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Australia and the United States: Two Common  
Criminal Justice Systems Uncommonly at Odds,  
Part 2\*

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## I. INTRODUCTION

Six years ago we considered a number of similarities and differences in the criminal justice systems of Australia and the United States.<sup>1</sup> Our investigation found that the regulatory framework for criminal procedure is similar in both systems, and that both systems promote the presumption of innocence and impose requirements designed to ensure the voluntariness of confessions.<sup>2</sup> Still, each system approaches some key matters on very different bases. These include the exclusion of illegally obtained evidence, the right to counsel, the transparency of jury deliberations, and the issue of entrapment in criminal investigation.<sup>3</sup> In our view, U.S. jurisprudence is “rights-oriented,” while Australian jurisprudence is “official-centric.”<sup>4</sup> Without a constitutional basis for rights development and a proclivity for jurisprudence designed to protect the integrity of the courts and their processes rather than individual rights, Australian courts are far less likely than their U.S. counterparts to exclude illegally obtained evidence and confessions, to limit evidence (or dismiss charges) obtained by way of entrapment, or to open trials to public scrutiny.

However, we did not simply point out the constitutional differences between our two countries as an explanation for the different paths taken. We offered the thesis that the embedding of rights in the United States Constitution and the subsequent development of rights-based jurisprudence governing criminal investigation and process—some of which, like the doctrine of entrapment, are wholly independent of

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1. See Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. INT'L & COMP. L. 27 (2004).

2. See *id.* at 28.

3. See *id.* at 114-16.

4. *Id.* at 114.

constitutional rights—sprang from a different history and culture than that which developed in Australia post-British colonization.<sup>5</sup> The Framers of the Australian Constitution drafted in the late 1890s deliberately rejected embedding rights out of the belief that the English system of responsible government was a sufficient assurance of civil liberty.<sup>6</sup> They thought that the imposition of rights would only benefit alien elements in Australian society. By contrast, in the United States, the revolutionary context in which the Constitution was formed resulted in a compact between the State and the people with a full articulation of rights, lest the State should use its power to ride roughshod over individual liberties.<sup>7</sup> In other words, it was the divergent cultures of colonization and revolution, and reliance upon state beneficence versus fear of state tyranny, which led to our constitutional differences and contrasting approaches to criminal justice.

The purpose of this Article is to investigate other areas of criminal justice and to consider whether our thesis continues to operate as an explanation for the different approaches taken in each jurisdiction. This Article will examine four key aspects of criminal justice in the two nations: prosecutorial discretion, especially in charging and plea bargaining; double jeopardy; sentencing; and alternatives to incarceration as punishment.

The investigation is timely for a number of reasons. First, following a change of government in 2007, Australia embarked upon a consultation process to examine whether Australia should have a Bill of Rights. A National Human Rights Consultation Committee was formed to convene a series of community roundtables, to develop submissions, and to deliver a report that is currently being considered by the Australian government.<sup>8</sup> Since our first article one Australian state, Victoria, and the Australian Capital Territory, Canberra, have already enacted legislation designed to protect and promote human rights.<sup>9</sup> The rights set out in these statutes do not endorse the adoption of the United States' approach to evidence obtained illegally, entrapment, and so on; moreover, the rights

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5. *Id.* at 116.

6. *Id.*

7. *Id.* at 100.

8. *See* AUSTRALIA NATIONAL HUMAN RIGHTS CONSULTATION COMMITTEE, NATIONAL HUMAN RIGHTS CONSULTATION REPORT (2009), available at <http://www.humanrightsconsultation.gov.au> (follow "Report" hyperlink). The committee is headed by Jesuit cleric and law professor Frank Brennan. *See* Australia National Human Rights Consultation Committee, Father Frank Brennan AO, [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who\\_FatherFrankBrennanAO-Chair](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who_FatherFrankBrennanAO-Chair) (last visited Mar. 15, 2010).

9. Charter of Human Rights and Responsibilities Act, 2006 (Vict. Acts); Human Rights Act, 2004 (Austl. Cap. Terr. Laws).

themselves are subject to limitation and qualification. Nevertheless, the fact of their articulation suggests that Australia's idiosyncratic position apropos of civil liberties in the common law world is undergoing change, albeit slow and incremental.

The second development worth noting since our original article was published is a series of decisions of the United States Supreme Court raising questions about the reach of the exclusionary rule, something we saw earlier as a fundamental difference between the two systems. Two of the decisions give grave concern about the direction of U.S. law and the exclusionary rule, while two others follow a much more rights-based approach.

The first case is *Herring v. United States*.<sup>10</sup> In a split decision, the Court relaxed the application of the exclusionary rule regarding search and seizure without a valid warrant.<sup>11</sup> The police officers who found drugs and firearms had acted on the basis of inaccurate information concerning the existence of an outstanding warrant included in a neighboring county database.<sup>12</sup> Although the majority Justices accepted that there had been a Fourth Amendment violation, they characterized the error as a matter of "isolated negligence" rather than systematic error or reckless disregard of constitutional requirements.<sup>13</sup> Releasing the defendant on such a minor violation, while the police were in possession of a warrant, seriously undermined the criminal justice system.<sup>14</sup>

In *Hudson v. Michigan*,<sup>15</sup> too, the United States Supreme Court was far more willing to limit the use of the exclusionary rule to head off police misconduct. The Justices there held that a violation of the "knock-and-announce" rule<sup>16</sup> does not require suppression of evidence found in a search in which an otherwise valid warrant was improperly executed.<sup>17</sup> Focusing on the key rationale for the exclusionary rule—deterrence—the Court determined that suppression would not serve the interest protected by the constitutional guarantee against unannounced entry.<sup>18</sup> Though the knock-and-announce rule protected property and privacy, for the

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10. 129 S. Ct. 695 (2009).

11. *Id.* at 702-03.

12. *Id.* at 698.

13. *Id.* (reasoning that when the error was due to such "isolated negligence," the benefits of deterring police misconduct by excluding illegally obtained evidence were clearly outweighed by the substantial social cost of allowing the defendant to go free).

14. *Id.* at 704.

15. 547 U.S. 586 (2006).

16. The basic principle was first announced in *Wilson v. Arkansas*, 514 U.S. 927, 931-32 (1995).

17. *Hudson*, 547 U.S. at 594.

18. *Id.*

majority this interest did not outweigh the social costs of excluding relevant incriminating evidence when the police were acting pursuant to a legitimate warrant.<sup>19</sup>

The direction of the United States Supreme Court as to a rights-based criminal justice system becomes much less clear when one views its most recent pronouncements in the area. The so-called *McNabb-Mallory* rule,<sup>20</sup> developed in the 1940s and 50s, requires an arrested person to be brought before a judicial officer “without unnecessary delay.”<sup>21</sup> If the rule is not satisfied, any statement obtained from the accused during the delay must be suppressed.<sup>22</sup> The holdings were actually based upon the Federal Rules of Criminal Procedure—not the Constitution—which were seemingly changed by Congress in a legislative enactment in 2006.<sup>23</sup> The Court in both *McNabb* and *Mallory* was careful to note that it was implying the sanction from the purpose of the Federal Rules of Criminal Procedure, but the impact of the subsequent changes to the federal statute was unclear until the Court’s decision in *Corley v. United States*.<sup>24</sup> In that case, the five-Justice majority held that if the suspect was not brought before a magistrate within the six-hour time period specified—unless there was an emergency—any resulting confession would be inadmissible.<sup>25</sup>

The other case to raise questions about whether the United States Supreme Court truly intends to step back from its strong support for a mandatory exclusionary rule is *Arizona v. Gant*.<sup>26</sup> After the defendant had stepped out of his car, officers arrested and handcuffed him.<sup>27</sup> They

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19. *Id.* at 599 (stating that “massive deterrence” was not necessary against unannounced entries).

20. So named for the cases of *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957).

21. *Mallory*, 354 U.S. at 452.

22. *Id.* at 453.

23. *Id.* at 452-53; see 18 U.S.C. § 3501(c) (2006).

24. 129 S. Ct. 1558 (2009).

25. *Id.* at 1571. The language here is quite strong, and reaffirming of an earlier period:

In a world without *McNabb-Mallory*, federal agents would be free to question suspects for extended periods before bringing them out in the open, and we have always known what custodial secrecy leads to. . . . No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far. “[C]ustodial police interrogation, by its very nature, isolates and pressures the individual,” . . . and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed.

*Id.* at 1570 (citations omitted).

26. 129A S. Ct. 1710, 1714 (2009).

27. *Id.* at 1715.

then searched the car and found drugs.<sup>28</sup> The trial court justified the arrest under a well-established doctrine that allows for a search of the defendant and the area under his immediate control at the time of the arrest.<sup>29</sup> The majority affirmed the Arizona Supreme Court's reversal of *Gant*'s conviction, ruling the search invalid.<sup>30</sup> They found that the "search incident to arrest" exception to the Fourth Amendment warrant requirement must be justified by concerns for officer safety or a valid suspicion of evidence in the vehicle.<sup>31</sup> Because the defendant had left the vehicle before the police went into it, the search of the vehicle was not directly connected to the arrest and, without that justification, violated the Constitution.<sup>32</sup>

By tempering the application of the exclusionary rule according to the degree of police culpability involved and tying this to the integrity of the criminal justice system, the decisions in *Herring* and *Hudson* appear far more analogous to the Australian official-centric jurisprudence examined in our original article than was previously observed. Yet, the Supreme Court's recent *Corley* and *Gant* rulings seemingly return the Americans to a more traditional view of individual rights and deterrence of overzealous law enforcement.

The question for us here is whether the various recent developments in our respective nations signal substantive shifts away from the views we expressed in our first article. We do not think that they do. We turn now to four distinct, yet related, areas in an attempt to shed light on this subject.

## II. PROSECUTORIAL DISCRETION

### A. *The United States*

The great reach of prosecutorial discretion is seen most prominently in the plea bargaining process.<sup>33</sup> The American criminal justice system

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28. *Id.*

29. *Id.* (relying on the doctrine of a "search incident to arrest"). The major case involving this doctrine is *Chimel v. California*, 395 U.S. 752 (1969).

30. *Gant*, 129 A.S. Ct. at 1719.

31. *Id.*

32. *Id.* Relying on its well-established case law, the Court held as follows:

*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle [unless, because of] circumstances unique to the automobile context . . . it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

*Id.* at 1714.

33. Though, certainly, the impact of great prosecutorial discretion is not limited to this area. The American prosecutor, for instance, retains tremendous power regarding pretrial

has become a process of negotiations more than a guaranteed trial by jury.<sup>34</sup> Today, plea bargaining disposes of more than 90% of criminal cases before a jury panel is even selected.<sup>35</sup> Plea bargaining is the process by which the lawyer for an accused criminal defendant and the prosecutor negotiate a mutually satisfactory disposition of the case, which is subject to the approval of the court holding jurisdiction over the matter. Such a deal prevents both parties from going to trial. Plea bargaining has evolved from an accepted, though limited, alternative to trial by a jury of one's peers to the primary and favored method of disposing criminal cases in the United States. It continues to be hotly debated.

Proponents of plea bargains argue that there are benefits for all participants in the system: prosecutors, defendants, and judges. Prosecutors must allocate their finite resources over an ever-expanding criminal docket. With the benefit of pleas, government attorneys are given the option of summarily disposing of cases that are less serious, allowing them to concentrate their efforts on graver issues that may

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discovery. See Symposium, *Prosecutorial Discretion*, 6 OHIO ST. J. CRIM. L. 367 (2009) (reviewing many aspects of prosecutorial discretion).

34. See Sara Sun Beale, *Introduction* to Symposium, *supra* note 33, at 367. The Sixth Amendment to the United States Constitution ensures that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. CONST. amend VI.

35. *Felony Sentences in State Courts, 2004*, BUREAU OF JUST. STAT. BULL. (U.S. Dep’t of Justice, Washington, D.C.), July 2007, at 1; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2001, at 2 (2003) (“The proportion of convicted defendants who pleaded guilty increased from 87% during 1990 to 95% during 2001.”); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2000, tbl.4.2 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/sc0001st.pdf> (finding 95% of felony convictions in state courts were achieved through guilty pleas); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2002, at 455 tbl.5.57 (Kathleen Maguire & Ann L. Pastor eds., 30th ed. 2004), available at <http://www.albany.edu/sourcebook/pdf/sb2002/sb2002.zip> (detailing the system in seventy-five counties). Americans are quite familiar with the plea bargaining process, which has been used by numerous high profile defendants such as:

- Actor Mel Gibson—driving under the influence; three years’ probation and ordered to attend Alcoholics Anonymous meetings for a year.
- Musician Richie Sambora—two counts of DUI; three years’ probation and must attend first-offender alcohol awareness class for three months.
- Singer Boy George—false reporting of an incident and drug charge; agreed to enter a drug rehabilitation program and perform community service.
- Football player Michael Vick—dog fighting conspiracy; twenty-three months in prison.
- Football player Plaxico Burress—possession of a weapon; two year prison sentence.
- Financier Bernard Madoff—multiple counts of unlawful stock trading; 150 years in prison.
- Rapper T.I. (Clifford Joseph Harris, Sr.)—attempting to buy unregistered weapons; a year and a day imprisonment and \$100,000 in fines.
- Football player Donte Stallworth—manslaughter (killing pedestrian while driving under the influence); thirty day jail sentence.

require the strictest attention and the verdict of a jury for maximum penalties.<sup>36</sup> Criminal defendants also derive an obvious benefit. In exchange for pleading guilty, the defendant avoids a trial and can receive sentence-related concessions from the prosecutor or the dismissal of some of the charges in the indictment. Finally, judges benefit by having the docket relieved of matters that would otherwise require the resources of the court. Plea bargains allow the judiciary to administer justice more diligently and efficiently by reducing the caseload of the courts and allowing judges more time to attend to fewer cases. Quick disposition of cases through pleas reduces the expense of providing jury trials.

The arguments in the opposing camp illustrate the potential dangers presented by plea bargaining. Critics assert that bargaining facilitates numerous subversions of the criminal justice system. For some, it is unconscionable that “criminals benefit from bargaining with the state and avoid what may be [the more] appropriate,” and more harsh, sanctions for their crimes.<sup>37</sup> For example, a defendant who clearly committed an assault with a deadly weapon may negotiate with a prosecutor, agreeing to plead guilty to simple assault (with no mention of a deadly weapon), in exchange for forgoing a trial on the more severe crime. The criminal may well deserve a stern punishment for the crime of which he is truly guilty, but because of plea bargaining he will receive a lesser punishment for a lesser crime.<sup>38</sup>

Other critics view the concerns from a very different perspective. They fear that constitutionally guaranteed safeguards against government oppression are circumvented. “[T]he Constitution and the Supreme Court’s interpretation of it provide . . . explicit rules for the determination of guilt and the establishment of punishment.”<sup>39</sup> Plea bargaining eludes these stringent due process requirements and the proof required for

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36. Of course, prosecutors may also engage in bargaining for other reasons: “to hedge against the risk of acquittal; to preserve scarce resources; to protect victims; and to show sympathy for the defendant.” John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 641-42 (2008).

37. See, e.g., Douglas D. Guidorizzi, Comment, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 770 (1998).

38. Compare CAL. PENAL CODE § 241(a) (Deering 2008) (requiring a punishment of a fine not to exceed \$1000 and/or imprisonment in the county jail not to exceed six months for assault) with *id.* § 245(a) (requiring a punishment of two to four years imprisonment in state prison or not exceeding one year in county jail and/or a fine not to exceed \$10,000 for assault with a deadly weapon).

39. Guidorizzi, *supra* note 37, at 768. Professor Stuntz notes that there are various constitutionally-guaranteed trial rights that only apply to defendants who go to trial; guilty pleas eliminate those rights, leaving states “free to use even extortionate threats to induce pleas.” William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2018 (2008).



conviction that occurs during trials.<sup>40</sup> The other, and arguably more troubling, issue is the potential for innocent defendants to plead guilty. The fear of the potential maximum sentence a judge or a jury can impose as a result of a guilty trial verdict may cause even the innocent defendant to partake in an unfortunate risk assessment. Here, the defendant is faced with a choice where the cost of pleading guilty is far outweighed by the fear of going to trial. A risk-averse, yet innocent, defendant who is well-advised by counsel might choose a lesser sentence attendant to a guilty plea, rather than go to trial and face a maximum penalty.<sup>41</sup>

Plea bargaining supporters, especially prosecutors, have pushed hard in support of the process; opponents have clearly lost the argument in the United States Supreme Court, as seen in the pivotal case of *Bordenkircher v. Hayes*.<sup>42</sup> In that case, a Kentucky state grand jury indicted Hayes on a charge of “uttering a forged instrument in the amount of \$88.30.”<sup>43</sup> The offense was punishable by two to ten years in prison.<sup>44</sup> Hayes’s lawyer and the Commonwealth’s attorney engaged in plea negotiations, during which the prosecutor offered to recommend a term of five years imprisonment if Hayes pled guilty.<sup>45</sup> However, the prosecutor threatened that if Hayes did not plead guilty, he would charge Hayes under the Kentucky Habitual Criminal Act, which would subject Hayes to a mandatory life sentence based on his two prior felony convictions.<sup>46</sup> Hayes rejected the plea bargain, was charged as threatened, and eventually lost at trial.<sup>47</sup> He was sentenced to life in prison pursuant to the Act.<sup>48</sup>

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40. Guidorizzi, *supra* note 37, at 768.

41. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 841 (2006); see also Andrew Taslitz, *The Guilty Plea State*, CRIM. JUST., Fall 2008, at 4, 4. The Innocence Project reports that about 25% of the 220 prisoners who have been exonerated by DNA evidence were convicted with some sort of false confession, incriminating statement, or by pleading guilty. See Innocence Project, *Understand the Causes: False Confessions*, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Jan. 9, 2010). It has identified common reasons for such actions including diminished capacity, mental impairment, ignorance of the law, fear of violence, and the threat of a harsh sentence. *Id.* It is also common for innocent defendants who have falsely confessed to police to agree to a plea bargain out of belief that the false confession will ensure a guilty verdict at trial. See *id.*

42. 434 U.S. 357 (1978).

43. *Id.* at 358.

44. *Id.*

45. *Id.*

46. At the postindictment/pretrial meeting, the prosecutor said directly “that if Hayes did not plead guilty and ‘save the court the inconvenience and necessity of a trial,’ he would return to the grand jury to seek an indictment under” the recidivist statute. *Id.* at 358-59.

47. *Id.* at 359.

48. *Id.*

The Supreme Court faced a dilemma. The Justices had indicated in a line of cases that a person cannot be punished for exercising constitutionally protected rights.<sup>49</sup> Hayes had a constitutional right to a trial by jury, and it appeared that the prosecutor had penalized him for exercising that right. In another line of Supreme Court cases, however, the Court had strongly endorsed the guilty plea process as an important component of the United States' criminal justice system. The Court, therefore, had to decide the constitutionality of a very common practice in plea bargaining: the state prosecutor's threat to indict a defendant on a more severe charge if the defendant chooses to exercise the right to a trial by jury instead of pleading guilty.<sup>50</sup>

Defending guilty pleas and plea bargaining, the Court highlighted some points that it had previously addressed regarding the process: "the importance of counsel during plea negotiations,"<sup>51</sup> "the need for a public record indicating that a plea was knowingly and voluntarily made,"<sup>52</sup> and "the requirement that a prosecutor's plea-bargaining promise must be kept."<sup>53</sup> However, the Justices were able to distinguish the actions of Hayes's prosecutor from the "vindictive" measures admonished in earlier decisions.<sup>54</sup> According to the Court, plea bargaining is a fair practice

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49. See, e.g., *United States v. Jackson*, 390 U.S. 570, 583 (1968) (holding the federal kidnapping statute that only allowed juries to recommend the death penalty was violative of due process by discouraging the defendant's exercise of the Fifth Amendment right to plead not guilty and the Sixth Amendment right to a jury trial); *Griffin v. California*, 380 U.S. 609, 614 (1965) (disallowing comment by judge or prosecutor on the exercise of the Fifth Amendment right against self-incrimination because to do so would constitute a penalty for exercise of that right).

50. The Court's exact constitutional question was "whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged." *Bordenkircher*, 434 U.S. at 358.

51. *Id.* at 362 (citing *Brady v. United States*, 397 U.S. 742, 758 (1970)).

52. *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)).

53. *Id.* (citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

54. See *id.* at 362-65. The Court held that vindictiveness must play no part in sentencing a defendant in a new trial after he has successfully attacked his first conviction, and that a prosecutor must not reindict a convicted misdemeanor on a felony charge after the defendant invoked an appellate remedy, since in that instance there is a "realistic likelihood of 'vindictiveness.'" *Id.* at 362 (quoting *Blackledge v. Perry*, 417 U.S. 21, 27 (1974)). These earlier cases "deal[t] with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction." *Id.* The practice of plea bargaining, in contrast, is an ongoing negotiation process in which the prosecution and the defendant "arguably possess relatively equal bargaining power." *Id.* (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970)). The unconstitutionality of vindictiveness, therefore, lay in the fact that there is a danger, "not in the possibility that a defendant might be deterred from exercising a legal right, . . . but . . . that the State might . . . retaliat[e] against the accused for lawfully attacking his conviction." *Id.* at 363 (citations omitted). It is a violation of a defendant's due process rights to punish him simply "because he has done what the law plainly allows him to do." *Id.* ("[I]n the

because there is a mutuality of advantage to both prosecutors and defendants. The Court responded to the notion that prosecutors act vindictively by threatening to bring more severe charges if a defendant does not forgo her right to a trial. Confronting a defendant with such a situation is simply “[‘]an inevitable’—and permissible—‘attribute of any legitimate system which tolerates and encourages the negotiation of pleas.’”<sup>55</sup> Because the American justice system has decided to allow—and even encourage—the negotiation of pleas, “[i]t follows that [the Supreme] Court has necessarily accepted as constitutionally legitimate the . . . reality that the prosecutor’s interest [in plea bargaining] is to persuade the defendant to forgo [the] right to plead not guilty.”<sup>56</sup>

*Bordenkircher* sent a striking message to prosecutors and defense attorneys: the government lawyers have extremely broad discretion; they can charge (and threaten) virtually anything and everything necessary to get the deal done. The defendants, however, are given a different script: take the offer or else.<sup>57</sup> The Court decided that threats of an enhanced charge and graver punishment used by prosecutors to assure a guilty plea were in the State’s best interest and were not inherently unfair.<sup>58</sup> This is the result of the fact that in order to charge a defendant with a crime, a prosecutor is only required to have probable cause to believe that an accused has committed that crime. Harshness and ugly threats will not constitutionally limit the prosecutor’s discretion in this area. Additionally, this discretion became even more stark with the mandatory sentencing and guidelines jurisprudence discussed below.<sup>59</sup> As a consequence, grave

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‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.”).

