

Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing

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I. Introduction

The problem of economically and socially disadvantaged offenders is one of the most perplexing issues in sentencing. It is a worldwide phenomenon that people from disadvantaged backgrounds are convicted of more crimes and sentenced to imprisonment than other people.¹ It has been suggested that this often occurs for reasons that are not within the control of disadvantaged offenders.² The potentially unfair manner in which the criminal justice system operates against offenders from deprived backgrounds, and their over-representation in the criminal justice system, has proven to be a complex problem, devoid of a clear solution. It has even led to some of the most eminent commentators on punishment to retract or re-think their theories of punishment.³

Herbert L.A. Hart suggests that, although there should not be a general defense of economic temptation, for “those who are below the minimum level of economic prosperity . . . [perhaps] we should incorporate as a further excusing condition, the pressure of gross forms of economic necessity.”⁴ This concept was influentially developed by Richard Delgado nearly forty years ago and was touted as the “rotten social background defense.”⁵

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1. See *infra* Part II; see also STEVEN BOX, RECESSION, CRIME AND PUNISHMENT 96 (1987) (concluding that income inequality is strongly related to criminal activity).

2. See, e.g., Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 499–500 (2013) (explaining that the “rotten social background” theory hypothesizes that “severe environmental deprivation” causes a defendant to commit a crime, thereby constituting a defense).

3. See MICHAEL H. TONRY, SENTENCING MATTERS 17–18 (1996).

4. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 51 (1968).

5. Richard Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9 (1985). See Marie-Eve Sylvestre, *Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice*, 55 MCGILL L.J. 771 (2010) (discussing the gap between theory and practice in reference to people’s

Antony Duff accepts that his communicative theory of punishment is not suitable in our present inequitable world.⁶ “[P]unishment is not justifiable within our present legal system; it will not be justifiable unless and until we have brought about deep and far-reaching social, political, legal and moral changes in ourselves and our society.”⁷ Duff believes that our failure to accord all citizens the concern and respect that they deserve provides disadvantaged offenders with the strongest moral basis for resisting punishment, “not because their actions are justified, nor because they ought to be excused, but because we lack the moral standing to condemn them.”⁸

Jeffrie G. Murphy and Andrew von Hirsch abandoned what is termed the “unfair advantage theory of punishment”⁹ because it requires “a heroic belief in the justice of the underlying social arrangements. Unless it is in fact true that our social and political systems have succeeded in providing for mutual benefits for all members including any criminal offender, then the offender has not necessarily gained from others’ law abiding behavior.”¹⁰

“actual material conditions”); see also Claire Finkelstein, *Excuses and Dispositions in Criminal Law*, 6 BUFF. CRIM. L. REV. 317 (2002); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

6. R. A. DUFF, TRIALS AND PUNISHMENTS 294 (1986).

7. *Id.*

8. Anthony [sic] Duff, *Punishment, Citizenship & Responsibility*, in PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT 17, 32 n.17 (Henry Tam ed., 1996).

9. This is the theory that offenders should be punished because they have taken unfair advantage of their victims and the community in general. This theory maintains that the criminal law confers benefits on all persons by prohibiting certain harmful acts and that these benefits can only be enjoyed if all people exercise self-restraint and do not infringe upon the criminal law. Lawbreakers enjoy the benefits conferred by the law, but renounce the obligations (burdens) observed by the rest of the community. They deserve to be punished because, by offending, they have taken unfair advantage of the restraints observed by the rest of the community. Punishment thereby restores the fair balance of benefits and burdens that is disturbed by crime. See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 263–64 (1980) (“[P]unishment rectifies the disturbed pattern of distribution of advantages and disadvantages throughout a community by depriving the convicted criminal . . .”); JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE AND THERAPY 82–115 (1979) (discussing Immanuel Kant and Karl Marx’s theories of criminal punishment and retribution, respectively); WOJCIECH SADURSKI, GIVING DESERT ITS DUE 221–60 (1985) (discussing punishment and the theory of justice); Herbert Morris, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 40 (Jeffrie G. Murphy ed., 1973) (asserting that there is a right to punishment).

10. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 58 (1985). See also Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973).

There is no obvious answer to what ought to be done to remedy the problem of offenders from deprived backgrounds. In this Article, the focus is on the sentencing systems in the United States and Australia. This perspective is apt, given the contrasting approaches to disadvantage in these countries. In Australia, formally at least, disadvantage is a mitigating consideration, whereas it does not reduce penalty harshness in the United States.¹¹ Despite this, as we shall see, the most disadvantaged group in the Australian community (Indigenous Australians) is imprisoned at a proportionally far higher rate than the most disadvantaged group in the United States (African Americans).¹²

I conclude that the solution to the link between poverty and imprisonment rests in conferring a sentencing discount to disadvantaged offenders, but only for certain forms of crimes. No discount is appropriate for serious sexual and violent offenders, because the empirical evidence suggests that these offences are profoundly damaging to the lives of victims and the heinousness of such conduct is something that is appreciated by all non-cognitively impaired people.¹³ Rich or poor, people know it is manifestly wrong to commit assault or violate the sexual autonomy of others.¹⁴ In relation to other less serious offences, a disadvantaged offender discount should apply even though, ultimately, the main determinant of crime seriousness is the impact on the victim, not the culpability of the offender. The criminal justice system should, to some extent, recognise the burden of poverty and its association with crime. This is best done by conferring less severe penalties on disadvantaged offenders for relatively minor offences.

In addition to making socio-economic disadvantage a mitigating factor for certain crime, there is a need to eliminate the significance attached to aggravating factors that unfairly weigh against impoverished offenders. The main consideration to this end is the recidivist premium, whereby repeat offenders are sentenced to considerably harsher penalties than first-time offenders. Disadvantaged offenders generally have more prior

11. See *infra* Part III.

12. *Id.*

13. See C. L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 124 (1987) (discussing the knowledge of a mentally ill offender related to the “nature and quality of the act” being done).

14. See, e.g., *Exodus* 20:13–15, 17 (instructing people not to murder, commit adultery, or steal).

convictions than other offenders.¹⁵ Accordingly, the recidivist loading is applied more frequently and acutely to this group of offenders.¹⁶ This is discriminatory because a close examination of the recidivist loading shows that it is unjustifiable from the normative and empirical perspective.¹⁷

An incidental benefit of ensuring that poverty mitigates penalty for less serious criminal offences is that it would provide institutional recognition of the hardships stemming from poverty and hence increase the likelihood of broader measures being implemented to ameliorate disadvantage. A key aspect of the solution to the link between crime and disadvantage is reducing the social and economic gap between the richest and poorest in the community. Criminal justice scholars are unlikely to strongly influence the measures needed to address this matter.¹⁸ However, we can contribute to the growing number of reasons for remedying this failing. This Article aims to make such a contribution and in particular stresses the need to improve education outcomes for the most disadvantaged.

The backdrop to the Article is developed in the next section (Part II), where I discuss the nature and prevalence of poverty, the hardship caused by imprisonment, and the connection between poverty and imprisonment. This is followed, in Part III, by a discussion of the extent to which poverty currently mitigates penalty severity. Part IV contains the key law reform proposals in the Article, and in particular sets out how the law should be reformed to properly and best accommodate poverty in the sentencing calculus. In Part V, I argue that aggravating factors (in particular, the recidivist premium) that operate unjustly against the poor should be abolished or moderated. The scope and limits of my recommendations are set out in Part VI. The concluding remarks are contained in Part VII and consist of the key recommendations in the Article.

15. See *infra* Part II.

16. See *infra* Part V.

17. *Id.*

18. For a discussion of the limits of sentencing reform, see Leslie Sebba, *Is Sentencing Reform a Lost Cause? A Historical Perspective on Conceptual Problems in Sentencing Research*, 76 LAW & CONTEMP. PROBS. 237 (2013).

II. Scene Setting: Definitional Matters, the Extent of Poverty Among Prison Inmates, the Pain of Imprisonment, and the Connection Between Crime and Poverty

A. Definitional Matters

The term “disadvantaged” can have many different meanings. In this Article, I have confined its coverage or usage to economic disadvantage, that is, persons or prisoners who are on or below the poverty line.

B. Poverty: Its Frequency and Representation in Prison Statistics

Poverty is a significant problem in the United States and Australia. In the United States, 15% of the population live in poverty.¹⁹ In Australia, the portion of the community that lives in poverty is slightly less, namely 12.8%.²⁰

There have been numerous studies that demonstrate a direct link between poverty and crime and consequently higher imprisonment rates for the poor.²¹ The relevant crime statistics

19. See Carmen DeNavas-Walt et al., *Income, Poverty and Health Insurance Coverage in the United States: 2012*, U.S. CENSUS BUREAU 13 (2013), <http://www.census.gov/prod/2013pubs/p60-245.pdf>. This is defined as an annual income of 50% of the official poverty line; for an individual this amounts to \$11,720 annually, and for a family of four it is \$23,492. *Id.* at 51. In 2012, 20.4 million Americans reported an income “below one-half of their poverty threshold.” *Id.* at 18. For a discussion of the poverty defence in the context of an increasing poverty rate, see Gilman, *supra* note 2, at 496.

20. AUSTRALIAN COUNCIL OF SOC. SERV., *POVERTY IN AUSTRALIA* (2012), http://acoss.org.au/uploads/ACOSS%20Poverty%20Report%202012_Final.pdf. Poverty is defined as 50% of the median income (which for an adult is \$18,616 annually, and for a couple with two children is \$39,104 annually). *Id.* at 6. This means that 2.265 million Australians lived in poverty in 2010. *Id.* It was noted that poverty increased one-third of a percentage point from 2003 to 2010. See *id.* at 37.

21. See, e.g., Stuart P. Green, Symposium Article, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders*, 2010 U. CHI. LEGAL F. 43, 48 (2010) (arguing that punishment should depend on poverty, subject to variables like type of crime committed); Harry J. Holzer et al., *The Economic Costs of Childhood Poverty in the United States*, 14 J. CHILD. & POVERTY 41 (2008) (estimating that childhood poverty costs the United States \$500 billion each year); Don Weatherburn & Bronwyn Lind, *What Mediates the Macro-Level Effects of Economic and Social Stress on Crime?*, 39 AUSTL. & N.Z. J. CRIMINOLOGY 384–97 (2006) (noting that parental neglect has a stronger connection with crime than poverty in relation to juveniles, however, there is a strong link between poverty and parental neglect). For a discussion of the link between poverty and homicide, see William Alex Pridemore, *Poverty Matters: A Reassessment of the Inequality–Homicide Relationship in Cross-National Studies*, 51 BRIT. J. CRIMINOLOGY 739 (2011); Paul B. Stretesky et al., *Space Matters: An Analysis of Poverty, Poverty*

that are the most wide-ranging and regularly updated do not directly map poverty and imprisonment.²² Rather, the relationship is typically and best demonstrated by reference to race and imprisonment, and to this end, race is used as a proxy for economic (and social) disadvantage.²³ This is a reliable indicator of poverty, given the breadth and depth of the disadvantage experienced by certain racial minority groups.

It is manifestly clear that in Australia the Indigenous community is the worst off according to a large range of measures of flourishing.²⁴ The Indigenous have the lowest life expectancy in Australia, with the gap between Indigenous males and non-Indigenous males estimated at 11.5 years, and 9.7 years for females.²⁵ In 2012, infant mortality was almost twice as high for Indigenous infants compared to non-Indigenous infants.²⁶ The rate of high school completion for non-Indigenous students was 81%, but only 51% for Indigenous students.²⁷ Indigenous Australians are far less likely to be employed, with their unemployment rate at 17% compared to 4% for non-Indigenous Australians.²⁸ The Indigenous homeless rate is fourteen times that

Clustering, and Violent Crime, 21 JUST. Q. 817 (2004). In relation to the link between poverty and violent crime in general, see Avelardo Valdez et al., *Aggressive Crime, Alcohol and Drug Use, and Concentrated Poverty in 24 U.S. Urban Areas*, 33 AM. J. DRUG & ALCOHOL ABUSE 595 (2007). See also NEW SOUTH WALES DEPT OF JUV. JUST., 2003 NSW YOUNG PEOPLE IN CUSTODY HEALTH SURVEY: KEY FINDINGS REPORT (2003) (discussing the results of a survey into the background, health, and risk behaviours of young Australians in custody); Morgan Kelly, *Inequality and Crime*, 82 REV. ECON. & STAT. 530–39 (2000) (discussing the differential relation between crime types and inequality); Robert E. Larzelere & Gerald R. Patterson, *Parental Management: Mediator of the Effect of Socioeconomic Status on Early Delinquency*, 28 CRIMINOLOGY 301 (1990) (finding that the effect of socioeconomic status on delinquency was not significant after controlling for parental monitoring and discipline).

22. Darren Wheelock & Christopher Uggen, *Race, Poverty and Punishment: The Impact of Criminal Sanctions on Racial, Ethnic, and Socioeconomic Inequality* 13 (Nat'l Poverty Ctr. Working Paper Series, Working Paper No. 6-15, 2006) (discussing how data on the number of prisoners who are impoverished are imperfect and involve a degree of estimation).

23. *Id.* at 11 (noting that “[i]t is virtually impossible to discuss the prevalence of racial and ethnic minorities in criminal justice without discussing crucial group differences in socio-economic backgrounds”).

24. See COUNCIL OF AUSTRALIAN GOVERNMENTS, *CLOSING THE GAP IN INDIGENOUS DISADVANTAGE*, available at http://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage.

25. AUSTRALIAN INST. OF HEALTH AND WELFARE, *AUSTRALIA'S WELFARE* 2013 405, 409 (2013).

26. *Id.* at 410.

27. *Id.* at 425.

