [16].

Thus, when an offender already under sentence is being sentenced for other offences, the guiding principle for the judge or magistrate is to ascertain the sentence that would have been imposed if the offender was sentenced for all of the offences at the one time.

More complicated is where the offences are committed over a long period of time. This issue has been considered in a number of cases and it is now clear that even where the offences are committed over a very long period of time, the principle of totality applies where the offences are of a similar nature.<sup>44</sup> The principle also applies where the offences are committed over a short period of time, but the sentencing occurs much later for reasons not related to the operation of the criminal justice system, for example, where the offender remains silent and evidence of his or her involvement in the offence comes to light several years later.<sup>45</sup>

Where an offender is reimprisoned for breaching parole, and the new offences are similar to those which resulted in the original jail term, it is unclear whether the totality principle applies to the entire time spent in custody for the original offence, or merely the additional period that the offender is sentenced to serve as a result of breaching parole. In *Contin v The Queen*, the Victorian Court of Criminal Appeal expressly refused to resolve the matter, noting that there are authorities supporting either approach.<sup>46</sup> A stricter approach was adopted in the more recent decision of *McCartney v The Queen*, where it was held that where an offender is sentenced for offences committed while he or she is on parole, the sentencer, in applying the totality principle, is required to have regard only to the additional period of imprisonment to be served as a result of the breach of parole.<sup>47</sup>

The application of the totality doctrine to offences of a different nature remains uncertain. It is well established that the principle can apply to offences between indictments or within the same indictment.<sup>48</sup> Earlier, authorities confined the principle to offences that were of a similar nature or in some way connected.<sup>49</sup> However, the trend of recent decisions is to abolish the need for the offences to be similar.<sup>50</sup> Authorities suggest that in some instances, total concurrency for distinct offences is appropriate. In *R v King*, the Court noted that ‘complete concurrency for separate crimes may be appropriate at times’<sup>51</sup> but then approved Justice Hidden’s comment in *R v Cutrale* that ‘it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence can not comprehend the criminality of the other.’<sup>52</sup>

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44 See, eg, *R v Wright* [2009] VSCA 27, where the offender sexually abused a number of boys over a period spanning nearly a decade.

45 *RLS v The Queen* [2012] NSWCCA 236.

46 [2012] VSCA 247, [71].

47 [2012] VSCA 268, [100]. A broad approach is taken in *Waugh v The Queen* [2013] VSCA 36, [26].

48 *DPP (Vic) v Marino* [2011] VSCA 133, [53].

49 *R v Harrison* (1990) 48 A Crim R 197.

50 *R v Hunter* (2006) 14 VR 336.

51 [2011] NSWCCA 274, [20].

52 *Ibid.*

The application of the totality principle is generally not contingent upon the nature of the offence in question, thus, the principle transcends all offence types. There is one qualification to this – offences against the person. In most circumstances where the offences have caused harm to more than one victim (even if they are committed as part of the single transaction, for example, dangerous driving causing multiple deaths), total concurrency is not appropriate.<sup>53</sup> This is justified by the need to recognise the importance of separateness of victims and the loss and trauma experienced by them.<sup>54</sup> However, even this principle is not absolute. In *Director of Public Prosecutions (Vic) v Marino* the Court stated:

It is understandable that, in relation to death and serious injury involving multiple victims, ordinarily, some cumulation is required in respect of the offences relating to each victim. The cases, however, are not authority for the proposition that, where the offending results in any injury to more than one victim, a sentencing judge must provide for some cumulation in respect of the offences relating to each victim. Cumulation may well be appropriate in many such cases. However, as I have already stated, cumulation must be applied in the light of the principle of totality.<sup>55</sup>

Where the offences relate to one victim, total concurrency will also often not be appropriate where the criminality relates to different forms of harm.<sup>56</sup>

The area where totality is most obscure is the extent to which it can operate to reduce a sentence. Apart from the fact that in some instances total concurrency is appropriate, there is no settled principle regarding this issue. As discussed below, this is partly due to the unclear nature of the rationales supposedly underpinning the doctrine. It is also largely a manifestation of the general approach to sentencing decisions, which by its very nature is open-ended.

The overarching methodology and conceptual approach that sentencing judges undertake is known as ‘instinctive synthesis’. The term originates from the Full Court of the Supreme Court of Victoria decision of *R v Williscroft*, where Adam and Crockett JJ stated that ‘ultimately every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.’<sup>57</sup>

The general methodology for reaching sentencing decisions has been considered by the High Court on several occasions, and the Court has consistently adopted the instinctive synthesis approach and rejected the alternative, which is normally referred to as the two step approach.<sup>58</sup> The alternative approach involves a court setting an appropriate sentence

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53 Similar comments have been made in relation to burglary offences: *R v Harris* (2007) 171 A Crim R 267.

54 See, eg, *Richards v The Queen* (2006) 46 MVR 165; *R v Janceski* (2005) 44 MVR 328.

55 [2011] VSCA 133, [53] (citation omitted). See also *R v KM* [2004] NSWCCA 65.

56 *Nguyen v The Queen* [2007] NSWCCA 14; *R v BWS* [2007] NSWCCA 59.

57 [1975] VR 292, 300 (Adams and Crockett JJ).

58 *Markarian v The Queen* (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ) (‘*Markarian*’); *Hili v The Queen* (2010) 242 CLR 520, 527 [18], 528 [25], 534 [44].

commensurate with the severity of the offence, then making allowances up and down in light of relevant aggravating and mitigating circumstances.<sup>59</sup>

In *Wong v The Queen* ('*Wong*'), most members of the High Court saw the process of sentencing as an exceptionally difficult task with a high degree of 'complexity'.<sup>60</sup> Exactness is supposedly not possible because of the inherently multifaceted nature of that activity.<sup>61</sup>

Despite the uncertainty of outcome that is produced by the instinctive synthesis approach, this methodology was confirmed by the majority in *Markarian*, where it was noted that '[f]ollowing the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison.'<sup>62</sup>

Thus, the general approach to sentencing decisions militates against a high level of clarity regarding the precise operation of the totality principle.<sup>63</sup> However, as noted above, it is clear that the principle is capable of weighing heavily in the sentencing decisions, to the point where, in some cases, total concurrency is available even in relation to serious offences.