55. *Id.* at 364 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)).

56. *Id.*

57. “The incentive to plead applies to innocent and guilty defendants alike. . . . [I]t may apply more strongly to innocents, who are more risk averse than their guilty counterparts.” Stuntz, *supra* note 41, at 841.

58. *See Bordenkircher*, 434 U.S. at 365. The Court addressed prosecutorial vindictiveness later in *United States v. Goodwin*, 457 U.S. 368 (1982). Once again, the prosecutor’s broad discretion was accepted, since there is no presumption of vindictiveness in the usual pretrial negotiation context. *Id.* at 381. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution, or he simply may come to realize that information possessed by the State has a broader significance. *Id.* At this stage of proceedings, the prosecutor’s assessment of the proper extent of prosecution “may not have crystallized.” *Id.* *See generally* Michael M. O’Hear, *The End of Bordenkircher: Extending the Logic of Apprendi to Plea Bargaining*, 84 WASH. U. L. REV. 835 (2006).

59. *See infra* Part IV. Commentators have strenuously debated the impact of varying sentencing regimes on the prosecutors’ bargaining power and ultimate discretion. *See, e.g.*, O’Hear, *supra* note 58; Jeffrey Standen, *The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 IOWA L. REV. 775 (2002); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004); Ellen Yaroshefsky, *Ethics and*

concerns exist as to whether American prosecutors are able to circumvent entrenched constitutional rights in the pretrial context during plea bargaining.<sup>60</sup> U.S. prosecutors appear to have a stranglehold on defendants and their lawyers, primarily because the prosecutor has the broad power to define the scope of charges brought against the defendant. This power is readily accepted and approved of because of the sense that in plea bargaining there is a “give-and-take” negotiations process, in which the prosecution and defense have arguably equal bargaining power.<sup>61</sup>

### B. Australia

Australian prosecutors, like their U.S. counterparts, are the gatekeepers to the criminal justice system, determining which criminal charges will be prosecuted and how they will be prosecuted. In both jurisdictions, their role is pivotal to the integrity and efficacy of the criminal justice system.<sup>62</sup> However, there are also significant differences between both the responsibilities of and constraints governing the practices of Australian and American prosecutors.

In Australia, there are two categories of prosecutors. Serious crimes heard by superior courts are prosecuted by legal practitioners employed by statutory Directors of Public Prosecution (DPP), which operate in

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*Plea Bargaining: What's Discovery Got To Do with It?*, CRIM. JUST., Fall 2008, at 28. One astute commentator succinctly captured this idea: “No government official has as much unreviewable power or discretion as the prosecutor. Few regulations bind or even guide prosecutorial discretion, and fewer still work well.” Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 959 (2009).

60. See Stuntz, *supra* note 41, at 791.

61. *Bordenkircher*, 434 U.S. at 362. As stated by the former Chief Justice in *Santobello v. New York*, 404 U.S. 257, 260-61 (1971):

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called “plea bargaining,” is an essential component of the administration of justice. Properly administered, it is to be encouraged. . . . Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

62. John McKechnie, *Directors of Public Prosecutions: Independent and Accountable*, 26 U. W. AUSTL. L. REV. 268, 271-72 (1996); Ivan L. Potas, *Measuring Prosecutorial Discretion*, in PROSECUTORIAL DISCRETION, AUSTRALIAN INSTITUTE OF CRIMINOLOGY SEMINAR PROCEEDINGS 7-9 NOVEMBER 1984 (Ivan L. Potas ed., 1985).

each State and at the Federal level.<sup>63</sup> The office of DPP is a relatively recent phenomenon, created as a result of difficulties encountered with prosecution at less than arm's length from the government.<sup>64</sup> At the summary level, where the majority of minor crimes such as drunk driving, minor assaults, and thefts are tried, prosecutions continue to be largely administered by police officers with specialist training in law and advocacy.<sup>65</sup> To the American eye, and in the view of some senior prosecutors in Australia,<sup>66</sup> deploying nonlawyers—who are not subject to the ethical constraints that govern those admitted to the bar, are unable to claim privilege over their communications, and are not fully trained in the law to prosecute the majority of criminal cases—may seem like a false economy, especially given instances of corruption that come to light from time to time.<sup>67</sup> However, there is scant evidence that police prosecutors are generally corrupt, inefficient, or incompetent.<sup>68</sup> Consequently, it seems that the administrative inertia and financial resourcing required to overcome the status quo remain substantial barriers in most Australian jurisdictions to the wholesale transfer of all prosecutions to the DPP.

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63. See Director of Public Prosecutions Act, 1983 (Austl.); Director of Public Prosecutions Act, 1986 (N.S.W.); Director of Public Prosecutions Act, 1991 (N. Terr.); Director of Public Prosecutions Act, 1984 (Queensl.); Director of Public Prosecutions Act, 1991 (S. Austl.); Director of Public Prosecutions Act, 1973 (Tas.); Public Prosecutions Act, 1994 (Vict.); Director of Public Prosecutions Act, 1991 (W. Austl.).

64. Richard Refshauge, *Prosecutorial Discretion—Australia*, in *THE CONVERGENCE OF LEGAL SYSTEMS IN THE 21ST CENTURY: AN AUSTRALIAN APPROACH* 358-59 (Gabriel A. Moens & Rodolphe Biffot eds., 2002).

65. JILL HUNTER ET AL., *LITIGATION VOLUME 11: EVIDENCE AND CRIMINAL PROCESS* 716 (7th ed. 2005). However, the Commonwealth and the Australian Capital Territory are exceptions. All summary prosecutions in these jurisdictions are undertaken by statutory Directors of Public Prosecution. Commonwealth Dir. of Pub. Prosecutions, *Steps in the Commonwealth Prosecution Process*, <http://www.cdpp.gov.au/Practice/ProsecutionProcess.aspx> (last visited Apr. 5, 2010); Australian Capital Territory, Director of Public Prosecutions, <http://dpp.act.gov.au> (last visited Apr. 5, 2010).

66. MICHAEL ROZENES, *PROSECUTORIAL DISCRETION IN AUSTRALIA TODAY* 4 (2004), <http://www.aic.gov.au/events/aic%20upcoming%20events/1996/~media/conferences/prosecuting/rozenes.ashx>; Chris Corns, *Police Summary Prosecutions: The Past, Present and Future*, Paper Presented at the Australian Institute of Criminology Conference on the History of Crime, Policing and Punishment (Dec. 9-10, 1999), in *POLICING THE LUCKY COUNTRY* (Mike Enders & Benoit Dupont eds., 2001), unedited version available at <http://www.aic.gov.au/events/aic%20upcoming%20events/1999/hcpp.aspx> (quoting from a number of state DPPs in favor of transferring summary prosecutions from the police to the DPP).

67. See, e.g., N.S.W. INDEP. COMM'N AGAINST CORRUPTION, *INVESTIGATION INTO THE RELATIONSHIP BETWEEN POLICE AND CRIMINALS*, SECOND REPORT 54-55 (1994).

68. Ken Drew, *The New South Wales Police Prosecutor*, in *IMPROVING ACCESS TO JUSTICE: THE FUTURE OF PARALEGAL PROFESSIONALS* 103 (Julia Vernon & Francis Regan eds., 1992).

To promote the dispassionate exercise of prosecutorial power and discretion, prosecutors (whether police prosecutors or DPP officers) generally do not participate in the criminal investigation process or in decisions to charge suspects.<sup>69</sup> These are areas reserved for police and other criminal investigation units. At least insofar as serious crimes are concerned, institutional separation of the DPP from the government, and thus from direct accountability to the community, is designed to depoliticize the office and ensure that prosecutions are carried out lawfully and fairly and are not unduly influenced by media-manipulated community campaigns.<sup>70</sup>

However, Australian de-politicization has a downside, compounded by limited judicial review of prosecutorial discretion<sup>71</sup> and almost nonexistent parliamentary oversight.<sup>72</sup> Lack of transparency and accountability has led to complaints that Australian prosecutors are secretive, remote from victims of crime and the community generally, and that they poorly document their dealings and decision making.<sup>73</sup>

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69. HUNTER ET AL., *supra* note 65, at 717; *see* ROZENES, *supra* note 66, at 3. Nonetheless, there is substantial precharge consultation between the prosecution service and investigators. Damian Bugg, Commonwealth Dir. of Pub. Prosecutions, Speech at the 2007 Rule of Law Conference: The Independence of the Prosecutor and the Rule of Law 20-21 (Aug. 31-Sept. 1, 2007), <http://www.lawcouncil.asn.au/library/speeches/speeches-rule-of-law.cfm>.

70. HUNTER ET AL., *supra* note 65, at 718; *see* Refshauge, *supra* note 64, at 358; *see also* Price v. Ferris (1994) 74 A. Crim. R. 127, 130 (per Kirby P.) (“What is the object of having a Director of Public Prosecutions? Obviously, it is to ensure that a high degree of independence in the vital task of making prosecution decisions and exercising prosecution discretions. Its purpose is illustrated in the present case. The Court was informed that, in the prosecution of a police officer, it is now normal practice in this State for the prosecution to be ‘taken over’ from a private prosecutor or informant and conducted by the DPP. The purpose of so acting is to ensure that there is manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour. Analyses by law reform and other bodies have demonstrated conclusively how vital are the decisions made by prosecutors.”).

71. Judicial review of prosecutorial discretion is limited to rare cases where an abuse of process can be established. *See* Maxwell v. The Queen (1996) 184 C.L.R. 501, 513-14. Otherwise, “[d]ecisions to commence, not to commence[,] or to terminate a prosecution are made independently of the courts.” Price 74 A. Crim. R. at 130. The High Court has stated in *The King v. Weaver* (1931) 45 C.L.R. 321, 334: “It is entirely a matter for the law officers of the Crown to determine the form of prosecution, and for the Court to determine whether the charge made had been supported.”

72. Refshauge, *supra* note 64, at 357 n.39.

73. Robyn Holder & Nicole Mayo, *What Do Women Want? Prosecuting Family Violence in the ACT*, 15 CURRENT ISSUES IN CRIM. JUST. 5, 12 (2003); ROZENES, *supra* note 66, at 2; Refshauge, *supra* note 64, at 354. In South Australia, following a particularly controversial plea bargain, the Solicitor-General, Chris Kourakis QC, recommended: “More prescriptive requirements as to consultations with victims and police and recording and reporting of negotiations should be adopted.” Press Release, House of Assembly, Plea Bargain Reforms

Charge bargaining, the Australian term for plea bargaining, is a specific target of such criticism.<sup>74</sup> Like the United States, charge bargaining is well entrenched in Australian criminal practice with studies reporting that defense counsel engage in charge bargaining in at least 50% of their cases.<sup>75</sup> However, to many Australians, charge bargaining is redolent of backroom deals between overly cozy prosecution and defense lawyers seeking to minimize the time, effort, and resources required to prosecute cases properly and ensure that sentencing principles and the rule of law are observed.<sup>76</sup> There is a strong community view that, unchecked, charge bargaining trivializes victims, leads to overly lenient sentencing of the guilty, and unjustly punishes those who, in good faith, seek a trial of the charges against them.<sup>77</sup>

Nationally uniform guidelines comprise the primary mechanism for regulating the use of prosecutorial discretion, including discretion over charge bargaining.<sup>78</sup> Although the guidelines are not directly enforceable, their breach may assist in establishing an abuse of process<sup>79</sup> or a

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Recommended by Kourakis Report (Apr. 19, 2004), available at <http://netk.net.au/Parliament/Medial.asp>.

74. Refshauge, *supra* note 64, at 381; Robert D. Seifman & Arie Freiberg, *Plea Bargaining in Victoria: The Role of Counsel*, 25 CRIM. L.J. 64, 64 (2001).

75. Seifman & Freiberg, *supra* note 74, at 68. An earlier study by Kathy Mack and Sharon R. Anleu, found charge bargaining occurred “nearly every day” at the defense bar. KATHY MACK & SHARON R. ANLEU, PLEADING GUILTY: ISSUES AND PRACTICES 20 (1995).

76. *NSW Revamps Sentencing Guidelines*, AUSTRALIAN, Jan. 10, 2008, <http://www.theaustralian.news.com.au/story/0,25197,23032363-5006784,00.html>; ACT VICTIMS OF CRIME COORDINATOR, THE QUALITY OF JUSTICE: OPERATION OF THE VICTIMS OF CRIME ACT 1994 IN THE AUSTRALIAN CAPITAL TERRITORY 1996-2007, at 79 (2008), available at <http://www.victimsupport.act.gov.au/res/File/Quality%20of%20Justice%20June%202008.pdf>; GORDON SAMUELS, REVIEW OF THE NEW SOUTH WALES DIRECTOR OF PUBLIC PROSECUTIONS’ POLICY AND GUIDELINES FOR CHARGE BARGAINING AND TENDERING OF AGREED FACTS § 6.1 (2002), [http://www.lawlink.nsw.gov.au/report/lpd\\_reports.nsf/pages/report\\_gsamuels](http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/report_gsamuels).

77. Rowena Johns, *Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services* 52-53 (N.S.W. Parliamentary Library Research Serv., Briefing Paper No. 10/02, 2002), [http://www.parliament.nsf.gov.au/prod/parliament/publications.nsf/0/578C6F10C6D98565CA256ECF00083B4D/\\$File/10-02.pdf](http://www.parliament.nsf.gov.au/prod/parliament/publications.nsf/0/578C6F10C6D98565CA256ECF00083B4D/$File/10-02.pdf). Nonetheless, a defendant who chooses to proceed to trial, while not entitled to the mitigation in sentence afforded a plea of guilty, should not be punished for the way in which the defense was carried out. See *Cameron v. The Queen* (2002) 209 C.L.R. 339, 351; *Siganto v. The Queen* (1998) 194 C.L.R. 656, 666.

78. See, e.g., COMMONWEALTH DIR. OF PUB. PROSECUTIONS, PROSECUTION POLICY OF THE COMMONWEALTH 3 (2008), available at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>; TAS. DIR. OF PUB. PROSECUTIONS, PROSECUTION GUIDELINES, available at [http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines) (last visited Jan. 10, 2010); S. AUSTR. DIR. OF PUB. PROSECUTIONS, PROSECUTION POLICY & GUIDELINES, available at [http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf) (last visited Jan. 10, 2010); N.S.W. OFFICE OF THE DIR. OF PUB. PROSECUTIONS, PROSECUTION GUIDELINES 1 (2007), available at <http://www.odpp.nsw.gov.au/guidelines/guidelines.html> (last visited Jan. 10, 2010).

79. See *MG v. R* (2007) N.S.W. Crim. Ct. App. 57, para. 59.

miscarriage of justice on appeal.<sup>80</sup> In that way they offer defendants some protection against improper inducements and coercion that may arise in plea negotiations. In relation to charge bargaining, the guidelines are primarily directed toward negotiations that revolve around the exchange of guilty pleas to some offences and the withdrawal from prosecution of others. The adequacy and admissibility of the evidence and the reasonable prospects of conviction comprise a priori considerations. Once it has been determined that sufficient evidence exists to warrant particular charges, the prosecutor is also bound to consider the public interest. Even though sufficient evidence of guilt is available, it may not be in the public interest to prosecute. The public interest encompasses factors such as the seriousness of the offense, the prior criminal history and personal circumstances of the defendant, the prevalence of the offence and the need for deterrence, the attitude of the alleged victim, and community attitudes toward the offence. In respect to the choice of charges and charge bargaining, prosecutors are directed to choose charges that adequately reflect the nature and extent of the offence so that they provide the basis for an appropriate sentence. Under no circumstances are charges to be laid for the purpose of subsequently engaging in charge bargaining. Further, prosecutors are directed not to entertain a charge bargaining proposal if the defendant maintains his or her innocence. For reasons that will be explained below, the guidelines only give cursory attention to negotiations regarding severity of sentence. Nor is there any guidance regarding negotiations over the factual basis upon which the offence is evaluated. Bargaining in relation to the existence of mitigating circumstances surrounding the commission of the offence or matters related to the defendant is therefore regulated by general ethical principles governing the conduct of prosecutors.<sup>81</sup>

Reviews demonstrate that charge bargaining is not counterproductive to proper sentencing practice.<sup>82</sup> Still, in one state, New South Wales, public disquiet and political pressure regarding perceived inappropriate charge bargaining outcomes have been so fierce that

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80. See *Livermore v. R* (2006) N.S.W. Crim. Ct. App. 334, para. 2.

81. See generally Seifman & Freiberg, *supra* note 74, regarding a survey of practice among the Victorian Bar which found that negotiations regarding the severity of sentence and a favorable summary of the factual basis of guilt were the second and third most popular form of charge bargaining. *Id.* at 70-71. In fact, negotiations over the factual basis of guilt scored the highest mean percentage involvement rate among Victorian barristers in charge bargaining. *Id.* at 70.

82. See, e.g., Denise Lievore, *Prosecutorial Discretion in Adult Sexual Assault Cases*, TRENDS & ISSUES IN CRIME & CRIM. JUST. (Austl. Inst. of Criminology, Canberra, Austl.), Jan. 2005, at 1, 1; SAMUELS, *supra* note 76.



Parliament has adopted a trial measure mandating compulsory conferencing between defense and prosecution counsel and obligatory sentencing discounts for guilty pleas.<sup>83</sup> The Criminal Case Conferencing Trial Act, 2008, provides that if an offender pleads guilty to an offence prior to being committed for sentence, the court must allow a discount of 25% on the term of imprisonment or fine that would otherwise be imposed.<sup>84</sup> If the offender pleads not guilty and at any time after being committed for trial decides to enter a guilty plea, the court may provide the offender with a sentencing discount of 12.5%, which can be increased if the court is satisfied that substantial grounds for doing so have been established.<sup>85</sup> As it was enacted as a pilot measure, the Act only operated between May 1, 2008 and May 1, 2009.<sup>86</sup> The Act was introduced chiefly to reduce the last minute resolution of serious criminal matters and to improve the effective deployment of judicial and prosecution resources in criminal trials, but it also has had the collateral effect of more strictly regulating the conduct of plea bargaining and of limiting the discretion of the trial judge as to sentencing.<sup>87</sup>

A number of other Australian jurisdictions adopted informal sentencing indication guidelines, which outline likely discounts in sentencing should a guilty plea be proffered.<sup>88</sup> These sentencing guidelines overcome the Australian reluctance to involve the sentencing judge in the plea bargain process,<sup>89</sup> and thus constitute another point of

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83. See Criminal Case Conferencing Trial Act, 2008, § 17(1) (N.S.W.).

84. Prior to the enactment of this legislation, *R v Thomson* (2000) 115 N.S.W. Crim. Ct. App. 104, 139, stated that a plea of guilty could attract a 35% discount on sentence.

85. Criminal Case Conferencing Trial Act, 2008, § 17(2) (N.S.W.).

86. *Id.* § 5.

87. See Dennis Miralis, *Tougher Sentences for NSW Offenders Pleading Guilty*, 46 LAW Soc'y J., Aug. 2008, at 69, 70-71.

88. Arie Freiberg & John Willis, *Sentence Indication*, 27 CRIM. L.J. 246, 249 (2003).

89. See the following from *R v Malvaso* (1989) S.A. St. R. 503, 509-10:

The prosecution has a role in the sentencing process which consists of presenting the facts to the Court and of making any submissions which it thinks proper on the question of what sentence ought to be imposed. The decision as to what sentence is to be imposed is, however, entirely a matter for the Court which may, of course, be influenced by the arguments that are placed before it by the prosecution as well as by the defence, but must never be influenced by the attitudes or opinions as distinct from the arguments of either. In particular it must be stressed that the attitude of the prosecution towards a particular proposed course of action in relation to sentence is, as such, irrelevant; the view of the prosecution has no greater weight than the arguments advanced in support of that view. These propositions are elementary and fundamental propositions relating to the administration of criminal justice by independent courts, but their express elaboration may assist in clarifying the confusion of thought which lay at the root of some of the argument addressed on the present appeal.

difference between the two jurisdictions. In Australia, if a plea of guilty is proffered, discussion between the prosecution and the trial judge as to the appropriate discount in sentencing that a defendant should receive would be regarded as highly improper.<sup>90</sup> Negotiation outside of the courtroom is confined to defense and prosecution counsel. Typically, as the prosecution guidelines referred to earlier indicate, defense counsel may propose that a guilty plea<sup>91</sup> will be accepted by the defendant on the basis that the prosecution will not oppose a submission to the sentencing judge that the penalty for the offence ought to fall within a nominated range. Under the guidelines prosecutors may only agree to such requests where the nominated range is consistent with an acceptable exercise of the court's sentencing discretion. However, any agreement between the prosecution and defense counsel of this nature will not bind the sentencing judge and will only operate as a submission before the court.<sup>92</sup> Notwithstanding earlier criticism from some members of the judiciary who are wary of applying both a simplistic mathematical discount for a guilty plea upon an otherwise determined sentence,<sup>93</sup> and also concerned by the potential discriminatory effect against persons who exercise their right to a trial,<sup>94</sup> the sentencing guidelines that permit an identified

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*See also* Malvaso v. The Queen (1989) 168 C.L.R. 227, 233; GAS v. The Queen (2004) 217 C.L.R. 198, 210.

90. *See* R v. Pugh (2005) 158 A. Crim. R. 302, 339-44; R v. Marshall (1981) V.R. 725, 733-34; The Queen v. Tait (1979) 46 F.L.R. 386, 387-88. In each of these cases sentencing judges were directed that any submissions regarding agreement between prosecution and defense counsel with respect to sentence should be made in open court in the presence of both counsel and the defendant.

91. A study by Seifman and Freiberg demonstrated that plea bargaining was usually initiated by defense counsel and on some occasions at summary level as suggested by the presiding magistrate. Seifman & Freiberg, *supra* note 74, at 69. This situation, of course, is very much unlike that seen in the U.S. where prosecutors routinely initiate the process.

