

THE IRRELEVANCE TO SENTENCING OF (MOST) INCIDENTAL HARDSHIPS SUFFERED BY OFFENDERS

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I INTRODUCTION

Criminal offenders often experience hardships beyond the imposition of a court-imposed sanction. These hardships typically take a variety of forms, but can be grouped into a number of relatively well-established categories, including loss of employment, public opprobrium and injuries sustained during or around the time of the commission of the crime. Other examples are deportation from Australia and the imposition of traditional forms of punishment.¹ Collectively, these harms are termed incidental hardships or extra-curial punishment.² Formally, extra-curial punishment is defined as a ‘loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for his [or her] offence or at least by reason of the offender having committed the offence’.³

Despite the fact that it is not uncommon for offenders to experience one or more of these forms of deprivations, the law in this area is unsettled. There is no consistent or orthodox approach to the relevance of incidental hardships to the sentencing calculus. The uncertainty in this area is exacerbated by the fact that this is an under-researched area of law and the courts have not sought to develop an overarching theory regarding the impact that extra-curial hardships should have in the sentencing realm. To the (limited) extent that the issue has been subject to academic analysis, no firm answers have been posited. This, at least to some extent, stems from the complexities of the issue and the vagaries of sentencing law in general.

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1 The impact that punishment may have on an offender’s dependants is not normally categorised as an incidental form of punishment. For a consideration of this issue, see Mirko Bagaric and Theo Alexander, ‘First-Time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing’ (2015) 78 *Albany Law Review* 397.

2 The terms are used interchangeably in this article.

3 *Silvano v The Queen* (2008) 184 A Crim R 593, 598 [29] (James J). See also Mark David Chong, Jamie Fellows and Frank Richards, ‘Sentencing the “Victimised Criminal”’: Delineating the Uncertain Scope of Mitigatory Extra-curial Punishment’ (2013) 35 *Sydney Law Review* 379, 381–2.

The relevance of extra-curial punishments has been considered by Chong, Fellows and Richards recently.⁴ The authors use as their guiding determinant in this article the notion of ‘common sense’. The authors conclude that

[t]he rules regarding extra-curial punishment and the manner in which they are applied comprise an area that deserves greater study because of the continuing complexity and ambiguity surrounding both the definitional parameters of extra-judicial sanctions, and the way in which the courts have applied these rules in a flexible, and sometimes improvised, fashion.⁵

The authors do not make clear or wide-ranging reform proposals. Moreover, in our view, notions of common sense cannot provide clarity to this issue. In order for a rule-based system to operate as law, minimal operative standards must be declared in advance with sufficient meaning and precision to guide conduct and lead to predictable results. These rules need to be developed against the backdrop of overarching objective principles and policies.⁶ In this article, we attempt to provide concrete answers to the proper role of extra-curial hardships in sentencing, by examining the issue from the perspective of overarching sentencing objectives and principles, coupled with an empirical understanding of the efficacy of sentencing to achieve its relevant objectives.

Sentencing is the system through which offenders are formally punished for their transgressions.⁷ To facilitate this process, courts are empowered to impose a range of sanctions, including fines and imprisonment,⁸ and are required to impose hardships which are commensurate with the gravity of the offence and culpability of the offender.⁹ There are, ostensibly, sound reasons for excluding incidental hardships from the sentencing calculus. Incidental hardships occur outside this process, their impact on the offender is often difficult to ascertain and, arguably, they not should undermine or detract from the imperative to impose a criminal sanction, which is proportionate to the level of wrongdoing. Further, enabling prominent and financially successful people (who are most likely to be the subject of public condemnation and the loss of employment as a result of criminal offending) to avoid the full burden of the criminal law because of incidental disadvantages they experience, potentially operates to entrench existing positions of power and privilege.¹⁰

There is considerable intuitive appeal associated with conferring the same criminal sanction on a person who assaults his or her partner or steals from his or her friends, irrespective of whether he or she is a lawyer, politician or bricklayer. In the same vein, it is not clear that a bank robber who breaks his or her leg as a result of stepping into a ditch while fleeing the scene of the crime should receive

4 The relevance of extra-curial punishments is considered by Chong, Fellows and Richards, above n 3.

5 Ibid 405.

6 See also the judgment of Kirby J in *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186.

7 Although, as is discussed below, rehabilitation is also an objective of punishment.

8 For an overview of the range of criminal sanctions, see Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook, 3rd ed, 2014) chs 7–12; Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) chs 6, 7.

9 See also below Part III.

10 See also below Part II.

a lighter penalty than the identically-placed robber who breaks his or her leg while playing football several hours after the robbery. These reasons, individually or collectively, have not always been endorsed by the courts and it has often been held that incidental punishments mitigate penalty.¹¹ Despite this, the courts have not extensively canvassed the rationale for reducing sentences on the basis of incidental hardships. To the extent that such analysis has occurred, judges have referred to the supposed reduced need for specific deterrence and retribution.¹²

In the next part of this article, we examine the existing law relating to the relevance of incidental hardships to sentencing. Part III sets out an overarching framework for dealing with incidental hardships in the sentencing system. In Part IV, we apply the framework in relation to each category of extra-judicial punishment. Our recommendations are summarised in the concluding remarks.

By way of overview, it is suggested that while there are a number of different forms of deprivations that come within the description of extra-judicial punishment, there is no common approach that should be adopted regarding incorporating them into the sentencing realm. Public opprobrium should be ignored as a sentencing consideration. Nearly all criminal guilt attracts some censure and condemnation; hence, to some extent, all sentenced offenders are subject to a degree of opprobrium.¹³ Condemnation is an intrinsic aspect of criminal guilt and it is not tenable to measure with any accuracy the level of opprobrium to which an individual is subjected. Further, the manner in which public scorn affects an offender is to a large degree within his or her control. Opprobrium, unlike a fine or incarceration, is intangible. Its impact can be diminished and, in fact negated by a resilient offender. The fact that high-profile offenders and those convicted of certain offences are subjected to more opprobrium is a matter of degree; it does not change the nature of the hardship.

Injuries suffered during the commission of a crime should also be ignored by a sentencing court. It is acknowledged that some offenders sustain serious and permanent injuries during the commission of a crime, for example, if they are shot by police. However, there is generally no relevant difference between an offender who is injured while committing a crime and an offender who sustains the same injuries at his or her workplace the day after the offence. It is conceded that, in some cases, an injury may make a criminal penalty, especially imprisonment, more burdensome. However, particularly burdensome prison conditions are already a discrete mitigating factor,¹⁴ and, to allow injuries sustained during the commission of a crime to discount penalty, would enable offenders to unduly double-dip on this account. For similar reasons, the infliction

11 See below Part II.

12 See below Part III.

13 See below Part IV.

14 See Mirko Bagaric, Richard Edney and Theo Alexander, '(Particularly) Burdensome Prison Time Should Reduce Imprisonment Length – And Not Merely in Theory' (2014) 38 *Melbourne University Law Review* 409.

of traditional forms of punishment on an offender should also not mitigate penalty.

A stronger case can be made for accommodating employment deprivations within the sentencing calculus. The loss of employment is a tangible hardship and, as far as possible, sanctions should have an equal impact on offenders. A lawyer who loses his or her livelihood as the result of a conviction for theft is disadvantaged more considerably than a bricklayer who receives the same court sanction but retains his or her job. Employment deprivations experienced by offenders arise as a result of systemic and deliberate actions by other individuals, entities or institutions and are directly related to the offending. This sets them apart from extra-curial hardships in the form of physical harm to offenders, which normally are (albeit unfortunate) happenstances associated with the offending. As will be discussed further below, deportation which arises due to the commission of a crime should be a mitigating consideration because it, also, arises from a systematic and calculated response to the offending.

Implementation of these recommendations would provide doctrinal and jurisprudential clarity in this area of law, thereby making sentencing outcomes more predictable and justifiable.

II CURRENT STATE OF THE LAW

In this part of the article, we examine the existing legal position regarding the relevance of extra-curial hardships to sentencing, and, in particular, whether such considerations operate to mitigate penalty. Prior to considering that matter in detail, however, we provide a brief overview of the sentencing system.

Each Australian jurisdiction has its own sentencing law and process, which is prescribed by a combination of legislation¹⁵ and common law.¹⁶ While there is divergence in terms of the finer details of each of the sentencing systems, the broad approach is similar. The key sentencing objectives are community protection, (specific and general) deterrence and rehabilitation and retribution.¹⁷ The principle of proportionality is also a cardinal consideration in determining the nature of a sanction and its length or severity.¹⁸

Sentencing in Australia is largely a discretionary process, whereby judges have considerable discretion to impose a penalty, so long as it does not exceed the maximum penalty for the offence. This methodology is termed ‘instinctive

15 The main legislative schemes are the *Crimes Act 1914* (Cth) pt IB; *Crimes (Sentencing) Act 2005* (ACT); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA).

16 For a deeper analysis of sentencing law in Australia, see Freiberg, above n 8, ch 1; Mackenzie and Stobbs, above n 8, ch 1.

17 See Freiberg, above n 8, ch 3; Mackenzie and Stobbs, above n 8, ch 3.

18 See *Veen v The Queen* (1979) 143 CLR 458, 467 (Stephen J); *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ); see also the discussion in Part III below.

synthesis'.¹⁹ In accordance with this approach, judges are required to identify all of the factors that are relevant to a particular sentence, and arrive at a judgment regarding the precise penalty that is appropriate in all of the circumstances.²⁰ However, judges are not required, nor permitted, to set out with particularity the precise weight that has been conferred on any particular sentencing factor.²¹

A large number of aggravating and mitigating considerations have been developed; most are derived from the common law. One study identified nearly 300 such considerations.²² While some legislative schemes expressly set out a number of factors that can mitigate sentence, none of them expressly refer to extra-curial hardship. Thus, the evolution and status of incidental hardships in the sentencing realm has evolved as part of the common law.²³

We now examine the role of incidental hardships in the sentencing calculus. The analysis commences by considering what is often the most serious form of incidental hardship – personal injuries.

A Incidental Injuries or Harm Stemming from Offending

A number of cases have considered the issue of whether injuries sustained by an offender during or shortly after the offence should mitigate penalty. However, few judges have expressly indicated a rationale which could justify reducing the severity of a sanction for this reason. One exception is the case of *R v Hannigan*,²⁴ where Chesterman JA stated that injuries received by an offender could mitigate penalty because the need for deterrence and retribution is lessened. The following comments by His Honour provide a useful backdrop to the following discussion:

the theory which underlies the relevance of extra-curial punishment to sentence is that it deters an offender from re-offending by providing a reminder of the unhappy consequence of criminal misconduct, or it leaves the offender with a disability, some affliction, which is a consequence of criminal activity. In such cases one can see that a purpose of sentencing by the court, deterrence or retribution, has been partly achieved.²⁵

19 See *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ); *Wong v The Queen* (2001) 207 CLR 584, 611 [75]–[76] (Gaudron, Gummow and Hayne JJ).

20 *Markarian v The Queen* (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ); *Barbaro v The Queen* (2014) 253 CLR 58, 72 [34] (French CJ, Hayne, Kiefel and Bell JJ).

21 *Pesa v The Queen* [2012] VSCA 109, [10]–[13] (The Court).

22 Roger Douglas, in a study of Victorian Magistrates' Courts, identified 292 relevant sentencing factors: Legal Studies Department, La Trobe University, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (1980) 62.

23 Common law aggravating and mitigating considerations continue to apply even in jurisdictions such as NSW, which have relatively extensive legislative aggravating and mitigating considerations: *R v Way* (2004) 60 NSWLR 168, 176–7 [43] (The Court). See also s 21A(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW): 'The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law'.

24 [2009] 2 Qd R 331.

25 *Ibid* 337 [25]. As is noted below, mitigation for injuries sustained by an offender was, in fact, denied in this case.

1 *Injuries Suffered by Offenders during the Offence Due to Their Fault*

There are numerous instances of sentences being reduced on account of injuries suffered by offenders during the commission of the offence. In some cases, the injuries arose out of the direct conduct of the offender, which had the unintentional effect of causing him or her bodily harm. In *Alameddine v The Queen*,²⁶ the New South Wales Court of Criminal Appeal regarded the fact that the offender was injured when his drug-making laboratory exploded as a matter to be taken into account in mitigation. In a similar vein, in *R v Haddara*,²⁷ the Victorian Court of Appeal held that injuries sustained by an arsonist as a result of the fire he lit mitigated penalty – although there was no basis for greater mitigation than that accorded by the sentencing judge.

