

REDEFINING THE CIRCUMSTANCES IN WHICH FAMILY HARDSHIP SHOULD MITIGATE SENTENCE SEVERITY

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The hardship stemming from prison goes well beyond the pain experienced by offenders. The family and dependants of prisoners often experience significant inconvenience and hardship. Family members of prisoners have not engaged in wrongdoing and hence arguably their suffering should be a mitigating consideration in sentencing. However, this approach potentially unfairly advantages offenders with close family connections and undermines the capacity of courts to satisfy a number of important sentencing objectives, including the imposition of proportionate penalties. The courts and legislatures have not been able to find a coherent manner in which to reconcile this tension. There is conflicting case law regarding the circumstances in which family hardship can mitigate the severity of the criminal penalties. This article examines these competing positions and proposes that family hardship should mitigate penalty severity only when incarcerating the offender would cause severe financial hardship to his or her dependants.

I INTRODUCTION

Imprisonment is the harshest sanction in our system of law. It causes considerable suffering to offenders and in fact more so than is apparent from the immediate nature of the sanction. There are a number of forms of hardship often experienced by prisoners which are not manifestly obvious from the nature of the sanction. These include the increased risk of being subjected to violent attacks in prison and higher mortality rates once offenders are released from prison.¹ In

* Professor of Law, Swinburne University. I thank the anonymous reviewers whose detailed and insightful comments considerably improved the structure and content of the article.

1 Bruce Western and Becky Pettit, 'Incarceration & Social Inequality' (2010) 139(3) *Dædalus* 8, 8, 13; Anne C Spaulding et al, 'Prisoner Survival inside and outside of the Institution: Implications for Health-Care Planning' (2011) 173 *American Journal of Epidemiology* 479, 479; Michael Roguski and Fleur Chauvel, 'The Effects of Imprisonment on Inmates' and Their Families' Health and Wellbeing' (Research Paper, National Health Committee, November 2009) 60–1 <http://www.antonioacasella.eu/salute/Roguski_2009.pdf>; Chalpat Sonti, 'WA Prison Sex Assaults "Ignored"', *WAtoday* (online), 15 December 2009 <<https://www.watoday.com.au/national/western-australia/wa-prison-sex-assaults-ignored-20091214-ksdz.html>>.

addition to this, prison often causes considerable harm to people connected to the offender, especially the offender's family.

The law recognises that in some circumstances the detriment caused to people associated with prisoners can be a mitigating consideration in sentencing.² This can operate to reduce the length of the prison term that the offender is subjected to or in some cases result in the imposition of a non-custodial sanction.³

While hardship to family members is an established mitigating factor at common law and in the sentencing statutes of several Australian jurisdictions, there is considerable uncertainty regarding the scope and application of this mitigating consideration. The general approach has been to interpret this consideration narrowly.⁴ Ostensibly, this is not surprising given that in most instances it is nearly inevitable that removing a person from the community and incarcerating him or her will have a negative impact on others. Further, it has been noted that there is the risk that reducing penalties for offenders with close ties to other people will unfairly favour these offenders and undermine the capacity of the courts to impose proportionate penalties.⁵

Recently, however, considerable divergence has occurred, especially in the federal jurisdiction, regarding the circumstances in which hardship to an offender's family should mitigate penalty. While the orthodox position is that the hardship needs to be of an exceptional nature in order to reduce penalty severity, judicial analysis has raised doubt about the accuracy of this position. Some judges have suggested that 'normal hardship' may suffice in order for family hardship to justify reducing an offender's sentence.⁶ Additionally, there is uncertainty regarding the nature of the hardship that can enliven this consideration. It appears that financial hardship to the family members of offenders can satisfy this consideration, but it is not clear, for example, whether psychological hardship is sufficient to invoke this mitigating consideration.⁷

In this article, I examine whether there is a jurisprudential basis for reducing the severity of sanctions inflicted on offenders due to hardship experienced by their family members, and if so, the circumstances when this consideration should reduce penalty severity. For the sake of clarity, this article considers the issue in the context of all individuals who are connected with offenders (including, for example, family, friends and business associates) but throughout this article, I generally refer to the relevant associates as the family of offenders – in keeping with the relevant case law and current usage.⁸ I make more nuanced distinctions where this is relevant.

I conclude that this area of law should be made more doctrinally robust and predictable. In short, hardship to people associated with offenders should be a mitigating factor only when imprisoning the offender would cause financial

2 See below Part II.

3 See below Part II.

4 See below Part II.

5 These rationales are considered further in Part III below.

6 See below Part II.

7 See below Part II.

8 See below Part II.

hardship to family members that are dependent on the offender. In these circumstances, the hardship should not also have to qualify as being exceptional in nature. The exceptional circumstances test in so far as family hardship is concerned in the sentencing context should be abolished. In effect, this means that hardship to others should only be a mitigating factor when the offender is the main financial provider for his or her partner and/or children. The key reasons for clarifying (and in some instances expanding) the scope of this mitigating factor is that insufficient weight has been placed on the principle that innocent parties should not suffer and there is emerging empirical data which establishes that children from deprived socio-economic backgrounds (which is invariably the case when the main bread winner is incarcerated) fare poorly on a number of important indicia of flourishing.

In the next part of this article, I provide a brief overview of sentencing law and analyse the current legal position regarding the scope and application of hardship to others in the sentencing calculus. In Part III, I evaluate whether there is a doctrinal basis for enabling hardship to others to reduce sentence severity. This is followed in Part IV by an analysis of the manner in which hardship to others should affect sentencing. My recommendations are summarised in the concluding remarks.

II OVERVIEW OF ROLE OF FAMILY HARDSHIP IN SENTENCING

A Overview of the Sentencing Landscape

Prior to examining the role of family hardship in sentencing, I provide a brief overview of the sentencing legal landscape. Sentencing law in Australia is a combination of statute and common law. Although each jurisdiction has its own statutory scheme, the broad considerations that determine sentencing outcomes are similar throughout the country. The key sentencing statutes in each jurisdiction set out the objectives of sentencing. They include just punishment, community protection, general and specific deterrence, rehabilitation and denunciation.⁹ In deciding how much to punish, the main determinant is the principle of proportionality, which provides that the severity of the crime should be matched by the hardship of the sanction.¹⁰

9 *Crimes Act 1914* (Cth) s 16A(1)–(2); *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9; *Sentencing Act 2017* (SA) ss 9–10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

10 In *Hoare v The Queen* (1989) 167 CLR 348, the High Court stated: ‘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’: at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original). In *Veen v The Queen [No 1]* (1979) 143 CLR 458, 467 (Stephen J) and *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ), the High Court stated that proportionality is the primary aim of sentencing. Proportionality has also been given statutory recognition in all Australian jurisdictions: *Crimes Act 1914* (Cth) s 16A(2)(k); *Crimes (Sentencing) Act 2005* (ACT) s

In addition to these considerations, aggravating and mitigating factors usually play an important role in arriving at a particular sentence. There is a degree of variation in the extent to which these factors are set out in each jurisdiction's legislative schemes. While the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Penalties and Sentences Act 1992* (Qld) both list several dozen such considerations,¹¹ most sentencing statutes deal only sparingly with these factors. This does not, however, result in a significant divergence between the respective jurisdictions because aggravating and mitigating factors are mainly defined by the common law in all jurisdictions.¹² There are in fact more than 200 mitigating and aggravating factors in sentencing law.¹³

The reasoning process by which sentencing decisions are made is known as the 'instinctive synthesis'.¹⁴ This requires judges to identify all of the factors that are applicable to a particular sentence, and then set a precise penalty,¹⁵ however, in doing so, courts are not permitted to set out with particularity the precise weight that has been conferred on any particular sentencing factor.¹⁶ In this article, I focus on the role that one mitigating factor (family hardship) should have in the sentencing calculus with a view to make its role in the sentencing calculus clearer and more predictable.

B Family Hardship – The Current Law

1 *Weight of Authority Supports a Strict Approach to Family Hardship Influencing Penalty*

The potential hardship that may be experienced by the family members of offenders as a result of the offender being sentenced to prison is a well-established

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); *Sentencing Act 2017* (SA) s 10(1)(a); *Sentencing Act 1991* (Vic) s 5(1)(a); *Sentencing Act 1995* (WA) s 6(1).

11 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A, 24; *Penalties and Sentences Act 1992* (Qld) pt 2.

12 See *Bui v DPP* (Cth) (2012) 244 CLR 638 with particular reference to the federal sentencing regime.

13 In Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55, 229 factors were identified, while in R Douglas, 'Sentencing' in Legal Studies Department, La Trobe University (eds), *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (Legal Studies Department, La Trobe University, 1980) 55, 68, 164 relevant sentencing factors were identified in a study of Victorian Magistrates' Courts. For an overview of the operation of mitigating and aggravating factors, see Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) ch 4; Stephen J Odgers, *Sentence: The Law of Sentencing in NSW Courts for State and Federal Offences* (Longueville Media, 3rd ed, 2015) ch 4.

14 See *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ); *Barbaro v The Queen* (2014) 253 CLR 58. See also Wayne Martin, 'The Art of Sentencing – An Appellate Court Perspective' (Paper presented at the Singapore Academy of Law & State Courts of Singapore Sentencing Conference 2014, Singapore, 9 October 2014) 6–8.

15 *Markarian v The Queen* (2005) 228 CLR 357, 373–4 (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, 72–4 (French CJ, Hayne, Kiefel and Bell JJ).

16 *Pesa v The Queen* [2012] VSCA 109, [10] (Maxwell ACJ and Hansen JA). The only exceptions are discounts which are accorded for pleading guilty and cooperating with authorities: see Mackenzie and Stobbs, above n 13 and the discussion below.

sentencing mitigating factor.¹⁷ The underpinning of this mitigating factor is the principle of mercy at common law.¹⁸ Richard Fox notes that this stems from the royal prerogative of mercy, which has a religious backdrop and is nowadays rarely analysed in legal decisions.¹⁹ To the extent that hardship to those connected with offenders has been applied to reduce sentence severity, it is generally in the context of members of defendants' 'immediate family or other dependants'.²⁰

The principle that family hardship can mitigate sanction severity also has a statutory basis in three jurisdictions. Section 10(1)(n) of the recently repealed *Criminal Law (Sentencing) Act 1988* (SA) provides that when a court is sentencing an offender, it must have regard to the 'probable effect any sentence under consideration would have on dependants of the defendant'.²¹ In a similar vein, section 33(1)(o) of the *Crimes (Sentencing) Act 2005* (ACT) and, in the Commonwealth sphere, section 16A(2)(p) of the *Crimes Act 1914* (Cth) state that in sentencing an offender, the court must take into account 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'. These statutory provisions have, until recently,²² generally been interpreted in the same manner as the application of the principle at common law.

Perhaps the most often cited judgment regarding the application and scope of the principle is that of Winneke P in *R v Panuccio*, where his Honour stated:

Although the court is not, both as a matter of compassion and common sense, impervious to the consequences of a sentence upon other members of the family of a person in prison, such factors will need to be 'exceptional' or 'extreme' before the court will tailor its sentence in order to relieve the plight of those other family members. Such a principle is clearly an obvious one, because the court's primary function is to impose a sentence which meets the gravity of the crime committed by the person who is being sentenced. There will rarely be a case where a sentence of imprisonment imposed does not have consequential effects upon the spouse, children or other close family members who are dependent in one form or another upon the person imprisoned.

Thus it has been often stated that it is a general principle of sentencing that the court should usually disregard the impact which the sentence will have upon the members of a prisoner's family unless exceptional circumstances have been demonstrated.²³

17 In principle, this consideration could also apply to reduce other forms of penalty, such as a fine, but there are no instances where this factor has been successfully raised in the context of other penalties and hence this article focuses on the scope of family hardship to mitigate sanctions in the form of imprisonment only.

18 *R v Wirth* (1976) 14 SASR 291, 295–6 (Wells J) ('Wirth'); *Boyle v The Queen* (1987) 34 A Crim R 202, 205–6 (Burt CJ); *R v Edwards* (1996) 90 A Crim R 510, 516–17 (Gleeson CJ) ('Edwards'). For a discussion of the historical notion of mercy, see Richard G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 1.

