

# A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational – The Sentencing of Offenders with Mental Disorders

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*People with mental impairment are so heavily over-represented in prisons and jails that jails have been labeled “warehouses for the mentally ill.” In many parts of the United States, there are more mentally impaired offenders in prisons than in hospitals for the mentally unwell. Offenders laboring with impaired mental functioning are often regarded as being less morally culpable for their crimes and hence less deserving of punishment. However, the reduced mental functioning of offenders does not diminish the harm caused to victims. People are no less dead if mentally unwell offenders kill them rather than offenders who are mentally sound. This tension has proven an intractable problem for sentencing law and practice. There are no clear, fair, and effective principles or processes for accommodating impaired mental functioning in the sentencing inquiry. It is an under-researched area of the law. In this Article, I explore this tension. Key to ascertaining the proper manner in which to incorporate mental illness into the sentencing system is clarity regarding the importance of consequences to the offender, as opposed to moral culpability. I analyze current approaches to sentencing offenders with mental health problems in both the United States and Australia. Despite the vastly different sentencing regimes in these countries, both systems are deficient in dealing with mentally ill offenders, but for different reasons. I propose a solution to administering sentences to offenders with a mental disorder that is equally applicable to both sentencing systems. Mental impairment should mitigate penalty. However, in determining the extent and circumstances in which it should do so, it is cardinal not to lose sight of the fact that those who are sentenced for a crime are not insane, and they were aware that their acts were wrong—otherwise they would not have been found guilty in the first instance. I argue that a standard ten percent sentencing discount should be accorded to offenders who were mentally disordered at the time of sentencing. There should be an even more substantial discount when it is likely that offenders will find the sanction—in particular imprisonment—more burdensome due to their mental state. This difference would ensure some recognition of the reduced blameworthiness of mentally impaired offenders and the extra hardship that some forms of punishment inflict on mentally*

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*ill offenders, while not compromising the important objectives of proportionality and community protection. The only situations when mental disorder should not mitigate penalty are when the offender is a recidivist, serious sexual or violent offender. In these circumstances, the interests of the community are the paramount consideration. The analysis in this paper applies most directly when a term of imprisonment is imposed. However, the reasoning also extends to the threshold decision of whether or not a term of imprisonment should be imposed in the first place.*

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#### INTRODUCTION

The sentencing of mentally impaired offenders is one of the most complex issues in the criminal justice system. It is also a poorly developed and under-researched area of the law. Most of the literature on mental impairment in the criminal law sphere has focused on the notion of criminal responsibility for crime, not on the sentencing of mentally disordered offenders.<sup>2</sup> There is no definitive data regarding the number and proportion

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2. The key focus has been on the contours of the insanity defense. See generally Jamie Walvisch, *Sentencing Offenders with Impaired Mental Functioning: Developing Australia’s “Most Sophisticated and Subtle” Analysis*, 17 PSYCHIATRY, PSYCHOL. & L. 187 (2010); JANE MORIARTY, *THE ROLE OF MENTAL ILLNESS IN CRIMINAL TRIALS* (2001); Anthony Platt & Bernard L. Diamond, *The Origins of the “Right and Wrong” Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54

of people with mental disorders who are found guilty of criminal offenses and hence are subjected to criminal sanctions. This is largely because of problems associated with the diagnosis and classification of mental disorders. However, most studies that have aimed to measure the prevalence of mental disorders among criminal offenders suggest that it is very high—ranging from approximately one-third to half of all criminal offenders.<sup>3</sup> The incidence of mental impairment among criminal offenders is approximately three times that of the general community.<sup>4</sup> Further, the rate at which mentally impaired offenders are being imprisoned is increasing and has reached a point where prisons have been termed modern day asylums<sup>5</sup> and warehouses for the mentally ill.<sup>6</sup>

While it is incontestable that people with mental disorders are considerably over-represented in the prison system, it is also clear that the mental state of offenders does not diminish the harm they cause. Murder victims are no less dead because they were killed by schizophrenic or depressed offenders than by offenders with totally sound minds, and rape victims are just as violated by intellectually disabled offenders as by other offenders. Yet, it is widely assumed that mentally impaired offenders are less blameworthy for their crimes by reason of their mental state.<sup>7</sup> The need to protect the public from serious offenders and the desire to accommodate reduced culpability in sentencing has produced a seemingly irreconcilable tension in the sentencing system.<sup>8</sup> There is no apparent workable solution to the prob-

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CALIF. L. REV. 1227 (1966); Julie E Grachek, *Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System* 81 IND. L.J. 1479 (2006).

3. See *infra* Part II.

4. See *infra* Part II.

5. E. FULLER TORRE ET AL., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 6 (2014); TERRY A. KUPERS, PRISON MADNESS 12–14 (1999).

6. KUPERS, *supra* note 5, at 12–14.

7. See *infra* Part IV (referring to the current approach in relation to sentencing mentally disordered offenders).

8. There have been many articles, books and research reports on the topic. See generally DARRELL STEINBERG ET AL., WHEN DID PRISONS BECOME ACCEPTABLE MENTAL HEALTHCARE FACILITIES? 1–2 (2015); *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250 (2015); *Developments in the Law – The Law of Mental Illness*, 121 HARV. L. REV. (2008) (discussing *Booker*, the Federal Sentencing Guidelines, and violent, mentally ill offenders); E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147 (2013); Christine M. Sarteschi, *Mentally Ill Offenders Involved with the U.S. Criminal Justice System: A Synthesis*, 3 SAGE OPEN 1 (2013); Anna L. S. Brandt, *Treatment of Persons with Mental Illness in the Criminal Justice System: A Literature Review*, 51 J. OF OFFENDER REHABILITATION 541 (2012); DORIS J. JAMES & LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006); Ian Freckelton, *Sentencing Offenders with Impaired Mental Functioning*, 14 PSYCHIATRY, PSYCHOL. & L. 359 (2007); SUSAN HAYES & GERALD CRADDOCK, SIMPLY CRIMINAL (2d ed. 1992); NEW SOUTH WALES LAW REFORM COMMISSION, REPORT 135: PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENTS IN THE CRIMINAL JUSTICE SYSTEM: DIVERSION (2012); T. Butler et al., *Mental Disorders in Australian Prisoners: A Comparison with a Community Sample*, 40 AUSTRALIAN & N.Z. J. OF PSYCHIATRY 272 (2006); James Ogloff et al., *Psychiatric Symptoms and Histories Among People Detained in Police Cells*, 46 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 871 (2011); VICTORIAN OMBUDSMAN, INVESTIGATION INTO PRISONER ACCESS TO HEALTH CARE (2011); Cameron Wallace et al., *Criminal Offending in Schizophrenia Over a 25-Year Period Marked by Deinstitutionalization and Increasing Prevalence of Comorbid*

lem at this time. The crisis is growing,<sup>9</sup> despite the introduction of supposedly more nuanced solutions, such as the establishment of Mental Health Courts<sup>10</sup> and the possibility (in some jurisdictions) of civil confinement for the mentally impaired.<sup>11</sup>

This Article will compare the treatment of mentally disordered offenders in the sentencing systems in the United States and Australia to explore practical solutions to the current sentencing crisis. While the United States and Australian systems both adopt—to varying degrees—the same broad key sentencing objectives (in the form of community protection, general deterrence, specific deterrence, rehabilitation, and proportionality),<sup>12</sup> they have vastly differing sentencing processes. In Australia, sentencing courts retain a large degree of discretion, whereas in the United States presumptive or fixed penalties apply for many offenses.<sup>13</sup> In recent years courts have attempted to inject clarity into the sentencing calculus for individuals with impaired mental functioning.<sup>14</sup> However, neither the doctrinal clarity nor the fairness of the process has improved. The current legal approaches are manifestly flawed. Mental disorder is not properly factored into the sentencing process. At least part of the solution may lie in adapting aspects of each of the existing regimes in Australia and the United States.<sup>15</sup>

Mental impairment is a complex ailment. The variability and extent of mental disorder is almost infinite.<sup>16</sup> The fact that mental impairment often has no direct physical manifestations adds another layer of complexity to its classification and characterization. Sentencing law is also a complex dynamic and is the area of law where there is the greatest gap between knowl-

*Substance Use Disorders*, 161 AM. J. OF PSYCHIATRY 716 (2004); Michelle Edgely, *Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence & Consistency*, 16 PSYCHIATRY, PSYCHOL. & L. 240 (2009).

9. See *infra* Part II.

10. There are now more than 100 Mental Health Courts in the United States. However, they deal with a small percentage of mentally disordered offenders and do not deal with those who have committed serious criminal offences. For a discussion of the mental health courts, see generally *Developments in the Law – The Law of Mental Illness*, *supra* note 8, at 1114.

11. See also *Developments in the Law – The Law of Mental Illness*, *supra* note 8 (discussing civil confinement for the mentally impaired); *infra* Part II. It should be noted that civil confinement is problematic for a number of normative and legal reasons, including the validity and appropriateness of predictions of criminality based on disability and the sufficiency of procedural safeguards. The UN Convention on Rights of Persons with Disabilities and its Committee on the issue of civil confinement further discusses these issues.

12. See *infra* Part IV.

13. See *infra* Part III.

14. See *infra* Part III (analyzing *Verdins*, an Australian criminal case addressing the relevance of mental impairment for sentencing criminal offenders; for additional details see *infra* p. 7 and text accompanying notes 181, 185).

15. See *infra* Part IV. Part of the solution involves adopting the wide-ranging approach in Australia regarding the circumstances of impact of penalty. Another component of the solution includes setting a fixed discount of mental illness. The prescriptive nature of this recommendation is consistent with the overarching approach to sentencing in United States.

16. See generally Dan J. Stein et al., *What is a Mental/Psychiatric Disorder? From DSM-IV to DSM-V*, 40 PSYCHOL. MED. 1759 (2010).

edge and practice.<sup>17</sup> This combination of uncertainty in mental health diagnosis and the complexity in sentencing law and practice can result in general incoherence in the sentencing of the mentally ill or impaired. Given the practical limitations of this reality, we cannot aspire to a utopian solution. Rather, it is necessary to accept the entrenched limitations of mental health diagnosis, resourcing, and the fundamental foundations of criminal law. Judges, legislators, and practitioners must make the existing system operate in its most favorable manner.

In particular, the solution offered in this paper is not contingent on more resources for the mentally unwell. It is widely accepted that there is a need for more medical services in the community to treat the mentally impaired.<sup>18</sup> This includes wider access to accommodation and in-house support services. The shortage of such services and facilities results in more mentally impaired people being institutionalized in prisons,<sup>19</sup> which is regrettable. In an ideal world, all people suffering from a mental disorder would receive optimal treatment, including, if necessary, in-patient accommodation. However, the criminal justice system cannot meaningfully influence all aspects of social policy, including the delivery of health services. Role clarity and an understanding of the limits and reach of each institution is cardinal to achieving effective policy improvement. While the seriously mentally impaired should be in mental health institutions, not homeless or in prisons,<sup>20</sup> from a societal perspective, offenders who commit serious criminal offenses are arguably better off in prison than in the community. Mentally disordered offenders should receive reduced penalties, but the discount cannot be so significant as to make the sanction inappropriate in relation to the damage caused by serious criminal acts. This reflects the main purpose of the criminal law, which is to prevent and punish bad deeds, not merely bad thoughts.

There are two key reforms advanced in this Article. First, it is recommended that in most situations mentally impaired offenders should receive a discount on the order of ten percent. Second, they should receive a further discount if it is likely that they would find the sanction more burdensome than other offenders would. This discount should be up to fifty percent and should apply even if mental impairment did not exist at the time of the

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17. Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. (forthcoming).

18. Thomas P. Weil, *Insufficient Dollars and Qualified Personnel to Meet United States Mental Health Needs*, 203 J. OF NERVOUS & MENTAL DISEASE 233 (2015); David R. Rubinow, *Out of Sight, Out of Mind: Mental Illness Behind Bars*, 171 AM. J. OF PSYCHIATRY 1041 (2014); Gary Fields & Jennifer Dooren, *For the Mentally Ill, Finding Treatment Grows Harder*, WALL ST. J. (Jan. 16, 2014), <http://www.wsj.com/articles/SB10001424052702304281004579218204163263142> [https://perma.cc/J69M-AESL]; Treatment Advocacy Center, *No Room at The Inn* (2015), <http://www.tacereports.org/bed-study> [https://perma.cc/H6ND-9FZW].

19. See STEINBERG, *supra* note 8, at 1.

20. See *id.*; *Developments in the Law: The Law of Mental Illness*, *supra* note 8, at 1120.

offence or was not raised as a mitigating consideration regarding the crime.<sup>21</sup> This approach would make the sentencing of mentally ill offenders more principled, transparent and workable. It would also result in greater mitigation for most mentally impaired offenders than is currently the case. Thus, fewer mentally disordered individuals would be incarcerated, and, when they were imprisoned, they would receive shorter terms than under the current sentencing regime. Although, in theory, courts now have considerable discretion to lower the penalties for mentally ill offenders, the data suggest that the opposite is happening—mentally ill offenders are, in fact, sentenced more harshly than other offenders.<sup>22</sup>

Another novel aspect of my proposal is that in order to qualify for a discount, mentally impaired offenders should not be required to establish that the impairment was causally related to the commission of the crime. Issues of causation in this context are too approximate and vague to productively litigate and evaluate. They should be removed from the sentencing calculus. This would open the pathway for more mentally ill offenders to receive lighter penalties.

A caveat to the recommendations and discussion in this Article is that I do not focus on the relevance of mental disorder in capital cases. The extreme nature of the death penalty often compels different jurisprudential principles.<sup>23</sup> Excluding consideration of death penalty cases does not constitute a serious limitation to this Article. The United States is the only developed nation apart from Japan that still imposes the death penalty.<sup>24</sup> Moreover, not all states in America impose the death penalty<sup>25</sup> and

21. See *infra* Part IV.

22. See *infra* Part III.

23. For example, the prohibition against cruel and unusual punishment has been applied sparingly in the sentencing domain. To the extent that it has been applied in this area, it has been mainly in relation proscribing the death penalty to certain forms of crimes (non-homicide offences). See *Kennedy v. Louisiana*, 544 U.S. 407 (2008). In determining the scope of this limitation the Supreme Court has taken into account international standards relating to appropriate levels of punishment. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Graham v. Florida*, 560 U.S. 48 (2010). In relation to non-capital sentences the Supreme Court has endorsed the concept of proportionality as being a constraint on the level of punishment, but the concept has not been developed with any degree of precision and can only be invoked to prohibit sanctions which contain “gross disproportionality.” Donna Lee, *Resuscitating Proportionality In Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 528 (2008) (observing that gross disproportionality is a threshold requirement to the application of the proportionality principle and if this is satisfied the Court will apply two further tests: “The second and third parts call for an intrajurisdictional review of sentences received within the state for more and less serious crimes, and an interjurisdictional review of sentences received in other states for the same crime.”).

24. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFORMATION CENTER (Dec. 31, 2014), <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140> [https://perma.cc/69U9-6KNT] (last visited Feb 24, 2016).

25. Thirty-one states still have the death penalty. *States With and Without Death Penalty*, DEATH PENALTY INFORMATION CENTRE (July 1, 2015), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/NE9R-PM3E] (last visited Nov. 11, 2015).

only a relatively small number of criminals are executed in the United States.<sup>26</sup>

The next part of this paper focuses on definitional issues and clarifies what is meant by the terms “mental impairment” and “mental disorder.” In Part II, I examine the extent of the problem, namely, the degree of overrepresentation of the mentally impaired in the criminal justice system. This is followed in Part III by an analysis of the current law in the United States and in Australia. Part IV contains reform recommendations. Concluding remarks are set out in Part V.

### I. THE MEANING OF “MENTAL IMPAIRMENT” IN SENTENCING

In order for mental impairment to be properly accommodated within the sentencing system, it is necessary to look beyond fixed technical classifications and adopt a broad approach that includes all types, varieties, and extents of mental illnesses and intellectual disabilities. A major difficulty with establishing how impaired mental condition should affect sentencing outcomes is the diversity of conditions and ailments that come under this rubric. Mental impairment is a complicated phenomenon for several reasons. First, it generally has no direct physical manifestations.<sup>27</sup> Depression and schizophrenia are not observable in the same manner as a broken leg or a cut hand. This often leads to a degree of cynicism about the reality of claims of mental disorder. Second, there are a large number of mental illnesses. Third, the intensity and duration of one illness can vary markedly from person to person and, indeed, the same applies to the episodes of the illness that one person suffers.<sup>28</sup> Fourth, establishing the existence and extent of a mental illness at an earlier point in time (for instance, at the time the offense was committed) and how it impacted decision-making is far from an exact or precise process.<sup>29</sup>

Perhaps in response to such difficulties the current approaches to the relevance of mental disorder to sentencing in the United States and Australia take a broad-brush perspective, which gloss over many clinical classifications and nuances. In the United States, the most wide-ranging and detailed attempt to document the existence and frequency of mental health problems among prisoners was a study reported by the Bureau of Justice

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26. Since 1976, there have been 1,419 executions in the United States. *Executions by Year Since 1976*, DEATH PENALTY INFORMATION CENTER (Oct. 30, 2015), <http://www.deathpenaltyinfo.org/executions-year> [https://perma.cc/82HB-LVNK] (last visited Nov. 11, 2015). Note that the federal government also still has the death penalty.

27. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxi–xxii (4th ed. 1994).

28. *Id.*

29. This is especially in light of the different degrees of severity of mental illness and diversity of clinical presentations for many of the types of illness. *Id.* at 2–4.

Statistics in 2006.<sup>30</sup> This study included all mental disorders set out in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM-IV), which includes more than 300 different mental conditions. The Manual does not include a definition of mental disorder. It notes, “[a]lthough this manual provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of ‘mental disorder.’ The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations.”<sup>31</sup>

It then adds:

Despite these caveats, the definition of mental disorder . . . is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual.<sup>32</sup>

The definition is broad enough to include not only mental illnesses, such as depression and schizophrenia, but also cognitive deficits, such as low IQ.<sup>33</sup>

In Australia, the types of mental disorders that can affect a sentence are so wide that the exact classification of the illness is not crucial to the inquiry. In *R. v Verdins*,<sup>34</sup> the leading judicial authority on the relevance of mental disorder to sentencing in Australia, the Court stated that the condition does not need to equate to a serious psychiatric illness:

The sentencing court should not have to concern itself with how a particular condition is to be classified. Difficulties of definition and classification in this field are notorious. There may be differences of expert opinion and diagnosis in relation to the offender.

30. JAMES & GLAZE, *supra* note 8.

31. See AM. PSYCHIATRIC ASS'N, *supra* note 27, at xxi; see also Stein, *supra* note 16, at 1759–65.

32. See AM. PSYCHIATRIC ASS'N, *supra* note 27, at xxi–xxii.

33. As noted in the next part of this Article, statutory and case law does not develop or limit this approach.

34. [2007] 169 A Crim R 581 (Austl.). For a discussion of this decision, see Freckelton, *supra* note 8; Ogloff et al., *supra* note 8. For cases citing *Verdins*, see *Monfries v The Queen* [2014] ACTCA 4, 65 (16 Oct. 2014) (Austl.); *R v Barratt* [2014] QCA 227 (11 Sept. 2014) (Austl.); *Melham v The Queen* [2011] NSWCCA 121 (2 June 2011) (Austl.); *R v Flentjar* [2013] SASCFC 11 (12 Mar. 2013) (Austl.); *McCulloch v Tas.* [2010] TASCRA 21 (22 Dec. 2010) (Austl.); *Groenewege v Tas.* [2013] TASCRA 7 (26 July 2013) (Austl.); *WA v Khasay* [2014] WASCRA 58 (19 Mar. 2014) (Austl.).

It may be that no specific condition can be identified. *What matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time . . . .*

Where a diagnostic label is applied to an offender, as equally occurs in reports from psychiatrists and psychologists, this should be treated as the beginning, not the end, of the enquiry.<sup>35</sup>

These observations are most acutely directed to offenders with a mental illness, as opposed to those with an intellectual disability.<sup>36</sup> And, until *Verdins* there was a tendency to treat the two broad categories differently for sentencing purposes. Intellectual disability as a specific mitigating factor had been recognized by a number of authorities.<sup>37</sup> While the policy reasons that justify taking intellectual disability into account as a mitigating factor at the sentencing stage of the criminal justice system are similar to those relating to psychiatric and psychological illness, there is a potentially relevant distinction between the two conditions: in the case of psychiatric or psychological illness, appropriate therapeutic interventions and treatment may be successful in restoring the offender to a position of health, but intellectual disability is generally a stable and subsisting factor.<sup>38</sup>

However, case authorities post-*Verdins* make it clear that the principles set out in that case apply not only to offenders with a mental illness but also to those with an intellectual disability. The range of mental disorders to which the *Verdins* principles apply is broad enough to include both cognitive impairment, such as intellectual disability<sup>39</sup> and dementia, and mental illnesses, such as depression.<sup>40</sup>

35. *R v Verdins* (2007) 169 A Crim R 581, 585–86 (Austl.) (footnotes omitted).

36. See *Monfries* [2014] ACTCA 4, 46; *Barratt* [2014] QCA 227; *Melham* [2011] NSWCCA 121; *Flentjar* [2013] SASFC 11; *McCulloch* [2010] TASSCA 21; *Groeneuwege* [2013] TASSCA 7; *Kbasay* [2014] WASCA 58.

37. See, e.g., *The Queen v Masolatti* (1976) 14 SASR 124 (Austl.); *R v Roadley* (1990) 51 A Crim R 336 (Austl.); *R v Tunchilek* [2000] NSWCCA 465 (24 Oct. 2000) (Austl.); *R v Azzi* [2003] NSWCCA 10 (6 Feb. 2003) ¶¶ 18–24 (Austl.); *R v Payne* [2002] QCA 75 (14 Mar. 2002) (Austl.); *R v CW* (2000) 111 A Crim R 287 (Austl.); *R v Gommers* [2005] SASC 493 (22 Dec. 2005) (Austl.).

38. See *What is Mental Illness: Mental Illness Facts*, NAT'L ALLIANCE ON MENTAL ILLNESS, <http://www.namisa.org/what-is-mental-illness—types-of-mental-disorders.html> [https://perma.cc/TT4D-JKJQ] (last visited Feb. 13, 2016); *Treatment of an Intellectual Disability*, THE ARC, <http://www.thearc.org/learn-about/intellectual-disability/treatment> [https://perma.cc/662Q-XPTT] (last visited Feb. 13, 2016) (noting that while intellectual disability is not curable, support is available to enable people to integrate better within the community).

39. In *R v McIntosh*, the court discussed the applicability of the principles in *Verdins* to offenders suffering an intellectual disability. (2008) 191 A Crim R 370 (Austl.). The court stated, “A dichotomy between intellectual disability and psychiatric conditions for the purposes of sentencing would not accord with the broad central question identified in *Verdins*, which appears equally apt for any mental condition, whether it be intellectual disability, psychiatric illness or other mental impairments or abnormalities. Such a distinction would serve no obvious purpose, in the context of the sentencing discretion, where the relevance (or the extent thereof) of the non-exhaustive considerations in *Verdins* depends on the circumstances of the particular case.” *Id.* ¶ 104. See also *O'Connor v The Queen* [2014] VSCA 108 (19 May 2014) ¶ 64 (Austl.).

40. This is consistent with the view taken by the New South Wales Law Reform Commission, which defined the terms as follows: “(a) *Cognitive impairment* means an ongoing impairment in compre-

Thus, we see that in both the United States and Australia the concept of a mental disorder is extremely broad, as far as sentencing (at least for classification purposes) is concerned. No recognized mental disorder is excluded and the concept includes both mental illness and intellectual disability. Accordingly, for the purposes of this Article, the terms “mental impairment” and “mental disorder” extend to both intellectual disability and mental illness, and are used interchangeably.

## II. THE MAGNITUDE OF THE PROBLEM: GROSS OVER-REPRESENTATION OF THE MENTALLY IMPAIRED IN THE CRIMINAL JUSTICE SYSTEM

We now examine the link between mental illness and criminal behavior. There is no definitive data regarding the existence and prevalence of mental disorder among offenders.<sup>41</sup> This is due to a combination of the difficulties (identified above) relating to the classification of mental illness and the absence of a systematic process for evaluating and recording the mental status of offenders at the time of arrest or sentence. The studies that have attempted to measure the incidence of mental disorder among criminal offenders have mainly focused on offenders who are imprisoned.<sup>42</sup> Offenders who are incarcerated are the easiest to monitor, given that they are confined.

As noted above,<sup>43</sup> the most extensive attempt in the United States to identify the prevalence of mental disorders among offenders is the 2006 report by the Bureau of Justice Statistics.<sup>44</sup> It reported, “[a]t midyear 2005 more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in State prisons, 78,800 in Federal prisons, and

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hension, reason, adaptive functioning, judgment, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind. Such cognitive impairment may arise from, but is not limited to, the following: (i) intellectual disability; (ii) borderline intellectual functioning; (iii) dementias; (iv) acquired brain injury; (v) drug or alcohol related brain damage; (vi) autism spectrum disorders. (b) *Mental health impairment* means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behavior, so as to affect functioning in daily life to a material extent. Such mental health impairment may arise from but is not limited to the following: (i) anxiety disorders; (ii) affective disorders; (iii) psychoses; (iv) severe personality disorders; (v) substance-induced mental disorders (which include ongoing mental health impairments such as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances).” NEW SOUTH WALES LAW REFORM COMM’N, REPORT 139: SENTENCING xxvi–xxvii (2014), <http://www.lawreform.justice.nsw.gov.au/Documents/report%20139.pdf> [<https://perma.cc/9S2G-A78R>]. The definitions are derived from NEW SOUTH WALES LAW REFORM COMM’N, REPORT 135: PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENTS IN THE CRIMINAL JUSTICE SYSTEM: DIVERSION 48 (2013).

41. See Sarteschi, *supra* note 8; Brandt, *supra* note 8.

42. See, e.g., NEW SOUTH WALES LAW REFORM COMM’N, *supra* note 40, at 90 (2012); see also Butler et al., *supra* note 8; Henry J. Steadman et al., *Prevalence of Serious Mental Illness among Jail Inmates*, 60 PSYCHIATRIC SERVICES 761, 764 (2009).

43. See *supra* Part I.

44. JAMES & GLAZE, *supra* note 8.

479,900 in local jails. These estimates represented 56% of State prisoners, 45% of Federal prisoners, and 64% of [local] jail inmates.”<sup>45</sup> Nearly a decade later, another (albeit less comprehensive) report made similar observations. It found that forty-five percent of state prison inmates had been treated for a severe mental illness within the past twelve months.<sup>46</sup> At the high end, another study found that “mental illness among today’s inmates is also pervasive, with 64 percent of [local] jail inmates, 54 percent of state prisoners and 45 percent of federal prisoners reporting mental health concerns.”<sup>47</sup> Further, in a study of five local jails in the United States, it was estimated that the rate of mental illness among inmates was three to six times that of the wider population.<sup>48</sup>

A 2010 assessment of relevant studies noted that at least sixteen percent of inmates in prisons had a *serious* mental illness, which meant that there were three times more seriously mentally-ill persons in prisons than in hospitals.<sup>49</sup> In a later paper (published in 2014), the same authors state, “[p]risons and jails have become America’s ‘new asylums’: The number of individuals with serious mental illness in prisons and jails now exceeds the number in state psychiatric hospitals tenfold.”<sup>50</sup> A recent report states that more than one in five prisoners in Ohio have a *diagnosed* mental illness and that there are ten times as many mentally-ill prisoners in Ohio prisons than in Ohio’s six psychiatric hospitals.<sup>51</sup> The problem has become so acute that a Californian State Senator recently claimed that the “Los Angeles County Jail is the largest mental health provider in the county.”<sup>52</sup>

In Australia, the rate of mental impairment among prisoners seems to be similar to that in the United States. A report in 2012 noted that nearly half (forty-nine percent) the sampled prisoners were experiencing a diagnosable mental disorder.<sup>53</sup> This was approximately 2.5 times the rate of mental disorder in the general Australian population.<sup>54</sup> A study focusing on Victorian

45. *Id.* at 1 (using the DSM-IV criteria for a mental disorder, which includes intellectual disabilities).

46. STEINBERG, *supra* note 8, at 1.

47. Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCHOL. 9 (2014), <http://www.apa.org/monitor/2014/10/incarceration.aspx> [<https://perma.cc/DS5S-D2W2>].

48. Steadman, *supra* note 42, at 764; *The Numbers Count: Mental Disorders in America*, NAT’L INST. OF MENTAL HEALTH, <http://www.lb7.uscourts.gov/documents/12-cv-1072url2.pdf> [<https://perma.cc/F66X-YZQA>].

49. E. FULLER TORRE, ET. AL., MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 1 (2010).

50. TORRE, TREATMENT OF PERSONS, *supra* note 5, at 4.

51. Alan Johnson, *Ohio’s Prisons Hold 10 Times as Many Mentally Ill as its Psychiatric Hospitals Do*, THE COLUMBUS DISPATCH (Apr. 22, 2015), <http://www.dispatch.com/content/stories/local/2015/04/19/mental-prison.html> [<https://perma.cc/J3RQ-MKEY>].

52. STEINBERG, *supra* note 8, at 1.

53. Lubica Forsythe & Antonette Gaffney, *Mental Disorder Prevalence at the Gateway to the Criminal Justice System*, 438 TRENDS & ISSUES IN CRIM. JUST. 6 (2012).

54. *Id.* at 7.

prisoners in 2009–10 showed that the prevalence of schizophrenia and bipolar disorder was ten times that of the rest of the community.<sup>55</sup>

The New South Wales (NSW) Law Reform Commission sets out a comprehensive analysis of the prevalence of mental illness in Australia in a recent report. The report notes the lack of accurate data regarding the prevalence of mental illness among criminal offenders.<sup>56</sup> It also notes a considerably higher prevalence of mental disorder in prisons than in the general population. It states:

It would appear that the rate of mental health impairment in prisoners is more than triple the rate in the general population, with the rate of over-representation varying, in some cases significantly, depending on the actual mental health impairment concerned . . . . The situation in relation to intellectual disabilities and other cognitive impairments is perhaps a little less clear . . . . In any case, it would seem that rates of intellectual impairment among prisoners are higher than rates in the general population.<sup>57</sup>

Thus, while there is no definitive data regarding the precise proportion of criminal offenders who have a mental disorder at the time of sentencing, it is incontestable that a large proportion of criminal offenders suffer from mental impairment. The rate of mental impairment is in the range of fifty percent of offenders, and is approximately three times higher than the rate of mental impairment in the community.<sup>58</sup> Thus, individuals with a mental disorder are disproportionately represented in the criminal justice system—

55. See Dion G. Gee & James R.P. Ogloff, *Sentencing Offenders with Impaired Mental Functioning: R v. Verdins, Buckley and Vo {2007} at the Clinical Coalface*, 21 *PSYCHIATRY, PSYCHOL. & L.* 56–57 (2014) (describing the findings of the Victorian Ombudsman).

56. N.S.W. LAW REFORM COMM'N REPORT 135; PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENTS IN THE CRIMINAL JUSTICE SYSTEM xvi (2012).

57. *Id.* at 90. See also Tony Butler et al., *Mental Disorders in Australian Prisoners: A Comparison with a Community Sample*, 40 *AUSTL. & N.Z. J. OF PSYCHIATRY* 272 (2006); Ogloff et al., *Psychiatric Symptoms and Histories Among People Detained in Police Cells*, 46 *SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY* 871–80 (2010); VICTORIAN OMBUDSMAN INVESTIGATION INTO PRISONER ACCESS TO HEALTHCARE (2011); Cameron Wallace, et al., *Criminal Offending in Schizophrenia Over a 25-Year Period Marked by Deinstitutionalization and Increasing Prevalence of Comorbid Substance Use Disorders*, 161 *AM. J. OF PSYCHIATRY* 716, 716 (2004) (stating that “[r]elative to the comparison subjects, the patients with schizophrenia accumulated a greater total number of criminal convictions (8,791 versus 1,119) and were significantly more likely to have been convicted of a criminal offence (21.6% versus 7.8%) and of an offence involving violence (8.2% versus 1.8%)”; also stating that the “proportion of patients who had a conviction increased from 14.8% of the 1975 cohort to 25.0% of the 1995 cohort, but a proportionately similar increase from 5.1% to 9.6% occurred among the comparison subjects,” that “[r]ates of known substance abuse problems among the schizophrenia patients increased from 8.3% in 1975 to 26.1% in 1995,” and that “[s]ignificantly higher rates of criminal conviction were found in patients with substance abuse problems than in those without substance abuse problems (68.1% versus 11.7%).”).

58. See *supra* note 57.

and by a considerable margin.<sup>59</sup> The next part of this Article examines the manner in which the sentencing system currently deals with mentally-disordered offenders.

### III. THE CURRENT LAW

In this section, I analyze the manner in which mental disorder is treated in the current sentencing systems in the United States and Australia.

#### A. *The United States*

In the United States, the federal government and each state in the United States, has its own sentencing system.<sup>60</sup> All of these systems are distinct, however, the single most common change to these systems over the past few decades is a move towards harsher penalties. Currently, more than two million Americans are in jail or prison, which equates to over 700 per 100,000 of the adult population.<sup>61</sup> This rate has more than doubled over the past two decades<sup>62</sup> and has been steadily rising during much of the past forty years.<sup>63</sup> In 2010, 2011, and 2012, imprisonment numbers decreased very little—by approximately three percent.<sup>64</sup> In 2013, jail and prison numbers started rising again.<sup>65</sup> The United States now has the highest imprisonment rate on earth, and by a large margin—most developed countries have rates of imprisonment around five to ten times lower than the United States.<sup>66</sup>

In the 1980s, the US Congress and most state legislatures passed wide-ranging prescriptive and harsh sentencing laws, which curtailed judicial discretion.<sup>67</sup> As noted by William W Berry III:

Prior to 1984, federal judges possessed discretion that was virtually “unfettered” in determining sentences, guided only by broad sentence ranges provided by federal criminal statutes. The Sen-

59. See Michelle Edgely, *Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence & Consistency*, 6 PSYCHIATRY, PSYCHOL. & L. 240 (2009) (debunking two studies rejecting a link between mental impairment and criminal behavior).

