

## SENTENCING 'CRIMMIGRANTS': HOW MIGRATION LAW CREATES A DIFFERENT CRIMINAL LAW FOR NON-CITIZENS

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*It was once a criminal offence for a 'prohibited immigrant' to be found within Australia. Today, the mandatory detention regime sees the issue of whether a non-citizen may enter or remain in Australia as one solely within the ambit of administrative law. Yet non-citizen status continues to have consequences in criminal courts. This article examines the question of 'what does criminal justice look like for non-citizens' from two angles: the effect of character-based deportation upon the criminal sentencing process; and the differential punishment of non-citizens. It is argued that the sentencing of non-citizens in Australia is produced across an unstable boundary between immigration law and crime, creating a different, and diminished, criminal law for non-citizens.*

### I INTRODUCTION

In December 2017, the Australian Federal Police, the Australian Border Force and the Australian Security Intelligence Organisation agencies were merged into one Home Affairs portfolio.<sup>1</sup> The number of people who had their visas cancelled on character grounds rose from 76 people in 2013–14, to 1,021 people in 2019–20.<sup>2</sup> In 2018, Australia's onshore immigration detention network held more people who had their visa cancelled on character or criminal grounds, than asylum seekers who arrived by boat.<sup>3</sup> At a time when the conflation between non-citizens and

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† For another article addressed to some of the same subject matter as Part III below, see Mirko Bagaric, Theo Alexander and Brienna Bagaric, 'Offenders Risking Deportation Deserve a Sentencing Discount: But the Reduction Should Be Provisional' (2020) 43(2) *Melbourne University Law Review* 423, published after submission and acceptance of the current article but before final proofs.

1 Peter Dutton, 'A New Era for National Security' (Media Release, Department of Home Affairs, 20 December 2017).

2 Department of Home Affairs (Cth), 'Key Visa Cancellation Statistics', *Visa Statistics* (Web Page, 14 August 2020) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>>.

3 Department of Home Affairs (Cth), *Immigration Detention and Community Statistics Summary* (Monthly Report, 30 June 2018) 4.

crime is at the forefront of government policy,<sup>4</sup> the interplay between criminal and migration laws in Australia demands greater scrutiny.

There is a growing scholarship examining the phenomenon of ‘crimmigration’, or the intermingling of criminal law and migration control.<sup>5</sup> However, literature in this field has largely centred on the treatment of offenders within the administrative law system, rather than on how ‘non-citizens’ interact with the criminal law system.<sup>6</sup> This article focuses on the latter, underexplored area, namely the ways in which Australian criminal courts have grappled with, and contribute to, the creation of a different criminal law for people without formal citizenship status. I do not address specific migration related crimes such as people smuggling offences.<sup>7</sup> Rather, I focus on the legal divide between ‘citizen’ and ‘non-citizen’ in order to chart the ways non-citizen offenders face differential treatment within the criminal system because of their immigration status, their detention, or their deportability<sup>8</sup> – I engage with ‘non-citizens *qua* non-citizens’.<sup>9</sup> This article reveals

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- 4 See, eg, Linda Briskman and Lucy Fiske, ‘Creating Criminals: Australia’s Response to Asylum Seekers and Refugees’ in Rich Furman, Greg Lamphear and Douglas Epps (eds), *The Immigrant Other: Lived Experiences in a Transnational World* (Columbia University Press, 2016) 225; Michael Welch, ‘The Sonics of Crimmigration in Australia: Wall of Noise and Quiet Manoeuvring’ (2012) 52(2) *British Journal of Criminology* 324; Sharon Pickering, *Refugees and State Crime* (Federation Press, 2005); Michael Grewcock, ‘Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners under Section 501 *Migration Act 1958*’ (2011) 44(1) *Australian and New Zealand Journal of Criminology* 56, 63–4 (‘Punishment, Deportation and Parole’).
  - 5 See, eg, Juliet Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’ (2006) 56(2) *American University Law Review* 367; Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019); Maartje AH van der Woude, Joanne P van der Leun and Jo-Anne A Nijland, ‘Crimmigration in the Netherlands’ (2014) 39(3) *Law and Social Inquiry* 560, 562; David Alan Sklansky, ‘Crime, Immigration, and Ad Hoc Instrumentalism’ (2012) 15(2) *New Criminal Law Review* 157; Jennifer M Chacón, ‘Overcriminalizing Immigration’ (2012) 102(3) *Journal of Criminal Law and Criminology* 613; Peter Billings, ‘Regulating Crimmigrants through the “Character Test”: Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of Non-Citizens in Australia’ (2018) 71(1) *Crime, Law and Social Change* 1 (‘Regulating Crimmigrants through the “Character Test”’); Elizabeth Stanley, ‘Expanding Crimmigration: The Detention and Deportation of New Zealanders from Australia’ (2018) 51(4) *Australian and New Zealand Journal of Criminology* 519; Patrick van Berlo, ‘Australia’s Operation Sovereign Borders: Discourse, Power, and Policy from a Crimmigration Perspective’ (2015) 34(4) *Refugee Survey Quarterly* 75.
  - 6 Ingrid V Eagly, ‘Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement’ (2013) 88(4) *New York University Law Review* 1126, 1129. For an acknowledgement of the need for further research in this area, see Alison Gerard, ‘Crimmigration and the Australian Legal Lexicon: Reflecting on Border Control, Theory and the Lived Experience’ in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 89.
  - 7 See, eg, Dina Yehia, ‘Boat People as Victims of the System: Mandatory Sentencing of “People Smugglers”’ (2016) 3(1) *Northern Territory Law Journal* 18; Michael Grewcock, ‘People Smuggling and State Crime’ in Kerry Carrington et al (eds), *Crime, Justice and Social Democracy: International Perspectives* (Palgrave Macmillan, 2013) 327; Mike Grewcock, ‘Irregular Migration, Identity and the State: The Challenge for Criminology’ (2003) 15(2) *Current Issues in Criminal Justice* 114; Andreas Schloenhardt and Colin Craig, ‘Penalties and Punishment: People Smugglers before Australian Courts’ (2016) 40(2) *Criminal Law Journal* 92.
  - 8 Katja Franko Aas, ‘Bordered Penalty: Precarious Membership and Abnormal Justice’ (2014) 16(5) *Punishment and Society* 520, 523 (‘Bordered Penalty’). See also Ana Aliverti, ‘Sentencing in Immigration-Related Cases: The Impact of Deportability and Immigration Status’ [2013] (205) *Prison Service Journal* 39, 39 (‘Sentencing in Immigration-Related Cases’).
  - 9 Leanne Weber, *Policing Non-citizens* (Routledge, 2013) xi (emphasis in original).

that traditional criminal law sentencing principles of proportionality and rehabilitation are eroded where criminal courts come up against immigration law and its consequences. By examining the way non-citizens are sentenced for 'status-neutral offences',<sup>10</sup> I contribute to an emerging recognition of the impact of immigration status upon criminal justice outcomes.

Where it was once a criminal offence for a 'prohibited immigrant' to be found within Australia,<sup>11</sup> the mandatory detention regime now sees the issue of whether a non-citizen may enter or remain in Australia as one solely within the ambit of administrative law.<sup>12</sup> Under the *Migration Act 1958* (Cth) ('*Migration Act*'), all non-citizens in Australia who do not hold a valid visa are 'unlawful' and liable to administrative detention until they are granted a visa or 'removed' from Australia.<sup>13</sup> Significantly, the Minister for Home Affairs ('Minister') may cancel or refuse a visa where a non-citizen fails the 'character test' under section 501 of the *Migration Act*, including on grounds of criminal conduct, rendering the person liable to immediate detention.<sup>14</sup> The High Court has held that visa cancellation and mandatory detention is not punitive in nature.<sup>15</sup>

Yet, despite formal 'decriminalisation',<sup>16</sup> non-citizen status continues to have consequences in the criminal law. This article focuses on the criminal sentencing process to investigate the effects of migration law upon the treatment of non-citizen offenders. Using original research on cases involving non-citizens who were charged with crimes, this article examines the question of 'what does criminal justice look like for non-citizens?' I explore this question through two dimensions: the impact of the administrative deportation of non-citizens on the criminal sentencing process; and the differential punishment of non-citizens. I adopt a broad model of criminalisation, looking beyond the moment of offence creation to focus on how structural factors influencing judicial discretion in sentencing non-citizens affect the criminal law.<sup>17</sup> By analysing these dimensions, I map ways in which non-

10 Ana Aliverti, 'Doing Away with Decency? Foreigners, Punishment and the Liberal State' in Anna Eriksson (ed), *Punishing the Other: The Social Production of Immorality Revisited* (Routledge, 2016) 124, 132 ('Doing Away with Decency?').

11 *Immigration Restriction Act 1901* (Cth) s 7.

12 Minister for Immigration and Border Protection and Attorney-General (Cth), 'Annotated Submissions of the Defendant and the Commonwealth Attorney-General (Intervening)', Submission in *Falzon v Minister for Immigration and Border Protection*, S31/2017, 7 June 2017, [11]. See also Louise Boon-Kuo, *Policing Undocumented Migrants: Law, Violence and Responsibility* (Routledge, 2018) 34–5 ('*Policing Undocumented Migrants*').

13 *Migration Act 1958* (Cth) ss 189(1), 196(1), 198.

14 *Ibid* ss 189(1), 198(2B), 501(1)–(3A). Throughout this article, I use the terms Department of Home Affairs and Department of Immigration, as well as the Minister for Immigration and Minister for Home Affairs, interchangeably, which reflects the continued rebranding of this portfolio.

15 See *Al-Kateb v Godwin* (2004) 219 CLR 562, 572 [45] (McHugh J), 636 [263] (Hayne J), 645 [291] (Callinan J), 649 [303] (Heydon J); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 499 (Gleeson CJ). The High Court has held that the exercise of an administrative power to cancel a visa by reference to previous criminal offending does not constitute the imposition of a punishment: *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 347 (Kiefel CJ, Bell, Keane and Edelman JJ) ('*Falzon*').

16 Boon-Kuo, *Policing Undocumented Migrants* (n 12) 35.

17 Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72(6) *Modern Law Review* 936, 942; Luke McNamara, 'Criminalisation Research in Australia: Building a Foundation

citizen offenders are treated differently within state criminal courts due to the operation of the Commonwealth migration system.<sup>18</sup>

The convergence of criminal and immigration law is on the frontier of both legal disciplines, and the phenomenon is pushing the boundaries of what it means to study ‘crime’ or ‘migration’.<sup>19</sup> Globally, scholars have examined how the language of migrant illegality enables governments to enact punitive border protection policies.<sup>20</sup> Since the United States (‘US’) scholar Stumpf coined the term ‘cimmigration’, there has been a proliferation of interest in the crime–migration convergence, including regarding the increasingly severe criminal penalties attached to immigration violations.<sup>21</sup> While the cimmigration framework cannot be directly transposed onto the Australian context,<sup>22</sup> there is an emerging scholarship examining the way character-based deportation in Australia is used as a mechanism for managing criminal threats.<sup>23</sup> Further, Australian scholars are exploring how migration status is policed in Australia,<sup>24</sup> revealing that

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- for Normative Theorising and Principled Law Reform’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 33, 47.
- 18 In Australia’s federal system, the Commonwealth has control of migration. States retain control over criminal law within their jurisdictions: see Michael Meek, *Australian Legal System* (Thomson Reuters, 5<sup>th</sup> ed, 2016) 22.
- 19 Leanne Weber, ‘The Detention of Asylum Seekers: 20 Reasons Why Criminologists Should Care’ (2002) 14(1) *Current Issues in Criminal Justice* 9, 25–6.
- 20 Van Berlo (n 5); Briskman and Fiske (n 4); Welch (n 4); van der Woude, van der Leun and Nijland (n 5); Michael Grewcock, *Border Crimes: Australia’s War on Illicit Migrants* (Institute of Criminology Press, 2009) 238, 242–76; Mary Bosworth and Sarah Turnbull, ‘Immigration Detention, Punishment and the Criminalization of Migration’ in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2014) 91; Pickering, *Refugees and State Crime* (n 4) 144, 186; Amy Nethery, ‘Immigration Detention in Australia’ (PhD Thesis, Deakin University, 2010); César Cuauhtémoc García Hernández, ‘Immigration Detention as Punishment’ (2014) 61(5) *University of California at Los Angeles Law Review* 1346.
- 21 See, eg, David Alan Sklansky, ‘Crime, Immigration, and Ad Hoc Instrumentalism’ (2012) 15(2) *New Criminal Law Review* 157; Jennifer M Chacón, ‘Overcriminalizing Immigration’ (2012) 102(3) *Journal of Criminal Law and Criminology* 613; Stephen H Legomsky, ‘The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms’ (2007) 64(2) *Washington and Lee Law Review* 469; van der Woude, van der Leun and Nijland (n 5); Annmarie Barnes, ‘Displacing Danger: Managing Crime through Deportation’ (2009) 10(4) *Journal of International Migration and Integration* 431; Aliverti, ‘Doing Away with Decency?’ (n 10).
- 22 This is largely because, unlike in the United States (‘US’), the majority of immigration violations are not prosecuted as criminal offences in Australia: see, eg, Weber, *Policing Non-citizens* (n 9) 5; Gerard (n 6).
- 23 Weber, *Policing Non-citizens* (n 9) 95–113; Grewcock, ‘Punishment, Deportation and Parole’ (n 4); Michael Grewcock, ‘Reinventing “the Stain”: Bad Character and Criminal Deportation in Contemporary Australia’ in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2014) 121 (‘Reinventing “the Stain”’); Khanh Hoang and Sudrishti Reich, ‘Managing Crime through Migration Law in Australia and the United States: A Comparative Analysis’ (2017) 5(1) *Comparative Migration Studies* 12; Stanley (n 5); Peter Billings and Khanh Hoang, ‘Characters of Concern, or Concerning Character Tests? Regulating Risk through Visa Cancellation, Containment and Removal from Australia’ in Peter Billings (ed), *Cimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 119.
- 24 Weber, *Policing Non-citizens* (n 9); Boon-Kuo, *Policing Undocumented Migrants* (n 12).

administrative removal of 'unlawful' non-citizens is viewed as a 'criminal justice option'.<sup>25</sup>

However, as the US scholar Eagly argues, literature in this field has largely 'concentrated on the treatment of criminals within the immigration system, rather than on non-citizens within the criminal system'.<sup>26</sup> This article takes up the challenge implied in Eagly's statement, to examine the treatment of non-citizens within Australia's criminal law system. The central questions propelling this article are: what challenges do 'crimmigrants' face before criminal courts in Australia, and how does the operation of the *Migration Act* influence sentencing options and outcomes for non-citizens?<sup>27</sup> I examine 115 cases discussing the relevance of deportation or administrative removal when sentencing, as well as 20 case examples discussing the availability of rehabilitative sentencing options for non-citizens.<sup>28</sup> There are few studies thoroughly identifying and analysing these two groups of cases in terms of sentencing approaches.<sup>29</sup> My research illustrates ways in which non-citizens are treated differently by the criminal law because of their non-citizen status.

In Part II of this article, I briefly discuss my methodology and guiding principles of Australian sentencing law. In Part III, I explore how courts in certain Australian jurisdictions are viewing visa cancellation and removal from Australia on criminal grounds as a relevant factor in sentencing. I show that the consequences of administrative law within the criminal process are preventing criminal courts from imposing appropriate, proportionate sentences on non-citizen offenders. In Part IV, I argue that sentencing courts are deeming non-citizen offenders ineligible for rehabilitative or community-based sentencing options, subjecting non-citizens to differential punishments. In Part V, I set out my conclusions and suggest future areas for research.

