

CHAPTER 1

The Fundamentals of Criminal Law



1.1 Introduction

Criminal law encompasses both a substantive and procedural component. Broadly speaking, the substantive component consists of defining and understanding the constituent elements of the various common law and statutory crimes and the defences that are available thereto. In contrast, the procedural component denotes the enforcement mechanism or, if you will, the process through which criminal defendants are brought to court and prosecuted for their alleged transgressions. The laws relating to arrest, search and seizure, illegally obtained evidence, pleadings, double jeopardy, arraignment, jury selection, and sentencing, for example, represent only a portion of the procedural component of the criminal law. It should be apparent, therefore, that to do justice to such a vast and complex subject would literally entail the writing of a separate and lengthy treatise. Accordingly, this book is concerned only with the substantive component of the criminal law.

It is important to emphasise that because the various state, territorial, and Commonwealth governments have their own separate crime legislation, there are literally thousands of criminal offences that are currently on the books throughout Australia, not to mention the common law offences that still exist in the three common law jurisdictions, namely New South Wales, South Australia, and Victoria. In our view, it would be neither practical nor helpful to undertake the task of familiarising the readers with all of these statutory and common law offences. In the chapters that follow, therefore, we shall limit our focus to the constituent elements of the most common crimes (and the defences thereto) against persons and property such as, for example, murder, manslaughter, sexual and non-sexual assaults, theft, burglary, robbery, and attempts in the common law jurisdictions of New South Wales, Victoria, and South Australia.

In this chapter, however, our primary objective is to provide a framework that will facilitate an understanding of the basic principles and underlying rationales of the substantive criminal law. In particular, we shall examine such questions as: What is a crime and how does it differ from

non-criminal prohibitions giving rise to civil liability such as torts and other civil wrongs? What purpose(s) are sought to be achieved by imposing criminal liability on persons or corporations? What, if any, elements do all crimes have in common? When is a crime considered to be one of *mens rea*? How many different types of *mens reas* are recognised? What is meant by the requirement of ‘temporal coincidence’, and what is the legal rationale for this requirement? What is meant by the term ‘strict liability’, and how does it differ from the term ‘absolute liability’? What is the difference between ‘primary’ or ‘denial’ defences and those which are classified as ‘secondary’ or ‘affirmative’ defences? Which defences are generally available to an accused? What is the difference between the ‘evidential’ and ‘legal’ burdens of proof, and which party bears the onus of discharging these burdens? How does one differentiate among principals in the first degree, principals in the second degree, accessories before the fact, and accessories after the fact—and why are these distinctions important?

Throughout the book, readers are provided with a number of questions that will assist in reviewing the law discussed in the respective chapters. In particular, these questions will require readers to critically assess the reasoning in the cases as well as the courts’ overall approach to the relevant principles involved.

1.2 The definition and justification of the criminal law

1.2.1 The definition of a crime

There is no universally accepted definition of what constitutes a crime as distinguished from other types of legal wrongs such as torts, breaches of contract, and the like. Professor Glanville Williams defines a crime as ‘a legal wrong that can be followed by criminal proceedings and which may result in punishment’: G Williams, *Textbook of Criminal Law* (2nd edn, 1983) 27. According to this definition, the primary distinction between crimes and other legal wrongs is that the former are prosecuted through criminal as opposed to non-criminal proceedings. Since each of the jurisdictions within Australia retains the power to designate which legal wrongs are to be prosecuted through this medium, the reality is that a crime is any conduct which the courts or legislatures choose to describe as such.

Louis Waller and CR Williams argue, however, that the distinction between criminal and non-criminal misdeeds is based upon more than merely an arbitrary designation: L Waller and CR Williams, *Criminal Law* (9th edn, 2001) 2, 3. Specifically, they espouse the view that with the exception of crimes of ‘strict’ or ‘absolute’ liability (see discussion below), a decision to designate conduct as criminal is generally based upon the existence or non-existence of two factors that inhere in all crimes; namely, that the conduct in question must be injurious to the public at large as opposed to merely being injurious to one or more individual persons; and the conduct at issue must involve an element of moral blameworthiness.