19 Fox, above n 18.

20 *Markovic v Queen* (2010) 30 VR 589, 591 [2] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA) ('Markovic').

21 The Criminal Law (Sentencing) Act 1988 (SA) was repealed following the introduction of the *Sentencing Act 2017* (SA). As a result, the family hardship mitigating factor now derives from the common law in South Australia: see s 11(2) of the *Sentencing Act 2017* (SA). The words of the repealed section remain relevant to the extent that they influenced the interpretation of the scope of that consideration.

22 See the discussion below.

23 (Unreported, Victorian Court of Appeal, Winneke P, Brooking and Charles JJA, 4 May 1998) 6–7.

Thus, in discussing the scope of family hardship to mitigate sentencing severity, Winneke P also refers to two of the key reasons why the consideration is applied strictly. Those considerations are that: (i) most offenders have family connections; and (ii) one of the main aims of sentencing is to impose penalties commensurate with the seriousness of the crime.²⁴

The rationale underpinning family hardship as a mitigating factor is examined at length in *Markovic v The Queen* ('*Markovic*') where the Victorian Court of Appeal noted 'there must always be a place in sentencing for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case'.²⁵ In this case, the appellant was the primary caregiver to his elderly parents whose only income was an overseas pension in the sum of A\$180 per month. The parents were living in a dilapidated caravan with no bathroom or heating. His mother was wheelchair bound as a result of stroke and his father, at age 75, was too old to care for her. In addition to this, the appellant also had three young children, who had medical conditions or learning difficulties. The Court of Appeal held that the sentencing judge could have found these circumstances to be exceptional but his decision to not make such a finding was not overruled because the conclusion was reasonably open to the judge.²⁶ In reaching this conclusion, the Court held that 'properly understood ... the purpose and effect of the "exceptional circumstances" test is to limit the availability of the court's discretion to exercise mercy on that ground'²⁷ and therefore 'there can be no "residual discretion" to exercise mercy on grounds of family hardship where the relevant circumstances are not shown to be exceptional'.²⁸

Accordingly, it is only in exceptional circumstances that hardship to others can mitigate the penalty to be imposed on an offender. In *R v Constant*, the Court elaborated on the test for establishing exceptional hardship in the following terms: 'Where the hardship occasioned by a defendant's family travels beyond what is appropriate in securing the community's welfare and protection through the enforcement of the criminal law, it becomes special or uncommon – exceptional'.²⁹

The scope of family hardship as a mitigating factor is further limited by the fact it has been held that it will be more difficult to establish where the offence is very serious. In *R v Panuccio*, it was held that:

the graver the crime for which the prisoner is being sentenced the more difficult it will be to find exceptional circumstances, because the relief usually sought and generally necessary to alleviate the plight of the relevant family members affected will require absolution from incarceration.³⁰

The general trend of decisions is to apply this ground strictly, not only in theory but also as a matter of practice. For example, in *R v Nagul*, the Court held that family hardship in the form of the offender's wife being diagnosed with cancer and

24 Ibid.

25 (2010) 30 VR 589, 590 [1] (The Court).

26 Ibid 604 [80].

27 Ibid 591 [5].

28 Ibid.

29 (2016) 126 SASR 1, 23 [67].

30 (Unreported, Supreme Court of Victoria Court of Appeal, Winneke P, Brooking and Charles JJA, 4 May 1998) 7, cited in *Markovic* (2010) 30 VR 589, 593 [10] (The Court).

their son completing secondary school did not cross the threshold to constitute a mitigating consideration.³¹

There are a large number of cases in which this mitigating factor has been considered by appeal courts. Generally, a submission that a sentencing judge failed to accord sufficient weight to family hardship in sentencing a defendant fails as a ground of appeal.³² Tamara Walsh and Heather Douglas examined 85 Court of Appeal decisions handed down during the years 2000–14 where family hardship was a ground of appeal. They too noted that the mitigating factor was applied strictly:

Regardless of what the basis for mitigation was, a common refrain in the cases was that although an offender's circumstances were 'sad', 'special' or worthy of sympathy, they were not sufficient to receive leniency in sentencing. In most of the cases, the judges agreed that to be relevant, the impact upon the children must be 'exceptional' – that is, 'quite out of the ordinary' – and that this was understood as a stringent test.³³

Walsh and Douglas reported that family hardship as a mitigating factor was only successful in 16 of the 85 instances. In these cases, the judges stated that the outcome was based on a finding that the hardship to the offender's children constituted exceptional circumstances³⁴ and to this end, it was observed that 'judges often found an offender's care responsibilities for a child with a serious illness or disability to be "exceptional"'.³⁵

The pattern noted by Walsh and Douglas regarding the relatively low success rate of family hardship being invoked as a ground of appeal by appellants is supported by a study by the Victorian Sentencing Advisory Council, which examined sentencing appeals in Victoria.³⁶ The study which looked at sentencing appeals in the calendar years of 2008 and 2010 noted that hardship to family was

31 [2007] VSCA 8, where Chernov JA stated at [46]: 'It is impossible not to sympathise with the applicant's family and recognise the hardship that they will bear because of his imprisonment, but in all the circumstances, as I have said, I consider that this does not justify the exercise of discretion to extend mercy in relation to the head sentence'. See also *ibid*; *R v Bristogiannis* [2016] SASFC 22.

32 A good catalogue of examples in which exceptional circumstances have not been established is set out in *R v Shortland* [2018] NSWCCA 34, [110] (Basten JA).

33 Tamara Walsh and Heather Douglas, 'Sentencing Parents: The Consideration of Dependent Children' (2016) 37 *Adelaide Law Review* 135, 146.

34 *Ibid* 155. The authors noted that it was rare that this outcome was based on international human rights interests relating to either the interests of the family or the rights of the child. Given that these instruments (ie, the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*) have not been enacted into Australian law, this approach is to be expected and hence these instruments are not considered further in this article. While theoretically an argument could be made for expanding the family hardship mitigating ground on the basis that it is inconsistent with the *Convention on the Rights of the Child*, it is clear that this instrument has not been incorporated into Australian domestic law and hence pragmatically the argument is not likely to influence law reform in this area. See *Tajjour v New South Wales* (2014) 254 CLR 508, 567 [96] (Hayne J); *Simsek v MacPhee* (1982) 148 CLR 636, 641 (Stephen J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224 (Mason J); *Kioa v West* (1985) 159 CLR 550, 571 (Gibbs CJ); *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J) for a discussion about the role of international law in the context of Australia's domestic law.

35 Walsh and Douglas, above n 33, 155.

36 Sentencing Advisory Council, 'Sentence Appeals in Victoria: Statistical Research Report' (Research Paper, 8 March 2012).

invoked relatively frequently by appellants but was rarely successful. In 2008, it was the 10th most common ground of appeal by offenders,³⁷ while in 2010 it dropped to number 15.³⁸ The rate at which the ground succeeded was 0.9 per cent in 2010³⁹ and 0 per cent in 2010.⁴⁰

2 *Recent Authority Suggests a Broader Approach to the Circumstances in which Family Hardship Can Mitigate Penalty*

While it is generally accepted that in order for family hardship to mitigate penalty the level of hardship must be exceptional,⁴¹ recently some uncertainty has emerged regarding the scope of the principle at common law and in particular regarding its application in the federal jurisdiction. In relation to the common law, in *R v Zerafa*, Beech-Jones J stated:

Although the limitations on considering hardship to third parties derived from *Edwards* are said to be the subject of ‘well settled principles’ (*FP v R* [2012] NSWCCA 182 at [309] per R A Hulme J) they are sometimes stated in different terms. Thus, in *Hay v R* [2013] NSWCCA 22 at [49] *Edwards* was cited for the proposition that ‘[i]t is well established that the effect on family or others can be taken into account only in exceptional circumstances’. . . . Recently, in *R v MacLeod* [2013] NSWCCA 108 at [43] the principle derived from *Edwards* was described as being that ‘it is only in exceptional circumstances that hardship to third parties can be taken into account *in order to reduce an otherwise appropriate sentence*’. This formulation leaves open the possibility that the ‘otherwise appropriate sentence’ is one in which hardship to third parties falling short of exceptional circumstances is considered as part of the process of ‘instinctive synthesis’, even if it cannot be considered as a ‘distinct matter justifying any substantial modification of an otherwise appropriate penalty’ (*Dipangkear v R* [2010] NSWCCA 156 at [41] per Whealy J).⁴²

While the uncertainty regarding the scope of the family hardship ground expressed above relates to a relatively minor aspect of the principle, uncertainty regarding a more central component of the principle has emerged in the context of section 16A(2)(p) of the *Crimes Act 1914* (Cth). To this end, there is growing support for expanding the operation of the consideration to circumstances where the hardship to family is less than exceptional. Beech-Jones J in dissent in *R v Zerafa* stated: ‘If in other contexts Courts are bound to consider the impact of their orders on innocent third parties . . . why is the impact on children of any sentence under consideration to be excluded unless their hardship is only exceptional?’⁴³

37 Ibid 92.

38 Ibid 95.

39 Ibid 100. The highest success rate was for manifest excess (24.5 per cent).

40 Ibid 104. Although in two percent of successful appeals, it was considered under the ground of manifest excess. The highest success rate was for manifest excess (28.1 per cent).

41 See especially *Wirth* (1976) 14 SASR 291; *Edwards* (1996) 90 A Crim R 510; *FP v The Queen* [2012] NSWCCA 182, [309] (R A Hulme J). But this principle is sometimes stated in different terms: see *Hay v The Queen* [2013] NSWCCA 22, [49] (Simpson J); *R v Togiass* (2001) 127 A Crim R 23, 25–6 [13]–[17] (Spigelman CJ).

42 (2013) 235 A Crim R 265, 292 [116] (emphasis in original).

43 Ibid 298 [140]. This is consistent with the approach in the ACT. For a discussion of the approaches in the respective jurisdictions, see *Sakovits v The Queen* [2014] NSWCCA 109, [22] (Leeming JA, Price and Bellew JJ). See also *R v Cornell* [2015] NSWCCA 258, [141] (Beech-Jones J).

Beech-Jones J referred to a number of reasons in support of a more expansive interpretation of section 16A(2)(p). The jurisprudential reasons are discussed more fully below, but for present purposes it is pertinent to note the interpretive (as opposed to normative and jurisprudential) reasons that he advanced in suggesting that previous case law which equated section 16A(p) to the position at common law were plainly wrong and hence should be overruled.⁴⁴ To this end, Beech-Jones J observed that the High Court in *Bui v Director of Public Prosecutions (Cth)* stated that all of the aggravating and mitigating factors set out in section 16A of the *Crimes Act 1914* (Cth) are not necessarily consistent with the position at common law.⁴⁵ Second, an examination of the secondary materials underpinning section 16A(2)(p) does not suggest an interpretation which is contrary to the plain words of the section – in particular the section does not mention any reference to exceptional or extreme hardship.⁴⁶ Third, Beech-Jones J noted that the narrow (exceptional circumstances) interpretation of the section stemmed from a South Australian case, which concerned the provision in that state which was in his view relevantly differently phrased.⁴⁷ His Honour concluded that:

In my view, the words of s 16A(2)(p) are clear. The secondary materials confirm that meaning. The cases that have considered the provision have not reconciled their construction with either. I am satisfied that the construction of s 16A(2)(p) which reads the provision as though it was preceded or proceeded by the words ‘in an exceptional case’ is plainly wrong on either of the approaches suggested in *Gett* at [294]–[295].⁴⁸

While the above observations are from a single judge, recently they have been more widely endorsed. In *Director of Public Prosecutions (Cth) v Pratten [No 2]*,⁴⁹ Basten JA (Campbell and N Adams JJ agreeing) did not conclusively decide which approach to section 16A(2)(p) should be followed, however, expressly stated that the view suggested by Beech-Jones J had considerable merit for several reasons. First, his Honour notes that there is no objective reference point from which to determine whether particular circumstances are exceptional or unexceptional. The example that was given was of female prisoners. Research indicates that 85 per cent of incarcerated women are primary caregivers of their children. While this circumstance is not exceptional in the context of women prisoners, being a primary caregiver may constitute an exceptional situation in the context of the entire prison population.⁵⁰ Basten JA also cast doubt on whether the leading case in NSW on the interpretation of the family hardship mitigating factor, on close reading, actually supported an exceptional circumstances test.⁵¹ Finally, his Honour stated that

44 Beech-Jones J noted that the clear weight of authority in all jurisdictions except Tasmania (where the issue had not been expressly considered) and the ACT (*DPP (Cth) v Ip* [2005] ACTCA 24 [60] (Higgins CJ, Gray and Madgwick JJ)) was consistent with the common law approach: of *R v Zerafa* (2013) 235 A Crim R 265, 297–8.