An offender who kills others while driving dangerously has been held to be entitled to mitigation as a result of serious injuries he or she sustains in the collision.²⁸ This position has been affirmed in the recent decision of *Altun v The Queen*²⁹ where the Victorian Court of Appeal (citing the earlier decision of *Chaplin v The Queen*³⁰) noted:

The court is required to take into account all material facts as required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment. How much weight a judge will give an extra-curial punishment would depend on all the circumstances of the case.³¹

The courts have taken a stricter approach regarding incidental injuries in the form of mental disorders. In *Khoja v The Queen*,³² the Victorian Court of Appeal refused to mitigate a penalty for an offender who killed his friend during an act of dangerous driving and who developed a stress disorder and depression as a consequence. The Court stated:

Reactive mental illness of the kind in issue here is hardly ever likely to qualify as an injury of the relevant kind. ... The trigger for Mr Khoja's illness ... was his own reaction to the enormity of his crime, namely, a combination of shame, guilt, embarrassment and remorse.³³

2 *Injuries Which Are Self-inflicted by the Offender*

Mitigation has also not been conferred where the injuries are inflicted intentionally by the offender during the offence or at the time of arrest. In *Christodoulou v The Queen*³⁴ it was held that injuries sustained by the offender

26 [2006] NSWCCA 317, [17] (Grove J). Both Kirby and Hislop JJ agreed with Justice Grove's judgment: at [34] (Kirby J), [35] (Hislop J).

27 (1997) 95 A Crim R 108, 113 (Callaway JA).

28 *Whybrow v The Queen* [2008] NSWCCA 270.

29 [2014] VSCA 46.

30 (2010) 55 MVR 591.

31 *Altun v The Queen* [2014] VSCA 46, [10] (Coghlan JA), quoting *DPP (Vic) v Altun* [2013] VCC 1218, [62], citing *Chaplin v The Queen* (2010) 55 MVR 591, 593–4 [13] (The Court), quoting *R v Daetz* (2003) 139 A Crim R 398, 410–11 [62] (The Court). See also *Fuller v The Queen* [2013] VSCA 186.

32 (2014) 66 MVR 116.

33 *Ibid* 123 [34] (The Court).

34 [2008] NSWCCA 102.

(who was convicted of serious domestic assault offences) as a result of injecting himself with acid around the time of the arrest were not mitigating. Justice Grove (with whom Johnson J agreed) noted:

It is a step beyond *Alameddine* (and *Haddara*) to seek to extend the availability of a mitigatory element to a deliberately self inflicted injury as distinguished from occasions where the injury was, although self inflicted and in the course of crime commission, unintentional.³⁵

3 *Injuries Caused by Others During or After the Offence*

When the injuries to the offender are caused by the deliberate acts of others, the effect on sentence is less clear. A number of cases exist where offenders have been injured by others who, out of fright, anger or an attempt to stop the offence, have acted violently towards the offender. In *R v Daetz*, a bank robber sustained a fractured skull as a result of being attacked by a group of people. In conferring a discount, the Court simply noted:

In sentencing the offender the court takes into account what extra-curial punishment the offender has suffered, because the court is required to take into account all material facts and is required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment. How much weight a sentencing judge should give any extra-curial punishment will, of course, depend on all the circumstances of the case.³⁶

In *R v Barci*, it was held that an armed robber who was shot by police during the crime should receive a reduced penalty on the basis that '[f]or the rest of his life, those injuries will serve as a savage reminder to Barci of his criminality, and as such, they must fairly be regarded as constituting some punishment for that criminality'.³⁷

*R v Webb*³⁸ is another case where an offender who was shot by police upon being arrested received a reduced sentence as a result of ongoing injuries sustained from the shooting.

35 Ibid [41] (Grove J), [45] (Johnson J). Justice of Appeal Campbell added: at [5]:

In my view it is of considerable importance that the applicant's self-injection with acid, though not in itself a criminal act, was intimately bound up with his criminal actions on 20 January 2006. The types of detriments that have been recognised as extra curial punishment that can be taken into account as mitigating factors have all been detriments that have come to be imposed on the criminal after the crime has been committed in retribution for or as a consequence of, his having committed the crime, or detriments unintentionally arising from the criminal conduct. I would not expect a matter of mitigation to arise from something that was part of the committing of a crime itself – for example, a person who engaged a hitman to injure someone would be unlikely to succeed in arguing that it was a mitigating factor that he had paid a lot of money to the hitman. In the present case, when the self-inflicted harm is intimately bound up with the criminal conduct, and the extent to which it is a serious disability is not well established, I see no error in the trial judge not having mentioned it as being a mitigating factor.

36 (2003) 139 A Crim R 398, 411 [62] (James J). Both Tobias JA and Hulme J agreed with Justice James' judgment: at 399 [1] (Tobias JA), 416 [109] (Hulme J).

37 (1994) 76 A Crim R 103, 111 (The Court).

38 (2004) 149 A Crim R 167.

However, a more equivocal position was adopted in *R v Noble*,³⁹ where the Queensland Court of Appeal considered whether an armed robber who was shot by a shop owner during the commission of an offence should receive a reduced sentence. The Court noted the absence of clear authority on the matter, and stated that the injury could be taken into account, but found there was no general principle that ‘any injury suffered in the course of committing an offence is necessarily a factor in sentencing’.⁴⁰

*Sharpe v The Queen*⁴¹ even better illustrates the fluidity of the law in this area. In this case, mitigation to an offender who was shot in the leg during the commission of an offence was not awarded – although the Court noted the injury was relatively minor.⁴² A similar approach was taken in *Clinton v The Queen*,⁴³ where the New South Wales Court of Criminal Appeal refused to reduce the sentence of an offender who was attacked by the occupant of a residence, which the offender was in the process of ransacking. The Court noted that the offender’s injuries required medical attention but were not permanent and the response by the occupant was proportionate to the threat posed by the offender.⁴⁴

It appears there is no clear temporal limitation between the commission of the offence and the occurrence of the injuries required for injuries sustained by an offender to be mitigating. The courts have been prepared to mitigate penalty not only for harm sustained during the commission of an offence, but also well after the offending behavior. Thus, in some cases, courts have reduced a sentence as a result of vigilante or other spiteful acts against an offender which occurred well after the crime. In *R v Allpass*,⁴⁵ the offender was convicted of sexual offences against a young girl. After the sexual assault allegations emerged, the offender and his wife were subjected to threats and harassment, resulting in the offender sustaining psychiatric harm. This was regarded as a mitigating factor.⁴⁶ In *Fernando v Balchin*,⁴⁷ an offender was convicted of spitting at a police officer. Following his arrest, the offender was assaulted by police and, on appeal, this consideration reduced the term of imprisonment from four to two months.⁴⁸

However, the approach to such situations is, again, not uniform. In *R v Hannigan*,⁴⁹ the Court refused to discount a sentence on account of the fact that the offender was assaulted by the police officer who arrested him for dangerous driving, two days after the relevant driving incident. The injuries were minor and

39 [1996] 1 Qd R 329.

40 Ibid 331. See also *R v Azar* [2004] NSWSC 797.

41 [2006] NSWCCA 255.

42 Ibid [67]. See also *R v Brunelle* (2010) 202 A Crim R 151.

43 [2009] NSWCCA 276.

44 Ibid [34] (Howie J). Both Allsop P and Hislop J agreed with Justice Howie’s judgment: at [1] (Allsop P), [42] (Hislop J).

45 (1993) 72 A Crim R 561.

46 Ibid 566. See also *R v Boehmke* [2011] QCA 174, where a penalty reduction was accorded to a rapist who was assaulted by the victim’s brother.

47 [2011] NTSC 10.

48 Ibid [28] (Blokland J).

49 [2009] 2 Qd R 331.

the offender was not aware at the time that he had been assaulted, because of his intoxicated condition.⁵⁰

Vendettas have been compared to traditional punishment. In *R v Jagamara*,⁵¹ it was held that traditional forms of punishment can be mitigating. But more recently, the High Court in *Munda v Western Australia*⁵² has cast doubt on this approach:

There is something to be said for the view that the circumstance that the appellant is willing to submit to traditional punishment, and is anxious that this should happen, is not a consideration material to the fixing of a proper sentence. Punishment for crime is meted out by the state: offenders do not have a choice as to the mode of their punishment. ...

[T]his case does not afford an occasion to express a concluded view on the question whether the prospect of such punishment is a consideration relevant to the imposition of a proper sentence, given that the courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice. It is sufficient to say that the appellant did not suffer any injustice by reason of the circumstance that the prospect of payback was given only limited weight in his favour by the courts below.⁵³

In some instances, the long period between the crime and the injuries has resulted in mitigation being denied because a causal connection between the events could not be established. *Silvano v The Queen* is one such case. The New South Wales Court of Criminal Appeal held that injuries inflicted while the offender was in jail could not justify a reduced penalty. The Court held:

In my opinion, it is not sufficient to enable injuries suffered by an offender in prison to be taken into account as extra-curial punishment, that the injuries would not have been suffered, if the offender had not been arrested and remanded in custody as a result of having committed the offences. If such a connection between the offences and injuries suffered by a prisoner was sufficient, then injuries suffered by a prisoner could be taken into account as extra-curial punishment, even if they had resulted merely from some mishap occurring in the prison, such as the prisoner accidentally falling.⁵⁴

4 Summary of Case Law Regarding Mitigating Impact of Injuries Sustained by Offenders

It follows from the above that there are no clear principles or approaches that determine whether injuries sustained by an offender are mitigating, even if they have some connection to the offence. However, some themes that emerge from the cases are that:

50 Ibid 337 [24] (Chesterman JA).

51 (Unreported, Supreme Court of the Northern Territory, Muirhead J, 28 May 1984), cited in Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [402]. See also *R v Minor* (1992) 79 NTR 1; *Jadurin v The Queen* (1982) 44 ALR 424.

52 (2013) 249 CLR 600.

53 Ibid 622 [61], [63] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

54 (2008) 184 A Crim R 593, 599 [35] (James J). Both Hislop and Hoeben JJ agreed with Justice James' judgment: at 601 [45] (Hislop J), 601 [46] (Hoeben J). The same conclusion was reached in *R v O'Connor* [2014] NSWCCA 53.

- injuries sustained by an offender during the commission of a crime can mitigate penalty, especially if they are serious. This is so whether they are sustained as a result of the negligence or inadvertence of the offender, or as a result of the response by other people to the criminal activity;
- when the injuries are deliberately self-inflicted, they will generally not mitigate penalty;
- injuries sustained after the commission of an offence can mitigate penalty but are less likely to do so where there is a considerable gap between the commission of the offence and the infliction of the injuries; and
- to the extent that physical harm sustained by an offender mitigates penalty, the key rationales are that (specific) deterrence and retribution are already partly achieved.

B Public Condemnation and Opprobrium

A common non-curial hardship stemming from criminal offending is condemnation and opprobrium. The law is not settled on the impact this should have on sentence. It was considered by several members of the High Court in *Ryan v The Queen*,⁵⁵ but a majority of the Court did not endorse a clear position. Kirby and Callinan JJ stated that public opprobrium was a factor which could be taken into account to reduce the sanction imposed by the Court, whereas McHugh J took the opposite approach. Justice Gummow did not canvass the issue, while Hayne J ‘substantially’ agreed with McHugh J.⁵⁶ Justice Callinan stated:

Of course the abuse of an office to commit a crime is greatly to be deplored but the crime of a person occupying an office of some prominence will often attract much greater vilification, adverse publicity, public humiliation, and personal, social and family stress than a crime by a person not so circumstanced. When these consequences are attracted they should not be ignored by the sentencing court.⁵⁷

Justice Kirby, agreeing with Callinan J, stated:

stigma [stemming from conviction] ... commonly add[s] a significant element of shame and isolation to the prisoner and the prisoner’s family. This may comprise a special burden that is incidental to the punishment imposed and connected with it. If properly based on evidence, it could, in a particular case, be just to take such considerations into account in fixing the judicial punishment required.⁵⁸

Justice McHugh rejected the relevance of public opprobrium on the basis that:

First, ... [t]he opprobrium attaching to offences varies greatly from one offender and one offence to another. ...

55 (2001) 206 CLR 267.

56 Ibid 313–14 [157].

57 Ibid 319 [177].

58 Ibid 304 [123]. See also *McDonald v The Queen* (1994) 48 FCR 555, 564 (Burchett and Higgins JJ).

Secondly, the worse the crime, the greater will be the public stigma and opprobrium. The prisoner who rapes a child will undoubtedly be subject to greater public opprobrium and stigma than the prisoner who rapes an adult person.⁵⁹

In *R v Bunning*,⁶⁰ the Victorian Court of Appeal regarded it as mitigating that the offender ‘lost his reputation, his career [as a police officer] and ... suffered public humiliation’.⁶¹ In *Kenny v The Queen*,⁶² Howie J (with whom Johnson J agreed) of the New South Wales Court of Criminal Appeal also stated that condemnation could be given some weight if it was so significant as to damage the person physically or psychologically.

