THE COMMON SENSE AND COMPLICATIONS OF GENERAL DETERRENT SENTENCING

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Whenever there is a reported rise in a serious crime, deterrent sentencing is often put forward as (part of) the appropriate response. This article sets out to assess the strength of the evidence for general deterrent sentences, identifying six complications that stand in the way of the "common sense" inference that when sentences go up, crime goes down. The article concludes by reviewing the use of deterrent reasoning by politicians, judges and the Sentencing Council, and by pointing to alternative methods of prevention.

Knife crime has increased considerably in recent years,[1] and it is rightly a matter of great public concern. Politicians have often put forward deterrent sentences as a necessary response to such increases. Thus, when in 2003 the Labour government proposed to create a mandatory minimum sentence of 5 years' imprisonment for possession of a specified firearm, the rationale was "to convey a message that an offender can expect to be dealt with more severely so as to deter others."[2] Similarly, when proposing a mandatory minimum sentence for a third drug dealing offence in 1996, the Conservative government stated that "severe deterrent sentences for those who deal in hard drugs are … essential".[3]

Likewise, judges will sometimes say, when passing sentence, that this kind of offence calls for a deterrent sentence. Thus when Lord Judge, as Lord Chief Justice, set out the approach to sentencing offenders involved in the riots of 2011, he stated that participants in disturbances of this magnitude, spreading fear as well as injury and damage, were "committing aggravated crimes" and "the sentences should be designed to deter others from similar criminal activity."[4] Similarly Lord Thomas, as Lord Chief Justice, stated that

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*This article was based on a public lecture delivered at the School of Law, De Montfort University, on November 9, 2018. My thanks to Tony Bottoms, Julian Roberts, Martin Wasik and Lucia Zedner for comments on a subsequent draft.

1 House of Commons Library, *Knife Crime in England and Wales* (Briefing Paper SN4304, 2018).

2 Lord Woolf CJ in *Rehman and Wood* [2006] 1 Cr. App. R. (S.) 404, at [4], summarising Parliament's intention; see also the Coalition government's *Consultation on Legislative Changes to Firearms Control* (Home Office, 2012).

3 Home Office, *Protecting the Public: the Government's Strategy on Crime* (1996), para. 11.2. Note that this minimum sentence relies on both general and individual deterrence: see below, n. 12 and text.

4 *Blackshaw et al* [2012] 1 Cr. App. R. (S) 679, at [4], [22].

> "Those who act dishonestly in [financial] markets must receive severe sentences to deter others from criminality that is often hard to detect and has such a damaging effect not only on the markets, but broadly on the general prosperity of the state."[5]

All these statements rely on the idea of deterrence. They imply that greater severity in sentencing brings reductions in offending, through fear of the consequences. But can we use "common sense" to extrapolate from the role of deterrence in the family, in the school or in the company, to the role of deterrence in sentencing? Exactly what definition of deterrence is being used by the politicians and judges quoted above? Do we know when deterrence will probably work and when it will probably not work? To what extent can the imposition of deterrent sentences be justified?

Deterrence in Criminal Justice and Criminal Law

The ideas of preventing offending and re-offending are fundamental to criminal justice. Some kind of criminal justice system is necessary for the maintenance of a moderate level of social stability, as is evident from the periods in history when police forces have been on strike or otherwise rendered ineffective. The police strikes in London (1918) and Liverpool (1919)[6] and in Melbourne (1923),[7] and the immobilization of the Danish police force (1944), were all characterised by increased lawbreaking, mostly property offences: atypical as these events were, the outcomes suggest that an operative system of policing exerts an underlying deterrent effect.[8] That system of policing involves, broadly speaking,[9] the enforcement of the laws of the jurisdiction. When the legislature creates a new crime, this act of criminalisation has two constituent elements – the authoritative declaration that certain conduct is wrong and should not be done, and the attachment of a proportionate maximum penalty to that conduct. The creation of a crime involves the making of a conditional threat ("if you do *x*, you are liable to be convicted and punished up to a certain limit"). The law recognizes that individuals are "fallible agents capable of acting on moral reasons but possibly requiring some practical disincentives to aid them in resisting temptation."[10] As von Hirsch puts it:

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5 *Hayes* [2016] 1 Cr. App. R. (S) 449, at [98-99].

6 The strikes were about pay and unionisation in the police. In London there was some rioting; in Liverpool there was reported to be "an orgy of looting and rioting": www.oldpolicecellmuseum.org.uk/content/history/police_history/police_strike

7 For details of the Melbourne strike, see M. Bagaric and T. Alexander, "(Marginal) General Deterrence doesn't work – and what it means for sentencing" (2011) 35 *Crim.L.J.* 269, at pp. 280-282 (reporting widespread looting and disorder).

8 Cf. T. Mathiesen, *Prison on Trial* (1990), p. 69.

9 "Broadly speaking", because the police exercise a degree of discretion in which laws to prioritise, in terms of enforcement.

10 A. von Hirsch and A. Ashworth, *Proportionate Sentencing: Exploring the Principles* (2005), p. 25.

> "[the] justification of the institution of punishment thus contains both a desert-oriented element concerning censure, and a preventatively-oriented element of providing a disincentive against harmful behaviour."[11]

Thus it is the system of sanctions, or "hard treatment," that seeks to provide the underlying deterrent force of the criminal justice system. Sentences based on proportionality, enforced by a reasonably efficient criminal justice system, form part of this underlying deterrence.

The Legislative Framework of Deterrent Sentencing

In putting forward the provisions that became section 142(1) of the Criminal Justice Act 2003, the Labour government stated that "for the first time, we will set out in legislation the purposes of sentencing."[12] The stated purposes are fivefold – punishment, deterrence, rehabilitation, public protection, and reparation. Any court dealing with an offender aged 18 or over "must have regard" to all those purposes of sentencing.

