The Fallacy of Punishing Offenders for the Deeds of Others: An Argument for Abolishing Offence Prevalence as a Sentencing Aggravating Consideration

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Abstract

Sentencing outcomes are often marked by a considerable degree of unpredictability. A key reason for this is the large number of aggravating and mitigating considerations, some of which have unstable questionable foundation. This article argues that one well-established aggravating factor — offence prevalence — should be abolished. Pragmatically, the courts have not established workable criteria or a process for establishing whether an offence is prevalent. From a normative perspective, increasing the penalty for prevalent offences is unsound because defendants should be punished for their acts, not those of other offenders. Further, on close analysis, all of the rationales (in the form of general deterrence, denunciation and specific deterrence) invoked to justify offence prevalence do not do so. Abolishing one sentencing variable will not make sentencing a significantly more coherent or predictable discipline, but the methodology applied in this article can be used to assess the viability of other sentencing considerations.

I Introduction

Sentencing has been described as ‘[t]he most controversial and politically sensitive aspect of the criminal law’* and it has been noted that it is ‘difficult to overstate the
importance of sentencing in the administration of any system of criminal justice.\(^2\)

Sentencing is also one of the least predictable areas of law. There is no single sentence that is correct in any particular case. Sentencing is innately complex for several reasons, including that the key objectives of sentencing in the form of community protection, general deterrence, specific deterrence, rehabilitation, denunciation and retribution\(^3\) are not prioritised and sometimes conflict. Moreover, there is a large number of aggravating and mitigating considerations, which continue to evolve.\(^4\)

The imprecise nature of sentencing is exacerbated by the sentencing methodology known as ‘instinctive synthesis’.\(^5\) That methodology requires judges to identify all of the factors that are applicable to a particular sentence, and then set a precise penalty.\(^6\) However, in doing so judges are not permitted to set out with particularity the precise weight that has been conferred on any particular sentencing factor.\(^7\) This process has resulted in some commentators describing sentencing as a jurisprudential wasteland, where the most important consideration is the profile of the judge who happens to determine the case.\(^8\) And, indeed, a number of reports and studies have noted inconsistency in this realm.\(^9\)

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\(^4\) Shapland identified 229 factors: Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge, 1981) 43; while La Trobe University identified 292 factors: Legal Studies Department, La Trobe University, *Guilty, Your Worship: A Study of Victoria’s Magistrates’ Courts* (La Trobe University, 1980). For a discussion of the more significant sentencing factors, see Odgers, above n 3, chs 3–4.

\(^5\) See *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ); *Barbaro v The Queen* (2014) 253 CLR 58 (‘Barbaro’). For a recent discussion of its operation, see Chief Justice Wayne Martin, above n 2, 6–9.


\(^7\) *Pesa v The Queen* [2012] VSCA 109 (4 June 2012). The only exceptions are discounts that are accorded for pleading guilty and cooperating with authorities: see Freiberg, above n 3; Mackenzie and Stobbs, above n 3.


proclaimed that the sentencing consistency that should be strived for is in the operation and application of principles, as opposed to numerical equivalence. However, it is argued that some sentencing objectives or principles are so imprecise or illogical that even that aim is untenable.

In order to improve the transparency and coherency of the sentencing system, it is necessary to critically evaluate the capacity of sentencing law to achieve its objectives and to examine the validity of each of the numerous aggravating and mitigating considerations.

This article attempts to inject increased clarity into the sentencing process. Offence prevalence is an entrenched aggravating factor at common law. It is also prescribed in several Australian sentencing statutes. The courts have stated that offence prevalence should aggravate penalty for several reasons, with the main rationale being to reduce the incidence of the relevant offence by discouraging potential offenders through the imposition of harsh sanctions. Theoretically, the role of offence prevalence in the sentencing matrix is sound, but, examined more closely, it is a flawed consideration.

First, at the pragmatic level, the courts have not established any mechanism for determining whether offences are, in fact, increasing. There is even uncertainty, at the most basic level, regarding whether prevalence means a high incidence of the crime in question or an increasing rate of the crime. It is also unclear whether offenders must be informed that the court regards the relevant offence as prevalent. These matters could potentially be resolved by detailed and thorough analysis and reformulation of the principle. Despite this, there is still no place for offence prevalence in sentencing because of a persuasive normative consideration. Offenders have no control over the conduct of other individuals. The fact that other offenders have committed similar offences cannot be attributed to a defendant in a doctrinally relevant sense. Severing the link between personal responsibility (and culpability) and the harshness of the penalty undermines the normative integrity of sentencing law.

A tenable argument can be mounted that the individual interests of offenders should be subjugated to the common good in the form of deterring crime by imposing harsher penalties for prevalent offences. However, ultimately this argument is unsound because its core premise is refuted by empirical evidence indicating that harsh penalties do not reduce the incidence of crime.

This article’s thesis will not make the sentencing process meaningfully fairer or more efficient. Offence prevalence is one of many aggravating and mitigating considerations. However, in considering the validity of this consideration, we also discuss the plausibility of key sentencing objectives in the
form of general deterrence, specific deterrence and denunciation.\textsuperscript{14} This wider perspective will hopefully inform deeper analysis and reform of some existing (dubious) sentencing aims. Moreover, the methodology applied in this article can be used as a basis for examining the appropriateness of a range of other sentencing considerations. Accordingly, the conclusions reached and the methodology employed will hopefully provide a catalyst for a more rigorous evaluation of sentencing law and practice, with a view to making sentencing a fairer and more efficient system. This is especially important given that sentencing is the realm where the state acts in its most coercive manner against individuals.

In the next part of this article, we analyse and explain the manner in which prevalence operates in sentencing law. Part III argues that the rationales invoked to underpin offence prevalence as relevant to sentencing are empirically or doctrinally unsound and, hence, cannot justify continued reference to offence prevalence. In Part IV we argue that it is morally unsound for offence prevalence to remain a sentencing consideration because it is unfair that offenders should have their punishment increased because of the acts of other offenders. For the sake of clarity, the key objections against prevalence remaining as an aggravating factor take two main forms.\textsuperscript{15} The first are mainly pragmatic in nature and are set out in Part III. A normative objection is discussed in Part IV. The normative objection is independent to the pragmatic reasons that are provided in favour of abolishing prevalence. In the concluding remarks we advance reform proposals.

II The Current State of the Law

A Overview

Offence prevalence is an aggravating sentencing factor at common law and, hence, operates to increase sanction severity in all Australian jurisdictions. It has been endorsed as a sentencing consideration for over 100 years.\textsuperscript{16} It is also prescribed as an express statutory sentencing consideration in the Northern Territory\textsuperscript{17} and Queensland.\textsuperscript{18} While it is not tenable to rank with any accuracy the respective importance of aggravating and mitigating considerations, it is clear that offence prevalence is capable of considerably influencing sentencing outcomes. In Hall v Tasmania,\textsuperscript{19} it was expressly noted that prevalence is a factor that can impact the

\textsuperscript{14} As noted further below, retribution or ‘just deserts’ is also sometimes advanced as an independent objective of sentencing. However, on closer analysis these terms are often used interchangeably with the concept of proportionality (which dictates how much to punish, rather than justifying the need to punish): see Andrew von Hirsch, Censure and Sanctions (Oxford University Press, 1993); Jesper Ryberg, The Ethics of Proportionate Punishment: A Critical Investigation (Kluwer Academic, 2004).