This view is problematic for several reasons. First, practically all torts and other civil wrongs could just as easily be classified as conduct that is ‘injurious to the public at large’. This is exemplified in the fact that many crimes, if proven, would *necessarily* give rise to civil liability for the *same conduct*. The crimes of rape and indecent assault, for example, would constitute the tort of battery; the crime of theft (or larceny) would constitute the tort of conversion; and the crime of obtaining property by false pretences would constitute the tort of deceit. In these

and numerous other examples, the elements of the crimes and their civil counterparts are very similar and, in some instances (for example, the crime of common assault and the torts of battery and assault), even identical. Should a decision as to whether to categorise the very *same conduct and its consequences* as ‘injurious to the public at large’ turn on whether it is being prosecuted criminally or civilly?

Second, the notion that an element of moral blameworthiness inheres in all non-strict liability crimes is open to question. The existence or non-existence of moral culpability is, and always will be, largely in the eyes of the beholder. With respect to non-*mens rea* crimes that prohibit the infliction of various types of harm through criminal negligence (such as involuntary manslaughter by criminal negligence), it is arguable whether the accused’s conduct, although deserving of the ‘fault’ epithet in strict legal parlance, involves an element of moral wrongdoing.

Finally, as discussed below, there are many forms of conduct (such as smoking, for example) that are not criminalised despite the fact that many view them as involving an element of moral culpability. Thus, notwithstanding such attempts to distinguish crimes from other legal wrongs, it is probably most accurate to state that what amounts to a crime is any conduct that the courts or legislatures choose to designate as such, irrespective of whether it is deemed as injurious to the public at large or morally blameworthy.

Although it is possible to identify some unique aspects of the criminal law, these are all procedural in nature. In a vein similar to that espoused in the above quotation from Glanville Williams, Lord Atkin wrote:

The criminal quality of an act cannot be discovered by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?:
Proprietary Articles Trade Association v Attorney-General (Canada) [1931] AC 310, 314.

Thus, a unique feature of criminal offences is that criminal sanctions may be imposed for their breaches. A related distinction is that in the case of the criminal law, the relevant conduct is taken from the control of private individuals and regulated by the state. It is important to note, however, that these are not substantive distinctions. They do not tell us which type of conduct should be prosecuted or met with harsh sanctions; rather, they simply reflect the different procedures and consequences that may follow after the decision has been made.

Thus, while we can distinguish between criminal and civil wrongs in a procedural sense, there is no principled basis upon which to draw such a distinction in a substantive sense. That aside, there is an enormous difference between criminal and civil wrongs in terms of their legal consequences. This is unsatisfactory because the stakes are far too high to be determined on the basis of such a tenuous distinction. The prosecution of criminal offences often results in the stigmatisation of the offenders and subjects them to a range of coercive measures. In contrast, civil wrongs are directed primarily at compensating the aggrieved parties and do not generally involve censure. The inability to substantively distinguish between criminal and non-criminal misconduct also impacts on the search for a justification of the criminal law.

1.2.2 The justification of the criminal law

The stigmatisation and punishment that are consequent upon a finding of guilt for a criminal offence require a moral justification. Not all practices or types of behaviour call for a moral justification. We do not need to justify playing sport, visiting friends, or dancing. However,

as Andrew Ashworth correctly notes, the criminal law is ‘society’s strongest form of official punishment and censure’: A Ashworth, *Principles of Criminal Law* (2nd edn, 1995) 16. It is the precursor to sentencing that is the area of law where the state acts in its most coercive and intrusive manner. Whereas all other areas of law (such as contract and tort) are concerned with ‘simply’ regulating the transfer and adjustment of monetary sums, sentencing involves the intentional infliction of some type of harm, and hence infringes upon an important concern or interest such as one’s liberty or reputation. As such, it is not dissimilar to activities such as slavery, abortion, and euthanasia. It is a ‘fundamental ethical principle that we may not inflict pain or disgrace upon another without adequate justification’: JV Barry, ‘Morality and the Coercive Process’ (1962–4) 4 *Sydney Law Review* 28, 29.

Thus, in order for an act to be deserving of blame and the deliberate infliction of punishment, it must breach some type of norm or standard. The strongest type of prohibition in our community is embodied in moral norms. By definition, morality is the ultimate set of principles by which we should live and consists of the principles that dictate how serious conflict should be resolved: M Bagaric, ‘A Utilitarian Argument: laying the foundation for a coherent system of law’ (2002) 10 *Otago Law Review* 163. Lord Atkin’s observation in *Proprietary Articles Associations v Attorney-General (Canada)* [1931] AC 310 at 324, that morality and criminality are not co-extensive, is correct. Equally accurate, however, is Lord Coleridge’s view that ‘the absolute divorce of law from morality would be of fatal consequence’: *R v Dudley & Stephens* (1884) 14 QBD 287.