28. *Id.* at 434.

of non-Indigenous Australians,²⁹ and the average income for Indigenous Australians is 0.7 that of non-Indigenous Australians.³⁰

A similar situation of relative disadvantage exists in the United States in relation to African Americans. In relation to income and poverty measures, the bleakness of the situation is highlighted by a report noting that the wealth disparity has not improved over the past fifty years and is in fact worsening.³¹ The unemployment rate of African Americans is approximately double that of White Americans.³² The median household income of African Americans is \$32,068, while for White Americans it is \$54,620.³³ The African American poverty rate is nearly three times that of White Americans: 28% compared to 10%.³⁴ White Americans live, on average, 3.8 years longer than African Americans.³⁵ The high school completion rate of African Americans is approximately 62% compared to 80% for Whites.³⁶

In the United States and Australia, African Americans and Indigenous Australians, respectively, have the highest rates of imprisonment. The disproportionate rate at which these groups are imprisoned is profound. The rate of imprisonment of African Americans in the United States is more than six times higher than the White American population.³⁷ Bruce Western and Becky Pettit

29. *Id.* at 418.

30. NICHOLAS BIDDLE, CAEPR INDIGENOUS POPULATION PROJECT: 2011 CENSUS PAPERS, PAPER 11 INCOME 5 (2013). In 2006, the portion of Indigenous people who had an annual income between \$1 and \$149 was 9.5%, while in 2011 about 12.5% had an annual income between \$1 and \$199. For the same time period and income bracket, the percentages of non-Indigenous people were 7.6% and 7.9%, respectively. *Id.* at 5, 7.

31. Brad Plumer, *These Ten Charts Show the Black-White Economic Gap Hasn't Budged in 50 Years*, WONKBLOG (Aug. 28, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/28/these-seven-charts-show-the-black-white-economic-gap-hasnt-budged-in-50-years/> (summarizing data taken from official government sources).

32. *Id.* (noting that 12.6% of African Americans are unemployed compared to 6.6% of White Americans).

33. *Id.*

34. *Id.*

35. KENNETH D. KOCHANET AL., HOW DID CAUSE OF DEATH CONTRIBUTE TO RACIAL DIFFERENCES IN LIFE EXPECTANCY IN THE UNITED STATES IN 2010?, NCHS Data Brief, no. 125 (July 2013) (showing that the average age of death for White persons was 78.9 years, compared to 75.1 years for African Americans), available at <http://www.cdc.gov/nchs/data/databriefs/db125.htm>.

36. Christopher B. Swanson & Sterling C. Lloyd, *Graduation Rate Approaching Milestone*, EDUC. WEEK (May 31, 2013), <http://www.edweek.org/ew/articles/2013/06/06/34analysis.h32.html>.

37. Heather C. West et al., *PRISONERS IN 2009*, U.S. DEP'T OF JUSTICE (2010), available at <http://bjs.gov/content/pub/pdf/p09.pdf> [hereinafter U.S. DEP'T OF JUST. 2009]. See PRISON REFORM TRUST, BROMLEY PRISON FACTFILE (2012),

show that the rate of incarceration of African American men who have dropped out of high school in the United States has surged from 10% in 1980 to 37% in 2008.³⁸ Remarkably, by 2008, African American males under age thirty-five who had not completed high school were more likely to be imprisoned than employed, and more than two-thirds of African American males who have not completed high school are expected to serve time in prison at some point in their lives.³⁹

In Australia, the over-representation of Indigenous prisoners in the total prison population is even greater, currently reaching a disturbing ratio of 15:1 compared to the rest of the community.⁴⁰ This is approximately 2.5 times the over-representation rate of African Americans in United States imprisonment.⁴¹ The United States has overall a much higher rate of imprisonment than Australia: 626 per 100,000 adult population⁴² compared to 170 per 100,000 adult population.⁴³ As an aside, this means that the rate of imprisonment of African Americans compared to Indigenous Australians is approximately one-fourth more.⁴⁴ In Australia, it is 1914 per 100,000 of the Indigenous population,⁴⁵ while in the United States it is over 3000 per 100,000 of the African American population.⁴⁶ Thus, while the over-representation rate of Indigenous Australians compared to White Australians is higher than the corresponding measure relating to African Americans in

available at <http://www.prisonreformtrust.org.uk/Portals/0/Documents/FactfileJune2012.pdf> (showing that the over-representation of racial minorities in the United Kingdom is similar).

38. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 10 (2010).

39. *Id.* at 12, 16.

40. AUSTRALIAN BUREAU OF STAT., 4517.0 - PRISONERS IN AUSTRALIA (2013), available at <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/BD0021D329F0464FCA257B3C000DCCE0?opendocument>.

41. Compare U.S. DEP'T OF JUST. 2009, *supra* note 37 (finding that six times more African Americans are imprisoned than White Americans in the U.S.), with AUSTRALIAN BUREAU OF STAT., *supra* note 40 (finding that Indigenous prisoners outnumber non-Indigenous by a ratio of 15:1 in Australia).

42. E. Ann Carson & Daniela Golinelli, *PRISONERS IN 2012 - ADVANCE COUNTS*, U.S. DEP'T OF JUSTICE (2013), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4737>.

43. AUSTRALIAN BUREAU OF STAT., *supra* note 40.

44. Compare U.S. DEP'T OF JUST. 2009, *supra* note 37 (finding that 626 per 100,000 adults are imprisoned in the U.S.), with AUSTRALIAN BUREAU OF STAT., *supra* note 40 (finding that 170 per 100,000 adults are imprisoned in Australia).

45. AUSTRALIAN BUREAU OF STAT., *supra* note 40.

46. Paul Guerino et al., *PRISONERS IN 2010*, U.S. DEP'T OF JUSTICE 7 (2011) [hereinafter U.S. DEP'T OF JUST. 2010].

the United States, the latter group is still imprisoned at a higher rate than Indigenous Australians.⁴⁷

C. *The Pain of Imprisonment*

Apart from the exceptional case of execution, the harshest punitive sanction that the communities in the United States and Australia may impose on their citizens is imprisonment.⁴⁸ This is the sharp end of sentencing. It is important that this penalty is imposed only in appropriate circumstances given the enormity of what is at stake. The impact of incarceration is seriously debilitating.⁴⁹ The direct adverse impact of prison conditions has been well documented, and, it has been known for several decades that the “pains” of imprisonment extend far beyond the deprivation of liberty.⁵⁰ Other negative consequences of imprisonment include:

- 1) the deprivation of goods and services;⁵¹
- 2) the deprivation of heterosexual relationships;⁵²
- 3) the deprivation of autonomy;⁵³ and
- 4) the deprivation of security.⁵⁴

Less well-known are the wider harms caused by imprisonment. Imprisonment has an adverse effect on well-being measures long after the conclusion of the sentence, even to the point of significantly reducing life expectancy.⁵⁵

A study which examined the 15.5-year survival rate of 23,510 prisoners who were imprisoned on June 30, 1991, in the State of Georgia, found much higher mortality rates for ex-prisoners than for the rest of the population.⁵⁶ Also, the mortality rate during

47. Compare the results of *supra* note 41, with AUSTRALIAN BUREAU OF STAT., *supra* note 40, and U.S. DEP'T OF JUST. 2010, *supra* note 46.

48. See my observations in Part III of this Article regarding the relevance of capital cases to this discussion. Australia has abolished the death penalty.

49. GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 63 (1958).

50. *Id.* at 64.

51. *Id.* at 67.

52. *Id.* at 70.

53. *Id.* at 73.

54. *Id.* at 76. See also Robert Johnson & Hans Toch, *Introduction*, in *THE PAINS OF IMPRISONMENT* 17 (Robert Johnson & Hans Toch eds., 1982) (“Sykes . . . five basic deprivations . . . together dealt a ‘profound hurt’ that went to ‘the very foundations of the prisoner’s being.’”).

55. Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479 (2011).

56. *Id.*

incarceration was much lower than for the post-release period.⁵⁷ There were 2650 deaths in total, which was a 43% higher mortality rate than normally expected (799 more ex-prisoners died than expected).⁵⁸ The main causes for the increased mortality rates were homicide, transportation injuries, accidental poisoning (which included drug overdoses), and suicide.⁵⁹

Moreover, imprisonment has a considerable impact on economic opportunity, because it leads to diminished employment opportunities⁶⁰ and reduces lifetime earnings by up to 40%.⁶¹ The hardship of prison transcends the trajectory of former prisoners. Males who have been imprisoned are four times more likely to assault their partners than men who have never been imprisoned.⁶²

Imprisonment is obviously meant to be a stern punishment. However, the extent to which it sets back the interests of offenders is not manifest. Given the damaging impact it can have on the life journey of offenders, it is essential that this disposition is appropriately utilised. The disproportionate use of imprisonment in defined sections of the community requires close analysis. This is the focus of the remainder of the Article.

D. The Link Between Crime and Poverty

The reasons for the connection between poverty and crime are multi-faceted and not fully understood. The increased inclination toward crime resulting from disadvantage stems broadly from the lack of resources and opportunities that are an almost unavoidable aspect of economic deprivation.⁶³ Crime often results from frustration-aggression,⁶⁴ which can stem from being subjected to inequality that is entrenched by poverty, poor schools, violent neighbourhoods, racism, and single-parent families.⁶⁵ Further, it is established that poverty negatively affects the

57. *Id.*

58. *Id.* at 482.

59. *Id.* at 484.

60. Wheelock & Uggen, *supra* note 22, at 18.

61. Western & Pettit, *supra* note 38, at 13.

62. *Id.* at 15.

63. See Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114, 117 (1982).

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

65. Delgado, *supra* note 5, at 23–24.

development of children, contributing to poor impulse control, low self-esteem, and reduced educational achievements, all of which are conducive to harmful activity such as crime.⁶⁶

Poor children . . . are more likely to be exposed to more environmental toxins and pollutants, and to live in less sanitary and lower quality homes that, in turn, tend to be located in places that are dangerous and physically deteriorated. Children who live in low income areas also tend to attend poorer quality schools and receive substandard overall municipal and social services. Thus, the environmental injustices to which the poor are subjected affect their children in numerous ways.⁶⁷

An individual's experiences, especially early in life, have a profound impact on the decisions, choices, and actions they perform. Craig Haney has observed:

[R]esearch confirms that traumas experienced earlier in someone's life—whether caused by structural forces like poverty and the effects of racial discrimination, or more direct forms of maltreatment like parental abuse and neglect—can be deeply 'criminogenic' (that is, persons exposed to them have a higher probability of subsequently engaging in crime).⁶⁸

Accordingly, the environment of poor children inclines them to delinquency and destructive conduct.⁶⁹ The lack of resources associated with poverty diminishes the capacity of parents to nurture and correct aberrant behaviour before it becomes socially and individually destructive.⁷⁰ Poverty is also closely associated with child neglect, which carries associated and considerable independent damaging effects.⁷¹ Lack of exposure to appropriate role models and normative standards are also key catalysts for committing crime.⁷² Additionally, there is an established link between poverty and victimisation. Poor people are far more likely to be the victims of most forms of crime, including serious

66. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 865–66 (2008).

67. *Id.* at 871.

68. *Id.* at 857.

69. *Id.* at 871–72.

70. See Lawrence D. Bobo, *Crime, Urban Poverty and Social Science*, 6 DU BOIS REV.: SOC. SCI. RES. ON RACE 273 (2009); Delgado, *supra* note 5, at 27–28, 33; Michael B. Greene, *Chronic Exposure to Violence and Poverty: Interventions That Work for Youth*, 39 CRIME & DELINQ. 106 (1993).

71. Julie L. Crouch & Joel S. Milner, *Effects of Child Neglect on Children*, 20 CRIM. JUST. & BEHAV. 49 (1993); Haney, *supra* note 66, at 866–68.

72. PER-OLOF H. WIKSTRÖM ET AL., *BREAKING RULES: THE SOCIAL AND SITUATIONAL DYNAMICS OF YOUNG PEOPLE'S URBAN CRIME* (2012); Joan McCord & William McCord, *The Effects of Parental Role Model on Criminality*, 14 J. SOC. ISSUES 66 (1958).

sexual and violent offences.⁷³ For example, the rate of victimisation of people from households earning less than \$7500 per year is nearly three times that of people in households earning more than \$75,000 annually.⁷⁴ In poor communities, exposure to criminal activity normalises it, thereby diminishing the disinclination to engage in such activity.⁷⁵

A broader reason for the link between poverty and crime is the choice-limiting effect of deprivation.⁷⁶ People have free will.⁷⁷ Even against a backdrop of a deterministic theory of human action, it is accepted that there is a role for moral and legal responsibility.⁷⁸ Yet, there are degrees of freedom.⁷⁹ It is for this reason that when choice is limited to a profound degree, it can constitute a defence to crime, as in the recognised defences of necessity or duress.⁸⁰ It is the capacity of poverty to limit choice, especially in a manner that inclines people to criminal behaviour, making it more tenable to suggest that the poor are less culpable when they commit crime.

It is not suggested that poverty directly causes crime—most poor people do not commit crime.⁸¹ In relation to the overrepresentation of African Americans in prisons, a recent study of

73. See U.S. DEPT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE U.S., 2003 STATISTICAL TABLES (2005), tbl.14.

74. Wheelock & Uggen, *supra* note 22, at 15–16, fig.5 (showing that African Americans are the most victimised group in the United States).

75. See also McCord & McCord, *supra* note 72, at 69 (researching the effect of a criminal parental role model and finding that “sons of criminals had a significantly higher incidence of criminality than did sons of non-deviants”).

76. See Gilman, *supra* note 2, at 507–10 (discussing the theory that poverty creates constrained choices, thus necessitating a defence acknowledging the “coercive effects of deprivation”).

77. See HART, *supra* note 4, at 180–84.

78. See Robert Young, *The Implications of Determinism*, in A COMPANION TO ETHICS 534 (Peter Singer ed., 1991) (explaining that deterministic theory states that all human action is causally determined); see also Stephen J. Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147, 149 (2011) (“[I]f causation or determinism per se were an excuse, no one would ever be responsible for any behavior.”) [hereinafter Morse I].

79. See HART, *supra* note 4, at 180–84 (arguing that responsibility should be reinterpreted to “stress the much more nearly universal ideas of fairness or justice and of the value of individual liberty”).