60. See *United States v. Morrison*, 529 U.S. 598, 610–11 (2000) (explaining that sentencing, and, more generally, the criminal law, in the United States is mainly the province of states).

61. The exact number of prisoners is 2,228,400. See U.S. DEP’T OF JUSTICE, BUREAU OF CRIMINAL JUSTICE, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASE 1991–2012 1 (2013).

62. Albert Hunt, *A Country of Inmates*, N.Y. TIMES (Nov. 20, 2011), [www.nytimes.com/2011/11/21/us/21iht-letter21.html](http://www.nytimes.com/2011/11/21/us/21iht-letter21.html) [<https://perma.cc/H9Q2-7FGW>].

63. In fact, during this period it has quadrupled. See NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES 1 (2014).

64. *Id.*

65. There was an increase of 4,300 prisoners in 2013, compared with 2012. While the federal prison population decreased for the first time since 1980, it was more than offset by an increase in the state prison population (the first increase since 2009). See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, U.S. DEP’T OF JUST. BULL. (2014).

66. NAT’L RESEARCH COUNCIL, *supra* note 70.

67. See *id.* (discussing the political context of the Federal Sentencing Guidelines).

tencing Reform Act of 1984 . . . moved the sentencing regime almost completely to the other extreme, implementing a system of mandatory guidelines that severely limited the discretion of the sentencing judge.<sup>68</sup>

Fixed, minimum, or presumptive penalties<sup>69</sup> now operate to varying degrees in the United States.<sup>70</sup> Prescribed penalties are typically set out in sentencing guidelines, which normally use criminal history score<sup>71</sup> and offense seriousness to calculate the appropriate penalty. Overwhelmingly, the impact on prescribed sentences has been severe. To this end, Michael Tonry notes:

Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), LWOP<sup>72</sup> laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe “career criminal,” “dangerous offender,” and “sexual predator” laws. These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.<sup>73</sup>

It has been contended that none of these policies leading to the increase in fixed penalties emanated from a clear theoretical foundation, but rather stemmed from “back-of-an-envelope calculations and collective intuitive judgments.”<sup>74</sup> In a similar vein, Berman and Bibas state, “[o]ver the last half-century, sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of

68. William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to §3553 After Booker and its Progeny*, 40 CONN. L. REV. 631, 633 (2008).

69. For the purposes of clarity, these both come under the terminology of fixed or standard penalties in this Article.

70. They are also one of the key distinguishing aspects of the United States’ sentencing system compared to that of Australia’s (and most other sentencing systems in the world). 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); see also Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL’Y 503, 516 (2014).

71. See NAT’L RESEARCH COUNCIL, *supra* note 63.

72. Life without the possibility of parole.

73. See Tonry, *supra* note 70.

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

rules.”<sup>75</sup> They add: “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.”<sup>76</sup>

The most extensively analyzed and influential fixed penalty laws are those set out in the United States Sentencing Commission Guidelines Manual (“Guidelines”), applicable only to federal crimes.<sup>77</sup> While the sentences set out in the Guidelines are generally considered severe, it is not the case that they were developed without an understanding of the objectives of sentencing. The US Federal Sentencing Commission observed that the Guidelines aim to “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”<sup>78</sup> Further, the Guidelines state “the [Sentencing Reform] Act’s basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.”<sup>79</sup> The Guidelines add that “most observers of the criminal law argue that the ultimate aim of the law itself, and of punishment in particular, is the control of crime.”<sup>80</sup> Moreover, the sentencing ranges were not developed in abstract or against a purely theoretical model. They were influenced by an analysis of over 40,000 sentences that had been imposed.<sup>81</sup>

These Guidelines are no longer mandatory. The US Supreme Court, in *United States v. Booker*,<sup>82</sup> held, in effect, that the Guidelines are advisory.<sup>83</sup>

75. Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 37 OHIO ST. J. OF CRIM. L. 37, 40 (2006).

76. *Id.* at 48.

77. U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM’N 2015). See generally AMY BARON EVANS & PAUL HOFER, LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION (2010) (providing analysis and criticism of the Guidelines).

78. U.S. SENTENCING GUIDELINES MANUAL 1 (U.S. SENTENCING COMM’N 2015).

79. *Id.* at 2.

80. *Id.* at 3.

81. See *id.* at 11 (“The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied on pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented pre-sentence reports, the parole guidelines, and policy judgments.”).

82. 543 U.S. 20 (2005) (holding that aspects of the guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial); see also *Pepper v. United States*, 562 U.S. 476, 481 (2011); *Greenlaw v. United States*, 554 U.S. 237, 247 (2008); *Gall v. United States*, 552 U.S. 38, 46 (2007); *Rita v. United States*, 551 U.S. 338, 349 (2007).

83. Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. See 18 U.S.C. §§ 3553(a)(4)–(a)(5); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) (“As a matter of administration and to secure nationwide consistency, the

However, until recently sentences within guidelines were still the norm.<sup>84</sup> In 2014, for the first time federal courts imposed more sentences that were outside the Guidelines than sentences that were within them. The margin is very small (fifty-four percent to forty-six percent), but it does reflect a trend by the judiciary to view the Guidelines as a less strict constraint than in the past.<sup>85</sup>

As with most other presumptive sentencing systems, the sanction range in the Guidelines system is determined by reference to two main considerations.<sup>86</sup> The first is the offense level, which entails an assessment of the seriousness of the offense (this often includes a number of variables and, depending on the offense, can include the nature of any injury caused or monetary amount involved).<sup>87</sup> The second is the offender's criminal history score, which is based on the seriousness of past offenses and the time that has elapsed since the prior offense.<sup>88</sup>

While criminal history score and offense severity are cardinal sentencing considerations, they do not exhaust all of the matters that influence the penalty. Courts can depart from a guideline for a number of reasons. The most wide-ranging statutory departure is<sup>89</sup> 18 U.S.C. § 3553, which states:

- (a) Factors to be Considered in Imposing a Sentence – The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
  - (2) the need for the sentence imposed –
    - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    - (B) to afford adequate deterrence to criminal conduct;
    - (C) to protect the public from further crimes of the defendant;
- and

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Guidelines should be the starting point and the initial benchmark.”). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). *See* Rita, 551 U.S. 338, 351.

84. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions*, 43 UC DAVIS L. REV. 1135, 1160 (2010). *See also* EVANS & HOFER, *supra* note 77; William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in MITIGATION AND AGGRAVATION AT SENTENCING 2471 (Julian V. Roberts ed., 2011).

85. U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT, FISCAL YEAR 2014 (2014).

86. Tonry, *supra* note 70, at 514–16.

87. U.S. SENTENCING GUIDELINES MANUAL 400 (U.S. SENTENCING COMM'N 2015).

88. *Id.*

89. *See* EVANS & HOFER, *supra* note 77, at 6. As discussed further below, the Guidelines set out a number of statutory departures, however, in addition to this courts can also depart from the prescribed sentence for reasons that are not expressly set out in the Guidelines.

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . .<sup>90</sup>

The Guidelines expressly set out over three-dozen considerations that can affect the penalty.<sup>91</sup> They also prescribe several considerations that should not have an impact on penalty.<sup>92</sup> In order to determine a sufficient but not excessive sentence, the courts can factor in a number of mitigating and aggravating considerations. They come in two main forms.

“Adjustments” are considerations that increase or decrease penalty by a designated amount.<sup>93</sup> For example, a demonstration of remorse can result in a decrease of penalty by up to two levels; it can decrease by three levels if it is accompanied by an early guilty plea.<sup>94</sup> The other main category of aggravating and mitigating considerations is known as a “departure.” If a departure is applicable, the court can more readily impose a sentence outside the applicable Guideline range. Moreover, the Guidelines permit, in some instances, considerations that are not set out in the Guidelines to justify departing from the range.<sup>95</sup> This means the range of aggravating and mitigating considerations set out in the Guidelines is not exhaustive. Where a court departs from the applicable range, it is required to state its reason.<sup>96</sup>

Most importantly, for the purposes of this Article, the Guidelines make it clear that mental impairment is a consideration that can be invoked to justify a sentence outside the guideline range. For the sake of clarity, federal courts have emphasized that where mental disorder is relevant to sentencing, it only operates in one manner—to reduce penalty.<sup>97</sup> It cannot justify an upward departure.

There are three pathways in the Guidelines whereby mental impairment can reduce penalty. The first pathway is § 5H1.3, which contains the Policy Statement regarding the relevance of mental and emotional conditions of an

90. For a discussion of the operation of this provision, see William W. Berry III, *supra* note 84; EVANS & HOFER, *supra* note 77.

91. U.S. SENTENCING GUIDELINES MANUAL §§ 3, 5H (U.S. SENTENCING COMM’N 2015).

92. *Id.* §§ 3, 5. For an historical overview of the development of aggravating and mitigating considerations in the Guidelines, see EVANS & HOFER, *supra* note 77, at 2–6.

93. U.S. SENTENCING GUIDELINES MANUAL § 3 (U.S. SENTENCING COMM’N 2015).

94. *Id.* § 3E1.1. However, § 5K2.0 (d)(4) provides that the court cannot depart from a guideline range as a result of “[t]he defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See, § 6B1.2 (Standards for Acceptance of Plea Agreement).”

95. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (U.S. SENTENCING COMM’N 2015); see also Gall v. United States, 552 U.S. 38, 46 (2007); Pepper v. United States, 562 U.S. 476, 480 (2011).

96. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(e) (2015).

97. See EVANS & HOFER, *supra* note 77, at 82–83 (quoting United States v. Pinson, 542 F.3d 822, 838 (10th Cir. 2008); United States v. Portman, 599 F.3d 633, 638 (7th Cir. 2010)). For a contrary argument, see *Developments in the Law – The Law of Mental Illness*, *supra* note 8, at 1139, 1141–42.

offender to his or her sentence. It states, “[m]ental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines . . . .”<sup>98</sup> It is expressly noted by the Guidelines that the offender’s mental condition may apply in order to determine whether a sentence *outside the guideline range* in a particular case is warranted. This will be the case “if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”<sup>99</sup> While this is a considerable limitation, there is no requirement that the condition contributed to or caused the offending. While the application of § 5H1.3 can result in a penalty outside the range, it is rare that this occurs.<sup>100</sup>

This is a matter expressly noted in the Guidelines Manual, which states:

. . . Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.<sup>101</sup>

While § 5H1.3 only applies to conditions that are present to an “unusual degree and distinguish the case from the typical cases covered by the guidelines,” the same limitation does not exist regarding departures from guideline ranges stemming from § 3553(a)(1). These require only consideration of the “history and characteristics” of the offender.<sup>102</sup> This is the second pathway by which mental impairment can reduce penalty. And, as noted above, § 3553(a)(1) can be utilized to justify a sentence outside the framework of the Guideline process.<sup>103</sup>

More directive as far as mental disorder is concerned is § 5K2.13, which applies specifically to diminished capacity.<sup>104</sup> It is the last pathway whereby mental impairment can impact penalty. It enables a downward departure from the Guideline penalty range, but only when the defendant committed

98. U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (2015). For a discussion of the background to this section, see EVANS & HOFER, *supra* note 77, at 70–84.

99. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (2015).

100. EVANS & HOFER, *supra* note 77, at 70–84.

101. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (2015).

102. EVANS & HOFER, *supra* note 77, at 79.

103. *Id.*

104. Section 5K2.13 (Diminished Capacity) is an “additional (and independent) source of guidance” regarding the relevance of mental impairment to sentencing. *Id.* at 77.

the offense while suffering from a significantly reduced mental capacity *and this substantially contributed to commission of the offense*.<sup>105</sup> It does not apply to a range of sexual offenses.<sup>106</sup> The section states:

A downward departure may be warranted if: (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense. However, the court may not depart below the applicable guideline range if: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.<sup>107</sup>

Thus, pursuant to the Guidelines, mental disorder can result in a reduced penalty through three pathways:

- § 5H1.3, where the condition applies to an unusual degree and distinguishes it from the typical cases covered by the guidelines (this normally leads to a within-guideline reduction);
- § 5K2.13, where the condition results in diminished capacity and this contributed substantially to the commission of the offense (this can result in a penalty below the guideline range); and
- § 3553(a)(1), which is the broadest consideration, where the “nature and circumstances of the offense and the history and characteristics of the defendant” can help determine the sentence (and can result in an outside-guideline penalty).

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105. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2015).

106. *Id.*

107. *Id.* Chapter 71 deals with offenses relating to obscenity. 18 U.S.C. ch. 71 (2015). Chapter 109A deals with sexual abuse offenses. 18 U.S.C. ch. 109A (2015). Chapter 110 deals with sexual exploitation and other forms of abuse of children. 18 U.S.C. ch. 110 (2015). Chapter 117 deals with transportation for illegal sexual activity and related offenses. 18 U.S.C. ch. 117 (2015). The legislative history of this is described in EVANS & HOFER, *supra* note 77, at 167–74. For examples of the application of this provision, see *United States v. Gapinski*, 561 F.3d 467, 474 (6th Cir. 2009); *United States v. Tom*, 327 F. App'x 93, 97 (10th Cir. 2009).

Accordingly, the courts can reduce a penalty based on a mental disorder, especially where the disorder contributed substantially to the commission of the offense.<sup>108</sup> Notably, the extent to which mental impairment can and should reduce a penalty is not prescribed by the Guidelines.

A penalty reduction on the basis of mental illness is most commonly a backward-looking inquiry, in that it focuses on the mental state of the accused at the time of offending. However, there is also scope for it to apply in a forward-looking manner. Courts in some cases have been prepared to reduce the penalty because it might be particularly burdensome for an offender experiencing a mental disorder.<sup>109</sup> As discussed below, this discount is supported by a considerable degree of empirical evidence showing that offenders with mental conditions find prison more difficult than others do.<sup>110</sup> Moreover, in *Brown v. Plata*<sup>111</sup> the Supreme Court held that denying prisoners medical treatment, especially for mental health issues, constitutes cruel and unusual punishment and, hence, violates the Eighth Amendment.<sup>112</sup> In reaching this conclusion, the Court affirmed an order that California was required to reduce its prison population to 137.5% of design capacity within two years.<sup>113</sup>

Thus, there is ample scope for courts to reduce penalties on the basis of mental impairment. However, the reality indicates that, in fact, mentally impaired defendants receive harsher penalties. It has been observed that:

Despite rules of court in California designed to mitigate punishments for mentally ill offenders, the average sentence imposed on defendants suffering from mental illness is longer than the average sentence imposed on defendants who do not have [a] mental health diagnosis but who committed the same crime. Unfortunately, this is true across every category of crime in California. For example, the average sentence for burglary imposed on men-

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108. Although this paper does not focus on relevance of mental impairment in capital cases, it is noteworthy that the above general approach in terms of requiring a connection between the mental condition and the crime is similar to that in capital cases. In *Penry v. Lynaugh*, the Court stated, “defendants who commit criminal acts that are attributable . . . to emotional and mental problems may be less culpable than defendants who have no such excuse.” 492 U.S. 302, 319 (1989).

109. E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 629, 656 (2014) (noting “some courts have also relied on sections 5K2.0, 5H1.4, and 5K2.13 to grant downward departures on the basis of suspected or demonstrated hardship in prison”). Johnston adds that “[a]t least a dozen jurisdictions recognize excessive offender hardship as a mitigating factor . . . . In addition, states may have a “catch-all” provision, which allows courts to mitigate an individual’s sentence when it feels that doing so is necessary for the ends of justice.” *Id.* at 652.

110. See *supra* Part IV.

111. *Brown v. Plata*, 563 U.S. 493 (2011).

112. *Id.*

113. *Id.* For a discussion of this case, see Ian Freckleton, *Cruel and Unusual Punishment of Prisoners with Mental Illnesses: From Oates to Plata*, 18 PSYCHIATRY, PSYCHOL & L. 329 (2011).

tally ill defendants is 30 percent longer than the average sentence for non-mentally ill defendants convicted of the same crime.<sup>114</sup>

Thus, while the courts have the capacity to reduce penalty severity on the basis of mental illness, there is no systematic or transparent methodology that has been applied to achieve this end.<sup>115</sup>

### 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.<sup>116</sup> While sentencing law differs in each jurisdiction, like the situation in the United States, there is considerable convergence in key areas.<sup>117</sup>

A key aspect of sentencing in Australia is that it is largely a discretionary process.<sup>118</sup> In contrast to the United States, fixed penalties for serious offenses in Australia are rare.<sup>119</sup> Each offense has a maximum penalty and judges have the discretion to impose any sanction not exceeding the maximum penalty, although, in relation to most offenses, a general range or tariff that most sentences fall within tends to have emerged.<sup>120</sup> Judges are not, however, locked into imposing a sentence within this range.<sup>121</sup>

The overarching methodology and conceptual approach that sentencing judges take in making sentencing decisions is the same in each jurisdiction.<sup>122</sup> This approach is known as “instinctive synthesis.” The term originates from the forty-year-old Full Court of the Supreme Court of Victoria decision of *R. v Williscroft*,<sup>123</sup> where Justices Adam and Crockett stated, “[n]ow, ultimately, every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.”<sup>124</sup>

The unfettered discretionary nature of Australian sentencing is reminiscent of the uncontrolled sentencing process used in parts of the United States fifty years ago, which led Justice Marvel Frankel to describe the sys-

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114. STAN. L. SCH., *supra* note 8, at 2.

