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# EXTRA-CURIAL PUNISHMENT IN CRIMINAL LAW SENTENCING: A PRINCIPLES-BASED APPROACH

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## Abstract

*Society will sometimes administer its own 'punishment' on the criminal offender irrespective of any court imposed sanction. This 'punishment' is often associated with verbal and physical abuse, and is referred to as 'extra-curial' punishment because it occurs without approbation of the courts. Some Australian courts accept that extra-curial punishment can play a role in mitigating sentences, primarily to avoid a double punishment effect. Whether or not extra-curial punishment is considered and applied, however, falls to the individual judge presiding over the matter. Several dilemmas exist for the judiciary in allowing extra-curial punishment to influence sentencing. These problems include: legitimising non judicial punishment; inconsistent application of extra-curial punishment within the judiciary; and the ethics of victimising the perpetrator. The purpose of this paper is to suggest that the subjective application of extra-curial punishment on the part of the sentencing judge is consistent with the various state and territory sentencing provisions and, furthermore, is supported in its application by Dworkin's principles of 'mercy' and maintaining the 'integrity of punishment'. As such, the inclusion of aspects of extra-curial punishment as part of the overall sentence is not something to be admonished, but rather it should be seen as a legitimate factor in sentencing when deemed appropriate in the circumstances of each case as determined by the skill and expertise of the sentencing judge.*

## I INTRODUCTION

The work of a judge is complex. He or she must deliver judgments that can, on occasions, be unpopular because those judgments might run counter to the general public's perception of 'justice'. An example of the types of decisions with which the judiciary must grapple, are those decisions involving 'extra-curial punishment'.<sup>1</sup> Extra-

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The authors are grateful for the helpful comments of the two anonymous reviewers. Any errors or omissions are those of the authors.

<sup>1</sup> This article builds on the work previously published by the authors in relation to extra-curial punishment. See Mark David Chong, Jamie Fellows and Frank Richards, 'Sentencing the

curial punishment can be defined as a serious loss or detriment suffered by an offender as a result of them having committed an offence.<sup>2</sup> This loss or detriment is a form of ‘collateral punishment’ often involving physical or psychological abuse directed at the perpetrator. This ‘collateral’ form of punishment is often applied illegitimately and operates in addition to judicial punishment.<sup>3</sup>

There are many instances in which extra-curial punishment might arise. Typically, these might include circumstances where a person is accused of offences involving children or in any other context where the community’s sense of anger and moral indignation in response to the offender’s conduct is sufficient to cause persecution of the offender.<sup>4</sup> Extra-curial punishment might also extend to situations where the perpetrator suffers psychological detriment as a result of their conduct which, for example, led to the death of their own child.<sup>5</sup>

Although not explicitly referred to in most state and territory sentencing statutes, there are a number of discretionary provisions available to a sentencing judge that provide the statutory basis for aspects of extra-curial punishment to be taken into consideration when determining the sentence.<sup>6</sup> The inclusion of these discretionary elements could be applied so as to avoid a ‘double punishment’ effect and to ensure that the most appropriate sentence is given when a range of factors are taken into consideration. One thing that is not clear, however, is under what circumstances is it appropriate, and how much weight should be given to extra-curial punishment as a factor in mitigation. The legislation does not address this question and the judiciary has struggled to articulate a coherent position on this point.<sup>7</sup>

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Victimised Criminal: Delineating the Uncertain Scope of Mitigatory Extra-Curial Punishment’ (2013) 35 *Sydney Law Review* 379; See also, Frank Richards, ‘Extra Curial Punishment and Mitigation of Sentence’ (2009) (26) *Hearsay* <[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=621&Itemid=48](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=621&Itemid=48)>.

<sup>2</sup> *Einfeld v Regina* (2010) 200 A Crim R 1, [86].

<sup>3</sup> *Ibid.*

<sup>4</sup> *R v Wilhelm* [2010] NSWSC 378: Known colloquially as the ‘Dianne Brimble case’, this case involved the death of Dianne Brimble aboard a P&O cruise ship due to Ms Brimble ingesting a drug supplied to her by Mark Wilhelm.

<sup>5</sup> *R v Shoemith* [2011] QCA 352 (*Shoemith’s case*); Roanne Johnson, ‘Killer Tag Haunts Accused’, *Townsville Bulletin* (Townsville), 10 November 2010, 8.

<sup>6</sup> See, section II(B) *Statutory inclusion of Extra-curial Punishment* of this paper for a detailed discussion of the various State and Territory legislative provisions that potentially allow for extra-curial punishment to be incorporated into the sentence.

<sup>7</sup> For a normative assessment of the instances where extra-curial punishment should or should not apply, see, Mirko Bagaric, Lidia Xynas and Victorial Lambropoulos, ‘The irrelevance to sentencing of (most) incidental hardships suffered by offenders’ (2016) 39(1) *UNSW Law Journal* 47. In contrast to the Bagaric, Xynas and Lambropoulos paper, this paper seeks to provide a justification for granting mitigatory status to extra-curial punishment on the basis of certain ‘principles’. The decision to use ‘principles’ as a guiding force for this paper is predicated on the desire to not limit or prescribe the use of extra-curial punishment; rather, this paper accepts that the circumstances for which extra-curial punishment could be relevant

The work of Ronald Dworkin may assist in articulating the process of judicial decision-making regarding extra-curial punishment. Dworkin asserts that there are a range of factors that judges employ, whether knowingly or not, when assessing the reasons for their decisions. Dworkin states that in hard cases, judges rely on a number of ‘principles’ of law that they use in order to maintain law’s ‘integrity’.<sup>8</sup> Such ‘principles’, as argued by Dworkin, are engrained throughout the common law and include notions of fairness, proportionality, and any other principle which is relevant to the conduct of the offender and the circumstances of the matter.<sup>9</sup>

One principle that can be considered in light of Dworkin’s work on judicial decision-making is the notion of ‘mercy’. ‘Mercy’ exists as a discretionary aspect for judicial sentencing and is reflected in both the common and some statute law of Australia.<sup>10</sup> With some scholars drawing links to the law of equity, the principle of mercy is neither fully understood nor uniformly applied in Australia. The main reason that mercy is applied by the judiciary in Australia is to avoid the perpetrator being punished twice for the same offence—once by the courts and indiscriminately by non-judicial agents.

Extra-curial punishment might also be considered, and applied, if the individual judge believes that to do so would achieve the intended purpose of punishment—or, put another way, whether the judge believes that the ‘integrity of punishment’ is achieved. For instance, the purpose of punishment would be achieved if the punishment rehabilitates the offender and/ or acts as deterrence for them (or others) against committing similar acts. Similarly, the ‘integrity of punishment’ could be maintained where the punishment has been applied for retributive reasons.

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are too wide and too complex to limit its use in predefined contexts. As such, the article aims to assist with the instinctive processes of the sentencing judge by providing the justification for including extra-curial punishment on the basis of ‘mercy’ and maintaining the ‘integrity of punishment’ where circumstances allow in each case.