In order to explain and justify the criminal law on the basis of morality, it is not necessary that every criminal law seeks to enforce a moral norm. During the course of propounding his Soundest Theory of Law, Ronald Dworkin noted that in order for moral principles to explain and justify the settled rules of law, only a significant portion of the rules need to be consistent with the background moral theory: R Dworkin, *Law’s Empire* (1986). There are two ways in which it could be argued that morality underpins the criminal law. First, most of the criminal offences might fit within (or be consistent with) a particular moral virtue. Alternatively, it could be argued that rules of the criminal law are explicable by reference to a general moral theory.

1.2.2.1 *The principle of liberty*

The only discrete moral principle that is potentially broad enough to account for many criminal offences is liberty. Still the most famous statement concerning the paramountcy of liberty is by John Stuart Mill:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right: JS Mill, ‘Utilitarianism’ in M Warnock (ed), *Utilitarianism* (1986) 135.

The courts too have heavily endorsed the central role of personal liberty. As Mason CJ and Brennan J wrote:

The right to personal liberty is ... the most elementary and fundamental of all common law rights. Personal liberty was held by Blackstone to be an absolute right vested in the

individual ... he warned 'of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any ... magistrate to imprison arbitrarily ... there would soon be an end of all other rights and immunities': *Williams v The Queen* (1986) 161 CLR 278, 292.

Despite the ostensible attractiveness of the view that the criminal law should prohibit only conduct that encroaches on the interests of others, the criminal law as we know it is so paternalistic and regulates so many victimless offences that an explanation of the institution on such a basis is indefensible. Offences such as drunkenness, failing to register one's pet, euthanasia, drug-taking, and not wearing seatbelts are evidence of this.

1.2.2.2 *Morality and the criminal law*

Rather than focusing on a discrete moral virtue, a more promising approach is to urge that a general moral theory underpins the criminal law. Lord Devlin is the most famous advocate of this view: P Devlin, *The Enforcement of Morals* (1965). He claimed that the purpose of the criminal law was to maintain and enforce public morality. For him there was a common morality that bonded society together. Lord Devlin's view has been fairly criticised on the basis that there is in fact no such thing as a *common* morality and, if there were, a large degree of convergence in the moral ideals of a society does not necessarily justify enforcement of such moral standards. For example, the existence of societies where it is widely believed that it is immoral for white and coloured persons to associate with each other does not mean that it is appropriate to enforce such a norm: HLA Hart, *Law, Liberty and Morality* (1963). However, such objections can be met if one adopts not the notion of some supposed common morality as being the foundation of the criminal law, but rather a coherent normative theory of morality.

Broadly, there are two types of normative moral theories. Consequential moral theories claim that an act is right or wrong depending on its capacity to maximise a particular virtue such as happiness. Non-consequential (or deontological) theories claim that the appropriateness of an action is not contingent upon its instrumental ability to produce particular ends, but follows from the intrinsic features of the act. It is for this reason that the notion of (absolute or near absolute) rights is generally thought to sit most comfortably in a non-consequentialist ethic.

The leading contemporary non-consequentialist theories are those which are framed in the language of rights. Since the Second World War, there has been an immense increase in 'rights talk', both in sheer volume and the number of supposed rights. The rights doctrine has progressed a long way since its original modest aim of providing 'a legitimization of ... claims against tyrannical or exploiting regimes': SI Benn, 'Human Rights—For Whom and For What?' in E Kamenka & AE Tay (eds), *Human Rights* (1978) 59, 61. As Tom Campbell points out:

The human rights movement is based on the need for a counter-ideology to combat the abuses and misuses of political authority by those who invoke, as a justification for their activities, the need to subordinate the particular interests of individuals to the general good: T Campbell, 'Realizing Human Rights', in T Campbell (ed), *Human Rights: From Rhetoric to Reality* (1986) 1, 13.

There is now, perhaps more than ever, a strong tendency to advance moral claims and arguments in terms of rights. Assertion of rights has become the customary means to express our moral sentiments: 'there is virtually no area of public controversy in which rights are not to

be found on at least one side of the question—and generally on both’: LW Sumner, *The Moral Foundation of Rights* (1987) 1. There is no question that ‘the doctrine of human rights has at least temporarily replaced the doctrine of maximising utilitarianism as the prime philosophical inspiration of political and social reform’: H LA Hart, *Essays in Jurisprudence and Philosophy* (1983) 196–7.