In undertaking this analysis, I reveal ways in which the operation of migration law has serious consequences within the criminal law space. This study has relevance beyond the Australian migration lawyer or criminal practitioner. By examining the interaction between distinct fields of law, this article emphasises the importance of studying the impacts of one legal sphere upon others. Further, by exposing how criminal justice outcomes are undermined by the operation of the

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25 Louise Boon-Kuo, 'The Policing of Immigration: Raids, Citizenship and the Criminal Law' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 276, 283 (emphasis altered).

26 Eagly (n 6) 1129.

27 See generally Katja Franko Aas, "'Crimmigrant' Bodies and Bona Fide Travelers: Surveillance, Citizenship and Global Governance' (2011) 15(3) *Theoretical Criminology* 331, 337 ("'Crimmigrant' Bodies and Bona Fide Travelers"). Similar questions have been posed in the US, United Kingdom ('UK') and European context: see Ana Aliverti and Mary Bosworth, 'Introduction: Criminal Justice Adjudication in an Age of Migration' (2017) 20(1) *New Criminal Law Review* 1, 4.

28 See full table of analysed cases (copy on file with author) and discussion of methodology in Part II.

29 For a brief discussion of the way deportation has been dealt with in criminal courts, see Mirko Bagaric, Lidia Xynas and Victoria Lambropoulos, 'The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders' (2016) 39(1) *University of New South Wales Law Journal* 47. For two recent and more detailed examinations of the impact of section 501 upon the criminal sentencing process, see Paul McGorrey, *Deportation and Sentencing: An Emerging Area of Jurisprudence* (Report, November 2019); Bagaric, Alexander and Bagaric (n †).

*Migration Act*, I hope to provide the beginnings of an Australian case study for the crimmigration field internationally. I argue that the differential treatment of non-citizens produces injustice at the intersection of crime and migration.

## II CONCEPTUAL FRAMEWORK AND METHODOLOGY

The rationale behind Australia's sentencing principles, and the nexus between these principles and my examined cases, forms the relevant context for my analysis.

Within Australia, while each state and territory has its own sentencing law (developed through legislation and common law), there are several key sentencing objectives which are common to all jurisdictions.<sup>30</sup> These include the protection of the community, deterrence (specific to the offender, and general deterrence), rehabilitation and retribution or denunciation.<sup>31</sup> By allowing judges to choose from sentencing options on a 'graduated and progressional scale of penalties',<sup>32</sup> ranging from fines to community-based penalties to imprisonment, sentences can be tailored to the particular circumstance of each offender in order to promote the goals of sentencing.<sup>33</sup>

In addition, proportionality is an integral and guiding principle of criminal law, and has been held by the High Court to be the most important aim of sentencing.<sup>34</sup> The principle of proportionality espouses the notion that a criminal sentence should 'never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances'.<sup>35</sup> As held by Deane J in *Veen v The Queen [No 2]*: 'It is only within the outer limit of what represents proportionate punishment for the actual crime that the interplay of other relevant favourable and unfavourable factors ... will point to what is the appropriate sentence in all the circumstances of the particular case'.<sup>36</sup>

Proportionality is seen to have two limbs: the seriousness of the crime, and the harshness of the sanction.<sup>37</sup> If a sentence is to be considered a proportionate penalty, the severity of the sanction must not outweigh the seriousness of the

30 Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) ch 1.

31 *Crimes Act 1914* (Cth) s 16A; *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(1); *Sentencing Act 2017* (SA) ss 3–4, 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) ss 1, 5(1). Pursuant to *Sentencing Act 1995* (WA) s 6, 'protection of the community' is the only stated purpose, however other goals such as punishment, denunciation and rehabilitation are listed as purposes for specific penalties: see, eg, *Sentencing Act 1995* (WA) ss 9C(2)(a), 65(1)(a), 75(1).

32 Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 2014) 227.

33 Mirko Bagaric, Richard Edney and Theodosios Alexander, *Sentencing in Australia* (Thomson Reuters, 5<sup>th</sup> ed, 2017) 624.

34 *Veen v The Queen [No 2]* 1988 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey J) ('*Veen [No 2]*'). See also *ibid* 159–62.

35 *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis omitted).

36 *Veen [No 2]* (1988) 164 CLR 465, 491 (Deane J).

37 For a detailed examination of the principle of proportionality, see Bagaric, Xynas and Lambropoulos (n 29) 64–73.

crime. Sentencing judges in Australia are generally afforded a wide degree of discretion to impose criminal sanctions, and are required to take into account the aggravating and mitigating considerations relevant to a particular offender in order to assess an appropriate sentence in light of the circumstances of the offence and in a way that reflects the individual's personal culpability.<sup>38</sup>

Inherent within these sentencing goals is an implied claim to cleanness and neutrality – that the criminal law is capable of punishing offenders according to an objective and neatly calibrated matrix, in which each offender's 'objective circumstances' are balanced against the aims of sentencing which will in turn 'point to' the just result.<sup>39</sup> Yet, the criminal justice system is fallible and human, and it has been argued that there is 'no decision in the criminal process that is so complicated and so difficult to make as that of the sentencing judge'.<sup>40</sup> In practice, it is widely recognised that groups of people within the criminal justice system experience differential treatment based on structural determinants such as gender, Indigeneity and class.<sup>41</sup> What is less widely appreciated is that non-citizen offenders also experience differential treatment due to the consequences of their immigration status within the criminal sentencing process.

In order to examine the relevance of non-citizen status to sentencing, I searched for criminal cases discussing the operation of the *Migration Act*. Early research indicated areas in which non-citizens were treated differently in criminal courts by virtue of their ability to be deported from Australia for criminal offending, guiding me to narrow my search. In doing so, I created my 'primary dataset' examining every case in the superior courts (Supreme Court and Court of Appeal) of Victoria, Queensland, the Australian Capital Territory ('ACT'), Tasmania and South Australia ('SA') from the years 2010 to 2019 discussing the relevance of deportation to sentencing.<sup>42</sup> Although cases from New South Wales ('NSW'), the Northern Territory ('NT') and Western Australia ('WA') were reviewed, these were ultimately excluded from my dataset as the risk of deportation is not a

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38 *Wong v The Queen* (2001) 207 CLR 584, 611 (Gaudron, Gummow and Hayne JJ); *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing) Act 2005* (ACT) s 33(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1995* (NT) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Sentencing Act 2017* (SA) ss 10–11; *Sentencing Act 1997* (Tas) ss 3, 9; *Sentencing Act 1991* (Vic) ss 1, 5(2); *Sentencing Act 1995* (WA) ss 6, 8.

39 *Veen [No 2]* (1988) 164 CLR 465, 491 (Deane J).

40 John Hogarth, *Sentencing as a Human Process* (University of Toronto Press, 1971) 3, citing President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* (Report, February 1967) 141.

41 See, eg, Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013); Kate Fitz-Gibbon and Sandra L Walklate, *Gender, Crime and Criminal Justice* (Routledge, 3<sup>rd</sup> ed, 2018); Nora V Demleitner et al, *Sentencing Law and Policy: Cases, Statutes, and Guidelines* (Wolters Kluwer Law and Business, 4<sup>th</sup> ed, 2018) ch 5; Samantha Jeffries and Christine EW Bond, 'Gender, Indigeneity, and the Criminal Courts: A Narrative Exploration of Women's Sentencing in Western Australia' (2013) 23(1) *Women and Criminal Justice* 19; Andrew James McGrath, 'The Subjective Impact of Contact with the Criminal Justice System: The Role of Gender and Stigmatization' (2014) 60(6) *Crime and Delinquency* 884.

42 See full table of analysed cases (copy on file with author). This search was initially done on Austlii in September 2017 on more limited grounds, and was then repeated in February 2020 to cover cases until 2019.

permissible sentencing factor in these states. I nevertheless discuss the approach of these jurisdictions in Part III.

My search was comprised of cases citing sections 200, 201 and 501 of the *Migration Act*, the key sections pursuant to which non-citizen offenders may be removed from Australia,<sup>43</sup> as well as cases that did not cite the *Migration Act* but nevertheless mentioned deportation in the context of sentencing.<sup>44</sup> The date range of 2010 to 2019 was chosen as it permitted a study of the approach of sentencing judges to deportation in the decade since the decision of *Guden v The Queen* ('*Guden*'),<sup>45</sup> the leading authority in this area. Of the 269 cases meeting these parameters, I excluded cases mentioning deportation or citing the *Migration Act* in ways irrelevant to my inquiry (for example, where deportation was mentioned to explicate the historical background of a case, or was mentioned by counsel but not considered by the court) – producing my set of 115 cases. No meaningful distinction could be drawn between consideration of visa *cancellation* pursuant to section 501 of the *Migration Act*, and cases considering *deportation*, as by limiting my search to criminal courts, this predominantly excluded cases where removal or deportation from Australia was not dealt with.<sup>46</sup>

My dataset is limited. Firstly, it does not consider the decisions of magistrate or district courts unless on appeal and in that respect, I cannot claim to be covering the field. Further, the majority of cases in my dataset concerned offences meeting the requisite level of seriousness to be heard in the superior courts of each state and territory, which may influence my results. Nonetheless, my scope enabled an examination of whether key amendments to the *Migration Act* over 10 years have affected the approach of superior criminal courts with regards to the relevance of deportation to sentencing.

From this study, I observed that certain cases also highlighted the limited sentencing options available to non-citizens, guiding me to produce a smaller group of 20 cases pertaining to the availability of non-custodial sentencing options for non-citizens. While my primary dataset comprises cases revealing to what extent deportation was a relevant factor in the *length* of sentence imposed, the second group of cases examine the *type* of sentencing options (for example, fines or community service orders) available for non-citizen offenders who were either liable to immigration detention or facing deportation. Five of these cases were produced when I compiled my primary dataset, while the balance were located through search strategies using terms specific to the types of penalties available in

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43 The legislative framework is discussed in Part III.

44 I utilised the search terms 'deport\* & crim\* & sentence'.

45 (2010) 28 VR 288 ('*Guden*').

46 For example, cases in which a non-citizen was challenging a decision to cancel their visa under section 501 would be heard in other courts such as the Administrative Appeals Tribunal or the Federal Court, courts which I excluded from my search. Similarly, a negligible number of *criminal* cases considered section 501 in contexts other than deportation, such as outlining the background to an offender or victim's history, and were excluded on the basis that they did not consider the impact of section 501 on the sentencing process.



each jurisdiction.<sup>47</sup> As this research was by nature exploratory, and given that the majority of decisions involving non-custodial sentencing options are made in lower court judgments (which are often not publicly available), I searched for case examples from the years 2000 to 2019 and from any court in each jurisdiction in Australia. This was to obtain a variety of demonstrative cases considering the availability of various non-custodial sentencing types for non-citizen offenders. Unlike my primary dataset, these cases are not examined quantitatively and do not purport to be a complete group. Rather, I draw on these cases in Part IV as case examples identifying where rehabilitative sentencing options have not been available to non-citizen offenders, due to their administrative detention or deportability. While the sample size is small, limiting my ability to assess the full scope of the problem, the issues identified are alarming. It is my intention that, having identified this problem across multiple jurisdictions in Australia, future research can be conducted in furtherance of my findings.

Examining these two groups of cases, I utilise the aims of sentencing (and particularly proportionality and rehabilitation) as a framework through which to explore how traditional sentencing principles are undermined by virtue of the consequences of non-citizenship status within criminal law. I claim that the operation of the migration system is perpetuating a substantively diminished criminal law for non-citizens.

### III REMOVING CRIMMIGRANTS

In 2016, the Turnbull Government announced a security upgrade of \$27.4 million to Yongah Hill IDC, on account of the 'growing number of the detention population [who] have had their visas cancelled on character grounds, due to criminal convictions and links to organised crime ...'<sup>48</sup>

Within the last decade, scholars have observed a 'remarkable increase in deportation of lawfully present noncitizens through the expansion of criminal deportability grounds'.<sup>49</sup> The increasing deportation of non-citizens for criminal conduct has been heavily criticised for its punitive consequences.<sup>50</sup> Using administrative law to deport non-citizens after serving their term of imprisonment has been argued to result in the imposition of multiple punishments, with disproportionate impacts on long-term residents.<sup>51</sup> The removal of non-citizens

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47 Examples of search strategies included: 'crim\*' & 'immigration detention' or '[name of detention centre]'; '(s 501 or deport\*)' & 'fine' or 'community service' or 'community corrections order' or 'intensive corrections order' or 'probation order'.

48 Department of Immigration and Border Protection, Submission No 1 to Parliamentary Standing Committee on Public Works, Parliament of Australia, *Inquiry into the Proposed Yongah Hill Immigration Detention Centre Hardening Project at Mitchell Avenue, Northam, Western Australia* (15 November 2016) 15–16.

49 Juliet P Stumpf, 'Two Profiles of Crimmigration Law: Criminal Deportation and Illegal Migration' in Francis Pakes (ed), *Globalisation and the Challenge to Criminology* (Routledge, 2013) 91, 92 ('Two Profiles of Crimmigration Law').

50 Daniel Kanstroom, 'Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases' (2000) 113(8) *Harvard Law Review* 1890.

51 *Ibid*; Grewcock, 'Punishment, Deportation and Parole' (n 4) 66; Stanley (n 5).

who offend exemplifies ‘cimmigration’ and the accelerated criminal–migration fusion in Australia.<sup>52</sup>

In this Part, I explore an issue that has received minimal attention in Australia, namely how the administrative power to deport non-citizens is impacting upon the sentencing process within criminal courts. After giving context to how criminal law concepts are intruding into the deportation process under the *Migration Act*, I focus on the less-observed consequences of migration law upon *criminal* processes. Drawing on my examination of 115 criminal cases discussing the administrative power to deport or ‘remove’ non-citizens for criminal offending, I show that criminal courts in Victoria, Queensland, the ACT and Tasmania view the potential for a non-citizen to be deported from Australia as a relevant factor in sentencing. Through my analysis, I reveal that the discretionary power to remove non-citizens from Australia prevents criminal courts from accurately assessing the likelihood of deportation and is precluding courts from proportionately sentencing non-citizen criminal offenders. I claim that the effect of administrative law powers on the criminal sentencing process is degrading the substantive criminal law as it applies to non-citizens.

### A The Mechanisms of Removal

My argument in this section builds on earlier insight that the administrative power to deport non-citizens is forming part of the arsenal of criminal law. Non-citizens who are convicted of certain crimes may be deported or removed under two key powers in the *Migration Act*.<sup>53</sup> Firstly, pursuant to sections 200 and 201, non-citizens who have been in Australia for less than 10 years may be deported if they have been convicted of a crime and sentenced to at least 12 months imprisonment.<sup>54</sup> Secondly, non-citizens who fail the ‘character test’ in section 501 may have their visa cancelled or refused,<sup>55</sup> thus rendering them unlawful non-citizens liable to detention and ‘removal’ from Australia.<sup>56</sup> Section 501(6) provides for a range of grounds upon which a person’s visa may be cancelled, such as where the person has a ‘substantial criminal record’ (defined at subsection (7) to include where a person has been sentenced to at least 12-months imprisonment).<sup>57</sup> As Grewcock demonstrates, by 2002, the character test in section 501 had replaced deportation pursuant to section 200 as the favoured means for removing non-citizens convicted of criminal offences from Australia.<sup>58</sup> This is largely because section 501 permits the visa cancellation of any non-citizen, regardless of their permanent resident status or length of stay in Australia.

