

## Chapter 1B

# The Purposes of Criminal Law

It is easy to think of criminal law as an instrument of oppression or at least of repression, a matter of the might of the state pitted against the meagre resources of the offender. Not always, but often. These appearances reflect a fair proportion of the reality. But there is a lot more to the reality than that.

Undoubtedly the main consequence of a criminal trial is the fact that if the offender is found guilty, something unpleasant or at least unwelcome is likely to happen to him or her. Convicted offenders stand in danger of being subjected to measures designed to punish them, or protect the community from them. It is only with a few matters, such as bonds or probation, that there is any measure of agreement between the court and the offender. Generally, the court simply imposes its will on the offender.

But there is another side to it. A day in court may not be a welcome experience for the accused, who could as a result be deprived of liberty, wealth or reputation. But it has advantages over other possible methods of crime control. Both private enterprise vengeance and control through executive action would avoid the drama and procedural messiness of a criminal trial, but would vastly diminish the quality of life. The criminal law is there not only to punish and control the offender, but to offer him or her a considerable measure of protection through a genuinely judicial system of punishment and control. These different aspects of the purposes of criminal law will be examined under three heads: protection of the offender, punishment, and protection of the community.

### I. Protection of the Offender

The infliction of harm is often likely to cause indignation and apprehension on the part of those injured and those who witness the injuries. Those most affected by the injury will want some kind of revenge, and they will share with others the wish to prevent similar harms in future.<sup>1</sup> The law cannot afford to ignore these concerns. In earlier times, action to avenge the wrong and prevent or deter its recurrences was likely to be left to the person injured

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<sup>1</sup> The need to protect suspected offenders from unofficial retaliation, people taking the law into their own hands, is sometimes called 'Montero's Aim'. See Walker N, *Sentencing in a Rational Society* (1969) p 17. See also Gardner J, 'Crime: in Proportion and Perspective' in Ashworth A and Wasik M (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (1998) pp 32-34.

or relatives, or to be taken by some more powerful person who owed the injured person some duty of protection. In a more advanced society more sophisticated options are available.

It is necessary to consider only three options: private action, executive control and criminal punishment. The overwhelming tendency of Australian law is to choose the third alternative. That is not to say that private self-help and executive control are completely non-existent in modern society. Possibly the most graphic illustration of the former is the earlier recognition in a number of American jurisdictions that it is lawful for a husband or wife to kill those found committing adultery.<sup>2</sup> A more familiar but attenuated form of this is the readiness of Anglo-Australian law to regard a finding in adultery as a serious form of provocation reducing the conviction for killing the adulterous party or parties from murder to manslaughter. On the preventive rather than retributive side, the right to kill to prevent certain kinds of crime provides another, though less cogent, example.

Modern instances of executive control include the power in times of war to lock up people who are suspected of being of hostile associations.<sup>3</sup> Courts are likely to show considerable indulgence while the emergency lasts.<sup>4</sup> Non-military examples include the power to order a person committed for trial to be detained where they are not fit to stand trial,<sup>5</sup> powers of involuntary commitment of those who are considered on mental health grounds to be dangerous,<sup>6</sup> and the mandatory detention of illegal immigrants or 'unlawful non-citizens'.<sup>7</sup>

Though some advantages, especially in terms of speed and costs, could no doubt be listed in favour both of private self-help justice and non-criminal executive control, the dangers of both methods are so great as to preclude their use in any but exceptional circumstances.

Among the more obvious dangers are those of mistakes of disproportionate punishment in the case of private redress, and of abuse of power in the case of executive control. While not eliminating these dangers, the use of the criminal law system of redress and control reduces them by providing procedural safeguards against mistake and abuse, and substantive safeguards against disproportionate redress or retribution. That leaves the problem of control, or protection of the public. This aspect of the problem will be considered under the third of the purposes of criminal law in Part III below.

The advantages of open trials, with procedural safeguards, over private or executive redress needs no elaboration. But more can be said about proportionality. The criminal law can see to it that punishment is proportionate

2 See Weinstein JD, 'Adultery Law and the State: A History' (1987) 38 *Hastings LJ* 195 at 229, n 35. Such provisions had their origin in early English and in Roman Law.

3 See *Criminal Code* (Cth) s 101.

4 See *Liversidge v Anderson* [1942] AC 206.

5 Smith JC, *Smith and Hogan's Criminal Law* (10th edn 2002) pp 213-214.

6 See for instance Div 2 of the *Mental Health Act 1986* (Vic) which enables a person, subject to certain conditions, to be detained as an 'involuntary patient' for, among others reasons, 'the protection of members of the public'.

