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I. Introduction

By *Elisa Hoven* and *Thomas Weigend*

Justice is an elusive ideal in many spheres of life, but to achieve justice in criminal law is perhaps the greatest challenge of all. It is difficult even to define what "justice" means in this context, given the various purposes of criminal punishment that have been proposed. Regardless of whether criminal punishment is to achieve retribution or crime prevention or both, we can say that punishment is "just" if it fulfills a number of conditions. First, punishment must be understood as a reaction to conduct defined as criminal because it is causing harm or an imminent risk for an important individual or social interest. Second, a person can be held responsible for such conduct if the harm or endangerment can be attributed to him, except when his conduct is justified because he is pursuing a more important legal interest. Third, punishment can be imposed on the actor only if he can be blamed for the conduct because he was able to recognize the legal prohibition and could be expected, in the given situation, to comply with the demands of the law. Finally, the sanction imposed should not be disproportionate to the seriousness of the violation. Beyond these general requirements, there are many areas in which criminal law must accommodate conflicting interests, for example between an aggressor and a defender, and between an offender's interest in being left alone after many years have passed since he committed the offense and the victim's – or society's – interest in pursuing retributory justice even decades later.

Our starting point in devising this volume was the hypothesis that similar concepts of justice in criminal law exist in most jurisdictions worldwide and that the conflicts of interest mentioned above are resolved in similar ways. We sought to test this proposition by positing a list of "hard cases" and presenting them to jurists from several jurisdictions, asking for their assessment. We did not ask our respondents for abstract statements; instead, we devised ten case vignettes which were meant to address key issues in criminal law. The Vignettes cover these themes:

(1) Trolley Problem – Killing one Person to Save Many

(2) Attribution of Death

(3) Torture to Save a Life

(4) Lethal Self-Defense

(5) Criminal Responsibility of Subordinates for Systemic Offenses

(6) Limits of Consent

(7) Withdrawal from an Attempt

(8) Criminal Responsibility of Minors

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(9) Statute of Limitations

(10) Life Imprisonment without Parole

26 experts from 16 countries, spread out all over the globe, have written national reports, explaining how the domestic laws of their jurisdictions, as interpreted by courts and scholars, would resolve each of the ten cases represented in the vignettes. Some of these scholars kindly agreed to write a synopsis on one of the ten case Vignettes, reviewing the relevant parts of the various national reports, describing similarities and differences between national perspectives, and drawing conclusions from comparing them.

In the summer of 2024, all participants in the project came together in a day-long online conference, discussing the draft synopses and trying to draw some general conclusions from the rich information and thought-provoking ideas that can be found in the various contributions. The broad range of ideas that were put forward during the conference went into the Concluding Observations which can be found in the final part of this publication. Our findings suggest that general ideas of justice in criminal law are indeed shared across legal systems, but that they do not necessarily lead to the same outcomes when applied to specific cases. Similarities appear more in the way judges, lawyers and scholars argue than in the results at which they arrive. This holds true even where systems are considered to belong to the same "legal family". Globalization may well have promoted some assimilation of people's sense of justice; but criminal law – more than other areas of the legal system – reflects basic value judgments of each society, hence national criminal laws and their interpretation can be expected to differ significantly from each other.

Apart from these general observations, the very process of collecting and comparing solutions to "hard cases" from 16 different jurisdictions has turned out to be a great intellectual pleasure and has greatly enriched our understanding of criminal law, given the large scope of possible approaches to justice as a response to crime. We hope that you, as readers of this volume, share our feeling of opening a treasure trove of new ideas.

We owe all this to the fantastic cooperation of the rapporteurs from the various jurisdictions and, to an even greater extent, to the analytical skills of the authors of the ten Synopses. We are most grateful to these wonderful colleagues. We also owe great thanks to Ms. Vanessa Kempe of the University of Leipzig, who has most ably assisted in the process of editing the contributions to this volume and has brought her intelligence, her attention to detail, and her patience to bear to make the product perfect.

Leipzig and Cologne, June 2025 *Elisa Hoven*
Thomas Weigend

II. National Reports

1. Australia

By *Andrew Dyer**, *Michael Peng***, *Thomas Crofts**** and *Arlie Loughnan*****

Vignette 1: Trolley Problem – Killing one Person to Save Many

> Five young children are playing on railway tracks. An express train is approaching, and it is too late to stop the train before it hits the children, probably killing them. Operator D recognizes the emergency situation. He electronically flips a switch and thus deflects the train from its regular track to a little-used sidetrack. However, the lone repairman V is busy on the sidetrack, and the deflected train kills V, as D had anticipated. Is D criminally responsible for murder of V?

In the largest Australian jurisdiction, New South Wales ("NSW"), it is unclear whether D would be held criminally responsible for the murder of V. All would depend on whether he could successfully raise the "shadowy, uncertain"[1] common law "defence"[2] of necessity, which is "often treated as though it were only a justification but sometimes [is] also recognised as an excuse"[3] – and which, relatedly, has some-

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1 *The King v Anna Rowan – A Pseudonym* (2024) 98 ALJR 508, 525 [86] (Edelman J) ("*Anna Rowan*").

2 We place this term within inverted commas because Australian courts have repeatedly made it clear that, where, as with necessity (*Rogers v The Queen* (1996) 86 A Crim R 542, 550), the ultimate onus lies on the Crown to disprove a ground of exculpation, it is inaccurate to describe that matter as a defence. See, e. g., *R v Youssef* (1990) 50 A Crim R 1, 2 – 4 (Hunt J, with whom Wood J agreed at 12 and Finlay agreed at 12); *CTM v The Queen* (2008) 236 CLR 440, 446 [6] (Gleeson CJ, Gummow, Crennan and Kiefel JJ); *R v Dziduch* (1990) 47 A Crim R 378, 380 – 1 (Hunt J, with whom Enderby J agreed at 384 and Sharpe J agreed at 384). In the last of these authorities, Hunt J noted that "it is very unwise ever to refer to the issue of self-defence as a 'defence', unless it is only to point out that it is not really a defence at all": at 380.

3 *Anna Rowan* (2024) 98 ALJR 508, 525 [86] (Edelman J).

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