115. Legislative provisions in some other states also expressly state that mental illness can mitigate penalty: *see* Johnston, *supra* note 7, at 153, where she cites examples including ALASKA STAT. § 12.55.155(d)(18) (2012); CAL. RULES OF COURT § 4.423(b)(2) (2012).

116. MIRKO BAGARIC & RICHARD EDNEY, *SENTENCING IN AUSTRALIA* 4–5 (2nd ed. 2015).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Hili v The Queen* (2010) 242 CLR 520, 554 (Austl.).

122. BAGARIC & EDNEY, *supra* note 115, at 19–21.

123. *R. v Williscroft* [1975] VR 292 (Austl.).

124. *Id.* at 300.

tem as “lawless.”<sup>125</sup> In a similar vein, in *Mistretta v. United States*,<sup>126</sup> it was noted that indeterminate sentencing had been criticized for producing, “[s]hameful consequences [in the form of] a great variation among sentences imposed by different judges upon similarly situated offenders [and] uncertainty as to the time the offender would spend in prison.”<sup>127</sup>

The key sentencing objectives in Australia, as in the United States, are general deterrence,<sup>128</sup> specific deterrence,<sup>129</sup> community protection, and rehabilitation.<sup>130</sup> Some degree of predictability<sup>131</sup> is injected into the sentencing system by the fact that the proportionality principle is adopted in all jurisdictions.<sup>132</sup> A clear statement of the principle of proportionality is found in the High Court case *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.”<sup>133</sup>

Another important commonality is that aggravating and mitigating factors operate relatively uniformly throughout the country, despite the different ways that they are dealt with by statute.<sup>134</sup> There are well over 100 mitigating and aggravating factors.<sup>135</sup> Mitigating factors can be divided into four categories.<sup>136</sup> The first relate to the offender’s response to a charge and include pleading guilty,<sup>137</sup> co-operating with law enforcement authori-

125. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 8 (1972). For a critique of Frankel’s impact, see Lynn Adelman & Jon Dietrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 *BERKELEY J. CRIM. L.* 239 (2008).

126. *Mistretta v. United States*, 488 U.S. 361 (1989).

127. *Id.* at 366.

128. General deterrence is the theory that harsh penalties will discourage potential offenders from committing crime.

129. Specific deterrence is the theory that the infliction of a harsh penalty on an offender will deter that offender from re-offending.

130. Rehabilitation is the aim of inducing positive attitudinal reform in offenders in order that they do not reoffend. The main sentencing objectives are set out in BAGARIC & EDNEY, *supra* note 115, ch. 1.

131. However, as noted below, the level of predictability is relatively minor. See also Mirko Bagaric, *Sentencing: From Vagueness to Arbitrariness – The Need to Abolish the Stain that is the Instinctive Synthesis in Australian Sentencing*, 38 *U. NEW S. WALES L.J.* 76, 88–93 (2015).

132. RICHARD EDNEY & MIRKO BAGARIC, *AUSTRALIAN SENTENCING: PRINCIPLES AND PRACTICE* 97 (2007).

133. *Hoare v The Queen* (1989) 167 CLR 348, 354 (Austl.).

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

135. *Compare* Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* 43 (1981) (identifying 229 factors), with LA TROBE UNIV., *GUILTY, YOUR WORSHIP: A STUDY OF VICTORIA’S MAGISTRATES’ COURTS* 62 (1980) (identifying 292 relevant sentencing factors in a study of Victorian Magistrates’ Courts).

136. See VICTORIAN ATTORNEY GENERAL’S DEP’T, *SENTENCING: REPORT OF THE VICTORIAN SENTENCING COMMITTEE* 359–60 (1988).

137. See *Cameron v The Queen* (2002) 209 CLR 339, 344 (Austl.).

ties,<sup>138</sup> and remorse.<sup>139</sup> The second group of factors relate to the circumstances of the offense and which contribute to, and to some extent explain, the offense. These include duress<sup>140</sup> and provocation.<sup>141</sup> The third category includes offender characteristics, such as youth<sup>142</sup> and previous good character.<sup>143</sup> The fourth broad type of mitigating factor is the impact of the sanction and includes considerations such as possible effects of onerous prison conditions<sup>144</sup> and public opprobrium.<sup>145</sup> Important aggravating factors are a prior criminal record,<sup>146</sup> significant level of injury,<sup>147</sup> high level of planning,<sup>148</sup> offenses committed while on bail or parole,<sup>149</sup> and breach of trust.<sup>150</sup>

For the purposes of this paper, the most important mitigating factor is mental disorder. *Verdins* set out six ways in which mental disorder can operate to reduce penalty. The court stated:

Impaired mental functioning, whether temporary or permanent (“the condition”) is relevant to sentencing in at least the following six ways:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender’s legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.

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138. See *R v Cartwright* (1989) 17 NSWLR 243, 252 (Austl.); *R v El Hani* [2004] NSWCCA 162 (21 May 2004) 166 (Austl.); *TXT v The State of Western Australia* [2012] WASCA 28 (8 Feb. 2012) 28 (Austl.).

139. See, e.g., *R v Whyte* (2004) 7 VR 397, ¶¶ 19–22 (Austl.); *Barbaro v The Queen* [2012] VSCA 288 (12 Feb. 2014) ¶ 36 (Austl.); *Phillips v The Queen* (2012) 222 A Crim R 149, 153–54 (Austl.).

140. See *Tiknius v R* [2011] NSWCCA 215 (22 Sept. 2011) ¶ 17 (Austl.).

141. See *Va v The Queen* [2011] VSCA 426 (15 Dec. 2011) ¶ 35 (Austl.).

142. See, e.g., *R v Neilson* [2011] QCA 369 (16 Dec. 2011) ¶ 28 (Austl.); see also *R v Kuzmanovski* [2012] QCA 19 (24 Dec. 2012) ¶ 11 (Austl.).

143. Although it has limited weight in relation to white-collar offenders. See, e.g., *R v Coukoulis* (2003) 7 VR 45, ¶¶ 17–18 (Austl.).

144. See, e.g., *WA v O’Kane* [2011] WASCA 24 (4 Feb. 2011) ¶ 20 (Austl.); *R v Puc* [2008] VSCA 159 (23 Nov. 2007) ¶ 33 (Austl.); *Tognolini v The Queen* [2012] VSCA 311 (14 Dec. 2012) ¶¶ 22–30 (Austl.).

145. See *Ryan v The Queen* (2001) 206 CLR 267, ¶¶ 38, 40–41 (Austl.).

146. See, e.g., *R v Field* [2011] NSWCCA 13 (16 Feb. 2011) ¶¶ 20, 32, 34 (Austl.); *Saunders v The Queen* [2010] VSCA 93 (15 Apr. 2010) (Austl.).

147. *DPP v Marino* [2011] VSCA 133 (13 May 2011) ¶ 32 (Austl.).

148. *Harris v The Queen* [2015] VSCA 192 (23 July 2015) ¶ 24 (Austl.); *R v Esposito* [2000] SASC 182 (30 June 2000) ¶¶ 18, 20 (Austl.).

149. *R v AD* [2008] NSWCCA 289 (9 Dec. 2008) ¶ 43 (Austl.); *Holloway v The Queen* [2011] NSWCCA 23 (28 Feb. 2011) ¶ 84 (Austl.); *Miller v The Queen* [2015] NSWCCA 86 (6 May 2015) ¶ 61 (Austl.).

150. *DPP v Truong* [2004] VSCA 172 (24 Sep. 2004) ¶¶ 12, 21 (Austl.); *R v JP* [2015] NSWCCA 267 (9 Oct. 2015) ¶ 49 (Austl.); *R v Cornell* [2015] NSWCCA 258 (24 Sept. 2015) ¶ 135 (Austl.).

3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.<sup>151</sup>

While the above passage states that mental impairment may impact on sentencing in at least six different ways, in reality the passage identifies only five such situations.

First, pursuant to point one, mental disorder can lead to a softer penalty because of a *diminished level of moral culpability*, which supposedly reduces the role of denunciation.<sup>152</sup> In *DPP v Weidlich*,<sup>153</sup> the court explained the connection with moral culpability in the following terms:

Generally, the measure of culpability of an offender under the criminal law rests upon the extent to which the individual can be seen to be personally responsible for both the prohibited acts and their consequences. Little thought is required to appreciate that the *greater the level of insight and understanding possessed by him or her concerning the act and its potential harm, the higher becomes the level of culpability for then deliberately engaging in the conduct involved*. The Court in *Tsiaras* and *Verdins* recognised that sometimes as a consequence of the contribution made to the commission of an offence by a mental disorder from which a perpetrator was suffering at the time, it would be unjust to attribute to the offender a full measure of personal responsibility.<sup>154</sup>

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151. *R v Verdins* (2007) 169 A Crim R 581, 589–90 (Austl.).

152. See, e.g., *Thompson v The Queen* (2005) 157 A Crim R 385, 395–96 (Austl.) (citing *R v Tsiaras* (1996) 1 VR 398, 400 (Austl.)); see also *Cooley v WA* (2005) 155 A Crim R 528, 551 (Austl.).

153. *DPP v Weidlich* [2008] VSCA 203 (27 Oct. 2008) (Austl.).

154. *Id.* ¶¶ 15, 17 (emphasis added).

Second, again pursuant to point one, the lower level of moral culpability of some mentally impaired offenders *reduces the harshness of the sanction that is necessary to impose a proportionate sentence*. To this end, the phrase “punishment that is just in all the circumstances” is a reference to the proportionality principle.<sup>155</sup>

Third, pursuant to point three, the diminished level of moral culpability may *reduce the relevance of general deterrence*.

Fourth, pursuant to point four, the diminished level of moral culpability may *reduce the relevance of specific deterrence*.

Fifth, pursuant to points five and six, the existence of a mental impairment may make the *penalty more burdensome* for an offender and, hence, could act as a mitigating factor. The additional burden can occur as a result of the greater difficulty associated with dealing with the prison environment, or compliance with another penalty, or the possibility that the sanction would make the condition worse.

Point two is simply a conclusion that follows from the comments in the other points.

There is some authority suggesting that mental disorder can in some cases also operate to negate the existence of an aggravating factor. In *R v Swan*,<sup>156</sup> the offender suffered from an intellectual disability.<sup>157</sup> He exacted revenge upon the victim, whom the appellant claimed had sexually abused him in the past.<sup>158</sup> Vigilante conduct can be an aggravating factor.<sup>159</sup> In *Swan*, however, Chief Justice Spigelman made it explicit that the intellectual disability of the appellant would mean that the ordinary operation of the principle of aggravation—taking the law into one’s own hands—is reduced. His Honor stated:

The principle that a person is not entitled to take the law into his or her own hands is well known . . . . However, the principle is, in large measure, a manifestation of the principle of deterrence, both general and personal. In that respect it is affected by other sentencing principles which impinge upon the weight to which personal and general deterrence is entitled in the circumstances of a particular case. Accordingly, on the medical evidence in this case, particularly that relating to the appellant’s intellectual disability, the application of the maxim—that a person must not be allowed to take the law into his own hands—is accordingly attenuated.<sup>160</sup>

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155. *DPP v Jones* [2013] VSCA 330 (21 Nov. 2013) ¶ 100 (Austl.).

156. *R v Swan* [2006] NSWCCA 47 (6 Mar. 2006) ¶ 5 (Austl.).

157. *Id.*

158. *Id.* ¶ 21.

159. *DPP v Whiteside* [2000] VSCA 142 (4 Aug. 2000) ¶¶ 23–24 (Austl.).

160. *Swan*, [2006] NSWCCA 47, ¶¶ 59–60.

The outcome in *Swan* is thus not indicative of a new and different manner that mental disorder can reduce penalty. The decision rests in the wider principle that general and specific deterrence are normally of less relevance in cases of mentally impaired offenders, and that aggravating considerations grounded in these sentencing objectives can similarly be neutralized or diminished for this category of offenders.

The *Verdins* principles have been followed in all Australian jurisdictions, with the exception of the Northern Territory.<sup>161</sup> New South Wales has frequently and extensively considered the issue of the impact of mental disorder on sentencing. It has applied *Verdins* and articulated almost identical principles to those developed in that case. For example, in *Director of Public Prosecutions (Cth) v De La Rosa*,<sup>162</sup> the NSW Court of Criminal Appeal summarized the relevant principles as follows:

Where an offender is suffering from a mental illness, intellectual handicap or other mental problems, the courts have developed principles to be applied when sentencing . . . . They can be summarized in the following manner:

1. Where the state of a person's mental health contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced. Consequently, the need to denounce the crime may be reduced with a reduction in the sentence . . . .
2. It may also have the consequence that an offender is an inappropriate vehicle for general deterrence, resulting in a reduction in the sentence which would otherwise have been imposed . . . .
3. It may reduce or eliminate the significance of specific deterrence.
4. Conversely, it may be that because of a person's mental illness, they present more of a danger to the community. In those circumstances, considerations of specific deterrence may result in an increased sentence. Where a person has been diagnosed with an Antisocial Personality Disorder there may be a particular need to give consideration to the protection of the public.

I should stress that the mental health problems of an offender need not amount to a serious psychiatric illness before they will be relevant to the sentencing process. The circumstances may indicate that when an offender has a mental disorder of modest

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161. See *Monfries v The Queen* [2014] ACTCA 4, 65 (16 Oct. 2014) (Austl.); *R v Barratt* [2014] QCA 227 (11 Sept. 2014) ¶ 17 (Austl.); *Papas v WA* [2011] WASCA 3 (10 Jan. 2011) ¶¶ 12–13 (Austl.); *Melham v The Queen* [2011] NSWCCA 121 (2 June 2011) ¶¶ 57–60 (Austl.); *R v Flentjar* [2013] SASCFC 11 (12 Mar. 2013) ¶ 43 (Austl.); *Groenewege v Tas* [2013] TASCSCA 7 (26 July 2013) ¶¶ 30–32 (Austl.); *Mack v WA* [2014] WASCA 207 (10 Nov. 2014) ¶ 201 (Austl.); *WA v Khasay* [2014] WASCA 58 (19 Mar. 2014) ¶ 38 (Austl.).

162. *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 (Austl.).

severity it may nevertheless be appropriate to moderate the need for general or specific deterrence.<sup>163</sup>

These principles are generally contained within the approach set out in *Verdins*. However, there is one important point of elaboration beyond the principles set out in that case, and which departs from the position in the United States. In *Iskandar*, the court stated that in some instances mental disorder can lead to a heavier penalty.<sup>164</sup> This is a theme that had been developed in earlier authorities. Mental illness can be so profoundly disturbing and pointed that it seems to involve a risk to the community, hence the need for a greater emphasis on community protection.<sup>165</sup> *Channon v The Queen*<sup>166</sup> discusses the dilemma that confronts courts in cases of offenders suffering from a serious psychiatric or psychological illness who have committed serious offenses:

Psychiatric abnormality falling short of insanity is frequently found to be a cause of, or a factor contributing to, criminal conduct. The sentencing of an offender in cases of that kind is inevitably difficult. The difficulty arises in part because the factors which affect the sentence give differing significance to an offender's psychiatric abnormality. An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe.<sup>167</sup>

Thus, in Australia, mental disorder normally mitigates penalty, but in cases of serious offenders, it can also be an aggravating factor, leading to a more severe sentence. In addition to these positions, it can also have a neutral effect: the aggravating and mitigating aspects of the mental disorder in a specific case can cancel each other out.<sup>168</sup>

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163. *Id.* ¶ 177; see also *Melbam*, [2011] NSWCCA 121, ¶¶ 56–60.

164. *Iskandar v The Queen* [2013] NSWCCA 235 (21 Oct. 2013) ¶¶ 28–29 (Austl.).

165. *Id.* ¶ 29.

166. (1978) 33 ALR 1 (Austl.).

167. *Id.*; *Channon*, 33 ALR at 4–5. The decision of *Veen v The Queen (No. 2)* (1988) 164 CLR 465 (Austl.) presents a good illustration of this principle. In such circumstances, the task of determining the appropriate disposition for offenders who fall into this category presents as a sentencing task that is “clearly very difficult.” *R v Sirillas* (2004) 145 A Crim R 390, 395–396 (Austl.).

