PUNISHMENT AND RESPONSIBILITY: AN ASSESSMENT OF MORAL CULPABILITY IN SENTENCING

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This speech was given by the Hon. Justice Emerton, the President of the Court of Appeal, on 2 May 2024 as the Annual Lecture at the Melbourne University Law Review.

*Sentencing is based on a conception of people as rational, autonomous actors. However, day to day, judges are tasked with sentencing offenders whose capacity to exercise appropriate judgment and make calm and rational choices are compromised, even though they are considered criminally responsible. The notion of a rational and responsible agent as the touchstone for assessing culpability often leads to a heavy reliance on expert psychological evidence. However, this arguably reductive analysis of culpability through the lens of psychologism is not necessarily well-adapted to dealing with the reality of structural disadvantage in the criminal justice system. This lecture will examine two ways the courts have sought to manage these difficulties consistently with the principle of individualised justice, principles for the mitigation of moral culpability (*R v Verdins *(2007) 16 VR 240) and the principles articulated in* Bugmy v The Queen *(2013) 249 CLR 571.*

Introduction

In a lecture about sentencing, I must specifically acknowledge the injustices Aboriginal people have suffered over generations here in Victoria and elsewhere in Australia, and the significant over-representation of Aboriginal people in the justice system, and particularly in custody. I acknowledge the courage and resilience of Aboriginal people, their profound love for, and understanding of, country and community, and their central role in dealing with the issues that arise as a result of intergenerational trauma. This injustice is relevant not only to a proper acknowledgement, but also to the subject of this lecture.

The 2023 *Melbourne University Law Review* Annual Lecture was given by my former colleague and predecessor as President of the Court of Appeal, Justice Chris Maxwell AC, on the topic of thinking philosophically about the law. In his lecture, Justice Maxwell considered the role of moral and political reasoning in shaping the law. His Honour pointed out that substantive legal

* Justice Karin Emerton was appointed President of the Court of Appeal in 2022, prior to which her Honour was a judge of the Court of Appeal from June 2018. Justice Emerton was appointed to the Trial Division of the Supreme Court of Victoria in October 2009. For eight years, her Honour was the Judge in Charge of the Valuation Compensation and Planning List in the Common Law Division. From 2010 to 2012, Justice Emerton was a member of the Victorian Law Reform Commission. Immediately prior to her Honour's appointment as a judge, Justice Emerton was Crown Counsel (Advisings) in the Department of Justice and, before that, her Honour was a barrister at the Victorian Bar for 14 years, practising primarily in the area of public law. Justice Emerton holds a PhD from the Sorbonne.

rules can be seen to rest on assumptions, conceptions and choices which can properly be characterised as philosophical in nature, concerning matters such as how we assess right and wrong, the attribution of responsibility for conducts and the nature of the relationship between the state and the individual.

In this lecture, I wish to build upon his Honour's work, but with a particular focus on the concept of criminal responsibility as it applies in sentencing. This lecture is about how the courts in Victoria understand criminal responsibility — culpability or blameworthiness — when they sentence offenders. I propose to examine how this concept is evolving, particularly in response to the recognition of the effects of disadvantage and racial discrimination. I will begin by looking at the main authorities, some of which approach culpability through a medical or psychiatric lens, the others through the lens of social disadvantage. I will then look briefly at how the courts are beginning to take account of more systemic disadvantage, particularly in relation to Aboriginal offenders. I am indebted to my colleagues, and the work of the Elders and Respected Persons in the Koori County Court for their assistance in this regard.

I should begin by explaining that I do not have a background in criminal law. My expertise is in public law. But, as a trial judge, I took the opportunity sit on a number criminal trials. As an appellate judge, because many of the appeals heard in the Court of Appeal are appeals against sentences, much of my work is about sentencing. I have found the application of criminal law to be intellectually challenging and to raise important ethical issues around assumptions, conceptions and choices that are made concerning how we, as a community, assess right and wrong, and how we attribute responsibility for conduct. I have made it my practice throughout my time as a judge to visit prisons and related facilities to better understand the reality of punishment and rehabilitation.

Criminal Sentencing

Sentencing is a complicated task. The purposes of sentencing are varied. They are expressed in the *Sentencing Act 1991* to be punishment, deterrence, rehabilitation, denunciation and protection of the community.[1] In sentencing the individual offender, these purposes frequently pull in different directions. A delicate balancing exercise is required. To punish may impede rehabilitation, for example, whereas a focus on rehabilitation might not give adequate weight to community protection. There are frequently competing and contradictory considerations. The judge must balance often incommensurable factors to arrive at a sentence that is just in all of the circumstances.