45 (2012) 244 CLR 638, 650–1 [18], 652–3 [25] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

46 *R v Zerafa* (2013) 235 A Crim R 265, 294 [123] (Beech-Jones J).

47 *Ibid* 297 [139]. The case was *Adami & Adami v The Queen* (1989) 42 A Crim R 88.

48 *R v Zerafa* (2013) 235 A Crim R 265, 299 [144], citing *Gett v Tabet* (2009) 254 ALR 504.

49 (2017) 94 NSWLR 194.

50 *Ibid* 206 [53] (Basten JA).

51 *Edwards* (1996) 90 A Crim R 510 – which is discussed further below.

changed approaches to statutory interpretation in recent decades justified revisiting the exceptional circumstances test:

it is proper to note the changes in the approach to statutory interpretation which have occurred over the last 25 years. Thus, when the Western Australian Court of Criminal Appeal concluded in 1990 that s 16A(2) was not intended to alter the common law in this regard, little attention was given to the precise wording of the section. That is not the approach which would now operate. The approach to s 16A adopted by the High Court in *Hili v The Queen* and in *Bui v DPP* gave careful attention to the manner in which general law principles were ‘accommodated’ by the language of Pt 1B of the *Crimes Act* ... As the High Court explained in *Bui*, it is one thing to read the language of s 16A as accommodating general law principles in order to identify the severity of the penalty appropriate in the circumstances of the offence; it is quite another to place a limitation upon an expressly stated consideration where the limitation is not found in the statute, but can only arise under the general law.⁵²

Thus, there is a degree of uncertainty relating to whether exceptional hardship is necessary to enliven section 16A(2)(p) of the *Crimes Act 1914* (Cth). In addition to this, there are other contexts in which the scope of this mitigating factor is unclear, and shows signs of being expanded in its scope of operation.

First, in relation to standard penalty offences in NSW,⁵³ it has been held that hardship amounting to less than exceptional can reduce penalty severity by justifying a finding of special circumstances in the context of section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), thereby enabling a court to set a penalty lower than the standard range set by the legislature for a number of serious offences.⁵⁴ Secondly, uncertainty regarding the need to demonstrate exceptional circumstances in order for sentencing mitigation to be justified has even been questioned in the context of the principle at common law.⁵⁵ In the recent decision of *Carter v The Queen*, McCallum J noted that the reasons set out by Beech-Jones J in *R v Zerafa*, above, for more broadly interpreting the scope of section 16A(2)(p) of the *Crimes Act 1914* (Cth), are equally applicable to the operation of the family hardship ground at common law.⁵⁶ McCallum J also stated that the exceptional circumstances test is not entrenched and is sufficiently uncertain to require clarification by ‘the High Court or at least an enlarged bench of this Court’.⁵⁷ Third, it was held in *R v MacLeod* that in hardship to non-family members (in this instance

52 *DPP (Cth) v Pratten [No 2]* (2017) 94 NSWLR 194, 207 [57], citing *Hili v The Queen* (2010) 242 CLR 520; *Bui v DPP* (2012) 244 CLR 638. See also *Michael v The Queen* [2004] WASCA 4, [57] (Wallwork AJ); *Scheele v Watson* [2012] ACTSC 196, [86] (Refshaug J).

53 Section 54A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets standard non-parole periods for a range of offences where an offender is found guilty at trial for an offence within the mid-range of objective seriousness for an offence of that type. Pursuant to s 44(2), the parole period must not exceed one-third of the non-parole period for the sentence, unless special circumstances exist. Thus, in normal circumstances, the non-parole period cannot be less than 75 per cent of the head sentence. For a discussion of these provisions, see *Muldock v The Queen* (2011) 244 CLR 120.

54 *R v Grbin* [2004] NSWCCA 220; *King v The Queen* [2010] NSWCCA 202.

55 *R v Xeba* [2009] VSCA 205, [21] (Maxwell P and Weinberg JA) but this was overruled in *Markovic* (2010) 30 VR 589, 594 [15] (The Court).

56 [2018] NSWCCA 138, [61].

57 *Carter v The Queen* [2018] NSWCCA 138, [68].

employees of the offender) could potentially mitigate a penalty.⁵⁸ However, on the facts of the case, the hardship was not sufficiently severe.

Finally, hardship experienced by *an offender* relating to the suffering his or her imprisonment causes to family members can itself mitigate penalty. In *Markovic*, the Court stated:

The effect on the offender of hardship caused to family members by his/her imprisonment is a quite separate matter. An offender's anguish at being unable to care for a family member can properly be taken into account as a mitigating factor – for example, if the court is satisfied that this will make the experience of imprisonment more burdensome or that it materially affects the assessment of the need for specific deterrence or of the offender's prospects of rehabilitation. These are conventional issues of mitigation, and they are not subject to the 'exceptional circumstances' limitation.⁵⁹

Thus, the courts and legislature have recognised that hardship to family members can mitigate the sentence that is imposed on offenders. The orthodox view remains that this will be invoked rarely, however, there is recent authority suggesting that (especially in the federal jurisdiction) this should be interpreted more broadly. I now analyse the jurisprudential basis for this mitigating factor with a view to making recommendations regarding the appropriate application of this principle.

III ANALYSIS OF RATIONALE UNDERPINNING THE STRICT APPROACH TO HARDSHIP TO FAMILY DISCOUNT

A The Obvious Consequences Argument

1 Outline of the Argument

In this part of the article, I set out and evaluate the main rationales that have been advanced for limiting the circumstances in which family hardship can mitigate penalty. There are several reasons that have been advanced in support of this approach. Most of the reasons are articulated in *R v Edwards*⁶⁰ and affirmed in *Markovic*.⁶¹

The first justification for giving the principle a narrow interpretation is that most people have close relationships with other people and hence it is an obvious consequence, and nearly inevitable, that imprisoning an offender will have a detrimental impact on others. This rationale was articulated by Gleeson CJ of the New South Wales Court of Criminal Appeal in *Edwards* in the following manner:

There is nothing unusual about a situation in which the sentencing of an offender to a term of imprisonment would impose hardship upon some other person. Indeed, ... it may be taken that sending a person to prison will more often than not cause hardship, sometimes serious hardship, and sometimes extreme hardship, to another person. It requires no imagination to understand why this is so. Sentencing judges

58 [2013] NSWCCA 108, [45] (Simpson J).

59 (2010) 30 VR 589, 595 [20] (The Court). This was also adopted in *R v Shortland* [2018] NSWCCA 34 [117]–[118] (Basten JA).

60 *Edwards* (1996) 90 A Crim R 510, 515–16 (Gleeson CJ).

61 (2010) 30 VR 589, 595 [1] (The Court).

and magistrates are routinely obliged, in the course of their duties, to sentence offenders who may be breadwinners of families, carers, paid or unpaid, of the disabled, parents of children, protectors of persons who are weak or vulnerable, employers upon whom workers depend for their livelihood, and many others, in a variety of circumstances bound to result in hardship to third parties if such an offender is sentenced to a term of full-time imprisonment.⁶²

This is an accurate observation. It is an ostensibly strong basis for limiting the scope of the family hardship mitigating consideration. The appeal of the argument stems from the fact that virtually all people have family and friends, and hence it is nearly certain that the imprisonment of an offender will cause at least a degree of inconvenience or disappointment to people associated with the offender. The fact that other people would experience some hardship as a result of imprisoning an offender is so manifest that presumably legislatures in prescribing penalties for offences and courts in setting tariffs for offences must have taken this factor into account.⁶³ A similar form of argument can be made for not reducing the length of prison terms on account of the detrimental impact of imprisonment on offenders. Thus, it would be untenable to argue that an offender should receive a reduced sentence because imprisonment will result in him or her being deprived of his or her liberty.

2 The Obvious Consequences Argument Does Not Negate the Relevance of Family Hardship

However, the ‘obvious consequences’ argument, while superficially compelling does not necessarily provide an insurmountable reason for never according hardship to the family of offenders. Although it is obvious that in most cases other people will be disadvantaged as a result of an offender being imprisoned: (i) in some cases the hardship may be beyond what is anticipated or normal; or (ii) new learning may shed a different light on the impact of imprisonment on others.

The first qualification is accommodated by the existing exceptional circumstances test and hence rather than totally rejecting family hardship as a mitigating factor, the courts have held that the circumstances in which it can justify a penalty reduction are narrow. Interestingly, from the perspective of legal coherence, this approach is in fact consistent with the manner in which the effect of the hardship of sanctions directly on offenders can mitigate penalty. Thus, offenders who are likely to suffer an additional burden to that which is normally consequent from a prison term can receive a reduced sentence. This additional burden can stem from two broad reasons. The first is that the prison conditions themselves are particularly harsh⁶⁴ or alternatively the particular offender has a

62 *Edwards* (1996) 90 A Crim R 510, 515.

63 The tariff for an offence is the range of penalties that are appropriate consistent with current sentencing practice, see *DPP (Vic) v Dalglish (a Pseudonym)* (2017) 91 ALJR 1063 (‘*Dalglish*’).

64 *York v The Queen* (2005) 225 CLR 466, 468 [3] (Gleeson CJ); *DPP (Vic) v Faure* (2005) 12 VR 115, 121 [28] (Williams AJA); *Tognolini v The Queen [No 2]* [2012] VSCA 311, [30] (Maxwell P, Buchanan and Redlich JJA).

condition (normally health-related) which makes prison more burdensome.⁶⁵ Thus, the first logical basis by which family suffering can reduce penalty severity is already accommodated within existing sentencing principle and is consistent with the circumstances in which hardship directly experienced by an offender can mitigate penalty.

3 *New Learning Changing the Operation of Sentencing Law*

The second qualification, relating to possible new knowledge concerning the effect of incarceration on the family of offenders, is however not necessarily accommodated within the existing law. It provides a basis for expanding the circumstances in which family hardship can mitigate penalty, broadening it beyond situations when the hardship experienced by offenders is exceptional. This is supported by the fact that the High Court has indicated that new evidence regarding the impact of crime and punishment can impact sentencing standards or approaches. A recent example stems from the approach of the High Court in the recent decision of *Dalgliesh*.⁶⁶

The narrow issue in *Dalgliesh* was the importance that Victorian sentencing courts should place on current sentencing practice in the sentencing calculus.⁶⁷ The decision in *Dalgliesh* related to a sentence handed down to the respondent who in the Victorian County Court had pleaded guilty to one count each of incest against two sisters. The County Court imposed a total effective sentence of five years and six months' imprisonment, with a non-parole period of three years. The Victorian Court of Appeal had found that the sentence imposed on the respondent did not reflect the gravity of the offending, but felt compelled to not increase the penalty because it was consistent with current sentencing practice.

The Director of Public Prosecutions ('DPP') appealed against the Court's decision on the grounds that the sentence was manifestly inadequate (and the way in which the prison terms were calculated was inappropriate). The High Court upheld the appeal by the DPP, holding that the function of the Court of Appeal is to correct any identified injustice.⁶⁸ The High Court held that the Victorian Court of Appeal erred in according cardinal status to current sentencing practice. In reaching this conclusion, Kiefel CJ, Bell and Keane JJ noted that the pursuit of current sentencing practice must be subordinate to the imposition of a just sentence.⁶⁹ In determining a just sentence, the Court held that regard must be had to current understandings of the impact of crime on victims. Kiefel CJ, Bell and Keane JJ in rejecting previous sentencing standards for incest noted:

65 *R v Smith* (1987) 44 SASR 587, 589 (King CJ) (AIDS). See also *R v Vachalec* [1981] 1 NSWLR 351, 353 (Street CJ) (oesophageal obstruction); *Eliassen v The Queen* (1991) 53 A Crim R 391 (AIDS); *R v Magner* [2004] VSCA 202 (bowel cancer); *AWP v The Queen* [2012] VSCA 41 (serious heart condition). See also *R v Van Boxtel* (2005) 11 VR 258, 266–7 [29]–[30] (Callaway JA) (spinal injury). Ill health can affect the total effective sentence and the length of the non-parole period: see, eg, *R v Magner* [2004] VSCA 202 [46]–[48] (Gillard AJA). Old age is also generally regarded as a mitigating factor: see, eg, *Gulyas v Western Australia* (2007) 178 A Crim R 539, 551–2 [52]–[53] (Steytler P).