7 *Migration Act 1958* (Cth) s 189. See also *Al-Kateb v Godwin* (2004) 208 ALR 124; 78 ALJR 1099.

to the crime. Not that it has always done so. Statutes which permitted capital punishment for relatively trivial offences like theft reflected no credit on their creators. But the criminal law system is capable of providing some contribution towards proportionality. This is captured in the notion of (no more than) an eye for an eye and a tooth for a tooth, and in the statement of one of the purposes in the American Model Penal Code, which is to differentiate on reasonable grounds between serious and minor offences.<sup>8</sup>

On the other hand, punishment is not always proportionate to the crime. The main question is whether the principle of proportionality is to restrict other purposes of the criminal law, in particular, protection of the public. Retributivists typically hold that it should. For instance, according to 'limiting retributivists',<sup>9</sup> what the offender deserves by way of punishment sets the ceiling to the just and proportionate sentence in any given case. However, this does not prevent taking other considerations into account, such as the rehabilitation of the offender, to lower the sentence. Others take a broader view of proportionality, which can embrace not just the seriousness of the offender's crime – the harm it causes, and the offender's culpability – but the possible danger that the offender presents to the community if not detained. According to its proponents, to exclude this broader reading of proportionality is to sacrifice the protection of the community on the altar of protection of the wrongdoer.<sup>10</sup>

This issue is considered below. Here the concern is with the other side of the coin. If the law does not take the harm sufficiently into account in trying to keep a sense of proportion, it could become oppressive to the offender<sup>11</sup> or self-defeating in so far as community protection is concerned. Capital punishment for theft is a good example from the past where juries would refuse to convict in the teeth of overwhelming evidence. Another example is the broadening definitions of rape.<sup>12</sup>

One way or another, the various mechanisms of the criminal law and criminal process operate to provide protection for the accused against disproportionate punishment. No mechanism can work perfectly, guaranteeing protection in each individual case. But it is important that the measure of protection offered is formed at the highest level of generality. It should not be left to the more haphazard qualities of discretion, disbelief and desuetude inherent in the operation of the judicial and jury system.

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8 *American Penal Code* Art 1.02(1)(e).

9 See Walker, *Punishment, Danger and Stigma* (1980) pp 25-26.

10 For an alternative view, see Wood D, 'Dangerous Offenders and the Morality of Protective Sentencing' [1988] *Crim LR* 424.

11 See von Hirsch A, 'Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"' (1990) 1 *Crim LF* 259; 'The Future of Proportionate Sentences' in Blomberg TG and Cohen S (eds), *Punishment and Social Control* (1995); Bottoms A, 'Puzzles in von Hirsch's Theory of Punishment' in Ashworth A and Wasik M (eds), *Fundamentals in Sentencing Theory* (1998) p 136.

12 See Chapter 6.

## II. Punishment of the Offender

To retributivists, punishment is the most important aim of criminal law.<sup>13</sup> To utilitarians (and ‘harm-reductivists’<sup>14</sup>) punishment is rather a means to an end – the end of maximising utility (or minimising harm). The conflict between retributivist and utilitarian views explains, in part at least, why punishment has come to be an omnibus term covering not only the exaction of a fair price for the wrongdoing,<sup>15</sup> but also such separate aims as rehabilitation, denunciation and moral education (quite apart from their contribution to harm-reduction), together with harm-reductive means such as deterrence (specific and general) and incapacitation.

This use of the language of punishment can confuse the issues of appropriate disposition in certain cases. But not in all cases. A long period of imprisonment may be capable of serving all the purposes, except perhaps for rehabilitation. But in some cases, the fulfilment of one purpose may be at the expense of one or more of the others. A just deserts sentence, for instance, may be too long for rehabilitation, and too short for deterrence. Consider one of the leading Victorian cases on sentencing. In *R v Williscroft*,<sup>16</sup> four offenders were convicted of armed robbery in which a sawn-off shotgun was used. Two were young married men with no prior convictions. The other two had criminal records. The trial judge imposed four year sentences with a minimum term of one year on each offender. The Full Court by a majority held that these sentences gave too much weight to rehabilitation, and not sufficient weight to the gravity of the offence or the need for deterrence, and imposed sentences of eight years with a four year minimum. Mr Justice Starke dissented and would have given greater weight to rehabilitation.

So what is punishment? It seems to be the infliction of consequences designed to be unpleasant on the ground that the offender deserves such treatment.<sup>17</sup> On the view suggested here, it has more to do with retribution and specific (or personal) deterrence, and less to do with general deterrence, rehabilitation or incapacitation. These latter are legitimate concerns but are not punishment.

Sometimes, restitution or compensation may be a large part of the story. This is especially so in cases of monetary loss where the offender is in a

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13 Or even the sole aim. See Moore M, *Placing Blame: A General Theory of Criminal Law* (1997).

14 Wood D, ‘Retribution, Crime Reduction and the Justification of Punishment’ (2002) 22 *OJLS* 301 at n 1. On reducing as opposed to totally preventing harm, see Husak D, ‘The Criminal Law as Last Resort’ (2004) 24 *OJLS* 207 at 217-218.