<sup>8</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 2–3. See also, generally, Ronald Dworkin, *Law’s Empire* (Fontana, 1986).

<sup>9</sup> *Ibid* 22–3.

<sup>10</sup> See, eg, Richard G Fox, ‘When Justice Sheds a Tear: The Place of Mercy in Sentencing’ (1999) 25(1) *Monash Law Review* 1; The Victorian, Australian Capital Territory and Tasmanian provisions explicitly allow for mercy to be judicially considered as a sentencing principle – see, *Sentencing Act 1991* (Vic) s 70(1)(e); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(s); *Sentencing Act 1997* (Tas) s 58(e); *Sentencing Act 1995* (NT) s 9(e). These provisions dealing with ‘mercy’ are to be contrasted with the ‘royal prerogative’ (or the executive prerogative) of mercy that exists throughout other states and territories - for example, *Sentencing Act 1991* (Vic) ss 13(2)(b), 106–7; *Sentencing Act 1995* (NT) s115; *Sentencing Act 1995* (WA) ss 137–8, 140–2; *Sentencing Act 1997* (Tas) s 97; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 102. The application of the royal (or executive) prerogative is said to be an executive discretion regarding punishment although it could be argued that the justification in the use of ‘mercy’ as part of the royal prerogative might be similar in process. The focus of this discussion, however, is not on the royal prerogative; rather, emphasis is given to cases where ‘mercy’ has been judicially considered.

This discussion provides some explanation of the judicial decision-making process in relation to the vexed issue of extra-curial punishment.<sup>11</sup>

## II EXTRA-CURIAL PUNISHMENT

### A *Extra-curial Punishment at Common Law*

Extra-curial punishment refers to the loss or detriment suffered by the offender.<sup>12</sup> Courts have considered extra-curial punishment in the context of an offender receiving either a physical or an emotional injury, or both.<sup>13</sup> There are instances where the courts have considered the effects of the mass media on the individual offender and the loss suffered by them to their reputation and future employment prospects.<sup>14</sup>

There are numerous cases which illustrate the operation of extra-curial punishment in Australia.<sup>15</sup> One high-profile case that considered extra-curial punishment involved former Justice Marcus Einfeld. The New South Wales Court of Criminal Appeal considered an appeal by the former Justice Marcus Einfeld on the grounds that the sentence, inter alia, failed to give ‘adequate weight to extra-curial punishment and public humiliation suffered’ resulting from the appellant’s conviction for perjury and

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<sup>11</sup> Aboriginal customary punishment is sometimes characterised as a form of extra-curial punishment because the punishment occurs outside the realms of the courts. Customary punishment has been the subject of a series of Law Reform Commission Reports. See, eg, Law Reform Commission of New South Wales, *Sentencing: Aboriginal Offenders*, Report No 96 (2000); Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project No 94 (2005); Australian Law Reform Commission, *Same Crime, Same Time: Sentencing Federal Offenders*, Report 103 (2006) Chapter 29. It should be noted although we acknowledge that extra-curial punishment can also include Aboriginal customary punishment, this paper focuses on non-Aboriginal punishment and as such the discussion will be limited to extra-curial punishment in the Australian judicial context.

<sup>12</sup> *R v Daetz* (2003) 139 A Crim R 398; See also Frank Richards, ‘Extra Curial Punishment and Mitigation of Sentence’ (2009) (26) *Hearsay* <[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=621&Itemid=48](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=621&Itemid=48)>; *Einfeld v Regina* (2010) 200 A Crim R 1, [86].

<sup>13</sup> See, eg, *R v Daetz* (2003) 139 A Crim R 398; *R v Allpass* (1993) 72 A Crim R 561; *R v Hannigan* [2009] QCA 40; *R v Wilhelm* [2010] NSWSC 378.

<sup>14</sup> See, eg, *R v Wilhelm* [2010] NSWSC 378, [17], [20]–[31], where Howie J in sentencing, remarked that Mark Wilhelm has suffered due to the publicity associated with the case, and would continue to suffer immeasurably within the community for most of his life despite the offence being relatively minor in nature.

<sup>15</sup> See, eg, *R v Allpass* (1993) 72 A Crim R 561; *R v Clampitt-Wotton* [2002] NSWCCA 383; *R v Hannigan* [2009] QCA 40; *R v Daetz* (2003) 139 A Crim R 398; For a detailed overview of these cases, see Mark David Chong, Jamie Fellows and Frank Richards, ‘Sentencing the Victimised Criminal: Delineating the Uncertain Scope of Mitigatory Extra-Curial Punishment’ (2013) 35 *Sydney Law Review* 379, especially 381–4.

perverting the course of justice.<sup>16</sup> Basten JA referred to the reasons why extra-curial punishment was sought by the applicant. These reasons related to:<sup>17</sup>

- (a) The revocation of the Applicant's commission as a Queens's Counsel;
- (b) The non-renewal of the Applicant's barrister's practising certificate;
- (c) Psychological impairment involving depression and anxiety; and
- (d) Public humiliation and vilification causing considerable distress and destruction of the Applicant's high reputation.

After examining various cases dealing with extra-curial punishment involving high profile members of the community, His Honour held that the sentencing judge was 'entitled to take into account effective "punishment" of the applicant which arose beyond the confines of the sentences imposed by the Court ...'<sup>18</sup> and in doing so, 'these factors were taken into account and given adequate weight by the sentencing judge'.<sup>19</sup> Extra-curial punishment was and is, therefore, a relevant matter for courts to 'take into account the public opprobrium he had suffered and the public destruction of his reputation'.<sup>20</sup>

Extra-curial punishment would not, however, be relevant to a sentence where the offender, for example, unintentionally shoots and causes serious injury to himself or herself during a robbery.<sup>21</sup> Nor would extra-curial punishment be a consideration where a methyl amphetamine manufacturer suffers serious burns to their body due to chemicals exploding during manufacturing the drug.<sup>22</sup> It seems there is a reluctance by the courts to allow extra-curial harm to be considered relevant if the offender's own criminal conduct is responsible for their injuries.

In addition to the common law, legislation in each state and territory clearly provides sufficient discretionary powers to allow judges to take into account extra-curial punishment when handing down sentence.<sup>23</sup>

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<sup>16</sup> *Einfeld v Regina* (2010) 200 A Crim R 1, [85]–[97].

<sup>17</sup> *Ibid* [93].

<sup>18</sup> *Ibid* [92] and [95].

<sup>19</sup> *Ibid* [97].

<sup>20</sup> *Ibid* [98].

<sup>21</sup> Fiori Rinaldi, Case Comment: Fletcher (1980) 4 *Criminal Law Journal* 244.

<sup>22</sup> *Alameddine v R* [2006] NSWCCA 317.

<sup>23</sup> *Penalties and Sentences Act 1992* (Qld); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Crimes (Sentencing) Act 2005* (ACT); *Sentencing Act 1991* (Vic); *Sentencing Act 1997* (Tas); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1995* (WA); *Sentencing Act 1995* (NT).