\textsuperscript{15} In Part III, we also raise a conceptual objection regarding the role of denunciation in sentencing.

\textsuperscript{16} See Hargreaves v Chakley (1903) 24 ALT 184.

\textsuperscript{17} Sentencing Act 1995 (NT) s 5(2)(g).

\textsuperscript{18} Penalties and Sentences Act 1992 (Qld) s 9(2)(g).

\textsuperscript{19} [2015] TASCCA 6 (15 April 2015).
sentencing tariff for an offence, and there are numerous cases where a tariff increase has occurred because of the prevalence of the offence.\textsuperscript{20}

**B  Overview of Areas of Uncertainty**

Offence prevalence is a consideration that is regularly invoked by sentencing judges.\textsuperscript{21} Despite this, it has rarely been subjected to considered judicial analysis in relation to its rationale or scope of operation. It is normally simply applied without examination of its justification or precise role in sentencing determinations. The main exception to this is the lengthy consideration of the concept by Callaway JA (Phillips CJ and Batt JA concurring) in *R v Downie*,\textsuperscript{22} which was handed down nearly 20 years ago.

*Downie* was an appeal against sentence by two offenders who were each sentenced to 14 months’ imprisonment with eight months wholly suspended after pleading guilty to burglary, criminal damage and intentionally causing serious injury. The offences arose out of a break-in into a caravan of the victim, in Morwell, Victoria, whereupon the offenders assaulted the victim, causing him to sustain cuts and bruises to the upper body.

In handing down the sentence, the sentencing judge stated that such behaviour was prevalent in this area, and such behaviour is all too often that of young men. It is that need to deter others, or general deterrence, as it is called, that causes me to consider that prison is the only appropriate disposition of this matter, and, furthermore, actual imprisonment.\textsuperscript{23}

Justice of Appeal Callaway allowed the appeal against sentence (reducing the penalty to eight months’ imprisonment and suspending the parts of the sentences that had not already been served) on the basis that the sentencing judge did not mention that prevalence was a relevant consideration and, hence, breached the *audire alteram partem* (procedural fairness) rule.\textsuperscript{24} In reaching this conclusion, Callaway JA considered at length some of the more important issues regarding the operation of the prevalence principle. Extracted below is an excerpt from his Honour’s judgment. The issues raised by Callaway JA highlight the lack of jurisprudential progress on this subject matter, thereby underlining the pressing need for considered analysis. Justice of Appeal Callaway, relevantly, stated:

The law on prevalence awaits its Labeo,\textsuperscript{25} but in the meantime the following propositions may be essayed:

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\textsuperscript{20} For an example of tariffs increasing because of offence prevalence, see *Conley v Western Australia* [2013] WASCA 95 (12 April 2013); *Butler v Western Australia* [2012] WASCA 249 (29 November 2012) [40].

\textsuperscript{21} See the cases cited in Part IIG–H below.

\textsuperscript{22} [1998] 2 VR 517 (‘*Downie*’).

\textsuperscript{23} Ibid 519.

\textsuperscript{24} Ibid 519–23.

\textsuperscript{25} Marcus Antistius Labeo was a prodigious Roman jurist who is reputed to have written over 400 books.
1. When a judge is minded to impose a more severe penalty on account of prevalence, or an appellate court is asked to review a discretion so exercised, three distinct issues arise for consideration. The first relates to the material or sources on the basis of which the judge is entitled to conclude that the offence is prevalent. Is he or she limited to admissible evidence and matters of which judicial notice may be taken or may regard be had to the wider range of material available on a plea or to an even more generous variety of sources? The second relates to the degree of assurance that the judge must have that the offence is prevalent. In the language of sentencing facts, the second issue relates to the standard to which prevalence must be established. The third is concerned with natural justice. In what circumstances must the judge make it clear to counsel that prevalence may be taken into account?

2. If prevalence is a sentencing fact in the ordinary sense, all those issues are affected to some degree by *Storey’s case* [R v Storey [1998] 1 VR 359; discussed in Part III of this article] … As to the first issue, prevalence would have to be established from the materials to which resort may properly be had on a plea to establish sentencing facts. … As to the second issue, prevalence would have to be established beyond reasonable doubt.26

His Honour also noted that sometimes a distinction is made between prevalence and increased prevalence, however, it was not clear that there was a relevant difference between the concepts. Without forming a final view, Callaway JA suggested that, on balance, prevalence (and increased prevalence) were not sentencing facts in the ordinary sense and, hence, there was no need to adduce evidence of prevalence before it could be invoked. Instead, prevalence could be established by judicial notice and even general knowledge and personal experience of the judge or magistrate.

His Honour then added:

> It is unnecessary to resolve this latent controversy in the present case, although, the more informal the procedure by which prevalence is established, the greater the need for the observance of procedural fairness. … A judge’s belief does not exonerate him or her from the duty of procedural fairness, for he or she may be mistaken.27

In this case, the appeal was allowed because even if breaking into homes and acting violently towards the occupiers was locally prevalent, the appellants should have been given an opportunity to challenge this assumption.28

As is discussed shortly, a somewhat striking aspect of the current sentencing law is that most of the issues relating to offence prevalence identified by Callaway JA remain unresolved, despite the frequent reliance by courts on prevalence and the nearly 20 years that have elapsed since. To some extent, this is perhaps a manifestation of the discretionary and intuitive approach to sentencing. But this does not totally explain the continued vagueness. At times, there has been a curious, seemingly defiant, refusal even to engage with the issues identified by Callaway JA in order to clarify the scope and contours of offence prevalence.

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26 *Downie* [1998] 2 VR 517, 520–1.
27 Ibid 522–3.
28 Ibid 523.
A good example is the approach by Brooking JA (Phillips and Buchanan JJA agreeing) in *R v Lim*, 29 which was decided less than a year after *Downie*. In *Lim*, the Victorian Court of Appeal rejected an appeal by a husband and wife who were Singaporean nationals on student visas. They were sentenced to two years’ imprisonment for a number of dishonesty offences, including insurance frauds. One of the grounds of appeal was that the sentencing judge increased the penalty on the basis that insurance frauds by foreign students were common. In rejecting this ground of appeal, Brooking JA stated that the penalty was increased for considerations of prevalence. His Honour then summarily rejected any attempt to infuse more clarity into the sentencing calculus so far as prevalence is concerned. This is not uncommon in the somewhat opaque area of sentencing law. 30 What is unusual is the perfunctory manner in which Brooking JA resisted an attempt to cohere this area of law. His Honour stated:

> Nowadays, no appeal against sentence is complete without the citation of authority, and Mrs Hampel and Mr Tehan both rose to the occasion by referring us to a number of reported cases. I have not found it necessary to discuss any of them, although I venture to record with respectful concern the melancholy fact that in one of the cases relied on, *R v Downie & Dandy (1998)* 2 VR 517, it was found to be desirable, as an interim measure, to lay down nine large bundles of propositions as part of ‘the law on prevalence’, which was said at 520 to await its Labeo. I note with apprehension that Labeo is the Roman jurist reputed to have written 400 books.