15 For criticism of this way of putting the retributivist’s point, see Hampton J, ‘Correcting Harms versus Righting Wrongs: The Goal of Retribution’ (1992) 39 *UCLA L Rev* 1659 at 60-61. For alternative versions of retributivism, see Wood D, ‘Retributive and Corrective Justice, Criminal and Private Law’ in (2005) 48 *Sc Stud Law* (Perspectives on Jurisprudence: Essays in Honor of Jes Bjarup, ed Wahlgren P) at 541, Pt 2.

16 [1975] VR 292.

17 For a more comprehensive definition, see Hart HLA, ‘Prolegomenon to the Principles of Punishment’, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) ch 1.

position to make good the loss. But however attractive and economical this form of penalty may be when all the conditions are right for it,<sup>18</sup> it cannot cover the whole field. Even in property offences, restitution may be impossible and compensation inadequate (for example, the killing of a pet), and in personal injury crimes it could be at worst futile and cruel and at best simply cruel. It is absurd to suggest that restitution for an attack which seriously damaged one of the victim's kidneys could take the form of removal of one of the attacker's kidneys in order to transplant it into the victim. Such punishment is reprehensible to societal values, even if there were no problems with compatibility and the transplantation procedure was totally without risk and guaranteed to be successful.<sup>19</sup> From another perspective, restitution (or restoration) may leave the victim insufficiently protected. So, mediation schemes, which may work well in the case of minor property offences, may simply prolong the victim's pain in cases such as domestic violence.<sup>20</sup> If, then, restitution and compensation are inadequate, inapposite or unacceptable there must be other considerations behind the notion of punishment.

This leads us into considerations of retribution. Retribution must be distinguished from revenge – at least, its suitability as a justification for punishment depends on this. Reluctance is engendered by the fact that it is considered that a civilised society should have outgrown retributive feelings.<sup>21</sup> In 1975, a justice of the Supreme Court of Victoria was prepared to say that retribution was no longer an aim of the criminal law.<sup>22</sup> The same judge as chairman of a sentencing committee a few years later had to concede that it represented a primary aim of the criminal law.<sup>23</sup> One way to deal with retribution is to recognise that human nature has not outgrown its desire for it.<sup>24</sup> A practical system like the criminal law cannot be framed on a view of human nature which is perfect. While the criminal law can be cast in such a way as to attempt to move human nature into a state of perfection and so plant the seeds of its own obsolescence, it must not try to move so far in advance of existing reality as to become irrelevant to current problems.

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18 See Schwartz LC, 'In Search of the Ideal Type of Punishment: An Economic Analysis' (1988) 65 *University of Detroit LR* 431. For doubts, see Scutt JA, 'Victims Offenders and Restitution: Real Alternative or Panacea?' (1982) 56 *ALJ* 156.

19 Australian Law Reform Commission, *Sentencing Report* No 44 (1987) para 31.

20 Hooper S and Busch R, 'Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea' (1996) 4 *Waikato LR* 101. But retribution may not work well in this area either: Martin DL, 'Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies' (1998) 36 *Osgoode Hall LJ* 151.

21 See Sarat A, 'Vengeance, Victims and the Identities of Law' (1997) 6 *Social and Legal Studies* 163; Gillespie A, 'Victims and Sentencing' (1998) 148 *New Law J* 1263; Ashworth A, 'Victim Impact Statements and Sentencing' [1993] *Crim LR* 498.

22 Starke J (dissenting) in *R v Williscroft* [1975] VR 292 at 303.

23 Victorian Sentencing Committee, *Sentencing Report* (1988) pp 88-94.

24 See *R v Darby* [1987] *Crim LR* 280; Mackie JL, 'Morality and the Retributive Emotions' (1982) 1 *Crim Just Ethics* 3.

However, consider also claims that in appropriate circumstances retribution is a perfectly reasonable 'moral emotion'.<sup>25</sup> Indeed, a person may be properly criticised for reacting to a shocking crime with detachment and indifference, for not experiencing any feeling of horror or resentment, or desire for vindication. Perhaps the most important reason for not abandoning retribution is that it can act as a constraint on unjust and excessive punishment, not to mention the alternatives of private retaliation and executive action. In addition, retributive justice can be appealed to in order to explain why oppressive state conduct formally quite external to the criminal law, is morally quite reprehensible. Consider, for instance, the indefinite detention of illegal immigrants.<sup>26</sup>

The corresponding indignation against the offender rather than the criminal law system finds its expression in a retributive sentence imposed by a criminal court. It is not that retribution is in itself noble in setting upper limits to penalties. Retribution itself implies no such liberal limitation. The concept of divine retribution should be enough to scotch that idea. Nor is it that the offender is being treated with due dignity in imposing a retributive rather than a deterrent or preventive sentence.<sup>27</sup>