80. For a discussion of the excuses in the criminal law, see TEN, *supra* note 13, at 86–122. For a discussion regarding the importance of human choice to criminality, see HART, *supra* note 4, at 180–84. The analogy with the defences of necessity and duress, so far as sentencing is concerned, is discussed below.

81. See, e.g., Green, *supra* note 21, at 47 (pointing out that studies that show a lower income makes one more likely to commit crime does not mean that “all or even a particularly significant percentage of impoverished people commit crime . . .”).

the relevant considerations noted that a range of other factors is also at work.⁸² On the whole, “study findings suggest that a variety of factors, including law enforcement practices, crime rates, and punitive sentencing policies, contribute to racial disparities in criminal justice involvement.”⁸³ The extent to which these considerations operate independently or cumulatively with poverty in the context of criminal behaviour is unclear. However, it is manifest that there is a connection between disadvantage and crime.

In a nutshell, people do not choose poverty. Economic disadvantage limits choice and can foster frustration and rebellion.⁸⁴ It also means that people have less to lose. By contrast, wealth confers freedom, comfort, and power. It also provides a motivation to maintain and improve one’s current situation and a sense of optimism. The reason that financially prosperous people often do not commit crime is because they have too much to lose from the incidental adverse consequences of a conviction, including the negative impact on their employment, reputation, and resource base. Poverty of itself often does not lead to criminality, however, when combined with certain other immediate circumstances, it may do so.⁸⁵

Thus, from a pragmatic perspective, given that the disadvantaged have a number of factors that incline them towards crime and have less to lose by engaging in such conduct, they are less culpable when they transgress the criminal law. The disadvantaged are less morally blameworthy for criminal acts because, relatively speaking, well-off individuals find it easier to comply with the criminal law and have a greater motivation to do so. This provides a tenable foundation for inflicting less severe sanctions on impoverished offenders. In order to analyse the desirability of this approach, I will now examine the existing relevant law.

82. THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 6 (2008).

83. *Id.*

84. See Gilman, *supra* note 2, at 507–10 (“[A] person commits what would otherwise be a crime due to a choice between two evils: he must violate the criminal law or someone will suffer a greater harm.”).

85. Haney, *supra* note 66, at 863 (“[T]here is now widespread recognition of the causal role of both past social history *and* immediate or present circumstances in shaping a person’s behavior, including his criminal behavior.”).

III. The Current Approach to Poverty as Both a Criminal Defence and as a Part of Sentence Mitigation

A. *United States*

There are two ways in which the economic situation of an offender can be accommodated within the criminal justice process. One way, and the most significant way, is as a criminal defence. The second, and less drastic way, is as a mitigating factor in sentencing. While this Article focuses on the second issue, there is an overlap between the relevant concepts, which merits a brief discussion of the possible role of poverty as a criminal defence. While poverty is not a criminal defence,⁸⁶ there has been a relatively rich discussion of the issue in academic literature.⁸⁷ The only reported decision in the United States where it has been suggested that disadvantage should minimise criminal responsibility is the judgment by Judge Bazelon in *United States v. Alexander*.⁸⁸ This decision relates to the applicability of social deprivation in the context of the insanity defence, as opposed to when mitigating a sentence. However, doctrinally speaking, similar considerations apply.

In his dissent, Judge Bazelon stated that a “rotten social background” (i.e., severe economic and social deprivation) should be available as a defence to a crime where it prevents a defendant from acting out of free choice.⁸⁹ In this case, Benjamin Murdock, an African American defendant, was charged with two counts of second-degree murder as a result of shooting and killing two

86. Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 81–82 (2011).

87. See Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and 'Rotten Social Background'*, 2 ALA. C.R. & C.L. L. REV. 53 (2011) (discussing the rotten social background as a form of coercive indoctrination); see also Stephen J. Morse, *Deprivation and Desert*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE 114, 153 (William C. Heffernan & John Kleinig eds., 2000) (stating “No convincing theory suggests that deprived offenders are less morally responsible simply because they are deprived and therefore deserve excuse or mitigation on that basis alone”) [hereinafter Morse II]; Morse I, *supra* note 78 (discussing how a severe emotional background defence may be a tragedy but is not a defence to a crime); Taslitz, *supra* note 86 (discussing why Richard Delgado's rotten social background theory has played an important role in scholarship of criminal responsibility, but not in case law).

88. *United States v. Alexander*, 471 F.2d 923 (1973). See Gilman, *supra* note 2 (noting poverty is actually recognised as a defence in child neglect cases; however, it is not clear that a defence to a crime that is committed unintentionally is readily transferrable to other forms of crime); Taslitz, *supra* note 86, at 80.

89. *Alexander*, 471 F.2d at 959–60.

White customers of a fast food store, one of whom racially abused him.⁹⁰ He asserted an insanity defence based on the contention that his rotten social background denied him the ability to control his behaviour.⁹¹ At trial, he was convicted and the jury was instructed to ignore his social deprivation in determining guilt and instead focus on his criminal responsibility.⁹² His conviction was affirmed on appeal.⁹³ In his dissent, Judge Bazelon stated that mental illness could not be properly considered by the jury without taking into account the social background of Murdock. Judge Bazelon stated:

McDonald [the trial judge] defined mental illness for purposes of the responsibility defense as an abnormal condition of the mind that ‘substantially affects mental or emotional processes and substantially impairs behavior controls.’ The thrust of Murdock’s defense was that the environment in which he was raised—his ‘rotten social background’—conditioned him to respond to certain stimuli in a manner most of us would consider flagrantly inappropriate. Because of his early conditioning, he argued, he was denied any meaningful choice when the racial insult triggered the explosion in the restaurant. He asked the jury to conclude that his ‘rotten social background,’ and the resulting impairment of mental or emotional processes and behavior controls, ruled his violent reaction in the same manner that the behavior of a paranoid schizophrenic may be ruled by his ‘mental condition.’ Whether this impairment amounted to an ‘abnormal condition of the mind’ is, in my opinion, at best an academic question. But the consequences we predicate on the answer may be very meaningful indeed.

We have never said that an exculpatory mental illness must be reflected in some organic or pathological condition. Nor have we enshrined psychosis as a prerequisite of the defense. But our experience has made it clear that the terms we use—‘mental disease or defect’ and ‘abnormal condition of the mind’—carry a distinct flavor of pathology. And they deflect attention from the crucial, functional question—did the defendant lack the ability to make any meaningful choice of action—to an artificial and misleading excursion into the thicket of psychiatric diagnosis and nomenclature.⁹⁴

The sentiment behind the reasoning of Judge Bazelon has not struck a chord with legislatures and courts for several reasons. First, it has been contended that there is no proof that poverty

90. *Id.* at 928–29.

91. *Id.* at 959.

92. *Id.* at 948, 956–59.

93. *Id.* at 968.

94. *Id.* at 960–61.

causes crime.⁹⁵ Most poor people do not commit crime.⁹⁶ While there is a correlation between crime and poverty, it does not establish a causal link.⁹⁷ This is an important observation for the purposes of this Article. The concept of causation, especially in the legal domain, is a conceptually complex concept and there is no universally accepted theory of causation.⁹⁸ While causation may be a necessary requirement to establish in order for poverty to ground a legal defence, this is not the case in relation to it acting as a mitigating factor. As is discussed in Part IV of this Article, in order for economic deprivation to mitigate penalty, it is enough (though it may not be sufficient) to establish that poverty inclines people towards crime.

Second, it has been noted that pragmatically it would be difficult to establish the exact scope and operation of the defence.⁹⁹ Third, excusing poor offenders from the criminal consequences of their actions would erode community safety.¹⁰⁰ Finally, it has been suggested that it is beyond the scope and objective of the criminal law to excuse conduct stemming from broader social problems, which the criminal law is not equipped to rectify.¹⁰¹ The objective of the criminal law is to condemn harmful acts, not to correct social and economic problems.¹⁰² Criminal courts are not equipped to cure social injustices.¹⁰³ It is for these reasons that, while rotten social background as a criminal defence has generated some scholarly discussion, it has had “no role whatsoever in the evolution of case and statutory law.”¹⁰⁴

In order to understand the current relevance of offender poverty to sentencing, it is necessary to provide a brief overview of the sentencing landscape. Each state of the United States has its

95. Robinson, *supra* note 87, at 10.

96. Delgado, *supra* note 5, at 10.

97. Robinson, *supra* note 87, at 59.

98. H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 27–28 (2d ed. 1985). *See also* THE OXFORD HANDBOOK OF CAUSATION (Helen Beebee et al. eds., 2009).

99. Robinson, *supra* note 87, at 59–61. *See also* Morse I, *supra* note 78, at 157.

100. Morse I, *supra* note 78, at 158.

101. Morse II, *supra* note 87, at 115.

102. Morse I, *supra* note 78, at 158.

103. *Id.* at 156–58 (making a similar observation regarding not making poverty a defence to crime).

104. Taslitz, *supra* note 86, at 80 (suggesting that the defence has not been accepted because it rests on the premise that part of the blame rests on society. This, in turn, violates important assumptions underpinning the criminal law, including that culpability cannot be shared between an offender and others, especially between an offender and society. Also, society cannot be ascribed with criminal responsibility because it cannot have a mental state.).

own sentencing system; there is considerable divergence across the respective regimes.¹⁰⁵ The federal jurisdiction also has a discrete sentencing system, which is important because of the large number of offenders sentenced under this system and the doctrinal influence it has at the state level.¹⁰⁶ Despite the sentencing variations across the United States, several key commonalities and themes exist.

The key distinguishing aspect of the United States sentencing system compared to that of Australia (and most other sentencing systems in the world),¹⁰⁷ is the wide-ranging use of mandatory minimum penalties, which in some form exist in every state.¹⁰⁸ As noted by Douglas Berman and Stephanos Bibas, “over the last half-century, sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of rules.”¹⁰⁹

These mandatory minimum penalties are often set out in sentencing grids, which typically use a criminal history score and offence seriousness to calculate the penalty.¹¹⁰ None of these policies and practices have emanated from a clear theoretical foundation, but rather stemmed from “back-of-an-envelope

105. *United States v. Morrison*, 529 U.S. 598, 609–11 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)) (noting that sentencing and, more generally, the criminal law in the United States is mainly the province of states).

106. Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40–41 (2006).

107. *See* UNIV. OF S.F. SCH. OF LAW, CTR. FOR LAW AND GLOBAL JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 46–47 (2012) (noting that 137 of 168 surveyed countries had some form of minimum penalties but none was as wide-ranging or severe as in the United States).

108. *Id.* at 45. *See also* Berman & Bibas, *supra* note 106, at 47 (“Meanwhile, in the 1960s and 1970s, scholars and criminal justice professionals began to criticize broad judicial sentencing discretion. Evidence suggested that similar defendants often received dissimilar sentences, and some studies found sentence disparities that correlated with offenders’ race, sex, and wealth. Troubled by disparities, the specter of discrimination, rising crime, and the inefficacy of rehabilitation, criminal-justice experts proposed broad sentencing reforms to improve consistency and certainty. Legislatures soon listened.”). For further background, see Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295 (2013) (advocating for sending fewer people to prison for shorter amounts of time); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005) (analysing critical areas of diversity and consensus in both guidelines design and in the philosophical and policy goals of sentencing guideline reform across states).

109. Berman & Bibas, *supra* note 106, at 40.

110. Which is based mainly on the number, seriousness, and age of the prior conviction.

calculations and collective intuitive judgments.”¹¹¹ Despite this, there is a convergence of approach:

Modern sentencing reforms have repudiated rehabilitation as a dominant goal of sentencing. Many structured sentencing laws, including many guideline sentencing systems and severe mandatory minimum sentences, are designed principally to deter, incapacitate, and punish offenders.¹¹²

The most extensively analysed fixed penalty laws are in the United States Sentencing Commission Guidelines Manual (“the Federal Sentencing Guidelines”).¹¹³ These Federal Sentencing Guidelines are no longer mandatory in nature, following the U.S. Supreme Court decision in *United States v. Booker*.¹¹⁴ However, sentences within guideline ranges are still imposed in approximately 60% of cases.¹¹⁵ Sentence enhancements apply to most types of offences, including drug, fraud, and immigration crime.¹¹⁶ A United States Sentencing Commission Report in 2011

111. Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, in PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 91, 93 (Julian V Roberts & Andrew von Hirsch eds., 2010) [hereinafter PREVIOUS CONVICTIONS]. For criticism of the guidelines, see Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005); James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173 (2010).

112. Berman & Bibas, *supra* note 106, at 48.

113. FED. SENTENCING GUIDELINES MANUAL (2012), available at http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf [hereinafter GUIDELINES I].

114. See Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); see also *Pepper v. United States*, 131 S. Ct. 1229 (2011) (finding that when a defendant’s sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of the defendant’s rehabilitation since his prior sentencing, and such evidence may support a downward variance from the advisory Federal Sentencing Guidelines range); *Irizarry v. United States*, 553 U.S. 708 (2008) (holding a sentence outside the Federal Sentencing Guidelines carries no presumption of unreasonableness); *Greenlaw v. United States*, 554 U.S. 237, 255–59 (2008) (holding that absent a government appeal or cross-appeal, the sentence defendant receives cannot be increased by the Court of Appeals); *Rita v. United States*, 551 U.S. 338 (2007) (giving judges discretion to make decisions outside the scope of sentencing guidelines); *Gall v. United States*, 552 U.S. 38 (2007) (holding that there is no rule that requires “extraordinary” circumstances to justify a sentence outside Federal Sentencing Guidelines range); *United States v. Booker*, 543 U.S. 220 (2005) (holding that aspects (the guarantee of trial by jury) of the guidelines that were mandatory were contrary to the Sixth Amendment).