Most appeals against sentence can and should be disposed of without the citation of authority. We must do what we can to strive for simplicity. The present case is no exception so far as authority is concerned. 31

The appeal for simplicity by Brooking JA is on one level desirable, but is ultimately misguided given the importance of the role of prevalence in sentencing and the considerable impact that the choice of sanction can have on offenders. Simplicity should not be used as a basis for resisting attempts to explain and clarify important areas of the law. The sentiments by Brooking JA do, however, explain the ongoing uncertainty in this area of law. We now turn to detailing the current role of prevalence in sentencing. We start with a discussion of the relatively (few) settled areas.

### C Rationales for Prevalence: General Deterrence, Specific Deterrence and Denunciation

The rationales for incorporating offence prevalence into the sentencing calculus are set out in *Downie*, above, as general deterrence and denunciation. These are well-established rationales. The cases are replete with reference to general deterrence 32

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30 See *Pesa v The Queen* [2012] VSCA 109 (4 June 2012). See also Chief Justice Wayne Martin, who describes sentencing as an art rather than a science: above n 2, 6. The same observation was made by Lord Lane CJ: see Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 89–90. We thank the anonymous referee for this observation.
and denunciation as underpinning the reason that offence prevalence aggravates penalty. In addition to this, it has also been held that specific deterrence can justify reliance on offence prevalence to aggravate penalty.

D  No Limitation to the Range of Offences to Which Prevalence Applies

There is no conceptual or pragmatic limitation to the types of offences to which prevalence can apply. Prevalence has been held to be relevant to a large number of offences, including:

- crimes of violence generally and, more specifically, certain categories of such crimes including serious assaults, alcohol-fuelled street violence and domestic violence;
- armed robbery;
- firearms offences;
- burglary and home invasion;
- sexual offences against children;
- child pornography offences;
- tax fraud;
- offences against Social Security;
- conspiracy to defraud (card skimming);
- dangerous driving causing death or serious injury;
- drug trafficking and specifically in relation to cannabis and methamphetamine; and

(a pseudonym) v The Queen [2014] VSCA 37 (13 March 2014) [40]; R v Davidson [2014] QCA 348 (19 December 2014) [63].


Powell v Tickner (2010) 203 A Crim R 421, 438 [82]. The intersection between prevalence and retribution is also examined below.

Mather v The Queen (2009) 25 NTLR 152, 163 [23].


Dragojlovic v The Queen (2013) 40 VR 71, 131–2 [228].


people smuggling.  

E Prevalence or Increased Prevalence is Sufficient

Logically, there is a difference between crimes that are prevalent (for example, road traffic offences) and crimes that are on the increase. There has been some discussion in the case law on whether prevalence can be invoked regarding crimes committed frequently or only regarding those for which the crime rate is actually increasing. However, in most situations when prevalence is invoked, there is no consideration as to which of these two contexts is being involved. In nearly all of the case types cited in Part IID above, the concept of prevalence was used generically without specifying whether the basis for aggravating the sentence was the high rate of the offence in question or an increasing rate of that crime. Hence, the weight of authority indicates that there is no relevant difference between the concepts — a high incidence or increasing incidence of an offence can justify a penalty increase.

F Characterisation of Offence Prevalence

In order for prevalence to aggravate penalty, there is no need for the characterisation of the behaviour to correlate to a formally recognised type of offence. Moreover, the relevant behaviour does not need to be confined by precise geographical or temporal constraints. Thus, we see that prevalence applies in a number of possible contexts.

The first is where it relates to a formally defined offence category, such as drug trafficking. The second is where it relates to a subcategory of a broader offence, such as assault by glassing. The third is where it relates to offence

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53 Road traffic and vehicle regulatory offences constitute more than one-third of the principal offences for which defendants are finalised in Australian courts: Australian Bureau of Statistics (‘ABS’), ‘4513.0 — Criminal Courts, Australia, 2013–14’ (March 2015) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4513.0>, ‘Finalised’ is defined in the explanatory notes to the ABS report as ‘that is, persons or organisations for whom all charges have been formally completed so that they cease to be an item of work to be dealt with by the court’.  
54 The only exception is Pickett [2014] TASCCA 1 (14 March 2014). See also Western Australia v Smith [2015] WASCA 87 (4 May 2015) [47].  
55 See also Wootton (2014) 241 A Crim R 256; Powell v Tickner (2010) 203 A Crim R 421, 438 [84].  
57 DPP (Vic) v Lawrence (2004) 10 VR 125. See also the offences set out in Part IID above.
prevalence or increased prevalence generally (without reference to a particular
time frame)\(^{58}\) or within a particular locality.\(^{59}\)

**G**  
**Normally Desirable to Provide Accused an Opportunity to**  
**Respond to Prevalence**

The weight of judicial opinion suggests that if a court intends to rely on  
prevalence, the defendant should be given an opportunity to make submissions on  
the issue.\(^{60}\) However this is not a strict rule. There are numerous recent cases in  
which offence prevalence has been used as an aggravating factor without the  
defendant first being given the opportunity to advance submissions to the contrary,  
and yet an appeal against sentence has been rejected. In *Powell v Tickner*, Buss JA stated:

> It is not essential that ‘due warning’ be given before the prevailing standard  
of sentencing in relation to a particular offence or offending is increased on  
account of prevalence or increasing prevalence, but the absence of a ‘due  
warning’ is a factor to be taken into account in the sentencing disposition.\(^{61}\)

Similarly, in *Chol v The Queen*,\(^{62}\) the Court noted that a judge should  
generally notify a defendant that prevalence is being relied upon. But a failure to  
do so does not necessarily constitute a sentencing error. In *Chol*, the Court held  
that the failure of the sentencing judge to indicate to the accused that he would  
aggravate the sentence on the grounds that the offence in question (armed robbery)  
was prevalent did not invalidate the sentencing decision because there was  
statistical data supporting an increase in the rate of armed robberies.\(^{63}\)

A mid-course was taken in *R v Lui*.\(^{64}\) It was held that an allegation of  
offence prevalence must be brought to the attention of the accused, except where  
this is a matter of ‘notoriety’.\(^{65}\) The Court stated:

> [T]he respondent was right to concede that the sentencing judge failed to  
afford procedural fairness to the applicant. … [Winneke P in *R v Li* [1998]  
1 VR 637] said at 643:

> ‘[I]t is inappropriate for a sentencing judge to aggravate a sentence by  
reference to facts of which he has knowledge (and which are not a matter of  
notoriety) without first giving to the accused, or his counsel, an opportunity  
to meet and counter such facts by appropriate submissions or otherwise ...  
Procedural fairness requires no less.’\(^{66}\)

A somewhat curious (verging on illogical) distinction has been suggested  
regarding the evidential approach needed to establish that offences are prevalent,

\(^{58}\) *Krijestorac v Western Australia* [2010] WASCA 35 (26 February 2010).