Our focus here is on the second of the purposes, which section 142(1)(b) defines as "the reduction of crime (including its reduction by deterrence)". The origins of this formulation lie in the government White Paper that preceded the 2003 Act, which stated that sentences should, *inter alia*,

> "-- reduce crime. Sentencing must be an effective tool which leads to fewer crimes;
>
> - deter (this includes both the general effect on the population at large and the specific effect on the offender)."[13]

Let us look more closely at these statements. They acknowledge the two different forms of deterrence. Specific or individual deterrence refers to sentences designed to deter this particular offender from re-offending, and this is usually taken to indicate sentences of escalating severity. A prime example of this is section 143(2) of the 2003 Act, indicating that when sentencing repeat offenders the court must treat each previous conviction as an aggravating factor.[14] Little more will be written here about special, specific or individual deterrence. Instead, the focus will be on general deterrence.

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[11] A. von Hirsch, *Deserved Criminal Sentences* (2017), p. 41; see also A. von Hirsch, "Censure and Hard Treatment in the General Justification for Punishment: A Reconceptualisation of Desert-oriented Penal Theory", in A. du Bois-Pedain and A.E. Bottoms (eds), *Penal Censure: Engagements within and beyond Desert Theory* (2019).

[12] Home Office, *Justice for All* (Cm 5563 of 2002), para. 5.8.

[13] Home Office, J*ustice for All* (Cm 5563 of 2002), para. 5.8

[14] "If the court considers that it can reasonably so treated …": for analysis and discussion, see E. Baker and A. Ashworth, "The Role of Previous Convictions in England and Wales", in J.V. Roberts and A. von Hirsch (eds), *Previous Convictions at Sentencing* (2010), p.185, and *Hawkins* [2018] 2 Cr. App. R. (S) 82.

The English sentencing system is now dominated by sentencing guidelines. An early guideline on general principles stated that "a court is required to pass a sentence that is commensurate with the seriousness of the offence" (i.e. proportionate), and it went on to elaborate on the elements of harm and culpability that are integral to the concept of proportionality.[15] Although the many guidelines created by the Sentencing Council continue to base their sentence levels on the idea of proportionality and relative seriousness,[16] these sentence levels surely exert some kind of general deterrent effect, in the sense that they bolster the underlying deterrent effect of the criminal justice system

General Deterrence and Sentencing Practice

When a judge in a particular case states that the offence "calls for a deterrent sentence",[17] the claim seems to be that increasing the sentence level for this particular type of crime (above the proportionate sentence) will have an enhanced deterrent effect. This is termed "marginal general deterrence,"[18] because the claim is that the additional increment or margin of sentence severity will have a significant deterrent effect – fear of the enhanced consequences will reduce the incidence of this crime. It is instructive to consider four examples of the language of general deterrence from recent Court of Appeal decisions:

- knife possession: "sentencing courts should have in the forefront of their thinking that the sentences for this kind of offence should focus on the reduction of crime, including its reduction by deterrence";[19]
- conspiracy to convey prohibited items (drugs and mobile phones) into a custodial institution: "there is indeed an important element of deterrence in sentencing for such offences";[20]

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15 Sentencing Guidelines Council, *Overarching Principles: Seriousness* (2004), para. 1.4.

16 For a recent example, see Sentencing Council, *Intimidatory Offences: Definitive Guideline* (2018), 4.

17 See notes 4 and 5 above, and text, for examples.

18 To be precise, as Beyleveld puts it, "a marginal deterrent effect of a sanction is its deterrent effect relative to that of some other sanction which it has replaced, does replace, or may replace:" D.Beyleveld, "Identifying, Explaining and Predicting Deterrence" (1979) 19 *B. J. Crim.* 205, at 214.

19 Per Sir Igor Judge P in *Povey et al* [2009] 1 Cr. App. R. (S.) 228, at [4]; for similar remarks on gun crime, see Lord Judge CJ in *Attorney General's References Nos 4, 5, 6, 7, and 8 of 2014,* [2010] 1 Cr. App. R. (S) 628, at [2-3].

20 Per Spencer J in *Bridger and Taylor* [2018] 2 Cr. App. R. (S.) 369, at [29].

- conspiracy to facilitate a breach of immigration law: "the offence will often call for a deterrent sentence since the problem with immigration control is a substantial one, causing considerable public concern;"[21]

- perverting the course of justice: "such offences are 'corrosive' of the criminal justice system. It is for that reason that deterrent sentencing is appropriate, ordinarily calling for an immediate custodial sentence";[22] "such offending strikes at the very heart of the administration of criminal justice. Accordingly, deterrence is indeed called for, although it is right to say that sometimes the necessary deterrence can be found in the making of an immediate custodial sentence and not one necessarily requiring a term of imprisonment of any very great length";[23] "it is a type of offence where the need for deterrence and the marking of the gravity of such offending for public policy reasons will often outweigh personal considerations relating to the offender. A custodial sentence should be imposed save in exceptional circumstances".[24]

Does the use of the language of deterrence mean that these are all instances where the courts are referring to a sentence that is more severe than the proportionate sentence? Are these true examples of marginal general deterrence? Or, alternatively, is the court using the language of deterrence less precisely, either as a rhetorical flourish or as a way of asserting that offences of this kind justify a higher sentence on proportionality grounds? Ambiguity on this point was evident in Lord Judge's statements in relation to sentencing offenders involved in the 2011 riots, where he said that the offenders "were committing aggravated crimes" (a proportionality issue) and that "the sentences should be designed to deter others from similar criminal activity" (the language of marginal general deterrence).[25] Thus the court's identification of an aggravating factor, rather than the "need" for a longer-than-proportionate sentence based on deterrence, might explain the statement about sentencing for knife crime[26] and the statement about prison employees bringing contraband into prisons.[27] In relation to the other two offence-types mentioned above, immigration offences and perverting the course of justice, the language of deterrence appears to be used to indicate that a custodial sentence will be the norm – and, perhaps, that factors which might normally mitigate sentence should

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21 Per Treacy LJ in *Attorney General's Reference No 28 of 2014,* [2014] EWCA Crim 1723, at [20]; see also *Roman* [2017] 1 Cr. App. R. (S.) 343, at [9].