115. Russell, *supra* note 114, at 1160.

116. *Id.* at 1157 n.112.

noted that the number of offences with set terms is increasing and the terms were increasing.¹¹⁷

In terms of establishing the appropriate sentence, apart from offence severity, the other key variable that determines the sanction is the prior history of the offender.¹¹⁸ In relation to most offences, an extensive criminal history can approximately double the presumptive sentence. For example, an offence at level fourteen¹¹⁹ in the Federal Sentencing Guidelines¹²⁰ carries a presumptive penalty for a first time offender of imprisonment for fifteen to twenty-one months, which increases to thirty-seven to forty-six months for an offender with thirteen or more criminal history points.¹²¹ For an offence at level thirty-six, a first time offender has a presumptive penalty of 188 to 235 months, which increases to 324 to 405 months for an offender with the highest criminal history score.¹²² Thus, a bad criminal history can add between 136 to 170 months (over fourteen years) to a jail term.¹²³

The key aspect of this sentencing regime for the purposes of this Article is that poverty is irrelevant to the determination of a sentence.¹²⁴ There is no formal or informal mechanism for accommodating this disadvantage into sentencing.¹²⁵ However, for reasons discussed in Part V, it is noteworthy that prior criminal history is a weighty aggravating factor in determining a sentence.

117. Memorandum from the Office of Gen. Counsel to U.S. Sentencing Comm'rs (May 20, 2011) [hereinafter Memorandum]. See also David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 223 n.86 (2004) (citing Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 388, 441 (1996) ("[T]he guidelines are superior to mandatory minimums because . . . [the] Commission not only has developed relatively narrow ranges within which a judge is to sentence an offender, but it has also provided a limited opportunity for departure.")).

118. Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1110–11 (2008) (stating the importance of the prior history of the offender in sentencing considerations).

119. GUIDELINES I, *supra* note 113, at 11, 62, 66, 138 (describing offence levels as ranging from one (least serious) to forty-three (most serious). Examples of level 14 offences are criminal sexual abuse of a ward; failure to register as a sex offender (tier II) and bribery).

120. *Id.* at 394.

121. *Id.* (stating that the criminal history score ranges from zero (least offending record) to thirteen or more (worst offending record)).

122. *Id.*

123. *Id.* The highest criminal score range of 324–405 subtracting the first time offender range of 188–235 gives us this number. See *id.*

124. See *id.*

125. *Id.*

There is one exception to the irrelevance of poverty to sentencing in the United States.¹²⁶ This is in relation to death penalty cases,¹²⁷ where the capital mitigation doctrine enables a jury to take into account a number of considerations in determining whether an accused should be spared the death penalty.¹²⁸ The connection between poverty and crime has been acknowledged by the U.S. Supreme Court for nearly thirty years.¹²⁹ In *California v. Brown*, Justice O'Connor noted "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."¹³⁰

The number of executions in the United States annually is relatively small and constitutes a numerically negligible portion of all criminal sentences in the United States.¹³¹ Accordingly, capital mitigation considerations have not been infused into the general norms of sentencing law and practice. This is also explained by the fact that capital penalty cases (given the permanency and dramatic nature of the penalty) are set apart from all other sentencing cases.¹³² However, as we shall see below, from the

126. Haney, *supra* note 66, at 844. ("A mitigating counter-narrative that incorporates a capital defendant's social history and immediate life circumstances is now recognized as the centerpiece of an effective penalty phase trial.")

127. *Id.* at 845–55.

128. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (vacating death sentence and remanding because the state court refused to consider as a mitigating circumstance the petitioner's "unhappy upbringing and emotional disturbance," including "evidence of a turbulent family history . . . [and] beatings by a harsh father . . ."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that mitigation is very broad because it includes any matter that serves "as a basis for a sentence less than death"); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding that the requirement of mandatory death without consideration of the character and record of defendant or the details of the offence was inconsistent with principles of the Eighth Amendment); *Gregg v. Georgia*, 428 U.S. 153 (1976) (allowing mitigating factors to be considered in sentencing to provide guidance to the sentencing authority and reduce the likelihood that it will impose an arbitrary sentence).

129. *California v. Brown*, 479 U.S. 538 (1987).

130. *Id.* at 545. See also *Wiggins v. Smith*, 539 U.S. 510 (2003) (holding counsel's decision not to investigate client's background for further mitigating evidence fell short of professional standards of conduct).

131. STATES WITH AND WITHOUT THE DEATH PENALTY, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 2, 2014). Thirty-two states in the U.S. still have the death penalty. *Id.* Between 1976 and September 18, 2014, there have been 1389 executions. EXECUTIONS BY YEAR SINCE 1976, <http://www.deathpenaltyinfo.org/executions-year> (last visited Oct. 2, 2014) (noting that there were forty-three executions and thirty-nine executions in 2012 and 2013, respectively).

132. *Lockett*, 438 U.S. at 605 ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for

doctrinal perspective, the observation by the U.S. Supreme Court that poverty can reduce culpability is relevant to the broad nature of mitigation.¹³³

For the sake of completeness, it is relevant to note that in one instance the U.S. Supreme Court has made an indirect link between poverty and sentence reduction in a non-capital case.¹³⁴ In *Miller v. Alabama*, the Court ruled that mandatory life imprisonment without parole in regards to offenders under the age of eighteen breached the prohibition against cruel and unusual punishment in the Eighth Amendment.¹³⁵ In doing so, the majority of the Court stated that maltreatment (which is more commonly associated with poverty) is a factor that diminishes culpability:

[I]f ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten.¹³⁶

It is important to not overstate the significance of this observation for the purposes of this Article. The link between poverty and crime is not the key basis for this decision.¹³⁷ Yet, the above quote does indicate receptivity by judges towards the concept that poverty can reduce criminal responsibility and culpability.

B. Australia

Sentencing in each of the nine Australian jurisdictions (the six states, the Northern Territory, the Australian Capital Territory, and the Federal jurisdiction) is governed by a combination of legislation and the common law.¹³⁸ While sentencing law differs in each Australian jurisdiction, considerable convergence exists in relation to key areas.¹³⁹ For the purposes of this Article, the key point of importance regarding sentencing in

treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.”).

133. The argument is developed in Part IV of this Article.

134. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

135. *Id.* at 2460.

136. *Id.* at 2469.

137. Instead, the decision was based on the concerns that by failing to take into account an offender's age and specific characteristics, there was a risk of disproportionate punishment. *Id.* at 2467–68.

138. LIBRARY OF CONGRESS, SENTENCING GUIDELINES: AUSTRALIA, available at <http://www.loc.gov/law/help/sentencing-guidelines/australia.php#Judgments>.

139. *Id.*

Australia is that it is largely a discretionary process in which judges process hundreds of potentially aggravating and mitigating considerations.¹⁴⁰

In contrast to the United States, fixed penalties for serious offences in Australia are rare.¹⁴¹ The overarching methodology and conceptual approach that sentencing judges undertake in making sentencing decisions is the same in each jurisdiction.¹⁴² This approach is known as “instinctive synthesis.”¹⁴³ The term originates from the forty-year-old Full Court of the Supreme Court of Victoria decision of *R v Williscroft*, where Justices Adam and Crockett stated: “Now, ultimately every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.”¹⁴⁴ The High Court of Australia has considered the general methodology for reaching sentencing decisions on several occasions.¹⁴⁵ The Court has consistently adopted the instinctive synthesis approach and rejected the alternative, which is normally referred to as the two-step approach.¹⁴⁶ The alternative approach involves a court setting an appropriate sentence commensurate with the severity of the offence and making allowances up and down in light of relevant aggravating and mitigating circumstances.¹⁴⁷

The proportionality principle is adopted in all jurisdictions.¹⁴⁸ A clear statement of the principle of proportionality is found in the High Court case of *Hoare v The Queen*: “[A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances.”¹⁴⁹ In *Veen v The Queen (No. 1)*¹⁵⁰ and *Veen v The Queen (No. 2)*¹⁵¹ the High Court stated

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *R v Williscroft* [1975] VR 292, 300.

145. See, e.g., *Channon v R* (1978) 20 ALR 1; *R v Williscroft* [1975] VR 292.

146. RICHARD EDNEY & MIRKO BAGARIC, AUSTRALIAN SENTENCING: PRINCIPLES AND PRACTICE 17 (2007) (stating that the prevailing sentencing technique in Australia is instinctive synthesis).

147. JOANNA SHAPLAND, BETWEEN CONVICTION AND SENTENCE: THE PROCESS OF MITIGATION 43 (1981) (discussing how an offender has the opportunity to rebut the prosecution’s recommended sentence in his mitigation speech).

148. EDNEY & BAGARIC, *supra* note 146, at 97.

149. *Hoare v The Queen* (1989) 167 CLR 348, 354 (emphasis original).

150. *Veen v The Queen (No. 1)* (1979) 143 CLR 458, 467.

that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which at various times has also been declared as the most important aim of sentencing.¹⁵² Thus, in the case of dangerous offenders, while community protection remains an important objective, at common law it cannot override the principle of proportionality.¹⁵³ It is for this reason that preventive detention is not sanctioned by the common law.¹⁵⁴ Proportionality has also been given statutory recognition in all Australian jurisdictions.¹⁵⁵

Another important commonality in all Australian jurisdictions is that aggravating and mitigating factors operate relatively uniformly throughout the country, despite the different ways in which they are dealt with by statute.¹⁵⁶ These considerations stem mainly from the common law and are continually evolving. There are between 200 and 300 such factors.¹⁵⁷ Key mitigating considerations include: a plea of guilty; assistance to law enforcement authorities; remorse; voluntary

151. *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 472.

152. *See Channon v R* (1978) 20 ALR 1, 5 (stating that the single purpose of criminal sanctions is to protect society and the community from further criminal actions).

153. *R v Chivers* (1993) 1 Qd R 432, 437–38 (comparing proportionality with societal protection in regards to sentencing determinations).

154. *Chester v The Queen* (1988) 165 CLR 611, 618; *see also R v Chivers* (1993) 1 Qd R 432, 437–38 (stating that a sentence should not be extended beyond what is proportional in order to increase society's protection).

155. *See Crimes (Sentencing) Act 2005* s 5(1)(a) (providing that the sentence must be “just and appropriate”); *Crimes Sentencing Procedure Act 1999* s 3A(a) (using the same phrase used in New South Wales); *Sentencing Act 1995* (WA) s 6(a)(a) (stating that the sentence must be “commensurate with the seriousness of the offence.”); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 1991* (Vic) s 5(1)(a) (providing that one of the purposes of sentencing is to impose a just punishment, and that in sentencing an offender the court must have regard to the gravity of the offence (s 5(2)(c)) and the offender's culpability and degree of responsibility (s 5(2)(d)); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(k) (emphasising that “the defendant is adequately punished for the offence” in South Australia); *Crimes Act 1914* (Cth) s 16A(2)(k) (showing the need for a sentencing court to “adequately punish” the offender is also fundamental to the sentencing of offenders for Commonwealth matters). In the Northern Territory and Queensland, the relevant sentencing statute provides that the punishment imposed on the offender must be just in all the circumstances. *See Sentencing Act* (NT) s 5(1)(a).

156. *Compare Sentencing Act 1995* (WA) s 8 (detailing how mitigation is used by the court to determine sentencing), *with Sentencing Act 1991* (Vic) s 5(2)(g) (mentioning mitigation as merely one factor in determining sentencing).

157. *Compare SHAPLAND, supra* note 147, at 55 (identifying 229 factors), *with LA TROBE UNIV., GUILTY, YOUR WORSHIP: A STUDY OF VICTORIA'S MAGISTRATES' COURTS* (1980) (identifying 292 relevant sentencing factors in a study of Victorian Magistrates' Courts).

cessation from offending; voluntary disclosure of crime; psychiatric and psychological illness; intellectual disability; youthfulness; good prospects of rehabilitation; previous good character; onerous prison conditions; forgiveness by the victim; and where the offence was committed under duress.¹⁵⁸ Important aggravating factors are: prior criminal record; significant level of injury or damage caused by the offence; vulnerability of the victim; high level of planning; offences committed while on bail or parole; offences committed with others; and breach of trust.¹⁵⁹ The large number of aggravating and mitigating factors is a key reason why it is not possible to predict with confidence the exact sentence that will be imposed in any particular case.

The main problem with Australian sentencing is its unpredictability and inconsistency.¹⁶⁰ The main reason for this is the instinctive synthesis approach to sentencing.¹⁶¹ The unfettered discretionary nature of Australian sentencing calculus is reminiscent of the uncontrolled sentencing process used in parts of the United States fifty years ago, which lead Justice Marvel Frankel to describe the system as lawless.¹⁶² For the purposes of this Article, the most important observation regarding the Australian sentencing system is that social and economic disadvantage is a mitigating consideration—at least in theory.

In *Bugmy v The Queen*, the appellant was an Aboriginal who was raised in a remote country town where alcohol abuse and violence were endemic.¹⁶³ He had a long list of prior convictions, including violent offences, and the sentence he was appealing was for seriously assaulting a prison officer (for which he was sentenced to imprisonment for four years and three months, which was increased to five years on appeal).¹⁶⁴

In allowing the offender's appeal, the High Court of Australia stated that individuals raised in disadvantaged circumstances may be less culpable because their formative years may have been

158. For recent discussions about key mitigating factors, see MIRKO BAGARIC & RICHARD EDNEY, *AUSTRALIAN SENTENCING* (2011) [hereinafter *AUSTRALIAN SENTENCING*].

159. *See id.*

160. EDNEY & BAGARIC, *supra* note 146, at 28–33 (discussing how the instinctive approach to sentencing leads to problems with subjectivity and the rule of law).

161. *Id.*

162. M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972). For a critique of Frankel's impact, see Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 *BERKELEY J. CRIM. L.* 239 (2008).

163. *Bugmy v The Queen* [2013] HCA 37 ¶ 12.

164. *Id.* ¶¶ 2, 4.

marred by being subjected to negative influences, thereby impairing their capacity to mature and diminishing their moral culpability.¹⁶⁵ Moreover, it noted that this neither dissipates as the offender grows older nor with the accumulation of prior convictions.¹⁶⁶ The Court stated that social deprivation can constitute a basis for mitigation not only for Aboriginals, but all people subjected to disadvantaged upbringing.¹⁶⁷ It also noted that for mitigation to occur, the social deprivation would need to be established, not assumed.¹⁶⁸ Moreover, social deprivation and a different cultural upbringing can mitigate if they make prison more burdensome.¹⁶⁹

In *Bugmy*, the majority judgment stated:

37. An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence. In this respect, Simpson J has correctly explained the significance of the statements in *R v Fernando*:

'Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.'¹⁷⁰

43. The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

44. Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to

165. *Id.* ¶ 40.