168. In *WA v Khasay*, the court stated, “In *Leach v The Queen*, Basten JA pointed out that although mental impairment will often tend to diminish moral blameworthiness or culpability and, in consequence, tend to diminish the otherwise appropriate sentence, it may in some circumstances have other effects. His Honour referred to the observation of Gleeson CJ in *R v Engert* that ‘the existence of a causal connection between the mental disorder and the offence might reduce the importance of general deterrence, and increase the importance of particular deterrence or the need to protect the public.’ See also,

In *R. v Dupuy*,<sup>169</sup> the court stated that no predetermined weight should be given to mental impairment, and that ultimately it is for the sentencing judge to determine how much impact it should have on the final sentence.<sup>170</sup> This is in keeping with the general discretionary approach to sentencing in Australia.<sup>171</sup>

A core issue regarding the circumstances that mental disorder at the time of the offending can mitigate penalty is the extent to which there must be a link between the condition and the crime. In *Verdins*, it was stated that a concrete causal nexus was not necessary:

Impaired mental functioning at the time of the offending may reduce the offender's moral culpability if it had the effect of—

- (a) impairing the offender's ability to exercise appropriate judgment;
- (b) impairing the offender's ability to make calm and rational choices, or to think clearly;
- (c) making the offender disinhibited;
- (d) impairing the offender's ability to appreciate the wrongfulness of the conduct;
- (e) obscuring the intent to commit the offence; or
- (f) contributing (causally) to the commission of the offence.<sup>172</sup>

These classifications and categories are notable for their vagueness. For example, is it the case that if categories (a) to (e) are present, (f) is always satisfied? If an offender cannot make a rational choice or think clearly (that is, if (b) is satisfied), it must follow that he or she cannot exercise appropriate judgment (that is, (a) is satisfied), and the offender's moral radar is also likely to be impaired (hence (d) is satisfied). The above list is, in reality, no more than a smorgasbord of examples of when courts have been inclined to permit mental disorder to mitigate penalty.

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*Wheeler* [No 2], where McLure P said, citing *Engert*, that a sentencing consideration may be relevant in more than one respect and not affect the outcome because it weighs both positively and negatively in the balance." [2014] WASCA 58 (19 Mar. 2014) ¶ 40 (Austl.) (citations omitted). Similar sentiments are expressed in *Freeman v The Queen*, where the Court stated: "Contrary to submissions advanced on behalf of the applicant, in our view the assessment of moral culpability required the judge to have regard to both the extent of the applicant's mental dysfunction and the gravity of the crime in question and to consider each in light of each other. That is to say, if an offence is but venial, a lesser mental condition may go a significant way to reducing the offender's moral culpability. But if an offence is as serious as this was, a relatively insignificant mental condition is likely to weigh less in the scale of assessment of moral culpability. It requires a substantial degree of mental disability to result in a substantial reduction in moral culpability for this class of offending." [2011] VSCA 349 (9 Nov. 2011) ¶¶ 27–28 (Austl.).

169. *R v Dupuy* [2008] VSCA 63 (24 Apr. 2008) (Austl.).

170. *Id.* ¶ 34.

171. The amount of weight given to a sentencing factor is only erroneous if it results in a sentence being manifestly excessive or inadequate. *DPP (Vic) v Terrick* [2009] VSCA 220 (21 Oct. 2009) ¶ 5 (Austl.).

172. *R v Verdins* (2007) 169 A Crim R 581, 588–89 (Austl.).

It is not surprising, then, that other cases have sought to provide more clarity to the test and tighten the criteria. For instance, *Charles v The Queen*<sup>173</sup> stated:

*Verdins* has no application in respect of a mental condition postulated to have existed at the time of the offending unless the condition relied upon can be seen to have some “realistic connection” with the offending; or is “caused or contributed” to the offending; or is “causally linked” to the offending.<sup>174</sup>

The requirement that there is a connection between the mental illness and the offending is illuminating because it considerably circumscribes the situations set out in categories (a) to (f) of *Verdins* regarding how mental disorder can reduce penalty. In fact, the six situations are reduced to the one single circumstance, namely, where the mental impairment caused or contributed to the crime by any of the processes set out in (a) to (e). This introduces a significant complexity into the inquiry, namely, when can it be said that mental disorder has a “realistic connection” with the offending? Or, when has it “caused or contributed” to the offending? Or, is “causally linked” to the offending?<sup>175</sup> The matter was clarified in *Bowen v The Queen*<sup>176</sup>, by Chief Justice Warren, who stated, “Impaired mental functioning that only forms the ‘background’ to the commission of the relevant offences cannot be treated in accordance with *Verdins* principles as relevant to the offender’s moral culpability. It can only do so if there is a direct causative link between the two.”<sup>177</sup> The requirement for a “direct causative link” between the offending and the mental disorder imposes a considerable limitation on the circumstances in which mental disorder at the time of the offense can mitigate penalty.

Apart from cases where there is a causal link to the offending that reduces the moral culpability of the offender, there are, as we have noted, three other reasons that may justify reduced penalties for mentally disordered offenders.<sup>178</sup>

General deterrence is a cardinal sentencing consideration, especially in relation to planned offenses involving a financial benefit to the offender.<sup>179</sup> As noted above, this is not an important consideration in cases involving mentally impaired offenders.<sup>180</sup> However, the role of general deterrence is

173. *Charles v The Queen* (2011) 34 VR 41 (Austl.).

174. *Id.* ¶ 162.

175. See *infra* Part IV (regarding the absence of a coherent test for causation).

176. *Bowen v The Queen* [2011] VSCA 67 (11 Mar. 2011) (Austl.).

177. *Id.* ¶ 33.

178. These are the reduced need for general deterrence and specific deterrence and the fact that prison conditions may be more burdensome for mentally impaired offenders.

179. BAGARIC & EDNEY, *supra* note 116, at 165.

180. This position has a long history. It goes back to the comments of Judge Dixon in *R v Porter*, who stated, “The purpose of the law in punishing people is to prevent others from committing a like crime or crimes. Its prime purpose is to deter people from committing offences. It may be that there is

not always totally negated in such circumstances. *Verdins* states, “General deterrence is not eliminated but still operates, sensibly moderated, in the case of an offender suffering from a mental disorder or severe intellectual handicap.”<sup>181</sup> In relation to specific deterrence, *Green v The Queen*<sup>182</sup> states that specific deterrence is often less relevant in relation to mentally disordered offenders because they have less capacity to weigh the costs and burdens of punishment:

The whole notion of personal deterrence assumes some rational analysis or reasoning in the course of comparing the likely gains from the crime against the prospect, and likely severity, of punishment. Where the illness affects the person’s ability to make that very analysis, there is no justification for affording the consideration of personal deterrence the same measure of significance as it might have in the case of a well person, although there may then be a greater need to protect the public.<sup>183</sup>

One form of mental disorder that does not mitigate penalty is self-induced impairment. In *Pederson v Western Australia*, the court stated that in such cases the “offender is generally to be regarded as morally responsible for his or her condition.”<sup>184</sup> This is presumably because while the level of culpability may be reduced at the time of offending, the offender is consid-

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an element of retribution in the criminal law, so that when people committed offences the law considers that they merit punishment, but its prime purpose is to preserve society from the depravations of dangerous and vicious people. Now, it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds.” *R v Porter* (1933) 55 CLR 182, 186 (Austl.).

181. *R v Verdins* (2007) 169 A Crim R 581, 586 (Austl.). This is derived from *R v Yaldiz* (1998) 2 VR 376, 381 (Austl.). The key High Court authority on mental disorder and sentencing is *Muldrock v The Queen* (2011) 244 CLR 120 (Austl.). The mental disorder in question was a mild intellectual disability. The principles set out by the Court apply to all forms of mental disorder. To this end, the Court focused on the diminished need for general deterrence as the basis upon which mentally disordered offenders should receive a lower penalty. The Court stated, “It was an error for the court to find that Black DCJ’s determination, that general deterrence had no place in sentencing the appellant, was not justified by the evidence. One purpose of sentencing is to deter others who might be minded to offend as the offender has done. Young CJ, in a passage that has been frequently cited, said this: ‘General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others.’ In the same case, Lush J explained the reason for the principle in this way: ‘The significance of general deterrence in a particular case will, however, at least usually be related to the kindred concept of retribution or punishment in which is involved an element of instinctive appreciation of the appropriateness of the sentence to the case. A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community.’ *Id.* at 138–39. *R v Driver* applied the *Muldrock* principles to reduce the sentence of a young accused charged with a number of violent offences. [2011] SASFC 130 (11 Nov. 2011) ¶ 22 (Austl.); see also *GN v The Queen* [2012] NSWCCA 96 (17 May 2012) ¶¶ 32–37 (Austl.) (applying the *Muldrock* principles).

182. [2011] VSCA 311 (14 Oct. 2011) (Austl.).

183. *Id.* ¶ 28.

184. *Pederson v WA* [2010] WASCA 175 (9 Sept. 2010) ¶ 50 (Austl.).

ered blameworthy for inducing the disorder which foreseeably led to the commission of a crime.

As in the United States, there is another area where mental disorder may mitigate a sentence. As noted above, in *Verdins*, the court listed two such situations: when the sentence will “weigh more heavily on the prisoner than it would on a person in normal health” or when imprisonment “might well cause an existing mental condition to deteriorate.”<sup>185</sup> This principle is reinforced by the reality that medical treatment in prison is invariably of a lesser standard<sup>186</sup> than in the community, generally due to difficulties in transporting prisoners to medical facilities and delays in seeing specialists.<sup>187</sup>

However, in Australia there is no rule saying that mentally impaired offenders who are more heavily burdened by prison conditions will receive a lighter penalty. In *R. v Wickham*<sup>188</sup> it was held that:

[C]ommon humanity will sometimes require a court to consider a life-threatening physical illness as a matter of mitigation even though the offender was suffering from such an illness at the time of the commission of the offence. However, where, as here, the issue is one of the protection of the community, it may be that common humanity for the offender gives way to concern for potential victims.<sup>189</sup>

### C. Summary of the Relevance of Mental Disorder to Sentencing

Despite the considerably different sentencing regimes in the United States and Australia, there are some key similarities in the approaches to sentencing mentally ill offenders. These shared sentencing principles can be distilled to the following propositions:

1. For sentencing purposes, the concept of mental impairment is not tightly constrained. The courts accord a large degree of latitude to conditions coming within the scope of the rubric, such that mental disorder can be relevant to sentence even if a precise diagnostic label is absent.
2. To the extent that mental disorder impacts sentencing, it is a mitigating factor. The only exception to this is in Australia where the penalty

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185. *Verdins*, 169 A Crim R at 589–90. As noted by Walvisch, a number of offenders have had their prison term reduced on the basis that their mental condition will make prison more burdensome. *Supra* note 2, at 187–201. The relevant conditions include depression, dysthymia, acquired brain injury, schizophrenia, bipolar affective disorder, and adjustment disorder. *Id.* For an illustration of this, see *R v Puc* [2008] VSCA 159 (23 Nov. 2007) ¶¶ 31–33 (Austl.).

186. Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 666–672 (2009).

187. *Pfeiffer v The Queen* [2009] NSWCCA 145 (15 May 2009) ¶¶ 13–14 (Austl.).

188. [2004] NSWCCA 193 (17 June 2004) (Austl.).

189. *Id.* ¶ 18.

can be increased if the mental disorder is regarded as making the offender an increased threat to community safety.

3. Mental disorder can mitigate sentences in two main ways. First, where it was present at the time of the offense; and second, where it is likely to persist during the sentencing phase.
4. Mental impairment that existed at the time of the offense can mitigate sentences because current orthodoxy maintains that it lowers the culpability of the offender. In order to operate in this fashion it must normally causally contribute to the commission of the offense.
5. In Australia, mental disorder that prevailed at the time of the offense can also mitigate penalty because it can undercut the need for general deterrence and specific deterrence.
6. In Australia and the United States there is not even an approximate mathematical calibration of the extent that a penalty should be reduced if the offender was mentally impaired at the time of the offense. Thus, there is no concrete evidence that courts are actually reducing penalties on account of mental impairment.
7. Mental disorder can also mitigate if at the time of sentence it is likely that as a result of it, the offender will find the sanction more burdensome.
8. If this is the case, again, there is no predetermined or fixed sentencing discount.
9. Although, in theory, mental disorder can mitigate penalty, the reality seems to be contrary. Mentally-impaired offenders sometimes receive harsher penalties than mentally-sound offenders.

#### IV. REFORM PROPOSALS

In this Part, I examine the impact that mental impairment should have on the sentencing calculus. In the process, I critique the current legal approach. I start with the most straightforward aspects of the inquiry, that being the relevance of specific and general deterrence. This is followed by a discussion relating to the proper impact of culpability. I then consider the role that burdensome prison conditions should have in a sentencing calculus. Finally, I explain the limited role that mental impairment should have in relation to the sentencing of offenders for serious sexual and violence offences.

##### *A. General Deterrence and Specific Deterrence Cannot Justify Lower Penalties*

As discussed above, mentally impaired offenders can receive lighter penalties in Australia because of the perceived diminished applicability of the objectives of general deterrence and specific deterrence. On closer analysis, neither of these reasons can justify lower penalties. First, while general deterrence and specific deterrence are orthodox sentencing objectives, empiri-

cal data show that state-imposed punishments cannot achieve either of these aims—certainly in the manner that they are conventionally understood to operate. It follows that any principles grounded in pursuit of these objectives are unsound.

There is a large volume of literature dedicated to the issues of general deterrence and specific deterrence. Given the peripheral relevance of these topics to this Article, I summarize the recent key findings.

Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and thereby convincing them that crime does not pay.<sup>190</sup> It attempts to dissuade offenders from re-offending by inflicting an unpleasant experience on them (such as imprisonment), which they will seek to avoid in the future.<sup>191</sup> The available empirical data suggests that specific deterrence does not work. There is nothing to suggest that offenders who have been subjected to harsh punishment are less likely to re-offend than identically placed offenders who are subjected to lesser forms of punishment.<sup>192</sup> In fact, some studies show the rate of recidivism among offenders sentenced to imprisonment to be higher. Nagin et al. suggest that:

Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic [that is, the possible corrupting effects of punishment] rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of them point to estimates that are not statistically significant.<sup>193</sup>

Thus, there is no basis for pursuing the goal of specific deterrence.<sup>194</sup> It follows that sentences should not be increased in order to attempt to achieve this goal. This logically entails that sentences for mentally disordered offenders cannot be reduced relative to penalty enhancements given to other offenders on the basis of specific deterrence.

The findings regarding general deterrence are also relatively settled.<sup>195</sup> The evidence suggests that in the absence of the threat of *any* punishment

190. Daniel S. Nagin, Francis T. Cullen & Cheryl Leo Jonson, *Imprisonment & Re-offending*, 38 CRIME & JUST. 115, 115–16 (2009).

191. See 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, 160 (2012).

192. DONALD RITCHIE, SENTENCING ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE (2011); DON WEATHERBURN ET AL., THE SPECIFIC DETERRENT EFFECT OF CUSTODIAL PENALTIES ON JUVENILE REOFFENDING (2009); Bruce A. Jacobs, *Deterrence and Deterrability*, 48 CRIMINOLOGY 417 (2010).

193. Nagin, *supra* note 190, at 145.

194. *Id.* at 115.

195. For an overview of the literature, see generally NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60–61 (1969); Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 35 J. APPLIED ECON. 569 (2001); Paul R. Zimmerman, *State Executions*,

for criminal conduct, the cohesive social fabric of society would dissipate, because crime would escalate and significantly diminish the capacity of people to lead orderly and flourishing lives.<sup>196</sup> Thus, general deterrence works in the absolute sense: there is a *connection* between the existence of some form of criminal sanctions and criminal conduct. This is known as the theory of absolute general deterrence.<sup>197</sup> In order to achieve this goal, the hardship must be something that people would seek to avoid, such as a fine or a short term of imprisonment.<sup>198</sup> The important point is that there is no need to impose a particularly onerous penalty.<sup>199</sup>

While absolute general deterrence is a valid theory, the type of general deterrence pursued by the sentencing system is marginal general deterrence: the view that there is a correlation between higher penalties and a reduction in the crime rate.<sup>200</sup> This objective is unattainable. In the most recent extensive analysis of the relevant literature, the US National Academy of Sciences notes, “The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.”<sup>201</sup> It follows that marginal deterrence should be disregarded as a sentencing objective, at least unless and until there is proof that it works.<sup>202</sup> Nearly ninety percent of criminologists believe that it does not work,<sup>203</sup> which is similar to scientific consensus relating to the causes of global warming.<sup>204</sup> Given this, it follows that no penalties should be escalated on the basis of it, and hence, that sentences for mentally-impaired offenders cannot be reduced relative to other offenders who are punished more heavily in the pursuit of this misconceived aim.

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*Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163 (2004); Dieter Dölling et al., *Is Deterrence Effective? Results of Meta-Analysis of Punishment*, 15 EUR. J. ON CRIM. POL'Y & RES. 201 (2009); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 177–178 (2004); Richard Berk, *New Claims about Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 328 (2005); NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 90 (Jeremy Travis et al. eds., 2014).

196. RITCHIE, *supra* note 192, at 8 (referring to the impact of police strikes); see also Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work – and What it Means for Sentencing*, 35 CRIM. L.J. 269, 270 (2011).

197. Bagaric & Alexander, *supra* note 196, at 270.

198. *Id.* at 282.

199. See generally *id.* at 282.

200. *Id.* at 270.

201. NATIONAL RESEARCH COUNCIL, *supra* note 195, at 4.

202. See Bagaric & Alexander, *supra* note 196, at 283.

203. See Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates: The Views of Leading Criminologists*, 99 J. OF CRIM. L. & CRIMINOLOGY 489, 490 (2009).