## B *Statutory inclusion of Extra-curial Punishment*

The extent to which each state and territory legislation provides the statutory basis for extra-curial punishment varies from one jurisdiction to the other. Very few jurisdictions explicitly include a direct reference to any loss or injury to the offender as a factor to be considered in sentencing, however, all jurisdictions include in their sentencing legislation a combination of provisions that could, if relied upon, provide a legitimate basis for a court to include in its judgment aspects of extra-curial punishment. Broadly, these provisions include:

- a general provision that allows the court to consider ‘any’ relevant factors in sentencing;
- a requirement that punishment is ‘just’ in view of ‘all’ the circumstances;
- the promotion of rehabilitation;
- factors of mitigation;
- a requirement that the sentence be proportionate to the offence; and
- a requirement that the imposition of punishment be appropriate in view of ‘all the circumstances’.

These relevant provisions are outlined in greater detail below. In the course of perusing them, it will become immediately apparent that some of these statutory clauses are merely convenient vehicles that the courts may employ in order to legally justify mitigating sentences where the convicted offenders have suffered some significant form of extra-curial punishment. Consequently, these types of provisions should not be viewed as substantive legal rationales, in and of themselves, but are simply legal tools of expediency. So, for example, with catch-all phrases like “in all the circumstances” (Queensland); “any other relevant circumstances” (Queensland and Victoria); “the nature and circumstances of the offence” (Australian Capital Territory); “any other relevant matter” (South Australia); and “any other relevant circumstance” (Northern Territory)—judges are given a great deal of latitude when sentencing, albeit bound by the notion of what is considered to be “relevant”. As argued in this article, “relevance” here will be defined by the courts through a principles-based approach. Conversely, other provisions that require, for example, the punishment to be “rehabilitative” (Queensland); “not disproportionate” (Queensland); “adequate” (New South Wales); ‘capable of being expediently inflicted’ (New South Wales); and a “deterrent” (South Australia)—will require from the courts additional intellectual effort to fit mitigatory extra-curial punishment within these categories. That said, such legal machinations are entirely unnecessary when clauses, by way of illustration, make specific reference to “any injury suffered by the offender or the offender’s family, or any danger of risk of injury to the offender or the offender’s family ...”—as seen in legislation emanating from the Australian Capital Territory.

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1 *Queensland*

In Queensland, s 9 of the *Penalties and Sentences Act 1991* (PSA) contains several provisions that could permit the Court to incorporate extra-curial aspects into the sentence. Particularly noteworthy is s 9(1)(a) that requires punishment to be just in ‘all the circumstances’.<sup>24</sup> The broadness of the phrase in ‘all the circumstances’ is such that it allows the sentencing judge to consider a range of factors including those relative to the offender. In certain instances, the failure to consider aspects related to the offender, could render punishment unjust.

Section 9(1)(b) requires punishment to ‘help the offender to be rehabilitated’.<sup>25</sup> In certain cases it is arguable that rehabilitation is better achieved without the infliction of an overly harsh sentence when taking into consideration all the circumstances of the case.

Section 9(2)(f) allows the Court to consider any mitigating circumstances concerning the offender. Sections 9(2)(p) and (q) allows the Court to consider ‘anything else prescribed by the Act’ or ‘any other relevant circumstances’.<sup>26</sup> Such catch-all provisions as (p) and (q) arguably make it possible for the Court to consider a wide range of facts in determining the sentence.

Section 9(11) stipulates that the sentence ‘must not be disproportionate to the gravity of the ... offence’; while s 9(12) requires the Court to impose a sentence of imprisonment ‘as a last resort’.

## 2 *New South Wales*

In New South Wales, the *Crimes (Sentencing Procedure) Act 1991* at s 3A(a) there is a requirement that the offender is ‘adequately punished’. The adequacy of the punishment might include an assessment of whether any incidental or extra-curial punishment exists for the sentencing judge to consider as part of their determination of the overall sentence.

Pursuant to s 10(1)(a) the Court is able to make ‘an order directing that the relevant charge be dismissed’ even where a Court ‘finds a person guilty of an offence’. Any severe extra-curial aspects could provide the basis of such a scenario.

Section 10(2)(a) similarly allows the Court to make an order discharging a person on a good behaviour bond where it is ‘inexpedient to inflict any punishment (other than nominal punishment) on the person’.<sup>27</sup> In determining whether it is ‘inexpedient’ to

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<sup>24</sup> See also, *Sentencing Act 1991* (Vic) s 5(1)(a); *Sentencing Act 1995* (WA) ss 6(2)(b)

<sup>25</sup> See, also, *Crimes (Sentencing Procedure) Act 1991* (NSW) ss 3A(d), 11(1)(c); *Sentencing Act 1991* (Vic) ss 5(1)(c) and 70(1);

<sup>26</sup> See, also, *Crimes Sentencing Act 2005* (ACT) s 17(4); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(a), (o).

<sup>27</sup> For similar provisions, see *Crimes Sentencing Act 2005* (ACT) s 17(2)(a);

inflict punishment on an individual, such an assessment would involve a consideration of the relevance of any extra-curial punishment that has already been or is likely to be inflicted upon the offender.

### 3 *Australian Capital Territory*

The *Crimes Sentencing Act 2005* (ACT) contains several provisions which, unlike most of its state and territory counterparts, make specific reference to the impact of the sentence on the offender as being relevant. Section 33(1)(a) allows the Court to consider ‘the nature and circumstances of the offence’;<sup>28</sup> while s 33(1)(e) allows the Court to consider the relevance of ‘any injury, loss or damage resulting from the offence.’<sup>29</sup> The provision stops short of attributing the injury, loss or damage to that of the victim, and as such, it is arguable that it is open for the Court to consider any injury, loss or damage to any party—including the offender—that came as a result to the offender’s conduct.

Sections 33(1)(r) allows the Court to consider whether the recording of a conviction or the imposition of a particular penalty would be likely to cause hardship to the offender.

More significantly, however, is s 36(3)(h) that provides the statutory basis for a lesser penalty due to ‘any injury suffered by the offender or the offender’s family, or any danger or risk of injury to the offender or the offender’s family’ due to any assistance provided by the offender to law enforcement authorities.<sup>30</sup>

### 4 *Victoria*

The *Sentencing Act 1991* (Vic) s 5(2)(d) requires the Court to make an assessment of the offender’s culpability and degree of responsibility for the offence. Such an assessment could involve an assessment of various aspects of extra-curial punishment in determining the degree of responsibility.

Section 5(2)(g) allows the Court to consider any ‘mitigating circumstances concerning the offender or of any other relevant circumstances’. Such a wide provision is precisely the type of statutory inclusion that would allow extra-curial punishment to be raised if relevant to the circumstances.

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<sup>28</sup> See, also, *Sentencing Act 1991* (Vic) s 5(2)(c).