92. *See* LJW v. Western Australia (2007) W.A.S.C.A. 68, para. 46; Ahmad v. Regina (2006) N.S.W. Crim. Ct. App. 117, para. 21 (citing GAS v. The Queen (2004) 217 C.L.R. 198, 210-11). In *Ahmad v. Regina*, the sentencing judge refused to accept a 25% discount for a plea of guilty agreed to by the prosecution and defense counsel. [2006] N.S.W.C.C.A. 117 paras. 6, 9. Instead, the sentencing judge applied a sentencing discount of 15%. *Id.* para. 10. The New South Wales Court of Appeal upheld the sentencing judge's determination noting:

The agreement can neither bind the judge nor be given any greater weight than is appropriate to a submission of counsel with knowledge of the facts relevant to the offence and the offender. It must of course be carefully considered but carries no greater weight than any other submission which the Crown may make in the sentencing process. If it were otherwise the fundamental assumption that it is for the judge to determine an appropriate sentence would be seriously compromised.

*Id.* para. 23.

93. *See, e.g.,* Wong v. The Queen (2001) 207 C.L.R. 584, 611-12.

94. *See, e.g.,* Cameron v. The Queen (2002) 209 C.L.R. 339, 343.

discount in sentencing for a plea of guilty have been subsequently approved by the Australian High Court.<sup>95</sup>

As in the United States, Australian charge bargaining performs an important utilitarian function in the criminal justice system by avoiding costly and unnecessary trials, saving the victims of offending the distress associated with attending and testifying in court, and assuring that criminality is punished in a timely manner. However, rather than focusing upon the potentially coercive nature of charge bargaining and concomitant sentence indication schemes, as practiced in the United States, the Australian community appears to be more concerned by the notion that charge bargaining leads to “horse trading” between the prosecution and the defense and results in the “sale” of justice. There is substantial concern that offenders are not receiving their “just desserts.” That community concern is exacerbated by the general lack of transparency and accountability over prosecutorial discretion collateral to the creation of a strong and independent prosecution service. The tension between a strong and independent prosecution service and responsiveness to community concern over criminal behavior is but a microcosm of a larger law and order debate reflected more generally in sentencing, which is discussed later in this Article.

### III. DOUBLE JEOPARDY

Double jeopardy is one area where the two systems of criminal justice are substantially at odds. The Americans remain firm in their commitment to the guarantees established centuries ago. There is considerable movement away from that commitment by the Australians, as there is by the English.

#### A. *Australia*

There is no constitutional basis for the doctrine of double jeopardy in Australia. After a comparative analysis of Fifth Amendment jurisprudence in the United States, just two years ago the New South Wales Court of Criminal Appeal concluded that the principle of finality of verdict lay outside of Australian constitutional protection.<sup>96</sup> Rather, the

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95. *Markarian v. The Queen* (2005) 228 C.L.R. 357, 375.

96. *R v. JS* (2007) 230 F.L.R. 275, 306-09 (Mason, P., concurring). The argument proffered by the defendant in this case was that Crown appeals against acquittal were constitutionally prohibited by the Constitution of Australia Act, section 80. *Id.* at 294 (Spigelman, CJ, lead opinion). Section 80 guarantees trial by jury for indictable federal offences. *Id.* The defendant argued that the principle of trial by jury incorporated the finality of jury

Court found that double jeopardy was a creature of the common law and therefore subject to statutory limitation or negation.<sup>97</sup> Indeed, despite article 14(7) of the International Covenant on Civil and Political Rights,<sup>98</sup> the double jeopardy principle has been qualified—allowing retrials for acquittals in the face of fresh and compelling evidence—by the following state enactments: Crimes (Appeal & Review) Amendment (Double Jeopardy) Act, 2006 (N.S.W.); Criminal Code (Double Jeopardy) Amendment Act, 2007 (Queensl.); and Criminal Law Consolidation (Double Jeopardy) Amendment Act, 2008 (S. Austl.). There is also a recommendation from the Model Criminal Code Officers Committee that double jeopardy be reformed at the federal level.<sup>99</sup>

The Australian law of double jeopardy springs from the older, narrower doctrines of *autrefois convict/acquit*.<sup>100</sup> *Autrefois convict/acquit* are defenses to a criminal charge both at common law and under statute. Thus the Queensland Criminal Code provides:

It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged.<sup>101</sup>

While each doctrine aims to prevent inconsistent verdicts and to preserve finality, they are slightly different in purpose. *Autrefois convict* has been characterized as similar to merger in *res judicata*, and is intended to preclude double punishment, whereas *autrefois acquit* is characterized as

verdicts. *Id.* This was rejected and the validity of the Crimes (Appeal and Review) Act, 2001, section 107 (N.S.W.) was upheld. *Id.* at 305.

97. *Id.* at 303.

98. The International Covenant on Civil and Political Rights (ICCPR) entered into force in Australia on November 13, 1980. 1980 Austl. T.S. No. 23. However, international treaties like the ICCPR are not self-executing in Australia, and therefore remain nonbinding in domestic law unless implemented by statute. *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 305.

99. MODEL CRIMINAL CODE OFFICERS COMM. (MCCOC), AUSTL. ATTORNEY GENERAL'S DEP'T, DOUBLE JEOPARDY (2004), [http://www.ag.gov.au/www.agd/wpattach.nsf/VAP/CCFD7369FCAE9B8F32F341DBE097801FF\)?~Open+Jeopardy+Report+25+Mar.pdf/\\$file/Double+Jeopardy+Report+25+Mar.pdf](http://www.ag.gov.au/www.agd/wpattach.nsf/VAP/CCFD7369FCAE9B8F32F341DBE097801FF)?~Open+Jeopardy+Report+25+Mar.pdf/$file/Double+Jeopardy+Report+25+Mar.pdf).

100. See Marion S. Kirk, "Jeopardy" *During the Period of the Year Books*, 82 U. PA. L. REV. 602, 602 (1934); Jill Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 1, 4 (1984).

101. Criminal Code Act, 1899, § 17 (Queensl.). Analogous statutory provisions from other states include: Criminal Procedure Act, 2004, § 126(3) (W. Austl.); Criminal Code Act, 1924, § 11 (Tas.); Criminal Code Act, 2009, §§ 18-20 (N. Terr.); Criminal Procedure Act, 1986, § 156 (N.S.W.); Crimes Act, 1958, § 394 (Vict.); Criminal Law Consolidation Act, 1935, § 285 (S. Austl.); Crimes Act, 1900, § 283 (Austl. Cap. Terr.).

a “species of estoppel” designed to prevent the ordeal of multiple prosecutions.<sup>102</sup> In either case, it must be shown that the elements of the offence charged are the same or substantially the same as those for which the accused was previously convicted or acquitted.<sup>103</sup> This latter requirement substantially constricts the scope of each doctrine. Hence in *R v. P, NJ (No. 2)*, neither *autrefois acquit* nor *autrefois convict* applied with respect to the prosecution of the defendant for murder, even though the defendant had been previously convicted and sentenced for wounding with intent and acquitted of attempted murder in relation to the same injuries which eventually led to the victim’s death.<sup>104</sup> Nor do the pleas apply to a verdict which is unavailable at law such that the defendant is not “in jeopardy.” Accordingly, in *Island Maritime Ltd. v. Filipowski*, *autrefois acquit* was unavailable where a prosecution was dismissed following a “no case to answer” submission arising out of a defective summons.<sup>105</sup>

As a result, the double jeopardy principle has been extended beyond *autrefois acquit/convict* and incorporated within the doctrine of abuse of process. Abuse of process in Australia is somewhat of a potpourri of illustrations of the exercise of inherent power that all superior courts have to control the integrity of their own processes. Despite a lack of precise definition, it is generally accepted that abuse of process comprises one or more of the following elements: (1) invoking of the court’s process for an illegitimate purpose,<sup>106</sup> for example, initiating a prosecution for the purpose of persecuting an innocent defendant rather than securing the conviction of the guilty;<sup>107</sup> (2) the use of process in a manner that is unjustifiably oppressive, for example, unreasonably delaying prosecution of the defendant and thereby depriving him or her of the ability to adequately defend prosecution;<sup>108</sup> or (3) using the court’s process in a

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102. *The Queen v. Carroll* [2002] H.C.A. 55, para. 30; *Pearce v. The Queen* (1998) 194 C.L.R. 610, 626-27; *R v. Stone* (2005) 157 A. Crim. R. 41, 48.

103. *See R v. P, NJ (No. 2)* (2007) 99 S.A. St. R. 1, 6; *Gilham v. The Queen* (2007) 178 A. Crim. R. 72, 82; *Pearce*, 194 C.L.R. at 615-16.

104. 99 S.A. St. R. at 10, 25 (special leave to appeal to the High Court refused, [2009] H.C.A. 6).

105. (2006) 226 C.L.R. 328, 331-32.

106. *PNJ v. R* (2009) H.C.A. 6, para. 3; *Rogers v. The Queen* (1994) 181 C.L.R. 251, 286.

107. *See, e.g., Zollo v. Nat’l Austl. Bank, S.A.S.C.* 38, para. 22 (2009); *Williams v. Spautz* (1992) 174 C.L.R. 509, 526-27.

108. *See The Queen v. Davis* (1995) 57 F.C.R. 512, 520; *Jago v. Dist. Court of N.S.W.* (1989) 168 C.L.R. 23, 30. *See also R v. Benbrika* (2008) 182 A. Crim. R. 205, 223-24, where the court threatened to stay proceedings because the conditions in which the accused were held on remand led to impairment of mental function such that the accused were not able to properly instruct their legal counsel nor participate in their trial. The stay was granted until the conditions of incarceration were ameliorated. *Id.* at 236.

manner that brings the administration of justice into disrepute.<sup>109</sup> Where abuse of process is appropriately raised, the court has discretion to stay criminal proceedings. The exercise of the discretion involves balancing the interests of the community with those of the applicant.

Generally speaking, where evidence is admitted in a subsequent trial that is manifestly inconsistent with a prior acquittal, the balancing process referred to above will favor the exercise of the discretion to stay proceedings,<sup>110</sup> even though technically the plea of *autrefois acquit* does not apply. Thus, in *The Queen v. Carroll*, the High Court found that a perjury indictment was an abuse of process that ought to have been stayed by the trial judge because it was based on the premise that the defendant had lied in a previous murder trial where he had denied his guilt on oath.<sup>111</sup> This was the case even though the plea of *autrefois acquit* could not be established since perjury was not a verdict available on his trial for murder and the verdict of murder was not available on his trial for perjury.<sup>112</sup>

In *Gilham v. The Queen*, the New South Wales Court of Criminal Appeal extended the principle of incontrovertibility to convictions, holding that manifest inconsistency between a prior conviction and a new criminal prosecution would also attract discretion to stay proceedings.<sup>113</sup> The defendant in *Gilham* had previously pled guilty to the manslaughter of his brother on the basis that he had killed his brother after being provoked by the brother's murder of their parents.<sup>114</sup> Following further investigation, the defendant was subsequently charged with the murder of his parents.<sup>115</sup> Notwithstanding a determination that the manslaughter conviction was manifestly inconsistent with a conviction for the murder of his parents, the Court held that the prosecution did not amount to an abuse of process warranting its intervention.<sup>116</sup> This rested on the basis that the defendant was never in jeopardy of being convicted of the

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109. See *The Queen v. Carroll* [2002] H.C.A. 55, para. 86; *Pearce v. The Queen* (1998) 194 C.L.R. 610, 625; see also *Rogers*, 181 C.L.R. at 268 (finding that multiple prosecutions for the same offence were an abuse of process because they were contrary to the need for judicial determinations to be treated as incontrovertibly correct, which would tend to bring the administration of justice into disrepute).

110. Compare *Gilham v. The Queen* (2007) 178 A. Crim. R. 72, 88 [2002], with *Carroll* [2002] H.C.A. 55, paras. 42, 51. See generally *The Queen v. Storey* (1978) 140 C.L.R. 364; *Garrett v. The Queen* (1977) 139 C.L.R. 437.

111. [2002] H.C.A. 55, para. 51.

112. *Id.*

113. 178 A. Crim. R. at 88.

114. *Id.* at 75.

115. *Id.*

116. *Id.* at 91-92.

murder of his parents in the first trial.<sup>117</sup> More importantly, the Court determined that the community interest required the defendant to be put to trial for the murder of his parents where there was reasonable evidence of his guilt.<sup>118</sup> In the Court's view, the scandal of inconsistent verdicts was substantially outweighed by the scandal of allowing a potential murderer to escape trial.<sup>119</sup>

However, outside of prosecutions involving incontrovertibility, analogous to the exercise of the discretion to exclude illegally obtained evidence examined in our previous article, it appears fairly unlikely that Australian courts will stay proceedings, reserving this remedy for exceptional cases.<sup>120</sup> Given the unlikelihood that the discretion to stay proceedings will be exercised, it is therefore surprising that the Council of Australian Governments (COAG) determined that the principle of double jeopardy applicable to acquittals should be reformed.<sup>121</sup>

The COAG recommendation followed reforms instituted in the United Kingdom by the Criminal Justice Act, 2003. Still, the impetus for reform was home grown rather than imported from the former "mother country," stemming from community disquiet and a media campaign generated in the aftermath of the High Court's decision in *The Queen v. Carroll*<sup>122</sup> and the release of the Model Criminal Code Officers Committee Discussion Paper.<sup>123</sup> Consequently, the reforms fall into a wider "law and order" agenda that perceives the protection of rights as a failure to prioritize community security properly and ensure that criminality is punished. To that extent, the double jeopardy reforms,

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117. *Id.*

118. *Id.* at 132.

119. *Id.* at 122. The Queensland Criminal Code, 1899, excludes conviction of a lesser offence from the scope of provisions creating exceptions to the double jeopardy rule. Criminal Code Act, 1899, § 678A(2) (Queensl.).

120. A stay of proceedings is an order that any further criminal prosecutions cease. A stay can be permanent or temporary. A permanent stay insulates the defendant from all further prosecution and therefore should only be granted in exceptional circumstances. *See* *Island Mar. Ltd. v. Filipowski* (2006) 226 C.L.R. 328, 341; *see also* [2006] N.S.W.C.C.A. 392 para. 101; *Pearce v. The Queen* (1998) 194 C.L.R. 610, 620 (declining to issue a stay based partly on such reasoning).

121. *See* Council of Austl. Gov'ts (COAG), Council of Australian Governments' Meeting 13 April 2007, Double Jeopardy Law Reform, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2007-04-13/index\\_old.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/index_old.cfm).

122. Kelley Burton, *Double Jeopardy: The Queensland Reform*, PROCTOR, Apr. 2008, at 21, 21.

123. Law Council of Austl., *Model Criminal Code: Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals* (Law Council of Austl., Discussion Paper, Apr. 7, 2004), available at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=330E0F8D-1E4F-17FA-D2EC-735FE715E653&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=330E0F8D-1E4F-17FA-D2EC-735FE715E653&siteName=lca).

which limit what was previously considered an inviolable right,<sup>124</sup> relate to the commentary upon the Australian official-centric approach to criminal procedure outlined in our earlier article.

Interestingly, both the Australia Capital Territory and Victoria, which have adopted Human Rights Charters, reserved their position in relation to COAG's determination. COAG's recommendation directly conflicts with section 26 of the Victoria Charter of Human Rights and Responsibilities Act and section 24 of the Australia Capital Territory Human Rights Act, 2004, both of which mirror article 14(7) of the International Covenant on Civil and Political Rights. These provisions protect the finality of acquittals and convictions as long as they are made according to law.<sup>125</sup>

The reform model adopted by COAG recommends that a person acquitted of an offence should not be protected by double jeopardy where:

1. Fresh and compelling evidence attained subsequent to the original acquittal demonstrates guilt. COAG recommended that this exception only apply in relation to the retrial of serious criminal cases including murder, manslaughter, trafficking or manufacturing commercial quantities of drugs, aggravated rape, and armed robbery.
2. The original acquittal is tainted by false evidence or corruption and it is more likely than not that but for the false evidence or corruption the accused would have been convicted.
3. The subsequent prosecution is for an offence contrary to the administration of justice, for example, bribery of a juror or a witness, conspiracy to pervert the course of justice, or perjury.<sup>126</sup>

Subject to variations, this is the model adopted in the legislation in New South Wales, Queensland, and South Australia, as outlined at the commencement of Part III.A.<sup>127</sup> In those states, applications for retrial of an acquittal must be made by the Director of Public Prosecutions to the Court of Criminal Appeal, Court of Appeal, or the Full Court of the Supreme Court respectively, which may order retrial if it considers that in

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124. See Mirko Bagaric & Luke Neal, *Double Jeopardy in Australia: The Illusion of an Absolute Protection and the Prosecution Process as Punishment*, 8 CANBERRA L. REV. 87, 109 (2005).

125. *King v. Fricker* (2007) A.C.T.S.C. 101.

126. See COAG, *supra* note 121. In relation to this last ground for reforming double jeopardy, COAG was heavily influenced by the outcome in *The Queen v. Carroll* discussed *supra* Part III.A.

127. The New South Wales and Queensland provisions do not provide for the relaxation of double jeopardy for a subsequent prosecution for an administration of justice offence.



all the circumstances it is in the interests of justice that the order be made.<sup>128</sup> Only one retrial may be ordered.

To date, case law on the provisions has been negligible, reflecting both their “newness” and the slow pace of the criminal process in serious criminal matters as well as the lack of many instances of miscarriage of justice deriving from application of the double jeopardy principle. Even the *Carroll* case, which in part generated the reforms, may not of itself qualify for retrial under the reforms as the new evidence relating to bite marks on the victim was characterized as of “doubtful quality.”<sup>129</sup> In other words, even without double jeopardy, Carroll’s conviction for perjury should have been quashed.

The promotion of the reforms has been closely tied to technological advances in criminal investigation, such as DNA profiling.<sup>130</sup> However, there is no empirical evidence indicating the extent to which fresh DNA evidence may be available for use during retrial.<sup>131</sup> Older evidence may not have been preserved sufficiently well to prevent contamination or deterioration.<sup>132</sup> Furthermore, while fresh DNA evidence may be sufficient to raise a reasonable doubt in relation to a prior conviction, it is another matter entirely to find that DNA evidence will, of itself, most likely lead to conviction. There may be a number of reasons why DNA profile evidence could be consistent with innocence, such as police or scientific misconduct.<sup>133</sup>

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128. Crimes (Appeal and Review) Act, 2001, pt. 8, div. 2 (N.S.W.); Criminal Code, 1899, ch. 68 (Queensl.); Criminal Law Consolidation Act, 1935, pt. 10, div. 3 (S. Austl.). In South Australia, the Full Court must be satisfied that the accused will receive a fair trial in the subsequent prosecution having regard to the effluxion of time between the acquittal and the retrial and the failure of the prosecution or the police to act with reasonable diligence or expedition. *Id.*

129. *The Queen v. Carroll* [2002] H.C.A. 55; *Ex parte Attorney-General* (2001) Q.C.A. 394, 61.

130. See, e.g., Gareth Griffith & Lenny Roth, *DNA Evidence, Wrongful Convictions and Wrongful Acquittals* 39-40 (N.S.W. Parliamentary Library Research Serv., Briefing Paper No.11/06, 2006), available at <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/DNAEvidence,WrongfulConvictionsandWrongfulAcquittals> (last visited Apr. 8, 2009); MCCOC, *supra* note 99, at 109.

131. See Chris Corns, *Retrial of Acquitted Persons: Time for Reform of the Double Jeopardy Rule?*, 27 CRIM. L.J. 80, 99 (2003).

132. Adequate DNA is only available in one out of every five felony cases. David Lazer & Michelle N. Meyer, *DNA and the Criminal Justice System: Consensus and Debate*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE* 359 (David Lazer ed., 2004).

133. David S. Rudstein, *Retrying the Acquitted in England, Part 1: The Exception to the Rule Against Double Jeopardy for “New and Compelling Evidence,”* 8 SAN DIEGO INT’L L.J. 387, 431-32 (2006).

### B. *The United States*

The concept of double jeopardy dates back well before the signing of the United States Constitution;<sup>134</sup> now, the Fifth Amendment of the Constitution is where U.S. citizens find their protected guarantee.<sup>135</sup> The Double Jeopardy Clause of the Constitution states: “[No] person [shall] be subject for the same offence to be twice put in jeopardy of life or limb . . . .”<sup>136</sup> While the language may seem simple on its face, the Clause and its wording have been quite difficult to apply through the years.<sup>137</sup> Double jeopardy has developed to include all criminal charges and all ranges of punishment: felonies and misdemeanors, as well as imprisonment, fines, or other sanctions.<sup>138</sup> This guarantee can now be summarized as prohibiting any criminal defendant from being twice criminally punished or prosecuted in any way, for the same offense, by the same sovereign. Where the Clause does apply, it is said that “its sweep is absolute.”<sup>139</sup> And, unlike the situation seen in other nations, there has been no serious debate in the United States over limiting protection here.

#### 1. Overview

The concept of double jeopardy can be traced back to ancient Greece and Rome.<sup>140</sup> The Greek statesman Demosthenes remarked in 355 B.C.: “[T]he laws forbid the same man to be tried twice on the same issue.”<sup>141</sup> Double jeopardy evolved slowly in English law, until formally written and defined in Sir William Staunford’s *Les Plees del Coron* in

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134. DAVID J. BODENHAMER, *OUR RIGHTS* 148 (2007) (stating that double jeopardy came to the United States from ancient Greece and Rome via English law).

135. U.S. CONST. amend. V. Double jeopardy protection applies to persons both federally and in the states as per incorporation by the Fourteenth Amendment. *See id.* amend. XIV; *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ . . . the same constitutional standards apply against both the State and Federal Governments.” (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968))).

136. U.S. CONST. amend. V.

137. Even the late Chief Justice William Rehnquist found the Double Jeopardy Clause a challenge: “[T]he decisional law in the area [of double jeopardy] is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.” *Albernaz v. United States*, 450 U.S. 333, 343 (1981).

138. *See Breed v. Jones*, 421 U.S. 519, 528 (1975) (“Although the constitutional language, ‘jeopardy of life or limb,’ suggests proceedings in which only the most serious penalties can be imposed, the Clause has long been construed to mean something far broader than its literal language.”).

139. *Burks v. United States*, 437 U.S. 1, 11 n.6 (1978).

140. BODENHAMER, *supra* note 134, at 148.

141. MARTIN L. FRIEDLAND, *DOUBLE JEOPARDY*, at vii (1969).

1557, and Sir Edward Coke's *The Institutes on the Laws of England* in 1648. "[N]o man is to be brought into jeopardy of his life, more than once, for the same offence."<sup>142</sup> Double jeopardy was likely made part of the American Bill of Rights—much as other provisions in the Bill of Rights—as a “check against a potentially tyrannical government and its overzealous prosecutors.”<sup>143</sup> The Amendment's language broadened the prior meaning of double jeopardy so that the guarantee would grant greater protection in the United States than in England<sup>144</sup> and other common law nations.<sup>145</sup>

The unquestioned purpose of the Double Jeopardy Clause is to provide protection for the citizens against the great power of the state in criminal justice matters.