One major criticism of retributivism is that it cannot explain the link between the condemnatory element of punishment, and the 'hard treatment' element. It cannot explain why a retributive response need be punitive, let alone, how punitive it should be. Retributivism has no answer to the practical question of what can be justifiably imposed as a retributive sentence, of what counts as a proportionate sentence to a given crime. Determining this requires ranking crimes according to their seriousness, and sentences according to their severity, and also having some common metric or currency for comparing the two. Wherever the requirement of proportionality comes from, that requirement can only narrow the question, not fully answer it. In principle, exact proportionality cannot be achieved. Excluding, for obvious reasons, capital and corporal forms of punishment, limits the options to deprivation of liberty<sup>28</sup> and deprivation of property.

But though exact proportionality cannot be assured, some claim that a fair tariff can be drawn up based on the penalty for murder and the seriousness of

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25. And, indeed, 'retributive hatred' as a moral emotion. See Hampton J, 'The Retributive Idea' in Hampton J and Murphy J, *Forgiveness and Mercy* (1988) ch 4. As Hampton argues, retributive responses are not restricted to criminal contexts, and need not be punitive. See Hampton J, 'Correcting Harms and Righting Wrongs: The Goal of Retribution' (1992) 39 *UCLA LR* 1659.

26 See *Al-Kateb v Godwin* (2004) 208 ALR 124; 78 ALJR 1099, and Wood D, 'Retributive and Corrective Justice, Criminal and Private Law' in (2005) 48 *Sc Stud Law* (Perspectives on Jurisprudence: Essays in Honor of Jes Bjarup, ed Wahlgren P) p 541, n 90.

27 Dolinko D, 'Three Mistakes of Retributivism' (1992) 39 *UCLA L Rev* 1623. On the issue of reconciling retributivism with liberalism, see Hampton J, 'Liberalism, Retribution and Criminality' in Coleman J and Buchanan A (eds), *In Harm's Way: Essays in Honor of Joel Feinberg* (1994) p 159.

28 Itself a far from perfect option: see Nygaard RL, 'Is Prison an Appropriate Response to Crime?' (1996) 40 *St Louis University LJ* 677.

murder relative to other wrongs.<sup>29</sup> Suppose that the proportionate sentence for murder is life imprisonment. (This is, in any case, the most severe penalty without capital punishment, and murder is the most serious crime.) So long as other offences are seen as deserving of less punishment than murder, the range of sentences permissible on retributive grounds should fall short of that available for murder. Thus, for instance, manslaughter should be punished less severely on grounds of lesser fault, and serious injuries offences and rape less severely on grounds of lesser harm.<sup>30</sup> These in their turn should be punished more severely than minor injuries and assaults. The relativity between these offences and non-personal injury crimes such as those against property, the state, or the environment cannot be worked out as a matter of logic, but is largely an exercise of policy, based on the needs of society from time to time. So in times of war, crimes against the state (in particular, treason) may be seen to require even greater punishment than murder, and as particular pollution threats develop, so certain environmental crimes may attract very high penalties.

None of this suggests that the maximum penalty for any given offence should be prescribed according to retributive or just deserts principles. That would be justifiable only if retribution were the only proper aim of the criminal law. Other aims may call for a wider range of options.

### III. Protection of the community

Society must have the power to protect itself against those who cause harm and are dangerous, even if no blame, or at least no commensurate blame, can be attached to them. Society can also protect itself against prospective wrongdoers through the use of deterrent sentences. As a retributive sentence will often serve to protect the community and deter potential offenders, it will not always be necessary for the courts to direct their minds to deterrent or preventive measures. In addition, personal or special deterrence (aimed at deterring further wrongs by the particular offender) may be accomplished through sentences which carry out retributive goals. But in some cases a sentence arrived at on retributive grounds may be inadequate to serve the deterrent or preventive aims of the law. The community may also seek to protect itself against future wrongdoing by attempting to reform or rehabilitate individual offenders, or through denouncing conduct it considers particularly threatening. Finally, note the growing interest in the notion of restorative justice which looks to the needs both of the victim and the

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29 Some, however, argue that the commensurability between crimes and punishments cannot be established, and others that there is no uncontroversial way of deciding, from the hypothetical possibilities, what the most serious penalty should be – whether, for instance, it should be capital punishment, life imprisonment, or even some non-custodial measure such as a fine.

30 See von Hirsch A and Jareborg N, ‘Gauging Criminal Harm: A Living Standard Analysis’ (1991) 11 *OJLS* 1 at 19-21.

offender. Though there is a common theme running through all these aims, they raise different questions and so will be considered separately.

### A. Deterrence

It is usual to divide this aim into special and general deterrence. Special deterrence involves a sentence which is designed to deter the wrongdoer from future wrongdoing. Though it looks to the future rather than the past, in contrast with retribution, it is still based on some notion of wrongdoing by the offender.