22 Per Davis LJ in *Attorney General's Reference No. 123 of 2015,* [2016] 1 Cr. App. R. (S) 479, at [32

23 Per Davis LJ in *Ratcliffe* [2016] 1 Cr. App. R. (S) 488, at [13].

24 Per Treacy LJ in *Attorney General's Reference (Carter)* [2017]1 Cr. App. R. (S) 326, at [31].

25 Above, n. 4.

26 See text at n. 19 above.

27 See text at n. 20 above. The Court upheld the imposition of the maximum sentence on Bridger.

not be allowed to bring the offence below the custody threshold.[28] In these cases – as in offences for which Parliament has enacted a mandatory minimum sentence – it appears that a marginal general deterrent is being imposed, in the sense that the sentence is longer than would be proportionate to the seriousness of the offence because mitigating factors are left out of account.

Exploring Marginal General Deterrence

The 2002 White Paper from the Labour government stated that "sentencing must be an effective tool which leads to fewer crimes",[29] implying that there must be good evidence that raising the level of sentences for a particular offence will produce a reduction in the level of that crime. This leads to two questions: how is marginal general deterrence meant to work, and is there evidence that it does work?

The simplest kind of deterrence theory posits what we may term a hydraulic relationship between sentence levels and crime rates. The hydraulics of marginal deterrence are supposed to operate thus: there is already a proportionate sentence for this offence which exerts a general deterrent effect; Parliament or the courts decide to enhance the sentence level; this extra increment of punishment is intended to produce increased fear of the consequences; the expected effect is improved compliance with the law.[30] This kind of hydraulic model sentences up, crimes down) has an intuitive attraction – it appears to be squarely based on "common sense."[31] As Webster and Doob put it:

> "the notion that people will not engage in prohibited behaviour if they know that they will receive a harsh penalty seems so intuitively obvious that one might wonder why it is even necessary to carry out research on the topic."[32]

However, as they and many others have concluded, this apparently simple hydraulic model runs into several complications – complications which indicate that one cannot simply assume that, if the legislature or a judge announces an increased sentence for deterrent purposes, that sentence will have a deterrent effect. Here are four major complications:

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28 In explaining what was meant by "deterrent sentences", Lord Woolf C.J. referred to sentences that "pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message …": *Rehman and Wood* [2006] 1 Cr. App. R. (S.) 404, at [4].

29 Above, n. 13 and accompanying text.

30 P.-O. Wikstrom, "Deterrence and Deterrence Experiences: Preventing Crime through the Threat of Punishment", in S. Shoham, O. Beck and M. Kett (eds), *International Handbook of Penology and Criminal Justice* (2008), 346, at pp. 351-352

31 For criticism of this reliance on "common sense," see T. Mathiesen, *Prison on Trial* (3rd ed., 2005), pp. 57-58.

32 C.Webster and A. Doob, "Searching for Sasquatch: Deterrence of Crime through Sentence Severity", in J. Petersilia and K. Reitz (eds), *Oxford Handbook of Sentencing and Corrections* (2012), p. 180.

First, deterrence works through the mind, through the operation of fear of the increased penalty. So it is the potential offender's perceptions that assume importance here. For example, if the penalty for an offence has been increased but the potential offender is unaware of this increase, it follows that that person's decision not to go ahead with the commission of the offence cannot be ascribed to the (marginal) deterrent effect of the increased penalty. This is the first of various subjective elements in the concept of deterrence, elements that vary according to the perceptions, the personal circumstances and the social situation of the potential offender.[33] Thus, in policy terms, increases in sentence levels must be well publicised among those likely to consider committing the offence, if those increases are to have the opportunity to influence the minds of potential offenders. There is evidence that some offenders are typically unaware of, or mistaken as to, the level of probable sentences for the offence. Thus research by Bennett and Wright, based on interviews with imprisoned burglars, found that when they committed the burglaries they typically did not know the likely sentence.[34] Research by Kleck involving offenders and non-offenders found a "weak to non-existent" correlation between believed sentence levels and actual sentence levels.[35] While this does not prove that marginal general deterrence cannot be effective – there is a need for further research into the perceptions of people likely to consider committing the particular type of offence – the existing research underlines the need for caution about claims of marginal general deterrence. The preponderance of research at present suggests that, if a deterrent sentencing policy is to work, it is essential that the marginal deterrent (i.e. the increased penalty, or the minimum sentence) is known to potential offenders, and that often this is not the case.

Secondly, even if the potential offender is aware of the deterrent sentence, the hydraulic relationship between deterrent sentences and reduced crime rates may be thwarted by a low risk of detection. Once again, it is a question of perception: so, if the potential offender believes that there is a low risk of being caught, he or she may go ahead and commit the crime despite knowing of the enhanced penalty that will be imposed in the (believed to be unlikely) event of conviction. However, if the potential offender believes that there is an enhanced risk of being caught, convicted and sentenced, that increases the probability of desistance. Thus Durlauf and Nagin found evidence that:

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[33] For elaboration on the role of subjectivity, see A.E. Bottoms and A. von Hirsch, "The Crime-Preventive Impact of Penal Sanctions", in P. Cane and H. Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (2010), and D. Kennedy, *Deterrence and Crime Prevention* (2009), pp. 21-23 and 40-41.

[34] T. Bennett and R. Wright, *Burglars on Burglary* (1984).

[35] G. Kleck, "Constricted Rationality and the Limits of General Deterrence", in T. Blomberg and S. Cohen (eds), *Punishment and Social Control* (2003).