### E The Concept of a Crushing Sentence as Guiding the Principle

The concept of a crushing sentence is integral to the totality principle. A crushing sentence is commonly defined as one that destroys an expectation of a meaningful life after release.<sup>64</sup> In *R v Beck* the Court described a crushing sentence (of nine and a half years imprisonment) as one which risked 'provoking within the applicant a feeling of helplessness and the destruction of any reasonable expectation of a useful life after release.'<sup>65</sup>

Whether a sentence is crushing is not solely determined by a numerical figure, although the length of the sentence is a cardinal consideration in evaluating whether a sentence is crushing. The age of the offender is another important consideration.

In *Haines v The Queen*, it was noted that in considering whether a sentence is crushing, other relevant considerations include 'maximum penalties, any standard non-parole periods, the objective and subjective factors'.<sup>66</sup>

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59 This approach is described (but not endorsed) by McHugh J in *Markarian* (2005) 228 CLR 357, 377–9 [51]–[54].

60 (2001) 207 CLR 584, 612 [77] (Gaudron J, Gummow and Hayne JJ).

61 See the dicta of McHugh J who notes the difficulties of any 'attempts to give the process of sentencing a degree of exactness which the subject matter can rarely bear': *AB v The Queen* (1999) 198 CLR 111, 120 [13].

62 (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ); see also *Hili v The Queen*; *Jones v The Queen* (2010) 242 CLR 520.

63 For criticism of the instinctive synthesis approach to sentencing, see Mirko Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21 *Sydney Law Review* 597.

64 *Azzopardi v The Queen* [2011] VSCA 372, [56]–[59].

65 [2005] VSCA 11, [22].

66 [2012] NSWCCA 238, [57].

Ultimately, the notion of a ‘crushing’ sentence remains impressionistic. In *R v Vaitos*, Young CJ stated:

Is the effective sentence to be regarded as crushing? This question can only be answered in relation to the facts of the case. The answer cannot be arrived at mathematically by reference to the offender’s age and the length of sentence to be served. In the particular case of this applicant, having regard to the very large number of very serious offences, and notwithstanding the severity of the effective sentence, I have come to the conclusion that the point has not been reached at which this Court is required to set aside the sentence as crushing.<sup>67</sup>

It is not clear whether the desire to avoid a crushing sentence is part of or incidental to the totality principle. In *R v Piacentino*, Eames JA (with whom Buchanan and Vincent JA agreed) observed that the concept of a crushing sentence is distinct from the principle of totality, and, in particular, that totality applies even when the sentence is not crushing. Justice of Appeal Eames noted:

As Callaway JA observed in *R v Barnes*, there is a difference between the principle of totality and the avoidance of a ‘crushing’ sentence – because a sentence of three years, for example, might offend totality principles and yet not be so long as to crush the offender – and the requirement to ‘stand back’ and assess the overall criminality applies even where the sentence would not be described as crushing.<sup>68</sup>

A different view is taken in Western Australia, where the desire not to impose a crushing sentence is regarded as the second limb of the totality requirement. In *Roffey v The State of Western Australia*,<sup>69</sup> McLure JA stated:

The appellant relies on the totality principle which comprises two limbs. The first limb is that the total effective sentence must bear a proper relationship to the overall criminality involved in all the offences. ... The second limb is that the court should not impose a ‘crushing’ sentence.<sup>70</sup>

Pragmatically, the issue of whether the desire to avoid a crushing sentence is core to the totality principle or an external check to its application is moot. There are three reasons for this. First, as noted above, the meaning of a crushing sentence is unclear and hence, at its highest, it only provides a slight qualification to the principle. Secondly, both approaches recognise that the totality principle can apply even when the sentence is not crushing. Thirdly, there is no question that in some instances a crushing sentence is appropriate and, in fact, must be imposed.<sup>71</sup>

The avoidance of crushing sentences is at best an aspirational aim of sentencing as opposed to a firm requirement. The fact that tariffs for certain

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67 (1981) 4 A Crim R 238, 257.

68 (2007) 15 VR 501, 507 [33] (citation omitted).

69 [2007] WASCA 246.

70 *Roffey v The State of Western Australia* [2007] WASCA 246, [24]–[25]. This has been expressly approved in a number of cases, see, eg, *Koncurat v Western Australia* [2010] WASCA 184. See also *Bagnato* (2011) 112 SASR 39; *Narrier v Western Australia* [2011] WASCA 193.

71 Also, it is clear that totality does not *only* apply in the case of potentially crushing sentences. In *Johnson* (2004) 78 ALJR 616, 624 [22] Gummow, Callinan and Heydon JJ stated: ‘We would with respect doubt that it is only in a case of an otherwise crushing burden of an aggregation of sentences that the totality principle may be applied.’

categories of offences have increased considerably in recent years<sup>72</sup> indicates a dilution of the desire to avoid crushing sentences. In *R v E*, Doyle CJ stated: ‘[c]are must be taken in using the concept of a crushing sentence. Not uncommonly, for particularly serious crimes, a sentence that is crushing in its effect must be imposed.’<sup>73</sup>

The lack of weight given to a crushing sentence is highlighted in *Paxton v The Queen* (*‘Paxton’*) where Johnson J (Tobias AJA and Hall J agreeing) stated that ‘[c]ourts are not unfamiliar with descriptions of sentences as “crushing” but that does not articulate some applicable test. A life sentence would presumably fall within the ambit of that description but the legitimacy of availability of a life sentence is not open to challenge.’<sup>74</sup>

Logically, sentences of life imprisonment are crushing. Nevertheless, they are often imposed in relation to single offences, such as murder.<sup>75</sup> The desire not to impose crushing sentences does not apply a meaningful fetter to the imposition of such penalties in relation to single offences. It follows that it must impose even less of a restraint in cases of multiple offences, given that, all things being equal, they are more serious single offences. Accordingly, at best, the concept of a crushing sentence is a weak consideration in the context of the application of the totality principle.