In *Einfeld v The Queen*,⁶³ Basten JA (Hulme and Latham JJ agreeing on this issue) endorsed the position in *Kenny*, and stated that in this case two considerations could increase the level of public opprobrium towards the offender. The first was the offender’s status as a former judge, which (supposedly) made the offence worse and gave rise to an increased level of public humiliation. Secondly, the offender used his previous position to advance his unlawful purpose.⁶⁴

An extensive analysis of the authorities was undertaken in *R v Nuttall; Ex parte Attorney-General (Qld)*⁶⁵ by Muir JA (with whom Fraser and Chesterman JJA agreed). The Court ‘assumed’ public opprobrium was relevant in light of the fact that it was not submitted that the sentencing judge failed to take it into account, but noted that public humiliation was of little weight given that it was inevitable:

The attainment of high public office brings with it public exposure and media scrutiny as well as power, fame and prestige. Criminal abuse of the office, if detected, will inevitably attract media attention and result in shame and distress to the offender and his family.⁶⁶

Thus, the balance of authority indicates that public condemnation of an offender can be a mitigating factor but that it generally carries little weight.

C Employment Deprivations: Dismissal or Loss of Opportunity to Work

There is no settled principle regarding the relevance of employment deprivations to sentence. A number of different approaches have been taken. In both *Kovacevic v Mills*⁶⁷ and *G v Police*,⁶⁸ the sentence was mitigated to avoid damage to the offender’s career prospects. There have also been a number of

59 *Ryan v The Queen* (2001) 206 CLR 267, 284–5 [53], [55].

60 [2007] VSCA 205.

61 *Ibid* [47] (The Court).

62 [2010] NSWCCA 6, [49] (Howie J), [53] (Johnson J). See also *R v Wilhelm* [2010] NSWSC 378.

63 (2010) 266 ALR 598, 621 [101].

64 *Ibid* 621 [98]–[101].

65 [2011] 2 Qd R 328.

66 *Ibid* 346 [65] (Muir JA). Both Fraser and Chesterman JJA agreed with Justice of Appeal Muir’s judgment: at 349 [80] (Fraser JA), 349 [81] (Chesterman JA).

67 (2000) 76 SASR 404.

68 (1999) 74 SASR 165.

other instances where sentences have been discounted because of consequential damage to career or work prospects.⁶⁹

On the other hand, in *R v Boskovitz*⁷⁰ and *Brewer v Bayens*,⁷¹ the sanction was imposed regardless of the effects on career or work prospects, while in *R v Liddy [No 2]*⁷² and *Hook v Ralphs*,⁷³ the sentence was designed or calculated to diminish an offender's career and employment prospects.⁷⁴

The strongest statement regarding the supposed irrelevance of reduced employment prospects to sentencing is found in the comments of McPherson JA in *R v Qualischefski*.⁷⁵ His Honour stated:

The applicant ... claims that a conviction for possession of cannabis will have dire consequences for him if it continues to be recorded. It will, he says, lose him his job as a computer operator with the Health Department, along with his career, his social position and his life style. Those consequences are undoubtedly severe; but, if for that reason, appeals like this are allowed and recording of convictions set aside, the impact of the administration of justice will in the course of time be no less serious. *It will mean that we are sanctioning the division of offenders into two classes. There will be those with good jobs and careers, enviable social positions and prosperous life styles. Their convictions will not be recorded for fear of the damage it may do them. Then there will be those without jobs, or career prospects, or with standards of living that are already depressed. In their case convictions will be recorded. Such an outcome seems to me to be quite wrong and thoroughly indefensible. It smacks of privilege, and can only lead to the evolution of a special class of persons in society who are exempt from the full operation of the criminal law at least at its lower reaches.*⁷⁶

A similar stance was adopted in *Whybrow v The Queen*,⁷⁷ where it was held that:

In my opinion no allowance should be made by reason of alleged extra curial punishment flowing from the loss of the applicant's employment in the Army. The deprivation of liberty resulting from a prison term necessarily precludes participation in many activities including participation in one's usual form of employment. There was nothing exceptional about the plaintiff's loss of his

69 See *Moorhead v Police* [1999] SASC 243; *R v Richards* (1980) 2 Cr App R (S) 119; *Ryan v The Queen* (2001) 206 CLR 267; *Simmonds v Bureau of Customs* [2001] SASC 306; *Hook v Ralphs* (1987) 45 SASR 529; *R v McDermott* (1990) 49 A Crim R 105; *McDonald v The Queen* (1994) 48 FCR 555; *R v Purdon* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, McInerney J and Donovan AJ, 27 March 1997).

70 [1999] NSWCCA 437.

71 (2002) 26 WAR 510. The appellant psychologist was convicted of solicitation consequent upon a random police sting operation. A conviction was recorded despite (or regardless of) the likely effects on his career, PhD studies and occupational contributions to the community: at 512 (The Court).

72 (2002) 84 SASR 231.

73 (1987) 45 SASR 529.

74 In *R v Whitnall* (1993) 42 FCR 512, the sentence was also increased as a consequence of the defendant's career.

75 (Unreported, Queensland Court of Appeal, Fitzgerald P, McPherson JA, Ambrose J, 12 August 1994) 4. This case is discussed in Andrew West, 'Prospective Loss of Employment as a Factor in Mitigation of Penalty' (1996) 16 *Queensland Lawyer* 157.

76 *R v Qualischefski* (Unreported, Queensland Court of Appeal, Fitzgerald P, McPherson JA, Ambrose J, 12 August 1994) 4 (McPherson JA) (emphasis added). See also *R v Bragias* (1997) 92 A Crim R 330.

77 [2008] NSWCCA 270.

employment and it was not known if he would resume that employment on the completion of his sentence.⁷⁸

However, more recently, in *R v Nuttall; Ex parte Attorney-General (Qld)*,⁷⁹ Muir JA (with whom Fraser and Chesterman JJA agreed) took the view that: ‘the respondent’s loss of employment and lack of job prospects on his release are relevant considerations.’⁸⁰

In some instances courts have been prepared to confer a sentencing discount when the loss of employment stems from an offence not committed during the course of employment (for example, a lawyer who is convicted of shoplifting) but not where the offence is committed in the course of employment (for example, a lawyer who steals trust money). In *R v Talia* it was held that:

There seems to us to be a distinct difference between a disqualification resulting from criminal conduct in the course of the employment from which the person is disqualified and criminal conduct remote from that employment but having that consequence. ... These situations are different to that which obtains [sic] when the offending conduct is remote from the employment from which the offender is incidentally precluded. In the latter class of case there might be a considerably stronger argument in favour of the incidental loss of employment being treated as a circumstance of mitigation.⁸¹

Formal disqualifications preventing offenders from being involved in the running or management of corporations are often an incident of being found guilty of a criminal offence.⁸² The disqualification follows automatically upon conviction and the sentencing court is given no discretion.⁸³

Again, there is no consistency in principle or approach regarding whether disqualification from managing a corporation is a mitigating sentencing consideration. Martin and Webster point out that any disqualification or disability ‘contributes significantly to the social stigma of the finding of guilt or conviction’.⁸⁴ For those offenders whose occupation involved the management of a company, the disqualification presents an obvious and significant hardship. Courts have recognised this in some cases⁸⁵ but not in others.⁸⁶ Arie Freiberg observes: ‘[t]he courts have been ambivalent on this issue, sometimes decreasing

78 Ibid [31] (Hislop J). Both Hodgson JA and Kirby J agreed with Justice Hislop’s judgment: at [1] (Hodgson JA), [2] (Kirby J). See also *FB v The Queen* [2011] NSWCCA 217.

79 [2011] 2 Qd R 328.

80 Ibid 343 [59].

81 [2009] VSCA 260, [28] (The Court).

82 The key provisions are contained in ss 206A and 206B of the *Corporations Act 2001* (Cth).

83 However, the court has power upon application by the disqualified person to grant leave to manage a corporation in the future: *Corporations Act 2001* (Cth) s 206G.

84 Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) 526, citing J P Martin and D Webster, *The Social Consequences of Conviction* (Heinemann Educational, 1971).

85 For example, specific reference to disqualification can be found in *R v Chan* (2010) 79 ACSR 189, 194 [20] (Forrest J).

86 No reference to the statutory disqualification was made at all in *R v Hartman* (2010) 81 ACSR 121 or *R v Richard* [2011] NSWSC 866.

a sentence to take into account the additional detriment and sometimes refusing to do so. The cases present no clear pattern.⁸⁷

D Deportation

Offenders who are not Australian citizens or permanent residents can be deported if they fail a ‘character test’. A term of imprisonment of a year or more can result in a failure to meet the character test.⁸⁸ Deportation or the risk of deportation is an additional burden that would then be faced by such offenders.

However, again, there is no consistent approach to the relevance of this in the sentencing calculus. Earlier authorities held that it was not relevant.⁸⁹ However, some more recent decisions indicate that it should mitigate. This was the position taken in *Valayamkandathil v The Queen*,⁹⁰ *Guden v The Queen*⁹¹ and *Director of Public Prosecutions v Yildirim*.⁹² However, a different position was taken in *Ponniah v The Queen*⁹³ where Mazza J (with whom Pullin and Buss JJA agreed) simply stated ‘in my opinion, the prospect of deportation is not a mitigating factor. Whether or not a person is deported is an executive decision’.⁹⁴

In *Director of Public Prosecutions (Cth) v Peng*,⁹⁵ the Victorian Court of Appeal noted that if deportation is to mitigate, the court must be satisfied that there is quantifiable risk that deportation will occur and that this would constitute a hardship to the offender.

III AN OVERARCHING THEORY FOR ASSESSING WHETHER EXTRA-CURIAL HARDSHIPS SHOULD MITIGATE PENALTY

The correct approach to factoring extra-curial deprivations into the sentencing equation requires consideration of the nature of punishment and the objectives of sentencing. The treatment of extra-curial hardships should enhance the likelihood of the successful attainment of the objectives of sentencing or, at

87 Arie Freiberg, ‘Sentencing White-Collar Criminals’ (Paper presented at the Fraud Prevention and Control Conference, Australian Institute of Criminology, Surfers Paradise, 24–25 August 2000) 12 <http://aic.gov.au/media_library/conferences/fraud/freiberg.pdf> (citations omitted).

88 See *Migration Act 1958* (Cth) s 501(2), which is discussed in *Darcie v The Queen* [2012] VSCA 11, [32]–[37] (Williams AJA). Justice of Appeal Buchanan agreed with Williams AJA: at [1].

89 *R v Pham* [2005] NSWCCA 94, [13] (Wood CJ at CL). Both Hislop and Johnson JJ agreed with Chief Justice Wood’s judgment: at [46] (Hislop J), [47] (Johnson J). See also *R v Shrestha* (1991) 173 CLR 48, 71–2 (Deane, Dawson and Toohy JJ).

90 [2010] VSCA 260, [25]–[27] (Neave JA). Justice of Appeal Buchanan agreed: at [44].

91 (2010) 28 VR 288, 294–5 [25]–[26] (The Court).

92 [2011] VSCA 219, [26] (Warren CJ). Both Buchanan and Sifris JJA agreed with Chief Justice Warren’s judgment: at [34] (Buchanan JA), [35] (Sifris JA). The NSW Law Reform Commission, in its report on sentencing recommended that the risk of deportation should be irrelevant to sentence: New South Wales Law Reform Commission, *Sentencing*, Report No 139 (2013) 95.

93 [2011] WASCA 105.

94 *Ibid* [48] (Mazza J) (citations omitted). Both Pullin and Buss JJA agreed with Justice Mazza’s judgment: at [1] (Pullin JA), [2] (Buss JA).

95 [2014] VSCA 128, [23] (Nettle and Redlich JJA). Justice of Appeal Priest agreed: at [42].

least, not comprise or undermine the pursuit of them. This is the doctrinally sound manner in which to approach this issue. However, this approach is complicated by the multifaceted nature of the objectives of sentencing; their lack of clarity; sometimes conflicting direction; and the fact that irrespective of which objectives are pursued, ultimately the issue of how much punishment should be administered is mainly driven by the principle of proportionality. In fact, the key to evaluating the place of extra-curial punishment in the role of sentencing relates to the extent to which it impacts on the proportionality principle. These premises are now examined.