[T]he State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.<sup>146</sup>

The Founders recognized a need to limit the government's potential for abuse, harassment, and oppression so defendants would be protected from “run[ning] the gantlet [sic]” in the court system.<sup>147</sup>

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142. Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its “Life or Limb”)*, 36 AM. CRIM. L. REV. 53, 62-63 (1999) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 335 (Univ. of Chi. Press 1979) (1769)). See also JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 17 (1969).

143. Limbaugh, *supra* note 142, at 66; see also GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 50-51 (1998).

144. See BODENHAMER, *supra* note 134, at 148 (commenting that the double jeopardy clause of the Fifth Amendment would apply to less serious criminal cases rather than only capital cases, as in England).

145. That clearly remains the case today, as discussed above. See *supra* Part III.A. Indeed, some U.S. states grant even greater double jeopardy coverage than is required by the federal Constitution. See, e.g., *People v. Paulsen*, 601 P.2d 634, 636 (Colo. 1979) (“Retrial is precluded [under the Colorado Constitution] even when the trial court erred as a matter of law in granting the judgment of acquittal.”); *State v. Lessary*, 865 P.2d 150, 156 (Haw. 1994) (holding that “the ‘same conduct’ test” bars a second prosecution under state principles); *Derado v. State*, 622 N.E.2d 181, 184 (Ind. 1993) (finding more protection than the federal standard regarding conspiracy and the substantive offense); *State v. Hogg*, 385 A.2d 844, 846 (N.H. 1978) (holding that estoppel-limiting sovereignty rules under the federal Constitution are inapplicable under state law).

146. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

147. *Ashe v. Swenson*, 397 U.S. 436, 446 (1970); see also *Burks v. United States*, 437 U.S. 1, 11 (1978) (“‘[D]ouble jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.” (quoting *Green v. United States*, 355 U.S. 184, 187 (1957))); *United States v. Jorn*, 400 U.S. 470, 479 (1971) (“The Fifth Amendment's prohibition against placing a defendant ‘twice in jeopardy’

Beyond the need to protect defendants, the Double Jeopardy Clause was created with the intent of balancing the competing issues of finality and accuracy.<sup>148</sup> Society has an interest in convicting a defendant who committed a crime. Still, we do not want someone previously acquitted of an offense to be ripped from the life she may have had to rebuild and be forced to revisit an accusation that was thought to have been resolved.<sup>149</sup>

## 2. What Is Jeopardy?

Accused persons are only afforded protections from this Clause when actually placed in jeopardy.<sup>150</sup> The beginning of the placement in jeopardy is generally referred to as jeopardy attaching.<sup>151</sup> Jeopardy attachment differs depending upon whether the criminal proceeding is a jury trial or bench trial. In a jury trial attachment occurs when the entire jury is sworn in, and in a nonjury trial jeopardy attaches when the judge begins to hear evidence.<sup>152</sup>

The ending of jeopardy is generally referred to as termination. After attachment, jeopardy is not barred until termination. A simple example of termination is an acquittal, which may be found for a variety of reasons, including the court finding the evidence to be legally insufficient to support a conviction.<sup>153</sup> The termination requirement is also consistent with the purpose of the Double Jeopardy Clause: to balance accuracy and finality.<sup>154</sup> The termination requirement allows for exceptions in certain scenarios that are important to our legal system, such as the appeals process and retrials in legitimate circumstances.<sup>155</sup>

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represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings.”)

148. *See, e.g., Jorn*, 400 U.S. at 479.

149. Of course, double jeopardy does not protect against a criminal and a civil charge (and punishment) for the same act. *See Schellenbach v. SEC*, 989 F.2d 907, 911 (7th Cir. 1993).

150. *Serfass v. United States*, 420 U.S. 377, 388 (1975).

151. *See, e.g., Illinois v. Somerville*, 410 U.S. 458, 471 (1973) (White, J., dissenting).

152. *Id.* There are obvious reasons why jeopardy attaches before there is a final judgment; the most important is to protect the accused. If jeopardy attached only at final judgment, the prosecution could “court shop.” If the prosecution perceives the trial as going unfavorably, it could withdraw from the case, only to recharge the accused in a different jurisdiction or court. “[T]he prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” *Arizona v. Washington*, 434 U.S. 497, 505 (1978). The U.S. courts have been vigilant in determining that jeopardy attaches before the final judgment in order to avoid court shopping. *See Downum v. United States*, 372 U.S. 734, 736 (1963).

153. *Burks v. United States*, 437 U.S. 1, 18 (1978) (holding that when a court finds that the evidence is legally insufficient to support a conviction, jeopardy is terminated).

154. *See, e.g., United States v. Jorn*, 400 U.S. 470, 479 (1971).

155. Such circumstances may include retrials after mistrials and hung juries. *Richardson v. United States*, 468 U.S. 317, 324 (1984) (holding that a retrial following a hung jury does not

With an appeal, termination occurs when the convicted fails to challenge her conviction successfully. Once a defendant files an appeal, she is considered to have waived the double jeopardy rights.<sup>156</sup>

### 3. Protections

The Double Jeopardy Clause offers protection against subsequent prosecution of the defendant for the same offense for which she has been convicted, multiple punishments for the same offense, and a later trial of the defendant for the same offense for which she has been acquitted.<sup>157</sup> It is this last aspect that is of chief concern in this Article, for it is the one that has occupied reformers in Australia and elsewhere.

The protection of the accused from prosecution after an acquittal means that “the State shall not be permitted to make repeated attempts to convict him.”<sup>158</sup> In the United States, there has been considerable litigation on the issue of what constitutes an acquittal and when it occurs. Procedurally, the protection applies to an acquittal whether it was by the court in a bench trial or by a jury verdict.<sup>159</sup> Additionally, an acquittal can be an acquittal of the charged offense as well as an acquittal of a particular punishment.<sup>160</sup>

An acquittal can occur when an offense is dismissed, and that acquittal must be treated as final, barring certain conditions.<sup>161</sup> Finality requires that the trial has proceeded to the defendant’s introduction of evidence, and the judge’s order of dismissal was facially unqualified at midtrial.<sup>162</sup> If there is a finding by the court or jury of insufficient evidence to establish guilt, that finding will constitute an acquittal and reprosecution is barred.<sup>163</sup> This rule has no exceptions no matter the cause for the insufficiency. The acquittal and bar to reprosecution stand if the insufficiency to support a finding of guilt was caused by

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violate double jeopardy); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003) (holding that there is no violation of double jeopardy to have a retrial following a hung jury, even in a capital case).

156. *Green v. United States*, 355 U.S. 184, 189 (1957).

157. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *see also* *United States v. Halper*, 490 U.S. 435, 440 (1989) (discussing the three “abuses” protected by the Double Jeopardy Clause).

158. *United States v. Wilson*, 420 U.S. 332, 343 (1975).

159. *See* *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005).

160. *Bullington v. Missouri*, 451 U.S. 430, 438 (1981) (holding that if a hearing resembles, in all relevant respects, a trial on the issue of guilt or innocence, a refusal by the jury to impose the death penalty can operate as an acquittal of that punishment).

161. *Smith*, 543 U.S. at 473.

162. *Id.* The acquittal is seen “as final, unless the availability of reconsideration ha[d] been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence.” *Id.*

163. *Sanabria v. United States*, 437 U.S. 54, 72-73 (1978).

prosecutorial error in obtaining or admitting evidence at trial. In stark contrast to what is being enacted or proposed elsewhere, double jeopardy in the United States bars reprosecution even if new and strongly incriminating evidence is later discovered after the finding of insufficient evidence to establish guilt.<sup>164</sup>

There is no type of error, exception, or defect of any kind that has the power to reverse or change an acquittal in American courts.<sup>165</sup> The U.S. courts are quite serious about the finality of an acquittal. To be sure, in one important case, the Justices wrote that there is no exception permitting retrial once the defendant has been acquitted, no matter how “egregiously erroneous” the legal rulings leading to that judgment might be.<sup>166</sup> Correctness of the ruling for acquittal is not the determining factor; rather, it is whether there was a substantive resolution in favor of the defendant after jeopardy attached.<sup>167</sup>

#### 4. Double Jeopardy’s Limitations

While the U.S. courts write of double jeopardy protection as absolute, in fact several significant limitations—though narrow in scope—are present. The most prominent is the so-called “dual sovereignty rule.” Double jeopardy attaches only to prosecutions for the same criminal act by the same jurisdiction. This means that a defendant could be charged and convicted of the same offense twice, as long as both charges and convictions were not within the same jurisdiction. The rationale behind this double jeopardy limitation is that each sovereign has

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164. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571-72 (1977) (holding that the acquittal stands when the state’s evidence is insufficient to establish factual guilt). That is, of course, precisely what is being promoted in Australia and in the United Kingdom. See *supra* Part III.A. The most prominent application of the altered rule in the United Kingdom came in 2006. See David Brown & Frances Gibb, *Mother’s Relief as Killer Is Convicted Under Double Jeopardy Law Reform*, *TIMES OF LONDON*, Sept. 12, 2006, at 3, available at <http://business.timesonline.co.uk/tol/business/law/article635850.ece>.

165. See, e.g., *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *Benton v. Maryland*, 395 U.S. 784, 797 (1969).

166. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

167. *Martin Linen Supply Co.*, 430 U.S. at 571 (“[A]cquittal’ is not to be controlled by the form of the judge’s action. . . . Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” (citation omitted)); see also *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (“[S]ubjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.”). For double jeopardy purposes, the Court has also found an “implied acquittal” to be of constitutional significance. When a defendant is convicted of a lesser included offense, that is an implied acquittal of the greater charge, and, thus, subsequent prosecution of the greater charge is barred by double jeopardy. *Illinois v. Vitale*, 447 U.S. 410, 421 (1980); see also *Price v. Georgia*, 398 U.S. 323, 329 (1970) (holding petitioner could not be retried for murder having been convicted of manslaughter).

its own laws, and thus, has a right to prosecute under its laws. Therefore, the previously discussed protections from re prosecution after acquittal and against multiple punishments would not apply with multiple prosecutions by different sovereigns. The following are all viewed as separate sovereigns: federal and a state,<sup>168</sup> two states,<sup>169</sup> or the military and a state.<sup>170</sup>

Re prosecution is allowed under double jeopardy when the defendant has moved for a mistrial. On the other hand, actions on the part of the prosecution resulting in a mistrial will nearly always restrict re prosecution. One exception to the bar on re prosecution falls within the category of manifest necessity.<sup>171</sup> The theory is that “the defendant’s interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice.”<sup>172</sup> A “high degree” of necessity must be present.<sup>173</sup> Most commonly, as noted above, the exception has been applied in cases involving hung juries.<sup>174</sup> The government claim of no fault in creating the necessity for a new trial is carefully scrutinized. “[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar.”<sup>175</sup>

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The Double Jeopardy Clause is seen as an extremely important protection in the United States. There are certain complexities associated with the right as well as some exceptions and limitations; however, the United States Constitution maintains strictly the protection the Clause affords. The United States has, historically and recently, offered a stringent guarantee, and has never seriously challenged the need for the

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168. See *Bartkus v. Illinois*, 359 U.S. 121, 131 (1959); *Abbate v. United States*, 359 U.S. 187, 192 (1959).

169. *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

170. See, e.g., *United States v. Ragard*, 56 M.J. 852, 856 (A. Ct. Crim. App. 2002). A tribal court is an additional, separate sovereign. *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding that an Indian tribal court can prosecute nonmembers who have been previously prosecuted elsewhere, and that prosecution will not amount to an exercise of federal power).

171. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

172. *Illinois v. Somerville*, 410 U.S. 458, 471 (1973) (citing *Wade v. Hunter*, 336 U.S. 684 (1949)).

173. *Arizona v. Washington*, 434 U.S. 497, 506 (1978) (“‘[N]ecessity’ cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a ‘high degree’ before concluding that a mistrial is appropriate.”).

174. See *United States v. Sanford*, 429 U.S. 14, 15-16 (1976) (holding that the government was not precluded on the double jeopardy ground from retrying defendants where the first trial ended in a mistrial of manifest necessity because of a hung jury). See also *United States v. Mauskar*, 557 F.3d 219, 228 (5th Cir. 2009).

175. *Washington*, 434 U.S. at 505.

basic principles. This view is consistent with the skepticism seen elsewhere as to the power of the government to prosecute its citizens. The Australian view, too, is consistent with what we saw earlier in several areas such as the rule of exclusion and entrapment. Without deeply ingrained skepticism as to the role of government in this process, leaders in some Australian states seem willing to grant greater power to the government to prosecute bad people more than once.

#### IV. SENTENCING

##### A. *The United States*

“Our resources are misspent, our punishments too severe, our sentences too long.”

—Justice Anthony M. Kennedy<sup>176</sup>

##### 1. Introduction

For decades now, the United States has punished its criminal offenders quite severely.<sup>177</sup> Indeed, the sense has been that such punishment may be appropriate when, relatively speaking, tremendous protections are offered to defendants in the criminal justice process.<sup>178</sup> With one in every 131 of its citizens behind bars,<sup>179</sup> the United States is

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176. Frank J. Murray, *Supreme Court Justice Urges Shorter Sentences; Justice Kennedy Wants Repeal of Mandatory Sentences After Voting that They Are Constitutional*, WASH. TIMES, Aug. 10, 2003, at A1.

177. In this Part, we will generalize about the current situation in the United States, but this approach is difficult and the reader should be cautioned that states have widely different views on the matter, as is allowed by the U.S. system of federalism. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 137, 137 (1991). The authors there correctly note that the punishment systems in the fifty states and U.S. federal system are so different from one another that they could be viewed as fifty-one different countries. *Id.*

Moreover, in this Article, we will not discuss capital punishment. At this point, we can add very little to the intense debate in the United States and the settled question in Australia. Capital punishment was banned in Australia in 1973. For history in this area and international comparisons, see generally Paul Marcus, *Capital Punishment in the United States and Beyond*, 31 MELB. U. L. REV. 837 (2007). See also Death Penalty Info. Ctr., *Facts About the Death Penalty* (2009), <http://www.deathpenaltyinfo.org/FactSheet.pdf> (stating that currently in the United States, the numbers of capital prosecutions, death sentences, and executions are much lower than in the past).

178. See generally Marcus & Wayne, *supra* note 1.

179. Press Release, Bureau of Justice Statistics, U.S. Dep't of Justice, *Growth in Prison and Jail Populations Slowing: 16 States Report Declines in the Number of Prisoners* (Mar. 31, 2009) (reflecting information as of June 30, 2008). For an excellent overview of the current issues in the United States regarding sentencing, see Kevin R. Reitz, *Reporter's Study: The Question of Parole Release Authority*, MODEL PENAL CODE: SENTENCING 1 (Discussion Draft No. 2, 2009). See also Dahlia Lithwick, *Our Real Prison Problem; Why Are We So Worried About Gitmo?*, NEWSWEEK, June 15, 2009, at 28.



currently facing an incarceration crisis of epic proportions. Since the determinate sentencing movement of the 1970s, the number of individuals incarcerated in the United States has increased seven-fold, with current prison and jail populations reaching 2.3 million.<sup>180</sup> With about just 5% of the world's population, the United States has 25% of the world's reported prisoners.<sup>181</sup> As of 2008, the United States had the highest known incarceration rate in the world with 762 inmates per 100,000 people.<sup>182</sup> Federal, state, and local spending on prisons and jails currently totals more than \$68 billion a year.<sup>183</sup> This incarceration crisis has disproportionately impacted racial minorities, with 40% of the individuals in prisons and jails being African American and 20% being Hispanic.<sup>184</sup> Furthermore, it has disrupted families and communities across the nation, leaving some 1.7 million children with a parent behind bars in 2007.<sup>185</sup>

## 2. History of Sentencing in the United States

In colonial times, the English imposed determinate, or fixed, sentences for felony offenses.<sup>186</sup> This practice of determinate sentencing left little discretion to trial court judges—once a jury found a defendant guilty of a felony beyond a reasonable doubt, the sentence for the

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180. See The Sentencing Project, Facts About Prisons and Prisoners (Apr. 2009), [http://sentencingproject.org/doc/publications/inc\\_factsaboutprison.pdf](http://sentencingproject.org/doc/publications/inc_factsaboutprison.pdf).

181. Jim Webb, *Why We Must Fix Our Prisons*, PARADE, Mar. 29, 2009, at 4, available at <http://www.parade.com/news/2009/03/why-we-must-fix-our-prisons.html>.

In 1984, Japan had a population half the size of ours and was incarcerating 40,000 sentenced offenders, compared with 580,000 in the United States. As shocking as that disparity was, the difference between the countries now is even more astounding—and profoundly disturbing. Since then, Japan's prison population has not quite doubled to 71,000, while ours has quadrupled to 2.3 million.

*Id.* See generally MaryBeth Lipp, *A New Perspective on the "War on Drugs": Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979 (2004).

182. Compare HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2008-STATISTICAL TABLES 2 tbl.1 (Mar. 2009) (reflecting statistics as of midyear 2008), with Webb, *supra* note 181, at 4 (reporting a slightly lower rate of incarceration—756 inmates per 100,000 residents).

183. See Webb, *supra* note 181, at 4.

184. The Sentencing Project, *supra* note 180.

185. SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007, at 2 (2009), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_incarceratedparents.pdf).

186. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 693 (2005).

defendant's crime was set.<sup>187</sup> In this way, a felony defendant "knew from the face of the charging instrument precisely what sentence she would receive if convicted."<sup>188</sup>

The English colonial practice of determinate sentencing was not, however, readily embraced by the Americans, who began criticizing the practice because it did not allow for individualized determinations of punishment.<sup>189</sup> By the beginning of the nineteenth century, Congress and the states had repealed their determinate sentences as part of a continued trend away from fixed sentencing and towards legislatively prescribed ranges for imprisonment, giving judges increased sentencing discretion.<sup>190</sup> "[A]ppellate review of sentencing was virtually non-existent"<sup>191</sup> during this time period, allowing judges an "enormous and essentially unbridled authority to impose a sentence anywhere within the legislatively prescribed range."<sup>192</sup>

During the mid-nineteenth century, Americans began to view imprisonment as a means of both moral reform<sup>193</sup> and penance.<sup>194</sup> Prisons became known as "penitentiaries" and states expended a considerable amount of money on their construction.<sup>195</sup> However, by 1865, "the reformatory ideals of the penitentiary had largely given way to the practical realities of modern imprisonment, with overcrowding and brutality among prisoners and staff a grim reality."<sup>196</sup> About one hundred years ago, the "rehabilitation model" came into favor.<sup>197</sup> "Prisons were re-conceptualized from places of penance and punishment to institutions for the transformation of offenders into law-abiding citizens."<sup>198</sup> Then, in 1910, the first federal prisoners were paroled, and by 1930 the Board of Parole, later known as the United States Parole Commission, was

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187. *Id.* According to Professor Klein, "[t]he judicial role was largely a ministerial one—impose that sentence mandated by the jury verdict." *Id.*

188. *Id.* at 696. The sentence ordered was usually "the death penalty or a fine [that] varied according to the value of the property stolen." *Id.* Nonfelony offenses were usually not punished by imprisonment, but rather by "whipping, fines, banishment, and public humiliations, such as time in the stocks." PAUL J. HOFER ET AL., U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 41 (2004), [http://www.ussc.gov/15\\_year/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/15_year/15_year_study_full.pdf).

189. Klein, *supra* note 186, at 696.

190. *Id.* at 697.

191. Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1050 (2003).

192. Klein, *supra* note 186, at 697.

193. HOFER ET AL., *supra* note 188, at 41.

194. *Id.* at 1.

195. *Id.* at 41. To be sure, Europeans such as Alexis de Tocqueville visited the United States with the specific purpose of studying these penitentiaries. *Id.*

196. *Id.*

197. *Id.* at 1; Klein, *supra* note 186, at 698.

198. HOFER ET AL., *supra* note 188, at 1.

established.<sup>199</sup> Parole boards throughout the nation began to consider a prisoner's behavior and progress towards rehabilitation in deciding when his/her sentence would end.<sup>200</sup> The flexibility of indeterminate sentencing allowed for this personally tailored approach to incarceration.

Both the practice of indeterminate sentencing and the rehabilitation model were in place for much of the twentieth century.<sup>201</sup> Belief in the efficacy of the rehabilitative model, however, began to falter by the late 1970s.<sup>202</sup> This was largely due to a "growing mistrust of a 'therapeutic state'" coupled with the fact that there was no "strong evidence for the effectiveness of correctional treatment programs."<sup>203</sup> Plus, the respective rates of crime and recidivism were high.<sup>204</sup> At the same time, concerns about the practice of indeterminate sentencing were growing.<sup>205</sup> Many Americans were troubled by the amount of discretion given to judges under the indeterminate system and felt that it resulted in "unwarranted disparities [in the sentences] for similarly situated defendants."<sup>206</sup> Another major criticism of indeterminate sentencing was that it resulted in punishments that were overly lenient.<sup>207</sup> Reformers began to advocate for punishments that were uniform and proportional to the severity of the offense.<sup>208</sup> The focus was no longer on the offender's potential for rehabilitation, but rather on the danger posed to the community.<sup>209</sup>

In the midst of this reform, several states passed mandatory minimum laws.<sup>210</sup> The key reform against indeterminate sentencing was

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199. U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM 1 (2003), available at <http://www.usdoj.gov/uspc/history.pdf>.

200. HOFER ET AL., *supra* note 188, at 41-42.

201. Rappaport, *supra* note 191, at 1049-50.

202. HOFER ET AL., *supra* note 188, at 2.

203. *Id.* at 2.

204. David Yellen, *Saving Federal Sentencing Reform After Apprendi*, Blakely and Booker, 50 VILL. L. REV. 163, 165 (2005).

205. HOFER ET AL., *supra* note 188, at 2, 42; Klein, *supra* note 186, at 699; Rappaport, *supra* note 191, at 1050-53.

206. Klein, *supra* note 186, at 699. Critics pointed to evidence that the disparities were attributable to factors like "geography, race, gender, socio-economic status, and judicial philosophy" and not to factors like criminal history, potential for rehabilitation, or the nature of the circumstances surrounding the crime. *Id.*; see also Rappaport, *supra* note 191, at 1050-52.