> "Increasing the visibility of the police by hiring more officers and by allocating existing officers in ways that heighten the perceived risk of apprehension consistently seem to have substantial marginal deterrent effects."[36]

Durlauf and Nagin give the example of "hot spots policing", a "focused deterrence" strategy that concentrates police resources on particular crime "hot spots" with the result (in most but not all cases) of a significant reduction in crime.[37] However, the question of thresholds emerges here: research on fare-dodging on Zurich public transport showed a sharp decline when the number of train attendants was increased in 2003, but a further increase of train attendants in 2006 appeared to have no effect on rates of fare-dodging, suggesting that the threshold of deterrence had already been reached.[38]

Changing methods of policing is not the only way of increasing the deterrent effect. Attention might also be devoted to increasing the perceived probability of conviction.[39] However, the "sanction detection rates" for London (Metropolitan Police District) in 2017-18 show that only 7 per cent of robberies and 6 per cent of burglaries were detected.[40] More broadly, the "attrition rate" for many offences results in only 2 or 3 per cent of offences leading to conviction and sentence – a startlingly low figure, which is produced by the non-reporting of many crimes, the non-recording of some crimes that are reported, the low detection rate, and the diversion (by means of cautions, Penalty Notices for Disorder and other out-of-court disposals) of some offenders whom there is sufficient evidence to prosecute.[41] These statistics reinforce the view that increasing the severity of sentences for a particular crime may not be the most effective path for deterrence, since, in addition to severity, deterrence has two further influential dimensions – certainty, and celerity. Increased

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[36] S.N. Durlauf and D.S. Nagin, "Imprisonment and Crime", (2011) 10 *Criminology and Public Policy* 1, p. 2; for different findings relating to the use of stop-and-search powers across London, see M. Tiratelli, P. Quinton and B. Bradford, "Does Stop and Search Deter Crime? Evidence from Ten Years of London-wide Data", (2018) 58 *B.J. Crim.* 1212.

[37] S.N. Durlauf and D.S. Nagin, "Imprisonment and Crime", (2011) 10 *Criminology and Public Policy* 1, pp. 25 and 31; see also A.A. Braga and D.L.Weisburd, *The Effects of "Pulling Levers" Focused Deterrence Strategies on Crime* (Campbell Systematic Review 6, 2012). However, "it is probably very difficult to say with any degree of precision how much it [enhanced policing] deters:" R. Paternoster, "A Century of Criminal Justice: Crime and Punishment: So How Much do we Really Know about Criminal Deterrence?" (2010) 100 *J. Crim. Law and Criminology* 765, at p. 799.

[38] M. Killias, D. Scheidegger, and P. Nordenson, "The Effects of Increasing the Certainty of Punishment: a Field Experiment on Public Transportation", (2009) 6 *European J. of Crim.* 387.

[39] And also the perceived probability that the sentence will be carried out, an issue raised by the low rate of executions in most U.S. states that retain the death penalty: see R. Hood and C. Hoyle, *The Death Penalty: a World-Wide Perspective* (5th ed., 2015), ch. 8.

[40] www.met.police.uk/sd/stats-and-data/met/year-end-crime-statistics/ (accessed 3 September 2018).

[41] For England and Wales, see G. Barclay and C. Tavares (eds), *Digest 4: Information on the Criminal Justice System in England and Wales* (Home Office, 1999).

severity cannot be assessed as a deterrent strategy without taking account of what the potential offender believes to be the degree of risk of being caught: even a significant increase in the believed severity of sentences for a particular crime might be undermined by a believed low chance of detection and prosecution to conviction.[42] This is borne out by the Cambridge study, which concluded that there is only weak evidence that increased severity may in some instances have a marginal deterrent effect, but much stronger evidence that the increased certainty that punishment will be imposed may have a marginal deterrent effect.[43] There is also evidence that celerity is relevant to the efficacy of deterrence: if the punishment is not likely to be imposed soon, there is a risk of it being discounted or at least downplayed by the potential offender. "Additions to severity of punishment are contingent future events", and "there is a general tendency to discount contingent future costs – to the extent that potential offenders are more oriented to immediate satisfactions, this tendency is heightened."[44] Thus, perceptions of low probability of detection and prosecution and low celerity of imposition of punishment are factors that weaken any hydraulic relationship between sentence levels and offending rates.

Thirdly, a deterrent sentencing policy assumes that the potential offenders to whom it is addressed behave rationally – not fully rationally ("in the sense of calculating how much they stand to gain or lose") but with what is termed "bounded rationality", giving some thought to benefits and costs.[45] The hydraulic model assumes that marginally greater severity which is not undermined by a perceived low risk of detection will lead to a reduced likelihood of offending, but that assumption is likely to be weaker with some potential offenders than with others. There may be conditions under which the severity of the probable sentence can have a marginal deterrent effect – for example, some (?professional) robbers might desist from arming themselves with guns if there was a significant incremental penalty for carrying a

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[42] A point emphasised in the review by D. Nagin, "Deterrence in the Twenty-First Century", (2016) 42 *Crime and Justice: a Review of Research* 199.

[43] A. von Hirsch, A.E. Bottoms, E. Burney and P.-O. Wikstrom, *Criminal Deterrence and Sentence Severity* (1999), p. 47; accord, D. Nagin, "Deterrence in the Twenty-First Century" (2016) 42 *Crime and Justice: a Review of Research* 199; cf. T. Baker, A. Harel and T. Kugler, "The Virtues of Uncertainty in Law: an Experimental Approach" (2004) 89 *Iowa L. R.* 443, drawing on behavioural economics to argue that uncertainty of outcome may lead subjects to be more risk-averse than certainty of outcome.