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52 Weber, *Policing Non-citizens* (n 9) 103; Hoang and Reich (n 23) 15.

53 While ‘removal’ under section 501 is distinct from ‘deportation’ under section 201 of the *Migration Act*, criminal courts use the terms interchangeably. In this article I also use the colloquial term deportation and the term removal interchangeably. It should be noted that non-citizens may also have their visa cancelled under the ‘general’ power to cancel a visa contained in *Migration Act 1958* (Cth) s 116.

54 *Migration Act 1958* (Cth) ss 200, 201.

55 *Ibid* ss 501(1)–(3).

56 *Ibid* ss 189, 196, 198.

57 *Ibid* ss 501(6)(a), (7)(c).

58 Grewcock, ‘Reinventing “the Stain”’ (n 23) 126.

The section 501 character test has been progressively amended to expand the types of conduct for which non-citizens may face visa cancellation and hence removal.<sup>59</sup> Notably, since the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) ('2014 amendments'), under section 501(3A) the Minister *must* cancel a person's visa where a non-citizen has been sentenced to a term of imprisonment of at least 12 months or found guilty of 'sexually based offences involving a child', and where that non-citizen is serving a sentence of imprisonment.<sup>60</sup>

If a person's visa is automatically cancelled under section 501(3A), that person may apply to get the cancellation revoked.<sup>61</sup> Written directions, called 'Ministerial Directions', govern the way certain functions under the *Migration Act* (such as a decision to revoke a mandatory visa cancellation) should be exercised.<sup>62</sup> The Ministerial Direction currently in force provides that when deciding whether to overturn a mandatory cancellation under section 501(3A), the decision maker (the Minister or their delegate) must take three primary and five secondary considerations into account.<sup>63</sup> Notably, the 'strength, nature and duration of [the offender's] ties to Australia' are only secondary considerations, while the primary considerations are the protection and expectations of the Australian community, and the best interests of minor children in Australia.<sup>64</sup> If a delegate of the Minister refuses the application, the non-citizen may apply to challenge the merits of that decision in the Administrative Appeals Tribunal ('AAT') through a process known as merits review.<sup>65</sup> However, if the Minister makes the decision personally, the non-citizen has no right to appeal to the AAT.<sup>66</sup> Furthermore, where a mandatory cancellation under section 501(3A) is overturned by the AAT or a delegate of the Minister, the Minister retains the discretion to nevertheless cancel the visa in the 'national interest'.<sup>67</sup>

The introduction of the mandatory visa cancellation power under section 501(3A) correlates with a dramatic rise in the number people who have had their visas cancelled on character grounds: from 76 people in 2013–14, to 983 people in 2015–16,<sup>68</sup> to 1,278 people in 2016–17,<sup>69</sup> resting at 1,021 in 2019–20.<sup>70</sup>

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59 See, eg, *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth); *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

60 *Migration Act 1958* (Cth) s 501(3A).

61 *Ibid* s 501CA(4).

62 *Ibid* s 499.

63 Minister for Immigration, Citizenship and Multicultural Affairs, *Direction No 79: Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA* (20 December 2018).

64 *Ibid*.

65 *Migration Act 1958* (Cth) s 500(1)(b).

66 *Ibid*.

67 *Ibid* s 501BA. This is only where the Minister is satisfied that the person does not satisfy the character test because of the operation of section 501(6)(e) (relating to 'sexually based offences involving a child') or section 501(6)(a) (where the person has a substantial criminal record on the basis of, inter alia, being sentenced to a term of imprisonment of 12 months or more).

68 Commonwealth Ombudsman, *The Department of Immigration and Border Protection: The Administration of Section 501 of the Migration Act 1958* (Report No 8, December 2016) 1.

69 'Key Visa Cancellation Statistics' (n 2).

70 *Ibid*.

Furthermore, at the time of writing, a bill is being debated by Parliament which, if passed, will further expand the grounds on which a person's visa may be cancelled under section 501.<sup>71</sup> This would include where a non-citizen has been convicted of a crime punishable by over two years' imprisonment, regardless of *when* the person was convicted or whether the person was actually sentenced to a term of imprisonment.<sup>72</sup> These amendments to section 501 and the corresponding rise in visa cancellations in Australia mirror trends in the US, where scholars have observed an increase in the deportation of non-citizens through expanding the grounds of criminal deportability.<sup>73</sup>

Tracing the constitutional background to section 501, particularly, the tension between that background and the objectives of the legislature expressed in parliamentary material accompanying amendments to section 501, helps us to appreciate one element of the crime-migration exchange: how the administrative removal of non-citizens can be seen as part of the arsenal of the criminal law. The distinction between 'criminal' powers such as the power to punish people for offences, and 'administrative' powers such as the power to deport non-citizens, has significance in Australian constitutional law. This is because Chapter III of the *Constitution* prohibits the executive exercising the judicial power of the Commonwealth.<sup>74</sup> The function of judging and punishing criminal guilt for an offence has been held to be a power exclusive to the judiciary, and a law purporting to invest this power in the executive will be invalid due to inconsistency with the *Constitution*.<sup>75</sup> However, it has been held that the deportation of non-citizens by the executive does not constitute punishment.<sup>76</sup> Furthermore, the High Court has held that laws authorising administrative detention for the purposes of exclusion or removal will not infringe Chapter III, because the power to detain non-citizens takes its character from the executive power to exclude or deport non-citizens, and is not punitive in nature.<sup>77</sup>

The separation between executive and judicial powers explains the argument espoused by the Commonwealth government in the case of *Falzon v Minister for Immigration and Border Protection* ('*Falzon*').<sup>78</sup> *Falzon* involved a challenge to the constitutionality of mandatory visa cancellation introduced in 2014 under section 501(3A) of the *Migration Act*, described above. In this case, the High Court accepted the argument of the Commonwealth government that the power to cancel

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71 Migration Amendment (Strengthening the Character Test) Bill 2019 (Cth).

72 Ibid sch 1 items 5–6.

73 Stumpf, 'Two Profiles of Crimmigration Law' (n 49) 92.

74 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

75 Ibid.

76 *Ex parte Walsh and Johnson* (1925) 37 CLR 36, 96 (Isaacs J); *O'Keefe v Calwell* (1949) 77 CLR 261, 278 (Latham CJ); *Falzon* (2018) 262 CLR 333, 347 [47] (Kiefel CJ, Bell, Keane and Edelman JJ).

77 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 32 (Brennan, Deane and Dawson JJ); *Falzon* (2018) 262 CLR 333, 341 [17] (Kiefel CJ, Bell, Keane and Edelman JJ). For a discussion of the Australian legal context in relation to administrative detention, see Rayner Thwaites, *The Liberty of Non-citizens: Indefinite Detention in Commonwealth Countries* (Hart Publishing, 2014) 36–64.

78 (2018) 262 CLR 333.

visas and remove non-citizens from Australia is executive in character.<sup>79</sup> The Court held that mandatory visa cancellation pursuant to section 501(3A) 'does not involve the imposition of a punishment for an offence'.<sup>80</sup>

Yet despite this formal separation between visa cancellation and deportation on the one hand, and punishment on the other, scholars have acknowledged that criminal notions are present in the motives of those enacting the 'character test' legislation.<sup>81</sup> For instance, in 2011, Parliament introduced amendments to section 501 that allow the Minister to cancel the visa of any non-citizen where they have been convicted of an offence that was committed in immigration detention.<sup>82</sup> As described in the Explanatory Memorandum, an objective of this law was to 'strengthen the consequences of criminal behaviour'.<sup>83</sup> This statement invokes a traditionally criminal notion, the punishment of criminal behaviour, as motivation for introducing a new administrative power to cancel the visas of non-citizens.

There is also evidence that criminal rationales of deterrence provided motivation for the 2011 amendments. As further stated in the Explanatory Memorandum, it was intended that the power to cancel a non-citizen's visa and deport a person who offends while in immigration detention would provide a 'significant disincentive for people in immigration detention from engaging in violent and disruptive behaviour'.<sup>84</sup> As Boon-Kuo argues, deterrence is a central principle of punishment in criminal justice.<sup>85</sup> By providing administrative consequences (visa cancellation and removal from Australia) as a 'significant disincentive' for non-citizens from engaging in unwanted behaviours, character-based visa cancellation invokes traditionally criminal law logics within the administrative law space.<sup>86</sup>

The invocation of these logics supports the argument that section 501 is becoming a tool of criminal law, a claim that is reinforced through examining the 2014 amendments. As noted above, the 2014 amendments to the character test introduced mandatory visa cancellation for any non-citizen who has been sentenced to a term of imprisonment of at least 12 months, regardless of their length of stay in Australia. The 2014 amendments were stated to 'target cohorts of

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79 Minister for Immigration and Border Protection and Attorney-General (Cth), 'Annotated Submissions of the Defendant and the Commonwealth Attorney-General (Intervening)', Submission in *Falzon v Minister for Immigration and Border Protection*, S31/2017, 7 June 2017, [11].

80 *Falzon* (2018) 262 CLR 333, 347 [47] (Kiefel CJ, Bell, Keane and Edelman JJ).

81 See, eg, Billings, 'Regulating Crimmigrants through the "Character Test"' (n 5); Hoang and Reich (n 23); Stanley (n 5) 10–11; Weber, *Policing Non-citizens* (n 9) ch 5; Boon-Kuo, *Policing Undocumented Migrants* (n 12) 160. For an exploration of how criminal notions of punishment have intruded into administrative law in the US context, see, eg, Juliet P Stumpf, 'The Process is the Punishment in Crimmigration Law' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2013) 58, 60.

82 *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth) sch 1 item 4.

83 Explanatory Memorandum, *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* (Cth) 1.

84 *Ibid.*

85 Boon-Kuo, *Policing Undocumented Migrants* (n 12) 160.

86 See *ibid* 159–70. See also Weber, *Policing Non-citizens* (n 9) 109–13.

people with serious criminality, or unacceptable behaviours or associations'<sup>87</sup> in order to 'reduce any risk to the Australian community that a non-citizen may present'.<sup>88</sup> As argued by Hoang and Reich, the emphasis on removing non-citizens who pose *any* risk to society reveals certain assumptions: 'that non-citizens who commit crimes are *prima facie* a risk to security ... and that the risk posed by non-citizens can be effectively managed by the Government'.<sup>89</sup> Indeed, research by Weber shows that departmental officials and police view the administrative power to remove people from Australia as part of the toolkit of the criminal law.<sup>90</sup> One NSW police officer stated that section 501 'can be a useful tool, because really prevention is better than cure in relation to crime, and if you can prevent the crime by ... deporting the person ... well it happens'.<sup>91</sup>

It can be seen that the administrative power to remove non-citizens on the basis of 'bad character' is being utilised as a useful 'tool' by which to manage risk of crime and remove 'cohorts of non-citizens deemed risky'.<sup>92</sup>

Existing Australian scholarship has examined this crime–migration 'hybrid'<sup>93</sup> in terms of its implications within administrative law. This has included analysing how criminal concepts such as deterrence have seeped into the reasoning of the AAT,<sup>94</sup> as well as how administrative removal is being used to manage the risk of crime.<sup>95</sup> However, there are comparatively few studies examining how administrative law, for example deportation or removal under the *Migration Act*, is influencing sentencing decisions in Australian criminal courts.<sup>96</sup> As Gerard argues, the impact of administrative law upon the criminal sentencing process is an increasingly complex area of law, requiring analysis as to how 'cimmigration legal processes' are shaping the work of those enacting cimmigration, including sentencing judges.<sup>97</sup> My research thus focuses on this side of the migration-crime convergence: the way in which *criminal* courts are grappling with the administrative power to remove non-citizens from Australia after their term of imprisonment. I show that sentencing judges face significant difficulties in imposing proportionate sentences where non-citizens are liable to administrative removal.

## B 'Punishing Consequences' and Proportionality

In this section, I show that superior courts in Victoria, Queensland, Tasmania and the ACT (and to an unsettled extent, SA) view visa cancellation and removal

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87 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Attachment A, 6.

88 Ibid 5.

89 Hoang and Reich (n 23) 15 (emphasis in original).

90 Weber, *Policing Non-citizens* (n 9) 103–4.

91 Interview with NSW Police Force officer quoted in Weber, *Policing Non-citizens* (n 9) 104–5.

92 Hoang and Reich (n 23) 15.

93 Weber, *Policing Non-citizens* (n 9) 109.

94 Ibid 108–13; Boon-Kuo, *Policing Undocumented Migrants* (n 12) 142–79.

95 Billings, 'Regulating Cimmigrants through the "Character Test"' (n 5) 1; Billings and Hoang (n 23).

96 Cf Bagaric, Xynas and Lambropoulos (n 29); McGorrey (n 29); Bagaric, Alexander and Bagaric (n †).

97 Gerard (n 6).

from Australia as a potential 'punishing consequence'<sup>98</sup> of offending. The courts of the remaining jurisdictions have not accepted the relevance of deportation to the sentencing process, such that these states were excluded from my quantitative analysis.<sup>99</sup> I argue that criminal courts in Victoria, Queensland, Tasmania and the ACT are appropriately considering that a non-citizen offender's prospect of deportation from Australia after serving their criminal sentence ought to be taken into account to ensure their sentence is proportionate to their offending. Yet, I show how the residual discretion of the Minister under migration law to make a future decision regarding deportation is creating a catch-22 situation in criminal courts, as judges struggle to factor in this risk of additional hardship to offenders.

Prior to 2010, what I call the 'traditional' approach prevailed throughout Australia, such that the likelihood of a non-citizen's deportation following criminal conviction was irrelevant to sentencing. This traditional approach was established in the cases of *R v Shrestha* ('*Shrestha*')<sup>100</sup> and *Chi Sun Tsui v R* ('*Tsui*').<sup>101</sup> In *Shrestha*, the High Court held that the likelihood of deportation was no obstacle to a sentencing judge setting a non-parole period for a non-citizen offender.<sup>102</sup> Similarly, in the context of withholding parole, the NSW Court of Criminal Appeal ('NSWCCA') held in *Tsui* that the 'prospect of deportation is not a relevant matter for consideration by a sentencing judge'.<sup>103</sup>

*Shrestha* and *Tsui* have been interpreted strictly by criminal courts in WA, NSW and the NT as authority for the rule that an offender's potential deportation is irrelevant when sentencing.<sup>104</sup> For example, in *Ponniiah v The Queen*<sup>105</sup> the WA Court of Appeal ('WASCA') held that the prospect of deportation is not mitigating because deportation is an 'executive decision'.<sup>106</sup> Similarly, the NSWCCA has held that deportation is not relevant to the sentencing exercise as it remains 'a matter for the Commonwealth Executive Government'.<sup>107</sup> This language reflects the distinction espoused by the Government that visa cancellation and removal is 'an administrative decision' and not a punitive sanction.<sup>108</sup>

In *Guden*, the Victorian Court of Appeal ('VSCA') departed from the traditional approach and held that a non-citizen's potential deportation following criminal conviction *is* relevant when sentencing. *Guden* concerned 20 year old Burak Guden, who pleaded guilty to causing serious injury. Guden had been living

98 *Guden* (2010) 28 VR 288, 295 [27] (Maxwell P, Bongiorno JA and Beach AJA).