<sup>29</sup> See, also, *Sentencing Act 1991* (Vic) s 5(2)(db); *Criminal Law (Sentencing) Act 1988* (SA) ss 10(1)(e). It should be noted, however that the case law does not seem to support the acceptance of extra curial punishment in circumstances where the offender has contributed to their own injuries in the course of criminal conduct – for a detailed discussion of various cases on this matter, see, Mark David Chong, Jamie Fellows and Frank Richards, ‘Sentencing the Victimized Criminal: Delineating the Uncertain Scope of Mitigatory Extra-Curial Punishment’ (2013) 35 *Sydney Law Review* 379, 389-97; and Mirko Bagaric, Lidia Xynas and Victorial Lambropoulos, ‘The irrelevance to sentencing of (most) incidental hardships suffered by offenders’ (2016) 39(1) *UNSW Law Journal* 47, 51-55.

<sup>30</sup> See, also, *Criminal Law (Sentencing) Act 1988* (SA) ss 10A(3)(g), (i) and (j) for similar provisions.

5 *Tasmania*

The *Sentencing Act 1997* (Tas) s 9(c) allows the Court to consider ‘the impact of a conviction ... on the offender’s economic, social wellbeing or employment prospects’. This provision is interesting in the sense that the Tasmanian Parliament saw fit to consider the impact of a conviction regarding such broad aspects of an offender’s life. The rationale underpinning this provision could be related to Parliament’s desire to assist the offender’s rehabilitation into society by maximizing their chances of employment and thereby relieving additional burden on the State.

6 *South Australia*

The *Criminal Law (Sentencing) Act 1988* (SA) at s 10(1)(i) requires the Court to consider the deterrent effect that any sentence may have on the offender or other persons. Arguably, circumstances could make punishment futile given the facts that led to the offending conduct and thereby reduce the effectiveness of any deterrent ~~effect~~.

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Section 10(1)(n) requires the Court to consider the impact of any sentence on the ~~dependants~~ dependents of the offender; while s 10(1)(o) allows the Court to consider ‘any other relevant matter’.

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Section 10A(3)(g), (i), (j), in determining any reduction of sentence, allows the Court to consider ‘violent retribution’ likely to result from cooperation with authorities, and the nature of the protection of the offender that would need to be implemented if a term of imprisonment was awarded).

7 *Western Australia*

The *Sentencing Act 1995* (WA) contains a range of provisions allowing for mitigation of sentence such as sections 6(2)(d), 6(3)(a) and 8(1). The scope of mitigating circumstances in WA are not closed and these provisions allow for the Court to determine which factors are relevant.

8 *Northern Territory*

The *Sentencing Act 1995* (NT) at s 5(2)(b) allows the Court to examine the nature of the offence while s5(2)(s) contains a wide provision that allows the Court to consider ‘any other relevant circumstance’.

In relation to the adequacy of each state and territory’s legislative provisions regarding extra-curial punishment, we do not necessarily advocate for additional legislative reform in this area and on that basis, submit that there is already sufficient legislation

to allow a sentencing judge to consider extra-curial punishment where he or she deems it appropriate to do so in light of the circumstances of each case.<sup>31</sup>

The relevant question, however, is *when* should extra-curial punishment become worthy of judicial consideration? What level of injurious factors ought to be worthy of judicial consideration? **When would it be 'relevant' to place extra-curial punishment on the sentencing scales of justice?** These questions can be examined through the lens of various 'principles'; namely, that of 'mercy' and the 'integrity of punishment'.

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### III. A 'PRINCIPLES' BASED APPROACH FOR JUDICIAL SENTENCING

The complexities associated with sentencing was articulated by Kirby J in *Markarian v R*.<sup>32</sup> In alluding to the range of factors that influence a sentencing judge, Kirby J expressed the view that the sentencing process is not a rigid scientific process. Rather, His Honour stated that,

there is no single correct sentence (unless it is lawfully fixed by Parliament). I also agree that sentencing is not a mechanical, numerical, arithmetical or rigid activity in which one starts from the maximum fixed by Parliament and works down in mathematical steps. The process is not so scientific. Because there are a multitude of factors to be taken into account ... the evaluation, in terms of time of imprisonment, quantity of fine or other sanction, is necessarily imprecise. Human judgment is inevitably invoked. In sentencing there is sometimes a legitimate role for differences of judicial view. These may occasionally favour the extension of leniency... So long as all relevant considerations are given due attention, the discretionary character of sentencing will inhibit appellate interference.<sup>33</sup>

Similar sentiments to which Kirby J referred, were expressed some years earlier in *Veen*.<sup>34</sup> In that case the majority stated that,

sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate

<sup>31</sup> However, some uniformity and further clarity in the form of legislation from each of the legislatures could be a welcome addition regarding their position on extra-curial punishment.

<sup>32</sup> *Markarian v R* 228 CLR 357.

<sup>33</sup> *Markarian v R* 228 CLR 357, [133]. Worthwhile noting that Kirby J went on to say at [134] that there are 'outer boundaries' that 'control the scope for judicial officers to indulge in individual idiosyncracies' and at [135] that 'judicial officers engaged in sentencing should be encouraged to reveal their process of reasoning'.

<sup>34</sup> *Veen v The Queen* [No.2] 164 CLR 465.

sentence in a particular case.<sup>35</sup>

In describing the process of judicial decision-making, Ronald Dworkin, a preeminent legal theorist, may shed some light on describing the application of extra-curial punishment within the criminal law. The basis of Dworkin's theory is that judges strive to achieve the 'integrity of law'<sup>36</sup> whereby law is interpreted in a way that confers with the individual decision-maker's perception of justice. Ratnapala argues that Dworkin's notion of integrity 'requires internal consistency of the system of rules and principles that make up the law'.<sup>37</sup> The internal consistency of law is characterised simply in that cases are treated alike.<sup>38</sup> Dworkin asserts that what courts are aiming to achieve in judicial decision-making, is to ensure that the law is consistent with other laws and principles within that legal system<sup>39</sup> and this in itself is 'generally accepted in liberal democracies as an article of political morality'.<sup>40</sup>

However, as Ratnapala points out, Dworkin goes further in his quest to uphold the 'integrity' of the system, by arguing that courts have the power to interpret statutes in a way that maintains the integrity of law as interpreted by that individual.<sup>41</sup> Dworkin claims that courts are involved in three phases of interpretation, of which a form of 'creative interpretation' is involved.<sup>42</sup> The term 'creative interpretation' necessarily implies that the courts do more than merely *discover* the purpose of the text as intended by the lawmakers, but rather courts *impose* a purpose in relation to the text.<sup>43</sup> According to Dworkin, this is manifested in the way that the law takes on the appearance of a 'chain novel' written by a series of authors where the 'integrity' of the unfolding story is maintained by following consistent principles throughout.<sup>44</sup>

Dworkin argues that the use of 'principles' are integral in the process of interpreting law and maintaining integrity within the system.<sup>45</sup> Principles, as posited by Dworkin, take on the appearance of social 'standards' and, as such, stipulate or advance a particular social good.<sup>46</sup> Lawyers use such 'standards' or 'principles' when arguing about rights and are integral in the requirement for justice, fairness or some other

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<sup>35</sup> *Veen v The Queen* [No.2] 164 CLR 465, 476 [Mason CJ, Brennan J, Dawson J, Toohey J]. For similar sentiments, see also *R v Engert* (1995) 84 A Crim R 67, 68 [Gleeson CJ].