[44] A. von Hirsch, A.E. Bottoms, E. Burney and P.-O. Wikstrom, *Criminal Deterrence and Sentence Severity* (1999), at pp. 35-37 and 48; for a study of time discounting among adolescents, see D. Nagin and G. Podarsky, "Time and Punishment: Delayed Consequences and Criminal Behaviour", (2004) 20 *Journal of Quantitative Criminology* 295.

[45] A. von Hirsch, A.E. Bottoms, E. Burney and P.-O. Wikstrom, *Criminal Deterrence and Sentence Severity* (1999), p. 6, citing R.G.V. Clarke, "Situational Crime Prevention", (1995) 19 *Crime and Justice: a Review of Research* 91.

firearm.[46] This may be extrapolated to other forms of "professional" offending and other behaviour that may involve planning, such as corporate offending.[47] However, any such cost/benefit assessment must take account of the problem of thresholds – that some potential offenders may regard the increased penalty as insufficient to turn them away from their planned offending.[48] By way of contrast, offending that is typically impulsive (e.g. many violent offences) or that involves people whose lifestyle includes taking alcohol or drugs will probably be an unpropitious subject for a marginal deterrent strategy.[49] As the White Paper issued by the Conservative government in 1990 put it:

> "It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not."[50]

Subsequent research by Wicharaya into the effects of greater sentence severity in U.S. states, as part of a "get tough on crime" agenda which included "three strikes and you're out" laws, revealed no discernible pattern. In some states, increased severity was followed by a drop in crime rates, whereas in others it was followed by an increase in crime rates. The author's overall conclusion is that neither violent nor sexual crimes were deterred by the increased severity of sentencing.[51] Without going into great detail, we can add that similar results emerge from a review of the "three strikes" law in California,[52] a review of mandatory

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[46] For suggestive but inconclusive research, see R. Harding, "Rational-choice Gun Use in Armed Robbery", (1990) 1 *Criminal Law Forum* 427; M. Makarios and T. Pratt, "The Effectiveness of Policies and Programs that attempt to Reduce Firearm Violence: a Meta-Analysis" (2012) 58 *Crime and Delinquency* 222; A.A. Braga, "Guns and Crime", in F. Parisi (ed), *The Oxford Handbook of Law and Economics, vol. 3: Public Law and Legal Institutions* (2017), pp. 353-357.

[47] T.C. Pratt et al, "The Empirical Status of Deterrence Theory: a Meta-Analysis", in F.T. Cullen, J.P. Wright and K.R. Blevins (eds), *Taking Stock: the Status of Criminological Theory* (2006); for a judicial attempt to produce better planning, see *Thames Water Ltd* [2015] 2 Cr. App. R. (S) 439, at [35], urging courts to "ensure that the penalty imposed is not only proportionate and just, but will bring home to the management and shareholders the need to protect the environment."

[48] A.E. Bottoms and A. von Hirsch, "The Crime-Preventive Impact of Penal Sanctions", in P. Cane and H. Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (2010); for example, some very wealthy offenders may be unmoved by financial penalties.

[49] A. von Hirsch, A.E. Bottoms, E. Burney and P.-O. Wikstrom, *Criminal Deterrence and Sentence Severity* (1999), 36, discussing research by R. Wright and S. Decker, *Burglars on the Job: Streetlife and Residential Break-Ins* (1994).

[50] Home Office, *Crime, Justice and Protecting the Public* (1990), para. 2.8.

[51] T. Wicharaya, *Simple Theory, Harsh Reality: the Impact of Sentencing Reforms on Courts* (1995).

[52] F. Zimring, G. Hawkins and J. Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (2001).

sentencing laws in Australia,[53] and an exhaustive review of mandatory sentences.[54] Thus, even if the potential offender is aware of the increased penalty (which, as we noted above, may often not be the actual position), there may be reasons why it may not influence his or her behaviour, and thus why a hydraulic relationship between increased penalty and reduced crime rate may not come about.

Fourthly, even if the probability of the enhanced sentence being imposed is thought to be high, and where this probability is not undermined by a believed lack of promptness in imposing that sentence, the hydraulic relationship may be weakened if the potential offender does not regard the legal penalty as the most important consequence. Correspondingly, the hydraulic relationship may be strengthened where the potential offender fears a loss of respect or social standing if convicted.[55] Thus Nagin has argued that "individuals who report higher stakes in conventionality are more deterred by perceived risk of exposure for law-breaking", whereas individuals whose informal bonds with non-criminal groups are weaker are likely to be less easily deterred.[56] Similarly, Pratt and collaborators found that "variables indicating the threat of non-legal sanctions were among the most robust of the deterrence theory predictors."[57] There may be some potential offenders who do not fear imprisonment, regarding it as a normal part of their lifestyle or even as a kind of badge of honour. Similarly, the Cambridge deterrence study refers to the effect of what it terms "the offender's subjective disutilities", for example, among confirmed drug users: "if the criminal activity is of sufficient importance in the potential offender's life because of the resources or life-style it provides or the needs it fulfils, then enhanced certainty or severity of punishment may not make him desist."[58] Put starkly, general deterrence "functions in relation to those who do not 'need' it. In relation to those who do 'need' it, it does not function."[59]

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[53] N. Morgan, "Mandatory Sentencing Laws in Australia: where have we been and where are we going?" (2000) 24 *Criminal Law Journal* 164; see also K. Warner, "Mandatory Sentencing and the Role of the Academic" (2007) 18 *Criminal Law Forum* 321.

[54] M. Tonry, "The Mostly Unintended Consequences of Mandatory Sentences: Two Centuries of Consistent Findings", (2009) *Crime and Justice: a Review of Research* 65.

[55] P.-O. Wikstrom, "Deterrence and Deterrence Experiences: Preventing Crime through the Threat of Punishment", in S. Shoham, O. Beck and M. Kett (eds), *International Handbook of Penology and Criminal Justice* (2008), 346, at pp. 351-352.