\(^{59}\) *Downie* [1998] 2 VR 517. A very rare offence is *Gower v Roffe* (Unreported, Supreme Court of  
Tasmania, Gibson J, 13 May 1966) (stealing potatoes in a rural area), cited in Freckelton, above  
n 1, [12.2.290].

\(^{60}\) See *Trajkovski v The Queen* (2011) 32 VR 587 (‘*Trajkovski*’) and discussion below.


\(^{62}\) [2012] VSCA 204 (31 August 2012) (‘*Chol*’).

\(^{63}\) See also *Braslin* [2010] TASCCA 1 (28 January 2010).

\(^{64}\) [2009] QCA 366 (1 December 2009).

\(^{65}\) Ibid [15].

\(^{66}\) Ibid (emphasis in original).
as opposed to being of increasing prevalence. It has been held that it is necessary to give the accused an opportunity to comment on a suggestion of the increased prevalence of an offence, but not prevalence per se.67

In the recent case of *Wootton*,68 the New South Wales Court of Criminal Appeal adopted a relaxed approach to the need to inform an accused that the offence in question is prevalent. The case is important because of the reason the Court set out for stating procedural fairness was not mandatory. In *Wootton*, the Court rejected an appeal against sentence by an offender who was sentenced to 10 years and nine months’ imprisonment (with a non-parole period of seven years) after pleading guilty to aggravated breaking and entering a dwelling and committing a serious indictable offence (which involved the use of a firearm). In sentencing the offender, the sentencing judge placed considerable emphasis on general deterrence because ‘[g]un crimes are on the increase’.69 No data was provided in support of this. In appealing the sentence, the offender submitted that he was denied procedural fairness as a result of not having the opportunity to rebut the proposition that gun crimes are on the increase and there was no such evidence of this increase. In rejecting the appeal, Campbell J (Gleeson JA and RA Hulme J agreeing) glossed over the argument by alluding to the fact that there could be no established tariff for the offence in question:

The applicant’s case at one level of abstraction is that he was not given a fair hearing because the Judge took into account factual material not in evidence without notice to the parties, namely ‘[g]un crimes are on the increase’. Expressed this way an infringement of the ‘hearing rule’ aspect of natural justice may have occurred. However, the argument advances only the conclusion for which it contends. Expressed this way, the error is asserted, not demonstrated.

In my judgment, the correctness of the argument has not been demonstrated. As the cases of *House*, *Phormmalysak* and *Trajkovski* relied upon by the applicant establish, demonstration of error in the present context depend upon showing that the sentence represents ‘an increase in the preceding pattern of sentencing’ or previously accepted available range. Given what the High Court has recently said in *Barbaro* about the availability of ‘ranges’ and emphasising that fixing of the appropriate sentence for the offence and the offender is the sole responsibility of the sentencing Judge, it is difficult to see how natural justice could impose a duty on the Judge to warn counsel, or provide advance notice of, the result he or she has in mind. Naturally, if a Judge chooses to give an indication that foreshortens legitimate persuasion by counsel he or she may not depart from it without allowing the opportunity for further argument. No such thing occurred here.70

The backdrop to this reasoning is the High Court decision in *Barbaro*, in which the High Court held that it is impermissible for the prosecution at plea to make a submission regarding the appropriate sentence or even the range of sentences that is appropriate.71 In doing so, it overturned earlier authority (R v

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67 See *Trajkovski* (2011) 32 VR 587, 607 [103]–[104].
69 Ibid 261 [36].
70 Ibid 262–3 [38]–[39].
71 (2014) 253 CLR 58, 66 [7].
MacNeil-Brown)\textsuperscript{72} that stated the prosecution can, and in some cases is required to, make submissions regarding the appropriate sentencing range. Following Barbaro, there were several unanswered questions regarding the scope of the sentencing range prohibition. Several of those issues were addressed in Matthews v The Queen,\textsuperscript{73} in which all members of the Court held that if the prosecution does breach the Barbaro proscription by putting forward a submission on range, this does not vitiate sentencing discretion unless it can be shown that the judge was, in fact, swayed by the prosecution submission. The Court also stated that the limitation on the prosecution only applies in relation to submissions regarding the appropriate range of sentences, not the appropriate type of disposition. Further, the majority of the Court (Priest JA and Lasry AJA not deciding this issue) held that the prohibition against sentencing ranges does not apply to submissions by the defence.

The outcome of Barbaro, however, does not logically diminish the need for defendants to be informed of the fact that perceived offence prevalence could aggravate sentence. While it is generally no longer appropriate for the prosecution to suggest a sentencing range, prevalence nevertheless operates to increase the sentence, irrespective of the range which the sentencing judge determines as being appropriate. Prevalence operates to make the sentence harsher than it would be without its application. This provides a persuasive reason for ensuring that defendants have the opportunity to rebut a submission that the relevant offence is prevalent.

**H How Prevalence Can Be Established**

It is not clear what information or material needs to be provided before prevalence can be invoked as an aggravating factor. In Director of Public Prosecutions (Vic) v Janson, the Court stated that the best view is that prevalence can be established by judicial notice.\textsuperscript{74} A need for more robust evidence was articulated in Powell v Tickner,\textsuperscript{75} in which Buss JA states that material in the form of statistics or a schedule of previous cases is necessary if prevalence is to play a role in the sentence.

A more searching approach is also suggested in WCB v The Queen,\textsuperscript{76} although there is no indication of what type of evidential foundation is appropriate to establish prevalence:

We do not doubt that a proven increase in prevalence of a particular crime may provide a foundation for the prosecution to urge a court to increase the penalties that have been previously imposed. It can only occur in the confined circumstances identified by the Chief Justice in DPP v Duong:

\textsuperscript{72} (2008) 20 VR 677.
\textsuperscript{73} [2014] VSCA 291 (19 November 2014).
\textsuperscript{74} (2011) 31 VR 222, 229 [34]; see also Chol [2012] VSCA 204 (31 August 2012) [22]–[30].
\textsuperscript{75} (2010) 203 A Crim R 421, 438 [84]. See also Pavlic v The Queen (1995) 5 Tas R 186; TS v The Queen [2014] VSCA 24 (21 February 2014) [32].
\textsuperscript{76} (2010) 29 VR 483, 493.
‘It seems to me that it would be desirable in a case such as this, if the Director wishes to urge an increase in penalties, for a prosecutor at first instance to put material before the court, properly set out, explaining the foundation for the submission that there has been an increase, and as to why the court should adopt a different approach and increase the penalty above and beyond that previously imposed.’

A similar approach is set out by the New South Wales Court of Criminal Appeal in *R v House*, in which the Court stated that in order for prevalence to be invoked it needs to be established by ‘proper and sufficient evidence’; although there is no clarification of the specific type of material that would satisfy this requirement.