<sup>36</sup> Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 183.

<sup>37</sup> Suri Ratnapala, *Jurisprudence* (Cambridge 2009) 177.

<sup>38</sup> *Ibid* 178.

<sup>39</sup> Dworkin, above n 36.

<sup>40</sup> Ratnapala, above n 37, 178.

<sup>41</sup> Dworkin, above n 36, 183. For a good discussion of Dworkin's sharp contrast to positivism, see Suri Ratnapala, *Jurisprudence* (Cambridge, 2009) Chapter 6.

<sup>42</sup> *Ibid* 179.

<sup>43</sup> *Ibid* 228.

<sup>44</sup> *Ibid* 229.

<sup>45</sup> Dworkin, *Taking Rights Seriously* 22–3. Dworkin cites a number of examples of such principles (eg, that a criminal should not benefit from their crime; a murderer shall not receive property under a will; and manufacturers should be restricted from limiting their liability). Such principles are engrained throughout the common law.

<sup>46</sup> *Ibid* 24.

dimension of morality.<sup>47</sup> Interpreting law, therefore, does consist of moral interpretation by the application of such principles.<sup>48</sup> What, then, might be such principles that the judiciary—either knowingly or otherwise—rely upon when considering whether or not to accept extra-curial punishment as mitigating circumstances? ‘Mercy’ and the ‘purpose of punishment’ are possible principles to be considered.

## **A *Mercy as a Sentencing Principle in Extra-curial Punishment***

One principle that is given recognition in a number of state and territory sentencing provisions is the concept of ‘mercy’.<sup>49</sup> Courts have on occasion referred to the operation of this principle forming part of the discretionary basis in sentencing,<sup>50</sup> and as such, ‘mercy’ is precisely the type of principle that Dworkin would consider to be one that would maintain the ‘integrity’ of the system. Relying on Fox,<sup>51</sup> Warner echoed this approach and noted that “[i]t may be that it is possible to use mercy as a catalyst or vehicle through which new precedents for leniency can be established so that it operates in a principled way rather than as an unconstrained act of grace driven by sentiment.”<sup>52</sup> It is, therefore, relevant here to examine mercy in the context of extra-curial punishment since ‘mercy’ not only has a statutory grounding, but it also forms the basis of a number of common law decisions.

### **1 *The Concept of Mercy***

The operation of ‘mercy’ in the context of judicial sentencing is not completely understood by the courts and this has produced some curious interpretations within the courts.<sup>53</sup> Indeed, as Fox argues, it is not just lawyers who have been puzzled by the nature of the concept, but modern theologians and philosophers have also grappled with the meaning of ‘mercy’ and how it should be applied.<sup>54</sup> Fox describes ‘mercy’ in sentencing as a ‘gift’ rather than a ‘right’, deriving its origins from early religious

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<sup>47</sup> Ibid 22–3.

<sup>48</sup> Ratnapala, above n 37, 181.

<sup>49</sup> *Sentencing Act 1991* (Vic) s 70; *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(s); *Sentencing Act 1997* (Tas) s 58.

<sup>50</sup> *Markovic v The Queen*; *Pantelic v The Queen* [2010] VSCA 105, [1]–[12]; *R v Miceli* (1997) 94 A Crim R 327.

<sup>51</sup> Richard G Fox, ‘When Justice Sheds a Tear: The Place of Mercy in Sentencing’ (1999) 25(1) *Monash University Law Review* 1, 2, 4.

<sup>52</sup> Kate Warner, ‘Sentencing Review 2010-2011’ (2011) 35 *Crim LJ* 284 at 298. That said, Warner would prefer to include in such a sentencing rationale the principles of proportionality, equal impact, individualised justice, and consistency (or equality).

<sup>53</sup> Fox, above n 51, 1, 2, 4.

<sup>54</sup> Ibid 1–2.

teachings whereby the concept is associated with ‘God’s pitying forbearance towards his creatures and his willingness to forgive their offences’.<sup>55</sup> In describing the nature and operation of ‘mercy’, Fox suggests there are a number of characteristics associated with the concept including the demonstration of power, the appearance of a possible ‘subversion’ of the law,<sup>56</sup> and the characteristics of the ‘merciful’.<sup>57</sup> Fox also contrasts the concept of mercy with that of the often conflated notion of ‘forgiveness’.<sup>58</sup> Likewise, the principle of ‘parsimony’ can also be contrasted with mercy in the sense that parsimony requires that the ‘sentence must be no more severe than is necessary to meet the purposes of sentencing’.<sup>59</sup> Parsimony could be seen as a form of mercy, however mercy goes beyond mere utilitarian considerations and could allow a range of factors to be considered that are borne out of the circumstances of each case.

The relationship between law and mercy was examined by William Blackstone in his seminal work, *Commentaries on the Laws of England*.<sup>60</sup> Blackstone describes the operation of ‘mercy’ arising within the context of law through the early construction of equity as something that is tied to ‘conscience ... [and] the essence of equity as a corrective to the rigours of laws was that it should not be tied to rules’.<sup>61</sup> It is interesting to note the discretionary nature with which Blackstone attributes the operation of mercy in the criminal law. Sarat seems to agree with this notion and argues that,

the calculus of mercy cannot be governed by rules; it remains purely discretionary. There remains something in the act of mercy that invokes the ineradicable and perhaps necessary gaps between law and justice, letter and spirit, rules and discretion, gaps that have troubled and continue to trouble legal institutions.<sup>62</sup>

Sarat does, however, pose the normative question regarding mercy’s place in a ‘system dedicated to formal equality’.<sup>63</sup> By this, it is assumed that Sarat means the formal equality or impartiality of justice that is inherent within the legal system created by a set of formal rules that apply to everyone equally. As such, the notion of ‘formal

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<sup>55</sup> Ibid 4–5.

<sup>56</sup> The reference to ‘mercy’ operating to subvert the law seems to imply that an application of ‘mercy’ may require the decision-maker to ignore, or at least overlook, what is within the actual penalty range and apply a reduced penalty on the grounds of mercy. The effect of this, Fox argues, would be to give the appearance of subverting sentencing law.

<sup>57</sup> Fox, above n 53, 5–7.

<sup>58</sup> Ibid 6.

<sup>59</sup> Victorian Sentencing Advisory Council, *Sentencing Principles, Purposes, Factors* (2 February 2016) Research, Statistics and Education about Sentencing in Victoria <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors>>

<sup>60</sup> William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (University of Chicago Press, 1979).

<sup>61</sup> Ibid 389.

<sup>62</sup> Austin Sarat, *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* (Cambridge University Press, 2011) 3. On this point, see also Austin Sarat and Nassar Hussain, ‘On Lawful Lawlessness: George Ryan Executive Clemency, and the Rhetoric of Sparing Life’ (2004) 56 *Stanford Law Review* (2004) 751.