A Current Evidence Suggests That the Sentencing System Cannot Achieve Several Key Objectives

As noted previously, each Australian jurisdiction endorses the same key objectives of sentencing in the form of community protection (or incapacitation⁹⁶), general deterrence, specific deterrence, retribution and rehabilitation.⁹⁷ These objectives provide possible rationales for imposing sanctions on offenders. In analysing the proper role of extra-curial punishment to sentencing, it is tenable to do so from two perspectives. The first is by reference to the existing orthodox goals of sentencing. The second is against the backdrop of the justifiable purposes of sentencing. As it transpires, for the purposes of this discussion it is irrelevant which perspective is chosen.

There has been a voluminous amount of empirical research into the efficacy of state-imposed punishment to achieve the goals of incapacitation, general and specific deterrence, and rehabilitation. It is beyond the scope of this article to consider these findings at length. However, the trend of the findings is relatively consistent and hence it is possible to provide an overview of the relevant literature. In short, the weight of the current empirical evidence provides no basis for confidence that punishment is capable of achieving the goals of incapacitation and specific deterrence. General deterrence works only in the absolute sense, and there remains considerable uncertainty on the capacity of the sentencing system to rehabilitate offenders.

Incapacitating offenders in prison is the most effective form of community protection given that offenders cannot commit crime in the community during their period of confinement. However, incapacitation is only necessary if the offender would have reoffended if he or she were not incarcerated. Incapacitation in its broadest sense (as being applicable to all offenders and all offence types) is

96 Incapacitation and community protection are often used interchangeably – incapacitation is the most effective means of protecting the community from offenders (at least during the period of their detention).

97 *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) ss 3, 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5; cf *Sentencing Act 1995* (WA) s 6 (which merely lists community protection). Other stated objectives included denunciation and retribution. It has been argued that, in effect, both of these equate to the goal of proportionality: see Mirko Bagaric, ‘The Negation of Venting in Australian Sentencing: Denouncing Denunciation and Retribution’ (2014) 88 *Australian Law Journal* 502.

flawed, since we are poor at predicting which offenders are likely to commit offences in the future (especially in relation to serious offences)⁹⁸ and while incapacitation seems to work in the case of certain categories of minor offences, the cost of imprisoning minor offenders normally outweighs the seriousness of the offence.⁹⁹ To the extent that incapacitation is justifiable, it should be confined to recidivist serious sexual and violent offenders, where a recidivist loading of 20–50 per cent should be applied, given that is consistent with their rate of reoffending.¹⁰⁰

Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and, thereby, convincing them that crime does not pay.¹⁰¹ It attempts to dissuade offenders from reoffending by inflicting an unpleasant experience on them (such as imprisonment), which they will (at least in theory) seek to avoid in the future.¹⁰² The available empirical data suggest that specific deterrence does not work. There is nothing to suggest that offenders who have been subjected to harsh punishment are less likely to reoffend than identically-placed offenders who are subjected to lesser forms of punishment.

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- 98 See Jessica Black, 'Is the Preventive Detention of Dangerous Offenders Justifiable?' (2011) 6 *Journal of Applied Security Research* 317, 322–3. The most thorough treatment of the subject matter is Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011). See also Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Federation Press, 2009).
- 99 William Spelman, 'What Recent Studies Do (and Don't) Tell Us about Imprisonment and Crime' (2000) 27 *Crime and Justice: A Review of Research* 419, 420, 485; Roger K Warren, 'Evidence-based Sentencing: The Application of Principles of Evidence-based Practice to State Sentencing Practice and Policy' (2009) 43 *University of San Francisco Law Review* 585, 594; National Research Council of the National Academies, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (National Academies Press, 2014) 4; Pew Charitable Trusts, *Prison and Crime: A Complex Link – Crime Drop since 1994 Has Been Bigger in States That Cut Imprisonment Rates* (11 September 2014) <<http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/prison-and-crime>>; Don Weatherburn, Jiuzhao Hua and Steve Moffatt, 'How Much Crime does Prison Stop? The Incapacitation Effect of Prison on Burglary' (Crime and Justice Bulletin No 93, NSW Bureau of Crime Statistics and Research, January 2006); Jacqueline Cohen, 'The Incapacitative Effect of Imprisonment: A Critical Review of the Literature' in Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (National Academy of Sciences, 1978) 187, 209. See also Alfred Blumstein and Joel Wallman (eds), *The Crime Drop in America* (Cambridge University Press, 2000).
- 100 Mirko Bagaric, 'The Punishment Should Fit the Crime – Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing' (2014) 51 *San Diego Law Review* 343, 416.
- 101 Daniel S Nagin, Francis T Cullen and Cheryl Lero Jonson, 'Imprisonment and Reoffending' (2009) 38 *Crime and Justice: A Review of Research* 115.
- 102 See Donald Ritchie, Sentencing Advisory Council (Vic), *Does Imprisonment Deter? A Review of the Evidence* (Report, April 2011); Mirko Bagaric and Theo Alexander, 'The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing' (2012) 36 *Criminal Law Journal* 159.

Thus, there is no basis for pursuing the goal of specific deterrence.¹⁰³ The weight of evidence suggests that rehabilitation fares slightly better. Certain rehabilitative techniques have some degree of success for some offenders, but there are no data to show that there are wide-ranging techniques to reform all offenders.¹⁰⁴

The findings regarding general deterrence are also relatively settled.¹⁰⁵ The existing data show that in the absence of the threat of *any* punishment for criminal conduct, the social fabric of society would readily dissipate because crime would escalate and overwhelmingly frustrate the capacity of people to lead happy and fulfilled lives. Thus, general deterrence works in the absolute sense: there is a *connection* between the existence of some form of criminal sanctions and criminal conduct (ie, absolute deterrence). However, there is insufficient evidence to support a direct correlation between higher penalties and a reduction in the crime rate. It follows that marginal deterrence (which is the theory that there is a direct correlation between the severity of the sanction and the prevalence of an offence) should be disregarded as a sentencing objective, at least unless and until there is proof that it works.¹⁰⁶

The failure of marginal general deterrence means that absolute general deterrence justifies inflicting some punishment on offenders, but it is of little relevance in fixing the amount of punishment. It follows that based on the existing empirical data, the goal of incapacitation should be pursued more sparingly; specific deterrence and marginal general deterrence should be abolished as sentencing objectives and rehabilitation should not influence

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- 103 Nagin, Cullen and Jonson, above n 101; Don Weatherburn, 'The Effect of Prison on Adult Re-offending' (Crime and Justice Bulletin No 143, NSW Bureau of Crime Statistics and Research, August 2010); Ritchie, above n 102; Donald P Green and Daniel Winik, 'Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders' (2010) 48 *Criminology* 357, 357–8; Franklin E Zimring and Gordon J Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, 1973) 14. See also New South Wales Law Reform Commission, *Sentencing*, Report No 139 (2013) 33–4.
- 104 Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Report No 112, Australian Institute of Criminology, 2011); Mark W Lipsey and Francis T Cullen, 'The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews' (2007) 3 *Annual Review of Law and Social Science* 297; Michael S King, 'Therapeutic Jurisprudence Initiatives in Australia and New Zealand and the Overseas Experience' (2011) 21 *Journal of Judicial Administration* 19.
- 105 For an overview of the literature, see Nigel Walker, *Sentencing in a Rational Society* (Allen Lane, 1969) ch 4, but see especially: at 60–1; John K Cochran, Mitchell B Chamlin and Mark Seth, 'Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment' (1994) 32 *Criminology* 107, 129; Dale O Cloninger and Roberto Marchesini, 'Execution and Deterrence: A Quasi-controlled Group Experiment' (2001) 33 *Applied Economics* 569; Dieter Dölling et al, 'Is Deterrence Effective? Results of a Meta-analysis of Punishment' (2009) 15 *European Journal on Criminal Policy and Research* 201; Anthony N Doob and Cheryl Marie Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice: A Review of Research* 143; Steven D Levitt, 'Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not' (2004) 18(1) *Journal of Economic Perspectives* 163, 177–8; Ritchie, above n 102; Richard Berk, 'New Claims about Executions and General Deterrence: Déjà Vu All Over Again?' (2005) 2 *Journal of Empirical Legal Studies* 303.
- 106 See Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – And What It Means for Sentencing' (2011) 35 *Criminal Law Journal* 269.

sentencing outcomes unless and until it is demonstrated that it is possible to prompt internal attitudinal reform of offenders while at the same time imposing hardships on them.

B Proportionality Is the Key To Determining Sentence Length

It follows from the foregoing that there is a discordance between the current objectives of punishment and the objectives that are empirically valid. However, irrespective of which reference point is adopted, the same conclusions follow for the purposes of this discussion. From either perspective the system of state-imposed sanctions is justified. Given that absolute general deterrence works in practice, it is appropriate to impose hardships on offenders. In addition to this, on the basis of either the accepted objectives of sentencing or the empirically validated objectives, when it comes to the issue of how much to punish, the guiding determinant is the principle of proportionality.¹⁰⁷

1 Statement of the Proportionality Principle

In its crudest form the principle of proportionality is that the punishment must fit the crime. A clear statement of the principle is found in the High Court case of *Hoare v The Queen*:

[A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances.¹⁰⁸

In *Veen v The Queen*¹⁰⁹ and *Veen v The Queen [No 2]*,¹¹⁰ the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which at various times has also been declared as the most important aim of sentencing.¹¹¹

Further, retributive scholars (who reject the goals of incapacitation, rehabilitation and specific deterrence as underpinning punishment) endorse proportionality as the central tenet of our sentencing system.¹¹² In fact, the view that the severity of the punishment should be commensurate with the gravity of the offence is one of the few principles in the area of punishment and sentencing which enjoys widespread acceptance by philosophers, legislatures and the

107 See also the discussion in Part III(B)(1)–(2) below.

108 (1989) 167 CLR 348, 354 (The Court) (emphasis in original) (citations omitted).

109 (1979) 143 CLR 458, 467 (Stephen J).

110 (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

111 See, eg, *Channon v The Queen* (1978) 33 FLR 433.

112 Jami L Anderson, 'Reciprocity as a Justification for Retributivism' (1997) 16(1) *Criminal Justice Ethics* 13; Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985) ch 1; Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Kluwer Academic, 2004) 2; Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Athlone Press, first published 1789–1823, 1970 ed) 165.

courts.¹¹³ The primacy of proportionality is underlined by the fact that it has been given statutory recognition in all Australian jurisdictions.¹¹⁴

This is not to suggest that proportionality is the only determinant in setting an appropriate penalty. As noted above, studies have shown that there are hundreds of aggravating and mitigating factors which can influence the choice of sanction and its severity.¹¹⁵ Moreover, even though empirical evidence casts doubt on the efficacy of sentencing to achieve several of its stated objectives, in practice, these objectives continue to influence sentence type and severity. Thus, for example, (marginal) general deterrence is an especially important consideration in relation to drug¹¹⁶ and many property offences,¹¹⁷ where it operates to increase penalty, whereas the goal of rehabilitation often serves to reduce the penalty in relation to certain types of offenders, especially those who are young.¹¹⁸ While these

113 Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish, 2001) ch 5.

114 The *Sentencing Act 1991* (Vic) provides that one of the purposes of sentencing is to impose just punishment (s 5(1)(a)), and that in sentencing an offender the court must have regard to the gravity of the offence (s 5(2)(c)) and the offender's culpability and degree of responsibility (s 5(2)(d)). The *Sentencing Act 1995* (WA) states that the sentence must be 'commensurate with the seriousness of the offence' (s 6(1)) and the *Crimes (Sentencing) Act 2005* (ACT) provides that the sentence must be 'just and appropriate' (s 7(1)(a)). In the NT and Queensland, the relevant sentencing statute provides that the punishment imposed on the offender must be just in all the circumstances: *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a). In SA, the emphasis is on ensuring that 'the defendant is adequately punished for the offence': *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j). The need for a sentencing court to 'adequately punish' the offender is also fundamental to the sentencing of offenders for Commonwealth matters: *Crimes Act 1914* (Cth) s 16A(2)(k). The same phrase is used in the NSW legislation: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a).

115 Roger Douglas, in a study of Victorian Magistrates' Courts, identified 292 relevant sentencing factors: Legal Studies Department, La Trobe University, above n 22, 62.

116 *Tulloh v The Queen* (2004) 147 A Crim R 107; *Aconi v The Queen* [2001] WASCA 211; *R v Stanbouli* (2003) 141 A Crim R 531. More recently, see *Nguyen v The Queen* (2011) 31 VR 673; *R v Nguyen* (2010) 205 A Crim R 106; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1.