204. See Brian Evans, *A Clear Scientific Consensus that the Death Penalty does NOT Deter*, AMNESTY INT'L (June 18, 2009, 1:26 PM), <http://blog.amnestyusa.org/us/a-clear-scientific-consensus-that-the-death-penalty-does-not-deter/> [https://perma.cc/8MY4-6WRU].

Moreover, even if marginal general deterrence was effective, it could not justify less harsh penalties for mentally-impaired offenders. The theory of marginal general deterrence is that making clear the hardship that offenders are subjected to will discourage potential offenders from committing crime. While it can be argued that mentally-disordered offenders are less likely to be impacted by any threat, it is important to understand that general deterrence is meant to speak to all prospective offenders. If the certainty of punishment is reduced for one cohort of individuals, it is likely that all prospective individuals would perceive a lowered risk of adverse outcomes.

The position taken in Australia that mentally-disordered offenders should receive lighter penalties because they are not appropriate vehicles for specific or general deterrence is flawed. However, as discussed below, there is something to learn from the approach courts take to general deterrence and specific deterrence in relation to offenders with a mental condition. The approach is sweeping in nature: all offenders with a mental impairment are accorded a discount. There is no inquiring into the precise nature of the mental disorder and, in particular, there is no requirement to establish a causal link between the crime and the condition. This point is developed further in the following section.

#### *B. Reduced Culpability Can Justify a (Relatively Minor) Reduced Penalty*

We saw in Part II that a key rationale for the mitigating impact of mental disorder is the lower culpability of such offenders. While mental disorders vary greatly in terms of nature and intensity, by definition, all mental disorders to some degree inhibit an individual's use of optimum levels of cognitive, emotional, and normative understanding and reasoning.<sup>205</sup> Given that the capacity of mentally-disordered individuals to exercise sound judgment and make sensible choices is reduced (though their willingness to make judgments and decisions is not necessarily reduced), it follows that their level of blameworthiness for committing criminal acts should be lower. The extent to which their blameworthiness is reduced compared to that of other individuals varies according to the exact nature of their disorder, and hence can vary quite markedly.

However, the continuum along which the culpability of mentally-impaired offenders can be pinpointed is not open-ended. It has a firm and important boundary: the defense of insanity. The availability of the defense means that offenders who are found guilty of crime have been considered to know the difference between right and wrong.<sup>206</sup> It is only the extent of the

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205. AMERICAN PSYCHIATRIC ASS'N, *supra* note 27, at xxi.

206. Offenders who do not understand the difference between right and wrong can avail themselves of the insanity defense. The inroad to this is the "guilty but mentally ill" provision that exists in some states. These have been criticized considerably. See John Q. La Fond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference*, 39 VILL. L. REV. 71, 103 (1994).

responsibility (that is, the level of culpability) that is at issue, not whether the responsibility threshold has been established.

The exact elements of the insanity defense in the United States and Australia are not identical, and there are differences in the test within the jurisdictions of both countries, however, substantively the same standard applies. In both countries, the defense of insanity stems from the *M'Naghten* Rule, which states:

[T]hat to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, and not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.<sup>207</sup>

The terminology used most commonly in the United States is that set out in the Model Penal Code in 1962, which provides: “[A] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.”<sup>208</sup> A similar test is applied in Australia.<sup>209</sup> Thus, offenders who are found guilty of criminal acts are blameworthy, and to a not inconsiderable degree—they have sufficient cognition and insight to be morally responsible for their acts.<sup>210</sup> As noted in *Weidlich*:

Generally, the measure of culpability of an offender under the criminal law rests upon the extent to which the individual can be seen to be personally responsible for both the prohibited acts and their consequences. Little thought is required to appreciate that the greater the level of insight and understanding possessed by him or her concerning the act and its potential harm, the higher becomes the level of culpability for then deliberately engaging in the conduct involved. The Court in *Tsiaras* and *Verdins* recognised that sometimes as a consequence of the contribution made to the commission of an offence by a mental disorder from which a perpetrator was suffering at the time, it would be unjust to attribute

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207. *M'Naghten's Case* (1843) 8 Eng. Rep. 718 (H.L.). See *Developments in the Law – The Law of Mental Illness*, *supra* note 8, at 1157; MENTAL CONDITION DEFENCES AND THE CRIMINAL JUSTICE SYSTEM: PERSPECTIVES FROM LAW AND MEDICINE (Ben Livings et al. eds., 2015).

208. This exact test no longer applies at the federal level, but is still used in eighteen states. *United States Insanity Defense*, US LEGAL, INC., <http://lawdigest.uslegal.com/criminal-laws/insanity-defense/7204> (last visited Mar. 17, 2016) [<https://perma.cc/WL9V-5QML>]. The defense of insanity has been abolished in four states. *Id.* For an overview of the elements of the defense, see *Developments in the Law – The Law of Mental Illness*, *supra* note 8, at 1157–59.

209. KEN ARENSEN & MIRKO BAGARIC, AUSTRALIAN CRIMINAL LAW IN THE COMMON LAW JURISDICTIONS: CASES AND MATERIALS ch. 15 (4th ed. 2014).

210. *Id.*

to the offender a full measure of personal responsibility. The presence of the disorder could bear upon the sentencing judge's assessment of the individual's motivation and level of culpability, prospects of rehabilitation, the need for specific deterrence and the appropriateness of giving full effect to the principle of general deterrence. However, it follows, when addressing the question of the significance of the disorder for these purposes, that the nature and extent of its possible effect upon the offender's behaviour must be carefully explored.<sup>211</sup>

This is an important caveat, as it requires an attempt to ascertain with specificity the exact extent to which mentally-disordered offenders are culpable for their criminal acts. However, matters of degree are made less important when the parameters of the inquiry are constrained by a defining concrete floor.

Attempting to ascertain exactly where in the continuum of blameworthiness a particular mentally-disordered offender lies is further complicated by the overall importance of culpability to sentencing and, more generally, to the criminal law. The criminal law, by its nature, is focused on prohibiting the commission of acts that are harmful to individuals or the community more widely. The criminal law is society's strongest form of condemnation and the forum in which we act most coercively against individuals.<sup>212</sup> In the end, the criminal law aims to prohibit and punish conduct that harms the interests of others<sup>213</sup>—it is focused not merely on bad intentions or thoughts.

In order for criminal responsibility to occur, it is necessary for the inappropriate mental state to result in conduct that harms another person or property. It is the act, not the mental process that underpins the act, which attracts the opprobrium and marks the individual out as deserving of punishment.<sup>214</sup> To the extent that mental states are relevant, it is primarily because there is generally a strong link between them and actions. Considerable significance is attached to mental states by our legal system: substantial emphasis is placed on particular mental states related to the concept of intent, such as recklessness, negligence, and carelessness. However, ultimately, the law recognizes that mental states per se are irrelevant. No matter how incorrigibly wicked a person may be or how resolutely they may intend that a certain harmful state of affairs should eventuate, no legal responsibility is ascribed until and unless such mental states are accompanied

211. *DPP v Weidlich* [2008] VSCA 203 (27 Oct. 2008) ¶ 17 (Austl.).

212. ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 16 (2nd ed. 1995).

213. Harm is the main reason for the prohibition of certain conduct as assumed in Jan Górecki's argument for decriminalizing certain "victimless" acts (e.g. homosexuality). See JAN GÓRECKI, *A THEORY OF CRIMINAL JUSTICE* 33–38 (1979).

214. For a rebuttal of desert orientated theories of crime and punishment, which place a premium on offender culpability, see Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 125, 165–170 (2000).

by actions. The only exception to this is the law relating to attempted criminal offenses. However, even here the degree of intrusion into the principle that intentions are per se irrelevant is marginal. For liability to occur it is necessary for the offender, as well as possessing the requisite mental state, to perform *actions* that are constitute a substantial step towards completing the offense.<sup>215</sup>

Culpability is already often factored into offence classification. Thus, as noted above, many forms of crime (especially serious crime, such as homicide) are broken down according to the mental state of the offender, for example whether the outcome of the crime was intended or the offender was merely reckless or negligent as to the eventual outcome. It is for this reason that, for example, murder is a more serious crime than involuntary manslaughter. However, it is important that culpability beyond offence classification should not considerably influence the determination of the ultimate penalty, otherwise it is effectively being double counted in its impact on the ultimate disposition of a matter.

Accordingly, the thought and evaluative process that culminates in committing a crime is a distant second-order consideration to the level of harm that is caused by the crime. The fact that some individuals have less capacity for clear thought, and a judgment deficit, does not make their actions less harmful. Neither does it diminish their criminal responsibility—at its highest, it merely diminishes their level of blameworthiness.

Therefore, while mental disorders vary considerably in nature, intensity and impact,<sup>216</sup> given that ultimately the thought process that underpins a crime is not a cardinal consideration so far as the criminal law is concerned, there is little utility in trying to ascertain precisely the degree and nature of the mental deficit. Culpability (as opposed to responsibility) is only a minor consideration in criminal law,<sup>217</sup> so it is not productive to inquire deeply into how any individual fares against this standard.

While the extent to which reduced culpability should lower a penalty is relatively small, the frequency with which the discount is accorded should be increased. Contrary to the position in Australia (and sometimes in the United States), the discount should not depend on establishing a causal connection with the crime. The exact explanation for any human conduct is complex and multifaceted.<sup>218</sup> There are always many reasons and desires that inform and drive action. The law lacks an overarching theory of causa-

215. For an overview, see, e.g., CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, *ATTEMPT: AN ABRIDGED OVERVIEW OF FEDERAL CRIMINAL LAW* 3 (2011). Another exception is the offense of conspiracy, but again this also requires the commission of overt acts—although they do not need to constitute the completed offense.

216. AMERICAN PSYCHIATRIC ASS'N, *supra* note 27, at xxi; Walvisch, *supra* note 2.

217. Unless, as noted above, it is an element of an offense.

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

tion.<sup>219</sup> Ascertaining the operative or main catalyst for human conduct is an exercise devoid of precision. This difficulty is compounded by the ways in which the thought processes of individuals with mental health issues are affected by those issues. A search for clarity of purpose and motivation is further complicated by the fact that most offenders do not testify, so there is no first-hand evidence that could be tested under cross-examination.<sup>220</sup> Legal efficiency, fairness, and pragmatism all compel the conclusion that causation should not be a threshold requirement in order to attract a sentencing discount on the basis of mental impairment at the time of sentencing. This approach would increase the number of situations in which the mitigation was granted on the basis of mental disorder and would also ensure that this principle was applied more uniformly and consistently.

The relevance of the culpability of mentally-disordered offenders in the sentencing calculus can be summarized as follows. Offenders who are mentally disordered at the time of the offense should receive a reduced sentence. This should not depend on establishing that the condition contributed to commission of the offense. Such a nexus should be assumed. However, culpability is not an important dimension of criminal responsibility. It is neither productive nor illuminating to inquire deeply into non-cardinal sentencing issues. The transparency, efficiency, and integrity of the sentencing process would be enhanced if all mentally-disordered offenders were accorded a predetermined penalty discount.

It is difficult to articulate precisely the ideal size of the discount. Any figure will necessarily involve a degree of arbitrariness. Legal regulation by its nature involves prescribing rules and principles which given their general nature cannot apply optimally to untypical situations. Moreover, a degree of crudeness of new standards is unavoidable if the norms are to operate in the context of overarching principles and practices that are themselves lacking in normative or empirical validity. As we have seen, many of the objectives of sentencing laws are misguided. Further, the penalties attached to offence types are devoid of any mathematical or jurisprudential rigor. In order to attain at least a degree of internal coherence (within the sentencing realm) some assistance can be derived from the nature and size of existing discounts that seem to operate in an effective manner. In the United States, while fixed or presumptive penalties are common, a precise discount is not typically accorded to a particular mitigating factor.<sup>221</sup> As we have seen, in

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219. The seminal work on causation remains H.L.A. HART & A.M. HONORÉ, *CAUSATION IN THE LAW* (1959). See also *THE OXFORD HANDBOOK OF CAUSATION* (Helen Beebe et al. eds., 2009). For a discussion of the complexities of causation in the context of sentencing mentally disordered offenders, see Gee & James, *supra* note 55.

220. The vast majority of cases are dealt with by way of guilty plea. See BAGARIC & EDNEY, *supra* note 116.

221. However, in some guideline sentencing schemes, a presumptive degree of weight is given some mitigation considerations. For example, in the United States federal system, adjustments are defined considerations that increase or decrease a penalty by a designated amount, as set out in Chapter 3 of the Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 3 (U.S. SENTENCING COMM'N 2015). For

Australia the sentencing system is largely discretionary. In most cases courts are free to allocate the weight they deem appropriate to a particular mitigating factor. However, in two cases, the size of a discount to be accorded to a mitigating consideration is mathematically designated. Offenders who plead guilty are entitled to a discount in the order of 25 percent,<sup>222</sup> and offenders who assist authorities by providing details and evidence that assists in the prosecution of other offenders can receive a penalty reduction in the order of 50 percent.<sup>223</sup> Both of these acts confer considerable tangible advantages to the community, by either reducing the money the community is required to spend on the court process (a sentencing plea takes far less time than a criminal trial) or increasing the number of criminals who are apprehended. It is not possible to state definitively whether the discounts are set at the optimal level. However, it is clear that the size of the discounts provides sufficient incentive for offenders to plead guilty or give evidence against other offenders, and the discounts do not seem to be so large as to lead to disproportionately light sentences.<sup>224</sup> Thus, these discounts seem to be in the appropriate region.

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example, a demonstration of remorse can result in a decrease of penalty by up to 2 levels, which can increase to 3 levels if it is accompanied by an early guilty plea. *Id.* § 3E1.1. However, the guidelines also provide that the court cannot depart from a guideline range as a result of “[t]he defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court). See § 6B1.2 (Standards for Acceptance of Plea Agreement).” *Id.* § 5K2.0(d)(4).

222. In Western Australia, the Sentencing Act of 1995 permits a court to reduce a sentence by up to twenty-five percent for a plea entered into at the first reasonable opportunity. *Sentencing Act 1995* (WA) s 9AA. In South Australia, the *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA) introduces sections 10B and 10C into the section *Criminal Law (Sentencing) Act 1988* (SA). In New South Wales and Queensland, the Court must indicate if it does not award a sentencing discount in recognition of a guilty plea. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2); *Penalties and Sentences Act 1992* (Qld) s 13(3). In South Australia, Western Australia, and New South Wales, the courts often specify the size of the discount given. In Victoria, when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. *Sentencing Act 1991* (Vic) s 6AAA. The rationale and size of the typical discount in Victoria is discussed in *Phillips v The Queen* (2012) 222 A Crim R 149, 173 (Austl.). There has been some judicial comment as to the artificiality of s 6AAA given the instinctive synthesis that produces the actual sentence. See, e.g., *id.* at 160.

223. See *Penalties and Sentences Act 1992* (Qld) s 9(2)(i); *Crimes (Sentencing) Procedure Act 1999* (NSW) s 23; *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(h), 10A; *Sentencing Act 1995* (NT) s 5(2)(h); *Crimes (Sentencing) Act 2005* (ACT) s 36. There are also similar provisions at the Commonwealth level. See *Crimes Act 1914* (Cth) s 16A(2)(h). These provisions set out the basis for the discount, but the amount of the discount is determined by the courts. For an example of where a fifty percent discount was allowed, see *R v Johnston* (2008) 186 A Crim R 345, 349–50 (Austl.). For an application of these principles, see *Dan Ning Wang v The Queen* [2010] NSWCCA 319 (17 Dec. 2010) 39–43 (Austl.); *Yue Ma v The Queen* [2010] NSWCCA 320 (5 Nov. 2010) 25–28 (Austl.). This is consistent with the decision in *R v Sabari*, where it was held acceptable to specify a specific discount for co-operating with authorities. (2007) 177 A Crim R 1, 21 (Austl.).

224. SENTENCING ADVISORY COUNCIL, *GUILTY PLEAS IN THE HIGHER COURTS: RATES, TIMING, AND DISCOUNTS* 75–76 (2015).

The importance of reduced criminal culpability would not seem to be as significant as either pleading guilty or giving evidence against co-offenders, at least in terms of utility to the community. Pleading guilty spares the community the expense of running a contested trial, while providing information against co-offenders leads to the tangible benefit of assisting the law enforcement process. The relevance of reduced culpability is less tangible. Additionally, the discount that should be accorded to mental impairment is capped by the importance of culpability to overall offence seriousness. Hence, I propose that all offenders who are laboring under a mental impairment at the time of the commission of an offense should receive a penalty discount in the order of ten percent.<sup>225</sup>

### C. Greater Burden of Sanction Can Justify a Considerably Reduced Penalty

As we have seen in Australia, and to a lesser extent in the United States, courts have provided a sentencing discount to offenders who are likely to find the sanction especially burdensome. The courts' rationales have included offenders' physical illness, infirmity, and mental impairment. As is discussed shortly, another rationale rests on the fact that a prisoner may be subject to harsher than normal prison conditions.