166. *Id.* ¶ 27.

167. *Id.* ¶ 39.

168. *Id.* ¶ 41.

169. *Id.* ¶ 39.

170. *Id.* ¶ 37 (internal citations omitted).

extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.¹⁷¹

A slightly different sentiment to that in *Bugmy v The Queen* was expressed by the High Court in *Munda v Western Australia*.¹⁷² In *Munda*, the Aboriginal offender was originally sentenced to imprisonment for five years and three months for the manslaughter of his de facto spouse. On appeal this was increased to seven years and nine months.¹⁷³ The High Court rejected his appeal against this sentence.¹⁷⁴ In doing so, it stated:

53. Mitigating factors must be given appropriate weight, but they must not be allowed 'to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence.' It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.

54. It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of

171. *Id.* ¶¶ 43–44 (internal citations omitted).

172. *Munda v Western Australia* [2013] HCA 38. This judgment was handed down on the same day as *Bugmy v The Queen* [2013] HCA 37.

173. *Munda v Western Australia* [2013] HCA 38 ¶ 2.

174. *Id.* ¶ 4.

general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.¹⁷⁵

The key theme of *Munda* is linking personal responsibility with human dignity, suggesting that it demeans Aboriginals to treat them as less culpable for their crimes.¹⁷⁶ This is empty phraseology. The concept of dignity is too obscure to guide legal standards and, to the extent that the ideal of dignity has some merit, most people would prefer to give up some dignity for less time in prison.¹⁷⁷ Moreover, the outcome of *Munda* is at odds with the recognition in *Bugmy* that disadvantage can impact upon nurturing which, in turn, diminishes the embedding of appropriate behavioural expectations and hence reduces criminal responsibility.¹⁷⁸ The relevance of social deprivation cannot be negated on the basis that the circumstances of the offence or the offender may point to a need to increase the sentence for reasons of deterrence of community protection. In such instances, while the sentence may need to be increased to achieve these other objectives, logic demands that social disadvantage should still operate to reduce the extent to which the sentence needs to be increased to accommodate these other objectives.

These two judgments cannot be reconciled on the basis that only in *Bugmy* was there evidence of relevant deprivation, given that this is not relied upon by the High Court for contrasting the judgments.¹⁷⁹ While it is not easy to reconcile the judgments of

175. *Id.* ¶¶ 53–54 (internal citations omitted).

176. *Id.* ¶ 53.

177. Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUMAN RTS. 257, 263 (2006) (“For dignity to provide meaningful guidance to judges and lawmakers . . . a number of matters need to [be] resolved, including the meaning and justification of dignity.”).

178. *Bugmy v The Queen* [2013] HCA 37 ¶ 12 (finding that appellant was raised in an alcohol-abusive and violent home atmosphere, which later contributed to his own criminal behaviour).

179. *See, e.g., Munda v Western Australia* [2013] HCA 38 ¶¶ 3–4 (rejecting appellant’s argument that systematic deprivation and disadvantage should be

Munda and *Bugmy*, it is clear that, at least in theory, entrenched poverty is a mitigating factor in Australia, so long as the offender can demonstrate an impoverished existence and that it is linked to the crime in question. In reality, the weight that is given to poverty as a mitigating factor is unclear. As a result of the instinctive synthesis approach to sentencing, it is for the sentencing judge to determine the weight to be accorded to this consideration. The freedom to reduce a penalty by 1% to, say, 50% at the whim of the sentencing judge potentially undermines the significance or reality of this consideration.

Skepticism about the mitigating impact of poverty in sentencing is supported by the grossly disproportionate incarceration rate of the most disadvantaged group in Australia. More acute studies build on this skepticism. A Victorian study which compared the rate of imprisonment for both Indigenous and non-Indigenous offenders confirmed that the former were more likely to have a criminal record (84% of Indigenous offenders had a prior conviction; compared to 75% for non-Indigenous offenders).¹⁸⁰ However, even when allowing for this and other known sentencing variables, Indigenous offenders were still more likely to be imprisoned.¹⁸¹ The reason for these findings is unclear. There are perhaps three possible explanations: (i) the researchers did not eliminate all variables that impacted the sentence; (ii) actual bias by judges and magistrates; or (iii) subconscious bias by magistrates and judges. These explanations could operate individually or cumulatively. Given the nature of the study, it is not possible to ascertain which explanation is the most plausible. However, taken at face value, the results are suggestive of harsher, rather than more lenient, treatment of Indigenous offenders.¹⁸²

taken into account by the court when determining sentencing).

180. THE SENTENCING PROJECT, *supra* note 82, at 6 (stating that the same overall trend exists in the United States).

181. VICTORIAN SENTENCING ADVISORY COUNCIL, COMPARING SENTENCING OUTCOMES FOR KOORI AND NON-KOORI ADULT OFFENDERS IN THE MAGISTRATES' COURT OF VICTORIA (2013) (detailing how Indigenous imprisonment and detention have increased over time) [hereinafter VICTORIAN ADVISORY COUNCIL]. Similar findings have been made in the United States regarding African Americans and Latinos. See Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 427, 429 (Julie Horney et al. eds., 2000).

182. VICTORIAN ADVISORY COUNCIL, *supra* note 181, at 19 (discussing common law principles to be applied by the court in sentencing Aboriginal offenders).

IV. Reform Proposals

A. *The Concept of Mitigation in Sentencing—An Overarching Perspective*

I now consider whether, doctrinally, poverty should be a mitigating factor in sentencing.¹⁸³ To this end an important consideration is the nature of mitigation. There is no established or accepted theory of what should constitute a mitigating sentencing consideration.¹⁸⁴ Courts and legislatures have articulated mitigating factors but they have not been developed with reference to an overarching theory or justification.¹⁸⁵ Some insight into the nature of mitigating in the context of sentencing can be derived from types of considerations that mitigate penalty. As noted above, Australian sentencing courts have a large degree of discretion, which has led to a proliferation of mitigating factors.¹⁸⁶ They can be divided into four categories. The first are those relating to the offender's response to a charge and include pleading guilty,¹⁸⁷ co-operating with law enforcement authorities,¹⁸⁸ and remorse.¹⁸⁹ The second are factors that relate to the circumstances of the offence and which contribute to, and to some extent explain, the offending. These include mental impairment,¹⁹⁰

183. It is noteworthy that while there is a considerable degree of literature on whether poverty should be a criminal defence, there has been far less consideration on whether poverty should be a mitigating factor in sentencing. A proponent of poverty being a mitigating factor is William Heffernan. See William C. Heffernan, *Social Justice/Criminal Justice*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE* 47, 72 (William C. Heffernan & John Kleinig eds., 2000). However, Heffernan believes that, in such a case, the effect of mitigation is not to reduce sentence length but sentence severity, by providing greater job skills to these offenders and by training them to accept responsibility for their crimes. See also Philip Pettit, *Indigence and Sentencing in Republican Theory*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE* 230, 230 (William C. Heffernan & John Kleinig eds., 2000) (arguing for a poverty sentencing discount; however, this is in the context of the republican theory of politics and freedom).

184. EDNEY & BAGARIC, *supra* note 146, at 202 (discussing that while numerous mitigating factors are set out in sentencing statutes or are derived from common law, "there has been little attempt to link most of the factors to empirically validated objectives of sentencing or normative principles that should inform the sentencing task").

185. *Id.*

186. See SHAPLAND, *supra* note 147, at 55; LA TROBE UNIV., *supra* note 157.

187. See *Cameron v The Queen* (2002) 209 CLR 339, 350.

188. See *TXT v Western Australia* [2012] WASCA 28 ¶ 28; *R v El Hani* [2004] NSWCCA 162 ¶ 66 (Howie J); *R v Cartwright* (1989) 17 NSWLR 243, 252 (Hunt J & Badgery-Parker J).

189. See *Barbaro v The Queen* [2012] VSCA 288 ¶ 38; *Phillips v The Queen* [2012] VSCA 140 ¶ 102; *R v Whyte* (2004) 7 VR 397 ¶ 22.

190. See *Muldrock v The Queen* (2011) 244 CLR 120 ¶ 54; *R v Verdins* (2007) 16

duress,¹⁹¹ and provocation.¹⁹² The third category are matters personal to the offender, which include youth,¹⁹³ previous good character,¹⁹⁴ old age,¹⁹⁵ and good prospects of rehabilitation.¹⁹⁶ The impact of the sanction is the fourth broad type of mitigating factor and includes considerations such as onerous prison conditions,¹⁹⁷ poor health,¹⁹⁸ and public opprobrium.¹⁹⁹

Mitigation has a lesser role to play in sentencing in the United States, largely as result of the prevalence of mandatory or presumptive sentencing.²⁰⁰ However, to the extent that it impacts sentences, similar considerations apply to those which exist in Australia. By way of illustration, the range of mitigating factors set out in the Federal Sentencing Guidelines for determining whether a death sentence is appropriate, include:

- (1) Impaired capacity — The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
- (2) Duress — The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
- (3) Minor participation — The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.
- (4) Equally culpable defendants — Another defendant or defendants, equally culpable in the crime, will not be punished by death.

VR 269, 272; *R v Tsiaras* (1996) 1 VR 398, 400.

191. *Tiknius v The Queen* [2011] NSWCCA 215 ¶ 32.

192. *Va v The Queen* [2011] VSCA 426 ¶ 35.

193. *R v Kuzmanovski, Ex parte Attorney-General (Qld)* [2012] QCA 19 ¶ 16; *R v Neilson* [2011] QCA 369 ¶ 27.

194. Although it has limited weight in relation to white-collar offenders, see *R v Coukoulis* (2003) 7 VR 45 ¶ 59.

195. *R v RLP* [2009] VSCA 271 ¶ 32; *Gulyas v Western Australia* (2007) 178 A Crim R 539, 546–47.

196. *R v Skilbeck* [2010] SASFC 35 ¶ 34 (stating that fair sentencing “requires weight to be given to the progress of his or her rehabilitation”); *Elyard v The Queen* [2006] NSWCCA 43 ¶ 18; *R v Osenkowski* (1982) 30 SASR 212 (Cox J).

197. *Tognolini v The Queen* [2012] VSCA 311 ¶¶ 31–32; *Western Australia v O’Kane* [2011] WASCA 24 ¶ 68.

198. In *AWP v The Queen* [2012] VSCA 41 ¶ 12; *Dosen v The Queen* [2010] NSWCCA 283 ¶ 26; *R v Puc* [2008] VSCA 159 ¶ 32 (discussing how imprisonment could cause significant adverse effects on one’s mental health).

199. *Ryan v The Queen* (2001) 206 CLR 267 ¶¶ 52–55.

200. See *supra* Part III.

- (5) No prior criminal record — The defendant did not have a significant prior history of other criminal conduct.
- (6) Disturbance — The defendant committed the offense under severe mental or emotional disturbance.
- (7) Victim's consent — The victim consented to the criminal conduct that resulted in the victim's death.
- (8) Other factors — Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.²⁰¹

The last 'catch all' consideration is reflected in a number of other statutes.²⁰² As noted above, the United States Supreme Court has recognised the importance of mitigation in capital cases. However, it has not developed an overarching theory of mitigation, and the concept is generally applied in a broad manner.²⁰³ For example, in *Penry v. Lynaugh*, Justice O'Connor stated that mitigating factors are considerations which reduce the culpability of a defendant.²⁰⁴

By way of further illustration, the range of mitigating factors set out in the Federal Sentencing Guidelines include:

- minimal participant in any criminal activity
- acceptance of responsibility, as demonstrated by:
 - (A) truthfully admitting the conduct comprising the offense(s) of conviction . . .
 - (B) voluntary termination or withdrawal from criminal conduct or associations;
 - (C) voluntary payment of restitution prior to adjudication of guilt;
 - (D) voluntary surrender to authorities promptly after commission of the offense;
 - (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
 - (F) voluntary resignation from the office or position held during the commission of the offense;
 - (G) post-offense rehabilitative efforts (e.g., counseling or

201. 18 U.S.C. § 3592 (2006).

202. For example, in Arizona, mitigation in capital cases is defined as "any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." ARIZ. REV. STAT. ANN. § 13-751(G) (2012).

203. This is reflected in *California v. Brown*, 479 U.S. 538, 544–46 (1987) (O'Connor, J., concurring).

204. *Penry v. Lynaugh*, 492 U.S. 302, 347–48 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002); *see also* *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.").

drug treatment); and

(H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

- Mental and emotional conditions²⁰⁵

However, Section 5H1.10 of the Federal Sentencing Guidelines expressly states that "Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status" are not "relevant in the determination of a sentence."²⁰⁶ Thus, poverty is expressly negated as a mitigating factor.²⁰⁷

Thus, there is little doctrinal guidance regarding the concept of mitigation. This applies in relation to analysis in court judgments and also scholarly works. In relation to the latter, for example, Hyman Gross has noted that:

It is no easy matter to decide what shall count as a good reason in mitigation of sentence once the relatively certain elements of culpability have been weighed and more general moral or prudential considerations are taken up. Because we are civilized . . . our moral life includes many different sorts of things, and in meting out punishment for crime we need to go beyond the simple justice of desert and show respect as well for other things of value. In the first place there are sometimes larger considerations of justice whose influence makes itself felt. In fairness to him, what a man has done that rebounds to his credit ought sometimes to be admitted to counterbalance the crime that now rebounds to his discredit. The acts of a good citizen and even of a virtuous human being often have a proper place and count in his favour in deciding on his sentence. Still, not every kind of creditable activity is properly taken into consideration, and we find it difficult to decide where to draw the line. Apart from justice, there is mercy Sometimes compassion is not a matter of mercy but a matter of right. When suffering would be cruel, the sentence must be mitigated to prevent that Finally, there are reasons of expediency that seem to warrant mitigation. We wish to encourage those apprehended to cooperate in bringing others to justice, and so we reward their cooperation with lighter sentences than they would otherwise receive.²⁰⁸

While this analysis is broad enough to encompass the mitigatory factors set out above, reliance on broad and obscure concepts as "fairness," "virtue," "mercy," and "justice" does not assist in distinguishing considerations which are genuinely mitigatory from those which are not. Ideally, analysis of whether a consideration should be mitigatory should be in the form of a

205. FED. SENTENCING GUIDELINES MANUAL §§ 3B1.2, 3E1.1, 5H1.3 (2011).

206. *Id.* § 5H1.10.