General deterrence involves making an example of the offender so that others will not be tempted to emulate their conduct. Controversies rage at one end of the spectrum over the question of whether attempts at deterrence are futile on the ground that would-be offenders are not capable of being deterred, and at the other end over whether deterrence should replace retribution as a principal aim of the criminal law.<sup>31</sup> It is not seriously suggested that the threat to inflict harm against potential offenders has no deterrent effect. The widely recognised and approved defence of duress shows, if support were needed for the proposition, that threats are generally regarded as effective. It is true that some people cannot be deterred, for instance because of mental incapacity or psychopathic personality, and the law must find other justifications for using coercive measures against them (for instance, incapacitation). But it is clear that the vast majority of people are capable of being deterred, even if most do not require threats to keep them law abiding. The effect of relying on threats alone however is well illustrated by the widespread outbreaks of lawlessness which appear when the police go on strike.<sup>32</sup> Even more graphic examples can be given where countries are prepared to impose more drastic penalties. Dr Ali Ali Mansour reports that Hijaz in Saudi Arabia was once one of the worst places for violent crime and highwaymanship, but when hudud penalties were introduced (involving amputation) such crimes ceased and criminal gangs were disbanded.<sup>33</sup>

That is not to say that such punishments would be acceptable to Australian society generally but it does provide further evidence to support the common sense position that threats do deter. The main question, identified by the Victorian Sentencing Committee, is whether a sentence greater than that required by the retributive aims of the criminal law has any additional deterrent effect. The Committee found that the research suggested

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31 See Andenaes J, 'General Prevention Revisited' (1975) 66 *J Crim L and Criminology* 338; Victorian Sentencing Committee, *Sentencing Report* (1988) pp 66-77; Donnelly SJM, 'The Goals of Criminal Punishment' (1990) 41 *Syracuse LR* 741; Robinson PH and Darley JM, 'Does the Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *OJLS* 173.

32 Victorian Sentencing Committee, *Sentencing Report* (1988) p 69, referring to the Victorian Police Strike in 1923. Consider also the Liverpool police strike in 1919, and the imprisonment of the Danish police force by the Nazis in 1944. But as Ashworth notes, '[b]roadly speaking, property crimes increased while crimes of violence and sexual crimes did not': Ashworth A, *Principles of Criminal Law* (4th edn 2003) p 15, n 40.

33 'Hudud Crimes' in Cherif Bassiouni M (ed), *The Islamic Criminal Justice System* (1982) p 201.

it did not.<sup>34</sup> Even so, both in England<sup>35</sup> and Australia<sup>36</sup> deterrence continues to be regarded as a relevant aim of the criminal law, and in Victoria itself this has been recognised by statute.<sup>37</sup>

## B. Prevention or incapacitation

Society must protect itself against those who commit serious harms even if they cannot help themselves from doing so.<sup>38</sup> If considerations of proportionality discussed earlier required account to be taken in all cases of blameworthiness, offenders in this category would have to receive either no penalty or a very reduced one. Since a long period of custody may be necessary to protect the community, some technique must be found which affords the appropriate measure of control while insulating the predicted harm-doer from blame, and affording him or her the procedural protection of the criminal law. There is a marked divergence between English criminal law on the one hand and Australian criminal law on the other, and within Australia there are different approaches which, taken together, present a pretty incoherent policy overall.

However, there is a certain amount of common ground. Where a society takes drastic action against those who are not, or not fully, to blame for the harm they do, it is important that prevention or incapacitation should be reserved for genuinely dangerous offenders and not mere nuisances. The protective principle mentioned earlier should go a long way to ensuring this, since the principle of proportionality would rule out long periods of incarceration for those who commit relatively minor harms.<sup>39</sup> One of the manifestations of this in practice is that under Australian law, the defence of insanity, though widely applicable in theory, is only worth running in murder cases. In contrast, in the past, it has been worth running with any capital crime. The other two defences which come closest to insanity for this purpose, diminished responsibility and provocation (where available), are also generally limited to the field of murder, although here as a matter of law, not of defence strategy.

As has been seen, in the case of the insane, the law makes no pretence of blaming the killer or applying retributive or deterrent penalties. The law's purposes switch from retribution and deterrence to incapacitation (protection

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34 Victorian Sentencing Committee, *Sentencing Report* (1988) p 72. See also Robinson PH and Darley JM, 'Does the Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *OJLS* 173.

35 Victorian Sentencing Committee, *Sentencing Report* (1988) p 75.

36 *Ibid* p 77.

37 *Sentencing Act* 1991 (Vic) s 5(1)(b).

38 *Veen v R (No 2)* (1988) 164 CLR 465. See also Price-Huish C, 'Born to Kill? Aggression Genes and their Potential Impact on Sentencing and the Criminal Justice System' (1997) 50 *SMULR* 604.