66 (2017) 91 ALJR 1063.

67 The current sentencing practice is set out in s 5(2)(b) of the *Sentencing Act 1991* (Vic).

68 *Dalgliesh* (2017) 91 ALJR 1063, 1075 [63] (Kiefel CJ, Bell and Keane JJ).

69 *Ibid* 1073 [53].

The decision in *Kaye* [which was influential in setting the tariff for incest] was delivered in 1986. In the three decades since, sexual abuse of children by those in authority over them has been revealed as a most serious blight on society. The courts have developed – as the Court of Appeal accepted in ‘emphatically’ rejecting the respondent’s submission that ‘there was no violence accompanying the offence’ – *an awareness of the violence necessarily involved in the sexual penetration of a child, and of the devastating consequences of this kind of crime for its victims*. And, importantly, the maximum penalty for the crime of incest when *Kaye* was handed down in 1986 was 20 years’ imprisonment. In 1997, the maximum sentence was increased to 25 years’ imprisonment.⁷⁰

Given that new learnings about the impact of crime can increase penalty, it follows that new evidence about the harshness of sanctions should also be capable of reducing the severity of the sanctions. This is because, as noted above, the cardinal sentencing principle regarding the nature and severity of sanction is the principle of proportionality, which provides that the seriousness of the offence should be matched by the harshness of the sanction. New information regarding the impact of crime on victims can impact the calibration of offence severity, and hence logically new knowledge of the impact of the sanctions should impact the other limb – the penalty severity – of the proportionality calculus.

To this end, it is notable that there is considerable evidence which links the imprisonment of an offender to adverse outcomes for his or her family members, especially if the offender is the main income winner in the family. To be clear, some of this evidence is not new in the form of the information emerging or becoming knowable only recently, but it is additional information in that it was not taken into account in the development of the relevant legal standards or norms. Thus, the information is new in the same way in which the information relating to the effects of child sexual offending was additional in *Dalgliesh*. Thus, it has been established for several decades that being the victim of child sexual abuse has long term significant adverse effects on people, however, it is only recently that the High Court has used this evidence to justify harsher penalties for child sexual offenders.⁷¹

4 Empirical Evidence Regarding the Harmful Impact of Incarceration on Family

There is a relative paucity of data which systematically and accurately assess the impact that imprisonment of a person has on his or her family members.⁷² However, the literature that does exist strongly supports the view that there is a

70 Ibid 1073 [57] (emphasis added).

71 Information relating to the negative effects of child sexual abuse has been available for several decades: see, eg, Rebecca M Bolen, *Child Sexual Abuse: Its Scope and Our Failure* (Springer, 2001); Rachel Calam and Cristina Franchi, *Child Abuse and Its Consequences: Observational Approaches* (Cambridge University Press, 1987); Anne Cohn Donnelly and Kim Oates (eds), *Classic Papers in Child Abuse* (Sage Publications, 2000); Kathleen Coulborn, *Understanding Child Sexual Maltreatment* (Sage Publications, 1990); Kee MacFarlane and Jill Waterman, *Sexual Abuse of Young Children: Evaluation and Treatment* (Guilford Press, 1986); William O’Donohue and James H Geer (eds), *The Sexual Abuse of Children: Theory and Research* (Lawrence Erlbaum Associates, 1992) vol 1; Raymond H Starr Jr and David A Wolfe (eds), *The Effects of Child Abuse and Neglect: Issues and Research* (Guilford Press, 1991).

72 Susan Dennison, Anna Stewart and Kate Freiberg, ‘A Prevalence Study of Children with Imprisoned Fathers: Annual and Lifetime Estimates’ (2013) 48 *Australian Journal of Social Issues* 339, 340.

strong link between the incarceration of an offender and negative life outcomes for people connected with the offender. The people that are most adversely impacted are the partners of the offender and especially his or her children. The negative impact on the offender's children is the most profound when the offender is also the main income earner.⁷³ The empirical data establishes that the children of prisoners have a much higher likelihood of themselves being imprisoned at some period of their lives.⁷⁴ Children of offenders who have been imprisoned also fare much worse on a range of other well-being measures including health and education. A summary of the key research findings regarding the impact of parental incarceration on children noted:

Research shows that children of incarcerated parents are at risk for lower educational achievement, suffer psychological, behavioral, and physical development issues and difficulties, and have an increased risk for substance abuse. Research also shows these children have an increased risk of contact with the juvenile justice system. ... [A]pproximately 50 percent of the children of incarcerated children will enter the juvenile system before their eighteenth birthday. Furthermore, research suggests with parental incarceration is associated with aggressive behavior in boys and, "[A]n increased likelihood of being expelled or suspended in school."⁷⁵

A more recent report notes that children with an incarcerated parent were far more likely to experience a range of adverse experiences. The statistical difference compared to children with no incarcerated parents across a number of indicia is in some instances striking. Children with an incarcerated parent were nearly twice as likely (46.8 per cent to 24.1 per cent) to experience frequent socioeconomic hardship as another children; more than three times more likely to experience parental death (9.8 percent to 2.6 per cent) and divorce or separation (57 per cent to 17.3 per cent) and nearly five times more likely (32.7 per cent to 6.8 per cent) to experience or witness neighbourhood violence.⁷⁶

73 Thus, for the sake of clarity, while the relevant literature mainly focuses on the negative impact on children as a result of the incarceration of a parent, as discussed below, the studies also show that this impact is most detrimental when the offender is also a key financial provider.

74 Rebecca Opie, 'Children of Prisoners Six Times More Likely to End Up in Jail; SA Judge Calls for Better Support', *ABC News* (online), 18 February 2017 <<http://www.abc.net.au/news/2017-02-18/more-support-needed-for-children-of-prisoners/8282936>>.

75 School of Law, University of North Carolina, 'Mass Incarceration, Collateral Consequences & Race: A Literature Review' (Literature Review) 21. Most of the literature and research regarding the impact of the incarceration on other people stems from the United States, but there is no reason to believe that relevantly different outcomes occur in Australia. See also, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 22 [3.17], where similar findings were made in the Australian context:

children with an incarcerated parent commonly experience a similar pattern of traumatic events, often witnessing their parent's crime and arrest, losing a parent, the disruption of their family environment, and the difficulties associated with visiting their parent within the prison system. Children with parents in prison are also more at risk of abusing drugs and alcohol, dropping out of school and exhibiting aggressive and/or antisocial behaviours.

76 David Murphey and P Mae Cooper, 'Parents Behind Bars: What Happens to Their Children' (Research Paper, Child Trends, October 2015) 6. See also Gwyneth Boswell, 'Imprisoned Fathers and Their Children: A Reflection on Two Decades of Research' (2018) 24 *Child Care in Practice* 212; Vicky Saunders and Morag McArthur, 'Children of Prisoners: Exploring the Needs of Children and Young

A less obvious but equally important outcome of imprisonment concerns the link between poverty and crime. If the principal income earner of a family is imprisoned, this necessarily means that the family unit will become economically challenged and research shows that ‘children with an incarcerated parent are likely to experience higher rates of poverty, food insecurity, homelessness’.⁷⁷ Further, empirical data shows that it is a worldwide phenomenon that people from deprived socio-economic backgrounds are convicted of more criminal offences and have higher incarceration rates than other people.⁷⁸ There is no established cause for the link between crime and poverty. However, there are a number of explanations that have been advanced. Economic disadvantage and inequality often result in reduced opportunities⁷⁹ and frustration-aggression,⁸⁰ which is commonly associated with living in violent neighbourhoods, attending under-resourced schools and being raised in single-parent families.⁸¹ Additionally, poverty is linked to poor self-esteem and lower levels of educational attainment, which are also associated with higher rates of criminal activity.⁸² As Craig Haney notes:

Poor children ... are more likely to be exposed to more environmental toxins and pollutants, and to live in less sanitary and lower quality homes that, in turn, tend to be located in places that are dangerous and physically deteriorated. Children who live in low income areas also tend to attend poorer quality schools and receive substandard overall municipal and social services. Thus, the environmental injustices to which the poor are subjected affect their children in numerous ways.⁸³

Thus, environmental considerations seem to incline people who live in poverty to engage in rebellious and often criminal conduct.⁸⁴ This problem is exacerbated by the reality that diminished economic resources increase the likelihood of childhood neglect⁸⁵ and limit the capacity of parents to fully nurture their children and, where necessary, put in place interventions to remedy defiant and delinquent

People Who Have a Parent Incarcerated in the Australian Capital Territory’ (Research Paper, SHINE for Kids, Institute of Child Protection Studies, Australian Catholic University, October 2013).

77 Neil Damron, ‘Poverty Fact Sheet: Life Beyond Bars: Children with an Incarcerated Parent’ (Institute for Research on Poverty, 2015) 2 <<https://www.irp.wisc.edu/publications/factsheets/pdfs/Factsheet7-Incarceration.pdf>>.

78 See above Part II and Steven Box, *Recession, Crime and Punishment* (Palgrave, 1987) 96 (concluding that income inequality is strongly related to criminal activity).

79 See Judith R Blau and Peter M Blau, ‘The Cost of Inequality: Metropolitan Structure and Violent Crime’ (1982) 47 *American Sociological Review* 114, 117.

80 Ibid 119 (explaining that substantial wealth disparities mean that ‘there are great riches within view but not within reach of many people destined to live in poverty ... [causing] resentment, frustration, hopelessness and alienation’ among the poor).

81 Richard Delgado, ‘“Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?’ (1985) 3 *Law and Inequality* 9, 23–4.

82 Craig Haney, ‘Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation’ (2008) 36 *Hofstra Law Review* 835, 865–6.

83 Ibid 871.

84 Ibid 871–2. In the Australian context, this does not explain the disproportionate rate of Indigenous incarceration. It has been suggested that other considerations include the fact that Indigenous children are more visible and hence tend to be targeted by police: Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 50.

85 Julie L Crouch and Joel S Milner, ‘Effects of Child Neglect on Children’ (1993) 20 *Criminal Justice and Behaviour* 49; Haney, above n 82, 866–8.

behaviour.⁸⁶ Additional factors which contribute to the likelihood of committing crime are the absence of appropriate role models (this is especially prevalent in poor areas given that crime is often generational) and exposure to, and entrenchment of, normative standards.⁸⁷

The negative effects of imprisonment extend not only to people closely associated with offenders, but sometimes also to the wider community.⁸⁸ There is considerable evidence to show that if incarceration levels are very high that this can damage the cohesiveness of a community. This problem is especially prevalent in the United States.⁸⁹ The incarceration rate in the United States is the highest on earth and by a considerable margin.⁹⁰ It is approximately four times higher than that in Australia and hence it is not tenable to make a strong analogy between the damaging community effect of mass incarceration in United States and the situation in Australia.⁹¹ However, the parallel is not totally irrelevant given that the incarceration levels in Australia are now at the highest point in recorded history and have more than tripled over the past three decades.⁹² If the incarceration rate does continue to increase at the same rate in Australia, there will be a meaningful risk that imprisonment could have demonstrable damaging effects in the community. This is especially in light of the fact that there is already evidence that some predominately Indigenous communities are being damaged by grossly disproportionately high rates of Indigenous incarceration.⁹³ There is an absence of accurate data regarding the portion of Indigenous offenders with children, however, a study in Queensland noted that Indigenous offenders were likely to have more children on average than other offenders.⁹⁴ It follows that if the family

86 See Lawrence D Bobo, 'Crime, Urban Poverty, and Social Science' (2009) 6 *Du Bois Review: Social Science Research on Race* 273; Michael B Greene, 'Chronic Exposure to Violence and Poverty: Interventions that Work for Youth' (1993) 39 *Crime & Delinquency* 106.