## F Summary: Scope and Application

Thus, the totality principle is unclear at the margins, but the following rules emerge regarding its scope and application:

- The principle of totality applies to guide sentencing regarding the appropriate penalty in cases of multiple offending;
- The effect of the principle is to reduce the overall penalty, compared to a linear cumulation of the sentence for each offence;
- It applies to all situations where multiple offending is considered by the courts, including when an offender is being sentenced for more than one offence, when an offender is already undergoing a sentence and is being sentenced for separate offences, and when an offender has completed a sentence and is being sentenced for an offence which was committed before or during the period of the initial sentence;
- The main technique for achieving totality is to make sentences totally or partially concurrent. Where this is not feasible, the sentence for each offence is reduced;

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72 This is especially the case in relation to drug offences and offences against the person. See Mirko Bagaric and Richard Edney, *Australian Sentencing* (Thomson Reuters, 2011).

73 (2005) 93 SASR 20, 30 [38]. This was approved in *R v Walkuski* [2010] SASC 146, [5].

74 [2011] NSWCCA 242, [213], citing *Ta’ala v The Queen* [2008] NSWCCA 132, [40]–[42] (Grove J).

75 The principle of totality has limited application in such instances: see *Roberts v The Queen* [2012] VSCA 313, [105].

- Totality applies even when the offences are committed over a longer period and are of a different nature, although the longer the time period between offences and the more disparate they are in nature, the less concurrency will apply;
- Offences against the person will rarely result in total concurrency, even when the harm is caused by the single act;
- The totality principle is informed by the desire to avoid crushing sentences. While the concept of crushing is unclear, it generally applies where, given the length of the sentence and the age of the offender, it would engender a feeling of hopelessness;
- In relation to serious crimes, a crushing sentence may be necessary;
- A sentence does not need to be crushing to attract the operation of the totality principle;
- There is no standard formula for giving effect to concurrency. The reduction in penalty, as compared to a linear cumulation of each sentence, is a matter for the sentencing judge or magistrate whose choice is close to an unfettered discretion; and
- The principle (as discussed below) has two rationales: proportionality and mercy. Both are vague, hence totality remains obscure.<sup>76</sup>

### III RATIONALE FOR THE TOTALITY PRINCIPLE: PROPORTIONALITY AND MERCY

#### A Judicial Comments

There is scant discussion regarding the justification for the totality principle. The most succinct and clear rationale is in *R v Walkuski*, where Doyle CJ stated that '[i]t can also be said that the concept of totality reflects two particular considerations. One of them is proportionality. The sentence must bear an appropriate proportion to the overall criminality involved. The other is mercy.'<sup>77</sup> Thus, the concerns that underpin totality are proportionality and mercy, which themselves are discrete sentencing considerations.

More extensive analysis of the rationale for totality has occurred, but it has not clarified the underpinnings of the doctrine. In *Bogdanovich v The Queen*,<sup>78</sup> Ashley and Weinberg JJA stated:

The totality principle is said to 'defy precision either of description or implementation'. Sometimes it is described as a requirement of 'just deserts', and whether the total effective sentence offends that principle is often a 'matter of impression'. ... The problem [of application] is exacerbated, however, when the sentencing judge must have regard not merely to totality in relation to the offences

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<sup>76</sup> See also *R v XY* (2009) 195 A Crim R 38, 48 [52] for an overview of the totality principle.

<sup>77</sup> *R v Walkuski* [2010] SASC 146, [6].

<sup>78</sup> [2011] VSCA 388.



for which the offender is being sentenced, but also other periods of incarceration in respect of earlier and unrelated offending.<sup>79</sup>

The concept of ‘just deserts’ articulated in the above passage is not a separate justification but seems to be a reference to the proportionality principle, which is commonly interchanged with the just deserts concept.<sup>80</sup> An illuminating aspect of the above passage is the recognition that totality is an obscure principle and, in fact, so obscure that courts have recognised it as being impressionistic.

We now consider whether proportionality and mercy can underpin the totality principle.

## B Proportionality: Too Vague to be Instructive

As the High Court stated in *Hoare v The Queen*, ‘a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or *proportionate to the gravity of the crime considered in the light of its objective circumstances*.’<sup>81</sup>

The principle of proportionality (at least in theory) operates to ‘restrain excessive, arbitrary and capricious punishment’<sup>82</sup> by requiring that punishment must not exceed the gravity of the offence, even where it seems certain that the offender will immediately re-offend.<sup>83</sup>

The key aspect of the principle is that it has two limbs. The first is the seriousness of the crime and the second is the harshness of the sanction. Further, the principle has a quantitative component – the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

Proportionality is one of the main objectives of sentencing.<sup>84</sup> In *Veen v The Queen (No 1)*<sup>85</sup> and *Veen v The Queen (No 2)*,<sup>86</sup> the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which at various times has also been declared as the most important aim of sentencing.<sup>87</sup> Thus, in the case of dangerous offenders, while community protection remains an

79 *Bogdanovich v The Queen* [2011] VSCA 388, [63]–[66] (citations omitted). This was approved in *Contin v The Queen* [2012] VSCA 247.

80 See, eg, Jami L Anderson, ‘Reciprocity as a Justification for Retributivism’ (1997) 16 *Criminal Justice Ethics* 13; Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press, 1993); M Bagaric, *Punishment and Sentencing: A Rational Approach* (Routledge, 1<sup>st</sup> ed, 2001) ch 1–4.

81 (1989) 167 CLR 348, 354 (emphasis altered).

82 Richard G Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 492.

83 See, eg, *R v Jenner* [1956] Crim L R 495, in which the court reduced a term of imprisonment despite believing that ‘it appeared likely that [the offender] would commit a crime as soon as he was released from prison’.

84 Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) 15–16; New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) ch 3; Home Office, Great Britain, ‘Criminal Justice and Protecting the Public’ (White Paper, Home Office, 1990) 5.

85 (1979) 143 CLR 458, 467.

86 (1988) 164 CLR 465, 472.