39 See *R v Adams* (1992) 13 Cr App R (S) 180 (three years for indecent assault by dangerous offender). See also *Chester v R* (1988) 165 CLR 611 at 619 (proportionality dominant in serious but non-violent offences).

of the community) and rehabilitation, purposes which may require indefinite periods of incarceration.

When it comes to diminished responsibility the divergence between the English and Australian approaches reveal fundamental differences in attitude towards prevention or incapacitation as a proper goal for the criminal law. Taking the term diminished responsibility at face value, it would mean that anyone acquitted of murder on this ground should receive a lower punishment than that prescribed for murder. There should, on retributive grounds, be a lower punishment because responsibility is diminished, but there still should be some punishment on both retributive and deterrent grounds because responsibility is not eliminated. This is inherent in the name of the defence and is the approach taken by Australian courts. What this approach fails to do is recognise that diminished responsibility is a defence which has to cover the case of total absence of responsibility, where this takes the form of lack of the power of self-control. The reason that this may fall to the lot of the defence of diminished responsibility is that lack of self-control may not be covered by the insanity defence.<sup>40</sup> Those who are acquitted of murder on the ground of total loss of the power of self-control should not receive a retributive sentence since they are without blame, and should not receive a sentence as a deterrent either since they have no, or only limited, capacity to be deterred. But they should be subjected to a restraint designed to protect the community (whether or not this is combined with the hope of rehabilitation), and that restraint should include the possibility of indefinite confinement.

The leading English and Australian cases on diminished responsibility reveal the conflicting tensions. In *R v Byrne*,<sup>41</sup> a sexual psychopath killed and mutilated a young woman from a YWCA hostel and was charged with murder. Despite uncontradicted evidence that he suffered from an abnormality of mind and found it difficult or impossible to control his perverted sexual desires, the jury convicted him of murder. The Court of Criminal Appeal quashed the conviction for murder, and disapproved a direction by the trial judge to the effect that difficulty or inability to exercise self-control was outside the defence of diminished responsibility.<sup>42</sup>

The court did however confirm the sentence of life imprisonment as the only possible one, having regard to the tendencies of the appellant.<sup>43</sup> Implicit in this laconic statement and the result of the case is the notion that the defendant did not deserve the stigma of a murder conviction, nor a retributive or deterrent punishment, but had to be subject to control because of his perceived future dangerousness. No question of proportioning the remedy to the blameworthiness of the offender arose.

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40 *Attorney-General for South Australia v Brown* [1960] AC 432; *Sodeman v R* (1936) 55 CLR 192 at 203-204; *R v Kopsch* (1925) 19 Cr App R 50.

41 [1960] 2 QB 396.

42 *Ibid* at 404.

43 *Ibid* at 405.

The approach of the High Court of Australia to this problem stands in marked contrast to that of the English Court. In *Veen v R*<sup>44</sup> the defendant was charged with murder by stabbing in New South Wales. There was evidence that as a result of brain damage he was subject to uncontrollable aggressive behaviour, that he was likely to kill again and that his condition was incurable. He was acquitted of murder but convicted of manslaughter on the ground of diminished responsibility. The trial judge recognised that punishment would not deter him and that ordinary principles of punishment did not apply. Even so, the judge sentenced the defendant to life imprisonment in order to protect the public. By a majority of three to two the High Court quashed the life sentence, in part on the ground that protection of the public does not justify a heavier sentence than that deserved according to the principle of proportionality. The two dissenting judges held that life imprisonment could be imposed to protect the community. The majority judges replaced the life sentence with one of 12 years.

Within weeks of his release, Veen stabbed another man to death. He was again found guilty of manslaughter and again sentenced to life imprisonment by the trial judge. His appeal went to the High Court in *Veen v R (No 2)*.<sup>45</sup> By a majority, the High Court upheld the sentence of life imprisonment. The majority included Mason CJ who had been in dissent in the earlier *Veen* case. The result is correct but the reasoning obscured the choices which were being made. The majority started by accepting the principle of proportionality.<sup>46</sup> That meant that a sentence should not be increased beyond what is proportionate to the crime merely in order to extend the period of protection of society from the risk of recidivism on the part of the offender.<sup>47</sup> On the other hand, the majority held, the protection of society is a material factor in fixing an appropriate sentence.

These two propositions sit very uneasily together. Under the first proposition a notional sentence which is arrived at presumably on retributive or deterrent grounds, cannot be extended to a sentence to protect the public. This would seem to mandate the release of someone like Veen. But where the second proposition is adopted the starting point seems to be the protection of the public. A life sentence is then in order, and no question of retribution or deterrence need be considered.