87 Per-Olof H Wikström et al, *Breaking Rules: The Social and Situational Dynamics of Young People's Urban Crime* (Oxford University Press, 2012); Joan McCord and William McCord, 'The Effects of Parental Role Model on Criminality' (1958) 14 *Journal of Social Issues* 66.

88 I thank the anonymous referee for this observation.

89 See Todd R Clear, 'The Effects of High Imprisonment Rates on Communities' (2008) 37 *Crime and Justice* 97; Isla Masson, *Incarcerating Motherhood: The Enduring Harms of First Short Periods of Imprisonment on Mothers* (Routledge, 2019, forthcoming).

90 See National Research Council, *The Growth of Incarceration in the United States* (National Academies Press, 2014).

91 The imprisonment rate in the United States is approximately 860 per 100 000 adults compared to a rate of approximately 220 per 100 000 in Australia: see Danielle Kaebler and Lauren Glaze, 'Correctional Populations in the United States, 2015' (Bulletin, No NCJ 250374, US Department of Justice, 29 December 2016) <<https://www.bjs.gov/content/pub/pdf/cpus15.pdf>>; Australian Bureau of Statistics, 'Corrective Services, Australia, June Quarter 2017' (Catalogue No 4512.0, 7 September 2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/4C983B7542339637CA2581E7000D0F48?opendocument>>.

92 Mirko Bagaric, Theo Alexander and Gabrielle Wolf, 'The United States' Incarceration Crisis: Cautionary Lessons for Australian Sentencing' (2018) 42 *Criminal Law Journal* 34, 35.

93 The Indigenous incarceration rate is approximately 13 times higher than the rest of the community. See Australian Law Reform Commission, above n 84, 90. For a discussion of the negative impact of this on the wider communities, see Hannah Payer and Andrew Taylor, 'Who's Missing? Social and Demographic Impacts from the Incarceration of Indigenous People in the Northern Territory' (Research Brief, Issue 2, Northern Institute, Charles Darwin University, 2015).

94 Dennison, Stewart and Freiberg, above n 72, 344.

hardship mitigating ground is interpreted more widely this could disproportionately benefit Indigenous communities.⁹⁵

Thus the fact that family members of offenders (and in particular their children) will suffer more considerably than has thus far been articulated in sentencing decisions provides an argument in support of more clearly and predictably applying the family hardship mitigating principle. The manner in which this fully impacts on the scope of the family hardship mitigating principle cannot be fully ascertained until the other reasons that have been advanced in support of tightly constraining the family hardship mitigating ground are analysed. It is to these that I now turn.

B Family Hardship as Potentially Undermining the Proportionality Principle (and Sentencing Objectives)

1 Outline of the Argument

The second key reason for strictly interpreting the family hardship mitigating ground is that it can supposedly undermine the objective of imposing proportionate sentences. In *Markovic*, it was noted that if a discount is given for family hardship, this undercuts the ‘the primary function of the sentencing court [which] is to impose a sentence commensurate with the gravity of the crime’.⁹⁶

A related argument is that a liberal application of this mitigating consideration would undermine the capacity of the courts to fulfil conventional and important sentencing aims, such as deterrence and protection of the community. Thus, in *Markovic*, the Court (in endorsing the statement of Wells J in *Wirth*) noted:

Hardship to spouse, family, and friends, is the tragic, but inevitable, consequence of almost every conviction and penalty recorded in a criminal court ... It seems to me that courts would often do less than their clear duty – especially where the element of retribution, deterrence, or protection of society is the predominant consideration – if they allowed themselves to be much influenced by the hardship that prison sentences, which from all other points of view were justified, would be likely to cause to those near and dear to prisoners.⁹⁷

2 Family Hardship Merely Determines Where in Spectrum of Proportionate Offences the Penalty Should Be Set

However, the suggestion that mitigating sanctions on the basis of family hardship will undermine the proportionality principle and the attainment of sentencing objectives is not persuasive once this argument is evaluated from the perspectives of the operation of the sentencing objectives, the manner in which the proportionality principle operates and how mitigating and aggravating factors influence the choice of penalty. As noted earlier, there are a number of sentencing

95 However, it is not suggested that the approach to this mitigating factor could make a meaningful contribution to the problems associated with the mass incarceration of Indigenous offenders. This issue has been the subject of a wide-ranging discussion by the Australian Law Reform Commission, which produced an extensive report containing 35 reform recommendations: see, Australian Law Reform Commission, above n 84, 13–18. It is beyond the scope of this article to consider these recommendations.

96 *Markovic* (2010) 30 VR 589, 592 [7] (The Court).

97 *Ibid* 593 [13], quoting *Wirth* (1976) 14 SASR 291, 296.

objectives. There is no clear hierarchy regarding the ordering of these objectives.⁹⁸ Sentencing objectives can justify the need for punishment and often incline in favour of harsher sanctions (for example, when community protection and general deterrence are important considerations) but sometimes they can incline in favour of softer penalties (for example, when rehabilitation is determined to be a relevant sentencing consideration). Courts are required to determine which sentencing objectives are applicable in each case and once this is done, it is the principle of proportionality (informed by the relevant sentencing aims) that determines how much to punish.⁹⁹ Thus, aggravating and mitigating considerations do not logically or pragmatically negate the capacity of courts to pursue appropriate sentencing objectives – the relevant aims of sentencing are identified prior to the application of sentencing and mitigating factors.¹⁰⁰

Further, the principle of proportionality does not operate to set a precise penalty. Current orthodoxy maintains that there is no single correct sentence¹⁰¹ and that the ‘instinctive synthesis methodology will, by definition, produce outcomes upon which reasonable minds will differ’.¹⁰² Under this model, courts can impose a sentence within an ‘available range’ of penalties.¹⁰³ The spectrum of this range is defined by current sentencing practices and is often referred to as a tariff.¹⁰⁴ This is found in ‘a range or pattern of cases in the relevant category of seriousness, being cases said to be comparable because they contain common features with the subject case’.¹⁰⁵ Aggravating and mitigating considerations cannot operate to justify or produce a penalty that is disproportionate to the seriousness of the offence. Rather, aggravating and mitigating factors (including family hardship) merely serve to determine where exactly in the continuum of proportionate sentences the punishment is set. This is a matter expressly noted by the courts in the context of the impact of prior convictions, which are often a powerful aggravating factor, in the sentencing calculus.

The sum total of the impact of prior convictions cannot be so significant to result in a penalty that is disproportionate to the objective gravity of offence. Prior convictions can influence where in the continuum of a proportionate penalty the actual penalty is set; they cannot impact on where the upper range of the appropriate penalty lies.¹⁰⁶

98 However, in some cases, the courts have declared that community protection is the paramount objective of sentencing: see *Channon v The Queen* (1978) 33 FLR 433, 437 (Brennan J); *R v Valentini* (1980) 48 FLR 416, 420 (Bowen CJ, Muirhead and Evatt JJ); *R v Willisicroft* [1975] VR 292, 298 (Adam and Crockett JJ); *R v Radich* [1954] NZLR 86, 87 (Fair J); *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 377 (Kirby P, Campbell and Newman JJ).

99 See, eg, *Veen v The Queen* (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 465.

100 *Markarian v The Queen* (2005) 228 CLR 357, 388 [76]–[78] (McHugh J).

101 *Ibid* 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

102 *Hudson v The Queen* (2010) 30 VR 610, 616 (Ashley, Redlich and Harper JJA).

103 See *R v Creighton* [2011] ACTCA 13; *R v Hill* [2010] SASFC 79; *R v Holland* (2011) 205 A Crim R 429, 441–2 [60] (Schmidt J); *R v McHarg* [2011] NSWCCA 115, [122]–[124] (Johnson J).

104 See, eg, *Bradshaw v The Queen* [2017] VSCA 273, [40] (Kyrou and Redlich JJA).

105 *Kalala v The Queen* [2017] VSCA 223, [40] (Maxwell P and Redlich JA).

106 Mirko Bagaric, Submission No 81 to Australian Law Reform Commission, Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People, 31, citing *Van Der Baan v The Queen* [2012] NSWCCA 5, [30] (Hall J).

3 *All Aggravating and Mitigating Factors Operate to Adjust the Penalty*

The argument that according weight to family hardship in sentencing can undermine sentencing objectives and proportionate penalties should also be rejected for another reason. Acceptance of the argument would lead to the patently unacceptable position that all mitigating (and aggravating) considerations should be abolished. By their very nature, the impact of mitigating factors is to the lower the penalty that would otherwise be imposed on the offender.¹⁰⁷ Other mitigating considerations have not been reconsidered or abolished on the basis that they operate to undermine the capacity of the sanctions to achieve goals such as deterrence and protection of the community or as conflicting with the proportionality thesis, and hence it would seem that there is no basis for treating mitigation based on family hardship differently in this respect.

4 *Aggravating and Mitigating Factors Are Not Confined to Matters Concerning the Offender or the Offence*

Potentially it could be argued that mitigating factors which are not grounded in matters directly connected to the offence or the offender should be carved out from the list of appropriate or legitimate mitigating factors. Shades of this approach are apparent in *Markovic*, where the Court states that family hardship is ‘not a true mitigating factor’. In *Markovic*, the Court stated:

As Redlich JA pointed out during the hearing, family hardship is not a mitigating factor properly so-called, since it concerns neither the offender nor the offence. As we have said, reliance on family hardship is properly to be understood as a request for mercy. ...

‘The true privilege of mercy is to be found in the residual discretion vested in each sentencer which allows a downward departure from the principle of proportionality outside the principles of mitigation. It can be utilised in exceptional circumstances to allow weight to be given to *factors which are ordinarily not regarded as relevant mitigating considerations*. It allows sentencers to give effect to significant, but as yet unaccepted, circumstances which, in their opinion, warrant leniency. ...

Third party hardship is thought to provide a better justification for *an act of pure mercy* since it arises less out of compassion for the offender than pity for those he or she has directly or indirectly harmed.’¹⁰⁸

However, a broader analysis of the nature of mitigating and aggravating considerations negates this argument. There are a large number of mitigating factors and there is no unifying rationale which underpins them.¹⁰⁹ In terms of searching for some doctrinal unity in relation to mitigating factors, it emerges that they can be divided into four categories.¹¹⁰ The first are those relating to the offender’s response to a charge and include pleading guilty,¹¹¹ co-operating with

107 See Mackenzie and Stobbs, above n 13, ch 4.

108 *Markovic* (2010) 30 VR 589, 594 [14] (The Court), quoting Fox, above n 18, 13, 16 (emphasis added in *Markovic*).

109 See Victorian Sentencing Committee, ‘Sentencing’ (Report, Victorian Attorney General’s Department, 1988) 359–60.

110 *Ibid.*

111 See *Cameron v The Queen* (2002) 209 CLR 339, 343 [11] (Gaudron, Gummow and Callinan JJ).

law enforcement authorities¹¹² and remorse.¹¹³ The second are factors that relate to the circumstances of the offence and which contribute to, and to some extent explain, the offending. These include mental impairment,¹¹⁴ duress¹¹⁵ and provocation.¹¹⁶ The third category includes matters personal to the offender, such as youth,¹¹⁷ previous good character,¹¹⁸ old age¹¹⁹ and good prospects of rehabilitation.¹²⁰ The fourth category relates to the impact of the sanction on the offender and includes considerations such as onerous prison conditions,¹²¹ poor health¹²² and public opprobrium.¹²³

On a closer examination of this demarcation, it emerges that there are numerous aggravating and mitigating factors which are justified by considerations which are totally extraneous to the offender, the offence and, for that matter, the victim. One example is the discount which is accorded when an offender pleads guilty. The discount is in fact so significant that it can reduce penalty severity typically by approximately 25 per cent.¹²⁴ Ostensibly, the discount is granted in recognition of the defendant's response to the offence, however, importantly, the full extent of the discount applies even if the plea of guilty is not indicative of remorse.¹²⁵ The rationale for the discount is based on the utilitarian advantages it confers to the community by saving the cost of a trial and sparing victims and witnesses the time and anxiety associated with giving evidence.¹²⁶ Thus, it is well-established that criminal sanctions should be influenced by extraneous interests, including that of the wider community. It follows that there is no reason in principle that the interests of families of offenders should not be able to impact on the choice and severity of criminal sanctions. Thus, there is no basis for rejecting

112 See *R v Cartwright* (1989) 17 NSWLR 243, 252 (Hunt and Badgery-Parker JJ); *R v El Hani* [2004] NSWCCA 162, [66] (Howie J); *TXT v Western Australia* (2012) 220 A Crim R 226, 270–1 [28] (Buss JA).