The task of the sentencing judge is normative. It requires the sentencing judge to make a moral judgement about the person standing in the dock. In this process, the judge makes an assessment of that person's culpability or blameworthiness for their conduct in breaking the law. The *Sentencing Act* tells us that an offender is only to be punished to the extent of their culpability and degree of responsibility for the offending.

As one of the principal purposes of sentencing is punishment, assessing culpability is at the forefront of sentencing. It is frequently referred to as assessing the offender's 'moral culpability'. In one of the cases to which I propose to pay special attention, *Director of Public Prosecutions v Herrmann* ('*Herrmann*'),[2] the Court of Appeal described the task as follows:

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1 See *Sentencing Act 1991*, s 5 ('*Sentencing Act*').

2 (2021) 290 A Crim R 110; [2021] VSCA 160 ('*Herrmann*').

> In assessing an offender's "moral culpability" the sentencing court is making a moral judgment on behalf of the community about the degree of blameworthiness to be attached to the offender for the offending conduct. Determining how harshly a particular offender is to be judged — and punished — often requires a close examination of the personal circumstances and background of the offender and an exploration of factors which may explain the offending conduct. To the extent that the offending conduct can be seen to reflect the operation of factors which are beyond the offender's control, the harshness of the moral judgment is likely to be moderated.[3]

In the case of *Herrmann*, the offending was particularly heinous — it involved the brutal rape and murder of a young woman walking back to her university accommodation at night.[4] The Court observed that the offending was of a type that engendered 'both extreme private grief and enormous public distress'.[5] In such cases, it is the judge's responsibility 'to provide a dispassionate assessment both of the objective gravity of the offending and of the subjective culpability of the offender'.[6] At the same time, the judge must acknowledge the pain and distress caused by the offending.[7] I want to examine how the courts try to provide this 'dispassionate assessment' of the culpability of the offender. While this is only one element in the sentencing mix, it is an important one. It is the one that ultimately justifies punishment as one of the purposes of sentencing.[8]

Sentencing carries with it a set of assumptions about the nature of the individual and where the individual stands vis-à-vis the law. Sentencing for the purposes of punishment and deterrence is premised on the conception that the person being sentenced is relevantly responsible, that he or she is a rational, autonomous actor. However, the law also recognises the need for what HLA Hart called the 'individualisation of punishment'.[9] It recognises that two individuals who are guilty of the same crime may be sentenced differently depending on their personal circumstances. Those circumstances will be relevant to such matters as the need for general deterrence and prospects of rehabilitation. They will often also be highly relevant to assessing the individual's blameworthiness for the offending.

One of my colleagues, a most experienced and respected criminal judge, described the sentencing task to me thus: 'we sentence the whole person'. To me, as a judge, that proposition is instinctively true. Any review of published sentencing remarks in the County Court or Supreme Court will show that sentencing judges devote extensive time and print to the circumstances of the individual being sentenced. However, analytically, the concept of the 'whole person' is problematic. Who is this person? To what extent is this person rational and autonomous and to what extent are they a

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3 (2021) 290 A Crim R 110, 114 [14] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

4 (2021) 290 A Crim R 110, 115–16 [20]–[24] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

5 (2021) 290 A Crim R 110, 113 [4] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

6 (2021) 290 A Crim R 110, 113 [4] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

7 (2021) 290 A Crim R 110, 113 [4] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

8 *Sentencing Act*, s 1(iv).

9 HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968) 164.

product of history, community and family, being the central forces that have shaped them? To what extent are those forces relevant to assessing moral culpability?

The accepted wisdom is that criminal responsibility is founded in capacity: capacity to reason, capacity to control impulses. Human agency remains key and the attribution of responsibility for specific actions 'lies in human capacities of cognition – knowledge of circumstances, assessment of consequences – and volition – powers of self-control'.[10] It is only legitimate to hold people criminally responsible for things that they have the capacity to avoid doing. As a consequence, much of the jurisprudence about criminal responsibility involves questions of impaired mental functioning. Offenders are considered to be legally responsible for their actions if they understand the nature and quality of their conduct and know it to be wrong. However, their culpability for the offending may be reduced if their mental capacity is diminished for one reason or another.