<sup>63</sup> Ibid 4.

equality' can be associated with aspects of impartiality<sup>64</sup> which exists within the legal system and aims to ensure that those who are convicted of an offence are dealt with the same as anyone else despite individual circumstances. When one allows aspects of 'mercy' to apply in certain circumstances, some uncertainty arises regarding the place of 'mercy' within the legal system if its application operates for some and not for others.

Walker asserts that the function of mercy has a different application with regards to sentencing:

[mercy] merely allows benign interference when the programming of the system seems to be having unacceptable effects in special cases. As the other organs of the system evolve they tend to take over this function: appellate courts are an example. Like the human appendix, mercy may become vestigial.<sup>65</sup>

Walker further states that the 'vestigiality' of mercy is not necessarily a desirable attribute within the criminal law.<sup>66</sup> Smart espouses the place of 'mercy' by putting forward a framework for its application, and argues that it would be unjust in certain circumstances to ignore the application of mercy.<sup>67</sup> Smart cites an example where a parent has caused the death of their own child as a result of their erratic driving.<sup>68</sup> In this example, 'mercy' might apply, for example, to avoid a 'double punishment'.<sup>69</sup> However, Smart does appear to recognise some potential pitfalls of 'mercy' and as such suggests circumstances in which the application of 'mercy' might not apply: if it causes suffering to an innocent person; is detrimental to the offender's welfare; harms the authority of law; or when it is clear the offender is not repentant or not likely to reform.<sup>70</sup>

## 2 'Mercy' in the Australian Courts

A number of cases which have addressed 'mercy' provide some indication as to when and how mercy might arise. In the case of *Markovic v The Queen*<sup>71</sup> the Victorian Supreme Court of Appeal was required to rule on, among other things, an appeal of a sentence of imprisonment on the basis that incarceration would result in extreme hardship to the offender's family members and other dependents. The legal issue before

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<sup>64</sup> Ross Harrison, 'The Equality of Mercy' in H Gross and Ross Harrison (eds), *Jurisprudence: Cambridge Studies* (Oxford University Press, 1992), cited in Austin Sarat, *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* (Cambridge University Press, 2011) 4–5.

<sup>65</sup> Nigel Walker, 'The Quiddity of Mercy' (1995) 70(271) *Philosophy* 27, 27.

<sup>66</sup> *Ibid* 27–8.

<sup>67</sup> Alwynne Smart, 'Mercy' (1968) 43 *Philosophy* 345, cited in Nigel Walker, 'The Quiddity of Mercy' (1995) 70(271) *Philosophy* 27, 28–9.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105 (unreported).

the Court was whether third party hardship justifies the judicial exercise of ‘mercy’.<sup>72</sup> The Applicant, Zoran Markovic, received a total sentence of two years and nine months for a range of fraud related offences under Victorian and Commonwealth criminal legislation.<sup>73</sup> The offences included falsification of documents,<sup>74</sup> obtaining financial advantage by deception<sup>75</sup> and opening accounts with false names.<sup>76</sup>

In deciding the case, the Court looked at a number of personal matters regarding the applicant such as his age, background, ethnicity, financial status and family circumstances.<sup>77</sup> The Court noted the Applicant was originally from Yugoslavia, was suffering from severe financial hardship, and was caring for a severely ill mother who had recently suffered a stroke and required substantial assistance from the Applicant. The Court further noted that his brother was suffering from drug addiction and this factor, as submitted by Counsel, was a significant contributing factor that led to Markovic engaging in illegal conduct.<sup>78</sup>

Central to Markovic’s appeal was the reliance on the argument that the sentencing judge erred to extend ‘mercy’ by reasons of the circumstances of Markovic’s parents, and that there was no, or insufficient weight given to the hardship that would be suffered by the Applicant’s parents upon his imprisonment.<sup>79</sup>

The appeal ultimately failed on the grounds that Markovic could not demonstrate sufficient family hardship worthy of ‘mercy’. However, in addressing the relevance of ‘mercy’ in regards to family hardship, the Court cited a long list of authorities<sup>80</sup> for the proposition that:

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<sup>72</sup> Ibid 106.

<sup>73</sup> *Crimes Act 1958* (Vic); *Financial Transactions Reports Act 1988* (Cth).

<sup>74</sup> Section 83A *Crimes Act 1958* (Vic).

<sup>75</sup> Section 82 *Crimes Act 1958* (Vic).

<sup>76</sup> Section 24(6) *Financial Transactions Reports Act 1988* (Cth).

<sup>77</sup> *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105 (unreported) [43]–[51].

The effect of this examination gives the appearance that the Court assumed a degree of emphasis on the subjective characteristics of the Applicant and as such it would appear that in the determination of ‘mercy’, courts would rely on a subjective test for this assessment.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid [55]. The matters relied upon the plea as amounting to ‘exceptional circumstances’ were his parents’ impecuniosity and lack of social security entitlements; the fact that his parents had no medical or health insurance; his mother’s paralysis, and lack of mobility; his mother’s need for constant care, which her husband could not provide; and the dire situation in which his parents found themselves in regards to their accommodation, and squalid living conditions.

<sup>80</sup> See *R v Osenkowski* (1982) 30 SASR 212, 212–13 (King CJ); *Cobiac v Liddy* (1969) 119 CLR 257, 269; *R v Kane* [1974] VR 759, 766; *R v Clarke* [1996] 2 VR 520, 523 (Charles JA, with whom Winneke P and Hayne JA agreed); *Director of Public Prosecutions (Cth) v Carter* [1998] 1 VR 601, 607 (Winneke P); *R v Miceli* [1998] 4 VR 588, 592 (Tadgell JA), 594 (Charles JA). See also, *DPP v Najjar* [2009] VSCA 246, [11].

There must always be a place in sentencing for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case ... [and] this is a proposition of long standing and high authority, repeatedly affirmed in this Court.<sup>81</sup>

The Court accepted that 'mercy' can indeed apply in circumstances of family hardship, however, the relevant test requires the person to prove such hardships are of an 'exceptional' nature of which the Applicant was unable to demonstrate.<sup>82</sup>

## **B     *Extra-curial punishment in achieving the 'integrity of punishment'***

Punishment plays a significant role in the criminal law and remains a legitimate component of state enforcement. The coercive powers of the state are such that the state has the ability to remove an individual's liberty or impose pecuniary sanction for certain acts or omissions. Dominant theoretical perspectives attempting to explain the justification of punishment are generally represented by theories broadly described in attempting to achieve *retribution*, *rehabilitation* and *deterrence*.<sup>83</sup> If punishment falls within one or more of these categories—and is applied lawfully within the statutory sentencing guidelines—then the punishment is thought to be legitimate. That is, the 'integrity of punishment' is achieved. The dilemma for the judiciary is in articulating where extra-curial punishment fits within these three broad categories that justify punishment.

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<sup>81</sup> *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105 (unreported) [Part I].

<sup>82</sup> *Ibid* [3]. The high threshold test is to limit the availability of the residual discretion of 'mercy' in the courts. This is informative since it indicates that 'mercy' should likewise only be used in 'exceptional' circumstances.