113 *R v Whyte* (2004) 7 VR 397; *Barbaro v The Queen* (2014) 253 CLR 58; *Phillips v The Queen* (2012) 37 VR 594.

114 See *R v Tsiaras* [1996] 1 VR 398; *Muldrock v The Queen* (2011) 244 CLR 120; *R v Verdins* (2007) 16 VR 269.

115 See, eg, *Tiknius v The Queen* 221 A Crim R 365.

116 See, eg, *Va v The Queen* (2011) 37 VR 452.

117 See, eg, *R v Neilson* [2011] QCA 369; *R v Kuzmanovski; Ex parte A-G (Qld)* [2012] QCA 19.

118 Although it has limited weight in relation to white-collar offenders: see, eg, *R v Coukoulis* (2003) 7 VR 45.

119 See, eg, *Gulyas v Western Australia* (2007) 178 A Crim R 539; *R v RLP* (2009) 213 A Crim R 461.

120 See, eg, *R v Skilbeck* [2010] SASFC 35; *Elyard v The Queen* [2006] NSWCCA 43.

121 See, eg, *Western Australia v O'Kane* [2011] WASCA 24; *R v Puc* [2008] VSCA 159; *Tognolini v The Queen* [2012] VSCA 311.

122 See, eg, *Dosen v The Queen* [2010] NSWCCA 283; *AWP v The Queen* [2012] VSCA 41.

123 See, eg, *Ryan v The Queen* (2001) 206 CLR 267.

124 *R v Thomson* (2000) 49 NSWLR 383, 418 [155] (Spigelman CJ); *Cahyadi v The Queen* (2007) 168 A Crim R 41, 42 [2] (Adams J); *Phillips v The Queen* (2012) 37 VR 594, 607 [45], 619 [86] (Redlich JA and Curtin AJA); *Morton v The Queen* [2014] NSWCCA 8, [32] (Hoeben CJ). See also *Sentencing Act 1995* (NT) s 5(2)(j); *Penalties and Sentences Act 1992* (Qld) s 13(2); *Sentencing Act 1991* (Vic) s 5(2)(e); *Sentencing Act 1995* (WA) s 9AA(2)–(3).

125 *Phillips v The Queen* (2012) 37 VR 594, 604–5, 608–9 (Redlich JA and Curtin AJA, Maxwell P agreeing); *Morton v The Queen* [2014] NSWCCA 8.

126 *Phillips v The Queen* (2012) 37 VR 594, 604–5, 608–9 (Redlich JA and Curtin AJA, Maxwell P agreeing); *Morton v The Queen* [2014] NSWCCA 8, [32]–[33] (Hoeben CJ at CL).

the relevance of family hardship to sentence on the basis that it does not relate to the circumstances of the offender or offence.¹²⁷

Accordingly, arguments that hardship to family should be interpreted narrowly because it undermines attainment of the sentencing objectives and the proportionality principle or does not relate to the offender or the offences are flawed.

C The Argument that Offenders with Family Should Not Be Treated Preferentially

1 Outline of the Argument

The third reason that has been advanced for limiting the circumstances when family hardship can mitigate penalty is that ‘to treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would “defeat the appearance of justice”¹²⁸ and be “patently unjust”’.¹²⁹ The principle of equal justice gains its strongest expression in the sentencing domain in the context of the parity principle. This is the view that all things being equal, like offenders should receive the same penalty.¹³⁰

2 Equal Justice Accommodates Different Penalties on the Basis of Relevant Differences

However, the parity principle is sufficiently flexible to acknowledge that in many instances different penalties for ostensibly similarly placed offenders are appropriate. Different penalties will only be struck down if the disparity is such as to give rise to a ‘justifiable sense of grievance’¹³¹ and this will only occur where the difference in penalties is ‘marked’¹³² or ‘gross’¹³³ or, in cases where a different penalty should have been imposed (because there is a relevant difference between

127 Further, even if the historical rationale for third party hardship to mitigate penalties is grounded in the concept of mercy, there is no reason that the circumstances in which this discretion should operate cannot be recast.

128 *Markovic* (2010) 30 VR 589, 592 [7] (The Court) citing *R v Pozvek* (Unreported, Victorian Court of Criminal Appeal, 2 September 1983); *R v Yates* (1998) 99 A Crim R 483, 487.

129 *Ibid*, citing *R v Boyle* (1987) 34 A Crim R 202. While this argument is made in the context of dependants it obviously applies with equal force in the context of all family members and relatives.

130 *Green v The Queen* (2011) 244 CLR 462, 472 [28] (French CJ, Crennan and Kiefel JJ).

131 *Dickman v The Queen [No 2]* [2017] VSCA 351, [48]–[49] (Whelan JA); *Wan v The Queen* [2017] NSWCCA 261, [39], in which Beech-Jones J stated:

The reference in this ground of appeal to a ‘justifiable sense of grievance’ invokes the discussion of the parity principle in *Lowe v The Queen* (1984) 154 CLR 606; [1984] HCA 46 at 610 (per Gibbs CJ), at 613 (per Mason J) and at 623 (per Dawson J, *Lowe*). The parity principle holds that there should not be a ‘marked disparity’ between the sentences imposed on co-offenders such as to give rise to ‘a justifiable sense of grievance’ in one of them (*Lowe* at 610 per Gibbs CJ, with whom Wilson J agreed at 616 and at 612 to 613 per Mason J and at 623 per Dawson J). The parity principle has its foundation in the obligation of the Courts to afford ‘equal justice’ (*Green v The Queen* (2011) 244 CLR 462; [2011] HCA 49 at [28] per French CJ, Crennan and Kiefel JJ).

See also *Lloyd v The Queen* [2017] NSWCCA 303.

132 *Arenilla-Cepeda v The Queen* [2012] NSWCCA 267, [97] (Johnson J).

133 *Sinkovich v The Queen* [2011] NSWCCA 90, [71] (Hoeben J).

the offenders), the contrast in the sanction is ‘grossly inadequate’.¹³⁴ In determining whether the offenders are ostensibly in a similar position for sentencing purposes, it is necessary to assess the respective role of each of the offenders; the aggravating factors that apply to the respective offenders; and the mitigating factors that apply to each of the offenders.¹³⁵ These mitigating factors can relate to the personal traits of offenders; youth,¹³⁶ old age¹³⁷ and even the offender’s upbringing can mitigate.¹³⁸ Thus, if family hardship is a justifiable mitigating factor¹³⁹ there can be no argument suggesting that treating offenders with close family more leniently to other offenders is unjust.

It follows that the argument that it is unjust to treat offenders with families more leniently is not compelling. There is no firm principle that prescribes that offenders who have committed similar offences must receive the same penalty. The principle of equal justice will not be violated where there is a relevant basis for distinguishing between offenders.

D The Supposed Paradox of the Guilty Benefiting so the Innocent Suffer Less

1 Outline of the Argument

Another reason that has been advanced for limiting the role of family hardship in sentencing is that ‘to treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less’.¹⁴⁰ However, this also is not a powerful reason for strictly limiting the circumstances in which a sentencing discount is conferred on account of family hardship. The law often involves the balancing of rights and interests, including calibrating the interests of innocent parties into the development of legal standards and the outcome of legal decisions. The view that hardship experienced by non-parties to a case is irrelevant to the outcome of legal decisions is not consistent with principles in wider legal contexts. The High Court in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (in the context of determining whether to make orders affecting the activities of a number of companies who were non-parties in the case) quoted with approval the following passage from Cumming-Bruce LJ in *Miller v Jackson*:¹⁴¹

the interests of the public and of third persons are relevant and have more or less weight according to the other material circumstances. So it has been said that courts

134 Ibid.

135 *Green v The Queen* (2011) 244 CLR 462.

136 See, eg, *R v Mills* [1998] 4 VR 235, 241–2 (Batt JA); *R v Edwards* (1993) 67 A Crim R 486, 489 (Crockett J); *R v Martin* [1973] VR 854, 856 (The Court); *R v Smith* (1988) 33 A Crim R 95, 97 (Young CJ); *R v Hearne* (2001) 124 A Crim R 451; *R v Price* [1978] Qd R 68; *R v P* (1991) 53 A Crim R 112, 116 (Mathews J); *R v Phung* (2003) 141 A Crim R 311, 319–22 (Vincent JA); *R v Bell* [1999] VSCA 223; *Lee v The Queen* [2011] NSWCCA 169; *R v Dullroy*; *Ex parte A-G (Qld)* [2005] QCA 219; *R v Wyley* [2009] VSCA 17.

137 See, eg, *Gulyas v Western Australia* (2007) 178 A Crim R 539; *R v RLP* (2009) 213 A Crim R 461.

138 See, eg, *Bugmy v The Queen* (2013) 249 CLR 571; *Magaming v The Queen* (2013) 252 CLR 381.

139 This is explored more fully in Part IV below.

140 *Markovic* (2010) 30 VR 589, 592 [7] (The Court).

141 [1977] QB 966, 988.

of equity ‘upon principle, will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the courts’. Regard must be had ‘not only to the dry strict rights of the plaintiff and the defendant, but also the surrounding circumstances, to the rights or interests of other persons which may be more or less involved’.¹⁴²

This was a point also noted by Beech-Jones J in dissent in *R v Zerafa*:

If in other contexts Courts are bound to consider the impact of their orders on innocent third parties (*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* [1998] HCA 30; 195 CLR 1 at [65] to [66]; *Silkstone Pty Ltd v Devreal Capital Pty Ltd* (1990) 21 NSWLR 317 at 324 and 332), why is the impact on children of any sentence under consideration to be excluded unless their hardship is only exceptional? The primary objects in sentencing of ‘retribution, deterrence [and the] protection of society’ described by Wells J in *Wirth* can still be given effect to without requiring sentencing courts to divide the forms of hardship occasioned to an offender’s family into those which meet the description ‘exceptional’ and those which do not.¹⁴³

The assertion that a state of affairs is paradoxical is logically not a compelling reason for rejecting that state of affairs, especially when there is no patent absurdity or oddity associated with the state of affairs.

2 Reducing Penalties for Family Hardship Cannot be Justified by the Proscription Against Punishing the Innocent Due to the Definition of Punishment

Further, highlighting the suffering of the innocent raises for consideration a broader principle of justice in the form of the proscription against punishing the innocent. The prohibition against punishing the innocent is a fundamental bulwark of justice. It is so powerful that it is one of the reasons that at the philosophical level utilitarianism is no longer the most influential theory of punishment.¹⁴⁴ Retributivists forcefully argued that utilitarianism justifies punishing the innocent where this would maximise net happiness (for example, by framing people that the community wanted punished) and hence any theory that justifies such repugnant outcomes must be flawed.¹⁴⁵

It could be argued that the mitigation for family hardship consideration should be given a wide scope of application because to inflict suffering on the family violates the no punishment of the innocent principle. However, the applicability of the operation of the principle that the innocent should not be punished to the family hardship mitigating ground is unclear. This is because it is not certain whether the concept of ‘punishment’ extends to the hardship felt by people, such as family members of offenders, who indirectly suffer from the imposition of a sanction. The inquiry is made complex by the large number of definitions of punishment that have been advanced. Jeremy Bentham, who persuasively argued in favour of a

142 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 42 (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

143 (2013) 235 A Crim R 265, 298 [140].