207. HOFER ET AL., *supra* note 188, at 42; Rappaport, *supra* note 191, at 1052-53.

208. HOFER ET AL., *supra* note 188, at 42.

209. *Id.* The United States was certainly not the only nation to have taken this approach during this period. See Stephan Terblanche & Geraldine Mackenzie, *Mandatory Sentences in South Africa: Lessons for Australia?*, 41 AUSTL. & N.Z. J. CRIMINOLOGY 402, 406-07 (2008).

210. See FAMILIES AGAINST MANDATORY MINIMUMS FOUND. (FAMMF), HISTORY OF MANDATORY SENTENCES 1 (2005), <http://www.famm.org/Repository/Files/Updated%20short%20HISTORY.pdf>. For example, New York enacted its famous Rockefeller Drug Laws in 1973. *Id.* These laws established mandatory minimum fifteen year sentences for certain drug offenses. *Id.* Shortly thereafter, in 1978, Michigan passed its 650 Lifer Law which imposed a mandatory

the federal Sentencing Reform Act of 1984 (SRA).<sup>211</sup> It made some drastic changes to the federal sentencing system in the United States, creating an expert agency called the United States Sentencing Commission (U.S.S.C.).<sup>212</sup> It called upon the new agency to draft federal sentencing guidelines.<sup>213</sup> Unsurprisingly, one of the central goals of the SRA was to “avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”<sup>214</sup> The U.S.S.C. issued its federal sentencing guidelines in 1987.<sup>215</sup> The guidelines set up a determinate sentencing system under which a criminal offender’s sentence was fixed based upon a variety of factors.<sup>216</sup> Furthermore, under the SRA, a court was required to follow the sentencing guidelines unless there was “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”<sup>217</sup>

In addition to creating the U.S.S.C., the SRA also abolished the Federal Parole Commission. This was seen by many as being the “final

minimum life sentence without parole for anyone found with 650 grams of certain kinds of drugs like cocaine and heroin. *Id.*; see Drug Policy Alliance Network, Rockefeller Drug Laws, <http://www.drugpolicy.org/statebystate/newyork/rockefeller/> (last visited Jan. 6, 2010); Yellen, *supra* note 204, at 167 (“[I]n 1980, Minnesota became the first state to promulgate sentencing guidelines, followed by Pennsylvania in 1982 and Washington in 1984.”).

211. 28 U.S.C. §§ 991-998 (2006).

212. *Id.* § 991.

213. *Id.* § 994.

214. *Id.* § 991(b)(1)(B). The four central purposes of punishment identified by the SRA were also unsurprising given the shift away from the rehabilitation model and the concerns of reformers about the leniency of indeterminate sentencing. These purposes, listed in the SRA, were:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2) (2006).

215. U.S. Sentencing Comm’n, An Overview of the United States Sentencing Commission 1 (2005), <http://www.ussc.gov/general/USSCoverview.pdf>.

216. These guidelines, contained in the Federal Sentencing Manual, established a determinate sentence (within a 25% discretionary range) for each offender according to the offense of conviction, offender characteristics, circumstances surrounding the offense, and relevant conduct not accounted for by the indictment. Unlike the determinate sentencing system in place in England and very early American colonial times, where all essential elements necessary to a particular determinate sentence were determined by a jury, many of the facts mandating a particular enhanced sentence under the Guidelines were found by the judge using a preponderance of the evidence standard. The role of the judge here was later sharply curtailed by the Supreme Court. *See infra* text accompanying notes 224-225.

217. 18 U.S.C. § 3553(b); *see* HOFER ET AL., *supra* note 188, at 7.

nail in the coffin of federal indeterminate sentencing.”<sup>218</sup> It meant that “[a]bsent an appellate reversal or a presidential pardon, the fixed sentence imposed by the district judge pursuant to the guidelines would be served, in full, by the offender.”<sup>219</sup> The SRA also added harsher mandatory minimums to many sections of the United States Code.<sup>220</sup> The net effect of the SRA was a dramatic reduction in judicial discretion when it came to federal sentencing decisions. This approach was widely followed in many states.<sup>221</sup>

In the years following the passage of the SRA, both Congress and state legislatures began passing mandatory minimum laws, and by 1994 all fifty states and the District of Columbia had versions of such laws.<sup>222</sup> The 1990s also saw a proliferation of so-called three-strikes laws, with nearly half of all states enacting such laws between 1993 and 1995.<sup>223</sup> Soon thereafter, an important line of Supreme Court cases indicated that enhancement of a sentence under the guidelines beyond the maximum amount based upon facts not proven beyond a reasonable doubt to a jury violated the United States Constitution, specifically the Sixth Amendment right to a jury trial.<sup>224</sup> The Court also held that the sentencing guidelines were advisory, not mandatory.<sup>225</sup> Taken together, these decisions were properly viewed as a victory against strictly determinate sentencing and a major win in the battle to reclaim judicial discretion.

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218. Klein, *supra* note 186, at 701.

219. *Id.* at 702.

220. Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 445-46 (1992) (citing amendments to the U.S.S.G.).

221. FAMMF, *supra* note 210.

222. David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 591 (2005).

223. Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89, 89 (2001).

The laws vary, but most call for life sentences without the possibility of release for at least 25 years upon a third conviction of a serious violent crime. The crimes include murder, rape, kidnapping, aggravated robbery, aggravated assault, and sexual abuse. A few states include additional crimes, most commonly firearm violations, burglary of occupied dwellings, and simple robbery. The rationale for the laws is that the longer prison terms reduce crime by deterring and incapacitating the most active and dangerous criminals.

*Id.* at 89-90 (footnotes omitted).

224. See *United States v. Booker* 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* and *Blakely* applied to state sentencing guidelines. *Blakely*, 542 U.S. at 301; *Apprendi*, 530 U.S. at 490. *Booker* however, made it clear that the holdings were applicable under the federal sentencing guidelines as well. *Booker*, 543 U.S. at 245.

225. *Booker*, 543 U.S. at 245.

With prison populations soaring, states began to enact significant reforms against determinate sentencing during this time period.<sup>226</sup> And, as noted below, states began a return to the expansion of treatment programs, the reform of parole and probation systems, and establishment of alternatives to imprisonment for nonviolent offenders.<sup>227</sup>

### 3. Impact of Severe Sentencing

Much has been written about the consequences of the determinate sentencing movement and harsh punishments of the past decades.<sup>228</sup> One of the most frequently cited consequences of determinate sentencing is the high rate at which American citizens are incarcerated.<sup>229</sup> This high incarceration rate has greatly impacted the American economy at the

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226. See RYAN S. KING, THE SENTENCING PROJECT, CHANGING DIRECTION?: STATE SENTENCING REFORMS 2004-2006, at 3 (2007), available at <http://www.sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf>; see also FAMMF, *supra* note 210. Michigan repealed its 650-lifer laws in 1998 and passed sweeping reforms of its mandatory minimum laws in 2002, New York revised its Rockefeller Drug Laws in 2004, and California passed a proposition mandating treatment, instead of imprisonment, for nonviolent first and second drug offenders in 2000. FAMMF, *supra* note 210. Both California and New York are in the middle of serious reviews of their criminal justice systems, particularly focusing on sentencing and imprisonment. See Jeremy W. Peters, *Albany Reaches Deal To Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1; California May Have To Cut Prison Population by 40 Percent (Feb. 10, 2009), <http://www.cnn.com/2009/CRIME/02/10/california.prisons/>. Changes will need to be substantial in order to make much of an impact. N.Y. Times Opinionator Blog, *California Will Survive Its Crackup*, <http://egan.blogs.nytimes.com/2009/05/20/California-will-survive-its-crackup/> (May 20, 2009, 22:00 EST) (stating that California has 750,000 people in prison or jail, or on parole or probation). The most recent development in California is a federal court order mandating the release of 40,000 state prisoners because of an unconstitutional health system in the prisons. Solomon Moore, *California Prisons Must Cut Inmate Population*, N.Y. TIMES, Aug. 5, 2009, at A9.

The debate over sentencing has spilled over into serious discussions of other significant aspects of the criminal justice system in the United States. For striking examples of this in media coverage, see Steven B. Duke, *Drugs: To Legalize or Not*, WALL ST. J., Apr. 25, 2009, at 1; Jennifer Steinhauer, *To Cut Costs, States Relax Hard Line on Prison Policies*, N.Y. TIMES, Mar. 25, 2009, at A1; Editorial, *A Sensible Call for Sentencing Reform: Virginia's Junior Senator Insists on Taking an Honest Look at the High Cost of the War on Drugs*, ROANOKE TIMES, Oct. 13, 2008, at B8; Editorial, *Go After the Real Problem*, DAILY PRESS (Va.), Mar. 31, 2009, at C5, available at [http://articles.dailypress.com/2009-03-31/news/0903300070\\_1\\_prison-reform-four-prisoners-prison-system](http://articles.dailypress.com/2009-03-31/news/0903300070_1_prison-reform-four-prisoners-prison-system); Editorial, *Reviewing Criminal Justice*, N.Y. TIMES, Mar. 30, 2009, at A28.

227. See *infra* Part V.

228. See, e.g., Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285 (2007); Editorial, *The 'War on Drugs' Is Over*, May 16, 2009, at A28; MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY (2007), [http://www.sentencingproject.org/Admin/Documents/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/Admin/Documents/publications/dp_25yearquagmire.pdf).

229. See, e.g., Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, in 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH 97, 97-98 (Michael Tonry ed., 2008).

federal, state, and local levels; American families and communities; and the entire democratic system.

With 1 in every 131 Americans incarcerated in a prison or a jail,<sup>230</sup> it is clear that the increase in the incarceration rate has not been a gradual one rising slowly throughout the twentieth century. It has skyrocketed to remarkable levels since the determinate sentencing movement of the 1970s.<sup>231</sup> In fact, from 1970 to the middle of 2008, the number of individuals incarcerated in federal and state prisons increased by almost seven-fold,<sup>232</sup> and from 1980 to 2007 the number of incarcerated drug offenders in federal, state, and local prisons/jails increased by 1200%.<sup>233</sup> As would be expected given the prevalence of mandatory minimums for drug and other nonviolent offenses, state prisons are now populated with low-level offenders—in 2004, 82% of the individuals sentenced to state prisons were nonviolent offenders, with 34% of them convicted for drug offenses and 29% for property offenses.<sup>234</sup>

The incarceration crisis has not impacted the U.S. population equally, however. According to The Sentencing Project, “Black males have a 32% chance of serving time in prison at some point in their lives” and “[h]ispanic males have a 17% chance”—in sharp contrast with white males who have a 6% chance.<sup>235</sup> With respect to drug offences, African-Americans make up “37% of those arrested on drug charges[,] 59% of those convicted,” and 74% of those sentenced to prison.<sup>236</sup> African-Americans constitute about 14% of the nation’s monthly drug users.<sup>237</sup>

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230. Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, *supra* note 179.

231. Jim Webb, National Criminal Justice Commission Act of 2009: The Scope of the Problem, <http://webb.senate.gov/issuesandlegislation/upload/SlidesCriminalJusticeBill.pdf> (last visited Jan. 6, 2010) (PowerPoint presentation); HOFER ET AL., *supra* note 188, at 39.

232. The Sentencing Project, *supra* note 180; HOFER ET AL., *supra* note 188, at 39.

233. Webb, *supra* note 231.

234. The Sentencing Project, *supra* note 180 (finding in 2007 that 47.5% of all drug arrests in the United States were for marijuana offenses); Webb, *supra* note 181. Furthermore, of those serving out drug offenses in state prisons, 60% of offenders were nonviolent and did not have a significant history of selling drugs. *Id.*

235. The Sentencing Project, *supra* note 180.

236. Webb, *supra* note 231.

237. *Id.*; see also Charles J. Ogletree, *Testimony of Charles Ogletree: Discriminatory Impact of Mandatory Minimum Sentences in the United States*, 18 FED. SENT’G REP. 273, 275 (2006). The scope of the incarceration crisis and its discriminatory impact become even larger, however, when the number of individuals on parole and probation is factored in. In 2008, approximately five million Americans were on parole, probation, or were receiving some other community sanction. Webb, *supra* note 231. Added together with the 2.3 million Americans incarcerated in federal and state prisons and in local jails, the total becomes 7.3 million Americans in the corrections system. *Id.*

a. Economic Impact

As would be expected, the costs of incarcerating and overseeing millions of people are staggeringly high. Almost \$70 billion<sup>238</sup> is spent per year at the federal, state, and local levels, making the high rates of incarceration a substantial contributor to many states' budget problems.<sup>239</sup>

With one of the highest incarceration rates in the nation, California is the clearest example of a state whose budget has been greatly affected by the costs of corrections. According to the California Department of Corrections and Rehabilitation, the average yearly cost per inmate in 2008 and 2009—in nonconstruction costs—was \$35,587 and per parolee was \$4338.<sup>240</sup> The proposed 2009-2010 California state budget for corrections is \$9.9 billion (7.3% of the total expenditures for the state).<sup>241</sup> It is not the only state in trouble. In Florida, the average yearly cost per inmate in fiscal year 2007-2008 was \$20,108 or about \$55.09 per day<sup>242</sup> (74% on operations, 24% on health services, and 2% on education).<sup>243</sup> Florida's corrections budget totaled more than \$2 billion (8.5% of the state general revenue budget).<sup>244</sup> Mississippi, a state with the second highest imprisonment rate for sentenced prisoners, spent an average daily amount of \$49.13 per inmate in the 2008 fiscal year.<sup>245</sup>

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238. See Webb, *supra* note 181, at 4.

239. Solomon Moore, *In U.S. Prison Spending Outpaces All But Medicaid*, N.Y. TIMES, Mar. 3, 2009, at A13.

240. LEGISLATIVE ANALYST'S OFFICE, CAL. DEP'T OF CORR. & REHAB., PRESENTATION TO SENATE BUDGET SUBCOMMITTEE No. 4 ON STATE ADMINISTRATION 4 (Mar. 19, 2009), available at [http://www.lao.ca.gov/handouts/crimjust/2009/CDCR\\_03\\_19\\_09.pdf](http://www.lao.ca.gov/handouts/crimjust/2009/CDCR_03_19_09.pdf).

241. ARNOLD SCHWARZENEGGER, STATE OF CAL., GOVERNOR'S BUDGET SUMMARY 2009-10, at 13 fig.SUM-07 (Jan. 9, 2009), available at <http://www.dof.ca.gov/budget/historical/2009-10/governors/summary/documents/FullBudgetSummary.pdf>; see also Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, in 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH, *supra* note 229, at 207, 222 ("The California prison system is incredibly expensive. . . . California has continuously shifted resources toward prisons and away from other areas. Between 1984 and 2006, overall state expenditures increased 294 percent but expenditures for adult corrections increased 1,094 percent. Expenditures for social services increased 182 percent; health services, 371 percent; and mental health services, 241 percent.")

California expects a \$42 billion deficit. California Budget Crisis Jeopardizes 20,000 Jobs (Feb. 17, 2009), <http://www.cnn.com/2009/POLITICS/02/17/California.budget.crisis/index.html>.

242. Fla. Dep't of Corr., Cost of Imprisonment (June 2009), <http://www.dc.state.fl.us/pub/statsbrief/cost.html>.

243. FLA. DEP'T OF CORR., BUDGET SUMMARY (FY 2007-08), available at <http://www.dc.state.fl.us/pub/annual/0708/budget.html>.

244. Fla. Dep't of Corr., *supra* note 242.

245. JOINT LEGISLATIVE COMM. ON PERFORMANCE EVALUATION & EXPENDITURE REVIEW (PEER), MISS. DEP'T OF CORR., MISSISSIPPI DEPARTMENT OF CORRECTIONS' FY 2008 COST PER INMATE DAY 4 (Dec. 9, 2008), available at <http://www.peer.state.ms.us/reports/rpt517.pdf>.



b. Societal Impact

The high incarceration rate is not just an economic problem, it is a daily reality for families and communities across the nation. In 2007, over half (52%) of all incarcerated men and women were parents, leaving a total of 1.7 million children nationwide with a parent in prison.<sup>246</sup> The number of incarcerated mothers skyrocketed from 1991 to 2007, increasing by 122% during that time period.<sup>247</sup> The number of incarcerated fathers increased by 76% during the same time period.<sup>248</sup>

Communities are also greatly affected by high incarceration rates. Social networks are disrupted when adults belonging to the community cycle in and out of prison.<sup>249</sup> Incarceration often causes marital relationships to deteriorate and results in an increased number of single parents and female-headed households.<sup>250</sup> In addition, with large numbers of males being incarcerated, the gender ratios of communities are altered, which in turn can have a negative impact on community health.<sup>251</sup>

4. Recent Developments

Since 2000, most U.S. states have enacted some measures to combat the rising prison population and the costs, economic and otherwise, associated with it.<sup>252</sup> The recent economic crisis has “increased the urgency” of resolving the incarceration cost problems.<sup>253</sup> In an attempt to

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246. SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007, at 2 (2009), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_incarceratedparents.pdf) (reporting that the number of children with an incarcerated parent has increased 82% since 1991).

247. *Id.*

248. *Id.* The impact on a child with an incarcerated parent can be substantial. Such children are often raised by a relative or placed in foster care, especially if the mother is the one incarcerated. *Id.* at 1. Children frequently lose contact with their incarcerated parent. *Id.* In 2004, for example, 59% of parents incarcerated in state prisons and 45% of those incarcerated in federal prisons said they were never visited by their children. *Id.* at 2. In addition to losing contact with their incarcerated parent, these children are “more likely to drop out of school, engage in delinquency, and subsequently be incarcerated themselves.” *Id.* at 1.

249. Clear, *supra* note 229, at 106-07.

250. *See id.* at 111-12.

251. *Id.* at 113-14.

252. *See* RYAN S. KING, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2008: DEVELOPMENTS IN POLICY AND PRACTICE 1 (2009), available at [http://www.sentencingproject.org/Admin/Documents/publications/sl\\_statesentencingreport2008.pdf](http://www.sentencingproject.org/Admin/Documents/publications/sl_statesentencingreport2008.pdf).

253. *Id.*; *see also* Steinhauer, *supra* note 226. A *New York Times* editorial pointed out that “[h]ard-pressed states and localities that reduce prison costs will have more money to help the unemployed, avert layoffs of teachers and police officers, and keep hospitals operating.” *Reviewing Criminal Justice*, *supra* note 226.

save money, some states are closing prisons.<sup>254</sup> To cut back on the number of individuals in prisons, other states began sanctioning parole violators with community service instead of jail time or enhancing credits toward release.<sup>255</sup>

There is serious discussion on reform of the determinate sentencing practice at the national level. Last year several U.S. senators proposed the National Criminal Justice Commission Act of 2009.<sup>256</sup> The Act would create a commission “charged with undertaking an 18-month, top-to-bottom review of [the] entire criminal justice system.”<sup>257</sup> The task of the Commission would be “to propose *concrete*, wide-ranging reforms designed to [responsibly] reduce the overall incarceration rate; improve federal and local responses to international and domestic gang violence; . . . restructure [the] approach to drug policy; improve the treatment of mental illness; improve prison administration; and establish a system for reintegrating ex-offenders.”<sup>258</sup> The Act currently has strong support from the Senate leadership and the backing of the Obama Administration.<sup>259</sup>

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In the United States, we have seen remarkable changes in our sentencing patterns over the past years. With strong constitutional protections for those convicted of crimes, Americans were not reluctant to get tough on crime, choosing to “[l]ock em up and throw away the key!”<sup>260</sup> We are, however, now seeing a dramatic rethinking of such a harsh regime.

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254. Steinhauer, *supra* note 226.

255. *Id.*

256. Jim Webb, Sen. Webb’s National Criminal Justice Commission Act of 2009 (Oct. 2009), <http://webb.senate.gov/issuesandlegislation/National-Criminal-Justice-Commission-Act-of-2009-fact-sheet.cfm>. One sponsoring senator and former prosecutor, Arlen Specter of Pennsylvania, stated the matter succinctly: “We call it a correctional system, but we all know it doesn’t correct.” Bill Sizemore, *Webb Takes on Prison System in “Crisis,”* VA. PILOT, June 13, 2009, at A8. There appears also to be support for change from the general public. See THE 2009 CRIMINAL JUSTICE TRANSITION COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 54 (Nov. 5, 2008), available at <http://www.constitutionproject.org/manage/file/62.pdf> (80% of Americans favor community service for nonviolent offenders).

257. Webb, *supra* note 256.

258. *Id.*

259. *Id.*

260. Briane Dumaine, *New Weapons in the Crime War*, FORTUNE, June 3, 1991, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/1991/06/03/75076/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1991/06/03/75076/index.htm).

*B. Australia*

Australian sentencing is largely entrusted to judicial discretion. This is in contrast to the position in the United States, where unstructured judicial discretion in sentencing has been rejected in favor of executive and legislative constraints perceived to more closely align sentencing with community expectations. In Australia there is a strong view that individual judges, and not the legislature, should own the sentencing process.<sup>261</sup> Mandatory sentences and mandatory sentencing guidelines are therefore the exception, rather than the rule.<sup>262</sup>

Nonetheless, the public role in sentencing in Australia is greater than it has ever been<sup>263</sup> and, despite legislative exhortations that imprisonment should be a last resort,<sup>264</sup> increasingly punitive sentencing is a common feature of the Australian criminal justice system.<sup>265</sup> Even so, Australian incarceration rates remain well below those in the United States. In 2007 and 2008, the national rate of imprisonment was 162.6 prisoners per 100,000 Australian adults,<sup>266</sup> whereas the noncustodial sentence rate was 337.5 offenders per 100,000 Australian adults.<sup>267</sup> This compares with an incarceration rate of 976 per 100,000 adults in the

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261. MICHAEL TONRY, SENTENCING MATTERS 178 (1996); *see also* GERALDINE MACKENZIE, HOW JUDGES SENTENCE 43 (2005).

262. *See, e.g.*, Criminal Code Act, 1913, § 401(4)(a) (W. Austl.) (imposing a minimum sentence of twelve months imprisonment for repeat offences of burglary); *see also* Crimes (Sentencing Procedure) Act, 1999, pt. 4, div. 1A (N.S.W.) (imposing standard nonparole periods for particular crimes). Just this past year, in August 2009, Western Australia implemented mandatory sentencing for assaulting police officers. Criminal Code Amendment Bill, 2008, § 4 (W. Austl.).