99 The approach in these states is discussed further in Part III(C).

100 (1991) 173 CLR 48 ('*Shrestha*').

101 (1985) 1 NSWLR 308 ('*Tsui*').

102 *Shrestha* (1991) 173 CLR 48, 71–2 (Deane, Dawson and Toohey JJ).

103 *Tsui* (1985) 1 NSWLR 308, 311 (Street CJ).

104 See, eg, *R v Van Hoang Pham* [2005] NSWCCA 94, [13] (Wood CJ at CL); *Ponniiah v The Queen* [2011] WASCA 105, [48] (Mazza J); *R v MAH* (2005) 16 NTLR 150, 155 (Mildren J).

105 [2011] WASCA 105.

106 *Ibid* [48] (Mazza J).

107 *Hanna v Environment Protection Authority* [2019] NSWCCA 299, [97] (Walton J) ('*Hanna*'). See also *R v Van Hong Pham* [2005] NSWCCA 94, [13] (Wood CJ at CL); *AC v The Queen* [2016] NSWCCA 107, [79] (Schmidt J); *Kristensen v The Queen* [2018] NSWCCA 189, [34] (Payne JA).

108 Department of Immigration and Multicultural and Indigenous Affairs, Answers to Questions on Notice, Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Administration and Operation of the Migration Act 1958* (5 December 2005) 93.

in Australia since the age of 11 on a tourist visa. Counsel for the Crown argued that there was a general proposition that ‘the possibility of deportation is an irrelevant consideration in the sentencing process’.<sup>109</sup> However, the VSCA held that no such proposition existed and that Guden’s probable deportation to Turkey at the conclusion of his sentence was a relevant matter for consideration in sentencing.<sup>110</sup> The Court firstly held that the decisions in *Shrestha* and *Tsui* were confined to the context of each case, namely whether the likelihood of a non-citizen’s deportation could be considered when deciding whether to fix a non-parole period under the relevant Commonwealth and NSW legislation respectively.<sup>111</sup> As such, the Court found that there was no occasion for the courts in *Shrestha* and *Tsui* to be making a wider statement about the relevance of deportation in sentencing.<sup>112</sup> Further, the Court held that ‘[like] so many other factors personal to an offender which conventionally fall for consideration, the prospect of deportation is a factor which may bear on the impact’ of an offender’s imprisonment.<sup>113</sup>

The Court then outlined two ways in which a non-citizen’s potential removal may constitute mitigatory additional hardship. Firstly, the Court held that a non-citizen’s expectation of being removed from Australia following release may increase the ‘burden of imprisonment’ due to anxiety over the prospect of deportation.<sup>114</sup> Secondly, the Court held that in an appropriate case, it is ‘proper to take into account the fact that a sentence of imprisonment will result in the offender losing the opportunity of settling permanently in Australia’ as ‘this may well be viewed as a *serious “punishing consequence” of the offending*’.<sup>115</sup> The Court therefore held that, subject to the state of the evidence about the risk of deportation, the prospect of deportation of an offender is a proper matter for consideration in determining an appropriate sentence. This was because deportation due to criminal offending may affect the impact of a sentence of imprisonment, either during an offender’s period of incarceration (the ‘first *Guden* principle’) or upon their removal from Australia (the ‘second *Guden* principle’).<sup>116</sup>

The Court in *Guden* hinged the justification for the two principles outlined above on the proposition that the risk of deportation could be taken into account as a ‘mitigating’ factor. The Court held that there was no legal principle prohibiting a sentencing judge from considering deportation as a relevant mitigating factor, along with the ‘infinite variety’ of personal factors which are conventionally considered during the sentencing process.<sup>117</sup> As outlined above, sentencing judges are afforded a wide discretion under legislation and common law to consider

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109 *Guden* (2010) 28 VR 288, 292 [15] (Maxwell P, Bongiorno JA and Beach AJA).

110 *Ibid* 295.

111 *Ibid* 292–3.

112 *Ibid*.

113 *Ibid* 294.

114 *Ibid* 295.

115 *Ibid* (emphasis added).

116 *Ibid* 294 [25].

117 *Ibid* 294–5.



factors relevant to a particular sentence.<sup>118</sup> Indeed, a Victorian study identified 292 aggravating and mitigating factors relevant in sentencing.<sup>119</sup> Further, whether a penalty would cause particular hardship to an offender *must* be considered in certain jurisdictions,<sup>120</sup> lending additional justification for considering deportation when sentencing.

While not explicitly considered by the Court, I also argue that by factoring in the risk of removal in sentencing, the *Guden* principles can be justified through a proportionality framework. As discussed above, the concept of proportionality espouses the notion that a penalty ought to be proportionate to the gravity of the offence.<sup>121</sup> This ensures that criminal sanctions are fairly balanced against the seriousness of the crime in light of all the circumstances. The first *Guden* principle holds that where a non-citizen must serve their term with the anxiety and expectation of being deported, this may mean that the burden of imprisonment will be a harsher sanction for that person than if the same crime was committed by a citizen who does not face this risk. By applying the first *Guden* principle, this additional burden is taken into account to ensure that the non-citizen's sentence is proportionate in light of the circumstances of the crime.<sup>122</sup> Similarly, the second *Guden* principle holds that where a non-citizen offender faces an additional hardship of losing the opportunity to remain in Australia as a direct response to their criminal activity, this hardship ought to be taken into account as an additional and serious 'punishing consequence' of offending.<sup>123</sup> As argued by Bagaric, Xynas and Lambropoulos, these consequences ought to be taken into account 'to inform more fully the sanction severity side of the proportionality equation',<sup>124</sup> to ensure that the sentence imposed is proportionate to the gravity of the particular offence. I explore this idea further by considering the application of the *Guden* principles within different state jurisdictions.

Courts in Victoria, Queensland, Tasmania, and the ACT (and to an unsettled extent, SA) follow the principles in *Guden*, meaning that in these states, a non-citizen's potential removal from Australia will be relevant to the sentencing equation. Between 2010 to 2019, it was more common for superior courts in these states to take into account the first *Guden* principle (concerning the increased burden of imprisonment for non-citizen offenders facing deportation).<sup>125</sup> This was

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118 *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing) Act 2005* (ACT) s 33(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1995* (NT) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Sentencing Act 2017* (SA) ss 10–11; *Sentencing Act 1997* (Tas) ss 3, 9; *Sentencing Act 1991* (Vic) ss 1, 5(2); *Sentencing Act 1995* (WA) ss 6, 8.

119 La Trobe University, Department of Legal Studies, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (La Trobe University, 1980) 62.

120 See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(r); *Sentencing Act 1997* (Tas) s 9(c).

121 *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

122 *Guden* (2010) 28 VR 288, 295 (Maxwell P, Bongiorno JA and Beach AJA).

123 *Ibid.*

124 Bagaric, Xynas and Lambropoulos (n 29) 68.

125 Of the cases examined, 58 cases held that an offender's potential deportation was mitigatory due to the increased burden of the sentence during the offender's incarceration, and in 11 cases the court held that the offender's lost opportunity to remain in Australia was mitigatory. Of those cases, eight overlapped and deportation was held to be mitigatory pursuant to both *Guden* principles. I classified a further 22 cases as 'other', for example where deportation was taken into account but it was not clear in what

exemplified in *Schneider v The Queen*,<sup>126</sup> where the VSCA upheld the decision of the magistrate to take into account as mitigatory that Schneider's imprisonment would be more burdensome given Schneider's fears about his likely deportation.<sup>127</sup> However, in certain cases, the second *Guden* principle (namely the loss of opportunity to remain in Australia) has also been found to be mitigatory.<sup>128</sup> For deportation to be a mitigatory factor, the courts have held that there must be both evidence of the risk of deportation, and evidence that deportation will in fact be a hardship on the offender.<sup>129</sup>

In the cases examined, both *Guden* principles were more likely to be taken into account where the non-citizen was a long-term resident or had family or other connections with Australia, as opposed to where a non-citizen had no established ties in Australia.<sup>130</sup> A pertinent example was in *Loftus v The Queen*,<sup>131</sup> which involved a 41 year old man who pleaded guilty to burglary-related charges and was sentenced to three years' imprisonment.<sup>132</sup> Loftus was a permanent resident who had lived in Australia for over 30 years.<sup>133</sup> The VSCA considered section 501(3A) of the *Migration Act* and the 'likely impact of deportation' upon Loftus, stating that '[relevantly], in the event a person in the position of the applicant is sentenced to a term of 12 months or more, the Minister must cancel [their] visa'.<sup>134</sup> The Court held that the prospect of Loftus's removal to the United Kingdom ('UK') was a 'significant' sentencing factor, given that Loftus had 'lived in Australia since he was 10 years old, his children are in Australia and he has no relevant ties to the United Kingdom',<sup>135</sup> and that the primary judge's failure to take this into consideration constituted a vitiating error. Following *Guden*, the Court held that the risk of Loftus losing the opportunity to remain in Australia due to his

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manner, or where the result was varied on appeal: see full table of analysed cases (copy on file with author).

126 [2016] VSCA 76.

127 *Ibid* [17], [23]–[27].

128 *R v Aniezue* [2016] ACTSC 82 ('*Aniezue*'); *Singh v The Queen* [2011] VSCA 317; *DPP (Vic) v Wan* [2018] VSC 195; *Kim v The Queen* [2016] VSCA 238; *DPP (Cth) v Afford* [2017] VSCA 201; *Sefo v The Queen* [2017] VSCA 336; *Ah-Kau v The Queen* [2018] VSCA 296; *Loftus v The Queen* [2019] VSCA 24 ('*Loftus*'); *DPP (Vic) v Za Lian* [2019] VSCA 75; *Sahhitanandan v The Queen* [2019] VSCA 115; *R v Liao* [2015] VSC 730 ('*Liao*'). In some cases the court did not, or refused to, distinguish between the two principles: see, eg, *R v Williams* [2017] QCA 307.

129 See, eg, *Guden* (2010) 28 VR 288, 295 (Maxwell P, Bongiorno JA and Beach AJA); *R v UE* [2016] QCA 58, [16] (Philippides JA).

130 See, eg, *Loftus* [2019] VSCA 24, [94] (Whelan AP and Niall JA); *Ah-Kau v The Queen* [2018] VSCA 296, [24] (McLeish and Forrest JJA); *DPP (Vic) v Zhuang* (2015) 250 A Crim R 282, 289 (Redlich, Priest and Beach JJA) ('*Zhuang*'); *Liao* [2015] VSC 730, [51] (Lasry J). Cf cases where deportation was not found to be mitigating due to the offender not having ties in Australia or there otherwise being insufficient evidence that deportation would be a hardship: see, eg, *DPP (Vic) v Tewksbury* (2018) 271 A Crim R 205 ('*Tewksbury*'); *R v Abdi* (2016) 263 A Crim R 38.

131 [2019] VSCA 24.

132 *Ibid* [6] (Whelan AP and Niall JA). Loftus was born on 19 November 1977 and was 41 at the time of resentencing.

133 *Ibid* [39].

134 *Ibid* [71]–[75].

135 *Ibid* [94].

sentence, and the increased burden of imprisonment caused by this prospect, were mitigatory.<sup>136</sup> Loftus was resentenced to two years imprisonment.<sup>137</sup>

While Victorian courts have applied the *Guden* principles since 2010, until recently, courts in Queensland and the ACT held that potential deportation was not relevant to the sentencing exercise.<sup>138</sup> However, in the 2016 case of *R v UE*,<sup>139</sup> the Queensland Court of Appeal ('QCA') adopted the two principles in *Guden* and held that deportation may affect the impact of a sentence of imprisonment.<sup>140</sup> The Court held that the justifications for the 'practical approach' taken in *Guden* were 'compelling',<sup>141</sup> and agreed with the reasoning in *Guden* that *Shrestha* and *Tsui* were confined to the context of each case, namely eligibility for parole.<sup>142</sup> The Court further held that it was 'undoubtedly correct' that the prospect of deportation 'may be a relevant factor, personal to the offender, to be considered in mitigation of sentence'.<sup>143</sup> Thus, the Court relied on the justification in *Guden* that it is permissible to consider an offender's potential deportation when sentencing (given the courts' wide discretion to consider all relevant factors), provided there is sufficient evidence of the risk of deportation and consequential hardship.<sup>144</sup> *R v UE* has been applied in subsequent cases in Queensland, including *R v Asaad*,<sup>145</sup> where the QCA did not disturb the sentencing judge's finding that the appellant's probable deportation would be a hardship on the appellant, given his long history in Australia and the fact that the appellant cared for his son who was living with a disability.<sup>146</sup>

Similarly, in the case of *R v Aniezue*,<sup>147</sup> the ACT Supreme Court ('ACTSC') applied *Guden* and took into account Aniezue's likely deportation in sentencing.<sup>148</sup> The Court held that Aniezue's impending deportation was a factor that would 'bear heavily' on him, particularly given that Aniezue had limited family in Nigeria.<sup>149</sup> The relevance of deportation to sentencing has been accepted in subsequent ACTSC cases,<sup>150</sup> by the Tasmanian courts,<sup>151</sup> and in SA,<sup>152</sup> although the extent to

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136 Ibid [94]–[95], [99].

137 Ibid [99].

138 See, eg, *R v Mao; Ex parte A-G (Qld)* (2006) 287 FLR 238, 241–4; *Gim Eng Moh v Pine* [2010] ACTSC 27, [43] (Refshauge J).

139 [2016] QCA 58.

140 Ibid [16] (Philippides JA).

141 Ibid [13]–[14].

142 Ibid [15].

143 Ibid [14], [16].

144 Ibid [16], [19].

145 [2017] QCA 108.

146 Ibid [60] (Fraser JA).

147 [2016] ACTSC 82.

148 Ibid [67] (Refshauge J).

149 Ibid.

150 See, eg, *R v Kamara* [2016] ACTSC 294, [42] (Elkaim J) ('*Kamara*'); *R v Oeti* [2018] ACTSC 229, [39] (Mossop J); *R v Saran* [2019] ACTSC 37, [51] (Loukas-Karlsson J).

151 *Taylor v The Queen* (2015) 26 Tas R 132, 145 (Pearce J); *MAC v Tasmania* [2018] TASCCA 19, [196] (Martin AJ).