87 See, eg, *Channon v The Queen* (1978) 33 FLR 433.

important objective, at common law it cannot override the principle of proportionality. It is for this reason that preventive detention is not sanctioned by the common law.<sup>88</sup> Proportionality has also been given statutory recognition in all Australian jurisdictions.<sup>89</sup>

There has been no systematic, doctrinally sound approach to defining the factors that are relevant to proportionality. Rather than positively defining the factors that are relevant to offence severity, it has proved easier to dismiss some considerations as being irrelevant. Factors such as ‘good character, ... repentance, restitution, possible rehabilitation and intransigence’<sup>90</sup> have been excluded.<sup>91</sup> However, some factors have been positively identified as relevant to offence seriousness. These include: the consequences of the offence, as well as the level of harm; the victim’s vulnerability and the method of the offence;<sup>92</sup> the offender’s culpability, which turns on such factors as the offender’s mental state<sup>93</sup> and his or her level of intelligence; the level of sophistication involved;<sup>94</sup> the protection of society;<sup>95</sup> and even the offender’s previous criminal history.<sup>96</sup>

The problem with such a list is that despite its non-exhaustive character, it is too particular, and is no more than a non-exhaustive list of common aggravating factors. Once considerations such as the method of the offence and the victim’s vulnerability are included, there appears to be no logical basis for not including other considerations that are typically thought to increase the severity of an offence such as breach of trust, the prevalence of the offence, profits derived from the offence, and an offender’s degree of participation. Such an approach is devoid of an overarching justification and is, ultimately, baseless.

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88 *Chester v The Queen* (1988) 165 CLR 611, 618. See also *R v Chivers* [1993] 1 Qd R 432, 437–8.

89 The *Sentencing Act 1991* (Vic) s 5(1)(a) provides that one of the purposes of sentencing is to impose just punishment (s 5(1)(a)), and that in sentencing an offender the court must have regard to the gravity of the offence (s 5(2)(c)) and the offender’s culpability and degree of responsibility (s 5(2)(d)). The *Sentencing Act 1995* (WA) states that the sentence must be ‘commensurate with the seriousness of the offence’ (s 6(1)) and the *Crimes (Sentencing) Act 2005* (ACT), s 7(1)(a) provides that the sentence must be ‘just and appropriate’. In the Northern Territory and Queensland, the relevant sentencing statute provides that the punishment imposed on the offender must be just in all the circumstances (*Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a)), while in South Australia the emphasis is upon ensuring that ‘the defendant is adequately punished for the offence’ (*Criminal Law (Sentencing) Act 1988* (SA) s 10 (1)(j)). The need for a sentencing court to ‘adequately punish’ the offender is also fundamental to the sentencing of offenders for Commonwealth matters (*Crimes Act 1914* (Cth) s 16A(2)(k)). The same phrase is used in the New South Wales *Crimes (Sentencing Procedure) Act 1999*, s 3A(a).

90 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 491.

91 See also *Hoare v The Queen* (1989) 167 CLR 348, 363.

92 This includes the matters such as use of weapons and whether there was a breach of trust: see Richard G Fox, ‘The Meaning of Proportion in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 499–500.

93 For example, whether it was intentional, reckless or negligent.

94 See Richard G Fox, ‘The Meaning of Proportion in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 498–501; New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) 62–4.

95 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 474.

96 *R v Mulholland* (1991) 1 NTLR 1, 13 where prior convictions were treated as part of the objective circumstances of the offence on the basis that they are relevant to the mens rea of the offender in committing the offence. This view was rejected in *R v McNaughton* (2006) 66 NSWLR 566.

It is for this reason that despite the widespread recognition of the principle, there is no convergence in sentences either within or across jurisdictions – even those that ostensibly place cardinal emphasis on proportionality in sentencing determinations.<sup>97</sup> The vagaries are so pronounced that it is verging on doctrinal and intellectual fiction to suggest that an objective answer can be given to common sentencing dilemmas, such as how many years of imprisonment is equivalent to the pain felt by an assault victim, or whether a burglar should be dealt with by way of imprisonment or fine, or the appropriate sanction for a drug trafficker. Certainly, there is no demonstrable violation of proportionality if a mugger, robber or drug trafficker is sentenced to either 12 months or 12 years imprisonment.<sup>98</sup>

Some commentators have argued that proportionality is so vague as to be meaningless, in light of the fact that there is no stable and clear manner in which the punishment can be matched to the crime.<sup>99</sup> Jesper Ryberg notes that one of the key and damaging criticisms of proportionality is that it ‘presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.’<sup>100</sup> The most obscure and unsatisfactory aspect of proportionality is that there is no stable and clear manner in which the punishment can be matched to the crime. Jesper Ryberg further notes that to give

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97 See also Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Springer, 2004) 2.

98 Just deserts (or retributive) theorists contend that proportionality is capable of providing clear guidance regarding choice of punishment: see also Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985); Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005); Andrew von Hirsch and Nils Jareborg, ‘Gauging Criminal Harm: A Living-Standard Analysis’ (1991) 11 *Oxford Journal of Legal Studies* 1. In our view, just deserts theory is doctrinally flawed. The main reason for this is that it cannot justify the need for punitive measures without resort to consequential considerations. The consequentialist considerations they normally invoke are said to come in the form of deterrence or victim (or community) satisfaction that is supposedly achieved by imposing hardships on wrongdoers. But reliance on such matters makes these theories incoherent. It means that punishment is not desirable in itself. Instead, it is only a worthwhile objective to the extent that it actually achieves such outcomes. In the end, this makes these theories simply a species of utilitarianism. Ultimately, the reliance on consequences undercuts the stability of many retributive theories. Without adverting to consequentialist considerations, it is impossible to justify the link between crime and punishment. See Stanley I Benn and Richard Stanley Peters, *Social Principles and the Democratic State* (Allen & Unwin, 1959):

We can justify rules and institutions only by showing that they yield advantages. Consequently, retributivist answers to the problem can be shown, on analysis, to be either mere affirmations of the desirability of punishment or utilitarian reasons in disguise ... To say, with Kant, that punishment is a good in itself, is to deny the necessity for justification; for to justify is to provide reasons in terms of something else accepted as valuable’: at 175–6.

See also Mirko Bagaric and Kumar Amarasakera, ‘The Errors of Retributivism’ (2000) 24 *Melbourne University Law Review* 124. In our view, the proportionality principle is most strongly underpinned by a utilitarian approach to punishment: see Mirko Bagaric, ‘Proportionality in Sentencing: Its Role and Justification’ (2000) 12 *Current Issues in Criminal Justice* 142.

99 As noted in section II of this article, the courts have not attempted to exhaustively define the factors that are relevant to proportionality.