263. *See* KAREN GELB, VICT. SENTENCING ADVISORY COUNCIL, MYTHS AND MISCONCEPTIONS: PUBLIC OPINION VERSUS PUBLIC JUDGMENT ABOUT SENTENCING, at v-vi (2006); KAREN GELB, VICT. SENTENCING ADVISORY COUNCIL, MORE MYTHS AND MISCONCEPTIONS 5 (2008) [hereinafter GELB, MORE MYTHS].

264. *See, e.g.*, Crimes (Sentencing Procedure) Act, 1999, § 5(1) (N.S.W.); Sentencing Act, 1991, § 5(2E) (Vict.); Criminal Law (Sentencing) Act, 1988, § 11 (S. Austl.); Penalties and Sentences Act, 1992, § 9(2)(a)(i) (Queensl.); Sentencing Act, 1995, § 6(4) (W. Austl.). Note, however, that in Queensland, the principle of last resort has been abolished for offences involving threatened or actual violence or where harm is inflicted on a victim. Penalties and Sentences Act, 1992, § 9(3) (Queensl.).

265. *See supra* note 264 and accompanying text. For example, in 2004 the Australian Bureau of Statistics reported that in the previous ten years Australia's prison population grew by 40% whereas Australia's general population only increased by 15% during the same time. Press Release, Austl. Bureau of Statistics, Population Increased by 40% over Past 10 Years (Dec. 23, 2004), <http://www.abs.gov.au/AUSSTATS/abs@.nsf/PreviousProducts/4517.OMedia%20Releani2004?opendocument&tabname=summary&prodno=4517.0&issue=2004&num=view=>. Between 2004 and 2008, imprisonment rates continued to climb. AUSTL. BUREAU OF STATISTICS, 4517.0 PRISONERS IN AUSTRALIA 16 (2008) [hereinafter PRISONERS].

266. STEERING COMM. FOR THE REVIEW OF GOV'T SERV. PROVISION, PRODUCTIVITY COMM'N, REPORT ON GOVERNMENT SERVICES 2009, at 8.5 (2009) [hereinafter STEERING COMM.].

267. *Id.* at 8.9.

United States, 129 per 100,000 adults in Canada, 167 per 100,000 adults in England, and 230 per 100,000 adults in New Zealand.<sup>268</sup> Based on these figures, the United States is clearly the outlier and Australia sits comfortably within the range of incarceration rates imposed by comparable common law jurisdictions. Interestingly, however, one Australian state, the Northern Territory, has an imprisonment rate of 697 per 100,000 adults,<sup>269</sup> which is more analogous to the United States' incarceration rate. The reasons proffered for the divergence between the Northern Territory and other Australian states relate to the larger number of socially disadvantaged indigenous people living in remote areas distant from supportive correctional services, as well as a lack of rehabilitative programs provided to prisoners.<sup>270</sup> Less convincingly, the Northern Territory has also explained that as a result of a smaller population and smaller numbers of prisoners, minor increases in prison populations can result in significant changes in incarceration rates.<sup>271</sup>

Average imprisonment terms are also generally shorter in Australia. Excluding prisoners with indeterminate, life, and periodic detention sentences, the median aggregate sentence length for sentenced prisoners in 2008 was approximately three years.<sup>272</sup> Only 5% of prisoners were serving a life term or other indeterminate sentence, whereas 58% of Australian prisoners were serving less than five years of jail time.<sup>273</sup> By comparison, prison sentences in state courts (excluding life sentences) in the United States averaged almost five years.<sup>274</sup>

As in the United States, incarceration rates vary disproportionately for certain segments of the population. In Australia, between 2007 and

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268. *Trends in the Use of Full-Time Imprisonment*, SENTENCING TRENDS & ISSUES (Judicial Comm'n of N.S.W., Sydney, Austl.), Nov. 2007, at 1, 3 fig.2; see *supra* text accompanying note 182.

269. AUSTL. BUREAU OF STATISTICS, 4512.0 CORRECTIVE SERVICES 4 (Mar. Quarter 2009).

270. See STEERING COMM., *supra* note 266, at 8.40. Although the Northern Territory adopted mandatory sentencing for property offences between 1997 and 2001, following its repeal on the basis that the sentences did not act as an effective deterrent, incarceration rates have continued to escalate. See OFFICE OF CRIME PREVENTION, N. TERR., MANDATORY SENTENCING FOR ADULT PROPERTY OFFENDERS: THE NORTHERN TERRITORY EXPERIENCE 2, 13 (2003), available at [http://www.nt.gov.au/justice/policycoord/documents/statistics/mandatory\\_sentencing\\_nt\\_experience\\_20031201.pdf](http://www.nt.gov.au/justice/policycoord/documents/statistics/mandatory_sentencing_nt_experience_20031201.pdf).

271. STEERING COMM., *supra* note 266, at 8.4. This reason is not particularly convincing because incarceration rates in the Northern Territory have been substantially higher than other Australian states for some time. See OFFICE OF CRIME PREVENTION, *supra* note 270, at 7.

272. See PRISONERS, *supra* note 265, at 30.

273. *Id.*

274. U.S. Bureau of Justice Statistics, State Court Sentencing of Convicted Felons 2004, tbl.1.3, [http://bjs.ojp.usdoj.gov/content/pub/html/scscf04/scscf04\\_HC.cfm](http://bjs.ojp.usdoj.gov/content/pub/html/scscf04/scscf04_HC.cfm) (last visited Jan. 14, 2010).

2008, the “standardised imprisonment rate per 100,000 Indigenous adults . . . was 1630.4 compared with a corresponding rate of 128.2 for non-Indigenous prisoners.”<sup>275</sup> However, this does not necessarily mean that sentencing of indigenous offenders in Australia is racially biased. The national rate of community-based corrections, that is, noncustodial sentences for the same period, “was 3288.2 per 100,000 Indigenous adults compared with 271.1 for non-Indigenous offenders,” suggesting higher rates of indigenous participation in crime.<sup>276</sup> Recent studies examining indigenous disparity in sentencing confirm that legal variables including criminal antecedents, current crime seriousness, and breach of noncustodial sanctions are determinative, rather than racial profile.<sup>277</sup> Indeed, one study found that indigeneity was more likely to mitigate sentence severity in jurisdictions where the judiciary recognizes the destructive impact of colonialization upon traditional indigenous societies and the severe socio-economic disadvantage it continues to produce.<sup>278</sup>

Nevertheless, the failure of the current sentencing regime to redress recidivism and mitigate the impact of unacceptably high rates of incarceration upon the indigenous community has led to experimentation with other approaches incorporating restorative justice elements. These are discussed *infra* Part V.

Judicial discretion in Australian sentencing is not completely unconstrained. All Australian jurisdictions have implemented sentencing legislation that specifies sentencing purposes and sets out relevant factors and principles that should be applied in the sentencing process.<sup>279</sup> Identified purposes of sentencing include punishment, rehabilitation, general and specific deterrence, protection of the community, denunciation, and restoring relations between the victim, the community,

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275. STEERING COMM., *supra* note 266, at 8.7.

276. *Id.* at 8.10.

277. Lucy Snowball & Don Weatherburn, *Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?*, 40 AUSTL. & N.Z. J. CRIM. 272, 286-87 (2007).

278. Samantha Jeffries & Christine Bond, *Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia's Higher Courts* 42 AUSTL. & N.Z. J. CRIM. 47, 64-65 (2009). Not all Australian jurisdictions adopt this approach. Other jurisdictions have downplayed indigeneity as a ground for leniency, especially where the offender lives in a modern, urban environment. See *R v. Fuller-Cust* [2002] V.S.C.A. 168, paras. 58-63; *R v. Ceissman* (2001) 160 F.L.R. 252, 257; *Crawford v. Laverty* (2008) A.C.T.S.C. 107, paras. 18-25.

279. Crimes Act, 1914, pt. 1B, div. 2 (Austl.); Crimes (Sentencing Act), 2005, pt. 4(1), §§ 33-34 (Austl. Cap. Terr.); Crimes (Sentencing Procedure) Act, 1999, § 4 (N.S.W.); Criminal Law (Sentencing) Act, 1988, § 2(10) (S. Austl.); Sentencing Act, 2008, Pt. 2 (N. Terr.); Penalties and Sentences Act, 1992, § 9 (Queensl.); Sentencing Act, 1997, § 3 (Tas.); Sentencing Act, 1995, § 6 (W. Austl.); Sentencing Act, 1991, § 5 (Vict.).

and the offender.<sup>280</sup> Specified factors the courts are required to take into account include the nature and circumstances of the offence, the degree of the offender's criminality, the victim's circumstances, the level of harm inflicted, demonstrated remorse and/or provision of restitution, the offender's personal circumstances, and the impact of a sentence upon the offender's family or dependents.<sup>281</sup> However, there is no ranking of the purposes or factors. Thus, no single approach to sentencing is practiced or prescribed, and judges are free to emphasize the purposes and factors they believe individual cases warrant. As explained in *Veen v. The Queen (No. 2)*:

[The sentencing purposes] are guideposts to the appropriate sentence but sometimes they point in different directions. And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter.<sup>282</sup>

The Australian approach has attracted critics voicing concerns similar to those opposed to indeterminate sentencing in the United States during the 1970s. Arguably, the lack of substantial constraint can lead to incoherence and produce unjustified disparities in sentencing.<sup>283</sup> The absence of data and studies supporting options that best address deterrence, rehabilitation, and other mandated sentencing aims and objectives from sentencing hearings also exposes Australian sentencing practice to claims of lack of efficacy.<sup>284</sup> This is exemplified by the Australian Law Reform Commission's report, *Same Crime, Same Time*,<sup>285</sup> which, among other things, recommended the adoption of new federal sentencing legislation in the face of apparently unequal sentencing practices across Australian jurisdictions.<sup>286</sup> Even within

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280. See sources cited *supra* note 279.

281. See sources cited *supra* note 279.

282. (1988) 164 C.L.R. 465, 476-77; see also *Markarian v. The Queen* (2005) 228 C.L.R. 357 (rejecting an atomistic, structured approach to sentencing and characterizing sentencing as a "complex alchemy").

283. See RICHARD EDNEY & MIRKO BAGARIC, *AUSTRALIAN SENTENCING: PRINCIPLES AND PRACTICE* 15-16 (2007); John L. Anderson, *'Indefinite, Inhumane, Inequitable'—The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda*, 29 U. N.S.W. L.J. 139, 139 (2006); ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 331 (4th ed. 2005).

284. See Mirko Bagaric, *Strategic (and Popular) Sentencing*, 2 INT'L J. PUNISHMENT & SENT'G 121, 126 (2006).

285. AUSTL. LAW REFORM COMM'N, REPORT NO. 103, *SAME CRIME, SAME TIME: SENTENCING OF FEDERAL OFFENDERS* (2006).

286. *Id.* at 13. Interestingly, however, the legislation recommended by the Law Reform Commission largely replicates existing Australian state legislation. In other words, judicial

Australian jurisdictions, the recognition of the potential for individualized justice to conflict with equality before the law has led to administrative, judicial, and legislative reforms in some jurisdictions and the call for reform in others.<sup>287</sup> The reforms include the establishment of sentencing databases to record trends in the range of sentences applicable to particular offences,<sup>288</sup> the creation of Sentencing Councils that act as advisory bodies to the courts and the Attorney General,<sup>289</sup> and the adoption of guideline judgments by appellate courts that set penalty tariffs for particular types of offences.<sup>290</sup> Consistent with *United States v. Booker*,<sup>291</sup> the latter are not binding,<sup>292</sup> but in contrast to the United States, the sentencing guidelines are judicially, not legislatively, generated.

Australian appellate courts have a greater capacity to review sentencing decisions and to develop sentencing guidelines compared with their U.S. counterparts, whose appellate sentencing jurisprudence has been described as “almost non-existent.”<sup>293</sup> This may be viewed as a partial justification for the rejection of indeterminate sentencing by U.S. policy makers and its continued appeal in Australia. Review at the behest of either the defendant or the prosecution, where both the justice

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discretion is left unfettered, although the Report purports to promote greater transparency of reasoning in the sentencing process. *Cf. id.* at 541-42.

287. *See, e.g.*, EDNEY & BAGARIC, *supra* note 283, at 17; Bagaric, *supra* note 284.

288. The utility of these databases is discussed further by N.S.W. Chief Justice J.J. Spigelman. J.J. Spigelman, N.S.W. Chief Justice, Consistency and Sentencing, Keynote Address to the Sentencing 2008 Conference of the National Judicial College of Australia (Feb. 8, 2008), available at [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/vwFiles/spigelman080208.pdf/\\$file/Spigelman080208.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman080208.pdf/$file/Spigelman080208.pdf).

289. *See, e.g.*, Victoria Sentencing Advisory Council, Welcome to the Sentencing Advisory Council, <http://www.sentencingcouncil.vic.gov.au/> (last visited Jan. 6, 2010); N.S.W. Sentencing Council, About Us, [http://www.lawlink.nsw.gov.au/Lawlink/scouncil/ll\\_scouncil.nsf/pages/scouncil\\_aboutus](http://www.lawlink.nsw.gov.au/Lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_aboutus) (last visited Jan. 6, 2010); N.S.W. Judicial Comm'n, Welcome to the Judicial Commission of New South Wales, <http://www.judcom.nsw.gov.au/> (last visited Jan. 6, 2010) (noting that the Commission is tasked with assisting the courts to achieve consistency in sentencing in New South Wales).

290. Guideline judgments have been adopted in New South Wales and to a limited extent in South Australia. *See* Crimes (Sentencing Procedure) Act, 1999, pt. 3, div. 4 (N.S.W.); Criminal Law (Sentencing) Act, 1988, § 29A-2913 (S. Austl.). Victoria and Western Australia have also enacted legislation allowing for guideline judgments. *See* Sentencing Act, 1991, § 6AA (Vict.); Sentencing Act, 1995, § 143 (W. Austl.). However, Arie Freiberg and Peter Sallmann report that appellate courts in those states have regarded guideline judgments as unduly legalistic and contrary to the paradigm that sentencing is largely a matter of judicial discretion. Arie Freiberg & Peter Sallmann, *Courts of Appeal and Sentencing: Principles, Policy and Politics*, 26 L. IN CONTEXT 43, 56 (2008).

291. 543 U.S. 220, 245 (2005); *see supra* text accompanying notes 224-225.

292. Studies by the Judicial Commission of New South Wales confirm that the guideline judgments have been very effective in producing greater uniformity in sentencing. *See* Spigelman, *supra* note 288, at 18-19.

293. Freiberg & Sallmann, *supra* note 290, at 56.

of the individual case and the public interest in ensuring that a just penalty is imposed can be addressed, allays the appearance of arbitrariness that individualized sentencing might otherwise evoke. This also provides Australian appellate courts with an opportunity to impart authoritative guidance to sentencing judges.<sup>294</sup> However, others are skeptical of appellate courts' ability to fashion sentencing standards, noting that appellate decision making is ad hoc, confined by the facts of the case and the arguments proffered by the parties, and itself subject to disparate views of the members of the bench regarding the importance of conflicting sentencing purposes and factors.<sup>295</sup> Moreover, despite the adoption of sentencing guidelines by some jurisdictions, it seems that Australian appellate courts remain deferential to the sentencing of trial judges and are unlikely to intervene except in egregious cases.<sup>296</sup> Hence, while appellate review constitutes a potential forum for the development of sentencing policy, it may in fact be a weak mechanism for achieving coherence and consistency and therefore of itself cannot be characterized as a substantial explanation for the stark divergence in sentencing outcomes observed between Australia and the United States.

One important feature of the maintenance of judicial discretion in sentencing is that it preserves a significant role for mercy. Subjective aspects of the offender's personal life become far more important when sentencing is the legal and moral responsibility of a judge facing the defendant in the courtroom. This, of course, is in contrast to having an anonymous and attenuated legislature that is accountable to a community whose outlook (in the absence of knowledge of the offender's particulars and the circumstances of the offending) will largely be skewed toward retribution.<sup>297</sup> Not having judicial discretion in sentencing is likely to lead to harsher sentencing, because the focus of the sentencing judge is forced away from individualized considerations to more publicly oriented matters such as culpability, just desserts, and the protection of the community.<sup>298</sup>

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294. *Wong v. The Queen* (2001) 207 C.L.R. 584, 10.

295. Freiberg & Sallmann, *supra* note 290, at 49-50.

296. *See, e.g., Lowndes v. The Queen* (1999) 195 C.L.R. 665, para. 15. For an outsider's perspective on Australian appellate courts' approach to sentencing appeals, see Grant Hammond, *Sentencing: Intuitive Synthesis or Structured Discretion?*, N.Z. L. REV. 211, 216 (2007).

297. GELB, MORE MYTHS, *supra* note 263, at 4-5 (finding that in the abstract, public opinion was that sentencing was too lenient, but when provided with particular information about the crime, the offender, and the victim, the public becomes far less punitive).

298. *See, e.g.,* Matthew S. Crow & William Bales, *Sentencing Guidelines and Focal Concerns: The Effect of Sentencing Policy as a Practical Constraint on Sentencing Decisions*, 30 AM. J. CRIM. JUST. 285, 286 (2006) (finding that while the introduction of determinate sentencing reduced disparity in sentencing linked to nonlegal variables such as the race of the offender, it



Mandatory sentences are not only designed to produce greater uniformity in sentencing outcomes; they are primarily designed to restrict perceived judicial trivialization of offences, narrowing sentencing options and increasing punitiveness. Mandatory sentencing rarely offers much more than longer terms of imprisonment and is almost myopic in promoting retribution and specific deterrence to the exclusion of other sentencing aims, such as rehabilitation and general deterrence.<sup>299</sup> Customized, alternative forms of sentencing—for example, community service orders, compulsory medical treatment, reparation, restorative measures, home detention, and fines—seldom figure into mandatory sentencing regimes. On the other hand, the maintenance of judicial discretion in sentencing is more consistent with greater innovation in sentencing practice. The U.S. war on drugs is an example. Because of harsh sentences for drug offenders that, in some cases, rival sentences for serious violent crimes,<sup>300</sup> the courts and prisons have become overcrowded with drug users and low level drug distributors.<sup>301</sup> Yet, the market for drugs has flourished. Arguably, this has occurred because drug policies based upon public health and harm-reduction have been sidelined.

However, the above observations still beg the question as to why the Australian polity retains judicial discretion, along with the less punitive forms of sentencing it generates, and why policy makers in the United States are seriously questioning whether mandatory sentencing and the punitive regimes they generate are cost-effective.<sup>302</sup> Public opinion in Australia regarding sentencing is very similar to public opinion in the United States. Driven by sensational reporting in the media, the majority of the Australian public is under the impression that crime (especially

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significantly increased sentencing severity); Matthew S. Crow & Marc Gertz, *Sentencing Policy and Disparity: Guidelines and the Influence of Legal and Democratic Subcultures*, 36 J. CRIM. JUST. 362 (2008) (examining the effects of the reintroduction of judicial discretion and finding that nonlegal variables, such as gender and race, increased the likelihood of incarceration in a follow up study).

299. See generally Neil Hutton, *Institutional Mechanisms for Incorporating the Public*, in PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY 205 (Arie Freiberg & Karen Gelb eds., 2008).

300. See, e.g., U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2D1.1, 1.2 (2009).

301. See Fernando Henrique Cardoso et al., *The War on Drugs Is a Failure*, WALL ST. J., Feb. 23, 2009; see also DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE*, at xii (1996).

302. See, e.g., Eric Holder, U.S. Att'y. Gen., Address at the 2009 ABA Convention, available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090803.html>; PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf).

violent crime) is escalating even when it is stable or decreasing.<sup>303</sup> They also underestimate the harshness of existing sentencing practices and overestimate rates of recidivism.<sup>304</sup> The public has little faith in the courts or the legal system and believes that sentencing judges are out of touch with community values. These views are reinforced by governments quick to claim that their punitive sentencing policies are linked to falling crime rates. As a result, the rhetoric of crime and justice is just as central in partisan politics in Australia as it appears to be in the United States.<sup>305</sup>

Yet at the same time, mandatory sentencing regimes are not popular except for those covering a small range of violent crimes.<sup>306</sup> They have been condemned by Australia's Human Rights and Equal Opportunity Commission<sup>307</sup> and the Australian Law Reform Commission.<sup>308</sup> These regimes are lambasted as draconian when applied to low-level criminal activity,<sup>309</sup> regarded as racially discriminatory in operation,<sup>310</sup> and in the case of the Northern Territory government, which campaigned to maintain mandatory sentencing, a cause of electoral failure.<sup>311</sup> Australians prefer individualized sentencing in the hands of judges, even if they perceive that judges are generally too lenient.

Australian courts also recognize that "money spent on increasing imprisonment is not necessarily well spent (even in comparison with

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303. *Western Australia v. BLM* (2009) 256 A.L.R. 129, para. 20 (citing DON WEATHERBURN, N.S.W. BUREAU OF STATISTICS & CRIME RESEARCH, *PUBLIC PERCEPTIONS OF CRIME TRENDS IN NEW SOUTH WALES AND WESTERN AUSTRALIA* (2004)); GELB, *MORE MYTHS*, *supra* note 263.

304. *BLM* 256 A.L.R. 129, para. 20.

305. See Michael Tonry, *Parochialism in U.S. Sentencing Policy*, 45 *CRIME & DELINQ.* 48, 49 (1999).

306. See Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 *CRIM. JUST. & BEHAV.* 483, 495-99 (2003).

307. Austl. Human Rights Comm'n, *Mandatory Detention Laws in Australia: An Overview of Current Laws and Proposed Reform*, [http://www.hreoc.gov.au/HUMAN\\_RIGHTS/children/mandatory\\_briefing.html](http://www.hreoc.gov.au/HUMAN_RIGHTS/children/mandatory_briefing.html) (last visited Mar. 27, 2010) (finding that mandatory regimes were contrary to Australia's international obligations under the International Covenant on Civil and Political Rights, and when applied to juvenile offenders were contrary to the Convention on the Rights of the Child).

308. AUSTL. LAW REFORM COMM'N, *supra* note 285, at 540-42.

309. Draconian examples include a fifteen-year-old boy who hanged himself while imprisoned for twenty-eight days for stealing stationary and breaking a window and the sentencing of a twenty-one-year-old Aboriginal man for one year for stealing biscuits and cordial. See Shame 2000, Bored, Unemployed, Indigenous and in Jail: Mandatory Sentencing in Australia, <http://www.unolympics.com/humanrights/mandatory.shtml> (last visited Jan. 7, 2010).