117 See, eg, *R v Bromley* (2010) 79 ATR 692, 697 [31] (Osborn J); *R v Nicholson; Ex parte DPP (Cth)* [2004] QCA 393, [20] (de Jersey CJ); *R v Wheatley* (2007) 67 ATR 531; *DPP (Cth) v Rowson* [2007] VSCA 176, [21] (Kaye AJA). Both Buchanan and Neave JJA agreed with Acting Justice of Appeal Kaye's judgment: at [1] (Buchanan JA), [2]–[4] (Neave JA). See also Mackenzie and Stobbs, above n 8, ch 4.

118 *R v Kane* [1974] VR 759, 766–7 (The Court); *R v Smith* (1987) 44 SASR 587, 589 (King CJ), with whom Cox and O'Loughlin JJ agreed: at 590; *Mason v Pryce* (1988) 34 A Crim R 1, 9 (Kearney J); *Duca v Police* (1999) 73 SASR 15.

objectives continue to influence the choice of sanction, they cannot take the sentence outside the bounds of a proportionate sentence.¹¹⁹

2 *The Components of Proportionality*

The key aspect of the principle is that it has two limbs. The first is the seriousness of the crime; the second is the harshness of the sanction. Further, the principle has a quantitative component – the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

Despite the clarity with which the principle can be expressed, there are no well-defined and precise criteria regarding the manner in which proportionate sentences are determined. The key reason is that legislatures and the courts have not developed a workable methodology for matching the two limbs of the principle. For example, how many years of imprisonment correlate to the pain endured by a rape victim? As noted by Andrew von Hirsch and Nils Jareborg, in developing their ‘living standard approach’ to offence seriousness,¹²⁰ ‘[v]irtually no legal doctrines have been developed on how the gravity of harms can be compared.’¹²¹

The main difficulty with giving content to the proportionality principle is that the currencies in each limb, which are supposed to match up, are normally different. The interests typically violated by criminal offences are physical integrity and property rights. At the upper end of criminal sanctions, the currency is (deprivation of) freedom. These theoretical complexities do not need to be

119 Unless there is express statutory authority permitting a disproportionate penalty. Some statutory incursions into the proportionality principle have also occurred, mainly stemming from the trend towards tougher sentences. In Victoria, for example, serious sexual, drug, arson or violent offenders may receive sentences in excess of that which is proportionate to the offence: see *Sentencing Act 1991* (Vic) pt 2A; see especially at s 6D(b). Serious offenders are, essentially, those who have previously been sentenced to jail for a similar type of offence, except in the case of serious sexual offenders, where the offender must have two prior sexual matters or a sexual and a violent offence arising from the same incident. Indefinite jail terms may also be imposed for offenders convicted of ‘serious offences’: at ss 18A–18P. Serious offences include certain homicide offences, rape, serious assault, kidnapping and armed robbery, where the court is satisfied ‘to a high degree of probability’ that the offender is a serious danger to the community: at ss 3, 18B(1). Similar provisions to those operating in Victoria regarding serious violent and sexual offenders exist in other jurisdictions: *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act 1995* (NT) s 65; *Criminal Law (Sentencing) Act 1988* (SA) s 23; *Sentencing Act 1997* (Tas) s 19; *Sentencing Act 1995* (WA) s 98. Indefinite sentences also exist in other jurisdictions: see, eg, *Penalties and Sentences Act 1992* (Qld) pt 10; *Crimes (High Risk Offenders) Act 2006* (NSW); *Sentencing Act 1995* (NT) ss 65–78; *Sentencing Act 1995* (WA) ss 98–101; *Criminal Law (Sentencing) Act 1988* (SA) pt 2 div III; *Criminal Code 1924* (Tas) s 392. The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) goes one step further and allows for preventive detention of offenders who have completed their sentence if there is a high degree of probability that they are a serious danger to the community (the constitutional validity of this Act was upheld by the High Court in *Fardon v A-G (Qld)* (2004) 223 CLR 575). For a discussion of the Queensland provision, see Mackenzie and Stobbs, above n 8, 210–11. See also *Criminal Law (Sentencing) Act 1988* (SA) s 23. However, these exceptions do not debunk the general rule that proportionality is the main sentencing consideration.

120 Andrew von Hirsch and Nils Jareborg, ‘Gauging Criminal Harm: A Living-Standard Analysis’ (1991) 11 *Oxford Journal of Legal Studies* 1.

121 *Ibid* 3.

resolved for the purposes of this article. First, it has been suggested that the issues are not insurmountable and that a way forward to giving proportionality greater clarity is to evaluate both limbs of the equation, focusing on the extent to which the interests of offenders and victims are set back by various offences and penalty types.¹²² Secondly, pragmatic concerns regarding the content of the proportionality principle are clear and there are mechanisms which, to some extent, already adjust for this vagueness.

Hence, in relation to sentencing outcomes, current orthodoxy maintains that there is no single correct sentence in any case¹²³ and that a lawful sentence is a matter upon which ‘reasonable minds will differ’.¹²⁴ Under this model, courts can impose a sentence within an ‘available range’ of penalties. The spectrum of this range is not clearly designated, however, if the tariff is not observed, the sentence can be overturned on appellate review as being either ‘manifestly excessive’¹²⁵ or ‘manifestly inadequate’.¹²⁶ The spectrum of sanctions that are regarded as within the acceptable range or tariff is circumscribed by the proportionality principle.¹²⁷ Thus, while there are a large number of considerations that impact on the judicial choice of penalty, the overarching determinant, or control point, is the proportionality principle. It is important to work within the contours of this (albeit) opaque principle, as opposed to railing against its applicability.

3 Extra-curial Hardships as Impacting on the Hardship Limb of Proportionality instead of Discrete Mitigating Factors

Given that proportionality is the lynchpin determinant for setting penalty type and severity, it follows that an obvious means through which extra-curial hardships could influence penalty is whether they can be accommodated within the proportionality thesis. Alternatively, it could be contended that, instead, extra-curial hardships could be incorporated into the sentencing calculus as discrete mitigating considerations.

Mitigating factors can be divided into four main types: the circumstances of the offence; the offender’s response to a charge; matters personal to the offender; and the impact of the sanction on the offender and his or her dependants.¹²⁸

122 See also Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005).

123 *Markarian v The Queen* (2005) 228 CLR 357.

124 *Hudson v The Queen* (2010) 205 A Crim R 199, 206 (The Court).

125 ‘The relevant test for the applicant to succeed on this ground [manifest excess] requires the applicant to demonstrate that the sentence was unreasonable or plainly unjust’: *Melham v The Queen* [2011] NSWCCA 121, [85], citing *Dinsdale v The Queen* (2000) 202 CLR 321, 325 [6] (Gleeson CJ and Hayne J).

126 For discussion of this concept, see *R v Creighton* [2011] ACTCA 13; *R v Hill* [2010] SASCFC 79; *R v Holland* (2011) 205 A Crim R 429, 443 [63] (Schmidt J), quoting *Hili v The Queen* (2010) 242 CLR 520, 538–9 [59]–[61] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *R v Sukkar* [2011] NSWCCA 140; *R v McHarg* [2011] NSWCCA 115, [122]–[124] (Johnson J). Both Whealy JA and Hidden J agreed with Justice Johnson’s judgment: at [1] (Whealy JA), [2] (Hidden J).

127 See, eg, *Van Der Baan v The Queen* [2012] NSWCCA 5.

128 See generally Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press, 1979) 453–4.

However, there is no universally accepted theory of aggravation or mitigation.¹²⁹ Accordingly, the stability and authority of many such factors is not firmly established and remains subject to revision.¹³⁰

The fourth category of mitigating factors (so far as it relates to the offender as opposed to his or her dependants) could potentially justify incorporating extra-curial hardship. This is the case if the impact of the sanction, such as a fine or imprisonment, is broadened to include the effect it will have on the offender who has suffered somewhat already due to the extra-curial punishment. And, as we have seen, there are shades of this approach in some of the cases, with comments to the effect that an extra-curial event should mitigate because the offender has already experienced suffering.

Thus, doctrinally, there are two means by which extra-curial hardships could be incorporated into the sentencing discretion: as a component of the proportionality principle or as a discrete mitigating consideration. On balance, it is more doctrinally and institutionally sound if incidental harms are viewed through the lens of the proportionality principle as opposed to being a discrete mitigating consideration. This would make the role of extra-curial events more stable given that there is no accepted coherent theory of aggravating or mitigating considerations – hence, it is difficult doctrinally to entrench a consideration as being incontestably mitigatory. Evaluating the concept of extra-curial hardships from the perspective of the proportionality principle potentially grounds them within a well-established construct and in a manner where its role is clear: to inform more fully the sanction severity side of the proportionality equation. Incorporating such concepts within the principle is also in keeping with existing orthodoxy, where a number of other aggravating and mitigating considerations have been held to be an inherent aspect of the proportionality principle.

To this end, some factors which have already been identified as relevant to offence seriousness include: the consequences of the offence, including the level of harm; the offender's culpability;¹³¹ the protection of society;¹³² and even the offender's previous criminal history.¹³³

In order for extra-curial sanctions to be relevant to the sanction side of the proportionality thesis, they can only validly impact on penalty if they constitute a form of punishment that is properly recognisable from the sentencing perspective: the punishment (not the extra-curial matter) must fit the crime. Thus, the key consideration is whether, in fact, extra-curial hardships constitute punishment.

129 For an attempt to construct such a theory, see Mirko Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals' (2014) 62 *Buffalo Law Review* 1159.

130 Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee* (Victorian Attorney-General's Department, 1988) vol 1, ch 5.

131 For example, whether it was intentional, reckless or negligent.

132 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 474 (Mason CJ, Brennan, Dawson and Toohey JJ).

133 *R v Mulholland* (1991) 1 NTLR 1, 13 (Angel J).

4 For an Incidental Hardship To Impact on Proportionality It Must Constitute 'Punishment'

This inquiry is complicated by the fact that there is no universally accepted definition of punishment.¹³⁴ In defining punishment, some commentators focus on its association with *guilt*. Thus, Herbert Morris defines punishment as 'the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person's guilty behaviour'.¹³⁵ Duff defines punishment as 'the infliction of suffering on a member of the community who has broken its laws';¹³⁶ and, similarly, McTaggart defines punishment as 'the infliction of pain on a person because he has done wrong'.¹³⁷

A wider definition is provided by Nigel Walker, who observes that while punishment generally requires that the offender has voluntarily committed the relevant act, it is sufficient that the punisher believes or pretends to believe that he or she has done so.¹³⁸ This definition better reflects this aspect of punishment, given that there is no question that accused who are wrongly convicted and sentenced by courts undergo punishment. However, what is notable for the purpose of this discussion is that the above definitions, while focusing on the aspect of guilt, nevertheless, require that the punishment is *for* the crime, that is, there is the implicit requirement of a causal link between the two subject matters.

This link emerges also in relation to commentators who focus on the connection with *blame* as being cardinal to the concept of punishment. Andrew von Hirsch states that '[p]unishing someone consists of visiting a deprivation (hard treatment) on him, *because* he supposedly has committed a wrong, in a manner that expresses disapprobation on the person for his conduct',¹³⁹ or '[p]unishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong, under circumstances and in a manner that conveys disapprobation of the offender for his wrong.'¹⁴⁰ Further, it has been noted by John Kleinig that:

[P]unishment ... involves a stigmatizing condemnation of the punished. It does so, because the person has been judged to be guilty *inter alia* of some *moral wrong*-

134 To this end, certainly the courts have not attempted to set out an authoritative definition: see Chong, Fellows and Richards, above n 3, 381.

135 Herbert Morris, 'Persons and Punishment' in Stanley E Grupp (ed), *Theories of Punishment* (Indiana University Press, 1971) 76, 83.

136 R A Duff, *Trials and Punishments* (Cambridge University Press, 1986) 267. See also at 151, where Duff states that punishment is suffering imposed on an offender for an offence by a duly constituted authority.

137 John McTaggart Ellis McTaggart, *Studies in Hegelian Cosmology* (Cambridge University Press, 1901) 129.

138 Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 2.

139 Andrew von Hirsch, 'Censure and Proportionality' in Antony Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press, 1994) 115, 118 (emphasis added).