When the courts in Victoria are invited to find a reduction in an offender's culpability, it is typically by reference to one or both of two cases understood to set out the relevant principles: *R v Verdins* ('*Verdins*')[11] and *Bugmy v The Queen* ('*Bugmy*').[12] In *Verdins*, the Court of Appeal considered the effects of impaired mental functioning and set out six circumstances in which it will be relevant to sentence, including the assessment of moral culpability.[13] *Bugmy* is a 2013 decision of the High Court of Australia, which considered culpability in the context of severe social disadvantage during childhood. Both of these cases were considered and applied by the Court of Appeal in *Herrmann* in 2021, to which I have already referred. In that case, the offender suffered from a severe personality disorder and severe neglect in his early life, both of which reduced his moral culpability.

In considering the limitations and opportunities presented by the framework of individual capacity (or incapacity), I also want to explore the ways in which the recognition and the increased understanding of the social disadvantage, alienation from country and culture, and intergenerational trauma experienced by Aboriginal offenders has the potential to change the way in which courts approach sentencing and questions of subjective culpability in particular. As long ago as 2002, sitting on a sentence appeal involving an Aboriginal offender, Eames JA said:

> To ignore factors personal to the offender, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself.[14]

His Honour recognised not just the social and economic disadvantages that might lead an Aboriginal person to commit an offence, but also acknowledged the more complex issues of history and cultural difference that should be taken into account in order to ensure that the individual is sentenced appropriately. For Aboriginal offenders in particular, understanding the reasons for offending and attributing criminal responsibility has exposed tensions between recognising individual responsibility (or agency) and giving meaning to a collective history of disadvantage and dispossession (or structure).

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10 Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press, 2016) 28.

11 (2007) 16 VR 269 (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102 ('*Verdins*').

12 (2013) 249 CLR 571; [2013] HCA 37 ('*Bugmy*').

13 *Verdins* (2007) 16 VR 269, 276 [32] (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102.

14 *R v Fuller-Cust* (2002) 6 VR 496, 520 [79]; [2002] VSCA 168.

R v Verdins

In 2007, the Victorian Court of Appeal used three appeals involving offenders with recognised mental disorders, captured under the title of the first appeal, *Verdins*, as an opportunity to review the case law since the case of *R v Tsiaras* ('*Tsiaras*')[15] and to restate, in a somewhat revised form, the guiding principles that that case laid down. In *Tsiaras*, the Court of Appeal had identified five ways in which what it described as '[s]serious psychiatric illness not amounting to insanity' might be relevant to sentence.[16] In *Verdins*, the Court held that the sentencing considerations identified in *Tsiaras* were not applicable only to cases of 'serious psychiatric illness'. They might be applicable in any case

> where the offender is shown to be suffering at the time of the offence (and/or to be suffering at the time of sentencing) from a mental disorder or abnormality or an impairment of mental function, whether or not the condition in question would properly be described as a (serious) mental illness.[17]

The Court held that '[t]he sentencing court should not have to concern itself with how a particular condition is classified', as '[d]ifficulties of definition and classification in this field are notorious'.[18] According to the Court, '[w]hat matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time'.[19] Relevantly, '[w]here a diagnostic label is applied to an offender, as usually occurs in reports from psychiatrists and psychologists, this should be treated as the beginning, not the end, of the inquiry'.[20] The Court emphasised that the sentencing court needs cogent evidence, normally in the form of expert opinion, to establish the existence of the mental impairment and the nature, extent and effect of the mental impairment experienced by the offender at the relevant time. The Court concluded that impaired mental functioning is relevant to sentencing in at least six ways.[21] These are referred to in and by sentencing courts as '*Verdins* 1 to 6'. '*Verdins* 1' is a reduction in moral culpability.

Verdins held that moral culpability might be reduced if the impaired mental functioning 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

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15 [1996] 1 VR 398 ('*Tsiaras*').
16 [1996] 1 VR 398, 400 (Charles and Callaway JJA and Vincent AJA).
17 *Verdins* (2007) 16 VR 269, 270–1 [4] (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102.
18 *Verdins* (2007) 16 VR 269, 271 [8] (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102.
19 *Verdins* (2007) 16 VR 269, 271 [8] (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102.
20 *Verdins* (2007) 16 VR 269, 272 [13] (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102.
21 *Verdins* (2007) 16 VR 269, 276 [31]–[32] (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102.

(f) contributing (causally) to the commission of the offence.[22]

A central enduring issue for the application of the *Verdins* principles is the question of causation. The application of *Verdins* principles is understood to require the mental impairment existing at the time of the offending to have some 'realistic connection' to the offending or to have 'caused or contributed' to the offending or to be 'causally linked' to the offending.[23] This causal requirement has presented difficulties in cases where drugs and alcohol are involved, as they nearly always are. The general rule is that drug or alcohol induced behavioural problems are not mitigatory.