144 Mirko Bagaric and Kumar Amarasekara, ‘The Errors of Retributivism’ (2000) 24 *Melbourne University Law Review* 124.

145 H J McCloskey, *Meta-ethics and Normative Ethics* (Martinus Nijhoff, 1969) 180.

utilitarian theory of punishment, declared that ‘all punishment is mischief, all punishment in itself is evil’.¹⁴⁶ Andrew von Hirsch, a leading retributivist philosopher, believes that ‘punishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong’.¹⁴⁷ A more descriptive definition of punishment is advanced by Nigel Walker, who states that 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.¹⁴⁸

After a close examination of the various definitions of punishment, it has been noted that ‘when one cuts through the often colourful language, [one] comes down to view that punishment is a hardship or deprivation; the taking away of something of value for a wrong actually or perceived to have been committed’.¹⁴⁹

Accordingly, punishment has three key components: (i) the infliction of a degree of hardship; (ii) the hardship must be imposed by an authority (ie, a court); and (iii) there must be a connection between the crime and the hardship. Thus, the concept of punishment would not directly extend to the hardship felt by relatives of offenders. However, while formally it appears that punishment does not extend to (a) hardships experienced by offenders but not directly imposed by courts or (b) hardships experienced by the family of offenders as result of court imposed sanctions on offenders, current legal orthodoxy adopts a wider understanding of the concept of punishment.

As the law currently stands, collateral hardships experienced by offenders can form the basis of mitigating the extent of formal punishment that is imposed on offenders. Common examples of incidental suffering that can operate to reduce penalty severity are injuries sustained by an offender during the commission of an offence;¹⁵⁰ public humiliation¹⁵¹ and loss of employment.¹⁵² Thus, a liberal approach has been adopted to take account of incidental suffering into the development of legal principle and resolution of cases. This is especially manifest from the fact that even non-curial harm (which is not intentionally imposed by a court and impossible to quantify) experienced by the offender can mitigate penalty.

3 The Principle that the Innocent Should Not Suffer as Grounding Family Hardship

Hardship experienced by the dependants of offenders is generally foreseeable at the sentencing stage and hence is arguably even more closely associated with the orthodox view of punishment than collateral punishment. Accordingly,

146 Jeremy Bentham, ‘Principles of Morals and Legislation’ in J H Burns and H L A Hart (eds), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Oxford University Press, 1970) 158.

147 Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985) 35.

148 Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 1.

149 Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing, 2001) 38.

150 See, eg, *R v Hannigan* (2009) 193 A Crim R 399.

151 See, eg, *Ryan v The Queen* (2001) 206 CLR 267.

152 *Kovacevic v Mills* (2000) 76 SASR 404.

incidental harm experienced by an offender's family should also arguably mitigate penalty. The reason for this seems to be not because of the prohibition against punishing the innocent, but rather the implied endorsement of an even broader standard: 'the innocent should not suffer'. Shades of this principle have been previously invoked as a basis for reducing the extent of parental incarceration. Thus more than 25 years ago, Roger Shaw stated:

Does the state have a right morally – as practice shows it has legally – to strip a child of its parent because that parent has offended, although the crime may have been less harmful to the victim than the imprisonment of the offender is to his or her child? Does not the [innocent] child have a right to uninterrupted parenting at least equal to the right of the state to punish?¹⁵³

The need to ameliorate hardships being imposed on the innocent in the sentencing context has also been grounded in the concept of residual moral obligations stemming from the damage that imprisonment often and foreseeably causes to other people. William Bülow believes that it is not morally sound to simply ignore the hardships imposed on others and that as a community, we have an obligation to reduce the collateral harms prison inflicts on others.¹⁵⁴ The types of steps that Bülow believes should be implemented include making prisons more accessible and friendly and even providing 'guest apartments for long-distance traveling families and [enabling] longer visits in a family and child friendly environment'.¹⁵⁵ While Bülow does not discuss the desirability of reducing penalties for offenders whose imprisonment will cause hardship to others, his overarching argument is consistent with this approach and underlies the fact that the innocent should not suffer principle has a grounding in both a deontological and utilitarian ethic.

Importantly, the principle against inflicting suffering on the innocent circumvents the stricture possibly associated with the formal meaning of punishment and associated view that relatives of offenders are not punished and hence their hardship should not be a basis for mitigating penalty. It follows that there a number of well-established arguments that have been advanced for limiting the scope of the family suffering mitigating ground. Several of these arguments are demonstrably unpersuasive. We now examine how the above analysis should be reflected in sentencing principle and practice so far as the hardship to family mitigating ground is concerned.

153 Roger Shaw, 'Conclusion: Politics, Policy, and Practice' in Roger Shaw (ed), *Prisoners' Children: What Are the Issues?* (Routledge, 1992) 192, 195. This argument also seems to have some intuitive appeal. Kate Warner et al, 'Aggravating and Mitigating Factors in Sentencing: Comparing the Views of Judges and Jurors' (2018) 92 *Australian Law Journal* 374 notes that jurors are more receptive to reducing the severity of sanctions on the basis of family hardship than judges. I thank the anonymous referee for drawing my attention to this article.

154 William Bülow, *Ethics of Imprisonment: Essays in Criminal Justice Ethics* (Licentiate Thesis in Philosophy, Royal Institute of Technology (KTH), 2014). I thank the anonymous reviewer for this drawing my attention to the views of Bülow.

155 *Ibid* 22.

IV THE PREFERRED APPROACH: FAMILY HARDSHIP SHOULD MITIGATE ONLY WHEN THE OFFENDER HAS FINANCIAL DEPENDANTS

A Possible Approaches to Reform

As we have seen, there is a considerable degree of uncertainty emerging regarding the circumstances in which hardship to others should mitigate penalty. The orthodox view that this should only be the case in exceptional circumstances has been questioned recently, especially in the federal sentencing sphere. The fact that there would be uncertainty in this area is not to be unexpected given the complexity of the competing issues involved.

The process of evaluating the competing arguments in this area is made more complicated by the fact that the manner in which the arguments have been weighed and conflated has resulted in a midcourse position, whereby family hardship stemming from prison has not been rejected as a mitigating ground; nor has it been fully endorsed as one. Rather it has been partially and, perhaps more accurately, narrowly endorsed. Logically, this means that the prevailing orthodoxy is that the arguments against family hardship being mitigatory have some appeal but are not strong. This entails that family hardship should be given a wider scope of operation if the arguments advanced against it are not as persuasive as has been previously assumed. Put another way, it is not necessary to totally repudiate the arguments against enabling family hardship to mitigate penalty in order for this consideration to be applied more liberally.

That said, it could of course also be argued that if the law relating to family hardship mitigation is to be reformed, the circumstances in which the consideration applies should in fact be applied even more strictly or the mitigating factor should be abolished altogether. This position could most readily be justified if there is a sentencing aim or objective that would necessarily be compromised by enabling family hardship to mitigate sentence severity. As we saw this is not the case, since the manner in which mitigating factors operate is to determine where a penalty should fit in the spectrum of proportionate sentences, rather than to fully negate an appropriate aim of sentencing.

From a philosophical perspective, it is tenable to mount a logically coherent argument that in determining whether to punish and how much to punish that the impact of the punishment on all third parties, including the general community and families of offenders should be ignored. This position is consistent with a purely retributive theory of punishment, which evaluates the appropriateness of punishment solely by the nature of the crime and the actions of the offenders. Numerous retributive theories of punishment have been advanced.¹⁵⁶ However, a

156 For a discussion of the core features of retributive theories, see Jami L Anderson, 'Reciprocity as a Justification for Retributivism' (1997) 16 *Criminal Justice Ethics* 13. Influential retributive theorists include R A Duff, who develops a communicative theory of punishment grounded in the Kantian principle of respect for autonomy (see R A Duff, *Trials and Punishments* (Cambridge University Press, 1986)), and Andrew von Hirsch, who believes that the principal justification of punishment is censure: that is, to convey blame or reprobation to those who have committed crimes (see Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993) 9–10).

fundamental flaw with these theories is that they imply that punishment is justified even it causes net harm (for example because the increase in recidivism might outweigh the benefits from incarceration) and most theories break down because at some point they invoke consequential considerations to justify punishment. As has been noted by Stanley Benn and Richard Peters, it is not possible to justify the link between crime and punishment without invoking consequential considerations:

We can justify rules and institutions only by showing that they yield advantages. Consequently, retributivist answers to the problem can be shown, on analysis, to be either mere affirmations of the desirability of punishment or utilitarian reasons in disguise ... To say, with Kant, that punishment is a good in itself, is to deny the necessity for justification; for to justify is to provide reasons in terms of something else accepted as valuable.¹⁵⁷

Further, as we have seen, all Australian jurisdictions have a strong emphasis on consequential considerations, including community safety, general deterrence and rehabilitation, in their sentencing schemes and from a pragmatic perspective it would be too revisionary to now argue that sentencing reforms should be implemented without regard to the likely consequences of the reforms.

The second reformist position is for a more expansive approach to the mitigating ground. This suggestion is more promising. In Part III, we saw that all four of the main arguments that have been advanced for strictly limiting the circumstances in which family hardship were either flawed or not as compelling as had been previously assumed. The arguments that according weight to family hardship in the sentencing calculus undercut the aim of proportionality or unfairly benefited defendants with family members were shown to be flawed. It was also established that there was no paradox associated with punishing the guilty less to benefit the innocent, and in fact it was normatively sound to seek to avoid inflicting harm on the innocent. Further, the appeal of the obvious consequences argument was diluted by the fact that the extent of the hardship experienced by family members (especially children) of imprisoned offenders had been underrated.

Given that the reasons in support of strictly limiting the family hardship mitigating ground have been overrated, it follows that this consideration should more commonly be applied to mitigate penalty severity. How much more often the ground should be applied is obviously a matter of degree. The default position that has been taken by judges who have questioned the existing status quo is to abolish the need for family hardship to be exceptional before it can operate to reduce sanction severity. The position is appealing because it would make this consideration consistent with the operation of most other mitigating and aggravating factors – which do not require an exceptional instance of the factor to influence the punishment that is imposed.

157 S I Benn and R S Peters, *Social Principles and the Democratic State* (Allen and Unwin, 1959) 175–6. See also C L Ten, *Crime, Guilt and Punishment* (Clarendon Press, 1987) ch 3; H L A Hart, *Punishment and Responsibility* (Oxford University Press, 1968) ch 1.

B The Concept of Dependence Providing a Coherent and Justifiable Reform

However, there are still other barriers to a wider application of this principle. If hardship to others should mitigate penalty, it is still necessary to define what hardship means in this context. As we saw above, it is incontestable that prison will have adverse effects on people connected to the offender. However, the extent of the hardship that will be experienced by others as a result of an individual being imprisoned varies markedly. In nearly all cases when an offender is imprisoned, people connected with the offender will experience negative feelings and emotions, including disappointment, shame, embarrassment and fear. These feelings last from minutes to years. Sometimes these feelings will manifest into psychological states, including anxiety, stress and depression. There is no even approximate point in this continuum where the inconvenience or suffering goes from trivial to meaningful, so that it can be described as something akin to hardship.

The negative effects to others stemming from the incarceration of an offender can extend to other forms of deprivation. This includes physical inconvenience, for example when frail relatives of offenders can no longer be cared for by the offender or when an offender's partner is encumbered with a large number of additional household family chores and duties. Then there is also economic deprivation which can arise from an offender's incarceration. This most commonly and acutely occurs when an offender is the only or primary bread winner in a household. As in the case of emotional or psychological distress, there is no obvious demarcation between levels of physical and financial inconvenience which are trivial to those which are meaningful.

Given the large number of ways in which the incarceration of a person can detrimentally affect another person, it is not tenable to suggest that 'hardship' to another person should mitigate penalty. The concept of hardship is simply too broad and nebulous a concept to ground a legal standard that is capable of satisfying the rule of law requirements of clarity, consistency and predictability.¹⁵⁸ Hardship in this context can range from, say, minor and transient embarrassment that a family member has been imprisoned to the profound material and physical harm that could be experienced by a young child if his or her only parent (and relative) and means of financial support is imprisoned. A clearer and exacting standard must be set, which is capable of being applied coherently and consistently by the courts. A possible solution rests in the concept of dependency, which arises when an individual's wellbeing is negatively impacted significantly if his or her connectedness with another person is severed.¹⁵⁹

The main forms of dependency are emotional, physical and financial. The form of dependency that is perhaps the most common is emotional dependence. A key

158 Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) ch 11, especially 211, 214–16; John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 270–6; H L A Hart, 'Discretion' (2013) 127 *Harvard Law Review* 652. For a critique of Hart's view on discretion, see Geoffrey C Shaw, 'H L A Hart's Lost Essay: Discretion and the Legal Process School' (2013) 127 *Harvard Law Review* 666.