140 von Hirsch, *Past or Future Crimes*, above n 112, 35. See also Ten, who states that punishment is not merely the imposition of unpleasantness on the offender: 'the imposition is made to express disapproval or condemnation of the offender's conduct which is a breach of what is regarded as a desirable and obligatory standard of conduct': C L Ten, *Crime, Guilt and Punishment: A Philosophical Introduction* (Clarendon Press, 1987) 2.

doing, that is, of violating basic conditions of our human engagement. ... [P]unishment is for ... a breach of standards that are believed to be of fundamental significance in our human intercourse.¹⁴¹

Apart from the alleged requirement of guilt and the tendency of punishment to condemn, another common definitional trait is the assumption that punishment must be imposed by a *person in authority*. For example, Hobbes provides that punishment is an:

[e]vill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the law; to the end that the will of men may thereby the better be disposed to obedience. ... [T]he aym of Punishment is not a revenge, but terrour ...¹⁴²

Honderich defines punishment as ‘*an authority’s infliction of a penalty, something involving deprivation or distress, on an offender, someone found to have broken a rule, for an offence, an act of the kind prohibited by the rule*’¹⁴³ and, in the postscript to the same book, written over a decade later, as ‘*that practice whereby a social authority visits penalties on offenders, one of its deliberate aims being to do so.*’¹⁴⁴ If the imposition of the punishment by an authority is essential, it follows that most forms of extra-curial punishment are not relevant to sentencing.

Some scholars have defined punishment in terms of pain. Bentham simply declared that ‘all punishment is mischief: all punishment in itself is evil’;¹⁴⁵ Ten states that punishment ‘involves the infliction of some unpleasantness on the offender, or it deprives the offender of something valued.’¹⁴⁶ Others have placed somewhat emotive emphasis on the hurt that punishment seeks to bring about. Punishment has been described as pain delivery,¹⁴⁷ and, similarly, it has been asserted that ‘[t]he intrinsic point of punishment is that it should *hurt* – that it should inflict suffering, hardship or burdens’.¹⁴⁸ Walker is somewhat more expansive regarding the type of evils which can constitute punishment: punishment ‘involves the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases, death.’¹⁴⁹

141 John Kleinig, ‘The Hardness of Hard Treatment’, in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Clarendon Press, 1998) 273, 275 (emphasis in original). For a fuller account of Kleinig’s definition of punishment, see John Kleinig, *Punishment and Desert* (Martinus Nijhoff, 1973) ch 2; see especially at 41–2.

142 Thomas Hobbes, *Leviathan* (Penguin, first published 1651, 1968 ed) 353, 355 (emphasis added).

143 Ted Honderich, *Punishment: The Supposed Justifications* (Penguin, revised ed, 1984) 15 (emphasis in original).

144 *Ibid* 208 (emphasis added).

145 Bentham, above n 112, 158.

146 Ten, *Crime, Guilt and Punishment*, above n 140, 2.

147 Nils Christie, *Limits to Pain* (Martin Robertson, 1981) 19, 48.

148 Anthony Duff, ‘Punishment, Citizenship and Responsibility’ in Henry Tam (ed), *Punishment, Excuses and Moral Development* (Avebury, 1996) 17, 18.

149 Walker, *Why Punish?*, above n 138, 1.

H L A Hart is even more comprehensive, and in his definition he includes all of the features adverted to above. According to Hart, the features of punishment are that:

1. It must involve pain or other consequences normally considered unpleasant.
2. It must be for an offence against legal rules.
3. It must be of an actual or supposed offender for his offence.
4. It must be intentionally administered by human beings other than the offender.
5. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.¹⁵⁰

5 Preferred Definition of Punishment

Thus, there are numerous definitions of punishment. Most of them involve concepts which negate the possibility of extra-curial hardships coming within the scope of the concept. Extra-curial hardship, while it constitutes a deprivation, is not imposed by an authority and does not require blame to be projected at the offender. Furthermore, in most instances, there is no need for the offender to be found guilty of an offence. However, these observations are not necessarily decisive against such deprivations being instances of punishment: the accounts of punishment which leave little scope for the operation of extra-curial hardships might be flawed. Additionally, there is a logical distinction between the definition of a term at its literal and justificatory levels. However, in order to reject orthodox understandings of concepts, it is necessary to set out concrete reasons for doing so: explanation and justification are often closely linked. It is to these issues that we now turn.

From the above accounts of punishments, it seems there is consensus on two points. First, that punishment involves some type of unpleasantness and, secondly, that it is on account of actual or perceived wrongdoing.

The requirement that punishment must be imposed by a person in authority is less obvious. Walker takes the view that punishment can be ordered by anyone who is regarded as having the right to do so, such as certain members of a society or family,¹⁵¹ not merely a formal legal authority, and that punishment stems not only from violation of legal rules, but extends to infringements of social rules or customs.¹⁵² This would seem to accord with general notions regarding punishment and, indeed, there would appear to be many parallels between, say, family discipline and legal punishment.¹⁵³ As Walker points out, punishment need not be by the state. It has different names depending on the forum in which it is

150 H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, 1968) 4–5.

151 Walker, *Why Punish?*, above n 138, 2.

152 *Ibid.*

153 See also, eg, Morris, above n 135.

imposed, adding that: ‘When imposed by the English-speaking courts it is called “sentencing”. In the Christian Church it is “penance”. In schools, colleges, professional organizations, clubs, trade unions, and armed forces its name is “disciplining” or “penalizing”.’¹⁵⁴

Thus, in principle there does not appear to be any reason that the practice of punishment does not extend to other situations (ie, those beyond the court setting) where the punisher is in a position of dominance, for example, where the punisher is a teacher, parent or employer.

Guilt and blame are also not intrinsic features of punishment. Innocent people who are wrongly convicted and imprisoned are nevertheless punished. Blame is a broader concept than guilt but probably still not essential for punishment to occur. Nearly all criminal behaviour engenders a degree of blame, but there are some types of behaviour where it is arguably lacking. An example is ‘mercy killing’ (ie, active voluntary euthanasia) which, strictly speaking, is murder but may not attract condemnation.¹⁵⁵ A more modest, and accurate, ingredient of this requirement in the context of punishment is that it is imposed for a wrong.¹⁵⁶

Thus, core aspects of punishment are that it consists of a hardship or deprivation; the taking away of something of value¹⁵⁷ for a wrong actually or perceived to have been committed.¹⁵⁸ Typically, this would be administered by another person, although it is not clear whether that is essential.

The first requirement is incontestable: an experience which benefits an individual or has no impact on them is not punishment. The second requirement is less germane but nevertheless essential. Without this stipulation, any experience that constituted a detriment could be termed a punishment. However, it is not credible to describe an illness, failure in an exam or marriage break-up, as a form of punishment.

Thus, in order for a hardship to constitute a form of punishment, it must be a form of deprivation and there must be some connection between the deprivation and violation of a social norm (or law). These concepts are developed further

154 Walker, *Why Punish?*, above n 138, 1. See also Kleinig, *Punishment and Desert*, above n 141, 17–22.

155 Opinion polls show that approximately 80 per cent of the community are in favour of active voluntary euthanasia. A poll published in *The Australian* on 15 February 1995 showed that 81 per cent of people favoured euthanasia: Justine Ferrari, ‘Eight in 10 Support Law to Allow Euthanasia’, *The Australian* (Sydney), 15 February 1995, 3. This figure is in line with international trends. Polls in the United Kingdom, the United States and Canada show approval rates for euthanasia of 78 per cent, 68 per cent, and 78 per cent, respectively: Select Committee on Euthanasia, Legislative Assembly of the Northern Territory, *Report of the Inquiry by the Select Committee on Euthanasia* (1995) 59–60 <<http://www.nt.gov.au/lant/parliamentary-business/committees/rotti/rottireport/vol1.pdf>>. The results of a comprehensive range of surveys on euthanasia are detailed in Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Euthanasia Laws Bill 1996* (1997) ch 7. More generally, see Margaret Otlowski, *Voluntary Euthanasia and the Common Law* (Clarendon Press, 1997).

156 Defined broadly to mean violation of a moral, civil or criminal norm.

157 In this respect, we agree with Kleinig, who points out that punishment involves some deliberate imposition by the punisher on the punished: Kleinig, *Punishment and Desert*, above n 141, 22–3.

158 Apart from the qualification relating to the perception of the offence, this definition accords with that advanced by C L Ten, ‘Crime and Punishment’ in Peter Singer (ed), *A Companion to Ethics* (Blackwell, 1991) 366.

below in the context of considering the relevance of each form of extra-curial hardship in the sentencing inquiry.

IV APPLYING THE OVERARCHING THEORY

A Public Opprobrium and Shame Should Not Reduce Penalty

We commence the discussion in this section with further consideration of public opprobrium. The appropriate response to the relevance of extra-curial punishment in the form of public opprobrium is the most straightforward. Criminal conduct normally attracts a degree of condemnation and opprobrium. In fact, it has been held that denunciation (which is the catalyst for opprobrium) is an important goal of sentencing. In *Channon v The Queen*, Brennan J said that '[p]unishment is the means by which society marks its disapproval of criminal conduct'.¹⁵⁹ Justice Kirby stated that in addition to expressing disapproval of the conduct, denunciation also expresses the message that the conduct must be punished:

A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'.¹⁶⁰

Denunciation is a common law sentencing objective, as well as being an express objective of several sentencing statutes.¹⁶¹

Given that sentencing aims to elicit denunciation and opprobrium, it is contradictory to claim that this very goal should, at the same time, be a basis for mitigation. This incongruity has been noted by Hayne J¹⁶² who observed in *Ryan v The Queen*: 'There is an irreducible tension between the proposition that offending behaviour is worthy of punishment and condemnation according to its gravity, and the proposition that the offender is entitled to leniency on account of that condemnation.'¹⁶³

The role of opprobrium in the sentencing calculus could, potentially, be salvaged if it were established that, in fact, denunciation should not be an

159 (1978) 33 FLR 433, 437. See also *O'Connell v Western Australia* [2012] WASCA 96; *DPP (Tas) v T* [2012] TASCRA 15, [23] (Crawford CJ), with whom Evans and Tennent JJ agreed: at [25] (Evans J), [26] (Tennent J); *Dawson v The Queen* [2013] NSWCCA 61, [37] (Schmidt J), with whom Price and McCallum JJ agreed: at [1] (Price J), [2] (McCallum J).

160 *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J) (citations omitted). See also Walker, *Why Punish?*, above n 138, 26.

161 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(f); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(f); *Sentencing Act 1995* (NT) s 5(1)(d); *Penalties and Sentences Act 1992* (Qld) s 9(1)(d); *Sentencing Act 1997* (Tas) s 3(e)(iii); *Sentencing Act 1991* (Vic) s 5(1)(d). There are no equivalent provisions in SA and WA.

162 (2001) 206 CLR 267.

163 *Ibid* 314 [157].

objective of sentencing.¹⁶⁴ However, even if this revisionary approach is endorsed there is still no role for opprobrium as a mitigating consideration.

Opprobrium can emanate from numerous sources including family, friends, associates or the wider community. The level of opprobrium directed towards an offender depends mainly on the offence type and the notoriety of the offender. While it comes in degrees, it cannot ever be accurately measured or quantified. This matter is also noted by McHugh J in *Ryan v The Queen*, who states that giving weight to opprobrium in the sentencing calculus is unsound because:

it would seem to place a burden on the sentencing judge which would be nearly impossible to discharge. The opprobrium attaching to offences varies greatly from one offender and one offence to another. How a judge could realistically take such a matter into account is not easy to see.¹⁶⁵

Opprobrium has no physical presence or force and can be ignored by a strident and resolute offender. Hardships that cannot be measured and whose impact can be negated to naught by offenders do not satisfy the most important requirement of punishment: that they must hurt.¹⁶⁶ Opprobrium should therefore not be a mitigating consideration in sentencing.

B Injuries Sustained While Offending

The most obvious and impactful form of harm that can be inflicted on an offender associated with an offence is physical injury. As we have seen, given the precarious nature of many criminal activities, this is not an irregular occurrence. Injuries suffered during the offending occur in either one of two relatively well-defined ways: (i) negligence by the offender, for example, as a result of an explosion in a drug laboratory; or (ii) self-defence or other responses by police or bystanders to a crime. Post-offence injuries to offenders typically stem from (iii) vigilante conduct (either in the community or in jail); or (iv) traditional punishment.

While there is no clear approach to the availability of sentencing discounts in relation to these matters, as we have seen, the weight of authority suggests that they normally mitigate sentence. It is contended that this approach is unsound. While injuries sustained by an offender satisfy the hardship dimension of punishment, they should be rejected as mitigating factors, for two key reasons.

1 Injuries Sustained During the Offence Due to Offender Neglect Should Not Mitigate – Causation Lacking

First, in relation to injuries that occur at the time of offending, there is insufficient nexus with the offence. Issues of causation are inherently complex and no satisfactory theory of legal causation has been developed by the courts or

164 For an argument to this end, see Mirko Bagaric, 'The Negation of Venting in Australian Sentencing: Denouncing Denunciation and Retribution' (2014) 88 *Australian Law Journal* 502.