207. *Id.*

208. HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 451–52 (1979).

top-down approach, grounded in an overarching theory which explains and justifies the concept. However, this logical process is not available in this context. This is because the large number of mitigatory factors and, more importantly, the groups within which they sit, have fundamentally different doctrinal and normative rationales. A unifying theory of mitigation does not exist.²⁰⁹ As noted above, it is established that mitigation may be justified for a number of different reasons, including expediency and efficiency (e.g., if an offender assists authorities to apprehend other offenders), reduced culpability, or where the punishment has a heavier burden on the offender.²¹⁰ A fullsome theory of mitigation would also require an examination of aggravating factors and take into account perspectives stemming from (i) the sentencing system, including the proportionality principle, (ii) the criminal justice system, and (iii) the wider well-established principles of justice.

Yet, it is tenable within each category of mitigation to invoke broader principles to ascertain the appropriateness of a particular consideration as a basis for reducing criminal punishment. The broadest category of mitigatory factors relates to the circumstance of the offence. The breadth of these factors stems from the almost infinite number of ways in which a crime can be committed and the vast diversity of human nature. No offences are identical, and hence there is often a need to moderate sentencing to accommodate relevant differences. To this end, as noted by the U.S. Supreme Court, a key inquiry is the extent of blameworthiness of the offender.²¹¹ Culpability can relate to an offender's particular mental state (e.g., where the act was intentional or reckless), the offender's involvement in the crime, and the offender's reason and motivation for the offence.²¹² In order for poverty to mitigate, it can only link into the last subcategory.

209. For an attempt to develop such a theory, see Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 BUFF. L. REV. (forthcoming Jan. 2015).

210. See, e.g., 18 U.S.C. § 3592 (2006); ARIZ. REV. STAT. ANN. § 13-751(E) (2012); *Penry v. Lynaugh*, 492 U.S. 302, 309 (1989); GUIDELINES I, *supra* note 113, at §§ 3B1.2, 3E1.1, 5H1.3.

211. See *Lockett v. Ohio*, 438 U.S. 586, 602 (1978).

212. See *id.* at 613 (Blackmun, J., concurring) (opining that the state was incorrect in assigning culpability to the defendant without assessing her *mens rea* and involvement in the crime); see also *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (introducing the defendant's "pathological background" as the contributing reason behind his commission of the crime).

In determining culpability, there is a significant overlap between the substantive criminal law and sentencing law.²¹³ In general, the substantive criminal law draws strict lines relating to the applicability of defences.²¹⁴ Key excuses which can exculpate otherwise criminal acts include duress, necessity, accident, and insanity.²¹⁵ The criteria for legal excuses are necessarily narrow due to the binary nature of criminal law, that is, defendants are either guilty or innocent and, if the latter, they are beyond the bounds of legal censure or punishment. However, sentencing is not so clear-cut, and there is scope for degrees of blame and wrongdoing that can be accommodated by adjusting the level of punishment.

Thus, circumstances that are similar to those which could attract a legal defence, but marginally fall short, should at least potentially constitute mitigating considerations. This approach has the additional advantage of injecting a degree of coherency throughout the criminal law system.

Thus, a justification for allowing poverty as a mitigating factor can be developed if it coheres with established and justifiable legal excuses. As we saw earlier, Judge Bazelon, in *United States v. Alexander*, stated that the impact of poverty can be akin to a mental illness.²¹⁶ This analogy has not been developed or adopted by other courts or commentators, and for good reason. There is no evidence that poverty directly affects cognition or understanding.²¹⁷ Yet, there are two other defences that could tenably extend to defendants who are impoverished. They are necessity and duress.²¹⁸

213. See, e.g., *The Sentencing Act 1991* (Vic) s 5: (1)(a), (2)(c), (2)(d) (providing that just sentencing law takes into account determinations typically governed by criminal law—the gravity of the offence and the offender’s culpability and degree of responsibility).

214. For examples of strict liability crimes where defences do not usually apply, see TEN, *supra* note 13, at 86.

215. For a discussion regarding the justification of criminal excuses, see *id.* at 86–122.

216. *United States v. Alexander*, 471 F.2d 923, 959 (D.C. Cir. 1973) (“But, counsel argued, the expert testimony showed that at the critical moment Murdock did not have control of his conduct, and the reason for that lack of control was a deepseated emotional disorder that was rooted in his ‘rotten social background.’ . . . I think his proposal was ingenious . . .”).

217. For an analysis of the insanity defence, see Stanley Yeo, *The Insanity Defence in the Criminal Laws of the Commonwealth of Nations*, SING. J. LEGAL STUD. 241 (2008); see also Morse I, *supra* note 78, at 149–51.

218. See also Gilman, *supra* note 2, at 507–09. In addition to this, the social forfeit theory proposes that coercion stemming from economic hardship is so pressing that poor offenders have no realistic choice other than to commit crime

Both of these defences have discrete elements that need to be satisfied in order to excuse what is otherwise criminal behaviour.²¹⁹ The exact content of these defences varies slightly across jurisdictions.²²⁰ However, the differences are irrelevant for the purposes of this discussion, given that any argument for extending a legal excuse to a mitigating sentencing consideration is necessarily based on the fact that elements of the defence have not been fully satisfied. Instead, what is relevant for this discussion is the extent to which impoverished defendants find themselves in situations which are similar to those which attract the defences of necessity or duress, both of which revolve around an absence of true choice. The defences assume that the cause of the criminal act is not the defendant's autonomous decision, but rather the exigencies of the desperate situation.²²¹ As noted earlier, at the sentencing stage the deprivation of choice stemming from an external factor does not need to be so profound as to be causative of the action.²²²

There is no question that poverty limits choices.²²³ Resources confer freedom. However, "freedom" is a relative concept—no action is fully free.²²⁴ The important inquiry is *the extent* to which

and, accordingly, that society loses its moral authority to punish poor offenders. The account focuses on the impact of current deprivation, as opposed to previous poverty, which is the focus of the insanity defence. Gilman suggests that both the insanity and social forfeit theories have been used to ground a deprivation defence in the context of child neglect matters in at least seven states in the United States. *Id.* at 499–500.

219. For a discussion of the elements of necessity and its divergence in some United States jurisdictions, see Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?* 75 U. CHI. L. REV. 1259 (2008). For a discussion of the elements of duress, see Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 575 (2011).

220. See Bedi, *supra* note 219; Schwartz, *supra* note 219.

221. In relation to necessity, the paradigm scenario in which it operates is when a defendant commits a crime to avoid a greater harm occurring, which has been caused by natural events—it is pressure of the situation that "forces" the defendant to commit a crime. The classic statement of the necessity defence derives from *R v. Dudley* [1884] 14 Q.B.D. 273 (Eng.). Duress, by contrast, occurs where a defendant is forced by the threats and overwhelming pressure of another person to commit the crime. See, e.g., *United States v. Bailey*, 444 U.S. 394 (1980).

222. Causation is one of the most important, yet ill-defined, principles of the law. The seminal work on the topic is HART & HONORÉ, *supra* note 98. These issues need not be addressed for the purposes of this Article.

223. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 57 (2d ed. 2012) (discussing the limiting effects of poverty on one's mobility, employment opportunities, education, and social circles).

224. For a short summary on the varying theories on free will and action, see Morse II, *supra* note 87, at 133.

impoverished people have their choices limited and the degree to which *this inclines them towards crime*. In relation to the first issue, there is no mathematical measure that can be used to gauge to what extent the poor have diminished opportunities. However, it is incontestable not only that the poor have a limited sphere of choice, but also that it can induce a degree of frustration. Moreover, the poor are more inclined to commit crime than the rich, because they do not have the same incentive to comply with the law in order to maintain their own status. While there is a sound argument that the poor are likely to be less prudent than other individuals and have more incentive to break the rules than the rich, it does not necessarily mean they are less blameworthy when it comes to all forms of crime.

To the extent that poverty is limiting, it is understandable that the disadvantaged might be more inclined to engage in conduct that would expand their choices.²²⁵ Thus, the poor may resort to economic-related crime to overcome poverty. This would incline them to property and drug offences.²²⁶ However, serious sexual and violent offences are not a means of overcoming poverty.²²⁷ Poor people committing such offences is, at best, a demonstration of anger and frustration or an utterly derelict value system. But “lashing out” has no place in a civilised community. It could be that the poor “lashing out” is akin to acts committed under provocation. However, this argument is untenable. First, most victims of sexual and violent offences are totally blameless, and it is not tenable to suggest that provocative conduct stems from the operation of societal forces in general.²²⁸ Moreover,

225. See *infra* Part IV.B.

226. See Barbara Hudson, *Punishing the Poor: Dilemmas of Justice and Difference*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE 189, 197 (William C. Heffernan & John Kleinig eds., 2000) (“This reflects the fact that there is also greater homogeneity of crimes at successive stages: more ‘index offenses’ such as robbery, burglary, more drug crime, especially ghetto drugs such as crack cocaine.”); see also Morse II, *supra* note 87, at 141–42 (“A poor person threatened with imminent death or starvation because he or she could not afford food or medicine could justifiably take these items from another, conduct that would otherwise be larceny . . .”).

227. Support for this assertion can be inferred from data that shows sexual and violent crimes to be widespread among the social classes. Hudson, *supra* note 226, at 213 n.28 (“Victim surveys, self-report studies, and other criminological investigations have established not only that the extent of these forms of behavior is far more widespread than had previously been assumed, but that their incidence is widely distributed among the social classes.”).

228. See Luke Neal & Mirko Bagaric, *Provocation: The Ongoing Subservience of Principle to Tradition*, 67 J. CRIM. L. 237, 242 (2003) (noting that in all jurisdictions—with the exception of Tasmania and the United Kingdom—the provocative conduct must have stemmed from the victim).

provocation is decreasingly being recognised as a criminal defence, and there are powerful arguments for suggesting that it has no role in a justifiable criminal law system.²²⁹

Thus, on the basis of parallels with criminal defences, disadvantage tenably should be a mitigating factor for property and drug offences, but not for sexual and violent offences.²³⁰ A closer examination of the dichotomy between these offences supports this view. It is to this issue that I now turn.

B. Sexual and Violent Offences

In relation to serious sexual and violent offences, empirical data show that they have profoundly damaging impacts on the victims. A number of studies have measured the impact of certain crime offence categories on victims. The best information available suggests that, typically, victims of crime suffer considerably and, in fact, more than is manifest from the obvious and direct effects of crime. The problem with some studies is that they do not distinguish adequately between different types of crime to determine the relative impact of specific and varied criminal offences. However, the available data suggest that victims of violent crime and sexual crime have their well-being more significantly set back than for other types of crime.

Rochelle Hanson, Genelle Sawyer, Angela Begle, and Grace Hubel reviewed the existing literature regarding the effects of violent and sexual crimes on key quality of life indices.²³¹ The crimes examined included rape, sexual assault, aggravated assault, and intimate partner violence.²³² The key quality of life indicia examined were: role function (i.e., capacity to perform in the roles of parenting and intimate relationships and to function in the social and occupational domains); reported levels of life satisfaction and well-being; and social-material conditions (i.e., physical and mental health conditions).²³³ The report demonstrated that many victims suffered considerably across a

229. See *id.* at 248–56. It is, however, a mitigating factor for sentencing in some jurisdictions. See, e.g., *Tyne v Tasmania* (2005) 15 A Crim R 208 (Austl.); *R v Kelly* [2000] VSCA 164 (Austl.); GUIDELINES I, *supra* note 113, at §§ 3E1.I, 5K2.10.

230. See also Gilman, *supra* note 2, at 505 (quoting Robinson, *supra* note 87, at 59 (“[T]here is little empirical support for the proposition that a generally impoverished upbringing can itself cause a specific crime so as to render the offender blameless.”)).

231. Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189, 189 (2010).

232. *Id.*

233. *Id.* at 190.

range of well-being indicia, well after the physical signs had passed.²³⁴ The report concluded:

In sum, findings from the well-established literature on general trauma and the emerging research on crime victimization indicate significant functional impact on the quality of life for victims. However, more research is necessary to understand the mechanisms of these relationships and differences among types of crime victimization, gender, and racial/ethnic groups.²³⁵

Findings showed that victims of violent crime, and sexual crime in particular, have:

- Difficulty in being involved in intimate relationships and far higher divorce rates;²³⁶
- Diminished parenting skills (although this finding was not universal);²³⁷
- Lower levels of success in the employment setting (especially in relation to victims who had been abused by their partners) and much higher levels of unemployment;²³⁸
- Considerable impairment and dysfunction in social and leisure activities, with many victims retreating from conventional social supports;²³⁹ and
- High levels of direct medical costs associated with violent crime (over \$24,353 for an assault requiring hospitalization).²⁴⁰

A study published in 2006, focusing on victims in the United Kingdom, found that:

- Victims of violent crime were 2.6 times as likely as non-victims to suffer from depression and 1.8 times as likely to exhibit hostile behaviour five years after the original offence;²⁴¹ and
- For 52% of women who have been seriously sexually assaulted in their lives, their experience led to depression or other emotional problems, and for one in twenty it led to attempted suicide (64,000 women living in England and Wales today have tried to kill themselves following a serious sexual assault).²⁴²

Chester L. Britt, in a study examining the effects of either violent or property crime on the health of 2430 respondents,

234. *Id.* at 190–94.

235. *Id.* at 194–95.

236. *Id.* at 190–91.

237. *Id.* at 190.