In a similar vein, Maxwell P in *Nguyen v The Queen* states in order to establish prevalence a ‘judge must have “some reliable foundation” for the conclusion that the offence is in fact (more) prevalent’. Again, no elaboration was provided regarding the type of evidence that amounts to ‘some reliable foundation’.

There are a number of conclusions that can be drawn from the above discussion on the state of the law relating to prevalence. First, offence prevalence is an aggravating sentencing consideration. Second, prevalence is most commonly justified by the objectives of general deterrence and denunciation. It has also been justified on the basis of specific deterrence. Third, prevalence means either a higher incidence of the offence in question or an increase in the frequency of the offence. There is no objective or clear criteria which determine when an offence is prevalent or increasing in prevalence. Fourth, prevalence can relate to either a specific established offence category or a particular manner in which an offence is committed. There are no objective parameters regarding the degree of generality or specificity within which conduct can be described to attract the operation of the principle. Fifth, prevalence (or increased prevalence) can relate to the incidence of an offence generally or in a designated locality. There are no objective parameters to how big or small a locality can be in order for the principle to operate. Further, there is no established methodology for establishing prevalence or increased prevalence. The weight of authority suggests that judicial notice is sufficient. However, some authorities have suggested empirical data is necessary. When empirical data is required, it is generally low level and not wide-ranging. For example, court statistics are sufficient. In any event, a failure to produce material which supports a suggestion of prevalence (or increased prevalence) will not necessarily constitute an appealable sentencing error. Finally, there is no clear rule regarding whether a defendant must have the opportunity to comment on a suggestion of offence prevalence. The trend of judicial opinion suggests that this is desirable, but not mandatory — especially if statistics can be produced on appeal to support a high (or increased) incidence of the offence in question.

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77 Ibid [31] (citations omitted).
79 (2011) 31 VR 673, 694 [82].
III Evaluation of the Current Approach to Prevalence

A Offence Prevalence in its Most Favourable Light

From the above discussion on the state of the law, it follows that there are several significant unresolved issues regarding the operation and scope of offence prevalence as a sentencing aggravating factor. This is undesirable because it undermines the key rule of law virtues of predictability and transparency.80

As noted previously, sentencing practice has been criticised because it leads to inconsistent outcomes. This shortcoming has been noted by courts. In Hili v The Queen,81 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ stated that consistency in sentencing is important, but the type of consistency that is sought is not mathematical equivalence, but rather the consistent application of legal principle.82

However, there is no meaningful prospect of attaining even consistency in the application of legal principles in sentencing law if a large degree of uncertainty exists regarding the application of cardinal aggravating factors such as offence prevalence. In order for offence prevalence to operate in a predictable, stable and consistent manner, it is necessary for the courts (or legislature) to clarify the circumstances and manner in which it operates. As we have seen, the uncertainties regarding its application relate to core aspects of the principle. These include the manner in which prevalence can be established and whether a defendant should be given an opportunity to respond to an allegation of prevalence. Until these matters are clarified and resolved, offence prevalence is more akin to a legal expedient (given that the bounds within which it can be invoked are so obscure) as opposed to a legal principle.

The fact that the operation and scope of offence prevalence is so obscure is not an insurmountable argument in favour of its abolition. It is equally an argument in support of a greater focus on the consideration, with a view to clarifying its scope and application. It is not the objective of this article to defend the continued relevance of offence prevalence and, hence, it is not essential to make reform proposals to better or properly ground the principle. However, we make some observations to this end in case the principle is retained. Moreover, in order to persuasively critique prevalence, it is necessary to present the arguments in favour of it in strongest fashion.

In further developing and framing the operation of offence prevalence as an aggravating factor, it is necessary to do so with regard to the overarching and fundamental aspects of sentencing law. Given the interests at stake in the sentencing process, it is important that factors adverse to an accused are established on the basis of objective evidence and to a high standard of proof. This is, in fact, a well-established principle in sentencing law. The High Court in R v

82 Ibid 527 [18]. See also Barbaro (2014) 253 CLR 58, 70 [26].
Olbrich\(^{83}\) (relying heavily on the reasoning of the Victorian Court of Appeal decision of \(R v \text{Storey}^{84}\)) held that the prosecution has the burden of proof of establishing aggravating sentencing facts and that the standard of proof is beyond reasonable doubt. In \text{Storey}, it was noted that the standard of proof of beyond reasonable doubt was applicable not solely to matters of aggravation, but extended to any circumstance the ‘judge proposes to take into account adversely to the interests of the accused’.\(^{85}\) The Court then defined ‘adversely’ by relying on the Western Australian Supreme Court decision of \text{Langridge v The Queen},\(^{86}\) in which a fact to be considered adverse would be ‘likely to result in a more severe sentence than would otherwise be the case’\(^{87}\).

Another well-established sentencing safeguard is the principle of procedural fairness.\(^{88}\) The principle has several different manifestations in sentencing. In essence, procedural fairness requires that the offender has an opportunity to comment on any adverse material or submissions and that the judge should inform an offender if he or she is inclined to reject submissions made by the offender.

In light of the above principles, several of the uncertainties relating to the application and scope of the prevalence aggravation principle are readily resolved. First, prevalence or increased prevalence should not be able to be established by means of judicial notice. It could be contended that experienced judicial officers obtain a sound grasp of offending patterns and trends as a result of handing down large number of sentences and, hence, they are well placed to make informed decisions regarding increases in certain forms of crime.\(^{89}\) Intuitively, this argument is appealing. However, ultimately judicial experience should not be a substitute for a more rigorous process for establishing prevalence. There would be considerable (and perhaps insurmountable) difficulties associated with identifying judges who had enough experience to make sufficiently informed evaluations regarding prevalence. Additionally, experience can often be skewed and not reflective of actual objective trends. Rules and procedures that have the capacity to impact important interests should apply irrespective of the profile and experience of the judicial officer who adjudicates on the outcome of a case.\(^{90}\)

Evidence of prevalence should be tendered and these matters should be required to be established beyond reasonable doubt. And from the procedural fairness principle it follows that it should be unlawful for an offender to be sentenced more heavily because of offence prevalence unless he or she has had an opportunity to rebut the evidence.

\(^{83}\) (1999) 199 CLR 270.
\(^{84}\) [1998] 1 VR 359 (‘\text{Storey}’).
\(^{85}\) Ibid 369. More recently, see \text{Filippou v The Queen} (2015) 323 ALR 33.
\(^{86}\) (1996) 17 WAR 346.
\(^{87}\) Ibid 367.
\(^{88}\) In the criminal law context, the principle has been elevated to a constitutional law principle: see \text{International Finance Trust Co Ltd v New South Wales Crime Commission} (2009) 240 CLR 319, 354–5 [54]–[57], 365–7 [93]–[98].
\(^{89}\) We thank the anonymous referee for this observation.
Nevertheless, even if these matters can be clarified, there are aspects of the offence prevalence principle that seem incapable of being defined with sufficient precision in order to avert suggestions of unworkable obscurity. The first seemingly intractable problem is defining what is meant by ‘prevalence’. This presumably is an absolute concept, but there is no (even) approximate point of reference that can be logically applied to draw a line between offences that attract aggravation on this basis and those which do not. The near randomness of this requirement is, to some extent, reflected by the very large number of offences to which prevalence has been ascribed and the fact that it has not been applied to the most common types of criminal offences (road traffic offences — apart from where injury is caused), while it has been invoked in relation to offences, such as people smuggling, that are rarely prosecuted.