The majority judges seemed to be uneasy about this issue, because a little later in their judgment they acknowledged that the practical observance of the distinction between the two propositions above called for a judgment of experience and discernment.<sup>48</sup> Another way of putting this is that it required an act of impossible reconciliation.

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44 (1979) 143 CLR 458. See Wood D, 'The Abolition of Mandatory Life Imprisonment for Murder: Some Jurisprudential Issues' in Strang H and Gerull S (eds), *Homicide: Patterns, Prevention and Control* Australian Institute of Criminology Proceedings No 17 (1992) p 237.

45 (1988) 164 CLR 465.

46 Ibid at 472.

47 Ibid.

48 Ibid at 474.

The majority went on to recognise that a mental abnormality which makes the offender a danger to society, but which diminishes his or her moral culpability, has countervailing effects, some tending towards a longer sentence and others towards a shorter sentence.<sup>49</sup> They held that the effects might balance out.<sup>50</sup> Since the balancing act could not result in release on the one hand, or life incarceration on the other, something like the 12 year sentence imposed in *Veen (No 1)* would seem to be called for. But this is a sentence justified on neither retributive nor deterrent nor protective grounds, and it led to disastrous results. A choice must be made rather than a balance struck. The only choice which does not force society to find other means of controlling dangerous offenders, and raises the dangers of some system of civil detention, is a disposition involving protective purposes.<sup>51</sup> This may be recognised in the next proposition stated by the majority in *Veen (No 2)*: that danger to society cannot lead to a more severe penalty than would have been imposed if the offender had not been suffering from mental abnormality.<sup>52</sup> Though this is put in a negative way, it may, taken with the actual decision in the case, provide a basis for giving more direct recognition to the protective principle. The killing was described by the trial judge as a vicious killing unattended by any extenuating circumstances. It could be resolved that such a killing, if not attended by mental abnormality, could well deserve life imprisonment, which could also be the appropriate sentence for the protection of the public.

While this line of reasoning leads to the appropriate result, it would be preferable to go straight to the dangerousness factor. Proportionality would then be satisfied by a relationship between the sentence and harm plus dangerousness, rather than harm plus culpability. It is better to recognise this openly than to arrive at the same result through the fiction of assessing the offender's culpability on the basis that the offender is not mentally disabled, when it is clear that he or she is. In any event, the High Court's confirmation of the sentence of life imprisonment indicates that dangerousness rather than actual culpability was the compelling factor.

Provocation should be dealt with in the same way, though current law does not allow this. Where the defence of provocation succeeds, it has the effect of reducing liability from murder to manslaughter, with the result that a lower penalty based on deterrent or retributive grounds is inflicted, rather than a higher penalty based on community protection (where, that is, community protection is an issue and requires a higher penalty). In some jurisdictions, for instance, Queensland, South Australia and the Northern Territory, there is the theoretical possibility of a life sentence for manslaughter.

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49 Ibid at 477. See also Cheang M, 'Diminished Responsibility under Singapore Law' [1990] *J Undang-Undang* 29 at 52.

50 (1988) 164 CLR 465 at 477.

51 Arenella P, 'Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability' (1992) 39 *UCLA L Rev* 1511 at 1526; Slogobin C, 'A Jurisprudence of Dangerousness' (2003) 98 *Northwestern U LR* 1.

52 (1988) 164 CLR 465 at 477.

However, in other jurisdictions, like the Australian Capital Territory, there is a maximum term of 20 years,<sup>53</sup> so that a sentence based on the protection of the public has a finite limit placed upon it. This could result in problems similar to those which faced the High Court in the *Veen* cases above.

The main difficulty with provocation is that the courts do not seem to have made up their mind on whether it involves total lack of ability to control oneself or whether a partial lack of control is enough.

In the case of partial lack of self-control, there is room for deterrent and retributive sentencing and objective factors like the nature and source of the provocation and whether ordinary people might act in the same way are relevant factors. But where an offender has totally lost the ability to control him or herself, objective factors seem beside the point. Such a person is not culpable (unless there is some earlier culpable act), and so a retributive or deterrent sentence is not appropriate. But such an offender is likely to be highly dangerous (although not necessarily, for instance, if the condition that leads to total loss of self-control could be controlled by a new drug) and so a sentence designed to protect the community is warranted.

It is open to parliaments to remove the requirement of proportionality so that an indefinite sentence may be imposed for offences where the harm falls short of death.<sup>54</sup> In *R v Moffat*,<sup>55</sup> the Victorian Court of Appeal held that Victorian legislation having this effect was not invalid on constitutional grounds. In *O'Shea v DPP*,<sup>56</sup> Perry J held that statutory provisions for indeterminate detention were not invalid owing to conflict with the International Covenant on Civil and Political Rights. Any such conflict may however be the subject of report by the Human Rights and Equal Opportunity Commission.<sup>57</sup>

### C. Rehabilitation or reform<sup>58</sup>

Another way that society may protect itself against future crimes by offenders is by rehabilitating the offender. In many ways this is the most enlightened purpose of the criminal law. That is in theory. But there are problems. One is that rehabilitation has not proved to be very successfully achieved in practice.<sup>59</sup> Secondly, rehabilitation may require a longer period of control than a deterrent or retributive punishment may warrant. Unless the longer sentence could be justified on grounds of incapacitation, as in the case of dangerous offenders, the excess period of control or incarceration looks like control for

53 *Crimes Act 1900* (ACT) s 15(2).