238. *Id.* at 191.

239. *Id.* at 191–92.

240. *Id.* at 193.

241. MIKE DIXON ET AL., CRIMESHARE: THE UNEQUAL IMPACT OF CRIME 25 (2006).

242. *Id.* at 17.

noted, “Victims of violent crime reported lower levels of perceived health and physical well being, controlling for measures of injury and for sociodemographic characteristics.”²⁴³ These findings were not confined to violent crime. Victims of property crime also reported reduced levels of perceived well-being, but it was less profound than in the case of violent crime.²⁴⁴

Thus, it is clear that serious sexual and violent offences often devastate the lives of victims, providing a powerful argument for the imposition of stern punishment in response to these offences.²⁴⁵ Of course, it does not mean that mitigating factors cannot necessarily apply in relation to such behaviour.

However, disadvantage should not be one such consideration. Even without familiarity with this data, all individuals are aware that it is painful to be subjected to a serious assault and that sexual integrity is important.²⁴⁶ Rich or poor, all rational people know that it is wrong to strike another person or to sexually coerce them.²⁴⁷

As noted above, poor people are themselves more likely to be victims of sexual and violent offences, which potentially normalises such conduct.²⁴⁸ This unfortunate narrative, however, should not be a basis for providing a sentencing discount. It does not militate against the fact that they are still aware of the gravamen of such conduct, and are perhaps, in fact, more so given the ruin that any victimisation would have had on their lives. Simply, the damaging effects of these crimes and their incontestable and palpably heinous intrinsic character permit no room for mitigation based on the unfortunate background of offenders. Thus, arguments in favour of a sentencing discount for all disadvantaged offenders are too crude.

243. Chester L. Britt, *Health Consequences of Criminal Victimization*, 8 INT’L REV. VICTIMOLOGY 63, 63 (2001).

244. *Id.* at 69–70. See also Adriaan J.M. Denkers & Frans Willem Winkel, *Crime Victims’ Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT’L REV. VICTIMOLOGY 141, 141 (1998). This is not necessarily inconsistent with the findings noted earlier that financial resources cannot produce happiness. Money and resources are relevant to well-being, but are not cardinal considerations.

245. See Mirko Bagaric, *Injecting Content into the Mirage that Is Proportionality in Sentencing*, 25 N.Z. U. L. Rev. 411, 438 (2013).

246. See Morse I, *supra* note 78; Morse II, *supra* note 87 (making a similar observation regarding not making poverty a defence to crime).

247. See Green, *supra* note 21, at 63–64 (rejecting the view that poverty should be a defence to such crime).

248. See BUREAU OF JUSTICE STAT., U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2003 STATISTICAL TABLES TBLS.14 & 15 (2003).

C. *Less Serious Offences*

In relation to less serious offences, there is a stronger argument for mitigating the penalty of the disadvantaged offender.²⁴⁹ This is true especially given that the level of damage caused by these offences is often minor and the intrinsic wrongness of such conduct is less manifest. As noted by W.J. Wilson, for many people in poverty, crime is regarded as the only option to rise beyond their station.²⁵⁰

Despite this, there are several arguments for not mitigating harm even in these circumstances. The first is that, ultimately, the principal reason for making certain conduct a crime is the harm that it causes.²⁵¹ The reason underpinning the act or the culpability of the offender are secondary considerations.²⁵²

Criminal law is the domain where society inflicts its greatest hardships on other members of society.²⁵³ Criminal sanctions involve the deliberate infliction of pain on people.²⁵⁴ Sentencing is the domain where “the state may use its most awesome power: the power to use force against its citizens and others.”²⁵⁵ A clear justification is necessary for institutional pain infliction. This justification stems largely from the carnage wreaked by crime. Criminal acts are regarded as serious because of the bad

249. For a discussion of this proposal, see Hudson, *supra* note 226, at 189–216.

250. WILSON, *supra* note 223, at 276 (“In a context of limited opportunities for self-actualization and success, some individuals in the community, most notably young black males, devise alternative ways to gain respect . . . ranging from simply wearing brand-name clothing to have the ‘right look’ and talking the right way to developing a predatory attitude toward neighbors.”).

251. See Morse II, *supra* note 87, at 115 (arguing that the purpose of criminal law is to condemn and blame, not to serve social welfare goals). Harm being the principle reason for prohibition of certain conducts is assumed in Jan Gorecki’s argument for decriminalizing certain “victimless” acts (e.g., homosexuality). JAN GORECKI, A THEORY OF CRIMINAL JUSTICE 33–38 (1979) (“What is their common characteristic? According to an often expressed view, they do not harm anyone: nobody, at least nobody other than the criminal himself, suffers from them, but they are prohibited and punished despite their harmlessness.”).

252. The secondary priority given to the offender’s circumstances in relation to the primary consideration afforded to the actual crime and the harm produced by the act is demonstrated in *Munda v Western Australia* [2013] HCA 38 (noting that the offender’s background and mitigating factors must be given “appropriate weight,” but the penalty should still reflect proportionality to the gravity and harm of the offence).

253. Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 345 (2014) [hereinafter Bagaric, *The Punishment Should Fit the Crime*].

254. Herbert Morris, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 41 (Jeffrie G. Murphy ed., 1973).

255. Taslitz, *supra* note 86, at 81–82.

consequences they cause: “The criminal law is designed to express a political culture’s highest level of condemnation for breach of its most fundamental moral principles.”²⁵⁶

However, there are degrees of harm and of diminution of community safety caused by crime, and this variability provides a tenable basis for the use of the offender’s profile as a mitigating factor in sentencing. Once the burden of victim suffering and community safety is reduced, the scourge of poverty prevails in balancing the competing considerations.

There are obviously some fine lines involved here. One relates to the degree of impoverishment necessary to reduce culpability; however, it is not an overwhelming consideration. While social disadvantage is a matter of degree, and there is no clear or even approximate level at which it so curtails free choice as to incline a person towards crime, the nature of law is that it must establish rules and principles which involve generalisations about human conduct.²⁵⁷ To make the law transparent and workable, it is preferable that a presumption is established that offenders who subsist in a state of poverty beyond a certain level should receive a sentencing discount because of their relatively lower level of culpability due to such poverty. The degree of impoverishment that attracts this discount should be considerable given the damaging effects of the crime and the importance of sentencing—changes in this area should occur gradually and in a measured manner.

I suggest that the discount should be conferred on offenders who, at the time of the offence, live in poverty²⁵⁸ and have done so for the majority of their lives.²⁵⁹ As noted above, this would apply to less than 15% of the community.²⁶⁰ In order to attract the discount, it should be necessary for a defendant to establish a direct causal link between the crime and his or her disadvantage. The exact explanation for human conduct is complex and multifaceted.²⁶¹ It would undercut the application of the defence too

256. *Id.* at 81.

257. This is in order to operationalise the rule of law. See, e.g., FINNIS, *supra* note 9, at 270–76; JOSEPH RAZ, *THE AUTHORITY OF LAW* 211, 214–16 (1979); Jeffrey Jowell, *The Rule of Law Today*, in *THE CHANGING CONSTITUTION* 3–23 (Jeffrey Jowell & Dawn Oliver eds., 2d ed. 1989).

258. According to the statistical definitions set out in Part II.

259. Transient poverty is not sufficient because many students are often temporarily poor. Heffernan, *supra* note 183, at 71–72.

260. See *supra* Part II.B.

261. See JULIAN V ROBERTS, *PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES* 193–202 (2008).

drastically to require the defendant to prove that poverty caused his or her offending in any particular case.²⁶²

The other important operational consideration is the appropriate size of the discount. It needs to be large enough to reflect the considerably lower culpability of impoverished offenders but, at the same time, not so large that the penalty would be grossly disproportionate to the seriousness of the crime. In my opinion, a reduction in the order of 25% satisfies these considerations. This is within the range of the typical penalty reduction that offenders in Australia receive if they plead guilty to an offence²⁶³ and has not resulted in patently disproportionate sanctions being imposed.²⁶⁴ At the same time, a 25% discount is considerable enough to offer offenders a pragmatic incentive to plead guilty, and hence it seems that it is a meaningful degree of mitigation.

A potential disadvantage of this approach is that it will reduce the deterrent impact of the criminal law so far as non-violent and non-sexual offences are concerned in the context of impoverished offenders. However, such a concern is misguided—a penalty reduction on the basis of impoverishment would not confer a licence on poor individuals to commit crime. The empirical evidence shows that there is no link between heavier penalties and crime reduction.²⁶⁵ To this end, there are two general forms of deterrence: *specific* and *general* deterrence.²⁶⁶

262. *But see* Heffernan, *supra* note 183, at 72 (arguing that an impoverished background itself should not be sufficient to be mitigating). Heffernan states, “What is needed [to mitigate] are foreground factors that connect [poverty] to a person’s life: an abusive parent, for example, or victimization by a neighbor or stranger.” *Id.*

263. *See, e.g., Phillips v The Queen* [2012] VSCA 140, n.38 (“The extent of the discount varies between jurisdictions. In NSW it appears to be in the order of 20–25%; in WA, 30–35%; 25% in SA and 10–33% in NZ.”); *Cameron v The Queen* (2002) 209 CLR 339, 340 (noting a typical sentence reduction of between 20% to 35% in Western Australia). For examples of statutes mandating consideration of guilty pleas in sentencing, see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1); *Penalties and Sentences Act 1992* (Qld) s 13(3); *Criminal Law (Sentencing) Act 1988* (SA) ss 10B, 10C.

264. *See, e.g., Phillips v The Queen* [2012] VSCA 140 ¶¶ 15, 26–27 (noting that an 11.5% discount for a guilty plea in a case of a violent murder was an acceptable derivation from the norm due to the severity of the crime).

265. Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn’t Work—and What It Means for Sentencing*, 35 CRIM. L.J. 269, 269 (2011) [hereinafter Bagaric & Alexander, *(Marginal) General Deterrence*].

266. Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159 (2012) [hereinafter Bagaric & Alexander, *Specific Deterrence*].

There are a large number of studies that have been undertaken regarding the effectiveness of both of these forms of deterrence.²⁶⁷ It is beyond the scope of this Article to discuss them in detail. I have recently overviewed and analysed this data, hence the commentary below provides a summary of the relevant conclusions.

“Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions, thereby convincing them that crime does not pay.”²⁶⁸ In other words, “it attempts to dissuade offenders from re-offending by inflicting an unpleasant experience on them (normally imprisonment) which they will seek to avoid in the future.”²⁶⁹ The available empirical data suggest that specific deterrence does not work, so inflicting harsh sanctions on individuals does not make them less likely to re-offend in the future.²⁷⁰ “The level of certainty of this conclusion is very high—so high, that specific deterrence should be abolished as a sentencing consideration.”²⁷¹ Thus, because imposing less punishment does not affect the likelihood of any offender re-offending, imposing less punishment on impoverished offenders for certain forms of crime will not make recidivism more likely.

The other main form of deterrence is *general* deterrence, and there are, in fact, two forms of general deterrence.²⁷² “*Marginal general deterrence* concerns the correlation between the *severity* of the sanction and the prevalence of an offense.”²⁷³ *Absolute* general deterrence concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct.²⁷⁴ The findings regarding general deterrence are relatively settled.²⁷⁵ The existing data show that, in the absence of the threat of punishment for criminal conduct, the social fabric of society would readily dissipate; crime would escalate and overwhelmingly frustrate the capacity of

267. For an overview, see Bagaric & Alexander, (*Marginal*) *General Deterrence*, *supra* note 265; Bagaric & Alexander, *Specific Deterrence*, *supra* note 266.

268. Bagaric & Alexander, *Specific Deterrence*, *supra* note 266, at 159.

269. *Id.*

270. *Id.* at 161.

271. *Id.*

272. Bagaric & Alexander, (*Marginal*) *General Deterrence*, *supra* note 265, at 270.

273. *Id.*

274. FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 14 (1973).

275. For an overview of the literature, see DONALD RITCHIE, VICTORIAN SENTENCING ADVISORY COUNCIL, *DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE* (2011).

people to lead happy and fulfilled lives.²⁷⁶ Thus, general deterrence works in the absolute sense: there is *a connection* between criminal sanctions and criminal conduct.²⁷⁷ However, there is insufficient evidence to support a direct correlation between higher penalties and a reduction in the crime rate.²⁷⁸ It follows that marginal deterrence (the theory that there is a direct correlation between the severity of the sanction and the prevalence of an offence) should be disregarded as a sentencing objective, unless and until there is, at least, proof that it works.²⁷⁹ Accordingly, lowering penalties for disadvantaged offenders for non-violent and non-sexual offences will not result in other people being more likely to commit crime.

The empirical data is relatively clear. The argument that reducing penalty severity in the case of disadvantaged offenders will provide them with a licence to commit crime, while intuitively appealing, is flawed.

V. The Need to Abolish Sentencing Practices That Operate Unfairly Against Disadvantaged Offenders

While it is contestable whether disadvantage should be a mitigating sentencing consideration,²⁸⁰ it is incontestable that it should not be an aggravating factor.²⁸¹ There are two ways in which disadvantage can act to aggravate penalties. The first and most obvious way is by the direct operation of a legal rule of principle. This does not occur in the United States or Australian systems of sentencing, and, in fact, it would be intolerable for any system of law (in a jurisdiction governed by the rule of law) to formally prescribe that disadvantaged offenders should be penalised more severely than other offenders.

The second way in which poverty can aggravate is if a trait which exists disproportionately among disadvantaged offenders serves to increase penalties. This creates unfairness if there is no justifiable reason for the aggravating effect of this characteristic.

276. See Bagaric & Alexander, (*Marginal*) *General Deterrence*, *supra* note 265, at 280–82.

277. See *id.*

278. *Id.* at 269.

279. See *id.*

280. See Heffernan, *supra* note 183, at 72.

281. This would be contrary to the proportionality principle: “[T]he severity of the sentence should be proportional to the seriousness of the crime for which the sentence is imposed and to the offender’s level of culpability.” ROBERTS, *supra* note 261, at ix.