100 Ryberg, above n 97, 184.

content to the theory it is necessary to rank crimes, rank punishments and ‘anchor the scales’.<sup>101</sup>

Thus, even when it comes to matching the punishment for one offence, there is considerable speculation about whether it can be done with any degree of objectivity or precision. This uncertainty is necessarily compounded when an offender is sentenced for more than one offence.

What is clear, however, is that the first limb of the proportionality principle, in fact, directly contradicts the totality thesis. The harm caused by a number of offences is no less when it is committed by one offender. The total harm caused by five rapes (on five different victims) is identical whether they are committed by five different offenders or the one offender. Thus, on the basis of this limb, proportionality does not in fact support, let alone justify, the totality principle.

However, proportionality may go some way to justifying totality if one focuses on the impact of the severity of punishment on an offender. It has been suggested that the hardship inflicted by a term of imprisonment increases at a higher rate than the duration of a sentence. In *Paxton v The Queen*, Johnson J (Tobias AJA and Hall J agreeing) adopted the earlier remarks by Malcolm CJ in *R v Clinch*, stating:

the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus, a sentence of five years is more than five times as severe as a sentence of one year. Similarly, while a sentence of seven years may be appropriate for one set of offences and a sentence of eight years may be appropriate for another set of offences, each looked at in isolation. Where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences.<sup>102</sup>

This involves a degree of speculation. In fact the converse could equally be argued: a sentence of, say, one year, is more than one quarter as onerous as a sentence of four years imprisonment. This is especially the case because the principal dichotomy between sentencing options is imprisonment or no imprisonment. Even a short jail term results in the potentially severe incidental harm in the form of the stigma associated with a jail term and other social, economic and employment deprivations and limitations.<sup>103</sup> Arguably, these incidental deprivations are not made meaningfully worse by a longer term of imprisonment.

Thus, intuitively, there is some appeal to the argument that the impact of sentences compounds at a greater rate than their linear length, but this is by no means incontestable. There is at best a weak argument in support of the contention that proportionality can justify totality. And, to the extent that it can

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101 Ibid 185. Even retributivists have been unable to invoke the proportionality principle in a manner which provides firm guidance regarding appropriate sentencing ranges: see, eg, von Hirsch and Ashworth, above n 98; von Hirsch and Jareborg, above n 98.

102 [2011] NSWCCA 242, [212] (citations omitted).

103 Gresham M Sykes, ‘The Pains of Imprisonment’ in Gresham M Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press, 1958) 285, 287.

underpin the totality principle, the utility of this is limited given the vague nature of the proportionality principle.

### C Mercy: A Feeling Rather Than a Legal Construct

The other purported justification for the totality principle is the principle of mercy.<sup>104</sup> However, mercy itself is a fragile construct. It is devoid of any recognisable legal foundation and is unpredictable in its application. Its application appears to be grounded in the capacity of the offender's subjective circumstances to enliven judicial sympathy. Further, there is no guidance regarding the extent to which it operates to reduce a sentence.

The nexus between mercy and sympathy was noted by King CJ in *R v Osenkowski*:

There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended, even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.<sup>105</sup>

Comments in *R v Kane* also endorse the sympathy rationale but attempt to inject an aspect of principle. The Court stated that:

mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. ... If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.<sup>106</sup>

However, there is no indication of what is meant by 'a well-balanced judgment'. The term cannot relate to established mitigating factors because mercy operates outside them. The operation of the principle of mercy was most recently considered at length by the full bench of the Victorian Court of Appeal in *Markovic v The Queen; Pantelic v The Queen*.<sup>107</sup> The Court noted that hardship faced by a family as a result of an offender's imprisonment is grounds for the exercise of mercy in exceptional circumstances, but that the principle of

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104 Judges and magistrates do not possess the prerogative of mercy: *Johanson v Dixon (No 3)* [1978] VR 377. The concept is part of the sentencing discretion. A related concept to mercy is parsimony, which is the view that a sentence should not be harsher than that required to fulfil its social purpose: *NOM v DPP & Ors* [2012] VSCA 198, [68]. It has been expressly noted that parsimony is probably not part of sentencing law: see *Blundell v The Queen* (2008) 70 NSWLR 660, 665–6 [39]–[47]; *Foster v The Queen* [2011] NSWCCA 285, [50]–[53] (Adams J). If the principle is part of sentencing law, its inexactness is incapable of shoring up other principles, such as totality.

105 (1982) 30 SASR 212, 212–13. This is approved in *R v Davies* (2006) 164 A Crim R 353; *R v Darby* [2011] NSWCCA 52. See also Richard G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 1.

106 [1974] VR 759, 766.

107 (2010) 30 VR 589.

hardship only applies when recognised mitigating circumstances are exhausted.<sup>108</sup>

Thus, as mercy is grounded in sympathy and, is by its nature an emotional response, it is difficult, if not impossible, to demarcate its bounds.<sup>109</sup> Arguably, it has no role in a system of law that purports to comply with the virtues of the rule of law, which minimally commands that the law must consist of predetermined rules and principles,<sup>110</sup> such that it is knowable and predictable.<sup>111</sup> The fragility of the concept of mercy as an appropriate legal principle undermines its capacity to explain and justify subordinate principles, such as totality.

A further conceptual difficulty with mercy in the context of totality is that it is superfluous. As we saw above, a key aspect of the proportionality principle is that it is meant to guard against excessive punishment. It is unclear why this objective should be advanced by two independent rationales in the context of the principle of totality.<sup>112</sup>

Even if mercy can underpin totality, the boundless nature of mercy means that it is incapable of providing any guidance regarding the extent to which totality should moderate sentences.

## IV REFORM RECOMMENDATIONS

### A Overview of Other Potential Rationales for Totality

The totality principle is vague in its scope and operation because the ideas supposedly underpinning it are themselves obscure. Proportionality is unable to match with any degree of precision the competing limbs of the doctrine, while mercy is more akin to an emotional retort than a justifiable legal standard.

However, it may yet be that totality is justifiable. Offenders who are sentenced for multiple offences at the same time can be distinguished from offenders sentenced to the same offences separately, following the expiration of

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108 For a recent application of this principle, see *El-Hage v The Queen* [2012] VSCA 309, where a sentence was reduced on account of hardship to the family caused by the imprisonment of the offender.