[56] D. Nagin, "Criminal Deterrence Research at the Outset of the Twenty-First Century", (1998) 23 *Crime and Justice: a Review of Research* 51, at p. 70.

[57] T.C. Pratt et al, "The Empirical Status of Deterrence Theory: a Meta-Analysis", in F.T. Cullen, J.P. Wright and K.R. Blevins (eds), *Taking Stock: the Status of Criminological Theory* (2006), 385.

[58] A. von Hirsch, A.E. Bottoms, E. Burney and P.-O. Wikstrom, *Criminal Deterrence and Sentence Severity* (1999), p.7.

[59] T. Mathiesen, *Prison on Trial* (3rd ed., 2005), p. 74.

Calculating Marginal Deterrents

In exploring the idea of marginal general deterrence, we have identified four complications, indicating why the hydraulic model – sentence levels up, crime rates down – might not operate as intended. The complications multiply when questions are asked about the quantification of marginal general deterrence. To return to the quotations with which this article began, when the government sought to introduce the mandatory minimum sentence of 7 years for the third drug dealing offence, how did it arrive at this figure? In particular, how much was it intended to add to the proportionate sentence (which would otherwise have been imposed)? And when Lord Judge called for deterrent sentences for offences committed during the riots of 2011, what premium was he intending to impose, over and above the proportionate sentence for the relevant offence? Evidently, the four complications discussed above do not exhaust the problematic features of marginal general deterrence.

To approach these questions of quantum, we must consider two further but little-discussed aspects of marginal general deterrence. The first aspect – and the fifth complication – raises the question whether the objective of the extra increment of punishment is to reduce the incidence of this offence to zero. If not, how can one specify the level of offending that is thought "acceptable" or "tolerable", and to which the deterrent sentence should aim to reduce its incidence? [60] The second aspect – and the sixth complication -- asks what resources should be used in order to calculate the extra margin of severity that is required in order to reduce the incidence of the crime to a "tolerable" level, or whatever level is specified. If it is effectiveness that is important – as suggested by the 2002 White Paper[61] -- then that would indicate that there should be some empirical testing of different marginal increases, perhaps through research with offenders and non-offenders.

In the absence of reliable research, we should perhaps return to the utilitarian foundations of deterrence theory, and notably to Bentham's "rules" on the quantum of punishment. The first five rules are as follows:

1. The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.
2. The greater the mischief of the offence, the greater is the expense, which it may be worth while to be at, in the way of punishment.
3. Where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.

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[60] Cf. A. von Hirsch, *Doing Justice* (1976), p. 44: "the threat and imposition of punishment is called for in order to secure compliance – not full compliance, but more compliance than there might be if there were no legal penalties at all." This refers to underlying general deterrence rather than to marginal general deterrence, but the arguments are similar.

[61] Above, n. 13 and text.

4. The punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.

5. The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.[62]

Rule 5 embodies the principle of frugality (parsimony), that the sentence should be set at the minimum level necessary to produce compliance. Rule 2 looks rather like a proportionality constraint, referring as it does to the relative seriousness of the offence. Yet none of these rules indicates precisely how to determine the quantum of the marginal general deterrent. Bentham warns that if rule 5 is not followed, the extra increment of punishment would be "so much misery in waste".[63] That is a warning rather than a prescription, but it is a warning that can only be taken seriously if considerable research into the effectiveness of marginal general deterrents is carried out.

Prevalence and the Sentencing Guidelines

When section 142 of the Criminal Justice Act 2003 was brought into force, it was accompanied by guidelines from the Sentencing Guidelines Council which stated that "the sentencer has the task of determining the manner in which [the five purposes of sentencing] apply."[64] However, the guideline goes on to state that "the sentencer must start by considering the seriousness of the offence", and that "a court is required to pass a sentence that is commensurate with the seriousness of the offence." Much of the guideline is concerned with harm and culpability as elements of seriousness, but part F deals with the imposition of a general deterrent sentence in response to the local prevalence of the offence:

> "There may be exceptional circumstances that arise which may lead a court to decide that prevalence should influence sentencing levels. The pivotal issue in such cases will be the harm being caused to the community. It is essential that sentencers both have supporting evidence from an external source (for example the local Criminal Justice Board) to justify claims that a particular crime is prevalent in their area and are satisfied that there is a compelling need to treat the offence more seriously than elsewhere."[65]

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62 J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), ch. 14.

63 Ibid.

64 Sentencing Guidelines Council, *Overarching Principles: Seriousness* (2004), p. 3.

65 Sentencing Guidelines Council, *Overarching Principles: Seriousness* (2004), p. 9.

In some cases the Court of Appeal has not taken this guideline seriously, suggesting that it was enough that the judge believed that the offence was prevalent.[66] In others, the guideline has been faithfully and therefore restrictively interpreted.[67] However, even the guideline itself falls short of the requirements of an effective marginal deterrent. Important as it is to have independent evidence of a significantly higher incidence of the crime in this locality than others, an appropriately circumspect approach requires attention to the first four complications set out above. Thus the sentence level must be known among potential offenders to be higher than before, it must be present in their minds when contemplating the offence, it must not be undermined by a belief that the detection rate is low, and the commission of the offence must not be so integral to the offender's lifestyle as to neutralise the effect of an enhanced sentence. As noted earlier, the research evidence on these matters is relatively sparse and, where it exists, indicates that deterrence is most likely to work where potential offenders believe that there is a high risk of detection. Simply announcing a marginal increase in sentences for a particular type of crime in a particular locality is unlikely to have a significant deterrent effect, even given the increased use of social media. Moreover, it would be unfair to impose the enhanced sentence on the offender in the case, who had no forewarning of the enhancement. That would be a form of retrospectivity that falls foul of the Kantian objection to treating a person merely as a means to an end.[68] This brings us to questions of justice.