Again, it is not clear whether or not a discount based on harsher than normal prison conditions is justifiable and, if it is, what the appropriate size of the penalty reduction ought to be. The approach used with respect to offenders who suffer an additional burden as a result of tangible causes – namely, harsh physical conditions in prison – can provide guidance. An analysis of penalty reductions related to outside causes is illuminating because of the clarity injected through the tangible nature of the extra burden.

The harshest sanction, apart from the death penalty, is imprisonment, and the strictest version of imprisonment is found in what are known as “supermaximum [security]” or “supermax.”<sup>226</sup> These regimes generally consist of “jails within prisons.”<sup>227</sup> There is little uniformity in such re-

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225. There is of course no bright line that can be established regarding the precise discount that is appropriate. A ten percent discount is not incontestably preferable to one pitched at eight percent or twelve percent. However, legal transparency and predictability require a numerical figure, and ten percent is relative to other discounts and the overall importance of culpability to the criminal law appropriate.

226. The National Institute of Corrections has defined supermax facilities as “a free-standing facility, or a distinct unit within a facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated. . . . [T]heir behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.” Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 PUNISHMENT & SOC'Y 163, 170 (1999) (quoting NAT'L INST. OF CORRECTIONS, SUPERMAX HOUSING: A SURVEY OF CURRENT PRACTICE (1997)); see also CHASE RIVELAND, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS (1999).

227. See RIVELAND, *supra* note 226, at 1. It is generally accepted that the first supermax prison was the “rock fortress” Alcatraz in San Francisco Bay, which was operated by the United States Federal Bureau of Prisons from 1934 until its closure in 1963. King, *supra* note 226, at 165–66. However, this

gimes, but in general they involve “incarcerating inmates under highly isolated conditions with severely limited access to programs, exercise, staff or other inmates.”<sup>228</sup> The conditions can include being locked alone in a cell for up to twenty-three hours per day.<sup>229</sup> When prisoners are out of their cell they move to what is, in effect, no more than another (larger) cell, where they generally have contact with no more than one other prisoner.<sup>230</sup> Some inmates incarcerated in such conditions have alleged a lack of access to fresh air, direct sunlight, or educational facilities, and they have limited visiting rights and access to communications.<sup>231</sup> In some circumstances, the regime is less restrictive, but it almost always involves being warehoused in a concrete room, with the time out of the cell, in effect, spent in a slightly larger concrete cell.<sup>232</sup>

Prison by its nature causes suffering because it limits freedom and the capacity for inmates to live their lives according to their preferences. The conditions in supermax cause demonstrably more pain than those in normal prisons. Research shows that enhanced levels of deprivation, such as those endured in supermax prisons, lead to increased psychological and emotional problems.<sup>233</sup> The weight of research suggests that “[i]nmates in isolation, whether for the purpose of protective custody or punishment, suffer from numerous psychological and physical symptoms, such as perceptual changes, affective disturbances (notably depression), difficulties in thinking, concentration and memory problems, and problems with impulse control.”<sup>234</sup>

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bears little resemblance to modern supermax prisons. The conditions which typically manifest in current supermax conditions can be traced back over forty years to the lockdown which occurred in the United States Prison at Marion, Illinois, following increasing prisoner misbehavior, including the killing of two prison officers. *Id.* at 5. More than thirty states in the United States now have supermax prisons. See *id.* at 175; Jesenia Pizarro & Vanja M.K. Stenius, *Supermax Prisons: Their Rise, Current Practices, and Effect on Inmates*, 84 PRISON J. 248, 251 (2004). About 25,000 inmates are currently in supermax conditions. See *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250, 1251 (2015).

228. See RIVELAND, *supra* note 226, at 1; see also NAT'L INST. OF CORRECTIONS, *supra* note 226.

229. See *R v Benbrika* (No. 20) (2008) 18 VR 410, 418 (Austl.); *DPP (Vic) v Faure* (2005) 153 A Crim R 316, 317 (Austl.).

230. Liz Hobday, *High-Security Prison 'Driving Remand Prisoners Mad'*, ABC NEWS (Sept. 22, 2009), <http://www.abc.net.au/news/2009-09-22/high-security-prison-driving-remand-prisoners-mad/1437474> [<https://perma.cc/4ECG-FXCT>].

231. MICHAEL WALTON & PAULINE WRIGHT, NSW COUNCIL FOR CIVIL LIBERTIES, SUBMISSION OF THE NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES TO THE GENERAL PURPOSE STANDING COMMITTEE NO. 3 OF THE NSW PARLIAMENT'S INQUIRY INTO ISSUES RELATING TO THE OPERATIONS AND MANAGEMENT OF THE DEPARTMENT OF CORRECTIVE SERVICES 2 (2006); see also David Brown, *The Effect of Terrorism and Terrorist Trials on Australian Prison Regimes*, in PROCEEDINGS OF THE 2ND AUSTRALIAN & NEW ZEALAND CRITICAL CRIMINOLOGY CONFERENCE 61 (Chris Cunneen & Michael Salter eds., 2008).

232. See RIVELAND, *supra* note 226, at 1.

233. See, e.g., Stanley L. Brodsky & Forrest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267, 267-79 (1988); *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250, 1251 (2015).

234. Pizarro & Stenius, *supra* note 227, at 256 (internal citations omitted). See generally Sharon Shalev, *Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis*, 11 J. FORENSIC PSYCHOL. PRAC. 151 (2011).

Thus, supermax conditions often have profound adverse consequences for prisoners. The level of pain and deprivation inherent in supermax conditions is so different from normal prison conditions that some courts in Australia have recognized that being sent to a supermax prison should attract a sentencing discount.<sup>235</sup> There is no strict rule regarding the size of the discount, but previous judicial decisions and theoretical analysis have suggested that it should lead to a sentence reduction in the order of fifty percent.<sup>236</sup>

In principle, the same approach should be taken with respect to prisoners who face additional difficulty in prison due to mental health issues. Such prisoners can suffer in prison partly because the quality of health care in prisons is reduced<sup>237</sup> and partly because the intrinsic restrictions in a prison environment make coping more difficult.<sup>238</sup>

Inmates with a mental disorder are approximately sixty percent more likely to be physically assaulted by other inmates and twenty percent more likely to be assaulted by staff than inmates without a mental disorder.<sup>239</sup> One study also revealed that inmates with a mental illness were more than seventy percent more likely to be subjected to sexual victimization than other prisoners (15.1 percent, as opposed to 8.9 percent).<sup>240</sup> Prisoners with mental health problems are also less adept at coping with the stressors of prison conditions and, hence, breach prison rules more regularly than other prisoners.<sup>241</sup> This phenomenon results in their being subjected to disciplinary procedures in prison, including being placed in solitary confinement and losing credits for “good-time.”<sup>242</sup>

However, there is also a relevant contrast between the extra burden suffered by prisoners because of harsh external conditions and the extra burden suffered because of a mental health issue. As noted previously, mental impairment varies greatly in terms of its nature and intensity—it varies more than supermax conditions do. There is also a bright line that can be drawn regarding the type of mental conditions that should attract an additional burden penalty reduction. To remove opportunities for trifling applications for such a discount, the hurdle should be set relatively high, such that mitigation would occur only when an offender’s condition suggests that he or she will suffer considerably more than other prisoners. Assessment of that

235. *DPP (Vic) v Faure* (2005) 153 A Crim R 316, 323 (AustLJ); *Tognolini v The Queen* [2012] VSCA 311 (14 Dec. 2012) ¶ 31 (AustLJ).

236. See Mirko Bagaric et al., (*Particularly*) *Burdensome Prison Time Should Reduce Imprisonment Length – and Not Merely in Theory*, 38 MELB. U. L. REV. 409, 436 (2015).

237. HUMAN RIGHTS WATCH, *ILL-EQUIPPED: US PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 94–127 (2003).

238. See Gee & James, *supra* note 55, at 58–59.

239. Johnston, *supra* note 8, at 163.

240. Johnston, *supra* note 8, at 166.

241. Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 396 (2006).

242. Johnston, *supra* note 8, at 170.

question will often require detailed evidence and astute judgment. This is a point also noted by Johnston:

To warrant sentencing accommodation, an offender with a serious mental illness may need to make a particularized showing that harm is probable in his case. In many instances an individualized showing of likelihood of serious harm will be possible given prior patterns of behavior, a personal history of abuse, and a constellation of other risk factors that can be brought to a judge's attention at a sentencing hearing.<sup>243</sup>

It follows that decisions regarding the likely extra burden that a mentally impaired offender may suffer in prison are nuanced. However, this is no reason not to accord a sentencing discount on this basis given the court is well placed to make an accurate assessment of the offender's mental condition at the time of sentencing.

A detailed inquiry into the mental state of the offender at the time of sentencing is also required because mental state at this point can be more relevant than mental state at the time of offense. As has been argued above, mental disorder at the time of offense should only attract a ten percent discount. On the other hand, the extent of hardship experienced by an offender as a result of the sanction can (on the basis of the analogy with harsh prison conditions) justify a discount in the order of fifty percent.<sup>244</sup>

There will, of course, be a degree of approximation involved in assessing the full nature and extent of an offender's mental impairment and anticipating how it will impact the offender's ability to cope with the sanction. However, as noted by Johnston, courts typically have an offender's mental health records and history at the time of sentencing, and statutes in many jurisdictions require presentencing reports that contain all relevant health and medical information.<sup>245</sup> Moreover, the fact that the judgment regarding the offender's mental health prognosis will not be perfect is not a basis for a complete refusal to approximate a fairer outcome.

The above argument for according a potentially considerable sentencing discount for the extra suffering that mentally disordered offenders may experience is grounded on the analogy with harsh prison conditions. The argument by analogy is reinforced by an argument based on the underpinnings of punishment and the principle of proportionality, to which I now turn.

Ultimately, sentencing is about the infliction of punishment. The below discussion establishes that in evaluating the nature and extent of punishment, it is important to factor in the actual impact of the hardship on the

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243. *Id.* at 180–81 (internal citations omitted).

244. Johnston endorses a similar proposal, but provides no indication of the size of the discount that is appropriate. *Id.* at 226. See generally Johnston, *supra* note 109.

245. Johnston, *supra* note 8, at 158–59.

offender.<sup>246</sup> If a sanction imposes an unintended but real additional burden on a certain category of offenders, it is necessary to incorporate the actual total burden into sentencing calibrations.

There is no universally accepted definition of punishment. In defining punishment, some commentators focus on its association with guilt. Thus, Herbert Morris defines punishment as “the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person’s guilty behavior.”<sup>247</sup> Duff defines punishment as “the infliction of suffering on a member of the community who has broken its laws.”<sup>248</sup> Similarly, McTaggart defines punishment as “the infliction of pain on a person because he has done wrong.”<sup>249</sup>

A wider definition is provided by Nigel Walker, who observes that while punishment generally requires that the offender has voluntarily committed the relevant offence, it is sufficient that the punisher believes or pretends to believe that he or she has done so.<sup>250</sup> This definition better reflects this aspect of punishment, given that there is no question that accused who are wrongly convicted and sentenced by courts undergo punishment – the suffering experienced by the wrongly convicted is no less painful than that experienced by accused that actually committed the crime in question. However, what is notable for the purpose of this discussion is that the above definitions, while focusing on the aspect of guilt, nevertheless, require that the punishment is *for* the crime, that is, there is the implicit requirement of a causal link between the two.

This link emerges also in relation to commentators who focus on the connection with blame as being cardinal to the concept of punishment. Guilt and blame are related but distinct concepts. Guilt focuses on an offender’s actual responsibility, while blame is externally focused in that it relates to the perceptions of others of an individual’s culpability. Andrew von Hirsch states that “[p]unishing someone consists of visiting a deprivation (hard treatment) on him, *because* he supposedly has committed a wrong, in a manner that expresses disapprobation on the person for his conduct,”<sup>251</sup> or “[p]unishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong, under circumstances and in a manner that conveys disapprobation of the offender for his wrong.”<sup>252</sup> Further, it has been noted by John Kleinig that:

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246. Adam Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (making a similar observation).

247. Herbert Morris, *Persons and Punishment*, in THEORIES OF PUNISHMENT 76, 83 (S.E. Grupp, ed., 1972).

248. R.A. DUFF, TRIALS AND PUNISHMENTS 267 (1985).

249. J.M.E. McTAGGART, STUDIES IN HEGELIAN COSMOLOGY 111 (1901).

250. NIGEL WALKER, WHY PUNISH? 2 (1991).

251. Andrew von Hirsch, *Censure and Proportionality*, in A READER ON PUNISHMENT 115, 118 (R.A. Duff & D. Garland eds., 1994) (emphasis added).

252. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 35 (1985) (emphasis added).

Punishment . . . involves a stigmatizing condemnation of the punished. It does so because the punished has been judged to be guilty *inter alia* of some *moral wrong-doing*, that is, of violating basic conditions of our human engagement . . . [P]unishment is for . . . a breach of standards that are believed to be of fundamental significance in our human intercourse.<sup>253</sup>

While guilt and blame are important aspects of punishment, neither of them is a core element. Innocent people who are wrongly convicted and imprisoned are nevertheless punished. Blame is a broader concept than guilt but probably still not essential for punishment to occur. Nearly all criminal behavior engenders a degree of blame, but there are some types of behavior where it is arguably lacking. An example of guilt without blame is “mercy killing” (active voluntary euthanasia) which, strictly speaking, is murder, but may not attract condemnation.<sup>254</sup> More accurately, punishment does not require guilt or blame, but merely that it is imposed for a wrong.<sup>255</sup>

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

*Evill inflicted by publique Authority* on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the law; to the end that the will of men may thereby the better be disposed to obedience . . . [T]he aym of Punishment is not a revenge, but terrour . . . .<sup>256</sup>

Honderich defines punishment as “*an authority’s infliction of a penalty, something involving deprivation or distress, on an offender, someone found to have broken a rule, for an offense, an act of the kind prohibited by the rule*”<sup>257</sup> and, in the postscript to the same book, written over a decade later, as that practice whereby “*a social authority visits penalties on offenders, one of its deliberate aims being to do so.*”<sup>258</sup> However, it does not seem to follow that the imposition of the punishment must be a person with formal legal authority. Walker takes the view that punishment can be ordered by anyone who is regarded as having the right to do so, such as certain members of a society or family,<sup>259</sup> not merely a formal legal authority, and that

253. John Kleinig, *The Hardness of Hard Treatment*, in *FUNDAMENTALS OF SENTENCING THEORY* 273, 275 (A. Ashworth & M. Wasik eds., 1998).

254. KUMAR AMARASAKARA & MIRKO BAGARIC, *EUTHANASIA, MORALITY AND THE LAW* 1 (2002).

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

256. THOMAS HOBBS, *LEVIATHAN* 353, 355 (1968) (emphasis added).

257. TED HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 15 (1984) (emphasis added).

258. *Id.* at 208 (emphasis added).

259. NIGEL WALKER, *WHY PUNISH?* 2 (1991).

punishment stems not only from violation of legal rules, but extends to infringements of social rules or customs.<sup>260</sup> This would seem to accord with general notions regarding punishment and, indeed, there would appear to be many parallels between, say, family discipline and legal punishment.<sup>261</sup> As Walker points out, punishment need not be by the state. It has different names depending on the forum in which it is imposed: “When imposed by the English-speaking courts it is called ‘sentencing.’ In the Christian Church it is ‘penance.’ In schools, colleges, professional organizations, clubs, trade unions, and armed forces its name is ‘disciplining’ or ‘penalizing.’”<sup>262</sup> Thus, the practice of punishment seems to extend to situations beyond the court setting, where the punisher is in a position of dominance: for example, where the punisher is a teacher, parent, or employer.

Some scholars have defined punishment in terms of pain. Bentham simply declared that “all punishment is mischief; all punishment in itself is evil.”<sup>263</sup> Ten states that punishment “involves the infliction of some unpleasantness on the offender or it deprives the offender of something valued.”<sup>264</sup> Others have placed somewhat emotive emphasis on the hurt that punishment seeks to cause. Writers describe punishment as pain delivery<sup>265</sup> and, similarly, assert that “the intrinsic point of punishment is that it should hurt – that it should inflict suffering, hardship or burdens . . . .”<sup>266</sup> Walker is somewhat more expansive regarding the type of evils that can constitute punishment: punishment involves “the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases, death.”<sup>267</sup>

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

- (i) it must involve pain or other consequences normally considered unpleasant;
- (ii) it must be for an offense against legal rules;
- (iii) it must be of an actual or supposed offender for his offense;
- (iv) it must be intentionally administered by human beings other than the offender;

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260. *Id.*

261. For example, see also Morris, *supra* note 247.

262. WALKER, *supra* note 259, at 1.

263. JEREMY BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., 1970).

264. C.L. TEN, CRIME, GUILT, AND PUNISHMENT 2 (1987) (emphasizing that punishment is inflicted to express disapproval or condemnation of a person's conduct).

265. NILS CHRISTIE, LIMITS TO PAIN 19, 49 (1981).

266. Antony Duff, *Punishment, Citizenship and Responsibility*, in PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT 17, 18 (Henry Tam ed., 1996) (describing a feature of current debates about punishment, which the author later calls into question).