Unlike offence prevalence, the concept of increasing prevalence appears to be a relative concept in that it compares the incidence of the same type of conduct at different times. This is problematic for several reasons. First, there is no external point of reference regarding the appropriate time frame over which the comparison should occur. There is simply no logically obvious point of reference which should be invoked. Second, there is not even an approximate line that can be drawn regarding what percentage increase is sufficient. For example, there is no concrete basis for suggesting that a 50% increase is sufficient while a 20% is not. The choice seems to be intrinsically impressionistic.

Moreover, on the basis of the current orthodoxy, there are no objectives or clear standards that are applied to limit the type of conduct that appears to be amenable to the prevalence principle. Once conduct such as ‘glassing’ or burglaries within a small geographical region are accepted as being capable of attracting the prevalence aggravation principle, there seems to be no basis for precluding virtually any categorisation of criminal conduct from attracting the principle, such as ‘thefts from Woolworths’, ‘thefts of Holdens’ or ‘assaults on university academics’. This makes the law appear arbitrary; it is removed from the predictability that is normally a defining aspect of the rule of law.

Despite these considerable pragmatic problems, it may be possible for greater clarity to be injected regarding acceptable standards by which criminal conduct should be classified before properly being capable of attracting the prevalence principle. The following discussion contends that even if the offence prevalence principle can be clarified to a point where it is jurisprudentially tenable, it should be rejected because none of the rationales advanced in support of it are empirically capable of underpinning the principle.

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91 See above Part IID.
92 In the five-year period between 2010 and 2014, there were only 335 convictions for people smuggling offences, which is less than 0.1% of all sentences handed down in Australia during this period: see Colin Craig and Andreas Schloenhardt, ‘Prosecutions and Punishment of People Smugglers in Australia 2011–2014’ (Research Paper, University of Queensland, June 2015).
B General Deterrence Does Not Work

General deterrence is the most common rationale that is advanced in justification of the prevalence aggravation principle. It is the theory that crime can be reduced by the imposition of harsh sanctions. General deterrence operates to increase the severity of the sanctions imposed on offenders by reference to its effect on people other than the offender. As noted over 50 years ago by the New Zealand Supreme Court in *R v Radich*:

[O]ne of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, [deterrence] has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only light punishment.

This passage has been cited with approval in numerous cases and deterrence remains a key sentencing objective in each Australian jurisdiction — even in the federal jurisdiction where it has no statutory foundation.

An ostensibly sound argument can be made that offences that are prevalent should be met with harsher offences in order to reduce the incidence of such crimes. Common sense suggests that one way to reduce crime is to provide a practical disincentive to committing such acts by making it clear to potential offenders that if they are apprehended they will be subjected to severe penalties. However, despite the widespread endorsement of general deterrence as an important sentencing objective, the empirical data suggests that it is a flawed theory.

It is not tenable in an article of this length to analyse in depth the findings of the hundreds of studies that have been undertaken to test whether there is a causal

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95 *Sentencing Act 1991* (Vic) s 5(1)(b); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(i); *Sentencing Act 1995* (NT) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c).
97 We thank the anonymous referee for this observation.
nexus between harsher penalties and reduced crime. However, given that there is a strong consensus among the findings, it is feasible to set out the main findings. The existing data shows that in the absence of the threat of any punishment for criminal conduct, the social fabric of society would diminish because crime would greatly escalate. Thus, general deterrence works in the absolute sense: there is a connection between the existence of some form of criminal sanctions and criminal conduct. However, there is insufficient evidence to support a direct correlation between higher penalties and a reduction in the crime rate.

Studies show that even the death penalty does not deter crime. In the United States (‘US’), it has been noted that states that have retained the death penalty for homicide offenders do not have lower rates of homicide. As noted by Berk, ‘for the vast majority of states in the vast majority of years, there is no evidence of a negative relationship between executions and homicides’. More recently, in 2014 following an extensive survey of general deterrence studies, the US National Academy of Sciences noted:

The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.

The weight of evidence suggests that the best way to reduce crime is to increase the perception in people’s minds that they will get caught if they break the law; the size of the penalty does not seem to impact on this decision.

Despite the scepticism in the academic realm regarding the efficacy of harsher criminal sanctions to reduce crime, legislatures and courts continue to rely on this rationale for setting higher penalties, to the point that they have adopted it a priori as an article of faith. In Yardley v Betts, the Court stated: ‘[t]he courts must assume, although evidence is wanting, that the sentences which they impose have the effect of deterring at least some people from committing crime’.  


101 Somewhat counterintuitively, this is the case even in relation to planned and calculated crimes: see Caleb Mason, ‘International Cooperation, Drug Mule Sentences, and Deterrence: Preliminary Thoughts from the Cross-Border Drug Mule Survey’ (2011) 18(1) Southwestern Journal of International Law 189; Sidney L Harring, ‘Death, Drugs and Development: Malaysia’s Mandatory Death Penalty for Traffickers and the International War on Drugs’ (1991) 29(2) Columbia Journal of Transnational Law 365; Mirko Bagaric, Theo Alexander and Athula Pathinayake, ‘The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud’ (2011) 26(3) Australian Tax Forum 511. For possible explanations regarding why the harshness of the penalty does not seem to be an important factor so far as the crime rate is concerned, see Ritchie, above n 98. We thank the anonymous reviewer for raising this issue.

102 See, eg, R v Renwick [2013] NTCCA 3 (21 February 2013) [51].

There are, in fact, some instances of courts being guarded about the capacity of higher penalties to reduce crime. For example, in *R v Vella*, the sentencing judge expressly stated that he was reluctant to endorse the objective of (marginal) general deterrence (because of the empirical data dispelling its efficacy), but felt compelled to do so. His Honour stated:

> Notwithstanding my strong reservations and reluctance, my oath of office requires me to accept decisions of the Court of Criminal Appeal as binding upon me and to apply the doctrine of general deterrence as a factor in the intuitive synthesis process.

In *Krijestorac v Western Australia*, the Court (in the context of prevalence) stated:

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

Despite this, the overwhelming trend of sentencing cases is to endorse the principle of general deterrence. This is a clear example of a gulf between (empirically based) knowledge and practice in the sentencing realm. In the context of proposals designed to improve and progress the law, it is necessary to base recommendations on the former consideration. We now examine whether denunciation and specific deterrence justify offence prevalence as an aggravating factor.