152 *R v Zhang* (2017) 265 A Crim R 113 ('*Zhang*').

which deportation is a relevant factor in sentencing remains unsettled in the latter state.<sup>153</sup>

I have shown that courts in Victoria, Queensland, Tasmania and the ACT (and to an unsettled extent, SA) now recognise deportation as relevant to the sentencing exercise. The approach of these jurisdictions reflects a growing consciousness of the disproportionate effects that administrative removal has on non-citizens. The first *Guden* principle acknowledges the hardship inherent in ‘perpetually conditional belonging’.<sup>154</sup> As Weber and Pickering demonstrate, fears surrounding likely deportation have been related to high levels of stress and suicide amongst non-citizens.<sup>155</sup> The second *Guden* principle (loss of opportunity to remain in Australia) lends support to Grewcock’s argument that despite formal separation between administrative deportation and criminal punishment, in practice, deportation for criminal offending results in the imposition of additional hardships or punishing consequences.<sup>156</sup> Significantly, when a person is deported pursuant to section 200 or their visa is cancelled under section 501, that person will be banned from applying for any visa (other than a protection visa) whilst in immigration detention, and permanently excluded from Australia once removed from the country.<sup>157</sup> Non-citizen offenders therefore face additional hardship in the form of banishment from Australia as a direct result of their offending, while other members of the community who commit similar crimes will not face these consequences.<sup>158</sup>

In some circumstances, for example, where an offender has minimal ties to Australia, there may be little or no hardship arising from deportation.<sup>159</sup> However, the courts have acknowledged that the hardship of deportation will be particularly disproportionate for long-term permanent residents such as Loftus, who may face removal from the only community in which they have family or other ties.<sup>160</sup>

I argue that the judicial trends in Victoria, Queensland, Tasmania and the ACT reflect the need to ensure that sentences are proportionate in all the circumstances. Regardless of the length of time spent in Australia, people lacking formal citizenship status are subject to a harsher application of the criminal law, as their

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153 In the case of *Zhang* (2017) 265 A Crim R 113, the SA Court of Criminal Appeal adopted the analysis of the Queensland Court of Appeal in *R v Schelvis* (2016) 263 A Crim R 1, which held that an offender’s potential deportation, provided there is sufficient evidence of that risk, may be a mitigating factor in sentencing. However, the court in *Zhang* did not consider prior inconsistent case law on this issue, and in subsequent decisions the superior courts of SA have not considered it necessary to resolve the issue: see, eg, *R v Leka* (2017) 267 A Crim R 432; *Mehr v Police (SA)* [2017] SASC 104 (‘*Mehr*’); *R v Taheri* [2017] SASFC 115; *R v Arrowsmith* (2018) 333 FLR 415.

154 Weber, *Policing Non-citizens* (n 9) 103. See also Billings, ‘Regulating Crimmigrants through the “Character Test”’ (n 5).

155 Leanne Weber and Sharon Pickering, ‘Exporting Risk, Deporting Non-Citizens’ in Francis Pakes (ed), *Globalisation and the Challenge to Criminology* (Routledge, 2013) 110, 123.

156 Grewcock, ‘Punishment, Deportation and Parole’ (n 4) 66.

157 *Migration Act 1958* (Cth) ss 198(2A), 501E; *Migration Regulations 1994* (Cth) reg 1.03 (definition of ‘special return criterion’), sch 5 cl 5001. Special Return Criterion 5001 functions to ban non-citizens from applying for any visa to which the criterion applies.

158 Bagaric, Xynas and Lambropoulos (n 29) 50, 82.

159 See, eg, *Tewksbury* (2018) 271 A Crim R 205, 225 [96] (Tate, Kyrou JJA and Kidd AJA).

160 See, eg, *Loftus* [2019] VSCA 24, [71], [94] (Whelan AP and Niall JA); *R v Cho* [2015] VCC 1697, [83]–[84] (Judge Tinney); *DPP (Vic) v Zhuang* [2014] VSC 371, [49] (Kaye J).

outsider status renders them liable to deportation and permanent exclusion from Australia for crimes that are tolerated when committed by citizens in the community. In my view, the clearly disproportionate consequences imposed on non-citizen offenders who commit 'like' crimes to their citizen counterparts present strong justification for factoring in these consequences in sentencing. That is not to suggest that the power to deport is itself of a punitive nature in the Constitutional sense, a question that has been debated elsewhere.<sup>161</sup> Rather, I claim that judges ought to take into account the administrative consequences of criminal offending in order to balance the burden of the sentence of imprisonment imposed (whether that be the burden whilst in custody, or the fact that the sentence of imprisonment will result in deportation) against the seriousness of each offence. On this basis I consider that the *Guden* principles are fair and consistent with the principle of proportionality. The fact that courts in at least four jurisdictions in Australia see these consequences as a relevant change of circumstances in sentencing, but are often unable to militate against them as shown below, highlights a significant criminal justice issue that is being created by the interaction between crime and migration law.

### C The Impact of Administrative Discretion on Criminal Justice

Although the mandatory visa cancellation power has seen a vast increase in the number of visas cancelled on character grounds,<sup>162</sup> the residual discretion of the Minister to revoke those visa cancellations compounds the difficulties for sentencing courts in factoring in this risk of additional hardship to offenders. While courts in Victoria, Queensland, Tasmania and the ACT have recognised that an offender's deportation or administrative removal is a relevant factor in sentencing, difficulties with quantifying the likelihood of deportation following conviction are preventing courts from factoring this in when sentencing.

A principle emerging from *Guden* is that courts should only reduce a criminal sentence where there is sufficient evidence to permit a 'sensible quantification' of the likelihood of removal.<sup>163</sup> In the majority of the cases I examined which considered the *Guden* principles, the courts held that the risk of deportation and lost opportunity to remain in Australia was too 'speculative' to be taken into account.<sup>164</sup> Prior to 2014, sentencing courts were assessing the risk of deportation

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161 See, eg, *Falzon* (2018) 262 CLR 333.

162 'Key Visa Cancellation Statistics' (n 2).

163 *Guden* (2010) 28 VR 288, 295 (Maxwell P, Bongiorno JA and Beach AJA).

164 Of the 32 cases that expressly considered the second *Guden* principle, 21 held that the risk of deportation was too 'speculative' to be taken into account: see, eg, *DPP (Vic) v Yildirim* [2011] VSCA 219; *Larsen v The Queen* [2011] VSCA 325; *Da Costa v The Queen* (2016) 307 FLR 153; *Singh v The Queen* (2016) 310 FLR 348; *Nguyen v The Queen* (2016) 311 FLR 289; *R v UE* [2016] QCA 58; *R v Schelvis* (2016) 263 A Crim R 1; *R v Lincoln* [2017] QCA 37; *R v Norris*; *Ex parte A-G (Qld)* (2018) 331 FLR 92 ('*Norris*'); *R v Butters* [2019] ACTSC 143; *Guden* (2010) 28 VR 288; *Darcie v The Queen* [2012] VSCA 11; *Konamala v The Queen* [2016] VSCA 48 ('*Konamala*'); *Schneider v The Queen* [2016] VSCA 76; *Bankal v The Queen* [2019] VSCA 171; *R v Singh* [2013] VSC 47; *The Queen v El Ali* [2013] VSC 172; *DPP (Vic) v Sciascia* [2014] VSC 305; *DPP (Vic) v Kunduraci* [2015] VSC 707; *AS v The Queen* [2019] VSC 260; *MAC v Tasmania* [2018] TASSCA 19. A further 39 cases only mitigated the sentence on account of the first *Guden* principle (increased burden of imprisonment), but did not explicitly state

by virtue of the operation of section 201 or sections 501(2)–(3) which permit, but do not mandate, the decision maker to deport or cancel the visa of a non-citizen offender.<sup>165</sup> Notably, criminal courts have also considered whether the likelihood of deportation following criminal proceedings has been elevated since the 2014 amendments inserting section 501(3A). As discussed above, the 2014 amendments introduced *mandatory* visa cancellation where the person has, inter alia, been sentenced to a term of imprisonment of at least 12 months.<sup>166</sup> However, in the Victorian, Queensland, ACT and Tasmanian cases I studied which considered the impact of section 501(3A), the courts have held that the 2014 amendments do not require a change to the approach in sentencing espoused in *Guden*.<sup>167</sup> This is because there must still be sufficient evidence bearing on the risk of removal, given that the Minister retains discretion to overturn a mandatory visa cancellation under section 501(3A).<sup>168</sup> Furthermore, it is a common principle across Australian jurisdictions that a sentencing judge cannot impose a sentence, that would otherwise be inappropriate, for the purpose of avoiding the operation of the *Migration Act* or an automatic visa cancellation.<sup>169</sup>

As explained above, the discretion available to the Minister to revoke character-based visa cancellation means that a non-citizen whose visa is cancelled on character grounds can seek to have the cancellation decision overturned, resulting in their visa being reinstated.<sup>170</sup> Statistically, the majority of mandatory visa cancellations will *not* be revoked under the Minister's discretion.<sup>171</sup> For example, from 1 July 2019 to 30 June 2020, 252 revocation requests led to an outcome of the cancellation being revoked and the visa reinstated, while 450 requests led to a 'not revoked' outcome upholding the cancellation decision.<sup>172</sup> Yet, uncertainty as to whether a cancellation decision *may* be revoked in the future has caused evidentiary difficulties in criminal courts. In the majority of cases from my dataset which applied the *Guden* principles, the offenders were unable to provide sufficient evidence to enable the courts to quantify the risk of deportation, regardless of whether the risk was that a person *might* be deported by virtue of the consequences of sections 201 or 501(2), or whether a mandatory visa cancellation under section 501(3A) *might* be revoked.<sup>173</sup>

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whether the second *Guden* principle was not applied on account of the risk of deportation remaining 'speculative'.

165 *Migration Act 1958* (Cth) ss 200–1, 501(2)–(3).

166 *Ibid* s 501(3A).

167 See, eg, *Da Costa v The Queen* (2016) 307 FLR 153; *Konamala* [2016] VSCA 48; *R v Schelvis* (2016) 263 A Crim R 1; *MAC v Tasmania* [2018] TASCRA 19; *R v Butters* [2019] ACTSC 143, [101] (Loukas-Karlsson J).

168 *Konamala* [2016] VSCA 48, [35], [37] (Maxwell P, Redlich and Priest JJA).

169 See, eg, *Mehr* [2017] SASC 104, [8] (Vanstone J); *Kamara* [2016] ACTSC 294, [42] (Elkaim J); *Norris* (2018) 331 FLR 92, 104 [46] (Gotterson JA); *Lofus* [2019] VSCA 24, [81] (Whelan AP and Niall JA).

170 *Migration Act 1958* (Cth) s 501CA(4).

171 'Key Visa Cancellation Statistics' (n 2).

172 *Ibid*.

173 Of the 24 cases where the second *Guden* principle was explicitly applied since the introduction of section 501(3A), 14 cases found that the possibility of deportation was 'too speculative' to be taken into account.

A pertinent example is the Queensland case of *R v Schelvis*.<sup>174</sup> This case involved an appeal against sentence of a Dutch national who had been living in Australia as a permanent resident since infancy, and was sentenced to 21 years imprisonment for conspiring to import methylenedioxymethamphetamine ('MDMA'). Schelvis argued that due to the 2014 amendments, her visa would be automatically cancelled under section 501(3A) and therefore the sentencing judge ought to have found that her removal from Australia was almost inevitable.<sup>175</sup> However, the QCA held that the prospect of Schelvis's removal remained uncertain even after the mandatory cancellation of her visa, as the relevant risk was the 'prospect of Schelvis being removed from Australia as a result of the rejection of an application by her for revocation [of the mandatory cancellation]'.<sup>176</sup> The Court further held that it was 'impracticable now to assess many apparently significant factors ... which might be considered by the Minister or delegate'.<sup>177</sup> The Court thus found it was 'entirely speculative' whether Schelvis would be removed from Australia, given the possibility for the decision maker to use their discretion to revoke the mandatory cancellation.<sup>178</sup> Although both *Guden* principles were arguments available to Schelvis's counsel,<sup>179</sup> Schelvis's risk of deportation was not taken into account in sentencing.

In my dataset, whether the prospect of deportation was too 'speculative' to be taken into account depended on the evidence before the court. Echoing a study by the Victorian Sentencing Advisory Council,<sup>180</sup> I found that the likelihood of an offender's deportation (whether pursuant to section 201, section 501(2) or following mandatory visa cancellation under section 501(3A)) has been variously assessed in superior courts in Australia since 2010: cases in my dataset found, for example, that deportation was a definite prospect or certainty,<sup>181</sup> a prospect 'capable of quantification',<sup>182</sup> 'highly likely',<sup>183</sup> 'likely' or a 'likelihood',<sup>184</sup> a 'possibility',<sup>185</sup> an 'uncertainty',<sup>186</sup> an 'unknown',<sup>187</sup> and a speculative or unquantifiable prospect.<sup>188</sup> This variation has turned, at least in part, on the evidence put before the court and the understanding of criminal lawyers of the operation of migration law.<sup>189</sup> However, as stated above, in the majority of cases

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174 (2016) 263 A Crim R 1.

175 Ibid 25 (Fraser JA).

176 Ibid 30.

177 Ibid.

178 Ibid.

179 Ibid 26.

180 McGorriery (n 29) 9 [26].

181 See, eg, *Aniezue* [2016] ACTSC 82, [66] (Refshauge J); *Liao* [2015] VSC 730, [51] (Lasry J); *Sahhitanandan v The Queen* [2019] VSCA 115, [12] (Priest, McLeish and Weinberg JJA).

182 See, eg, *Zhuang* (2015) 250 A Crim R 282, 301 [54] (Redlich, Priest and Beach JJA).

183 See, eg, *Hui v The Queen* [2015] VSCA 314, [17] (Whelan JA).

184 See, eg, *R v Oeti* [2018] ACTSC 229, [39], [51] (Mossop J); *R v Singh* [2013] VSC 47, [34]–[36] (King J).

185 See, eg, *DPP (Vic) v Jensen* [2019] VSC 327, [52] (Beale J).

186 See, eg, *Magedi v The Queen* [2019] VSCA 102, [58] (Maxwell P and Weinberg JA).

187 See, eg, *Alam v The Queen* [2015] VSCA 48, [16] (Priest and Beach JJA).

188 See, eg, *MAC v Tasmania* [2018] TASCSCA 19; *R v Leka* (2017) 267 A Crim R 432.

189 See, eg, *Allouch v The Queen* (2018) 276 A Crim R 1, where the Victorian Supreme Court stated that the failure of the applicant's legal representative to inform the sentencing judge of their immigration status

applying the *Guden* principles in my dataset, the future exercise of ministerial discretion was found to be too speculative for the risk of deportation to be taken into account.

I argue that this discretionary imposition of ‘punishing consequences’<sup>190</sup> by the executive is curtailing the ability of criminal courts to sentence offenders in a way that is proportionate and reflects their individual culpability. The principle of proportionality reflects the need to ensure that sentences are neither too harsh nor too lenient when judged against the features of the crime and the offender’s culpability, or moral blameworthiness, in the particular circumstances.<sup>191</sup> Yet where courts cannot accurately assess whether an offender *will* be deported, this creates a legal dilemma for criminal courts in imposing proportionate sentences. Courts are wary of imposing a lesser sentence for those liable to be removed, should it be found that ‘the Minister in fact later exercised [their] discretion to allow the offender to remain in Australia’.<sup>192</sup> However, the courts have acknowledged that should the executive impose the additional consequence of removal after criminal conviction, this ought to be taken into account in mitigation, or else disproportionate hardship will be imposed on non-citizens as compared to citizen offenders who commit like crimes.<sup>193</sup>

Indeed, such evidentiary issues relating to the future exercise of discretionary administrative powers underpin why the risk of removal does not mitigate penalty in NSW, WA and the NT,<sup>194</sup> and why there is uncertainty on this issue in SA.<sup>195</sup> Courts in NSW, WA and the NT continue to rely on the traditional approach espoused in the case of *Tsui* discussed above as one justification for not adopting the *Guden* principles.<sup>196</sup> In the recent case of *Hanna v Environment Protection Authority*,<sup>197</sup> the NSWCCA rejected the argument that Hanna’s sentencing miscarried because of a failure of his lawyer to adduce evidence of Hanna’s residency status. Walton J pointed to NSW authority applying the statement in *Tsui* that deportation is the ‘product of an entirely separate legislative and policy area of the regulation of our society’, and found that there could be no such miscarriage of justice in light of these authorities.<sup>198</sup> However, his Honour also held that it was unnecessary to ‘delve into’ the applicant’s submissions challenging the longstanding authority in NSW, as the evidence of the applicant’s potential

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was the result of ‘ignorance ... as to the potential importance of such evidence’: at [48] (Beach and Weinberg JJA).