165 (2001) 206 CLR 267, 284 [53].

166 See above Part III.

legislature which can be invoked to provide clear answers to complex interactions.¹⁶⁷

However, several bright lines have been drawn in this context that apply to resolve clear-cut instances. They operate to exclude several forms of extra-curial punishment from being factored into the sentencing realm.

Injuries sustained during the offence that fall into the first category set out above (ie, due to offender inadvertence or misadventure) are not sufficiently connected to the offending behaviour to be categorised as punishment. Rather, the fact that an offence is being committed in such circumstances is merely part of the backdrop to the injury. The injury is not precipitated by a finding of guilt nor an attribution of blame, at least not in the sense of a considered judgment being made to this end. Where an offender is injured in a drug laboratory explosion or in a motor vehicle collision that results in the death of other people, the injury is not caused by the fact that the conduct is a criminal offence. The legal characterisation of the behaviour is simply part of the contextual backdrop to the behaviour which can only be determined definitively in an ex-post facto sense. Moreover, there is clearly no institutional or systemic decision-making process that mandates criminality as being a necessary ingredient or requirement for the infliction of the injury. In such cases, the injury is simply an unfortunate happenstance arising from an (admittedly illegal) activity that the offender was undertaking at the time. The hardship (in the form of the injury) is not one that, in any sense of the word, is imposed *for* the crime. The connection between the crime and the injury is so tenuous that not even the most modest causation requirement is satisfied. The minimal test for causation that has been advanced is the ‘but for’ standard. If an accused person, who is suspected of dangerous driving, is injured during a collision that kills others and is subsequently acquitted of the offence, the injury will obviously remain even though any (institutional) sense of wrongdoing has been negated. It follows that the legality

167 The approaches include the ‘substantial and operating cause test’: *R v Hallett* [1969] SASR 141; *R v PL* (2009) 261 ALR 365; the ‘natural consequence standard/reasonable foresight test’: *Royall v The Queen* (1991) 172 CLR 378; and the ‘*novus actus interveniens* test’: *R v Blaue* [1975] 1 WLR 1411. None of the tests is paramount. As noted by McHugh J in *Royall v The Queen* (1991) 172 CLR 378, 448:

Judicial and academic efforts to achieve a coherent theory of common law causation have not met with significant success. Perhaps the nature of the subject matter when combined with the lawyer’s need to couple issues of factual causation with culpability make achievement of a coherent theory virtually impossible.

In the torts area the issue is just as opaque. Tests that have been adopted are the ‘but for’ test: *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390; *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111; the ‘common sense’ test: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506; and the ‘scope of liability test’: *Civil Liability Act 2002* (NSW) s 5D. In sentencing, the approach is even more obscure. In some cases the courts have held that offenders are only liable for harm that was reasonably foreseeable as a result of the offender’s actions: *Josefski v The Queen* (2010) 217 A Crim R 183; however, on other occasions, broader approaches have been taken: *Eade v The Queen* (2012) 35 VR 526; *DPP (Vic) v Marino* [2011] VSCA 133, [30]–[31] (Kyrou AJA), with whom Buchanan and Nettle JJA agreed: at [1] (Buchanan JA), [2] (Nettle JA); *DPP (Vic) v Eli* [2008] VSCA 209, [36] (The Court) where a ‘natural result’ test was applied. See also Kenneth J Arenson, ‘Causation in the Criminal Law: A Search for Doctrinal Consistency’ (1996) 20 *Criminal Law Journal* 189.

of the conduct is merely part of the setting in which the injury occurred – but it is a setting that is of no legal relevance.

2 *Injuries Inflicted by Others Should not Mitigate: Appropriate Response is to Punish Them*

The mitigatory relevance of injuries sustained by offenders as a result of the infliction of harm by others (that is, categories (ii), (iii) and (iv) above), whether during the commission of the offence, vigilante attacks after the offence, or in the form of customary forms of punishment, could also potentially be dismissed using the same rationale. In relation to all of these instances, the hardship is invoked irrespective of whether the offender is guilty of the relevant offence. However, there is a logical difference between these injuries and those sustained as a result of the inattentiveness of the offender. In the case of the latter injuries, they are generally precipitated by a decision by another individual responding to an event that he or she (rightly or wrongly) believed to be a criminal offence. Thus, there is at least a tenable link between the injury and the crime.

However, in determining the relevance of a mitigating consideration, it is necessary to understand the multidimensional institutional legal construct within which such factors operate. The sentencing system does not exist in a vacuum. It is subsumed within the broader system of criminal justice and the overarching system of law and justice. It is this wider perspective that negates the desirability of these forms of physical injury constituting a mitigating consideration. Legal coherence requires that individuals should not benefit from the lawful actions of others.¹⁶⁸ In short, offenders who are injured as a result of, for example, defensive conduct by other individuals should not derive a benefit. Additionally, offenders who are injured as a result of the overreaction to their offending behaviour should also not benefit.

The actions of individuals who respond unlawfully to the criminal conduct of offenders are criminal offences. The immediate and direct response to such actions should be to prosecute and sentence such individuals. Thus, in *R v Hannigan*, one of the reasons the Queensland Court of Appeal refused to reduce the sentence for an offender who was assaulted by an arresting police officer was because it was held that the appropriate response to the assault was to prosecute the police officer. Justice of Appeal Chesterman (with whom de Jersey CJ agreed) stated:

To reduce the sentence imposed on the applicant will not work any sanction on the arresting constable. It will not operate as a punishment for his misconduct or as a deterrent against any future misconduct. If such sanctions are shown to be warranted they should be imposed by the means I have described. They will not be imposed by reducing the applicant's sentence.¹⁶⁹

168 As for the need for legal coherence across different legal subject areas, see *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390; *Sullivan v Moody* (2001) 207 CLR 562; *Miller v Miller* (2011) 242 CLR 446, 454 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

169 [2009] 2 Qd R 331, 337–8 [29].

Admittedly, in some instances, prosecution of the individual who caused the offender's injuries is not feasible; for example, in the case of an assault victim who injures the accused while acting in self-defence. In these cases, there is nevertheless no basis for mitigating the sentence of the offender. The victim's response is a situational (and often) instinctive response, which generally has no connection to the criminality of the act. Put simply, the appropriateness of the victim's response is not defined by the criminality or otherwise of the offender's conduct. For example, a victim is permitted to act in self-defence against an insane attacker in the same manner as against a sane aggressor. Thus, the criminality or otherwise of the conduct of the offender is merely part of the backdrop to the injury – as is the case of the scenarios set out in category (i). The injury to the offender is not punishment in any sense of the word.

The second reason that all injuries sustained by an offender which have a supposed connection to the offending should not mitigate is that the impact of an injury is not contingent upon the circumstance in which it was sustained. A one-legged prisoner feels the same additional burden whether he lost his leg during a burglary or as a result of a workplace injury.

3 Injuries Inflicted by Others Should not Mitigate: Additional Burden of Sanction on Infirm Offenders is Already Mitigating

Thirdly, injuries sustained during the commission of an offence or shortly afterwards should not mitigate because a discount is often already accorded where an offender finds a sanction more burdensome because of his or her physical (or mental) state. The courts have generally been prepared to confer a discount where ill health or infirmity make prison more difficult. In *R v Smith*,¹⁷⁰ King CJ stated:

Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.¹⁷¹

There are numerous instances where bad health has been mitigating.¹⁷² In *R v Puc*, the mental frailty of the offender was mitigatory. The Court stated:

170 (1987) 44 SASR 587.

171 Ibid 589. See also *R v Vachalec* [1981] 1 NSWLR 351, 353 (The Court). Ill health can affect the total effective sentence and the length of the non-parole period: *R v Magner* [2004] VSCA 202. Old age is also generally regarded as a mitigating factor: *Gulyas v Western Australia* (2007) 178 A Crim R 539. However, it is often given little weight: see *Ljuboja v The Queen* (2011) 210 A Crim R 274; *R v Cave* [2012] SASFC 42. While old age and adverse health are often coupled together as mitigating considerations, the reasons for additional burden are different. In the case of old age, it is because 'each year of a sentence represents a substantial proportion of the period of life which is left to an offender of advanced age': *Ljuboja v The Queen* (2011) 210 A Crim R 274, 295 [102] (Buss JA).

172 See, eg, *Eliassen v The Queen* (1991) 53 A Crim R 391, 396 (Crockett J), where AIDS was mitigating. Both McGarvie and Phillips JJ agreed with Justice Crockett's judgment: at 397. See also *R v Magner* [2004] VSCA 202; *A W P v The Queen* [2012] VSCA 41; *R v Van Boxtel* (2005) 11 VR 258, 267 (Callaway JA), with whom Ormiston and Charles JJA agreed: at 259 [1] (Ormiston JA), 259 [2] (Charles JA).

Impaired mental functioning will also be relevant to sentencing where the existence of the condition at the date of sentencing means that the sentence will weigh more heavily on the offender than it would on a person in normal health, or where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health.¹⁷³

This principle is reinforced by the reality that medical treatment in prison is invariably of a lesser standard than in the community, due to difficulties in transporting prisoners to medical facilities and delays in seeing specialists.¹⁷⁴ To allow a further reduction where the injury occurred in the course of a crime is to double-dip for this factor.

4 Injuries Suffered by an Offender do not Reduce the Need for Specific Deterrence

Moreover, to the extent that the courts have provided express reasons for sometimes mitigating penalty on account of injuries sustained by an offender, these rationales are flawed. As we saw above, three such reasons have been advanced. The first rationale suggested by the courts is that an offender who sustains injuries at or about the time of offending will thereby be deterred from future offending. In sentencing terms, the courts here are referring to specific deterrence. However, as we have seen above, there is no evidence that this objective is achievable.¹⁷⁵ The second rationale is connected to the first. It is the view that injuries associated with offending will provide the offender with an 'unhappy reminder' of the crime.¹⁷⁶ This is, in effect, merely a speculative observation as opposed to a reason for reducing a sentence.

5 Injuries Suffered by an Offender do not Reduce the Need for Retribution

The third rationale is that the need for retribution is diminished as a result of the harm suffered by the offender. It is difficult to address this rationale fully because retribution is not well-defined in the sentencing context.

173 [2008] VSCA 159, [32] (Maxwell P). Both Nettle and Dodds-Streeton JJA agreed with President Maxwell's judgment: at [35] (Nettle JA), [36] (Dodds-Streeton JA).

174 *Pfeiffer v The Queen* [2009] NSWCCA 145, [14] (McClellan CJ at CL), with whom Simpson and Buddin JJ agreed: at [28] (Simpson J), [29] (Buddin J). But there is no firm principle that ill health must reduce jail length. Thus, in *R v Wickham* [2004] NSWCCA 193, [18] (Howie J), with whom Bell and Hislop JJ agreed: at [1] (Bell J), [52] (Hislop J), it was held that:

Common humanity will sometimes require a court to consider a life-threatening physical illness as a matter of mitigation even though the offender was suffering from such an illness at the time of the commission of the offence. However, where as here, the issue is one of the protection of the community, it may be that common humanity for the offender gives way to concern for potential victims.