### C Denunciation — No Residual Meaning beyond Proportionality

As we have seen, denunciation has also been advanced as a rationale for prevalence as an aggravating factor. However, it is not clear that denunciation can logically underpin the relevance of prevalence in the sentencing calculus. There are two reasons for this. The first is that the role of denunciation in the sentencing process is itself contentious — arguably, it has no residual application beyond that which is achieved by the proportionality principle. Second, even if denunciation has an independent role in sentencing, it is not clear that prevalent offences are worthy of greater condemnation than other crimes.

We now develop these points — starting with the suggestion that a proper application of the proportionality principle subsumes the need for denunciation. While denunciation is an established sentencing objective in all Australian

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105 Ibid [36].
jurisdictions, its meaning has not been well developed by sentencing courts. To the extent that denunciation has been explained and examined, it has been advanced as a means of expressing society’s disapproval of criminal conduct. In Channon v The Queen, Brennan J said that ‘[p]unishment is the means by which society marks its disapproval of criminal conduct’.109

Justice Kirby stated that, in addition to expressing disapproval of the conduct, denunciation also expresses the message that the conduct must be punished:

A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society’s condemnation of the particular offender’s conduct.110

In assessing the degree of community disapproval, the courts look not to actual community feeling, but rather to informed public opinion. Denunciation is also sometimes invoked as a means of pursuing the goal of deterrence.112

In essence, to denounce is to criticise and make clear that certain behaviour is inappropriate. It is a communicative exercise. Like most forms of communication it can be done in several ways. In the non-sentencing context, the most obvious and common way to indicate disapproval of conduct is by express words. This is achieved in the sentencing process through the process of sentencing remarks. This is the easiest and most direct means of expressing disapproval. Sentencing orthodoxy, however, maintains that this technique is insufficient to adequately convey the desired message.

The practice of imposing a tangible hardship on offenders is normally thought necessary to adequately denounce criminal conduct. However, the imperative to impose a hardship on offenders (which thereby denounces criminal acts) is already underpinned by the proportionality principle. The objective of denunciation seems to add nothing to this requirement. The clearest statement of the proportionality principle is the following passage in the High Court case of Hoare v The Queen:

It has an express statutory basis in most jurisdictions: Crimes (Sentencing) Act 2005 (ACT) s 7(1)(f); Crimes (Sentencing Procedure) Act 1999 (NSW) s 3A(f); Sentencing Act 1995 (NT) s 5(1)(d); Penalties and Sentences Act 1992 (Qld) s 9(1)(d); Sentencing Act 1997 (Tas) s 3(e)(iii); Sentencing Act 1991 (Vic) s 5(1)(d). There are no equivalent provisions in South Australia and Western Australia.


(1978) 33 FLR 433, 437.

Ryan v The Queen (2001) 206 CLR 267, 302 [118].


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.\(^{114}\)

In *Veen v The Queen*,\(^{115}\) and *Veen v The Queen [No 2]*,\(^{116}\) the High Court stated that proportionality is the primary aim of sentencing.

The hardship that is imposed pursuant to the application of the proportionality principle marks the community disapproval of the conduct in a more profound manner than a mere judicial declaration of impropriety. It is the tangible penalty that also educates the community and the offender about the wrongness of the crime — demonstration through consequences is more compelling than disapproval in abstract. The overlap between proportionality and denunciation is noted by Kirby J in *Ryan v The Queen*: ‘[T]he denunciation of unlawful conduct, contemplated as a purpose of criminal punishment and judicial sentencing, would seem to me to involve, substantially, the denunciation inherent in the punishment itself’.\(^{117}\) Thus, it would seem that there is no residual role for denunciation beyond the need to implement the proportionality principle. Given that denunciation has no standalone role in the sentencing system, it cannot shore up the operation of specific sentencing considerations beyond those that are justified by the broader rationale of proportionality.

For the sake of completeness, it is important to note that proportionality is often advanced as a standalone principle. However, it is also sometimes used interchangeably (or at least closely linked) with the sentencing aim of retribution (or just deserts).\(^{118}\) While retribution is a well-developed concept in the literature involving the justification of punishment, its meaning in the sentencing domain has not been discussed at length by the judiciary.\(^{119}\) Justice McHugh, in *Ryan v The Queen*, provided the most expansive and illuminating statement regarding the nature of retribution in sentencing. His Honour stated:

> [E]xisting principles require many sentences to be retributive in nature, a notion that reflects the community’s expectation that the offender will suffer punishment and that particular offences will merit severe punishment. … [U]nder the notion of giving the offender his or her ‘just deserts’, the retributive aspect has re-asserted itself in recent years.\(^{120}\)

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\(^{114}\) (1989) 167 CLR 348, 354 (emphasis in original) (citations omitted).

\(^{115}\) (1979) 143 CLR 458, 467.


\(^{117}\) (2001) 206 CLR 267, 303 [120] (emphasis added).

\(^{118}\) We thank the anonymous referee for raising this matter. See von Hirsch, above n 14; Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985); Ryberg, above n 14.

\(^{119}\) When it is mentioned by sentencing courts, it is generally merely declared as being relevant without any explanation of the concept. See, eg, *R v CBG* [2013] QCA 44 (15 March 2013) [30]; *Buksh v The Queen* [2013] NSWCCA 60 (11 April 2013); *Hudd v The Queen* [2013] NSWCCA 57 (15 March 2013); *Phan v The Queen* [2013] NSWCCA 49 (5 March 2013); *Azzopardi v The Queen* (2011) 35 VR 43; *R v Pickard* [2011] SASCFC 134 (11 November 2011) [92]; *DPP v T* (2012) 21 Tas R 442, 447 [23]; *Crosswell v Tasmania* [2012] TASCCA 1 (25 January 2012) [19]; *DPP (Vic) v Anderson* (2013) 228 A Crim R 128.

\(^{120}\) (2001) 206 CLR 267, 282–3 [46].
Thus, in the sentencing realm the principal manifestation of retribution is the need to impose sentences that appropriately reflect the seriousness of the crime.\textsuperscript{121} It follows that the concept of retribution cannot provide an alternative justification for applying offence prevalence as an aggravating factor. Irrespective of whether proportionality is regarded as a discrete sentencing requirement or based in the need for retribution or just punishment, it is clear that a cornerstone of sentencing law is that offenders should be punished appropriately for their offences. Given this, it is not clear that denunciation has a legitimate stand-alone role in sentencing.

A second basis for rejecting denunciation as a rationale for prevalence as an aggravating factor stems from the fact that most criminal acts are harmful. They should be met with sanctions that are commensurate with the harm caused by the crime. There is no basis for condemning popular crime more than unpopular crime. If the murder rate in a locality drops to zero in an Australian jurisdiction or locality, that is no reason why the next murder should not be met with a stern punishment.\textsuperscript{122}

Moreover, while it has been noted that denunciation has a role in deterring crime, this cannot carve out a justification for denunciation (and other considerations, such as prevalence, which it supposedly grounds) for several reasons. First, deterrence is an independent and discrete sentencing objective. It is not contingent upon denunciation for its justification. Second, as we have argued, general deterrence is a flawed theory.