159 For a discussion about the meaning of wellbeing, see Mirko Bagaric, 'Injecting Content into the Mirage that Is Proportionality in Sentencing' (2013) 25 *New Zealand Universities Law Review* 411, 430–4.

problem with emotional dependence is that it is inherently vague and unverifiable with any degree of rigour. Hence it is incapable of forming a consideration which can properly inform outcomes in the sentencing realm. While there are some psychological tools which claim to be capable of measuring emotional dependence, many rely, at least in part, on self-reported responses.¹⁶⁰ Family members of offenders obviously have a strong motivation to overstate levels of attachment to offenders. Thus, emotional dependence is not a sufficiently well-developed or arguably durable concept to impact the sentencing calculus.

The other forms of dependence are, however, more concrete. Physical dependence arises when a person relies on the accused to attend to their health and mobility needs. It is difficult to mount a case for this type of dependence to form the basis of mitigation in sentence. First, this type of dependence varies markedly, from driving a relative to important activities such as medical appointments and shopping centres, to caring for an incapacitated relative. Further, in a nation such as Australia with an advanced medical system, including a National Disability Insurance Scheme, in most cases public services can be utilised to assist with medical and mobility needs.¹⁶¹

Financial dependence, however, is a clearer and more binary concept. The concept is utilised in other areas of the law, including social security and welfare.¹⁶² The paradigm case of financial dependency is a sole parent who is working to support his or her children. However, the concept extends beyond these circumstances to include situations where a couple both work, but the offender is the principal income earner. Thus, for the sake of clarity, for the purposes of the recommendations in this article, financial dependence occurs when the offender is the only or main income earner in a family setting and that income is the main source of financial support for one or more other individuals – typically the offender's partner or children.¹⁶³ As with physical dependence, Australia has a welfare system which provides a safety net to ensure that no people are totally destitute. However, the difference between the, say, average income and level of welfare provided to unemployed people is profound.¹⁶⁴ It is so stark that it can

160 For a discussion of the relevant assessment tools and difficulties in assessing emotional dependency, see Alex Cogswell et al, 'Assessing Dependency Using Self-report and Indirect Measures: Examining the Significance of Discrepancies' (2010) 92 *Journal of Personality Assessment* 306. I thank the anonymous reviewer for this observation.

161 The workings of the scheme are set out at: Department of Social Services (Cth), *National Disability Insurance Scheme* (30 April 2018) <<https://www.dss.gov.au/disability-and-carers/programmes-services/for-people-with-disability/national-disability-insurance-scheme>>. Further, it is undesirable that the different levels of physical dependence of those associated with the offender should be dealt by means of the sentencing discretion because this would inevitably result in the levels of uncertainty discussed in Part II of this paper.

162 See *Social Security Act 1991* (Cth).

163 Obviously complexities can arise in circumstances where the dependants of the offender can draw on resources from other people or sources to compensate (at least in part) for the depletion of income from the offender. In such instances, financial dependence would not be established. I thank the anonymous reviewer for this observation and request for clarification.

164 The average adult income in Australia is \$1628 per week: Australian Bureau of Statistics, 'Average Weekly Earnings, Australia, Nov 2017' (Catalogue No 6302.0, February 2018), while the level of social security paid to a single parent is a maximum of \$381 per week: Department of Human Services, *How Much Parenting Payment You Can Get* (12 May 2018)

mean the difference between a family living in relative comfort and poverty.¹⁶⁵ If the main income earner of a family is imprisoned, this can foreseeably result in, for example, a family being required to sell their home and totally disrupt their lifestyle. The impact on the family can be very damaging. As we have seen, studies relating to the impact of imprisoning a family member demonstrate that this can have a financially crippling effect on the family.¹⁶⁶

The disruption can be so significant to incontestably constitute a form of hardship. In these circumstances, the balance between the community in punishing an offender and the interests of the dependants of the offender tilts towards the needs of the latter and should constitute a mitigating consideration. Family financial dependence should replace the exceptional circumstances test for defining when the adverse impacts of the incarceration of the offender on their family should mitigate penalty severity.¹⁶⁷

C Operationalising the Reform

If this recommendation is adopted, there remains the issue of the most appropriate manner in which financial hardship should be factored into the sentencing calculus. The default position is that it should merely form part of the numerous other considerations which are factored into the instinctive synthesis, whereby the court does not stipulate the exact emphasis accorded to the consideration. An alternative approach is to require courts to precisely articulate the weight accorded to family hardship. As noted above, courts do not generally indicate the precise manner in which an aggravating or mitigating factor impacts on the sanction which is imposed. There are two exceptions to his approach. Sentencing courts generally set out the precise weight that is accorded to a guilty plea.¹⁶⁸ This varies from jurisdiction to jurisdiction but for an early plea of guilty (which attracts the largest discount), the discount is in the order of 25 per cent.¹⁶⁹ Cooperating with authorities also normally attracts a designated discount and when

<<https://www.humanservices.gov.au/individuals/enablers/how-much-parenting-payment-you-can-get/39196>>. See also Greg Jericho, 'If You're Going to Compare Levels of Income and Welfare, Do It Fairly', *ABC News* (online), 20 May 2015 <<http://www.abc.net.au/news/2015-05-20/jericho-budget-2015-unfair-comparisons-of-income-and-welfare/6480576>>; Monica Howlett, Matthew Gray and Boyd Hunter, 'Wages, Government Payments and Other Income of Indigenous and Non-Indigenous Australians' (2016) 19 *Australian Journal of Labour Economics* 53, 67–75.

165 The social security single parenting payment is well below the poverty line for even a single adult, which is \$433 per week; see Australian Council of Social Service, *Poverty* (2018)

<<https://www.acoss.org.au/poverty/>>.

166 An alternative approach to dealing with financial hardship is of course to enhance the resources available in the social security system to the dependants of imprisoned offenders, but this would require extensive reforms to the taxation and social security systems and hence is arguably too ambitious to constitute a viable reform recommendation.

167 For the sake of clarity, this means that hardship to other people connected with offenders, such as friends and business associates should not mitigate penalty. I thank the anonymous reviewer for this observation.

168 For a discussion of the operation of the guilty plea discount, see Elizabeth Wren and Lorana Bartels, "'Guilty, Your Honour': Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on Its Operation' (2014) 35 *Adelaide Law Review* 361.

169 *Ibid.*

it is coupled with a plea of guilty, the discount is often in the order of 50 per cent.¹⁷⁰ Thus, it is not unprecedented for courts to precisely articulate the weight accorded to a mitigating consideration. Whichever methodology is employed in relation to the proposed family financial hardship ground would be an improvement to the current legal position – which involves an undesignated discount given only in circumstances of exceptional hardship. On balance, however, it is suggested that the latter approach (ie, a precise discount) is preferable because it will make it more likely that this mitigating factor will be analysed carefully by the courts and that it is accorded appropriate emphasis.¹⁷¹ In terms of the size of the discount that is appropriate, it is suggested that it should generally be in the order of 25 per cent. This is a meaningful discount and, based on the experience with the guilty plea discount, does not seem to be too large to distort the pursuit of other sentencing objectives.¹⁷²

D Reform Not Discriminatory against Unemployed Offenders

A possible incidental disadvantage of the suggested reform is that it may be viewed as advantaging employed offenders, and thereby discriminating against groups such as women and Indigenous Australians – who have lower rates of employment than non-Indigenous offenders.¹⁷³ Ostensibly this is an important criticism.¹⁷⁴ Logically, it is the same form of argument that has been made in favour of a narrow approach to mitigating penalty for all forms of hardship to family.¹⁷⁵ However, the argument merits further analysis at this point because it is possible that it will be advanced with considerable enthusiasm in relation to the proposed reform because the reform ostensibly discriminates against two already disadvantaged groups. However, even in this context that argument is not insurmountable, for two reasons.

First, the concept the discrimination does not apply where there is a relevant difference between the groups or practices under consideration.¹⁷⁶ Thus, for example, in the sentencing context, youthful offenders¹⁷⁷ and offenders without a criminal history¹⁷⁸ are normally given a lower penalty than older offenders or those

170 Mirko Bagaric, ‘Abolishing the Curious Sentencing Anomaly between the Voluntary Disclosure of One’s Own Offending and Assisting Authorities with the Offending of Others’ (2017) 43 *Monash Law Review* 299, 314.

171 These are considerations that influence a precise discount for the guilty plea and cooperating with authorities: *ibid.*

172 If this discount is applied, as in the case of the guilty plea, it would operate to reduce the length of long prison terms and in relation to shorter prison terms could make the difference between a custodial term or an alternative sanction.

173 See Andrew Bushnell, ‘Indigenous Australians and the Criminal Justice System’ (Report, Institute of Public Affairs, September 2017) 22.

174 I thank the anonymous reviewer for this observation.

175 See Part III(C) of this article.

176 See A F Bayefsky, ‘The Principle of Equality of Non-discrimination in International Law’ (1990) 11 *Human Rights Law Journal* 1. See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 480 (Gaudron and McHugh JJ); *Street v Queensland Bar Association* (1989) 168 CLR 461, 590 (McHugh J).

177 *R v Neilson* [2011] QCA 369; *R v Kuzmanovski*; *Ex parte A-G (Qld)* [2012] QCA 19.

178 *Ryan v The Queen* (2001) 206 CLR 267, 278 [33] (McHugh J), 287–8 [67] (Gummow J).

with a criminal record. These mitigating factors have not been challenged on the basis that they discriminate against other offenders, such as the elderly or those with a prior criminal history. Such a criticism would be unpersuasive because there is a relevant basis for the mitigating factors – young offenders and those with no prior criminal history are typically viewed as being good candidates for rehabilitation. Similarly, in the case of the proposed (and reformed) financial dependence mitigating ground, there is a relevant difference for treating employed offenders differently – their incarceration often causes a higher degree of hardship to their family members than the imprisonment of other offenders. The second basis for rejecting this criticism is that there are other reforms that are possible and in fact desirable for ameliorating the disproportionate hardship experienced by other groups of offenders, including Indigenous offenders. Thus, we see, for example, that the recent Australian Law Reform Commission report on Indigenous incarceration has recommended that ‘sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples’.¹⁷⁹ Thus, the fact that employed offenders would often benefit under the proposed reform does not mean this unjustifiably disadvantages other offenders.

V CONCLUSION

The hardship that is felt by people associated with offenders who are sentenced to prison can mitigate penalty. The orthodox view is that this can only occur where the hardship is exceptional. However, recently courts have indicated a willingness to broaden the scope of this mitigating factor to situations where normal hardship occurs (at least in the context of sentencing in the federal jurisdiction). Thus, there is now a degree of uncertainty in this area of law.

The main argument in favour of confining narrowly this mitigating factor is that it is an obvious consequence of prison that those associated with the offender will experience hardship. This argument is not as compelling as might initially seem to be the case. New evidence suggests that the negative consequences experienced by the family of prisoners are greater than previously appeared. This is especially where the offender is a parent and when he or she is the main income earner.

In addition to this, other arguments that have been advanced in favour of strictly limiting the application of this mitigating factor are not persuasive. Reducing penalties on the basis of family hardship does not undermine the proportionality principle nor does it violate the principle of equal justice – it is legitimate to impose different penalties on offenders who are relevantly differently situated. Further, in developing the scope of the test for mitigation on the basis of

179 Australian Law Reform Commission, above n 84, 14. It is beyond the scope of this article to consider the nature of such reforms at length.

family hardship, insufficient weight has been accorded to the principle that the innocent should not suffer.

Thus, greater latitude should be accorded to this mitigating ground. However, the hardship should be confined to economic deprivation because this is the only form of hardship that is measurable, tangible and cannot readily be overcome by assistance from other sources. Thus, the test for defining when adverse consequences to family members arising from the imprisonment of offender should reduce sanctions in sentencing should not be grounded in the need for exceptional, nor indeed 'ordinary' hardship. The first test is too restrictive, and the second is too vague and meaningless. Instead a different standard should be employed: economic dependency.