109 The suggestion that there is a concept of 'rational mercy' is debunked by David Hume's theory of human motivation, which distinguishes between two states of mind: beliefs and desires. For a fuller account of Hume's theory of motivation see Michael Smith, 'Valuing: Desiring or Believing?' in David Charles and Kathleen Lennon (eds), *Reduction, Explanation and Realism* (Oxford University Press, 1992) 323; Michael Smith, 'Realism', in Peter Singer (ed), *A Companion to Ethics* (Basil Blackwell, 1991) 399, 400–2. According to Hume, there are two broad mental states. Beliefs are copies or replicas of the way we believe the world to be. Desires (which is the realm in which emotions reside) are our wants; the states that move us to act. Beliefs are capable of being right or wrong and hence are rational. Desires on the other hand are not amenable to reason and hence it is flawed to place them within a logical construct.

110 For a discussion on the distinction between rules and principles, see Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 4<sup>th</sup> ed, 1977) 22–8, 76–7.

111 See Joseph Raz, *The Authority of Law* (Oxford University Press, 1979) ch 11, 211, 214–16; John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 270–6.

112 Potentially, mercy could still be relevant to the extent that proportionality sets the lower limit for an appropriate penalty. However, in reality, the need for merciful intervention in relation to sentences that are as lenient as possible within the bounds of proportionality is questionable.

each sentence. While sentencing is, essentially, a punitive exercise, some of its objectives are designed to either assist the offender or at least reduce the prospect that he or she will reoffend. Thus, sentencing has a positive aspect from the perspective of the offender. Offenders who have been sentenced for multiple offences separately, following the expiration of each sentence, have had the benefit of interventions with the potential to curtail their criminality. Those sentenced for multiple offences at the same time have not benefitted from this positive aspect of sentencing. Arguably, their culpability is less than offenders who have completed their sentencing and then re-offended.

The two main sentencing objectives designed to discourage reoffending by particular offenders (as opposed to potential offenders) are specific deterrence and rehabilitation. Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and, thereby, convincing them that crime does not pay. In effect, it attempts to dissuade offenders from reoffending by inflicting an unpleasant experience (normally imprisonment) which they will seek to avoid in the future.<sup>113</sup>

Specific deterrence is a central common law sentencing objective and is given express statutory recognition in all Australian jurisdictions.<sup>114</sup> Specific deterrence applies most acutely in relation to serious offences<sup>115</sup> and offenders with significant prior convictions,<sup>116</sup> since it is assumed that previous sanctions have failed to stop their criminal behaviour. Conversely, it has little application where an offender has voluntarily desisted from further offending<sup>117</sup> or where the offender was suffering from impaired intellectual or mental functioning at the time of the offence.<sup>118</sup>

Rehabilitation, like specific deterrence, aims to discourage the commission of future offences. The main difference between these objectives lies in the means used to encourage desistance from crime. Specific deterrence focuses on frightening an offender into not reoffending. Rehabilitation, by contrast, seeks to alter the values of the offender so that he or she no longer desires to commit criminal acts – it involves the renunciation of wrongdoing by the offender and the re-establishment of the offender as an honourable, law-abiding citizen.<sup>119</sup> It is achieved by ‘reducing or eliminating the factors which contributed to the conduct

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113 See Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Routledge-Cavendish, 2001) ch 6.

114 *Crimes Act 1914* (Cth) s 16A(2)(j); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act 1995* (NT) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(i); *Sentencing Act 1997* (Tas) s 3(e)(i); *Sentencing Act 1991* (Vic) s 5(1)(b).

115 See, eg, *DPP (Vic) v Zullo* [2004] VSCA 153; *DPP (Vic) v Lawrence* (2004) 10 VR 125.

116 See, eg, *Saunders v The Queen* [2010] VSCA 93.

117 *R v Pickett* [2010] NSWCCA 273.

118 *R v Verdins* (2007) 16 VR 269; *Melham v The Queen* [2011] NSWCCA 121; *R v HBA* [2010] QCA 306, [31]; *R v Goodger* [2009] QCA 377, [21]; *Startup v Tasmania* [2010] TASCCA 5.

119 See, eg, *Vartzokas v Zanker* (1989) 51 SASR 277, 279.

for which [the offender] is sentenced'.<sup>120</sup> Thus, it works through a process of positive, internal attitudinal reform.<sup>121</sup>

Offenders who are sentenced and then reoffend have not had the advantage that these sentencing aims seek to achieve. However, this is only an actual detriment if, in fact, it is likely that specific deterrence or rehabilitation would have diminished the likelihood of subsequent offending.

We now analyse the efficacy of the sentencing process in achieving the goals of specific deterrence and rehabilitation. There have been hundreds of relevant empirical studies. Hence, it is not feasible to summarise them all here. However, as now discussed, the trend of the evidence is now relatively settled and it is tenable to provide an overview of the current state of knowledge regarding these topics.

## B Specific Deterrence Does Not Work

The available empirical data suggest that specific deterrence does not work. The evidence suggests that inflicting harsh sanctions on individuals does not make them less likely to re-offend in the future. The level of certainty of this conclusion is very high – so high that specific deterrence should be abolished as a sentencing consideration.

There have been numerous studies across a wide range of jurisdictions and different time periods which come to this conclusion.<sup>122</sup> Daniel Nagin, Francis T Cullen and Cheryl L Jonson provide the most recent extensive literature review regarding specific deterrence.<sup>123</sup> They reviewed the impact of custodial sanctions versus non-custodial sanctions and the effect of sentence length on reoffending. The review examined six experimental studies where custodial versus non-custodial sentences were randomly assigned;<sup>124</sup> 11 studies which involved matched pairs;<sup>125</sup> 31 studies which were regression based<sup>126</sup> and seven other studies which did not neatly fit into any of those three categories, and included naturally occurring social experiments which allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.<sup>127</sup>

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120 *Channon v The Queen* (1978) 33 FLR 433, 438.

121 See also C L Ten, *Crime, Guilt and Punishment: A Philosophical Introduction* (Oxford University Press, 1987) 7–8.

122 These are summarised recently in Mirko Bagaric and Theo Alexander, 'The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might, and the Implications for Sentencing' (2012) 36 *Criminal Law Journal* 159.