310. AUSTL. SENATE LEGAL & CONSTITUTIONAL REFERENCES COMM., *INQUIRY INTO THE HUMAN RIGHTS (MANDATORY SENTENCING OF JUVENILE OFFENDERS) BILL 1999*, at 96 (2000).

311. LAW SOC'Y N. TERR., *THE DEMISE OF MANDATORY SENTENCING—A 5 YEAR SOCIAL EXPERIMENT 5* (2002), available at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/hra\\_mandset/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/hra_mandset/submissions/sublist.htm).

expenditure on rehabilitation, let alone in comparison with expenditure on matters such as policing or healthcare).”<sup>312</sup> In 2007—2008, Australian state governments spent \$2.6 billion on prisons compared with \$0.3 billion spent on community-based corrections.<sup>313</sup> However, Australian law reform agencies have found no scientific evidence supporting a causal link between increasing the severity of sentencing and reduced crime rates.<sup>314</sup> In fact, the rise of alternative restorative and therapeutic approaches in sentencing is consistent with a level of dissatisfaction with the efficacy of ever-increasing imprisonment rates and a search for a more judicious, evidence-based sentencing policy and practice.

## V. ALTERNATIVE SENTENCING

### A. *United States*

“After decades of supercharged incarceration rates, our bloated prison system is straining under its own weight, and policy makers are finally being forced to deal with the need to shrink it.”<sup>315</sup>

As noted earlier, the United States currently appears to have the highest reported incarceration rate in the world.<sup>316</sup> With the astronomical economic and social consequences of over-incarceration, pressure to resolve this problem has created a great demand for alternatives. For the first time in decades, a serious debate—fueled by tough economic realities and pushed by a small number of U.S. senators—is beginning to take place across the nation.<sup>317</sup> Alternatives to incarceration are sought.

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312. *Western Australia v. BLM* (2009) 526 A.L.R. 129, para. 20.

313. STEERING COMM., *supra* note 266, at 8.3.

314. *See, e.g.*, TAS. LAW REFORM INST., SENTENCING FINAL REPORT NO. 11, at 2.1.25–30 (2008).

315. Charles M. Blow, *Getting Smart on Crime*, N.Y. TIMES, Aug. 14, 2009, at A19. For a good overview of the developments here—focusing on the economic impetus—see Nicholas Riccardi, *Cash-Strapped States Revise Laws To Get Inmates Out*, L.A. TIMES, Sept. 5, 2009, available at [www.latimes.com/news/nationworld/nation/la-na-prison-release5-2009sep05,0,5705309.story](http://www.latimes.com/news/nationworld/nation/la-na-prison-release5-2009sep05,0,5705309.story).

316. *See supra* Part IV.

317. The chief proponent is Senator James Webb of Virginia, who has aggressively promoted a broad debate on the topic. *See* Jeff E. Schapiro, *Webb States Case for Prison Reform*, NEWS & ADVANCE (Va.), Apr. 16, 2009, [http://www.newsadvance.com/Ina/news/state\\_regional/article/webb\\_sates\\_case\\_for\\_prison\\_reform/15231](http://www.newsadvance.com/Ina/news/state_regional/article/webb_sates_case_for_prison_reform/15231); *Reviewing Criminal Justice*, *supra* note 226; Editorial, *Webb Takes on Politics’ Third Rail: Prison Reform*, NEWS & ADVANCE (Va.), Mar. 29, 2009, [http://www.newsadvance.com/Ina/news/opinion/editorials/article/webb\\_takes\\_on\\_politics\\_third\\_rail\\_prison\\_reform/14713/](http://www.newsadvance.com/Ina/news/opinion/editorials/article/webb_takes_on_politics_third_rail_prison_reform/14713/). Many states, however, have already instituted numerous changes in response to dire economic situations. *See* Keith B. Richburg, *States Seek Less Costly Substitutes for Prison*, WASH. POST, July 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/17/12/AR2009071202432.html> (“[M]ore than half the states and the District [of Columbia] are trying to reduce the growth in their prison populations through alternative sentencing and through new probation and parole procedures.”).

We focus *infra* Part V.A.1 on the development in the United States of one of the earliest, and most widespread, alternatives: the drug court. Other options clearly are present. Still, with an apparent consensus that the current state of incarceration in the United States is problematic, viewpoints significantly differ more in the United States than in Australia on what should be done to correct that problem. The drug courts, though, are widely heralded.<sup>318</sup>

### 1. Drug Courts

National and state drug policy, supporting longer sentences and mandatory minimums for drug offenders as a part of the “war on drugs,” created a huge influx of inmates:<sup>319</sup> 80% of adults incarcerated for felonies were arrested on drug offenses, were under the influence of drugs at the time of their offense, committed a crime to support a drug habit, and/or were regular drug or alcohol users at arrest.<sup>320</sup> Unfortunately, incarceration has proved to do little to solve the problem of substance abuse for offenders. Nearly 70% of drug abusing offenders are rearrested within three years following release, with 41% being rearrested on a drug offense in particular.<sup>321</sup> Increasingly, critics assert that substantial prison sentences represent the most expensive and least successful response to drug crimes with a cost that is incredibly high.<sup>322</sup> Due to the significant effect of drugs and substance abuse on the penal

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318. One important development occurring in recent years concerns pretrial diversion programs. This area is not included for discussion here, as it is an alternative to prosecution, rather than an alternative to traditional sentencing options. These programs “divert certain offenders from traditional criminal justice processing into a program of supervision and services.” U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL § 9-22.010, *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/22mcrim.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/22mcrim.htm) (last visited Jan. 7, 2010). For an interesting state program, see Georgia’s version, detailed in S. 412, 1999-2000 Sess. (Ga. 2000).

319. See Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 41-42 (2000) (discussing the “War on Drugs” policies and their impact on the criminal justice system).

320. Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 720 (2008).

321. *Id.* at 721.

322. *Id.* (“The U.S. government is now spending upwards of \$12.9 billion per year on illicit drug control, including police protection, the judiciary, corrections, and related costs. In 2003, alcohol and other drugs were responsible for roughly 628,000 emergency room visits in the United States. Moreover, the total impact on society of alcohol and other drug use is estimated to have cost the United States in excess of \$180 billion in 2002, a 5.34% increase over the prior decade. Using U.S. Census data, this figure represents a burden of \$642 for every resident of the country during 2002.” (footnotes omitted)).

system, it is no surprise that this area has become a focal point for creating options other than incarceration.<sup>323</sup>

Drug courts represent the most significant alternative to the incarceration problem specifically keyed to the needs of drug abusing offenders. The drug court is a nonadversarial, therapeutic adjudication alternative to the traditional criminal justice system. Instead of working in opposition to one another, the prosecutor, defense, and judge are asked to collaborate in addressing the specific needs of the offender in treatment. Typically, there are three paths to the drug court: (1) as a condition of an agreement for diversion of prosecution, (2) as a condition to a guilty plea, or (3) as a sentencing deferral for a verdict. Participation in the drug court treatment programs is not mandatory for drug violation defendants but is strongly encouraged, and breaking conditions of such programs usually results in the imposition of significant consequences.<sup>324</sup> Jurisdictions impose a variety of eligibility requirements for drug court programs, and such treatment programs last a year or more; treatment services are predominantly outpatient. Two key components that are characteristic of the more than 2000 U.S. drug courts are (1) the use of short jail terms for court participants who do not comply with the requirements of the program, and (2) frequent court appearances before the same judge to monitor treatment progress.<sup>325</sup>

The first drug court was established in Florida twenty years ago.<sup>326</sup> The federal government has contributed to the funding of these drug courts, further encouraging growth. The 2009 Omnibus Appropriations Act allocated \$40 million for funding of drug court programs and \$1.25 million for funding of the National Drug Court Institute.<sup>327</sup> Additionally, legislatures in forty-nine states have supported the growth of drug courts providing funding and statutory guidelines.<sup>328</sup> With this support, and the ever pressing need to find a fix for overcrowding in the penitentiary system, the drug court movement has accelerated rapidly.

The drug court movement has fueled strong support and vehement opposition on both ideological and practical levels. Supporters argue that

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323. For a good overview, see Richburg, *supra* note 317.

324. See Hora & Stalcup, *supra* note 320, at 746. The National Association of Drug Court Professionals (NADCP) publishes an excellent set of materials describing the process. See generally Nat'l Drug Court Inst., Publications, <http://www.ndci.org/publications> (last visited Jan. 7, 2010) (linking to NADCP publications).

325. See Hora & Stalcup, *supra* note 320, at 762-63.

326. *Id.* at 766.

327. H.R. 1105, 111th Cong. (2009), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1105enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1105enr.txt.pdf).

328. See Hora & Stalcup, *supra* note 320, at 766.

drug courts are ideologically a more rational, effective, and ethical way to deal with drug addicted offenders, by providing treatment for the recognized disease of addiction.<sup>329</sup> On a practical level, supporters claim that drug courts reduce recidivism, lower costs associated with incarceration, and address the root problem of substance abuse behind drug crimes.<sup>330</sup> In terms of repeat offenders, some evidence indicates that drug court treatment programs successfully lower recidivism rates.<sup>331</sup> The National Association of Drug Court Professionals is an especially effective supporter. Its views are striking:

FACT: Nationwide, for every \$1.00 invested in Drug Court, taxpayers save as much as \$3.36 in avoided criminal justice costs alone.

FACT: When considering other cost offsets such as savings from reduced victimization and healthcare service utilization, studies have shown benefits range up to \$12 for every \$1 invested.

FACT: Drug Courts produce cost savings ranging from \$4,000 to \$12,000 per client. These cost savings reflect reduced prison costs, reduced revolving-door arrests and trials, and reduced victimization.

FACT: In 2007, for every Federal dollar invested in Drug Court, \$9.00 was leveraged in state funding.

....

FACT: For methamphetamine-addicted people, Drug Courts increase treatment program graduation rates by nearly 80%.

FACT: When compared to eight other programs, Drug Courts quadrupled the length of abstinence from methamphetamine.

FACT: Drug Courts reduce methamphetamine use by more than 50% compared to outpatient treatment alone.<sup>332</sup>

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329. *See, e.g., id.* at 745-46.

330. *See id.* at 791.

331. *Id.*; *see also* Douglas B. Marlowe et al., *A Sober Assessment of Drug Courts*, 16 FED. SENT'G REP. 153, 154 (2003) (stating that in surveying fifteen unpublished studies on drug court statistics, drug court participants were found to have lowered rates of criminal recidivism, drug use, and unemployment than those with prison time, intermediate sanctions, or probation, and these rates were reduced by 20 to 30% for participants during the program, and 10 to 20% following conclusion of treatment).

332. Nat'l Ass'n of Drug Court Policy (NADCP), *Drug Courts Work*, <http://www.nadcp.org/learn/drug-courts-work> (last visited Jan. 7, 2010); *see also* Nat'l Drug Court Inst., *Court Facts*, [http://www.ndci.org/courtfacts\\_benefits.html](http://www.ndci.org/courtfacts_benefits.html) (last visited Jan. 7, 2010). Other commentators are more restrained:

The not-so-simple fact is that drug courts are neither successful nor unsuccessful. They "work" for some clients under some circumstances but are ineffective or contraindicated for others. They can be administered poorly and inefficiently and, unfortunately, we do not know enough to identify specific errors in implementation.

If drug courts were required to undergo the same type of approval process as new medications, they would probably be labeled as "experimental" and might not be

Despite some documented advantages over incarceration, drug court opponents question the validity and methods of studies indicating that drug courts have a statistically significant reduction in recidivism.<sup>333</sup> Even if the reduced recidivism rates are accurate, some critics of drug courts argue that while treatment of offenders in the program may have higher rates of success, the programs actually trigger “massive net-widening” by including offenders who would not otherwise be incarcerated.<sup>334</sup> They also attack the courts on rights-based and ideological grounds. One of the most common criticisms here is that the collaborative drug court system erodes the adversarial system, impacting the rights of defendants and weakening the ability of defense counsel to ethically represent defendants.<sup>335</sup>

Other prominent rights-based and ideological attacks of drug courts are focused on the coercive nature of the court, and the impact of faith-based organizations in treatment of offenders. Opponents of drug courts contend that offenders are not provided with any real option of accepting treatment when the only alternative is incarceration.<sup>336</sup> Still, such critiques have not at all slowed the growth rate of, and enthusiasm for, the drug court option.

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approved for specific uses. This is because we do not yet understand their mechanism of action, do not know their contraindications, and do not know their appropriate dosage. On the other hand, to take the analogy a step further, there is ample scientific support for drug courts to warrant further research on them, and to make them available to desperate clients who have not responded favorably to currently available treatments.

Marlowe, *supra* note 331, at 156. *But see* ROBERT BARNOSKI & STEVE AOS, WASH. STATE INST. FOR PUB. POLICY, WASHINGTON STATE’S DRUG COURTS FOR ADULT DEFENDANTS: OUTCOME EVALUATION AND COST-BENEFIT ANALYSIS 1 (Mar. 2003), *available at* <http://www.wsipp.wa.gov/rptfiles/drugcourtMar2003.pdf> (“[D]rug courts generate \$1.74 in benefits for each dollar of costs. Thus, adult drug courts appear to be cost-effective . . .”). The latest research appears to bear out many of the pro-court claims. In the Supreme Court of Virginia’s Program Evaluation of Virginia’s Drug Treatment Courts, the authors found that the rearrest rate for drug court participants was significantly lower than for nonparticipants. SUPREME COURT OF VA., PROGRAM EVALUATION OF VIRGINIA’S DRUG TREATMENT COURTS 2008 REPORT 43-44 (2009). And, that was not the only positive result found in the state’s twenty-nine drug courts. Other evidence of progress is shown as to “improved employment, education, and health gains.” *Id.* at 2.

333. *See* Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENT’G REP. 172, 172 (2001).

334. *See id.* at 174. This complaint is, as we shall see, also heard in Australia.

335. *Id.* at 175; *see also* Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 3 (2006); Quinn, *supra* note 319, at 74.

336. Hora & Stalcup, *supra* note 320, at 750.

## 2. Other Alternative Courts

Additional therapeutic jurisprudence specialty courts are spreading around the United States, following the drug court framework. Over 2500 such problem-solving courts, in more than a dozen different substantive areas, can be found across the nation.<sup>337</sup> These include: mental health courts,<sup>338</sup> domestic violence courts,<sup>339</sup> community courts,<sup>340</sup> homeless courts,<sup>341</sup> criminal mediation projects,<sup>342</sup> prisoner reentry courts,<sup>343</sup> veteran's criminal courts,<sup>344</sup> DUI/DWI courts,<sup>345</sup> and college student restorative justice courts.<sup>346</sup>

Some in the United States also argue forcefully for alternatives that look to different sorts of punishment, such as shaming.<sup>347</sup> While, as we shall see, the Australians have been somewhat more willing to look to other approaches, the Americans have seemingly united—at least at this time—mainly on the drug court option as discussed above.

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337. John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 98 (2007) (citing C. West Huddleston III et al., *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States*, NAT'L DRUG CT. INST. REV., May 2005, at 10-14). For a good overview of such courts, see PAUL HIGGINS & MICHELL B. MACKINEM, *PROBLEM SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?* (2009).

338. See generally LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255 (2001); Andrea M. Odegaard, Note, *Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System*, 83 N.D. L. REV. 225, 245 (2007); Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507 (2005).

339. See Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. CENTER FOR FAM. CHILD. & CTS. 23, 23-24 (2000).

340. See Meekins, *supra* note 335, at 24.

341. *Id.* at 26. First created in San Diego, California, in 1989, the homeless court was formed as a means of clearing warrants existing for homeless people already involved in shelter treatment programs. *Id.* Program advocates broker plea agreements in exchange for the accused being sentenced to continue the treatment program. *Id.*

342. Birgit Larsson, *Mediation in Criminal Matters Project Flourishes in Kings County, New York*, A.B.A. CRIM. JUST. SEC. NEWSL. (A.B.A. Criminal Justice Section, Wash., D.C.), Spring 2009, at 4.

343. *Id.*

344. See Nicholas Riccardi, *Courts Give Wayward Veterans a Chance*, L.A. TIMES, Mar. 10, 2009, [http://articles.latimes.com/2009/Mar/10/nation/na\\_veterans\\_court10](http://articles.latimes.com/2009/Mar/10/nation/na_veterans_court10).

345. Victor E. Flango, Nat'l Ctr. for State Courts, *DWI Courts: The Newest Problem-Solving Courts*, in FUTURE TRENDS IN STATE COURTS 84, 84 (Carol R. Flango et al. eds., 2004), available at [http://www.ncsconline.org/WC/Publications/KIS\\_CtFutu\\_Trends04.pdf](http://www.ncsconline.org/WC/Publications/KIS_CtFutu_Trends04.pdf).

346. See Sara Lipka, *With 'Restorative Justice,' Colleges Strive To Educate Student Offenders*, CHRON. HIGHER EDUC., Apr. 17, 2009, at A26, available at <http://chronicle.com/article/With-Restorative-Justice-130551>.

347. Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2162-63 (2001).



## B. Australia

### 1. Introduction

Heavily influenced by innovations in sentencing practices in the United States, Australian courts have also been involved in a wave of experimentation over the last ten years as incarceration rates and expenses have increased along with community expectations for a more responsive and cost-effective criminal justice system. As in the United States, specialty courts have developed with the aim of diverting offenders from jail and delivering more therapeutic or restorative justice that is oriented to resolving the problems underlying criminal behavior. In Australia, however, it is not only the drug court that has gained widespread approval.

### 2. Australian Drug Courts

As noted earlier, drug courts in the United States have arisen as a reaction to the severity of the war on drugs. Australian drug courts, in contrast, emerged unaccompanied by harsh mandatory minimum sentences for drug possession and use. Nonetheless, the impetus for the establishment of drug courts in Australia was similar, driven by community concern over increasing rates of property and violent crime and their perceived link with drug trafficking and drug use.<sup>348</sup> However, unlike the United States, where the legislature's response to community apprehension was to impose draconian penalties, the Australian response reflected the realization that imprisonment was an ineffective instrument to address drug related offending.<sup>349</sup> Drug courts appealed because they adopted a therapeutic approach to the problem of drug dependency, required offenders to take personal responsibility for their offending and rehabilitation, and appeared to reduce drug related crime at a much lower cost than imprisonment.<sup>350</sup>

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348. JOY WUNDERSITZ, AUSTL. INST. OF CRIMINOLOGY, CRIMINAL JUSTICE RESPONSES TO DRUG AND DRUG-RELATED OFFENDING: ARE THEY WORKING? 2 (2007).

349. See David Indermaur & Lynne Roberts, *Drug Courts in Australia: The First Generation*, 15 CURRENT ISSUES IN CRIM. JUST. 136, 137 (2003) [hereinafter Indermaur & Roberts, *Drug Courts*]; Lynne Roberts & David Indermaur, *Timely Intervention or Trapping Minnows? The Potential for a Range of Net-Widening Effects in Australian Drug Diversion Initiatives*, 13 PSYCHIATRY, PSYCHOL. & L. 220, 220 (2006) [hereinafter Roberts & Indermaur, *Timely Intervention*].

350. Indermaur & Roberts, *Drug Courts*, *supra* note 349, at 137; see also Melissa Bull, *A Comparative Review of Best Practice Guidelines for the Diversion of Drug Related Offenders*, 16 INT'L J. DRUG POL'Y 223, 223 (2005); Frances O'Callaghan et al., *Drug and Crime Cycle: Evaluating Traditional Methods Versus Diversion Strategies for Drug-Related Offences*, 39 AUSTL. PSYCHOLOGIST 188, 190-91 (2004).

Whereas drug courts in the United States were developed principally at the grass roots level, in Australia a nationally coordinated approach was adopted, underpinned by significant fiscal support. Between 1999 and 2008, the federal government devoted AUS\$340 million to drug diversion programs supplemented by substantial state-based funding of drug courts.<sup>351</sup> The injection of funding, together with the development of a national framework known as the Illicit Drug Diversion Initiative (IDDI), agreed to by all Australian state governments, facilitated the rapid rollout of a range of drug diversion programs across Australian jurisdictions.<sup>352</sup> Although Australian drug courts were also largely local initiatives, they sit within and receive considerable support from the national strategy. They operate across the criminal process and health services spectrum at the prearrest, postarrest, presentencing, postsentencing, and prerelease stages involving police, corrections workers, government departments, government service providers, health practitioners, and social workers working in conjunction with the judiciary.<sup>353</sup> New South Wales established the first drug court in 1999,<sup>354</sup> and by 2006 there were thirty-two IDDI-funded diversion police and court programs, operating in each Australian state and territory.<sup>355</sup> There are also approximately twenty-one non-IDDI funded programs.<sup>356</sup>

In a number of jurisdictions, the practices of the drug courts are codified by legislation. This is in contrast with the United States, where practices of drug courts are generally unconstrained by regulation. For example, the Drug Court Act, 1998 (N.S.W.), determines the eligibility of offenders for diversion to the drug court; empowers the court to commit the offender to a period of detention for the purpose of detoxification, assessment, and treatment; gives the court authority to impose compulsory treatment orders and other conditions of participation in the program; lays down procedures for noncompliance;

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351. Wundersitz, *supra* note 348, at 2.

352. Bull, *supra* note 350, at 223.

353. Catherine Spooner et al., *An Overview of Diversion Strategies for Australian Drug-Related Offenders*, 20 DRUG & ALCOHOL REV. 281, 281-82 (2001).

354. Ruth Lawrence & Karen Freeman, *Design and Implementation of Australia's First Drug Court*, 35 AUSTL. & N.Z. J. OF CRIMINOLOGY 63, 63 (2002).

355. AUSTL. INST. OF HEALTH & WELFARE, THE EFFECTIVENESS OF THE ILLICIT DRUG DIVERSION INITIATIVE IN RURAL AND REMOTE AUSTRALIA 44 (2008), *available at* <http://www.aihw.gov.au/publications/index.cfm/title/10496>.