Despite the prominence of rights talk in conventional moral discourse, even a cursory glance over the criminal law statute books shows that only a very small portion of criminal offences seek to protect individual rights. Certainly many traditional common law criminal offences protect important recognisable rights and interests: namely, the right to physical (including sexual) integrity and the right to own property. The criminal law, however, has grown almost exponentially in the past few decades, and offences aimed at securing the rights of others constitute an ever-decreasing portion of the criminal law.

For example, in Victoria each year only about 5000 offences are dealt with in the Higher Courts—County Court and the Supreme Courts: M Bagaric, ‘The “Civilisation” of the Criminal Law’ (2001) 25 *Criminal Law Journal* 197. These are the most serious offences and relate to matters such as armed robbery and sexual offences. Further, an approximate 300,000 offences are dealt with in the Magistrates’ Courts. The offences dealt with at this level relate to a hotchpotch of behaviour. They range from burglary and assault to travelling on a train without a ticket and playing games to the annoyance of another. It is difficult to generalise about the nature of the offences dealt with at this level. For example, in terms of the twenty most common offences about half relate to behaviour which infringes the rights of another (for example, theft, burglary, and unlawful assault); the other half are comprised of victimless offences such as, the use of a drug of dependence, the refusal to furnish a tax return, intoxication in a public place, and unlicensed driving.

However, these offences only scratch the surface in terms of the number of total criminal offences charged each year. In fact, about 85 per cent of criminal offences never reach court. Instead, they are dealt with on the spot by means of an infringement notice. The ratio of matters dealt with on the spot to that determined by the courts exceeds 7 to 1: M Bagaric, ‘Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt with on the Spot’ (1998) 24 *Monash University Law Review* 231. Most of these offences are simply regulatory in nature, and aimed at controlling and deterring certain behaviour. They are typically victimless, strict liability offences. In 1990–91, for example, the ten most common infringement notices which were sent to court for enforcement were exceeding the speed limit over 15 km/h and less than 30 km/h, leaving a vehicle in a no standing area, speeding less than 15 km/h over the limit, leaving a vehicle longer than the period fixed, leaving a vehicle at an expired meter, not wearing a seatbelt, leaving a vehicle in a carriageway, parking within nine metres of an intersection, travelling without a ticket, and leaving a vehicle in a no parking area: R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (1995).

All of these offences constitute paradigm instances of regulatory offences that do not seek to protect any recognisable right. It is therefore untenable to suggest that there is connection between the criminal law and contemporary moral discourse; the weight of numbers is simply crushing. Thus, the only apparent rationale for criminalising such conduct is that it is presumed to be an effective practical means of controlling and regulating the relevant conduct. The criminal law is a relatively cheap, convenient, and swift means of reinforcing a system of regulation.

Economic considerations and reasons of expediency are treated as outweighing any argument that the criminal law should be reserved for the most antisocial form of behaviour: A Ashworth, *Principles of Criminal Law* (2nd edn, 1995) 50.

The other main moral theory is consequentialism. Many consequentialist moral theories have been advanced such as egoism and utilitarianism. The most influential in moral and political discourse is hedonistic act utilitarianism. This theory provides that the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness.

From a utilitarian perspective, the criminal law should seek to protect and enforce important human interests that are necessary for humanity to flourish. This approach appears to justify a far wider range of criminal offences than rights-based moral theories. A tenable utilitarian argument can be made in favour of criminalising much of the conduct that is prohibited by even the most trivial of regulatory offences. For example, it could be argued that it is morally permissible to forbid the riding of a bicycle without a helmet because it reduces the risk that cyclists will become a burden to the community by utilising scarce public health dollars. Similarly, it could be asserted that parking offences are justifiable because parking in a no parking zone may inconvenience others more than it benefits the offender.

However, an argument along such lines would be weak. Every legal prohibition to some degree encroaches upon personal liberty. Personal liberty weighs very heavily on the utilitarian scales because the capacity for people to lead their lives in accordance with their own ideas is an important ingredient for happiness. Further, in so far as regulatory offences are concerned, the other side of the scales appears to be lightened for two reasons. First, the interests sought to be protected by regulatory offences are generally not very important. Second, the risk of harm inherent in the conduct is normally remote. Ultimately, the scales appear to militate in favour of foregoing the use of the criminal law to regulate such conduct. As noted by Feinberg, the interference by the criminal law with trivia is likely to cause more harm than it prevents: J Feinberg, *The Moral Limits of the Criminal Law, Offense to Others* (1986). Similarly, Bentham argued that one of the circumstances in which criminal punishment should not be inflicted is where it is unprofitable or too expensive because the harm inflicted by the punishment is greater than the harm it prevents: J Bentham, *Introduction to the Principles of Morals and Legislation* (1789).