123 Daniel S Nagin, Francis T Cullen and Cheryl L Jonson, 'Imprisonment and Reoffending' (2009) 38 *Crime & Justice* 115, 145. The main studies are summarised in: Don Weatherburn, Sumitra Vignaendra and Andrew McGrath, 'The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending' (2009) 132 *Crime and Justice Bulletin*; Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Report, Sentencing Advisory Council, 2011).

124 Nagin, Cullen and Jonson, above n 123, 144–5.

125 *Ibid* 145–54.

126 *Ibid* 154–5.

127 *Ibid*.



The last category included a study based on clemency granted to over 20 000 prisoners in Italy in 2006. A condition of release was that if those who were released reoffended within five years they would be required to serve the remaining (residual) sentence plus the sentence for the new offence. It was noted that there was a 1.24 per cent reduction in reoffending for each month of the residual sentence. This observation can be explained on the basis that the threat of future imprisonment discouraged reoffending. However, it was also noted that offenders who had served longer sentences prior to being released had higher rates of reoffending, supporting the view that longer prison terms reduce the capacity for future imprisonment to shape behaviour.<sup>128</sup>

Nagin et al suggest that offenders who are sentenced to imprisonment do not have a lower rate of recidivism than those who receive a non-custodial penalty and, in fact, that some studies show that the rate of recidivism among offenders sentenced to imprisonment to be higher. They conclude that:

Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic [that is, the possible corrupting effects of punishment] rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.<sup>129</sup>

The review suggests that not only do longer jail terms not deter, but neither do tougher jail conditions. Studies also show that offenders who are sentenced to maximum security prisons as opposed to minimum security conditions do not reoffend less.<sup>130</sup>

These general findings are supported by a more recent experimental study by Donald Green and Daniel Winik.<sup>131</sup> They observed the reoffending of 1003 offenders who were initially sentenced for drug-related offences between June 2002 and May 2003 by a number of different judges whose sentencing approaches varied significantly (some were described as ‘punitive’, others as ‘lenient’), resulting in differing terms of imprisonment and probation. The study concluded that neither the length of imprisonment nor probation had an effect on the rate of reoffending during the four year follow-up period.<sup>132</sup>

Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment is unlikely to increase the prospect that they will become law-abiding citizens in the future.

It seems that specific deterrence embedded in an earlier sanction would not have reduced the likelihood of reoffending. It follows that there is no basis for treating offenders sentenced for multiple offences at the same time differently from offenders sentenced consecutively. Thus, the fact that offenders who are sentenced for multiple offences at the same time have been denied the specific

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128 Ibid 155.

129 Ibid 145.

130 Ibid 124.

131 Donald P Green and Daniel Winik, ‘Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders’ (2010) 48 *Criminology* 357.

132 Ibid.

deterrent aspect of an earlier sanction cannot justify their overall penalty being reduced on account of the totality principle.

### C Rehabilitation Probably Does Work

The evidence about rehabilitation is less conclusive but more promising – on balance, it seems that specific forms of intervention may be able to reduce recidivism. The effectiveness of rehabilitation in reducing repeat offending has been the subject of a large number of studies. Following extensive research conducted between 1960 and 1974, Robert Martinson, in an influential paper, concluded that empirical studies had not established that any rehabilitative programs had worked in reducing recidivism.<sup>133</sup> The Panel of the National Research Council in the United States, several years after this work, also noted that there were no significant differences between the subsequent recidivism rates of offenders regardless of the form of punishment. As they stated, '[t]his suggests that neither rehabilitative nor criminogenic effects operate very strongly'.<sup>134</sup>

In recent years, the research has taken on a more optimistic note. Most Australian jurisdictions have devoted increasing resources to rehabilitation over the past decade. The most recent wide-ranging Australian study regarding the effectiveness of rehabilitation is a report by Karen Heseltine, Andrew Day and Rick Sarre for the Australian Institute of Criminology, published in 2011.<sup>135</sup> The report focused on changes and improvements to prison based correction rehabilitation programs in the custodial environment since 2004, when the previous report was issued.<sup>136</sup>

The report by Heseltine et al, while unable to evaluate the effectiveness of rehabilitation programs currently operating in Australian prisons, summarised recent studies into the effectiveness of certain rehabilitation programs. It noted that while there were mixed results, there were some programs that reported positive outcomes.

This was especially the case in relation to sexual offender programs, where some studies showed that the recidivism rate of offenders completing the program was less than half of that of other offenders.<sup>137</sup> The results of programs directed towards violent offenders were less positive, but a wide-ranging review of studies focusing on United Kingdom programs noted that reductions in offending for violent offences by around seven to eight per cent had occurred. Overseas studies reported some success with anger management programs, but

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133 R M Martinson, 'What Works? Questions and Answers about Prison Reform' (1974) 35 *Public Interest* 22, 25.

134 Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (National Academy of Sciences, 1978) 66.

135 Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report, Australian Institute of Criminology, 2011) <<http://www.aic.gov.au/documents/5/6/4/%7B564B2ECA-4433-4E9B-B4BA-29BD59071E81%7Drpp112.pdf>>.

136 *Ibid* 2.

137 *Ibid* 14.

an Australian study (of a shorter 20 hour program) showed no positive outcomes related to program completion. There is no cogent evidence supporting the effectiveness of domestic violence or victim awareness programs. However, drug and alcohol programs have been shown to be effective at reducing substance abuse and reoffending.<sup>138</sup>

This assessment is consistent with the findings of Mitchell, Wilson and MacKenzie who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison.<sup>139</sup> The studies they focused on related to drug users and compared reoffending patterns of offenders who completed a drug rehabilitation program with those who did not complete a program, or completed only a minimum program between the years 1980 and 2004. They analysed 66 studies in total. The report concluded that '[o]verall, this meta-analytic synthesis of evaluations of incarceration based drug treatment programs found that such programs are modestly effective in reducing recidivism.'<sup>140</sup>

Moreover, it was noted that programs that dealt with the multiple problems of drug users (termed therapeutic communities) were the most successful, whereas there was no evidence to support good outcomes associated with 'boot camp' programs.<sup>141</sup>

Thus, there is some support for the view that criminal punishment can assist to reform certain categories of offenders; although there is no firm evidence showing that it cannot work for the majority of offenders.