190 *Guden* (2010) 28 VR 288, 295 (Maxwell P, Bongiorno JA and Beach AJA).

191 Bagaric, Edney and Alexander (n 33) 159; *R v Hernando* (2002) 136 A Crim R 451, 459 (Heydon JA).

192 *R v S* [2003] 1 Qd R 76, 78 [6] (McPherson JA).

193 See, eg, *DPP (Vic) v Nguyen* [2015] VCC 1179, [69] (Judge Cohen).

194 See, eg, *Hickling v Western Australia* (2016) 260 A Crim R 33, [59] (McLure P) (‘*Hickling*’); *R v Van Hoang Pham* [2005] NSWCCA 94, [13] (Wood CJ at CL); *Kristensen v The Queen* [2018] NSWCCA 189, [35] (Payne JA); *R v MAH* (2005) 16 NTLR 150, 155 (Mildren J). Cf *R v Kim* [2014] NSWDC 358, [45] (Norrish DCJ); *R v Hull* [2016] NSWSC 634, [130]–[131] (Davies J).

195 See, eg, *Urahman v Semrad* (2012) 229 A Crim R 11, 28 [61] (Southwood J); *R v Leka* (2017) 267 A Crim R 432, [30]–[32] (Stanley J); *R v Arrowsmith* (2018) 333 FLR 415, 422 (Parker J).

196 See, eg, *Hanna* [2019] NSWCCA 299, [97] (Walton J, Bellew J agreeing at [106] and Macfarlan JA agreeing at [46]).

197 [2019] NSWCCA 299.

198 *Ibid* [97] (Walton J, Bellew J agreeing at [106] and Macfarlan JA agreeing at [46]).



deportation 'did not rise above speculation ... [these] circumstances make the case an inappropriate vehicle to embark upon such a course'.<sup>199</sup> This was likewise the case in *Kristensen v The Queen*,<sup>200</sup> where the NSW Court of Appeal held that, due to the lack of evidence concerning the offender's deportation, the case was 'not an appropriate vehicle' to challenge the 'long standing New South Wales approach'.<sup>201</sup>

Similarly, in WA and the NT, a principal reason why courts are reluctant to factor in deportation when sentencing is that doing so would involve 'predictions about how such an administrative discretion ... may be exercised at some future time'.<sup>202</sup> This was seen in the WASCA case *Hickling v Western Australia*,<sup>203</sup> where the 'evidence fell well short of establishing hardship on the part of the appellant or that deportation was more than a completely speculative possibility'.<sup>204</sup> Likewise in *Urahman v Semrad*,<sup>205</sup> the NT Supreme Court held that it was bound by the traditional approach in *Tsui* as applied by the NT Court of Criminal Appeal decision of *R v MAH*,<sup>206</sup> despite recognising there was 'some force' in the *Guden* principles.<sup>207</sup> The Court further found that even if the Victorian authorities were to be applied, there was no evidence about the 'actual risk of the offender being refused a visa by the Minister'.<sup>208</sup> It thus appears that the traditional approach in NSW, WA and the NT may be enduring, at least in part, due to insufficient evidence being before the courts regarding the future exercise of the Minister's discretion to deport an offender or to revoke the cancellation of an offender's visa.

It is in this way that I argue that the administrative discretion being exercised with respect to deportation or removal under the *Migration Act* has created a significant legal problem for criminal courts and is 'intruding' into the criminal justice process. I have argued that courts in at least four Australian jurisdictions have appropriately recognised the force of the *Guden* principles and consider deportation or administrative removal a relevant factor when sentencing. However, the discretionary nature of character-based deportation means it is difficult in practice to apply the *Guden* principles where there is insufficient evidence of the risk of deportation. Specifically in relation to section 501(3A), this is despite statistics showing that the majority of visa cancellations will *not* be revoked, as outlined above. This means that, despite the endeavours of sentencing courts to factor in deportation, residual uncertainties regarding the exercise of

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199 Ibid [89] (Walton J).

200 [2018] NSWCCA 189.

201 Ibid [35] (Payne JA).

202 (2016) 260 A Crim R 33, 45 [59] (Mazza JA and Mitchell J).

203 *Hickling* (2016) 260 A Crim R 33.

204 Ibid 46 (Mazza JA and Mitchell J).

205 (2012) 229 A Crim R 11.

206 (2005) 16 NTLR 150.

207 *Urahman v Semrad* (2012) 229 A Crim R 11, 28 [61] (Southwood J).

208 Ibid. In this case, the offender had been found to be a refugee but had not yet been granted a visa. The offender's visa was likely to be refused due to failing the character test pursuant to section 501(6)(aa), due to being convicted of an offence committed in immigration detention.

administrative discretion are eroding the ability of judges to impose proportionate sentences for those vulnerable to deportation, non-citizens.<sup>209</sup>

This problem has justice implications, particularly for long-term residents. As the criminal courts have recognised, character-based removal from Australia constitutes an acute hardship, particularly for permanent residents ‘repatriated to a country they left as an infant or teenager, one that has never in truth been a home at all, even possibly without knowledge of the relevant language’.<sup>210</sup> Research by Grewcock shows that the majority of non-citizens challenging their visa cancellation before the AAT between 2005 and 2011 were long-term residents.<sup>211</sup> There have been reports of the removal of long-term permanent residents from Australia on the basis of minor or non-violent crimes.<sup>212</sup> Illustrative examples are the visa cancellation of 40 year old Angela Russell, who had been living in Australia since the age of two, after a serving a three-month sentence for shoplifting,<sup>213</sup> and of Maryanne Caric in 2017 for drug possession charges, who faced removal to Croatia despite the fact that she had lived in Australia since infancy for nearly 50 years and had no Croatian relatives or language skills.<sup>214</sup> Yet, government policy states that when deciding whether to cancel a visa, risk of reoffending is a ‘primary’ consideration, whilst the length of stay and ties to Australia are secondary considerations.<sup>215</sup> The operation of administrative removal is thus producing a ‘distinctive system of justice’<sup>216</sup> for non-citizens, with particularly harsh consequences for permanent residents. Non-citizens may face administrative removal for relatively minor crimes, irrespective of their length of stay in Australia, and yet criminal courts are often hamstrung in their ability to factor in these consequences when sentencing.

The consequences of the interaction between deportation and sentencing are also severely felt by refugees in immigration detention. Under section 501(6)(aa) of the *Migration Act*, non-citizens automatically fail the character test under section 501(6) if they have been convicted of an offence that was committed while the person was in immigration detention, or during an escape from immigration

209 For a recent proposal to reform this area of law, see Bagaric, Alexander and Bagaric (n †), where it is argued that deportation at the expiration of an offender’s sentence should normally mitigate the sentence imposed by the court, but that this discount should subsequently be rescinded if deportation does not in fact occur: at 450–60.

210 *DPP (Vic) v Nguyen* [2017] VCC 510, [25] (Judge Tinney).

211 Grewcock, ‘Reinventing “the Stain”’ (n 23) 127–8.

212 See Stanley (n 5) 525; Hoang and Reich (n 23) 1.

213 Bill Hoffman, ‘Coast-Raised Mum to be Deported over Shoplifting Conviction’, *Sunshine Coast Daily* (online, 25 September 2015) <<https://www.sunshinecoastdaily.com.au/news/mistakes-prove-costly/2786207/>>; Jill Poulsen, ‘Anguish for Mum of Woman Who Was Detained in Darwin’s Wickham Point Detention Centre’, *NT News* (online, 30 November 2015) <<http://www.ntnews.com.au/news/northern-territory/anguish-for-mum-of-woman-who-was-detained-in-darwins-wickham-point-detention-centre/news-story/29411a431ac649cb5475b7487938fdaa?=>>>.

214 Ann Arnold, ‘Immigration Department Set to Deport Grandmother Who Arrived in Australia as a Two-Year-Old’, *ABC News* (online, 15 March 2017) <<http://www.abc.net.au/news/2017-03-15/grandmothers-visa-cancelled-faces-deportation-to-croatia/8355302>>.

215 Minister for Immigration, Citizenship and Multicultural Affairs, *Direction No 79: Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA* (20 December 2018) [9.1], [10.2].

216 Aliverti, ‘Doing Away with Decency?’ (n 10) 129.

detention.<sup>217</sup> However, where that non-citizen has been found to be a refugee, under international law they cannot be sent back to the country from which they are fleeing, which may lead to indefinite detention.<sup>218</sup>

*Chegeni Najad v Bruhn*<sup>219</sup> is particularly demonstrative. In this case, Fazel Chegeni Najad was convicted of an assault for a one-minute long fight in immigration detention.<sup>220</sup> Although the WASCA found that a term of imprisonment would be excessive in light of the brief nature of the assault, Mr Chegeni was still convicted to a suspended term of imprisonment due to the need for 'general deterrence'.<sup>221</sup> The Court noted that conviction for an offence committed in immigration detention would automatically cause Mr Chegeni to fail the character test under section 501(6)(aa), but, in line with WA authority, did not take this into account as mitigating.<sup>222</sup> Mr Chegeni had been found to be a refugee, however his protection visa was cancelled under section 501(2) on the basis of his conviction. Mr Chegeni was returned to indefinite detention, where he tragically died.<sup>223</sup> As mentioned above, there is a general principle across Australian jurisdictions that courts cannot impose a lesser sentence for the express purposes of allowing offenders to escape visa cancellation and ensuing removal under the *Migration Act*.<sup>224</sup> This effectively traps refugees such as Mr Chegeni, a man who faced indefinite detention for a minor crime not found to deserve a term of imprisonment. The fate of refugees caught by section 501(6)(aa) further exposes the justice implications where criminal courts are unable to appropriately factor in additional hardship resulting from visa cancellation and deportation.

Through examining the operation of migration law within criminal courts, I have outlined one dimension of the crimmigration phenomenon – namely the way in which character-based removal of non-citizens is impacting upon the criminal sentencing process. It is widely appreciated within scholarship that administrative domains are intruded on by 'penal thinking'.<sup>225</sup> What is less widely appreciated is that administrative law and its consequences have consequences for the sentencing process. As sentencing courts struggle with how to determine an appropriate sentence in light of discretionary administrative issues, this has negative impacts on non-citizens as well as the criminal justice process as a whole. Non-citizens are subjected to a different criminal law where they face removal from Australia on criminal grounds.

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217 *Migration Act 1958* (Cth) s 501(6)(aa).

218 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33(1).

219 (2014) 239 A Crim R 158.

220 *Ibid* 170 (Commissioner Sleight).

221 *Ibid* 171.

222 *Ibid* 162.

223 Ben Doherty, 'How Australia's Immigration Detention Regime Crushed Fazel Chegeni', *The Guardian* (online, 21 December 2015) <<https://www.theguardian.com/australia-news/2015/dec/21/how-australias-immigration-detention-regime-crushed-fazel-chegeni>>.

224 *Mehr* [2017] SASC 104, [8] (Vanstone J); *R v Kamara* [2016] ACTSC 294, [42] (Elkaim J); *Norris* (2018) 331 FLR 92, 104 [46] (Gotterson JA); *Lofthus* [2019] VSCA 24, [81] (Whelan AP and Niall JA).

225 Weber, *Policing Non-citizens* (n 9) 111.

## IV PUNISHING CRIMMIGRANTS

‘This is one of the most difficult situations as a sentencing judge I have faced ... I couldn’t invite Mr Morrison to come here and have a discussion on this I suppose?’<sup>226</sup>

- Judge Patrick, on sentencing an offender unable to access rehabilitative programs in immigration detention.

In this Part, I explore a further challenge that immigration law is imposing on sentencing judges in Australia, namely the effects of migration law upon the types of punishment options available to non-citizen offenders. To do so, I draw on my examination of 20 case examples in which criminal courts have discussed the practical limitations on sentencing options for non-citizen offenders in Australia. My research reveals that non-custodial sentencing options have been denied to certain non-citizen offenders, and that inappropriate penalties have been imposed on non-citizens, due to the practical effects of Australia’s migration laws and mandatory detention regime.

While my sample size is small and inherently limited to judgments that were publicly available, these cases suggest a wider problem. It appears that non-citizens are being criminalised by a different set of practices to those with citizenship status, reducing their access to rehabilitation, compromising community safety, and leaving certain non-citizen offenders in a state of ‘legal limbo’.<sup>227</sup> This Part thus affirms the argument by Aliverti that foreignness has ‘served to legitimize a second-class justice system’<sup>228</sup> for non-citizens, in which punishment is becoming harsher and notions of rehabilitation are lost at points of intersection between migration law and crime. I argue that this is a second aspect of the way in which non-citizens are subject to an inferior version of criminal sentencing law.

### A Sentencing Rationale

As raised in Part II, the availability of ‘flexible’<sup>229</sup> sentencing options such as those allowing for the supervised release of offenders ostensibly benefits both the community and individual offender. Sanctions such as community-based orders typically require the offender to perform labour in the community, addressing deterrence or punishment, and will usually contain a treatment aspect, addressing rehabilitation and community protection.<sup>230</sup>

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226 Judge Jane Patrick quoted in Editorial, ‘Sex Offender Refugee from Afghanistan in Legal Limbo, Victorian Judge Says’, *ABC News* (online, 1 November 2014) <<http://www.abc.net.au/news/2014-10-31/sex-offender-refugee-in-legal-limbo-judge-says/5858356>> (‘Sex Offender Refugee from Afghanistan in Legal Limbo’).

227 Ibid.

228 Aliverti, ‘Doing Away with Decency?’ (n 10) 125.

229 *Boulton v The Queen* (2014) 46 VR 308, 311 [2] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA) (‘*Boulton*’).

230 Ibid.

An illustrative example is the 'community corrections order' ('CCO'), available in Victoria, NSW and Tasmania.<sup>231</sup> A CCO is served in the community, and has certain mandatory conditions attached to it such as the condition not to commit further offences.<sup>232</sup> Judges may then impose additional conditions,<sup>233</sup> such as undertaking treatment.<sup>234</sup> The VSCA has held that CCOs minimise the risk of reoffending by 'affording the best prospects for rehabilitation'.<sup>235</sup> Other jurisdictions have related community-based sentencing options, such as community service orders<sup>236</sup> and intensive correction orders ('ICOs').<sup>237</sup> These sanctions are widely used in Australia, at nearly twice the rate of imprisonment.<sup>238</sup> Flexible sentencing options allow courts to better serve the purposes of sentencing and are a crucial element of individualised justice, affording judges discretion to select penalties that address the particular circumstances of each offender.<sup>239</sup> The High Court in *Shrestha* held that punishment options must *formally* be available to all offenders, regardless of their immigration status.<sup>240</sup> Yet my research reveals that the sentencing options for non-citizen offenders are diminished in practice.