However, even if it is possible to provide a utilitarian and, therefore, a moral explanation for the bulk of our criminal laws, this is not a basis for *distinguishing* between the criminal and civil wrongs. At its highest, the utilitarian theory of morality provides a necessary, but *not a sufficient* criterion for criminalising certain behaviour. This is because the harm that is caused by breaches of the civil law is certainly no less than that occasioned by breaches of the criminal law.

The purchaser who fails to honour a contract for the sale of land, the solicitor who gives incorrect legal advice, the builder who is six months late completing a home, the doctor who fails to diagnose an illness, the plumber who arrives an hour late to fix the broken pipe, the storeowner who fails to mop up a spill in his or her shop, the taxi-driver who, as a result of a wrong turn gets his or her passenger late to the airport, the telecommunications company that disconnects the wrong telephone line, and the energy company that fails to prevent a power blackout—are all guilty of conduct which actually or in all likelihood causes a far greater amount of unhappiness than occurs as a result of a failure to register one's dog, driving at 70 km/h in a 60 km/h zone, flying a kite which annoys another, or parking too long at a parking meter.

Thus, even if it could be asserted that there is a general overlap between the criminal law and morality on the basis that most criminal offences relate to conduct which has at least the potential to cause unhappiness to either the agent or another, this does not form the basis for a coherent distinction between civil and criminal wrongs. Civil wrongs are generally no less harmful than the great majority of criminal offences.

Accordingly, it seems that the decision to make an activity a criminal offence is devoid of a moral justification.

1.2.3 Possible reform suggestions

To remedy this situation, there are at least two possible approaches that the legislature can undertake. The first is to narrow the range of conduct proscribed by the criminal law by limiting the criminal law to breaches of important moral principles. This would likely result in the decriminalisation of a large volume of conduct. Conduct such as littering and illegal parking could still be deterred (though perhaps not as effectively) through civil sanctions.

An alternative and more radical approach would be to do away with the distinction between the criminal and civil law. One could merely treat a breach of the law as just that—a violation of *the law* where the law is treated as a unified institution devoid of any demarcation between civil and criminal liability. Such a unification would provide the state with the option of being the party that enforces *all* breaches of the law. The relative seriousness of the breaches could be reflected by the different orders that are available for the respective types of conduct. Thus, murderers would still be imprisoned and contract breachers would still be forced to compensate the other party for the breach; however, the label (criminal or civil) ascribed to the body of law to which a particular legal dispute relates would be irrelevant to the determination of the dispute and the legal ramifications stemming from it.

Both approaches are doctrinally consistent and arguably represent an improvement over the present situation. The viability of the first approach will turn primarily on the possibility of fashioning a moral theory that provides a justification for the criminal law. In our view, this is not insurmountable. The main obstacle to the second approach is the pragmatic difficulties involved in expanding the role of the state to enforcing breaches of all laws.

Questions

- 1.1 After you have completed reading this book, re-read the above discussion. Do you agree with the discussion? Are there other possible definitions or justifications of crime?
 - 1.2 Which of the two reform options discussed above is the most persuasive? Why?
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1.3 The purposes of criminal laws: The connection between crime and punishment

1.3.1 Theories of punishment

As noted in the above section, there is close connection between crime and punishment. In a sense, punishment constitutes the ‘sharp end’ of the criminal law. It involves the deliberate infliction of pain on an offender by the community.

Punishment is the study of the connection between wrongdoing and state-imposed sanctions. The main issue raised by the concept of punishment is the basis upon which the evils administered by the state to offenders can be justified. Sentencing is the system of law through which offenders are punished. The main issues that must be addressed by any sentencing system are the types of sanctions that are appropriate and the factors that are relevant in fitting the sanction to the crime. Thus, sentencing and punishment are inextricably linked, with punishment being the logically prior inquiry. In order to properly decide how and how much to punish, it must first be decided on what basis punishment is justified and why we are punishing. For example, the *lex talionis*, an eye-for-an-eye theory of punishment, requires us to select a sanction that, as far as possible, equates with the nature of the crime. This stands in contrast to the communicative theory of punishment, which favours sanctions that will best inform offenders of the wrongfulness of their crimes.