Therefore, offenders who have not been subject to the rehabilitative aspects of sentencing may indeed be at a disadvantage compared with those who have previously been sentenced. Accordingly, it can be tenably asserted that offenders who are sentenced for multiple offences are disadvantaged compared to those sentenced consecutively.

#### **D Implications for Totality**

The current rationales for totality are flawed. The only tenable basis for conferring a sentencing discount to offenders who are sentenced for more than one offence is that they were deprived of the opportunity for internal attitudinal reform that would probably have been a part of the sentence if they were sentenced for one offence initially. Being deprived of this opportunity potentially increases their likelihood of reoffending, hence, they are less culpable than

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138 Ibid 27.

139 Ojmarrh Mitchell, David B Wilson and Doris L MacKenzie, 'The Effectiveness of Incarceration-Based Drug Treatment on Criminal Behaviour (Systematic Review, The Campbell Collaboration, 18 September 2006) <[www.campbellcollaboration.org/lib/download/98/](http://www.campbellcollaboration.org/lib/download/98/)>.

140 Ibid 17.

141 Ibid.

offenders who reoffend consecutively, despite being subjected to the rehabilitative aspects of the sentencing process.<sup>142</sup>

While this provides a justification for the totality principle, it entails that there should be a number of changes to its application.

First, it should be irrelevant whether the offences are of a similar nature – the same discount should apply for similar or different offence types. The length of time between offences should not be an important consideration. However, where an offender has already been subjected to a sentence and reoffends while on parole, the application of the totality principle is greatly diluted, given that he or she has been subjected to a significant part of the rehabilitative aspect of the sanction and has still reoffended.

The extent of the discount remains obscure given that the impact of rehabilitation is speculative and the instinctive synthesis approach to sentencing does not readily permit numerical computations. However, consistent with current sentencing orthodoxy, it would seem that totality should not significantly reduce the total effective sentence. While rehabilitation is an established sentencing consideration, it is not a particularly important variable. There are dozens of other mitigating and aggravating considerations<sup>143</sup> and, in principle, rehabilitation is seemingly no more powerful than most others. This statement cannot be conclusively proven because the instinctive synthesis approach to sentencing does not generally permit mathematical comparisons to be made of the respective importance of sentencing considerations.<sup>144</sup> However, this uncertainty cuts both ways – unless there is a demonstrable reason to assert that rehabilitation is a cardinal consideration, the default position is that it ranks approximately equal to other established sentencing variables. In light of this, to then suggest that totality should operate generally to greatly reduce penalties is flawed because it is a case of a stream rising higher than its source.

## V CONCLUSION

Totality is a well-established sentencing principle. The circumstances in which it applies are also relatively well settled, although there remains some

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142 The argument for a discount in these circumstances applies with less force in relation to offenders who have previously been sentenced and have again reoffended. Where an offender has been, for example, convicted and sentenced 10 years earlier and is now being sentenced for multiple offences, the first sentence obviously did not succeed in totally rehabilitating the offender. However, he or she is not thereafter precluded from attempts at rehabilitation by other sentences and hence a totality discount is still appropriate in these circumstances.

143 Joanna Shapland identified 229 factors: J Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge, 1981) 55; Roger Douglas identified 292 relevant sentencing factors: R Douglas, *Guilty Your Worship: A Study of Victoria's Magistrates' Courts* (La Trobe University, 1980).

144 There are, in fact, two sentencing considerations that carry quantifiable reductions. They are pleading guilty (generally up to 25 per cent) and assisting authorities (generally up to 50 per cent). Both of these reductions are obviously considerable. Notably, rehabilitation is not treated similarly which suggests it is not as weighty as these considerations. For a further discussion regarding the operation of these mitigating factors, see Bagaric and Edney, above n 72.

uncertainty regarding its operation when parole is violated and its application to offences of a completely different nature. However, the manner in which it applies, in the form of the size of the sentence reduction that it should confer, is obscure. This is a matter of ongoing concern. It is also unclear at what point the offending is so serious that the principle of totality ceases to have a meaningful operation. Crushing sentences are appropriate in some circumstances, however, they have not been defined with any degree of precision.

Thus, aspects of totality are obscure, leading to impressions of arbitrariness. This is regrettable given that imprisonment is the harshest penalty that the community imposes on individuals. The totality principle will remain unclear because the underpinning rationales are themselves uncertain.

While proportionality is relatively coherent and grounded, numerous definitional and pragmatic aspects remain unresolved, meaning that it is incapable of providing clear guidance regarding the appropriate sentence.

Mercy is the most unstable rationale because it has no role in a system of law given that it is principally based on stimulating the 'feelings' as opposed to engaging with the rationality of the sentencer. Moreover, the weight mercy should be accorded in the sentencing calculus is indeterminate.

The most tenable justification for the principle of totality stems from the goal of rehabilitation. Offenders who are sentenced for multiple offences and did not undergo the rehabilitative effect of an earlier sentence are disadvantaged compared to those who had the opportunity to rehabilitate from an early sentence, but failed to do so. Hence, totality is a justifiable principle, but the extent to which it moderates sentencing is probably overstated. The weight that any considerations relating to rehabilitation should be accorded in the sentencing determination is modest given the lack of empirical clarity regarding its effectiveness – it seems, at this point, to work for some offenders but not all and, of course, it is not possible to determine which offenders would have benefited from a rehabilitative intervention and which would not. However, it does follow from this rationale that the totality principle is not contingent upon the offences being of a similar nature nor having being committed over a short timeframe.

Further developments in totality theory and application are contingent upon a fuller understanding of the principle of proportionality and, in particular, whether longer sentences are disproportionately harsher than their linear increase would suggest. If this is the case, potentially, there is a basis for strong application of the totality principle, such that offenders who are sentenced for multiple offences are entitled to a significant sentence reduction, as is currently the situation. However, this is undermined significantly by a clear minded assessment of the other limb of the proportionality thesis – the level of harm caused by a number of criminal acts is the same, whether it is by the one offender or multiple offenders.