356. CAITLIN HUGHES & ALLISON RITTER, AUSTL. NAT'L DRUG & ALCOHOL RESEARCH CTR., A SUMMARY OF DIVERSION PROGRAMS FOR DRUG AND DRUG-RELATED OFFENDERS IN AUSTRALIA 11 (2008), *available at* [http://www.dpmp.unsw.edu.au/DPMPWeb.nsf/resources/Monograph+16.pdf/\\$file/Mono+16.pdf](http://www.dpmp.unsw.edu.au/DPMPWeb.nsf/resources/Monograph+16.pdf/$file/Mono+16.pdf).

and also regulates the Drug Court's procedure.<sup>357</sup> Other similar state-based legislation includes: (1) Drug Rehabilitation (Court Diversion) Act, 2000 (Queensl.); (2) Sentencing Act, 1991, sections 18Q-18ZS (Vict.); (3) Sentencing Act, 1995, sections 33A-33Q (W. Austl.); and (4) Sentencing Act, 1997, sections 27A-27Y (Tas.). The legislation in each jurisdiction operates to target defendants with substance abuse problems who are brought before the courts on a wide range of matters. It then diverts them to a specialized court or requires the offenders to undertake a form of coerced treatment for their substance abuse problem over a substantial period of time (on average about three to four months' duration), subject to ongoing monitoring and review.<sup>358</sup> The majority of the programs operate at the pre-sentence stage, although the Queensland legislation also refers to postsentence options.<sup>359</sup> Defendants charged with sex offences or offences of serious violence are excluded from the drug diversion programs.<sup>360</sup> If the defendants successfully complete the program it may lead to the withdrawal of charges against them, but typically program participation results in a reduced sentence.<sup>361</sup>

There is some concern that Australia's formalization of drug diversion may counterintuitively widen the net of individuals subject to the criminal justice process.<sup>362</sup> While previously lower-level offending, such as the possession of small amounts of drugs, may have attracted little or no intervention, once an intervention program is formalized it has been suggested that a greater number of individuals will therefore be corralled into the criminal justice system.<sup>363</sup> For example, South Australia introduced expiation notices for cannabis possession instead of criminal prosecution, which could result in a potential sentence of imprisonment.<sup>364</sup> Expiation notices then increased three-fold, as did the number of individuals with a criminal conviction for possession of cannabis because the police found the expiation notices easier to administer.<sup>365</sup> Once caught by the criminal justice system, individuals charged with drug offences may have a strong incentive to plead guilty to

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357. See Drug Court Act, 1998 (N.S.W.).

358. Katie Willis & Jennifer Ahmad, *Intermediate Court-Based Diversion in Australia*, CRIM. JUST. BULL., Apr. 2009, at 1, 4, available at [http://ncpic.org.au/assets/downloads/ncpic/publications/aic\\_bulletins/intermediate-court-based-diversion-in-australia.pdf](http://ncpic.org.au/assets/downloads/ncpic/publications/aic_bulletins/intermediate-court-based-diversion-in-australia.pdf).

359. *Id.*

360. *Id.* at 3.

361. *Id.* at 4.

362. See Roberts & Indermaur, *Timely Intervention*, *supra* note 349, at 220; O'Callaghan et al., *supra* note 350, at 192.

363. See O'Callaghan et al., *supra* note 350, at 192.

364. Roberts & Indermaur, *Timely Intervention*, *supra* note 349, at 226.

365. *Id.*

qualify for the diversion program and therefore avoid the possibility of a long term of imprisonment. As a result, the programs may attract infrequent drug users instead of the seriously addicted that the programs were intended to assist, although evidence that Australian drug courts are clogged with recreational drug users is scant.

There have been a series of evaluations undertaken of Australian drug court regimes,<sup>366</sup> but many are compromised because of a lack of comparison groups, small sample sizes, and short term follow up. As a result of high attrition rates, all suffer from reporting bias. Bearing these caveats in mind, the research has found that the diversion programs reduce drug use and criminal behavior and improve offenders' health and well-being. In terms of costs incurred, drug courts are not necessarily cheaper than conventional criminal justice processes, especially where participation in the diversion program requires the offender to undergo custodial assessment and treatment.<sup>367</sup> However, when reoffending is factored in, drug courts are much more cost-effective than incarceration.<sup>368</sup> A study conducted by the Western Australia Attorney General's department has estimated cost savings of \$67,345 per drug court client.<sup>369</sup>

Notwithstanding the demonstrated benefits of a nationally coordinated and well funded strategy, there is evidence that barriers to access have undermined the program's success, particularly among indigenous Australians. Although the Australian government has committed itself to closing the gap between indigenous and nonindigenous Australians,<sup>370</sup> on all social and economic indicators, indigenous Australians are severely disadvantaged.<sup>371</sup> As noted earlier in this Article, incarceration rates are approximately thirteen times higher in the indigenous population. At the same time, substance abuse among indigenous offenders is alarmingly high. Over 68% of indigenous detainees in police custody test positive to a range of drugs, and there are

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366. Most of these are summarized in Wundersitz, *supra* note 348, at 2. See also HUGHES & RITTER, *supra* note 356, at 2; Don Weatherburn et al., *The NSW Drug Court: A Re-Evaluation of Its Effectiveness*, CONTEMP. ISSUES IN CRIME & JUST., Sept. 2008, at 1, 4; Marian Shanahan et al., *Cost-Effectiveness Analysis of the New South Wales Adult Drug Court Program*, 28 EVALUATION REV. 3, 4 (2004).

367. Wundersitz, *supra* note 348, at 110.

368. *Id.*

369. DEP'T OF THE ATT'Y GEN., GOV'T OF W. AUSTL., A REVIEW OF THE PERTH DRUG COURT 32 (2006), available at [http://www.courts.dotag.wa.gov.au/=files/Drug\\_court\\_review\\_2006.pdf](http://www.courts.dotag.wa.gov.au/=files/Drug_court_review_2006.pdf).

370. See Soc. Inclusion, Closing the Gap for Indigenous Australians, <http://www.socialinclusion.gov.au/Initiatives/Pages/closingthegap.aspx> (last visited Jan. 8, 2010).

371. STEERING COMM. FOR THE REVIEW OF GOV'T SERV. PROVISION, PRODUCTIVITY COMM'N, OVERCOMING INDIGENOUS DISADVANTAGE: KEY INDICATORS 2009, available at [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0003/90129/key-indicators-2009.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0003/90129/key-indicators-2009.pdf) (last visited Mar. 27, 2010) [hereinafter STEERING COMM.].

indications that alcohol abuse is associated with up to 90% of indigenous contacts with the criminal justice system.<sup>372</sup> Many indigenous offenders also suffer from a coexisting mental illness.<sup>373</sup> Diversion of indigenous offenders with substance abuse problems to assessment, education, and treatment would clearly be of great benefit to the offenders, their families, and their communities. Unfortunately, the IDDI framework excludes offenders who commit violent offences or those whose primary drug problem is an alcohol problem.<sup>374</sup> The requirement that the offenders admit their guilt also operates as a barrier, since many indigenous people are reluctant to engage with the police or the criminal justice system.<sup>375</sup> Insofar as the indigenous population is concerned, obviously current sentencing policy and practice is failing. Eligibility criteria need to be changed, tailored indigenous health services need to be incorporated into the drug diversion programs, and the treatments they offer need to be made more inclusive of indigenous communities and indigenous culture.<sup>376</sup>

### 3. Indigenous Courts

The establishment of indigenous sentencing courts in some Australian jurisdictions has been another method to address overrepresentation of indigenous offenders in the criminal justice system.<sup>377</sup> Consistent with the philosophy of equality before the law, the indigenous courts apply the same sentencing principles to indigenous persons that would apply to nonindigenous persons.<sup>378</sup> However, the indigenous courts adopt procedures that aim to make criminal justice processes more culturally appropriate, to establish better communication and trust between the indigenous community and the judiciary, and to facilitate better understanding of offenders' life stories and situations through a process of exchange informed by senior members of the indigenous

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372. NAT'L INDIGENOUS DRUG & ALCOHOL COMM., AUSTL. NAT'L COUNCIL ON DRUGS, BRIDGES AND BARRIERS: ADDRESSING INDIGENOUS INCARCERATION AND HEALTH 5-6 (2008), [http://www.nidac.org.au/publications/pdf/nidac\\_bridges\\_and\\_barriers.pdf](http://www.nidac.org.au/publications/pdf/nidac_bridges_and_barriers.pdf).

373. *Id.* at 7.

374. *Id.* at 11.

375. *Id.* at 7.

376. *See id.* at 11-12.

377. MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE 178 (2009); EDNEY & BAGARIC, *supra* note 283, at 8.10; Elena Marchetti & Kathleen Daly, *Indigenous Courts and Justice Practices in Australia*, TRENDS AND ISSUES IN CRIME & CRIM. JUST., May 2004, at 1, 1; Elena Marchetti & Kathleen Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, 29 SYDNEY L. REV. 415, 422 (2007) [hereinafter Marchetti & Daly, *Indigenous Sentencing Court*].

378. Marchetti & Daly, *Indigenous Sentencing Court*, *supra* note 377, at 420.

community.<sup>379</sup> While the courts incorporate elements of therapeutic and restorative justice, they have been characterized as *sui generis* because their hallmark is involvement of the local indigenous community.<sup>380</sup>

The first indigenous court was established at Port Adelaide in South Australia in 1999.<sup>381</sup> There are now indigenous courts operating in each Australian jurisdiction except Tasmania.<sup>382</sup> Some are governed by specific legislation or regulation, for example, Criminal Procedure Regulation, Part 5 (N.S.W.); Penalties and Sentences Act, 1992, § 195B (Queensl.); and Magistrates' Court (Koori Court) Act, 2002 (Vict.), while others have developed indigenous sentencing practices within existing sentencing law.<sup>383</sup>

Like the drug courts, evaluation of Australian indigenous courts is generally positive.<sup>384</sup> Indigenous courts have assisted offenders to take more responsibility for their offending and increased their awareness of the impact of their offending on victims and among the community. Unfortunately, however, because of the collaborative nature of the processes adopted by indigenous courts, like the IDDI framework, eligibility criteria exclude violent and sexual offenders, and so access to more culturally appropriate treatment is limited for many indigenous offenders. Consequently, the impact of indigenous courts upon reoffending has been mixed, with one study finding that direct involvement of the indigenous community in sentencing made no difference to indigenous recidivism absent other interventions such as drug treatment, cognitive behavioral therapy, or remedial education.<sup>385</sup>

## VI. ANALYSIS AND CONCLUSION

Our initial thesis is that the divergence between the criminal justice systems of the United States and Australia can be explained as a difference between a rights-oriented culture and an official-centric culture. This notion can be easily applied to double jeopardy, as protection from double jeopardy clearly sits under the mantle of due

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379. *Id.*

380. *Id.*

381. *Id.* at 417-18 tbl.1.

382. *Id.*

383. *Id.*

384. Bridget McAsey, *A Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court*, 10 DEAKIN L. REV. 654, 657 (2005); see also Ivan Potas et al., *Circle Sentencing in New South Wales: A Review and Evaluation*, 8 AUSTL. INDIGENOUS L. REP. 73, 80 (2004); NATALIE PARKER & MARK PATHE, QUEENSL. DEP'T OF JUSTICE & ATT'Y GEN., REPORT ON THE REVIEW OF THE MURRI COURT 4 (2006).

385. Jacqueline Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?*, CONTEMP. ISSUES IN CRIME & JUST., May 2008, at 1, 6-7.

process<sup>386</sup> and, at an international level, comprises a long-established and commonly recognized civil right.<sup>387</sup> In the United States, where the protection of the individual from an overbearing government is embedded within both popular and legal culture, protection from double jeopardy is an inviolable right that cannot be qualified or negated by legislation or government action.<sup>388</sup> Conversely, while at common law the Australian High Court has extended double jeopardy beyond the ancient doctrines of *autrefois acquit/convict* to embrace the broader concept of abuse of process,<sup>389</sup> this development has been effectively negated. We refer here to a number of Australian state jurisdictions implementing laws that allow the retrial of acquittals or the trial of further offences that call earlier acquittals into doubt when fresh and compelling evidence of guilt is adduced. These laws were enacted largely because Australians do not believe that rights should trump the conviction and punishment of the guilty.<sup>390</sup>

When applied to divergences between plea bargaining practice and, more importantly, completely distinct approaches to sentencing, our thesis requires further refinement. As noted above, charge bargaining in Australia is more limited than the plea bargaining that occurs in the United States. Although it occurs frequently, Australian charge bargaining is confined to negotiations over the number and seriousness of charges that will be prosecuted, and under nationally uniform guidelines that attempt to reflect the actual nature and extent of the defendant's criminality. Australian sentencing judges do not participate in, and are not bound by, agreements reached between defense counsel and prosecutors regarding any recommended sentence.<sup>391</sup> Given the comparatively limited nature of charge bargaining in Australia, it is therefore surprising that the major policy concern is the fear that negotiations between prosecution and defense will lead to unjustified horse trading, thus undermining the rule of law.<sup>392</sup> State-based Australian legislative attempts to rein in charge bargaining are not initiated to

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386. See U.S. CONST. amend. V.

387. See The International Covenant on Civil and Political Rights (ICCPR) art. 14, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

388. See, e.g., *Burks v. United States*, 437 U.S. 1 (1978).

389. See *The Queen v. Carroll* [2002] H.C.A. 55, paras. 32-33.

390. David Hamer, *The Expectation of Incorrect Acquittals and the "New and Compelling Evidence" Exception to Double Jeopardy*, 2 CRIM. L. REV. 63, 63 (2009).

391. See, e.g., *R v. Pugh* (2005) 158 A. Crim. R. 302, 339-45; *R v. Marshall* [1981] V.R. 725.

392. See *supra* text accompanying note 76; see also Asher Flynn, *Carl Williams: Secret Deals and Bargained Justice—The Underworld of Victoria's Plea Bargaining System*, 19 CURRENT ISSUES IN CRIM. JUST. 120, 120 (2007).

protect the rights of defendants. They are largely designed to ensure that defendants receive their just desserts.<sup>393</sup>

In the United States, where plea bargaining is less constrained, the concern is different. Here, critics look to the coercive impact that an offer made by an overzealous prosecutor may have upon hapless defendants otherwise faced with an extraordinarily harsh sentence.<sup>394</sup> The unease regarding coercive plea bargaining in the United States is closely allied to high levels of punitiveness within U.S. mandatory sentencing frameworks. One of the observed collateral effects of adopting tough mandatory sentencing regimes in the United States has been a significant increase in the exercise of prosecutorial discretion as to whether mandatory-sentencing-eligible charges will be pursued.<sup>395</sup>

As we discussed above, in Australia, the community is playing a greater role in sentencing and, as a result, sentences are becoming more punitive. Still, sentencing remains largely within the province of the trial judge's discretion, allowing individualized mercy to be exercised where appropriate. Unlike their U.S. counterparts, Australian judges are highly insulated from the consequences of sentencing decisions. Australian judges are appointed until retirement age, and cannot be removed except by way of an onerous parliamentary process.<sup>396</sup> Typically, gross moral turpitude rather than unpopular decision making must be established to force an Australian judge from the bench.<sup>397</sup> By contrast, at the lower and intermediate levels of the state judiciary, where most sentencing occurs in the United States, many judges are compelled to seek re-election to remain in office.<sup>398</sup> Studies confirm that sentences increase as judicial election/reelection nears, in response to the tendency of voters in U.S.

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393. See Miralis, *supra* note 87.

394. See generally Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349 (2004); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargain Reform*, 50 CRIM. L.Q. 67 (2005); Douglas A. Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949, 949 (1986).

395. See Jeffrey T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. IN CRIME & DELINQ. 427, 427-28 (2007). One study in Arizona has found that as a result of prosecutors' charging decisions, only 10% of eligible offenders actually receive the applicable mandatory minimum sentence, while at the federal level only 35 to 40% of eligible offenders receive the relevant mandatory sentence. JENNIFER E. WALSH, *THREE STRIKES LAWS* 62 (2007).

396. See Australia Constitution Act, 2003, § 72(ii); see also ENID CAMPBELL & H.P. LEE, *THE AUSTRALIAN JUDICIARY* 111 (2001).

397. CAMPBELL & LEE, *supra* note 396, at 111.

398. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 247 (2004).



judicial electorates to be more mindful of instances of underpunishment than overly harsh sentencing.<sup>399</sup>

As a result of mandatory sentencing regimes and sentencing guidelines, U.S. judges are less able to incorporate individualized mercy in their sentencing. These regimes were designed to ensure consistency in sentencing and thus supported the principle of equality before the law.<sup>400</sup> In a second wave of reform during the 1980s and 1990s, along with the enactment of such measures as “three-strikes laws,” the regimes became a vehicle to increase the use of imprisonment and the severity of prison sentences.<sup>401</sup>

The retention of judicial discretion in Australian sentencing and the concomitant disparity in sentencing that it produces has been criticized for undermining equality before the law.<sup>402</sup> Nevertheless, limited attempts to introduce mandatory sentencing have had to be withdrawn following community outcry over its harsh and discriminatory impact.<sup>403</sup> While the Australian public, like the U.S. public, believes that sentences are generally too lenient, they perceive mandatory sentencing as unjust<sup>404</sup> and contrary to the realization that criminal behavior is often associated with victimization of the offender,<sup>405</sup> disability,<sup>406</sup> or significant disadvantage.<sup>407</sup> The retention of judicial discretion enables the sentencing judge to take account of the offender’s personal situation and the circumstances of the offending, encourages guilty pleas to appropriate charges, and enables a creative and customized sentence more likely to incorporate therapeutic or restorative elements.

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399. *Id.* at 258.

400. *See supra* text accompanying notes 206-208.

401. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 9 (2001).

402. *See, e.g.*, EDNEY & BAGARIC, *supra* note 283.

403. AINSLIE LAMB & JOHN LITTRICH, *LAWYERS IN AUSTRALIA* 145 (2007); *see supra* text accompanying notes 306-311.

404. *See* Mark A. Nolan & Penelope J. Oakes, *Human Rights Concepts in Australian Political Debate*, in *PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS* 75, 83 (Tom Campbell et al. eds., 2003); *see also* Roberts, *supra* note 306, at 495.

405. *See, e.g.*, David Weisbrot, *Homicide Law Reform in New South Wales*, 6 *CRIM. L.J.* 248 (1982) (linking the abandonment of mandatory life sentences for murder in New South Wales with public concern over the punishment of victims of domestic abuse who killed their violent partners).

406. *See, e.g.*, Clyde A. Winters, *Learning Disabilities, Crime, Delinquency, and Special Education Placement*, 32 *ADOLESCENCE* 451 (1997); J.S. Kreutzer et al., *Interrelationships Between Crime, Substance Abuse, and Aggressive Behaviours Among Persons with Traumatic Brain Injury*, 9 *BRAIN INJURY* 757 (1995).

407. *See, e.g.*, Jeffrey Draine et al., *Role of Social Disadvantage in Crime, Joblessness, and Homelessness Among Persons with Serious Mental Illness*, 53 *PSYCHIATRIC SERVICES* 565 (2002).

The popularity of noncustodial forms of sentencing in Australia also demonstrates the realization that overdependence on custodial sentencing is not cost-effective. On the whole, Australian legislatures and governments are of the view that high levels of imprisonment lead to unnecessary public expenditure through increased trial rates and longer case processing,<sup>408</sup> and also place a significant financial strain on limited state budgets. Moreover, despite public “tough on crime” rhetoric as in the United States, they are also aware that harsh sentencing has a negligible impact on crime rates.<sup>409</sup> American policy makers are increasingly beginning to share these views as the cost and social impact of high levels of incarceration demonstrate that harsh mandatory sentencing regimes may not be sustainable, especially in tough economic times.

The greater degree of prosecutorial discretion and the imposition of mandatory minimum sentences in the United States may reflect distrust and disempowerment of the judiciary.<sup>410</sup> To that extent, the differences between the features of each criminal justice regime examined in this Article are consistent with the thesis that the Australian criminal justice system is more official-centric. By retaining their faith in the judiciary as best placed to exercise sentencing power (albeit while demanding greater participation in the sentencing process), Australians continue to exhibit the confidence in state-based institutions that we outlined in our earlier article. This does not involve eschewing rights-based jurisprudence focused upon the protection of the individual from an overbearing state. Still, it exhibits a continued belief in the need to preserve an independent judiciary free from executive constraint and shielded from populism.<sup>411</sup> By contrast, the limits placed on judicial sentencing discretion in the United States appears to reflect a penal policy aimed at capturing common public opinion and prioritizing it in sentence determination.<sup>412</sup>

However, the thesis should not be strained too far. There are other differentiating sociological and political factors in each jurisdiction that

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408. Cf. TONRY, *supra* note 261, at 160.

409. AUSTL. SENATE LEGAL & CONSTITUTIONAL REFERENCES COMM., INQUIRY INTO THE HUMAN RIGHTS (MANDATORY SENTENCING OF PROPERTY OFFENCES) BILL 298 (2000), *available at* [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/hra\\_mandsent/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/hra_mandsent/index.htm).

410. See Huber & Gordon, *supra* note 398, at 247; cf. Garland, *supra* note 401.

411. See Peter Sallmann, *Mandatory Sentencing: A Bird's Eye View*, 14 J. JUD. ADMIN. 177, 183 (2005).

412. See Katja Franco Aas, *The Ad and the Form: Punitiveness and Technological Culture*, in THE NEW PUNITIVENESS: TREND, THEORIES, PERSPECTIVES 150, 151-53 (John Pratt et al. eds., 2005).

also help explain the strong divergence in sentencing outcomes and, in particular, between rates of incarceration. U.S. and Australian literature on public attitudes to sentencing is remarkably similar, confirming that U.S. citizens are probably no more punitive in their attitudes than Australians.<sup>413</sup> Although communities in each jurisdiction want offenders to receive appropriate punishment, they also want to see them rehabilitated and are happy for state budgets to be expended upon noncustodial programs as long as public safety is not compromised. Nonetheless, arguably there is a greater fear of perceived pathological and dangerous criminality in the United States, which has elevated the protection of public safety to a more dominant position in penal policy than is apparent in Australia.<sup>414</sup>

In this Article, we have examined important aspects of the criminal justice systems in our nations apart from what we looked at in our earlier work. Once again, we continue to be struck by how the two nations approach problems from sharply different perspectives. We conclude, as in the earlier piece, that much—though not all—of that difference is traceable to the sense that Australian jurisprudence is official-centric while U.S. jurisprudence is rights-oriented.

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413. See GELB, MORE MYTHS, *supra* note 263, at 1; Julian V. Roberts, *American Attitudes About Punishment: Myth and Reality*, in SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 250 (Michael Tonry & Kathleen Hatlestad eds., 1997).

414. Loïc Wacquant, *The Great Penal Leap Backward: Incarceration in America from Nixon to Clinton*, in THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES, *supra* note 412, at 3, 11.