## B Ineligibility for Community-Based Penalties

In this section I claim that certain non-citizens are effectively ineligible for community-based punishment options, due to their visa status, their presence in immigration detention or their 'deportability'.<sup>241</sup>

Victorian case law is demonstrative of the way judges are coming up against practical limitations in sentencing non-citizen offenders. A pertinent illustration is *Director of Public Prosecutions (Vic) v Hussain*,<sup>242</sup> which concerned a 25 year old offender who was charged with first-time offences of procuring child pornography and grooming. The Victorian County Court ('VCC') recognised the seriousness of this offence, but also stated that given Hussain's young age, his rehabilitation 'must be a significant sentencing consideration'.<sup>243</sup> The Court discussed how Hussain's 'psychosexual immaturity' was linked to trauma in his upbringing before fleeing to Australia, and emphasised that offence-specific treatment was 'clearly an important matter'.<sup>244</sup> Yet, as Hussain's bridging visa had been cancelled

231 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8; *Sentencing Act 1997* (Tas) s 42AN; *Sentencing Act 1991* (Vic) s 36.

232 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 88; *Sentencing Act 1997* (Tas) s 42AO; *Sentencing Act 1991* (Vic) ss 36, 45(1).

233 In Victoria, this is mandatory: see *Sentencing Act 1991* (Vic) s 47(1).

234 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89; *Sentencing Act 1997* (Tas) s 42AP; *Sentencing Act 1991* (Vic) ss 47(1), 48D.

235 *Boulton* (2014) 46 VR 308, 377 [25] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

236 *Penalties and Sentences Act 1992* (Qld) ss 100–8; *Sentencing Act 2017* (SA) s 25(3)(a)(iii).

237 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(1); *Penalties and Sentences Act 1992* (Qld) ss 111–19; *Sentencing Act 2017* (SA) s 82.

238 Bagaric, Edney and Alexander (n 33) 625–6.

239 *Boulton* (2014) 46 VR 308, 311 [2] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

240 *Shrestha* (1991) 173 CLR 48, 71–2 (Deane, Dawson and Toohey JJ).

241 Aliverti, 'Sentencing in Immigration-Related Cases' (n 8) 39.

242 [2016] VCC 628.

243 *Ibid* [28] (Judge Patrick).

244 *Ibid* [17], [28].

since the offending, it was ‘not in practice possible’ for him to undertake a CCO, given that he would remain in immigration detention if he were released on any community-based order.<sup>245</sup> Thus, the Court found itself prohibited from imposing a CCO with rehabilitative conditions attached, a course it ‘would have otherwise’ taken.<sup>246</sup> This was also the situation in *Director of Public Prosecutions (Vic) v Tran*,<sup>247</sup> *Director of Public Prosecutions (Vic) v Nguyen*<sup>248</sup> and *Director of Public Prosecutions (Vic) v Yeoh*,<sup>249</sup> cases involving cultivation of cannabis, commercial cultivation of cannabis and conspiracy to defraud respectively. In each case, the VCC held that ordering a CCO or other combination orders would be ‘futile’ given the visa status of the offenders and their likely detention and deportation.<sup>250</sup>

These issues can be detected in SA, WA and NSW. In SA, intervention programs allow proceedings for minor offences to be adjourned while the health needs of offenders are addressed through programs in the community.<sup>251</sup> In *Nicholls v Police*,<sup>252</sup> which involved charges for various driving offences, the SA Supreme Court (‘SASC’) discussed difficulties that Nicholls had had in complying with a Mental Health Diversion Program imposed by the Magistrate.<sup>253</sup> The Court noted that Nicholls was ‘removed from that program on account of the fact that he failed to appear in court ... due to his detention in the Baxter [Immigration] Detention Centre’.<sup>254</sup> The Magistrate declined to readmit Nicholls into the Diversion Program and the SASC found no error in doing so.<sup>255</sup> In *Amirthalingam v Police*,<sup>256</sup> a case also involving driving offences, the Magistrate at first instance held that it was not possible to impose a community service order due to the offender being held in immigration detention.<sup>257</sup> On appeal, the SASC found no error in that respect, as these issues were ‘of course practical matters that faced the Magistrate’.<sup>258</sup> Similarly, in *AA v Anthony*,<sup>259</sup> a case involving unlawful assembly offences committed whilst in immigration detention, the WA Supreme Court (‘WASC’) held that due to the ‘personal situations’ of the offenders who were still being held in detention, the magistrate was correct in concluding that the only ‘realistic’ alternative to imprisonment was a conditional release order.<sup>260</sup> Again in the case of *R v Bui*,<sup>261</sup> concerning cultivating cannabis charges, the NSW District

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245 Ibid [33].

246 Ibid.

247 [2016] VCC 1011.

248 [2016] VCC 26.

249 [2016] VCC 54.

250 *DPP (Vic) v Nguyen* [2016] VCC 26, [22] (Judge Parrish). See also *DPP (Vic) v Tran* [2016] VCC 1011, [11] (Judge Tinney); *DPP (Vic) v Yeoh* [2016] VCC 54, [24] (Judge Parrish).

251 *Sentencing Act 2017* (SA) s 29.

252 (2007) 97 SASR 431.

253 Ibid 443–4 (Kelly J).

254 Ibid 443 [32].

255 Ibid 443–4.

256 [2015] SASR 189.

257 Ibid [25] (Lovell J).

258 Ibid [24].

259 [2016] WASC 127.

260 Ibid [28] (Chaney J).

261 [2019] NSWDC 398.

Court held that the 'immigration status' of the offenders made it 'pointless' to impose an ICO.<sup>262</sup>

The problem of limited sentencing options available to non-citizen offenders is also observable in the ACT. A pertinent case is *R v Williams*,<sup>263</sup> concerning a New Zealand citizen sentenced to charges including inflicting actual bodily harm. At the time of sentencing, Williams' visa had been cancelled and he was assessed as unsuitable for an ICO due to being liable to deportation.<sup>264</sup> As such, the ACTSC declined to make an ICO and instead imposed a sentence of imprisonment, stating that there was 'virtually no prospect' of Williams complying with the ICO.<sup>265</sup> This was because it was accepted that if he were to be released from custody, Williams would be immediately taken into immigration detention pending deportation to New Zealand.<sup>266</sup> A similar result occurred in the ACTSC case of *R v Butters*,<sup>267</sup> as well as in *R v Grenon*,<sup>268</sup> in which the offender was not assessed by the ACTSC for periodic detention or for a community service condition to good behaviour order because of the likelihood of her deportation.<sup>269</sup>

These cases highlight the difficult situation faced by sentencing judges where a non-citizen would be unable to undertake a community service order, CCO or participate in diversionary programs due to the operation of the mandatory detention regime or due to their deportability. These issues mirror findings in Europe and the US, that, in practice, 'foreignness, lack of immigration status and eligibility for deportation' are automatically obstacles to release on community-based sentences.<sup>270</sup> Where courts are constrained in their ability to impose a particular sentence that they would have otherwise considered or deemed appropriate, this is a negation of individualised justice and functions as an 'additional [sanction]' upon non-citizens,<sup>271</sup> denying them the opportunity to participate in schemes promoting their rehabilitation. The effectiveness of any particular rehabilitative program is beyond the scope of this article. However, the fact that certain non-citizens are denied outright access to these programs due to their 'alien' status reveals a discriminatory element of the criminalisation of non-citizens, and suggests the beginnings of an Australian case study for a global crimmigration phenomenon.

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262 Ibid [27] (Buscombe DCJ).

263 [2018] ACTSC 354.

264 Ibid [10] (Burns J).

265 Ibid [13].

266 Ibid.

267 [2019] ACTSC 143. In this case, it was held that it was not practical to impose an ICO, despite this being recommended, due to the offender's potential deportation: at [122]–[126] (Loukas-Karlsson J).

268 [2013] ACTSC 292.

269 Ibid [43] (Refshauge J).

270 Aliverti, 'Doing Away with Decency?' (n 10) 133. See also Shahram Khosravi, 'Sweden: Detention and Deportation of Asylum Seekers' (2009) 50(4) *Race and Class* 38, 40; Nora V Demleitner, 'Terms of Imprisonment: Treating the Noncitizen Offender Equally' (2009) 21(3) *Federal Sentencing Reporter* 174, 174; Eagly (n 6) 1134; Katherine Beckett and Heather Evans, 'Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation' (2015) 49(1) *Law and Society Review* 241, 272.

271 Demleitner (n 270) 174.

This narrower set of sentencing options also has serious implications for community safety. The high profile case of *R v Jaffari* ('*Jaffari*') is instructive.<sup>272</sup> Ali Jaffari, a refugee living on a protection visa, was charged with six counts of an indecent act with a child under 16 and one charge of attempted indecent assault, arising out of an incident occurring at a swimming pool. In relation to those charges, Jaffari was sentenced to a two year CCO with conditions that he undergo treatment for mental health issues, participate in the sex offender program and perform community service.<sup>273</sup> However, as a result of disclosures made by Jaffari during an appointment with a psychologist as part of his treatment under the CCO, he was later charged with accessing child pornography at a public library, and his protection visa was subsequently cancelled by the then Minister, Scott Morrison.<sup>274</sup> As a result, Jaffari was unable to comply with the original CCO.<sup>275</sup>

When sentencing Jaffari for the pornography charges in the VCC, Judge Patrick held that it was 'extremely important' that Jaffari receive counselling and participate in a sex offender treatment program, and that Jaffari's rehabilitation was 'necessary in order to prevent future harm to children'.<sup>276</sup> Yet, the Court held that Jaffari was unsuitable for a CCO, principally because Jaffari was in immigration detention meaning that there was 'no practical way' for the Court to require him to participate in a program such as the Sex Offender Program.<sup>277</sup> Instead, Jaffari was sentenced to a three month suspended term of imprisonment.<sup>278</sup> Justice Patrick stated that this was 'one of the most difficult situations as a sentencing judge I have faced',<sup>279</sup> noting that, as a refugee, Jaffari could not be deported back to Afghanistan and faced the prospect of indefinite detention.<sup>280</sup> After multiple self-harm attempts, Jaffari died as a result of setting himself alight at Yongah Hill Immigration Detention Centre.<sup>281</sup> *Jaffari* reveals a way in which migration law is confounding the rehabilitative purposes of Australia's criminal sentencing system.

The inability for criminal courts to implement rehabilitative programs when sentencing non-citizen offenders also has safety implications for people held in Australia's immigration detention facilities. As emphasised by the Court in *Jaffari*, treatment was not only needed for Jaffari's mental health, but was also necessary in order to prevent future harm to others.<sup>282</sup> By denying non-citizen offenders rehabilitative sentencing options through mandatorily detaining and deporting

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272 [2014] VCC 2027 ('*Jaffari*').

273 *DPP (Vic) v Jaffari* [2014] VCC 1449, [1] (Judge Sexton).

274 *Ibid* [1]–[4].

275 *Ibid*.

276 *Jaffari* [2014] VCC 2027, [20] (Judge Patrick).

277 *Ibid*.

278 *Ibid* [28].

279 'Sex Offender Refugee From Afghanistan in Legal Limbo' (n 226).

280 *Ibid*.

281 Nicolas Perpetch and Graeme Powell, 'Man Who Set Himself on Fire at Yongah Hill Detention Centre is Convicted Child Sex Offender Ali Jafarri', *ABC News* (online, 17 September 2015) <[www.abc.net.au/news/2015-09-16/child-sex-offender-ali-jaffari-set-self-on-fire-at-yongah-hill/6781492](http://www.abc.net.au/news/2015-09-16/child-sex-offender-ali-jaffari-set-self-on-fire-at-yongah-hill/6781492)>; Editorial, 'Australian Detainee Who Set Himself on Fire Dies', *BBC News* (online, 16 September 2015) <<http://www.bbc.com/news/world-australia-34275511>>.

282 *Jaffari* [2014] VCC 2027, [20] (Judge Patrick).



them, governments may appear tough on 'foreign crime' issues whilst actually exporting any risk of reoffending into immigration detention facilities.<sup>283</sup>

People who would traditionally be dealt with in the criminal environment, through programs designed to promote their rehabilitation, are being placed into immigration detention facilities alongside asylum seekers and families who have not committed any crimes. There have been numerous reports documenting an increase of violence in immigration detention centres accompanying the rising percentage of criminal offenders held in detention due to their visas being cancelled under section 501(3A).<sup>284</sup> In 2018, Australia's onshore immigration detention facilities held more people who had their visa cancelled on character or criminal grounds than any other category, including asylum seekers who arrived by boat.<sup>285</sup> Indeed, an immigration department spokesperson reportedly conceded that 'there had been "higher reported incidents of violent behaviour" in detention centres due to increased numbers of higher-risk detainees, many with criminal backgrounds'.<sup>286</sup> Yet as argued by Cooney in the UK context, if non-citizens are seen as 'deportees', there seems to be little interest in whether they will reoffend in immigration detention (or indeed in another country).<sup>287</sup>

Criminal courts have found that rehabilitative sentences are not available for non-citizens who will be detained or deported, due to the practical difficulties of implementing community-based sentences in detention. These administrative law processes undermine traditional rehabilitative sentencing processes, with implications for individual and community safety.

### C Inappropriate Penalties

The operation of the mandatory detention and removal regime has also restricted the discretion of sentencing courts such that courts have imposed inappropriate penalties on non-citizens. In this section I show that fines and community-based orders have been imposed as punishments on non-citizens in situations where the court has recognised that these orders would be impossible to

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283 Liz Fekete and Frances Webber, 'Foreign Nationals, Enemy Penology and the Criminal Justice System' (2010) *Race and Class* 51(4) 1, 6, quoted in Grewcock, 'Punishment, Deportation and Parole' (n 4) 68.

284 Nicole Hasham and Michael Koziol, 'Asylum Seekers: Ousted Criminals Raise Level of Violence in Detention Centres', *The Sydney Morning Herald* (online, 16 January 2016) <[www.smh.com.au/politics/federal/asylum-seekers-ousted-criminals-raise-level-of-violence-in-detention-centres-20160116-gm782s.html](http://www.smh.com.au/politics/federal/asylum-seekers-ousted-criminals-raise-level-of-violence-in-detention-centres-20160116-gm782s.html)>; Michael Gordon, "'I Do Not Deserve This,'" Pleads Asylum Seeker Detained with Violent Criminals on Christmas Island', *The Sydney Morning Herald* (online, 27 September 2016) <[www.smh.com.au/politics/federal/i-do-not-deserve-this-pleads-asylum-seeker-detained-with-violent-criminals-on-christmas-island-20160927-grp92x.html](http://www.smh.com.au/politics/federal/i-do-not-deserve-this-pleads-asylum-seeker-detained-with-violent-criminals-on-christmas-island-20160927-grp92x.html)>; Nicole Hasham, 'Asylum Seekers Kept in Detention with Violent Criminals', *The Sydney Morning Herald* (online, 15 July 2015) <[www.smh.com.au/politics/federal/asylum-seekers-kept-in-detention-with-violent-criminals-20150714-gic3ps.html](http://www.smh.com.au/politics/federal/asylum-seekers-kept-in-detention-with-violent-criminals-20150714-gic3ps.html)>; Nicolas Perpetch, 'Criminals Housed in Yongah Hill Detention Centre; Asylum Seekers "Scared"', *ABC News* (online, 11 February 2015) <[www.abc.net.au/news/2015-02-11/convicted-criminals-housed-in-detention-centre/6085502](http://www.abc.net.au/news/2015-02-11/convicted-criminals-housed-in-detention-centre/6085502)>.

285 *Immigration Detention and Community Statistics Summary* (n 3) 7.