Questions of Justice

If the various complications identified above could be resolved, there would remain questions of justice about the imposition of marginal general deterrent sentences. This is the significance of the *caveat* written into Webster and Doob's conclusion:[69]

> "Despite enormous research efforts, no credible and consistent body of evidence has been found to support the conclusion that harsher sentences (within ranges conceivable in Western democracies) achieve marginal deterrent effects on crime."

Thus, if the maximum sentence for the possession of a specified firearm had been raised and the minimum set at 20 years rather than 5 years, and even if the "exceptional circumstances"

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66 E.g. *Stockdale* [2005] EWCA 1582, and *Tatomir and Velicor* [2016] Crim.L.R. 503, "everyone knew the prevalence of such offences and stiff sentences were indeed required to discourage others so as to justify, indeed to require, sentences beyond the range of sentences set by the Sentencing Council."

67 E.g. *Oosthuizen* [2006] 1 Cr. App. R. (S) 385, per Rose V-P; *Bondzie* [2016] 2 Cr. App. R. (S) 261, per Treacy LJ; *Ajayi and Limby* [2018] 2 Cr. App. R. (S) 1, per Treacy LJ at [18].

68 On which see N. Walker, "The Efficacy and Morality of Deterrents" [1979] Crim.L.R, 129, at p. 140.

69 C.Webster and A. Doob, "Searching for Sasquatch: Deterrence of Crime through Sentence Severity", in J. Petersilia and K. Reitz (eds), *Oxford Handbook of Sentencing and Corrections* (2012), p. 175.

qualification were retained,[70] the sentence level would be radically disproportionate to the seriousness of the offence, with the result that offenders with relatively low culpability might be sentenced at the same level as, or a higher level than, some offenders convicted of attempted murder, armed robbery, and so forth. In other words, a minimum sentence of 20 years might well have a significant marginal deterrent effect, but that would be at the cost of considerable unfairness and undermining of proportionality.[71] This is presumably the implication of Webster and Doob's reference to what is "conceivable" in Western democracies.

Even if there were a sufficient evidential basis for marginal general deterrence, there would still be a problem of justice in imposing a higher sentence on one offender in order to protect future victims. It is one thing for Parliament or the Sentencing Council to announce and publicize an increase in sentence levels for a particular crime from a given date in the future; it is quite another thing for a court to impose a higher sentence on this offender in order to deter potential offenders and to protect future victims, without this offender having been forewarned of the possible increase. As mentioned above,[72] this is objectionable on the Kantian ground of treating a person merely as a means to an end, rather than respecting that person as an end in herself or himself.

Is there a problem of justice in imposing general deterrent sentences on young offenders? Even the model of "bounded rationality", discussed above, might be unrealistic for many young offenders. A substantial German study of youths aged 15-17 found that the severity of punishment had no effect on their criminal behaviour, not even if it involved detention, but that a believed high risk of detection had an effect in some cases.[73] A Canadian study found that youths in detention are "overwhelmingly characterized by major and multiple childhood and early adolescent problems" that render responses that might be thought "normal" or "rational" somewhat unlikely.[74] Three reasons for maintaining a separate system of criminal justice and courts for young offenders are that i) their cognitive abilities tend to be under-developed, and they may have limited understanding of the impact of their actions on others; ii) their emotional controls tend to be under-developed, and their responses to situations tend to be self-centred and often impulsive; and iii) they tend to be more easily led than older

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[70] See M. Wasik, "Time to Repeal the Firearms Minimum Sentence Provision" [2017] Crim.L.R. 203, especially the discussion at pp. 206-208 of the Canadian Supreme Court's decision in *Nur* [2015] 1 R.C.S. 773.

[71] The New Zealand Supreme Court has stated that the principle of deterrence should be "applied in a proportionate way", pointing out that too much deterrence may have detrimental commercial effects (such as dissuading people from taking on company directorships): *Graham et al v. R.* [2014] NZSC 55, at [33].

[72] Above, n. 68.

[73] Research by Schumann et al, discussed by T. Mathiesen, *Prison on Trial* (3rd ed., 2005), 61-62.

[74] R.R. Corrado et al., "Should Deterrence be a Sentencing Principle under the Youth Criminal Justice Act?" (2006) 85 *Can. B.R.* 539, at pp. 556-557.

people.[75] For these developmental reasons, it may be fairer to remove deterrence from the purposes of sentencing young offenders, and to pursue prevention chiefly through rehabilitative measures, within a framework of proportionate sentences.[76] Similar arguments may apply to offenders with learning difficulties, some forms of mental disorder, or drug or alcohol addictions.

Conclusions

English law requires a court passing sentence on an offender aged 18 or over to have regard to five purposes of sentencing, including the reduction of crime by deterrence.[77] Not only does this provision create a risk of inconsistent approaches to sentencing, but it does so without supplying clear definitions or summaries of the evidential basis. From the beginning of this article, we have identified considerable ambiguity in references to deterrent sentences. In some instances the reference to the need for deterrent sentences is nothing more than the recognition of an aggravating factor,[78] suggesting that the court is not necessarily seeking to impose a sentence that is outside proportionality constraints. In some other instances, however, what Parliament and the courts seem to mean is that sentences for a particular crime should be increased so as to provide a marginal general deterrent – for example, when Parliament created the minimum sentence for firearm possession, and when the Court of Appeal gave guidance on sentencing for dishonesty in the financial markets.[79] The assumption here is that marginal general deterrents work in a hydraulic fashion (sentences up, crimes down), whereas this article argues that they can rarely be expected to do so.