54 Consider, for instance, the provisions for indefinite sentences in the *Sentencing Act 1991* (Vic) ss 18A-18P.

55 [1998] 2 VR 218. See also *Kable v DPP (NSW)* (1996) 189 CLR 51; Johnston P and Hardcastle R, 'State Courts: The Limits of Kable' (1998) 20 *Syd LR* 216; and Wood D, 'A One Man Dangerous Offenders Statute - the Victorian *Community Protection Act* (1990)' (1990) 17 *MULR* 197.

56 (1998) 71 SASR 109.

57 *Ibid* at 133.

58 Victorian Sentencing Committee, *Sentencing Report* (1988) pp 78-88.

59 *Ibid* pp 80-82.

the good of the offender rather than for the good of society. Such paternalism should find no part in the criminal law.

On the other hand, rehabilitation should not be abandoned as one of the aims of the criminal law. If a person is to be imprisoned on retributive, deterrent, or incapacitative grounds, the period of imprisonment may provide an opportunity to reform the offender. Applying a Rawlsian theory, Professor Donnelly has persuasively argued that sending a person convicted of a crime to prison without providing an opportunity and programs for rehabilitation is unjust and contrary to human dignity.<sup>60</sup> While society as a whole is responsible for avoiding such injustice, it is for the supervised prison system to discharge this responsibility.

#### D. Denunciation

A sentence may be imposed in order to express society's abhorrence of the crime committed. Denunciation is sometimes seen as a separate aim of the criminal law.<sup>61</sup> It is hard to see, however, what denunciation adds to the other aims of punishment, particularly retribution and deterrence, and what circumstances would lead to giving a sentence which could not be justified by one of the other aims of the criminal law.<sup>62</sup> The Victorian Sentencing Committee noted that, despite negative research findings, denunciation constituted justification for sentencing in England, though the Australian Law Reform Commission did not consider it to be a legitimate sentencing aim. Even so, the committee recommended that one of the purposes for which a sentence might be imposed was to allow the court to denounce the conduct of the offender. The *Sentencing Act* 1991 (Vic) largely adopted this recommendation and provides that a sentence may be imposed to manifest the denunciation by the court of the offender's conduct.<sup>63</sup> It would be better to regard denunciation as a side effect of sentencing rather than a justification for it.

#### E. Restoration<sup>64</sup>

This purpose of punishment aims to pay greater attention to the position of the victim, by getting offenders to face up to the harm they have inflicted. A degree of community participation is involved with meetings which may contain support groups both of the defendant and the victim. Recommendations emerging from such meetings may be taken into account by the sentencing judge, and the community representatives may be involved in seeing that the defendant complies with conditions which may be laid down

60 Donnelly SJM, 'The Goals of Criminal Punishment: a Rawlsian Theory' (1990) 41 *Syracuse LR* 771 at 778-783 (ultimately grounded in multiple views concerned with human dignity).

61 Victorian Sentencing Committee, *Sentencing Report* (1988) pp 100-106.

62 See *Smiles v Commissioner of Taxation* (1992) 35 FCR 405.

63 *Sentencing Act* 1991 (Vic) s 5(1)(d).

64 See Pollard C, 'Victims and the Criminal Justice system: A New Vision' [2000] *Crim LR* 5; Morris A and Gelsthorpe L, 'Restorative Justice under the Crime and Disorder Act 1998' [2000] *Crim LR* 18; Green RG, *Justice in Aboriginal Communities: Sentencing Alternatives* (1998).

in the sentence. While the aim is rehabilitative and reparative rather than retributive, some element of deterrence may emerge from the pursuit of this aim of punishment.

Since one aspect of this aim is to replace prison with community based sentences some fairly serious offences such as robbery at knife-point may be covered.<sup>65</sup> There is more ambivalence about the suitability of this aim of punishment and its attendant procedures to cases of sexual offences and domestic violence.<sup>66</sup>

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65 See Pollard C, 'Victims and the Criminal Justice system: A New Vision' [2000] *Crim LR* 5 at 5-7.

66 See Green RG, *Justice in Aboriginal Communities: Sentencing Alternatives* (1998) p 133; Sherman LW and Strang H, *Policing Domestic Violence: The Problem Solving Paradigm* (1996) <<http://www.aic.gov.au/rjustice/rise/sherman-strang.pdf>>.