<sup>83</sup> See, eg, Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 11–49, 67–80; Stanley Grupp (ed), *Theories of Punishment* (Indiana University Press, 1971) 13–317; Ted Honderich, *Punishment: The Supposed Justifications* (Penguin Books, 1971) 22–103; Nigel Walker, *Sentencing in a Rational Society* (Penguin Books, 1972) 15–39, 77–97; Abraham S Blumberg, *Criminal Justice: Issues and Ironies* (New Viewpoints, 1979) 316–338. Punishment theorists tend to focus on retribution, rehabilitation and deterrence with each offering a similar analysis of the theory. F J O Coddington in Stanley E Grupp (ed), *Theories of Punishment* (Indiana University Press, 1971) 9–10, 333–79, offers a further theory of 'integrative' punishment. The basis of 'integrative' punishment relates to an inclusive theory which relies on integrating several functions of punishment, one of which is to 'mitigate' or completely 'satisfy' the need for retribution, while still serving as a form of deterrent to others. The importance of this notion can be asserted as one justification for extra-curial punishment since an 'integrative' approach might assume that an allowance of extra-curial punishment would 'mitigate' the need for further state-imposed punishment.

Retribution is premised on the notion that the state is justified in administering punishment on the basis that the offender is guilty of a past crime and ‘deserves’ what they get.<sup>84</sup> While retribution does play a role within the sentencing framework, a more positive way to consider punishment, at least from a utilitarian perspective, is that punishment should focus on rehabilitation and deterrence.<sup>85</sup>

So far as extra-curial punishment can be considered a legitimate form of punishment, Richards outlines a number of examples where the judiciary have considered extra-curial punishment and its relationship to maintaining the ‘integrity to punishment’.<sup>86</sup> Richards argues that extra-curial punishment is principally considered in order to avoid the injustice of a double punishment effect on the perpetrator. Extra-curial punishment is most likely to be considered where the court can identify the existence of genuine remorse, the existence of legitimate reasons for the perpetrator receiving that extra-curial punishment, where the extra-curial punishment acts as a specific deterrent to future criminal conduct of the perpetrator, and where extra-curial punishment generally deters others from committing the same or similar acts as the perpetrator.

## 1 *Punishment Achieved Where Genuine Remorse*

Pursuant to the *Penalties and Sentences Act*, in Queensland, remorse can be a factor to be taken into account when sentence is handed down.<sup>87</sup> In the case of *Daetz*, Woods J acknowledged that the perpetrator ‘had a deeper understanding of the position of the victim’ due to the injuries the perpetrator sustained at the time of the commission of the offence.<sup>88</sup>

Woods J then went to state that a ‘substantial discount’ was allowed for the fact that the perpetrator demonstrated ‘contrition’ but not because of ‘the fact that he has had his skull fractured in a revenge attack’.<sup>89</sup>

It is important to note in this case that the Court did not pay credence to the injury, rather the fact that the perpetrator demonstrated remorse in relation to his part in the offence. Although the remorse was brought on by the fact that the perpetrator had himself suffered an injury, the clear presence of remorse in the case demonstrated that remorse could be an aspect of extra-curial punishment.

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<sup>84</sup> C W K Mundle, ‘Punishment and Desert’ in Stanley Grupp (ed), *Theories of Punishment* (Indiana University Press, 1971) 58–75.

<sup>85</sup> Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 11–19.

<sup>86</sup> Frank Richards, ‘Extra-Curial Punishment and Mitigation of Sentence’ (2009) (26) *Hearsay* <[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=621&Itemid=48](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=621&Itemid=48)>

<sup>87</sup> *Penalties and Sentences Act 1992* (Qld) s 9(3)(i).

<sup>88</sup> (2003) 139 A Crim R 398, [26].

<sup>89</sup> (2003) 139 A Crim R 398, [26].

## 2 *Punishment as Retribution*

There is broad scope in the *Penalties and Sentences Act 1992* (Qld) to include ‘retribution’ as a valid reason for accepting extra-curial punishment. Section 9(1)(a) of the Act states that one of the purposes for imposing sentences is ‘to punish the offender to an extent or in a way that is just in all the circumstances.’<sup>90</sup> One interpretation of this provision was given in the case of *Daetz* where Justice James acknowledged that a court must take into account all ‘material facts as is required to ensure that the punishment the offender receives ... is not an excessive punishment.’<sup>91</sup> While acknowledging that it is for the courts to impose punishment on persons who have committed offences, James J stated that the Court could take into account any ‘serious loss’ or ‘detriment’ meted out against the perpetrator. According to his Honour, consideration of any serious loss or detriment could be taken into account ‘even where the detriment the offender suffered has taken the form of extra-curial punishment by private persons exacting retribution or revenge for the commission of the offence.’<sup>92</sup> The decision in *Daetz* received the approval of the Queensland Court of Appeal in *R v Hannigan*.<sup>93</sup>

## 3 *Punishment as Deterrence*

Deterrence is a factor which is considered in the *Penalties and Sentences Act 1992* (Qld). According to the Act, one of the purposes of punishment is to deter the offender or other persons from committing offences.<sup>94</sup>

In the case of *Hannigan*, Chesterman J made reference to the purpose of extra-curial punishment serving as a deterrent against future offending. According to his Honour, extra-curial punishment acts as a deterrent because the punishment serves as a ‘reminder of the unhappy consequences of criminal misconduct, or it leaves the offender with a disability, some affliction, which is a consequence of criminal activity.’<sup>95</sup> His Honour went on to say that ‘in such cases one can see that a purpose of sentencing by the court, deterrence or retribution, has been partly achieved.’<sup>96</sup>

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<sup>90</sup> S 9(1)(a).

<sup>91</sup> (2003) 139 A Crim R 398, [62].

<sup>92</sup> *Ibid.*

<sup>93</sup> *Hannigan* [2009] QCA 40, [24]–[25].

<sup>94</sup> S 9(1)(c).

<sup>95</sup> [2009] QCA 40, [25].

<sup>96</sup> [2009] QCA 40, [25].

#### ***4 Extra-curial Punishment - legitimising unlawful punishment?***

Difficult questions arise regarding the consequences of accepting extra-curial punishment as part of the sentencing 'tool kit'. One question that might arise is whether the judiciary implicitly condones unlawful or 'vigilante-style' punishment against the offender, thereby legitimising the unlawful conduct of a few? Perhaps the real issue here, at least from a judicial perspective, is whether the judiciary are undermining their own authority and the public confidence in the administration of justice<sup>97</sup> if they accept that a form of 'punishment' can be meted out by someone other than the judiciary.