267. WALKER, *supra* note 259, at 1.

- (v) it must be imposed and administered by an authority constituted by a legal system against which the offense is committed.<sup>268</sup>

Thus, there are numerous definitions of “punishment.” From the above accounts it seems there is consensus on two points. First, punishment involves some type of unpleasantness and, second, it is on account of actual or perceived wrongdoing.

Therefore, core aspects of punishment are that it consists of: (i) a hardship or deprivation, and the taking away of something of value;<sup>269</sup> and (ii) it is imposed for a wrong actually committed or perceived to have been committed. The first requirement is incontestable: an experience that benefits an individual or has no impact on them is not punishment. The second requirement is equally essential. Without this stipulation, any experience that constituted a detriment could be termed a punishment. Clearly, it is not credible to describe an illness, failure in an exam, or a marriage break-up as a form of punishment.

In short, in order for a hardship to constitute a form of punishment, it must be a form of deprivation and there must be a connection between the deprivation and violation of a norm. Thus, punishment by its very nature involves the infliction of a degree of inconvenience or hardship on an offender. An important aspect of this is that hardship comes in degrees and the intensity can vary considerably. This is reflected in the fact that all jurisdictions have a hierarchy of sanctions, which range from a fine, to probation (with or without confinement conditions), to imprisonment.<sup>270</sup>

Some mentally disordered offenders suffer additional burdens as a result of criminal sanctions.<sup>271</sup> Of course, in sentencing, courts do not intend to make prison conditions, for example, more burdensome for mentally-impaired offenders, but that result is often a foreseeable and sometimes an inevitable reality.

This outcome, however, does not mean that all mentally-disordered offenders who flourish less fully than other offenders in prison are entitled to a reduced penalty. Mental health conditions cause a measureable reduction in the quality of life experienced by non-incarcerated citizens who suffer from them.<sup>272</sup> The fact that this would continue while in prison is not a basis for a lower penalty; if it were, all individuals with impaired mental (or physical) functioning would need to be treated more favorably than other prisoners. Offenders should only receive a mental health discount when it is

268. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4–5 (1968).

269. See also JOHN KLEINIG, PUNISHMENT AND DESERT 22–23 (1973) (stating that punishment involves some deliberate imposition by the punisher on the punished).

270. See BAGARIC & EDNEY, *supra* note 116, at 5–6, ch. 14.

271. See *supra* Part IV.C.

272. See AM. PSYCHIATRIC ASS’N, *supra* note 27, at xxi; see also NAT’L MENTAL HEALTH COMM’N, A CONTRIBUTING LIFE: THE 2012 NATIONAL REPORT CARD ON MENTAL HEALTH AND SUICIDE PREVENTION 26 (2012).

established that their condition would demonstrably worsen *as a result of* incarceration, or they would be disproportionately adversely impacted by the prison experience compared to other prisoners.

The level of deprivation inherent in a sanction is an important component of decisions regarding how much punishment is appropriate. This reflects the principle of proportionality, which, in its most basic and persuasive form, requires that the seriousness of the crime be matched by the harshness of the penalty.<sup>273</sup>

Proportionality is explicitly incorporated into sentencing law in the United States and in Australia. It is a constitutional requirement of the sentencing regimes of ten States in the United States.<sup>274</sup> It is also a core principle within the Federal Sentencing Guidelines. The Guidelines Manual states that one of the three objectives underpinning the Sentencing Reform Act is “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.”<sup>275</sup> The High Court of Australia, in *Hoare v The Queen*, stated “[A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances.”<sup>276</sup>

Broken down to its core features, proportionality has two limbs. The first is the seriousness of the crime and the second is the harshness of the sanction. The principle has a quantitative component—the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

The main criterion regarding the sanction harshness limb is the extent to which the penalty sets back the interests of offenders.<sup>277</sup> Given that mentally-impaired offenders often suffer more as a result of being subjected to criminal sanctions, it follows that proportionality requires this to be factored into sentencing.<sup>278</sup> Thus, offenders with mental impairment should be accorded a sentencing discount if the sanction is likely to set back their interests more than those of other offenders.

273. See Richard G. Fox, *The Meaning of Proportionality in Sentencing*, 19 MELB. U. L. REV. 489, 491–92 (1994).

274. See, e.g., Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 242 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington and West Virginia).

275. The most basic objective is to “combat crime through an effective, fair sentencing system” through (i) honesty in sentencing (that is, removing the power of the parole commission to reduce the term to be served); (ii) reasonable uniformity in sentencing—by reducing the wide disparity of sentences for similar offenses; and (iii) proportionate sentences. See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, 2–3 (2015).

276. (1989) 167 CLR 348, 354 (Austl.).

277. Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 N.Z. UNIV. L. REV. 411, 438 (2014).

278. See ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 79–80 (2nd ed. 1995) (describing the principle that sanctions analysis should incorporate offenders’ different resources and sensitivities so that sanctions have an equal impact on different offenders).

This discount should potentially be up to fifty percent. This is a sizeable discount. It is justified by the fact that, as noted above, the burden of imprisonment has a quantitative component (that is, the length of the term) and a qualitative component (that is, the prisoner's experience of imprisonment) and there is little question that mentally-impaired offenders find it considerably more difficult to cope with incarceration than non-impaired offenders do. The fifty percent discount is in addition to the ten percent discount that is attributable to offenders who committed an offense while mentally disordered. These factors (like all mitigating factors) do not operate in a simple cumulative manner. Otherwise, a combination of mitigating factors could amount to a discount of 100 percent or more. Instead, the discounts should be applied individually, to the contracted sentence, following application of the previous consideration. Thus, the maximum discount that an offender suffering from a mental impairment can receive on account of mental disorder at the time of sentencing, coupled with a discount for more burdensome prison conditions, is fifty-five percent of the entire sentence (that is, fifty percent for the burdensome nature of the sanction, plus a further discount of ten percent on the *remaining part* of the sanction—which is fifty percent—for having had the disorder at the time the offense was committed).

The above analysis of mitigation applies most readily to situations where a term of imprisonment is imposed. However, it should also apply to the threshold decision of whether or not a term of imprisonment should be imposed. There is no clear mathematical modeling that can be invoked to help with this threshold issue. Indeed, there is no orthodox theory regarding the interchangeability of sanctions.<sup>279</sup> For example, it can be hypothesized that a fine of some amount is equal to the suffering caused by a day's imprisonment. Whether the sum is \$100, \$1,000, or somewhere in between, is unclear. However, what is clear is that reducing the length of a prison sentence will make it easier and more common for substitution (by a fine, or by probation, or by time worked, for example) to occur, thus making a sentence of imprisonment less likely. It is far more likely that a court would replace a prison term of, say, six months with another sanction, such as probation or a fine, than with a term that is approximately double this length. The imposition of a fine as opposed to a term of imprisonment is generally a more preferable outcome given that, as discussed above, most sanctions are unduly harsh because of attempts to achieve unattainable sentencing objectives such as general and specific deterrence.

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279. For some preliminary observations, see ANDREW VON HIRSCH, CENSURE AND SANCTIONS 59–63 (1993); Andrew von Hirsch et al., *Punishments in the Community and the Principles of Desert*, 20 RUTGERS L.J. 595, 597–98 (1989); JESPER RYBERG, THE ETHICS OF PROPORTIONATE PUNISHMENT 184–85 (2004).

*D. Mental Disorder Can Undercut Mitigation in Relation to Serious Sexual and Violent Offenders*

Thus far I have discussed the situations in which mental disorder should mitigate penalty. As we have seen, there is a discord between Australia and the United States about whether in some cases mental impairment should aggravate penalty. In this regard, the situation in the United States is preferable—mentally-disordered offenders should never receive a longer penalty because of their mental impairment, but in some situations the mitigation that is normally attributable to mental disorder should be lost. This is because in relation to some types of offending, the interests of the community outweigh those of offenders.

A number of studies have measured the impact of certain offense categories on victims. Empirical data show that serious sexual and violent offenses often have profoundly damaging impacts on the victims. The best information available suggests that, typically, victims of crime suffer considerably—in fact, more than is manifest from the obvious and direct effects 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.<sup>280</sup> The crimes examined included rape, sexual assault, aggravated assault, and intimate partner violence.<sup>281</sup> The key quality of life indices examined were: role function (that is, 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 (physical and mental health conditions).<sup>282</sup> The report demonstrated that many victims suffered considerably across a range of indicia, even long after the relevant crimes occurred.<sup>283</sup> 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.<sup>284</sup>

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

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

281. *Id.* at 189.

282. *Id.* at 190.

283. *Id.* at 190–94.

284. *Id.* at 194–95.

- Difficulty being involved in intimate relationships and higher divorce rates;<sup>285</sup>
- Diminished parenting skills for female victims of partner violence (although this finding was not universal);<sup>286</sup>
- Lower levels of success in the employment setting (this applies especially to victims who had been abused by their partners) and much higher levels of unemployment;<sup>287</sup>
- Considerable impairment and dysfunction in social and leisure activities, with many victims retreating from conventional social supports;<sup>288</sup> and
- High levels of direct medical costs associated with violent crime (over \$24,353 for an assault requiring hospitalization).<sup>289</sup>

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

- According to a 1997 U.S. study, 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 behavior five years after the original offense;<sup>290</sup> and
- For fifty-two percent 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 (meaning that 64,000 women living in England and Wales today have tried to kill themselves following a serious sexual assault).<sup>291</sup>

Chester L. Britt, in a study examining the effects of violent and property crime on the health of 2,430 respondents, noted that “[v]ictims of violent crime reported lower levels of perceived health and physical well-being, controlling for measures of injury and for socio-demographic characteristics.”<sup>292</sup> 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.<sup>293</sup>

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285. *Id.* at 190–91.

286. *Id.* at 190.

287. *Id.* at 191.

288. *Id.* at 191–92.

289. *Id.* at 193 (finding average medical costs of this type to be \$24,353 as of 2001).

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

291. *Id.* at 17.

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

293. *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).

It is clear that serious sexual and violent offenses often devastate the lives of victims, providing a powerful argument for the imposition of stern punishment for the perpetrators of such crimes.<sup>294</sup> Given the significance of these offenses, community protection from this type of behavior should be a cardinal consideration. Mitigation normally accorded to offenders for criminal acts should be negated if there is a realistic prospect that such mitigation could result in an increased likelihood of their re-offending.

Mentally-impaired offenders are similar to other offenders in this respect. Amy Baron Evans and Paul Hofer note that research indicates that offenders with substantial criminal histories do not seem to have a higher incidence of mental disorder, suggesting that mental illness does not lead to, and is not an indicator of, an increased rate of re-offending.<sup>295</sup> Thus, this cohort of offenders should not be subjected to additional punishment in order to protect the community from serious violent and sexual offenses. However, neither should they be excluded from the general principles that govern repeat offenders of this kind of crime.

A disproportionate number of serious sexual and violent offenses are committed by repeat offenders.<sup>296</sup> Accordingly, I have previously suggested that such offenders should receive a (relatively modest) loading on their sentences.<sup>297</sup> This loading should apply to mentally disordered offenders as well, given that there is no evidence that they are less likely to re-offend.

There is, of course, a degree of ostensible unfairness associated with imprisoning offenders for longer than is commensurate with the severity of the specific offense for which they have been convicted. However, it would be remiss of legislatures not to take all reasonable steps to prevent innocent people from being victimized. The fact that potential victims cannot be identified in advance does not negate the need to put in place mechanisms to limit serious encroachments on the human rights of citizens. In risk allocation decisions, the weight of the burden should be disproportionately shouldered by the morally and legally culpable—the offenders—rather than by the innocent potential victims. “The rights of the innocent trump those of the guilty.”<sup>298</sup>

Thus, longer sentences for recidivists (including those with a mental disorder) are justified as a means of increasing the protection of other individuals. However, this does not justify greatly enhanced penalties. The balance must be proportionate to the objective that is sought.

There is insufficient empirical data to enable accurate choices to be made about exactly how much extra jail time should be imposed on recidivists.

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294. See Bagaric, *supra* note 277.

295. AMY BARON EVANS & PAUL HOFER, *LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION* 80 (2010).

296. See Mirko Bagaric, *The Punishment Should Fit the Crime – Not the Prior Convictions of the Person that Committed the Crime*, 51 SAN DIEGO L. REV. 343, 410 (2014).

297. See *id.* at 411.

298. *Id.* at 410.

“However, at some point, there is a diminishing return in terms of offenses prevented for each year of jail time.”<sup>299</sup> In addition, in any decision-making calculus, certain consequences, in the form of additional jail time, need to carry more weight than speculative outcomes (whether or not a particular offender would have actually re-offended). It is for that reason that the recidivist loading for serious offenses should be relatively minor, say twenty to fifty percent—which is considerably less than the oppressive levels that are manifest in some sentencing grids and three-strikes regimes in the United States.<sup>300</sup> The fact that some recidivist serious sexual and violent offenders have a mental disorder does not remove the need to apply this loading to them.

## V. CONCLUSION

Mentally-impaired offenders are grossly disproportionately represented in the criminal justice system. The problem is so acute that there are more people with serious mental health problems in prisons than in mental hospitals. There is no ready solution to this problem. Perhaps the most effective approach would be to provide, in our communities, far greater medical resources and accommodation for people with mental impairments, but this is not likely to occur in the foreseeable future. Hence, a criminal justice solution is necessary. The term *solution* is, in fact, too optimistic. This is because any possible meaningful cure lies outside the criminal justice system. However, it is possible to achieve a considerable *improvement* in the manner in which the criminal justice system deals with mentally disordered offenders.

Any improvement must be based on an overarching assessment of the objectives of sentencing, the empirical data concerning what can be achieved through the sentencing process, and the role of mental impairment more generally within the criminal justice system. It is against this backdrop that the recommendations in this Article have been formed.

It is clear that the current approaches for dealing with mentally disordered offenders in Australia and the United States are flawed. An advantage of both systems is that mental disorder is taken into account at the sentencing stage. However, beyond this, both systems have considerable weaknesses.

In Australia, a considerable failure of the system is that it provides a sentencing discount for mentally disordered offenders on the basis of sen-

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299. *Id.* at 411.

300. The prior conviction loadings under some sentencing regimes can be around 100%. See, e.g., U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A, 404 (2015). An offense at level 14 has a guideline range of 15-21 months for an offender with a good criminal history score, but increases to 37-46 months for an offender with a bad criminal history score. *Id.* Similarly for an offense at level 28, a good criminal history range is 78-97 months, and this increases to 140-75 months for a bad criminal history score. *Id.*

tencing objectives that are unattainable: general deterrence and specific deterrence. However, the system has an advantage in that it provides scope for a considerable discount in sentencing offenders who are mentally disordered at the time of the offending because of the likely additional burden they will experience as a result of being incarcerated.<sup>301</sup>

The US system has an advantage in that in some cases there is no need to establish a nexus between the disorder and the offense. A major failing of the sentencing regime in the United States is that there is no (even approximate) set sentencing reduction for offenders who are mentally ill—hence, data indicates that, in fact, on average, no discount is granted at all.

A rational approach to dealing with mentally impaired offenders involves the implementation of three main principles. First, offenders who had a mental impairment at the time of the offense should get a penalty discount. This should not be contingent upon the offender demonstrating a causal link between the crime and the mental condition. This association is too complex to determine with accuracy, especially given that most offenders do not give evidence at the time of sentence and there is often a significant temporal gap between offense and sentence. Moreover, the main focus of the criminal law is not an evaluation of the mental state of offenders. It follows that the discount that should be accorded for mental disorder at the time of sentencing should be meaningful but not considerable. It should be in the order of ten percent. This discount should be fixed.

Second, mentally-impaired offenders should be eligible for an additional discount based on their disproportionately harsh experience of imprisonment. While the main focus in the literature concerning mental disorder and sentencing has been on the manner in which reduced culpability should impact the sentence, this Article has demonstrated that, in fact, the more relevant inquiry is the impact that the penalty should have where an offender suffers a mental disorder at the time of sentencing. Research shows that offenders who are mentally impaired often suffer considerably more in prison than other offenders. It follows that they are entitled to a considerable discount pursuant to the principle of proportionality. This can be in the order of fifty percent, depending on the nature and extent of their disorder.<sup>302</sup>

Finally, there is a limitation on the extent to which mental disorder should mitigate penalty. There should be no mitigation for reasons relating to the presence of a mental disorder, either at the time of commission of the offense or at the time of sentence, if the offender is a recidivist serious sexual

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301. This discount however, is not a mathematical figure. Still, as noted earlier, a discount on this basis is more widespread in Australia than the United States. See, e.g., Walvisch, *supra* note 2.

302. See E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433, 477 (2015) (suggesting that a means to accommodate mental impairment in sentencing is to enable judges to order certain preferential conditions in prison). The complexity of the implementation of such orders makes them unlikely to succeed.

or violent offender. In such circumstances, the interests of the community outweigh those of the offender.

The above approach would make the law relating to the sentencing of mentally-disordered offenders fairer, more transparent, and more efficient to apply. It would reduce the severity of penalties imposed on most mentally-impaired offenders and lower their incarceration rates. It would not provide a complete solution to the over-representation and unsatisfactory treatment of such offenders by the criminal justice system, but implementation of these reforms would make the system the best that it can be given the current constraints of the mental health system.