286 Hasham and Koziol (n 284).

287 Francesca Cooney, 'Double Punishment: The Treatment of Foreign National Prisoners' [2013] (205) *Prison Service Journal* 45, 47. For a discussion of the issues of exporting risk into the global community, see Weber and Pickering (n 155) 112.

comply with. Where a non-citizen cannot possibly comply with the conditions of their sentence, the breach of those conditions may then result in further legal consequences such as imprisonment.<sup>288</sup> By examining these issues, I reinforce my argument that despite the endeavours of its actors, non-citizens are treated more harshly by the criminal justice system due to the operation of migration law.

*Hussaini v Szolnoski* ('*Hussaini*'),<sup>289</sup> which involved an indecent assault committed within immigration detention, is demonstrative of this phenomenon. The WASC held that community-based orders were 'not viable as options given the appellant's continuing detention', as '[any] such orders could not be meaningfully enforced in immigration detention'.<sup>290</sup> The Court noted that this restricted its sentencing options, leaving 'only a fine or a conditional release order'.<sup>291</sup> As a conditional release order was not found to reflect the severity of the offending, the Court imposed a fine of \$2,000 as the 'only' option.<sup>292</sup> However, the Court also noted that the 'only realistic possibility that the appellant could pay a fine in any amount is if he is released from detention and permitted to work', and that it was 'difficult to contemplate a fine that he would have the capacity to pay in the foreseeable future'.<sup>293</sup> I observed this issue in several other cases in WA, SA and the NT.<sup>294</sup>

*Hussaini* reveals the difficulties where reduced sentencing options have resulted in courts imposing fines on non-citizens who do not have the ability to pay them. While judges in most criminal jurisdictions are required to consider the financial means of an individual offender when assessing the amount of a fine,<sup>295</sup> long-standing issues in criminal justice regarding fines become acute at the intersection of crime and migration. Where a person does not have the right to work due to their visa status or their presence in immigration detention, it is arguable that 'the legitimacy of the fine is nullified when imposed on a person who lacks the capacity to pay'.<sup>296</sup> While it is beyond the scope of this article to consider the various ways in which migration, poverty and crime may intersect, *Hussaini* reflects a concern that, for certain non-citizens, a fine may be 'a *de facto* prison sentence where imprisonment is the penalty for fine default'.<sup>297</sup> There are pathways

288 For example, in various Australian jurisdictions fine recovery statutes permit imprisonment when a person is either ineligible or fails to comply with a community service order imposed following fine default: see, eg, *Crimes (Sentence Administration) Act 2005* (ACT) s 116ZK; *Fines Act 1996* (NSW) s 87; *Fines and Penalties (Recovery) Act 2001* (NT) s 88; *State Penalties Enforcement Act 1999* (Qld) s 119; *Fines Reform Act 2014* (Vic) ss 160, 165, 165B; *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53. Similarly, a failure to comply with a CCO attracts a further prison sentence of three months in Victoria: see *Sentencing Act 1991* (Vic) s 83AD.

289 (2013) 227 A Crim R 586.

290 *Ibid* 593–4 [40] (Hall J).

291 *Ibid* 594 [41].

292 *Ibid* 594 [42]–[43].

293 *Ibid* [42].

294 See, eg, *Al-Saleh v Clarkson* [2002] WASCA 122, [35] (McKechnie J); *Nguyen v Ciolka* [2015] NTSC 67, [24] (Riley CJ); *Amirthalingam v Police (SA)* [2015] SASC 189, [24] (Lovell J).

295 *Crimes (Sentencing) Act 2005* (ACT) s 14(3); *Fines Act 1996* (NSW) s 6; *Sentencing Act 1991* (Vic) s 52; *Sentencing Act 1995* (WA) s 53; Bagaric, Edney and Alexander (n 33) 650–1.

296 New South Wales Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices* (Interim Report, October 2006) 20.

297 Findlay, Odgers and Yeo (n 32) 228 (emphasis in original).

from fine default to imprisonment in most Australian jurisdictions, typically where an offender is either ineligible for or fails to comply with other orders (such as a community service order) imposed following fine default<sup>298</sup> – notably, in WA, offenders may be imprisoned to ‘cut out’ fine debt for court ordered fines.<sup>299</sup>

Issues regarding the imposition of inappropriate penalties also arose in Victoria, where the VCC has imposed CCOs despite recognising the difficulties non-citizen offenders would have in complying with them. In *Director of Public Prosecutions v Percell*,<sup>300</sup> a case involving negligent driving, and *Director of Public Prosecutions v Alam*,<sup>301</sup> which involved an indecent assault, the VCC *did* impose a CCO as punishment. However, the Court noted the ‘strange situation’ in which it would be difficult or impossible for each offender to comply with the conditions of their CCO, due to the offender’s detention or likely deportation.<sup>302</sup>

In *Alam*, the Court had specifically sought a report from the Office of Corrections as to the suitability of Alam for a CCO, given that he was currently held in Maribyrnong Immigration Detention Centre.<sup>303</sup> The assessing officer stated that given Alam’s detention, he was ‘uncertain’ as to whether the conditions of a CCO could be implemented and thus that Alam was ‘unsuitable for such an order’.<sup>304</sup> Nevertheless, the Court decided that Alam’s potential unsuitability was not a sufficient reason to decline the imposition of an order which the Court had determined was a ‘just and appropriate disposition in all the circumstances’.<sup>305</sup> The Court held that the sexual inexperience of the offender meant that it was ‘crucial’ for the offender to ‘undergo programs to address the risk of reoffending’.<sup>306</sup> In summarising the problem faced by the Court, Judge Hogan stated: ‘The Court can only hope that the Executive Branch of Government might take into consideration these sentencing remarks in order to enable you to fulfil your obligations under the order’.<sup>307</sup>

A similar situation arose in the Queensland context in *R v MG*,<sup>308</sup> where the sentencing judge ‘strongly recommended’ that the 17 year old offender not be deported, such that he could benefit from ‘in depth psychological and psychiatric treatment’ under a probation order.<sup>309</sup>

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298 *Crimes (Sentence Administration) Act 2005* (ACT) s 116ZK; *Fines Act 1996* (NSW) s 87; *Fines and Penalties (Recovery) Act 2001* (NT) s 88; *State Penalties Enforcement Act 1999* (Qld) s 119; *Fines Reform Act 2014* (Vic) ss 160, 165, 165B; *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

299 *Fines, Penalties and Infringement Notices Enforcement Act 194* (WA) s 53. The Fines, Penalties and Infringement Notices Enforcement Amendment Bill 2019 (WA) was introduced in the WA Parliament in September 2019 to restrict the use of imprisonment for non-payment of fines.

300 [2015] VCC 1194.

301 [2015] VCC 1766.

302 *DPP (Vic) v Percell* [2015] VCC 1194, [61] (Judge Smallwood). See also *DPP (Vic) v Alam* [2015] VCC 1766, [18] (Judge Hogan).

303 *DPP (Vic) v Alam* [2015] VCC 1766, [18].

304 *Ibid.*

305 *Ibid.*

306 *Ibid* [17].

307 *Ibid* [18].

308 [2018] QDC 194.

309 *Ibid* [50] (Smith DCJA). Cf *Norris* (2018) 331 FLR 92, 104 [48] (Gotterson JA, Sofronoff P agreeing at 93 [1] and Philippides JA agreeing at 105 [54]), where the QCA upheld the primary judge’s imposition of

My case examples reveal that courts in WA, SA, ACT, Victoria, Queensland, NSW and the NT have acknowledged that non-citizens may find it difficult or impossible to comply with fines or community-based orders, by virtue of their immigration status. This restricts the sentencing options available to the courts, particularly in the light of the fact that a failure to comply with a CCO, for example, attracts a further prison sentence of three months.<sup>310</sup> These circumstances present an problematic choice for sentencing judges. Should the court order a community-based sentence, it may not be possible for the non-citizen to comply with it. This leaves the offender without rehabilitative treatment options, and if the person breaches their community-based order, they may be exposed to further punitive consequences such as a longer prison sentence. Yet, where a court does *not* impose a community-based order as it would otherwise, the offender is also, straightforwardly, deprived of the rehabilitative potential of those orders.

This curtailing of the independent discretion of judges runs against the parliamentary intention of non-custodial penalties, and means that the criminal law is harsher as it applies to non-citizens. In a way that mirrors Grewcock and Eagly's research on parole, judicial decisions made about a non-citizen's eligibility for rehabilitative punishment options are thwarted by the operation of migration law.<sup>311</sup> Scholars have demonstrated that the visas of non-citizens are routinely cancelled prior to a successful completion of a parole period, rendering them liable to immediate detention and removal despite being found eligible for parole by the parole authorities.<sup>312</sup> As explained in *R v Abdi*,<sup>313</sup> deportation renders the supervisory and reporting conditions attached to parole impossible to comply with, exposing the offender to the consequence of a cancellation of their parole.<sup>314</sup> It has also been demonstrated that non-citizen offenders may have reduced prospects of being granted parole in situations where they face deportation upon release from incarceration.<sup>315</sup> This echoes my analysis regarding the imposition of inappropriate penalties, as non-citizens may be liable for imprisonment if their fine or conditions of their CCO are impossible to comply with. The common point is that non-citizen offenders are set up to fail, by virtue of their non-citizen status.

The criminalising and punishing effects of immigration detention and deportation itself has received the majority of scholarly attention in the crimmigration space. The effect of foreign status on more 'bread-and-butter'<sup>316</sup> criminal processes, such as the selection of an appropriate penalty type in sentencing, reveals more subtle (but equally insidious) consequences of

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a suspended sentence to minimise the risk of interruption to the offender's rehabilitation that immigration detention beyond a fixed release date would entail.

310 *Sentencing Act 1991* (Vic) s 83AD. In NSW, where a CCO is breached, the CCO may be revoked and the court may resentence the offender taking into account the fact that the offender was subject to the order: *Crimes (Administration of Sentences) Act 1999* (NSW) ss 107C(5), 107D(1).

311 Eagly (n 6) 1155; Grewcock, 'Punishment, Deportation and Parole' (n 4) 62–3.

312 Beckett and Evans (n 270) 273; Eagly (n 6) 1155; Grewcock, 'Punishment, Deportation and Parole' (n 4) 62–3.

313 (2016) 263 A Crim R 38.

314 *Ibid* [42] (Philip McMurdo JA).

315 See, eg, McGorrrery (n 29) 15–16; Grewcock, 'Punishment, Deportation and Parole' (n 4) 62.

316 Eagly (n 6) 1129.

crimmigration. The consequences in this second category are indirect, evidencing the wider ripples and distortions in the legal system's normal functioning caused by mandatory deportation and removal. Non-citizens have been denied rehabilitative punishment options and may face harsher sentences, precisely due to their citizenship status and the operation of Australia's mandatory detention and removal policies. This creates difficulties in the criminal sentencing process, as the discretion of judges to set appropriate penalties is restricted. Criminal justice for non-citizens and communities is eroded where the migration status of non-citizens denies them access to punishments that would, if not for their legal status, be available.

## V CONCLUSION

This article has focused on two dimensions of the sentencing of non-citizens in Australia. By analysing two aspects of this problem, I have shown that injustices currently arise at the intersections between crime and migration and have demonstrated ways in which criminal courts are confronting, and contributing to, the creation of a different criminal law for non-citizens. Australia is furthering the creation of a 'global underclass'<sup>317</sup> of offenders, who are subjected to differential types of sentencing, process, and punishment, by virtue of their deportability or physical exclusion in detention centres.

As shown in Part III, administrative removal is affecting the ability for criminal courts to sentence non-citizens in a way that is proportionate and reflects their individual culpability. The impacts of mandatory detention and removal upon the criminal sentencing process were further mapped in Part IV. I argued that non-citizen offenders are being denied individualised punishment because their immigration status renders them ineligible for rehabilitative sentencing options.

Yet, examination of these aspects of the crimmigration phenomenon goes beyond concerns around individualised justice, and engages broader questions regarding the consequences of administrative law on the legal system as a whole. I have illustrated two ways in which the current provisions of the *Migration Act* undermine core tenets of the criminal law, namely proportionality and rehabilitation (and, to an extent, community safety). My suggestion is that these issues posed by the mandatory detention and deportation regime cannot be quarantined within the administrative law system. As migration law distorts the criminal sentencing process, this undermines the legal system more generally and raises questions regarding other, hidden, areas of effect. This article has not offered solutions to these issues. Rather, I have aimed to contribute to the diagnosis of the wider crimmigration phenomenon from a perspective that has otherwise been underexplored.

It is important to emphasise that 'non-citizen' status is not clearly defined nor homogenous – as Aliverti argues, 'not all foreigners are outsiders; equally, not all

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317 Aas, "'Crimmigrant' Bodies and Bona Fide Travelers' (n 27) 337.

citizens are insiders'.<sup>318</sup> Indeed, recent attempts to administratively detain Aboriginal offenders whose visas were cancelled under section 501(3A) of the *Migration Act* illustrate this phenomenon.<sup>319</sup> While crime and migration intersect in particular ways, membership is also tied to issues of race, gender, ability and class.<sup>320</sup> These issues may form the basis of further study within the crimmigration space, for instance into the way that citizenship status and crime intersects with work rights, gender, class or poverty. As suggested in several of the examined cases,<sup>321</sup> a lack of work rights may prevent non-citizens from paying fines post-conviction. Nationality and race may also influence the way community membership is perceived by the courts at sentencing. Scholars have shown in the UK context that assumptions around nationality and 'foreignness' are linked to perceptions about social ties, leading judges to be more inclined to see certain non-citizens as flight risks when deciding whether to grant bail.<sup>322</sup> Further research in Australia might be done on the way foreignness influences criminal justice processes in practice, as well as future research comparing the treatment of citizens and non-citizens within lower magistrate or district courts at sentencing.

While some scholars have described the criminal law as a 'shadow' cast over people and conduct,<sup>323</sup> crimmigration has been said to create a 'chasm'<sup>324</sup> – a space into which people may fall. As the overlaps between crime and migration shift and change, so too will the space that forms between these boundaries. As Eagly argues, 'the criminal-immigration merger is an area that is based on policies and practices that are often hidden from view'.<sup>325</sup> By examining the shape of this emerging chasm and the way criminal justice functions within it, I have aimed to illuminate certain aspects of the criminalisation of non-citizens that might otherwise have remained hidden. I have shown that the operation of Australian migration law diminishes criminal justice outcomes for those without formal citizenship status.

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318 Aliverti, 'Doing Away with Decency?' (n 10) 128.

319 See *Love v Commonwealth* (2020) 94 ALJR 198, where a majority of the High Court held that Aboriginal Australians are not within the reach of the aliens power conferred by the *Constitution*.

320 Aas, 'Bordered Penalty' (n 8) 532; K Soldatic and L Fiske, 'Bodies "Locked Up": Intersections of Disability and Race in Australian Immigration' (2009) 24(3) *Disability and Society* 289.

321 *Al-Saleh v Clarkson* [2002] WASC 122, [35] (McKechnie J); *Nguyen v Ciolka* [2015] NTSC 67, [24] (Riley CJ); *Amirthalingam v Police (SA)* [2015] SASC 189, [24] (Lovell J).

322 Aliverti, 'Doing Away with Decency?' (n 10) 133.

323 See, eg, Mary Heath, 'Policing and Self-Policing in the Shadow of the Law: Negotiating Space for Public Dissent' (2000) 17(1) *Law in Context* 15, 30.

324 Juliet P Stumpf, 'Civil Detention and Other Oxymorons' (2014) 40(1) *Queen's Law Journal* 55, 86.

325 Eagly (n 6) 1196.