The uncertainty about what is meant by a deterrent sentence is also apparent in some Sentencing Council guidelines. For example, on three occasions the guideline on Environmental Offences states that the court should ensure that the sentence reflects the

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[75] Of the many writings on this, see F. Zimring, "Toward a Jurisprudence of Youth Violence", (1998) 24 *Crime and Justice: a Review of Research* 447; C. McDiarmid, *Childhood and Crime* (2007); D. Archard, *Children: Rights and Childhood* (2nd ed., 2004). For judicial recognition by the United States Supreme Court, see *Roper v. Simmons* (2005) 543 U.S. 551 and *Graham v. Florida* (2010) 560 U.S. 48.

[76] As in Canada: Youth Criminal Justice Act 2002, as interpreted by the Canadian Supreme Court in *R v. B.W.P.* (2006) SCC 27, and discussed by R.R. Corrado et al, "Should Deterrence be a Sentencing Principle under the Youth Criminal Justice Act?" (2006) 85 *Can. B.R.* 539. Cf. Criminal Justice and Immigration Act (U.K.) 2008, s. 8, which lists the purposes of sentencing youths and follows s. 142(1) of the Criminal Justice Act 2003 for adults in all but one respect, since it does not mention deterrence. When the youth justice provisions of the 2008 Act were brought into force, s.8 was not implemented: for a possible political explanation, see A. Ashworth, *Sentencing and Criminal Justice* (6th ed., 2015), p. 108.

[77] Criminal Justice Act 2003, s. 142(1) (above, nn. 12-13 and text).

[78] E.g. rioting (n. 4 above) and conveying prohibited items into a custodial institution (n. 20 above).

[79] See text at footnotes 2 and 5 above.

objectives of "punishment, deterrence and the removal of gain";[80] but, viewing the guideline as a whole, the reference to deterrence surely does not encourage a court to go above the (proportionate) guideline sentence in the hope of achieving marginal general deterrence. It is noteworthy that, in his report on the Sentencing Council, Bottoms proposed that the Council should consider giving guidance to sentencers on the relevant research relating to general deterrence and other consequentialist aims of sentencing.[81] Such guidance must extend to definitional issues and then to some of the nuances of research, and it should also be directed towards Parliament and the judiciary.

Bottoms states that "the bulk of the evidence suggests that increases in sentence severity have zero or very weak deterrent effects",[82] but he recognizes that there may be some circumstances in which measures such as "focused deterrence strategies" may have deterrent effects.[83] This, however, requires that attention be first paid to the four complications outlined above:

i) That, because deterrence works through the mind, potential offenders must be aware of the increased penalty;

ii) that if potential offenders believe the risk of detection and conviction is low, this may undermine the deterrent effect of the penalty;

iii) that potential offenders do not always respond rationally to increased penalties and increased risk of conviction even if they are aware of them;

iv) that some potential offenders may not regard the legal penalty as the most important consequence.

A criminal justice policy that relies on measures of marginal general deterrence must take account of these complications. The absence of reliable research findings on many of the complicating issues raises questions about the justifications for judges imposing sentences based on marginal general deterrence, and the justifications for Parliament creating mandatory minimum sentences (rather than leaving the Sentencing Council to identify aggravating features when drawing up sentencing guidelines).[84] The complicating factors grow greater when we consider the quantum of the marginal general deterrent – by how much is it intended to reduce the incidence of the target crime, and on what basis can the extra increment or margin of severity be calculated? Thus it is a large step from affirming that an

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[80] Sentencing Council, *Environmental Offences: Definitive Guideline* (2014), at pp. 12, 18 and 21.

[81] A. Bottoms, *The Sentencing Council in 2017: a Report on Research to Advise on how the Sentencing Council can best Exercise its Statutory Functions* (Cambridge: Institute of Criminology, 2018), para. 93.

[82] Ibid., para. 88; see generally paras. 87-93 of his report.

[83] Ibid., para. 89.

[84] See the arguments of M. Wasik, "Time to Repeal the Firearms Minimum Sentence Provision" [2017] Crim.L.R. 203.

operative criminal justice system (police, prosecutors, courts and sentencers) is necessary for the control of crime, by supplying a kind of underlying general deterrent, to the claim that marginal general deterrent sentences (adding an extra increment to the proportionate sentence) can be justified. Even if there are conditions under which a marginal general deterrent might achieve the desired effect,[85] account must also be taken of the justice-based objections discussed above.

Moreover, if the primary aim is to prevent offending and re-offending, there may be other preventive strategies which are more effective than marginal general deterrence, at a lower financial and human cost. Not only are three of the five purposes of sentencing in section 142 of the Criminal Justice Act 2003 forms of prevention (deterrence, incapacitation and rehabilitation), but it should not be assumed that sentencing is the most effective means of prevention. Situational and social crime prevention may be more effective, or no less effective. Thus, in the recent debate about knife crime, both government ministers and senior police officers have said that knife crime requires a public health approach.[86] While the details of what a "public health approach" requires need careful assessment – for example, the Metropolitan Police Commissioner emphasised the troubled upbringing of many of the individuals involved, and there is also the question of applying the "public health" approach to drugs policy – the kind of multi-agency approach taken by the Violence Reduction Unit in Scotland warrants close investigation.[87] If the prevention of offending and re-offending is the goal, altering the sentencing system may be a less promising and less justifiable strategy than tackling knife crime as a social issue.

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[85] A.E. Bottoms and A. von Hirsch, "The Crime-Preventive Impact of Penal Sanctions", in P. Cane and H. Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (2010), p.104; see also text at nn. 36-37 above.

[86] Sajid Javid, Home Secretary, reported in newspapers for April 1, 2019; Theresa May, Prime Minister, reported in newspapers for April 2nd, 2019; Cressida Dick, Commissioner of Metropolitan Police, reported in *The Guardian,* January 6th, 2018; Mayor of London, *The London Knife Crime Strategy* (2017).

[87] For a review and references, see R. Grimshaw and M. Ford, *Young People, Violence and Knives – Revisiting the Evidence and Policy Discussions* (Centre for Crime and Justice Studies, 2018).