175 See above Part III.

176 See above n 25.

While retribution is a well-developed concept in the literature involving the justification of punishment,¹⁷⁷ its meaning has not been discussed at length by the judiciary.¹⁷⁸

Justice McHugh, in *Ryan v The Queen*,¹⁷⁹ provided the most expansive statement regarding the nature of retribution in sentencing. His Honour stated that the aim of retribution is to maintain public confidence in the courts. His Honour also added:

Thus, the existing principles require many sentences to be retributive in nature, a notion that reflects the community's expectation that the offender will suffer punishment and that particular offences will merit severe punishment. The 'persistently punitive' attitude of the community towards criminals means that public confidence in the courts to do justice would be likely to be lost if courts ignored the retributive aspect of punishment. In the middle of the twentieth century, the need for sentences that were conducive to the rehabilitation of the prisoner was much emphasised. Less attention was then paid to the retributive aspect which was often ignored by an embarrassing silence. But under the notion of giving the offender his or her 'just deserts', the retributive aspect has re-asserted itself in recent years.¹⁸⁰

Thus, retribution has two aspects. It is advanced as a stand-alone justification for punishing offenders as well as a limiting principle, confining punishment to a level that is commensurate with the gravity of the crime.¹⁸¹ Interpreted in the second manner, as we have seen, it has a statutory foundation in most jurisdictions.¹⁸²

On either understanding of the retributive ideal, the central tenet of the notion is that the punishment should fit the crime, which is an embodiment of the

177 See discussion in Part III above.

178 When it is mentioned by sentencing courts, it is generally merely declared as being relevant without any explanation of the concept: see, eg, *R v CBG* [2013] QCA 44, [30] (Atkinson J), with whom White and Gotterson JJA agreed: at [4] (White JA), [5] (Gotterson JA); *R v Tout* [2012] QCA 296, [19] (Fraser JA), with whom Muir and Gotterson JJA agreed: at [1] (Muir JA), [23] (Gotterson JA); *R v Roberts-O'Keefe* [2012] QCA 260, [39] (McMeekin J), with whom Holmes and Gotterson JJA agreed: at [1] (Holmes JA), [2] (Gotterson JA); *Buksh v The Queen* [2013] NSWCCA 60; *Hudd v The Queen* [2013] NSWCCA 57; *Phan v The Queen* [2013] NSWCCA 49; *Azzopardi v The Queen* (2011) 35 VR 43; *R v Pickard* [2011] SASFC 134, [92] (Blue J); *DPP (Tas) v T* [2012] TASC 15, [23] (Crawford CJ), with whom Evans and Tennent JJ agreed: at [25] (Evans J), [26] (Tennent J); *Crosswell v Tasmania* [2012] TASC 1, [19] (Evans J); *Brough v The Queen* [2013] NSWCCA 110, [18] (Barr JA), with whom Latham and Button JJ agreed: at [1] (Latham J), [2] (Button J); *Thompson-Davis v The Queen* [2013] NSWCCA 75, [77] (Campbell J), with whom Beazley P and Hall J agreed: at [1] (Beazley P), [2] (Hall J); *DPP (Vic) v Anderson* [2013] VSCA 45, [1] (The Court); *Collins v The Queen* [2012] VSCA 163, [73] (Hansen JA).

179 (2001) 206 CLR 267.

180 Ibid 282–3 [46] (citations omitted).

181 Lawbook, *The Laws of Australia* (at 14 November 2014) 12 Criminal Sentencing '1 Purposes of Sentencing' [12.1.60]; Judicial College of Victoria, *Victorian Sentencing Manual* (at 10 April 2015) B General Sentencing Principles '7 Sentencing Purposes' [7.2.2] <<http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#15303.htm>>.

182 *Crimes Act 1914* (Cth) s 16A(2)(k); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j); *Sentencing Act 1991* (Vic) s 5(1)(a); *Sentencing Act 1995* (WA) s 6(1).

proportionality principle.¹⁸³ However, as we have seen, this cannot justify allowing injuries to the offender to mitigate, irrespective of the circumstances in which the injuries were sustained or their exact timing.

6 *Analogy between Offender Injuries and Remorse Is Not Persuasive*

The last possible basis for attempting to find a role for injuries sustained during the offending to mitigate penalty, is by drawing an analogy with a well-accepted mitigating consideration in the form of remorse. Physical harm stemming from an offence is, arguably, in principle no different from mental harm or anguish that is experienced by an offender. Remorse is a well-established mitigating factor.¹⁸⁴ This is a self-induced feeling of regret relating to the crime.¹⁸⁵ The presence of remorse can operate to significantly reduce the severity of the punishment meted out to an accused, as was explained in *Neal v The Queen*: ‘Contrition, repentance and remorse after the offence are mitigating factors, leading in a proper case to some, perhaps considerable, reduction of the normal sentence’.¹⁸⁶

While remorse is not a recognisable mental condition, it is a negative mental affliction which sets back the sentiments of an offender. It is, therefore, potentially a form of incidental punishment: remorseful offenders hurt more than identically placed non-remorseful offenders.

The main rationale for ascribing weight to remorse in the sentencing calculus is the assumption that repentant offenders accept that their behaviour was wrong and are, presumably, less likely to reoffend.¹⁸⁷

However, this same rationale cannot be applied to injuries sustained by the offender during or at about the time of the offence. There is no evidence or even strong theoretical basis (as opposed to mere conjecture) for assuming that an offender who is injured during the commission of an offence is less likely to reoffend.¹⁸⁸

Thus, it emerges that the existing orthodoxy that inclines to the practice of according mitigation to offenders who are injured during or at about the time of the commission of an offence, is flawed. In most cases, the crime is simply the

183 Anderson, above n 112; von Hirsch, *Past or Future Crimes*, above n 112, ch 1; Ryberg, above n 112, 2.

184 *R v Shannon* (1979) 21 SASR 442, 452 (King CJ); *R v Thomson* (2000) 49 NSWLR 383, 412 [118] (Spigelman CJ); *Cameron v The Queen* (2002) 209 CLR 339; *Davy v The Queen* [2011] VSCA 98.

185 In *Fusimalohi v The Queen* [2012] ACTCA 49, [31], Refshauge J made the following observations regarding the meaning of remorse:

R Edney and M Bagaric, in *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) at 175, describe remorse as ‘the feeling of regret or sorrow for what one has done.’ See also [*Alvares v The Queen* (2011) 209 A Crim R 297] at 313; [44], and at 311; [38] where Buddin J noted that there is a relevant distinction between ‘contrition’ and ‘remorse’. It is, as Winneke P noted in *R v Whyte* (2004) 7 VR 397 at 403; [21] ‘not to be confused with such emotions as self-pity.’ Nor, as Asche CJ noted in *R v Jabaltjari* (1989) 64 NTR 1 at 10, should it be confused with a different emotion of ‘being ... sorry for being caught’. As Winneke P said, ‘it is an elusive concept’.

186 (1982) 149 CLR 305, 315 (Murphy J).

187 See Mackenzie and Stobbs, above n 8, 93.

188 Unless the nature of the injury makes it difficult for them to, eg, carry out future robberies. We thank the anonymous referee for this clarification.

backdrop in which the injury occurred – it is not sufficiently causally connected to the offending to constitute punishment, hence, it is irrelevant to the hardship limb of the proportionality thesis. In circumstances where the injury occurs because of the offending, it is still unsound to reduce the penalty because the extra burden that may be felt by the offender as a result of the injury is already a discrete mitigating factor. Wider principles of justice also militate against a penalty concession in these circumstances.

C Employment Deprivations Should Reduce Penalty

As noted above, a number of employment-related hardships are experienced by some offenders as a result of being convicted of a criminal offence. They include being dismissed from a job, being precluded from pursuing a certain career, such as law or accountancy, or having those prospects severely curtailed as a result of a conviction. There is little doubt these deprivations set back the interests of offenders: ‘a person’s employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem’.¹⁸⁹ It is clear that an unemployed offender who commits a fraud suffers less than a lawyer who loses his or her practising certificate as a result of the same offence, and who receives the same court sanction. Thus, a tenable argument is that the effect the commission of a crime has on an offender’s employment situation should be recognised in the sentencing calculus.

Further, unlike the other instances of extra-curial punishment which have been analysed above, there is a direct connection between the crime and the diminished employment situation of the offender. The hardship stems from a *systemic and lawful* process which is normally implemented by the employer (or registration board) and which directly stems from the finding of guilt for a criminal offence. The causal nexus between the crime and hardship is evident.

As noted in Part IV(B)(2) above, sentencing law does not exist in a vacuum and is not necessarily superior to other branches of law. It should take into account wider issues of public and social policy. To this end, as noted above, it has been argued that sentencing law should not operate to perpetuate existing undesirable social or economic structures. It has been suggested that an employment deprivation discount is inappropriate because it would discriminate between offenders and exacerbate existing unfair social structure by, again, favouring those privileged to hold a job. To allow employment status to result in a sentencing discount, so the argument runs, only further compounds the disadvantage that is experienced by the unemployed offender.

This argument fails. The fact that one individual has an occupation and another does not, is not of itself indicative of an unfair economic or social situational advantage. Australia is a market economy and largely a meritocracy. Differences in job status are just as likely to indicate a contrast in commitment and application towards the acquisition of the education and skill sets necessary

¹⁸⁹ *Johnson v Unisys Ltd* [2003] 1 AC 518, 539 [35] (Lord Hoffmann).

to gain employment, as to indicate the unfair treatment of the unemployed individuals.

Employment deprivations are a form of punishment. Consequently, they should be recognised in the overall sanction meted out to an offender, and be subject to the normal sentencing practices and principles governing the infliction of criminal punishment.

To be clear, what should mitigate is not only the loss of a job as a result of a criminal sanction but also any employment deprivation. This extends to the diminished capacity of an offender to secure employment and the disqualification or suspension of a professional or similar qualification (as in the areas of law, medicine or accounting) that often stems from a criminal sanction. Moreover, the mitigatory impact of employment deprivation should apply, even where the offence occurred in the employment setting. There is an intuitive distinction between a solicitor who loses his or her practising certificate as a result of stealing trust money, and one who has it cancelled because of committing a burglary.¹⁹⁰ However, intuition aside, there is no principled basis for the distinction. There is no evidence to suggest that offenders who commit crime in the context of their work setting are more likely to reoffend than those who commit crime in another setting.

A difficulty associated with accommodating employment deprivations in the sentencing calculus is that, at the time of sentence, the impact of the conviction on employment status will not be certain. However, that should not prevent mitigation being accorded. Sentencing courts are accustomed to making informed assessments of future events, and giving appropriate weight to them in the decision regarding an appropriate penalty. Thus, sentencing judges must often make predictions of the likely impact of imprisonment on an offender, their prospects of reoffending, and the like. A similar methodology and reasoning should apply in the context of anticipating the employment hardships that are likely to follow from being found guilty of the offence in question.

Deportation should also be a mitigating consideration, for similar reasons as employment deprivations. Deportation for a crime is causally related to offending behaviour because it is contingent upon a finding of guilt and imposed in a systemic and deliberative manner as a direct response to the criminal activity. As noted earlier, some cases have indicated that deportation should only mitigate penalty if it can be established that it would cause hardship to the offender. It is appropriate to maintain this requirement. However, it is not a requirement that most offenders would find difficult to establish.¹⁹¹ Individuals who are in Australia have made a considered decision to come to this country, typically because they believe it is the place where they can flourish most fully. Most offenders have familial or other connections in Australia and some will have

190 The distinction was invoked in *R v Talia* [2009] VSCA 260, [28] (The Court): see above n 81 and accompanying text.

191 Especially given that mitigating factors need only be established on the balance of probabilities: *R v Storey* [1998] 1 VR 359, 369 (Winneke P, Brooking and Hayne JJA and Southwell AJA); *R v Olbrich* (1999) 199 CLR 270, 281 [27] (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

business and employment interests. Being forced to sever the connections invariably causes some degree of hardship to offenders. The only offenders who could discharge this burden are likely to be those who have been in Australia for a very short period.

V CONCLUSION

Incidental forms of punishment relating to criminal offending come in a variety of different forms. No clear jurisprudence has emerged regarding the circumstances in which these forms of harms should mitigate penalty. The general trend of authorities is that physical harm sustained during the course of an offence should reduce penalty, and to a lesser extent, so too should employment deprivations, public opprobrium and deportation. It is important to emphasise that there are many exceptions to each of these approaches.

This area of law is likely to remain unstable and uncertain in the foreseeable future. This is to some extent a reflection of the imprecise nature of sentencing law. However, the main reason for the obscurity and lack of clarity in this area of the law is the cursory jurisprudential treatment of this issue by the courts. In (generally) allowing extra-curial harm to mitigate penalty, the courts invoke broad, unproven or dubious principles (such as deterrence, retribution and the rehabilitation of offenders), and make speculative assertions regarding the relevance of potential mitigating factors to these objectives.

The confused nature of this area of law ultimately derives from the lack of doctrinal clarity regarding the place of extra-curial harms in the system of sentencing overall. This article attempts to address this gap in the research and in the legal reasoning.

Extra-curial harms should only be factored into the sentencing calculus if they are relevant to the proportionality principle and, in particular, if they increase the hardship experienced by the offender. In order for this to occur, the incidental harms need to constitute a form of punishment, which requires a causal nexus to the offending behaviour.

Public opprobrium fails this standard because it is not a measurable harm and is a hardship which can be ignored by a resilient offender; it is not a form of punishment. Harm sustained while offending is not sufficiently causally related to the offending to constitute punishment. Moreover, if, as a result of a physical harm sustained during or around the time of the offence, the offender sustains an additional burden as part of the criminal sanction (especially imprisonment), the offender will receive a reduced penalty on account of this consideration. It is only employment deprivations and deportation that should be factored into the sentencing calculus. They are directly related to the criminal act and stem from a deliberate and systematic approach to the crime.

The above approach to extra-curial hardships in the sentencing calculus will explain and justify the impact these common forms of deprivation should have in the sentencing calculus and will assist to inject greater clarity into a complex area of sentencing law.