There exists some arguments to suggest that extra-curial punishment is incongruous with the fundamental principles of valid punishment on the basis that punishment must be administered only after careful consideration and sanction by the judiciary. HLA Hart highlighted this fact when he defined punishment to consist of five basic elements:<sup>98</sup>

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

Extra-curial punishment would appear to satisfy a number of Hart's elements of punishment. For example, element (1) would be satisfied since much of the 'pain' suffered by the offender involves substantial physical and emotional stress. Elements (2), (3) and (4) would be satisfied providing the offender committed the act, of which

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<sup>97</sup> The Australasian Institute of Judicial Administration Incorporated, 'Guide to Judicial Conduct' (Published for the Council of Chief Justices of Australia, 2<sup>nd</sup> edition, March 2007) 3. As part of their report, the AIJA assert that 'the principles applicable to judicial conduct have three main objectives:

- (1) To uphold public confidence in the administration of justice;
- (2) To enhance public respect for the institution of the judiciary; and
- (3) To protect the reputation of individual judicial officers and of the judiciary.

<sup>98</sup> H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, 1968) 4-5. See also Mark David Chong, Jamie Fellows and Frank Richards, 'Sentencing the Victimised Criminal: Delineating the Uncertain Scope of Mitigatory Extra-Curial Punishment' (2013) 35 *Sydney Law Review* 379, 381.

the act was an offence and the punishment was carried out by someone other than the alleged offender.<sup>99</sup>

However, by virtue of clause (5), Hart indicates that punishment will not be legitimate where the punishment is administered to the offender by an ‘authority’ not constituted by a legal system. The judiciary in Australia is such an authority constituted by a legal system by virtue of the powers bestowed on the courts under the *Commonwealth Constitution* and each of the *state* and *territory Constitutions*.<sup>100</sup> There is good reason as to why only certain ‘authorities’, as Hart calls them, are the legitimate entities to administer punishment. Primarily, the strict rationale for the control relating to who can administer punishment is concerned with law and order.

Hart’s assertion in relation to (5) must be given some consideration. To allow punishment that is neither lawfully sanctioned nor exercised by the appropriate ‘authority’, could be seen to be, at least according to Hart, a violation of key principles of punishment. The obvious consequence being that punishment becomes no longer valid and is administered in a vigilante-style fashion.<sup>101</sup> Vigilantism often involves taking on the role of law-maker and law-enforcer, and is at odds with the very notion of western democracy law.<sup>102</sup> The concept of vigilantism is nothing new and permutations of the vigilante ‘mob’ behaviour have appeared consistently throughout history in a range of forms.<sup>103</sup> Examples of this can be readily seen in the history of the United States with self-imposed vigilante groups operating to take control of the function of the law in areas where law-enforcement was either underdeveloped or ineffectual.<sup>104</sup>

The danger that goes with judicial recognition of ‘pain’ in the guise of extra-curial punishment that an alleged offender receives at the hands of the ‘mob’, could in fact be seen as a means to legitimise non-state punishment. The effect of this would undermine the state’s legitimacy to act as *the* law-maker and enforcer in relation to the criminal law. The formal recognition of extra-curial punishment could work to legitimise the process of non-state enforcement and turn non-state ‘actors’ into a legitimate institution in their own right. Extra-curial punishment administered by anything or anyone other than the state does not confer with our understanding of a legitimate ‘source of law’<sup>105</sup>

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<sup>99</sup> Mark David Chong, Jamie Fellows and Frank Richards, ‘Sentencing the Victimised Criminal: Delineating the Uncertain Scope of Mitigatory Extra-Curial Punishment’ (2013) 35 *Sydney Law Review* 379, 381.

<sup>100</sup> See, eg. *Commonwealth of Australia Constitution Act 1900* (Imp) Chapter III.

<sup>101</sup> *Macquarie Concise Dictionary*, (Macquarie, 5<sup>th</sup> ed, 2009) 1405.

<sup>102</sup> Franklin E Zimring, *The Contradictions of American Capital Punishment* (Oxford University Press, 2003) 14–15, 119–20, 121–24, 125.

<sup>103</sup> See especially, Richard M Brown, *Strain of Violence: Historical Studies of American Violence and Vigilantism* (Oxford University Press, 1975) .

<sup>104</sup> *Ibid* 37–60.

<sup>105</sup> R A Hughes and G W G Leane, *Australian Legal Institutions: Principles, Structure and Organisation* (Lawbook Co, 2001) 44–7.

and would represent a strong argument for restricting the inclusion of extra-curial punishment in all contexts.

## IV Conclusion

It is arguable that ~~The~~ the common law and the sentencing provisions of each of the states and territories in Australia, adequately provide a legitimate basis for the application of extra-curial punishment in sentencing. Due to the subjective (or indeed, instinctive) application of extra-curial punishment in sentencing, however, the question to be asked is in which situations should extra-curial punishment be taken into consideration? ~~The sheer variety of decisions made by the courts in relation to arguments for the inclusion or exclusion of extra-curial punishment is very wide indeed, and this inevitably raises~~ ~~(The question goes to of the seemingly random nature of the application of extra-curial punishment within~~ by the judiciary. As Dworkin argues, difficult judicial questions—such as those involving the applicability of extra-curial punishment—are as much to do with individualised notions of fairness and the purpose of punishment relative to the decision-maker, as it does to specific rules of sentencing. Indeed there are those who argue that the problem of the common law is that judges decide the case first and seek reasons later.<sup>106</sup> In avoiding such indelicate assertions, Dworkin adopts a more nuanced approach and argues that individuals do make decisions based on what they conceive as the facts and law in order to preserve the overall ‘integrity’ of law. If the ‘integrity’ of law is preserved in allowing extra-curial punishment to affect the judicial sentence, then there exists strong argument for accepting that extra-curial punishment should play some role in the discretion allowed by the sentencing judge in appropriate circumstances. Gauged by the variability of the various decisions presented throughout this discussion, there does appear strong evidence in support of Dworkin’s argument relating to the principles of ‘mercy’ and the ‘integrity of punishment’ as reasons for allowing extra-curial punishment, particularly where an offender runs the risk of being punished twice for the one offence, ~~infringing as it were, the court’s instinctive disdain for injustice, and hence the ‘integrity of law’.~~ The role of a sentencing court will be expected to clearly articulate their reasons for allowing extra-curial punishment to be considered as part of the overall sentence.<sup>107</sup> ~~Of course, given the relative indeterminate nature of many of these principles, for example, that of mercy, this sentencing task will not be an especially simple endeavour to accomplish. That said, One-one~~ thing that will be certain is that with more of these types of factors being taken into account as part of ~~the~~ overall sentencing ~~tariff~~, a ~~more~~

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<sup>106</sup> Jutersonke Oliver, *Morganthau, Law and Realism* (Cambridge, 2010) 107–8.

<sup>107</sup> *Markarian v R* 228 CLR 357, [135]. Kirby J clearly expressed the view that judges should be allowed to engage in what is described as ‘instinctive synthesis’ in reaching their decisions *providing* that their rationale for any decision is clearly articulated. The strength of their judgment—and whether it would fail on appeal—will come down to the lawful merits of their rationale.

clearer pattern will develop regarding judicial preference as to which sorts of offenders and criminal conduct will be worthy of having extra-curial aspects considered when determining sentences. In this latter regard however, it is vital that judges be encouraged (and not just in their grounds of decision upon appeal but also in their sentencing remarks), to make more explicit their reasoning, and in particular, the principles that they have applied when including as well as excluding extra-curial punishment in their sentences.

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