Philosophical discussion in the area of punishment has been largely confined to the justification of punishment. On the other hand, legal analysis has primarily focused on sentencing issues. Oceans of ink have been spilt on each issue, and despite the logical dependence of sentencing on punishment, the spills have rarely merged; as a result, punishment and sentencing have generally evolved with only a cursory consideration of one another. However, there is logically a need for greater integration between the justification for punishment and sentencing law. In order to decide how offenders should be punished, we must first ascertain why we are justified in punishing offenders. Only then can the means (sentencing) be tailored to suit the ends.

There are two main theories of punishment that have been advanced. Utilitarianism is the view that punishment is inherently bad due to the pain it causes the wrongdoer, but is ultimately justified because this is outweighed by the good consequences stemming from it. These are traditionally thought to come in the form of incapacitation, deterrence, and rehabilitation. The competing theory, and the one which enjoys the most contemporary support, is retributivism. All Australian jurisdictions examined in this book incorporate a mix of utilitarian and retributive sentencing objectives: see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1991* (Vic) s 5; *Sentencing Act 1995* (WA) s 6. Retributive theories of punishment are not clearly delineated and it is difficult to isolate a common thread running through theories carrying the tag. All retributive theories assert that offenders deserve to suffer and that the institution of punishment should inflict the suffering they deserve. However, they provide vastly divergent accounts of why criminals deserve to suffer. Despite this, there are broadly three similarities shared by retributive theories. The first is that only those who are blameworthy deserve punishment and that this is the sole justification for punishment. Thus, punishment is only justified, broadly speaking, in cases of deliberate

wrongdoing. The second is that the punishment must be equivalent to the level of wrongdoing. Finally, punishing criminals is just itself: it cannot be inflicted as a means of pursuing some other aim. Accordingly, the justification for punishment does not turn on the likely achievement of consequentialist goals; it is justified even when 'we are practically certain that attempts [to attain consequentialist goals, such as deterrence and rehabilitation] will fail': RA Duff, *Trials and Punishments* (1986) 7. Thus, it is often said that retributive theories are backward-looking, merely focusing on past events in order to determine whether punishment is justified in contrast to utilitarianism, which is concerned only with the likely future consequences of imposing punishment.

It has been argued that retributivism cannot justify punishment: see M Bagaric, *Punishment and Sentencing: A Rationale Approach* (2001). The most pervasive flaw with retributive theories is that they cannot justify the need for punitive measures without resort to consequential considerations. This expedient reliance on consequences undercuts the stability of many retributive theories. Retributive theories that do not incorporate consequentialist considerations are flawed because they lead to the unacceptable view that we should punish even if no good comes from it. It has been suggested that utilitarianism is the most persuasive justificatory theory of punishment.

1.3.2 The goals of sentencing

As noted above, it has been suggested that there are three good consequences that flow from punishment: deterrence, incapacitation, and rehabilitation. However, recent empirical evidence casts doubt on the efficacy of a state-imposed system of punishment to achieve some of these objectives.

1.3.2.1 Deterrence

There are two broad forms of deterrence. Specific deterrence aims to discourage crime by punishing actual offenders for their transgressions, thereby convincing them that 'crime does not pay'. General deterrence seeks to dissuade potential offenders from engaging in unlawful conduct by illustrating the unsavoury consequences of offending. Available empirical evidence suggests that deterrence is achievable through criminal punishment, but only in a very narrow form.

It is inordinately difficult to obtain information regarding the effectiveness of sanctions in deterring offenders from committing offences at the expiry of a sanction. Offenders may not re-offend for numerous reasons, apart from the fear of being subject to additional punishment. The offending may have been a 'one-off' event, a suitable opportunity may not again present itself, rehabilitation may have occurred, or the offender may get a job.

However, the available evidence supports the view that severe punishment (namely imprisonment) does not deter offenders; the recidivism rate of offenders does not vary significantly, regardless of the form of punishment or treatment to which they are subjected: M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals' (2000) 24 *Criminal Law Journal* 19, 34–5. Thus, there is no empirical evidence to suggest that offenders who are dealt with by way of one of the new sanctions, as opposed to being sentenced to imprisonment, are more likely to offend.