To this end, there is one consideration that profoundly operates disproportionately against disadvantaged offenders: that the prior convictions of an offender are an aggravating sentencing consideration. In fact, the prior criminal history of an offender is the most important sentencing consideration, after offence seriousness, in all common law countries²⁸² and can be so significant that it means the difference between receiving a small fine or many years in jail.²⁸³ The issue is pervasive given that most offenders have at least one prior conviction.²⁸⁴ In the United States, prior convictions aggravate heavily.²⁸⁵ As we saw in Part III, it is most clearly evident from sentencing grids where prior convictions always feature prominently and, generally, are the most telling consideration, other than the offence type.²⁸⁶

Punishing recidivists more harshly than first-time offenders is intuitively appealing. Most people, including lawyers and judges, share the view that repeat offenders deserve additional punishment. There is, however, no settled justification for this practice and, in particular, there is no tenable theory which suggests that recidivists should be punished considerably more severely than offenders without a criminal history. Principally, the punishment should fit the crime, not the antecedent actions of the person who committed the crime.²⁸⁷

Recently, I have examined at length the appropriateness of recidivist loading and have concluded that, as a general rule, there is no justification for a sentencing loading based on recidivism.²⁸⁸ This is because the rationales underpinning the loading in the form of general deterrence and specific deterrence are largely unattainable²⁸⁹ and, hence, cannot justify a recidivist loading. However, there is some evidence that serious sexual and violent offences are disproportionately committed by offenders with prior

282. Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 304 (1997) (discussing the role of prior convictions in sentencing). The recidivist premium extends beyond the common law world to countries such as Korea and Israel. See ROBERTS, *supra* note 261, at 16.

283. ROBERTS, *supra* note 261, at 1–4.

284. See Richard S. Frase, *Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*, in PREVIOUS CONVICTIONS, *supra* note 111, at 117–36 [hereinafter Frase, *Prior-Conviction Sentencing Enhancements*]; Kevin R. Reitz, *The Illusion of Proportionality: Desert and Repeat Offenders*, in PREVIOUS CONVICTIONS, *supra* note 111, at 137–60.

285. ROBERTS, *supra* note 261, at 96.

286. See *supra* Part III.A.

287. Bagaric, *The Punishment Should Fit the Crime*, *supra* note 253, at 345–46.

288. *Id.* at 415.

289. See *supra* Part IV.

convictions for these offences.²⁹⁰ This justifies a recidivist loading for such offenders in the order of 20–50%, but only for such offences.²⁹¹ Moreover, the extent of the loading is not justified at the level of the “super premiums” which are currently accorded.

Thus, the manner in which the loading currently operates is unfair. This unfairness is compounded in relation to disadvantaged offenders. Poor offenders are far more likely to have prior convictions, and it is they who overwhelmingly bear the brunt of the extra punishment that is meted out for previous misdeeds.²⁹² For example, an analysis of Californian correctional statistics found a significant racial disparity in sentencing, with African Americans being sent to prison more than thirteen times as often as Whites.²⁹³ Also, despite the fact that African Americans comprise only 7% of California’s population, they represent almost half (43%) of third-strike inmates.²⁹⁴ Similar figures come from Washington,²⁹⁵ where African Americans account for about 13% of the state’s population, yet they represent about 40% of three-strikes casualties.²⁹⁶

Thus, it is on the basis of the prior convictions that disadvantaged offenders are often sentenced more severely.²⁹⁷ This

290. Bagaric, *The Punishment Should Fit the Crime*, *supra* note 253, at 416.

291. *Id.*

292. See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97 (2008); Frase, *Prior-Conviction Sentencing Enhancements*, *supra* note 284, at 132; Brett E. Garland et al., *Racial Disproportionality in the American Prison Population: Using the Blumstein Method to Address the Critical Race and Justice Issue of the 21st Century*, 5 JUST. POL’Y J. 2 (2008) [hereinafter Garland et al., *Racial Disproportionality*].

293. Kelly McMurry, *‘Three-Strikes’ Laws Proving More Show Than Go*, 33 TRIAL 12, 12 (1997) [hereinafter McMurry, *Three Strikes*]. This is even higher than the normal gross over-representation of African Americans in United States prisons. In 1991, they comprised 49% of the country’s prison population, and only 6% of the general population. See MARC MAUER, *AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION* 4 (1991).

294. See Garland et al., *Racial Disproportionality*, *supra* note 292; McMurry, *Three Strikes*, *supra* note 293, at 12–13. More recent data reveal similar trends, see Elsa Y. Chen, *Impacts of “Three Strikes and You’re Out” on Crime Trends in California and Throughout the United States*, 24 J. CONTEMP. CRIM. JUST. 345 (2008).

295. McMurry, *Three Strikes*, *supra* note 293, at 13. However, the number of people sentenced under three-strikes laws is significantly less in Washington (seventy-one) than in California (more than 15,000 for second- or third-strike offences). *Id.* at 12–13.

296. *Id.*

297. See also Elaine R. Jones, *The Failure of the “Get Tough” Crime Policy*, 20 U. DAYTON L. REV. 803 (1995) (arguing that tougher penalties have not solved the problem of violent crime); Nkechi Taifa, *“Three-Strikes-and-You’re-Out”—Mandatory Life Imprisonment for Third Time Felons*, 20 U. DAYTON L. REV. 717 (1995) (arguing that three-strikes laws are against public policy).

constitutes indirect discrimination and needs to be eliminated from the sentencing inquiry. Attaching less weight to prior convictions will not cure the ills that make it more likely that offenders from deprived social backgrounds will commit crime; however, the advantage of ignoring prior convictions is that it will ensure that every time such offenders are sentenced, their punishment will be no more than what is imposed on the affluent offender who has committed the same crime. Disadvantaged offenders will still appear in court more frequently than other offenders, but, unless they have committed a serious sexual or violent offence, their sentence would be determined on the basis of the instant offence—not according to other factors. And even when they have committed a serious sexual or violent offence, the length of the sentence should, in general, be far less than is currently the case.

VI. Limitations of Recommendations in this Article and Priorities for Wider Social Reform

The recommendations in this Article, if they are adopted, will not ameliorate all of the unfair burden experienced by impoverished offenders. There have been a number of studies which note the unfair treatment of the poor in the context of the criminal justice system. Some of these findings provide institutional reasons for the link between poverty and crime. For example, in the United States, it has been noted that racial minorities are stopped more while driving than White drivers.²⁹⁸ Moreover, there is typically a greater police presence in poorer areas²⁹⁹ and some evidence of a higher number of arrests of racial minorities, even when the commission of a particular crime (in this case drug offences) is not meaningfully higher within that group.³⁰⁰

Further, it has been observed that:

[I]nequitable access to resources can result in very different outcomes between middle-class and low-income individuals even though they may share similar behavioral problems Once the decision is made to rely on the criminal justice system as the primary response to social problems in low-income, minority communities, the day-to-day actions of criminal justice practitioners are constrained by that decision. For example, police make more drug arrests in low-income neighborhoods because those communities are not equipped

298. THE SENTENCING PROJECT, *supra* note 82, at 2.

299. *Id.* at 6.

300. *Id.*

with available alternatives for dealing with drug problems.³⁰¹

There is also some evidence that police and judges treat African Americans more harshly than other individuals.³⁰² As noted in Part III, there is also evidence suggesting that Indigenous offenders are sentenced more heavily than similarly situated non-Indigenous offenders in Australia.³⁰³

Thus, institutional biases seem to be part of the reason for the disproportionate burden shouldered by the poor when it comes to criminal sanctions. Nevertheless, the proposed sentencing reduction would decrease the suffering imposed on the poor so far as sentencing is concerned and could act as a catalyst for the implementation of other concrete changes to the criminal justice system, which would further reduce this burden.

Beyond that, it is clear that a more wide-ranging solution to the problem of poverty and crime is necessary. My proposal deals with the sharp end of the criminal justice system—sentencing. Preferably, the underlying cause of the problem should be remedied. Instinctively, the solution would seem to be to reduce the gross income and resource disparity that exists between the rich and poor. This is unlikely to happen. The gap in the United States³⁰⁴ and Australia³⁰⁵ is, in fact, widening.

It is generally beyond the useful realm of criminal justice scholars to recommend wide-ranging social reform—certainly from the perspective of the recommendations being readily adopted. However, it may be useful to add to the reasons in support of an existing recommendation.

The benefits of education are well understood and relate to enhancing both individual and community prosperity. Less well known are the advantages of education in terms of criminal justice involvement. Education is, in fact, the single most important variable that contributes to reducing the likelihood of

301. *Id.* at 6–7.

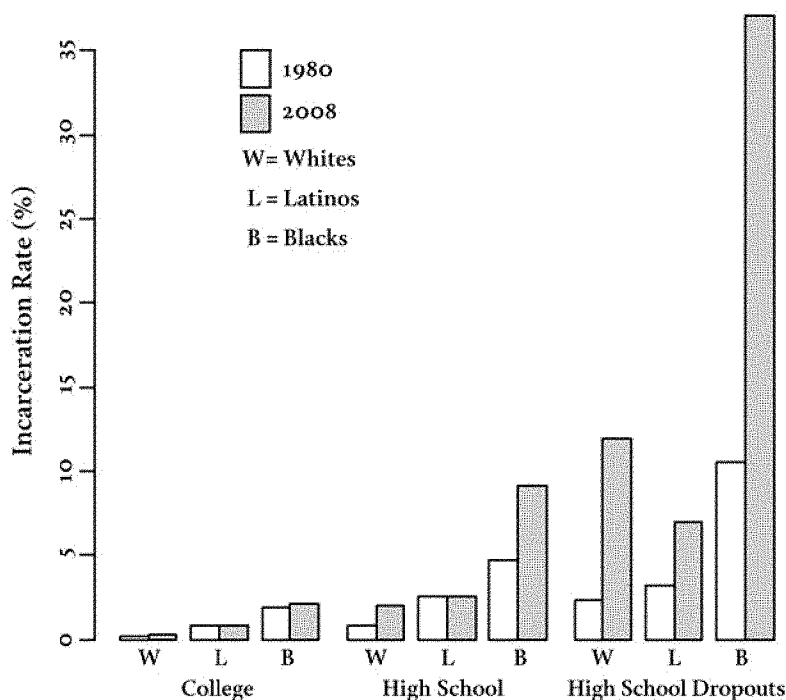
302. See Wheelock & Uggen, *supra* note 22, at 10. For studies establishing subconscious judicial bias, see David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?* 41 J. LEGAL STUD. 347 (2012); Ronald S. Everett & Roger A. Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189 (2002); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 285–88 (2001).

303. See *supra* Part III.B.

304. *Growing Apart*, THE ECONOMIST (Sept. 21, 2013), available at <http://www.economist.com/news/leaders/21586578-americas-income-inequality-growing-again-time-cut-subsidies-rich-and-invest>.

305. AUSTRALIAN SOCIAL INCLUSION BOARD, *SOCIAL INCLUSION IN AUSTRALIA: HOW AUSTRALIA IS FARING* (2d ed. 2012).

imprisonment. A high school education, even for the most disadvantaged section of the community, has a profound impact on the likelihood of imprisonment, reducing the rate by over five-fold.³⁰⁶ This figure is about ten-fold for a college education, as is illustrated by the graph below.³⁰⁷



Percentage of Men Aged Twenty to Thirty-Four in Prison or Jail, by
Race/Ethnicity and Education, 1980 and 2008

It follows that the single main policy initiative that governments should undertake to reduce incarceration rates is to make their children smarter. Prisons are expensive institutions to run: it costs taxpayers in the United States, on average, \$45,000 to house a prisoner for one year.³⁰⁸ The total spending on prisons

306. See Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DEDALUS (2010), available at <https://www.amacad.org/content/publications/pubContent.aspx?d=808>.

307. See *id.*

308. UNIV. OF S.F. SCH. OF LAW, *supra* note 107, at 18.

is now over \$50 billion annually.³⁰⁹ By comparison, in Australia, the imprisonment rate is 170 people per 100,000 adult population,³¹⁰ however, the cost of imprisonment in Australia is nearly double that of the United States: \$79,000 per prisoner per year.³¹¹ Social advantages aside, it would presumably be more economical to invest more in education than to deal with the fall-out in the prisons.

VII. Conclusion

There is no clear solution to what ought to be done to remedy the problem associated with poverty and imprisonment. Given that the underprivileged do not choose poverty, as well as the difficulty associated with rising above impoverishment, there are ostensibly strong reasons for treating disadvantaged offenders more leniently. Disadvantage limits opportunity and choice and often leads to rebellious behaviour.

However, doctrinally speaking, the sentencing system should not always confer sentencing discounts to the poor. In relation to serious sexual and violent offences, the devastating effect that these offences often have on the lives of victims, plus the fact that all people (no matter how poor) are aware of the heinous nature of such crime, militates against a sentencing discount for these offences.

The calculus is differently weighted regarding other forms of offences, such as drug and property offences. Once the suffering associated with violent and sexual injuries is removed from the equation, the stricture and pain of poverty is paramount and should be reflected in a 25% sentencing reduction for the poor who commit such crime.

Moreover, poverty should not be an aggravating factor in sentencing. Presently, this is the case because of the gross sentence inflation that often stems from prior convictions. This is a cause of considerable discrimination against the poor and needs to be greatly curtailed, such that it only applies to sexual and violent offenders and then only to escalate the penalty by 20% to 50%. This would considerably reduce the rate and duration of prison terms imposed on the poor.

309. *Id.*

310. See AUSTRALIAN BUREAU OF STAT., *supra* note 40.

311. PRODUCTIVITY COMM'N, REPORT ON GOV'T SERV. 2012 (2012), available at http://www.pc.gov.au/_data/assets/pdf_file/0019/114940/24-government-services-2012-chapter8.pdf.

Other than that, the main reform that needs to occur for the poor in order for them to be less represented in the prison population is that their education levels need to be improved. Until that occurs, equal opportunity in all respects (including the opportunity to avoid figuring so disproportionately in prison statistics) will be diminished.