\section*{D Specific Deterrence Has No Connection with the Offences of Others}

Specific deterrence is the least-cited rationale for offence prevalence. It is also, manifestly, the weakest justification. Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and, thereby, convincing them that crime does not pay.\textsuperscript{123} It attempts to dissuade offenders from reoffending by inflicting an unpleasant experience on them (normally imprisonment) that they will seek to avoid in the future. Specific deterrence is a central common law sentencing objective and is given express statutory recognition in all Australian jurisdictions\textsuperscript{124} except Western Australia.\textsuperscript{125} It applies most acutely in relation to

\textsuperscript{121} The fact that retribution has no meaningful role in sentencing independent of other sentencing objectives such as accountability and punishment is noted by the New South Wales Law Reform Commission: above n 3, \[2.70]\textendash\[2.76].

\textsuperscript{122} Thus, while logically it is tenable to suggest that offence prevalence can go directly to the gravity of the offence (and the need for an appropriate penalty to serve as a proportionate and retributive punishment), it is for this reason that the frequency of a crime does not, in fact, make any particular commission of an offence more serious. We thank the anonymous referee for raising this issue.


\textsuperscript{124} 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).

\textsuperscript{125} Where it applies as a matter of common law.
serious offences and to offenders with significant prior convictions, since it is assumed previous sanctions have failed to stop their offending behaviour. Where specific deterrence is applicable to the sentencing of an offender, it operates to increase the severity of the sanction.

The most pertinent aspect of specific deterrence for the purposes of this article is that it derives its significance and application from the offender’s past conduct. It has nothing to do with the frequency of the present offence nor, in particular, the extent to which other offenders have committed the same crime as the defendant. Hence, it is logically incapable of justifying offence prevalence as an aggravating factor.

Further, the available empirical data suggests that specific deterrence does not work. As in the case of general deterrence, space does not permit an extensive dissertation on the many studies into whether harsher penalties deter individual offenders. However, again, the outcomes of the studies are convergent in their conclusions. The data shows that offenders who have been subjected to harsh punishment are no less likely to reoffend than identically placed offenders who are subjected to lesser forms of punishment. In fact, the weight of studies into specific deterrence indicates that custodial sanctions can have a small criminogenic effect, rather than reducing the incidence of offender recidivism. Thus, there is no empirical basis for pursuing the goal of specific deterrence.

IV Normative Objection to Offence Prevalence

In addition to the pragmatic objectives relating to offence prevalence as a sentencing aggravating factor, there is a normative objection to its application. Offenders should be punished for their crimes, not for the acts of others. This objection is similar to the one previously raised in relation to general deterrence. In the context of general deterrence, it has been noted that inflicting (additional) pain on one person in order to advance the interests of the community as a whole is unjust. This criticism is so forceful that it is one of the principal reasons for the demise of the utilitarian theory of punishment. Each individual is morally

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126 See eg, DPP (Vic) v Zullo [2004] VSCA 153 (19 August 2004); DPP (Vic) v Lawrence (2004) 10 VR 125.
129 Thus, it has been suggested that subjecting offenders to prison may, in fact, slightly increase their future risk of reoffending.
130 Nagin, Cullen and Jonson, above n 123, 145.
autonomous and complete and it is often inappropriate to aggregate interests to defeat the rights of a person.\(^{133}\)

This objection in the context of general deterrence is noted by Ashworth, who states that giving weight to general deterrence involves treating ‘citizens merely as numbers to be aggregated in an overall social calculation’.\(^{134}\) At the core of this objection is the Kantian maxim that people should always be treated as ends, and never as means.\(^{135}\)

The moral objection to imposing exemplary punishment resulted in the Law Reform Commission rejecting general deterrence as an appropriate rationale for sentencing:

> To impose a punishment on one person by reference to a hypothetical crime of another runs completely counter to the overriding principle that a punishment imposed on a person must be linked to the crime that he or she has committed.\(^{136}\)

The normative objection to offence prevalence as an aggravating factor is, in fact, even stronger than that which applies to general deterrence. In the case of general deterrence, offenders receive additional punishment in a bid to prevent future crimes. In the case of offence prevalence, the increase in penalty stems from the past conduct of other offenders who have committed a similar crime and a desire to influence the conduct of prospective future offenders. In relation to both cohorts, the offender has neither responsibility nor control over their behaviour.

The ‘scapegoating’ criticism has not been totally missed by the courts. In *Withers v The King*, MacKinnon J said:

> We have been told that there had been a considerable amount of warehousebreaking in Leicester at that time and that it was the policy of the Recorder to impose a sentence which might act as a deterrent to those who commit that class of crime. That is a proper consideration so long as it does not result in a convicted man being made the scapegoat of other people who have committed similar crimes but have not been caught and convicted.\(^{137}\)

The normative objection against prevalence is strong, but potentially not insurmountable. Most human rights theorists accept that no right is absolute and any given right can be defeated in order to promote the greater good.\(^{138}\) But, in order for this to occur, the offsetting benefit must be clearly established. The only tenable offsetting benefit that can theoretically stem from punishing offenders of prevalent crimes more harshly is to reduce the incidence of such crimes in the future. However, as we have seen, the empirical data does not support this

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\(^{133}\) See, eg, JJC Smart and Bernard Williams (eds), *Utilitarianism: For and Against* (Cambridge University Press, 1973).


\(^{136}\) Law Reform Commission, above n 131, 18 [37]. But see Weinberg, above n 96.

\(^{137}\) (1935) 25 Cr App R 53, 54.

outcome. Accordingly, the normative objection to offence prevalence provides a compelling argument for its rejection as a sentencing objective.

V Conclusion

Offence prevalence is a well-established sentencing aggravating factor. This is despite the fact that there are a number of uncertainties regarding its scope and application. This article has suggested that the vagaries associated with the principle are so pronounced that the principle should be abolished. Even if the nebulous aspects of the principle could be clarified adequately, there is still no role for offence prevalence in sentencing determinations.

The three rationales advanced as a basis for shoring up the principle are flawed themselves or have no logical connection with offence prevalence. General deterrence cannot justify punishing offenders who commit prevalent offences more harshly because there is no established connection between harsher penalties and less crime. Denunciation is itself a flawed sentencing objective and has no role beyond the imposition of a proportionate penalty. Even if denunciation has an independent legitimate standing as a sentencing objective, there is no principled reason why crimes that are committed infrequently (but cause considerable harm) should be condemned less than crimes that are committed frequently. Specific deterrence cannot justify punishing offenders who commit prevalent crimes more harshly because this focuses on the past deeds of the offender — not the actions of other offenders.

The strongest objection to offence prevalence as an aggravating factor is normative. Individuals should be punished for their acts, not for those of others. The nexus between responsibility (and culpability) and punishment should be maintained unless there is a clear countervailing reason to sever that link. Given that there are no countervailing benefits stemming from the additional punishment of offenders who commit prevalent offences, the sentence aggravating role of offence prevalence should be abolished.