In *Wright v The Queen*,[24] for example, the offender suffered from schizophrenia and had been experiencing psychotic symptoms at the time of the offending. However, the sentencing judge concluded that

> the cause of the offending was not the underlying mental illness — which had previously been well controlled by medication — but his taking of methamphetamine instead of his prescribed medication, which he had continued to do even after he had come to appreciate the effects which methamphetamine had on him.[25]

Thus, although there was active psychosis at the time of the offending, the judge was satisfied that it was the intoxication resulting from the drug taking that was causally linked to the offending.[26] The Court of Appeal upheld the judge's conclusion that, as a result, there was no reduction in moral culpability.[27]

In *Mune v The Queen*,[28] the offender was guilty of drug offences and intentionally causing injury. He violently attacked a friend visiting him. The psychological report stated that he had chronic stimulant dependence. In relation to this, Harper JA said that

> *Verdins* must not become that which it was never intended to be: a refuge for those who seek to deny the import of the words which Shakespeare put in the mouth of Cassius: 'The fault, dear Brutus, is not in our stars, but in ourselves'. It has been held by this Court that the principles of *Verdins* should be applied only after careful scrutiny and assessment, based on cogent evidence, of the relationship between the mental disorder and the offending and other matters.[29]

In an article entitled 'Whydunnit? Causal Explanations in Sentencing Offenders with Mental Health Problems',[30] four writers — an academic (Jamie Walvisch), two psychiatrists (Andrew

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22 *Verdins* (2007) 16 VR 269, 275 [26] (citations omitted) (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102.

23 *DPP v O'Neill* (2015) 47 VR 395, 414 [74] (Warren CJ, Redlich and Kaye JJA) ('*O'Neill*') (citations omitted). See also cases referred to in *O'Neill* at 414 [74].

24 (2015) 257 A Crim R 261; [2015] VSCA 333.

25 (2015) 257 A Crim R 261, 263 [3](Maxwell P, Redlich and Osborn JJA); [2015] VSCA 333.

26 (2015) 257 A Crim R 261, 272–3 [43]–[44] (Maxwell P, Redlich and Osborn JJA); [2015] VSCA 333.

27 (2015) 257 A Crim R 261, 274 [53] (Maxwell P, Redlich and Osborn JJA); [2015] VSCA 333.

28 [2011] VSCA 231.

29 [2011] VSCA 231, [31] (Hansen JA agreeing at [37]) (citations omitted).

30 Jamie Walvisch et al, 'Whydunnit? Causal Explanations in Sentencing Offenders with Mental Health Problems' in Kay Wilson et al (eds), *The Future of Mental Health, Disability and Criminal Law: Essays in Honour of Emeritus Professor Bernadette McSherry* (Routledge, 2024) 161 ('Whydunnit?').

Carroll and Jaydip Sarkar) and a barrister (Tim Marsh) — highlighted the evaluative nature of causal determinations in this area of the law and argued for the relevance of 'indirect' causal factors as well as more direct factors. The authors make a number of interesting points.

First, they say it is not clear why an indirect contribution to the offending should not enliven *Verdins*.[31] The fact that the cause of an offender's conduct is indirect does not mean that it is irrelevant. The authors comment that:

> It will often be the case that an offender's mental disorder will greatly increase their vulnerability to choose to engage in offending behaviour, playing a crucial, but indirect, causative role in the offence.[32]

It makes sense to take such a disorder into account when analysing the offending behaviour, even if its impact is indirect.

Secondly, they point out that:

> Whilst there may be valid *policy* grounds for deciding, for example, that moral culpability is not reduced where the offender's mental disorder predisposed them to the use of drugs, this is a policy decision about the use of illicit drugs rather than about the significance of the mental disorder to, or its direct relationship with, the offending behaviour.
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> …
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> Hence, rather than focussing on whether the causal connection was direct or indirect, it would be preferable for sentencing judges to focus on whether the connection was *sufficient* to reduce the offender's moral culpability. … that is a moral evaluative question, appropriately influenced by social policy concerns.[33]

Thirdly, in considering the type of causal explanation that should be given to help the judge make the determination, the authors propose what they call 'possibility explanations' rather than 'necessity explanations'.[34] The use of possibility explanations in the sentencing context means 'construct[ing] a narrative account of the relationship between mental health problems and offending … which is clinically convincing, best fits the known facts and is held together by a clear logical thread'.[35] It will be

> a *story*, rather than the ultimate complete version of 'the true cause"' of the offence. Such stories can help to meet the psycho-legal challenge by focussing on factors such as the likely aetiology of any condition, any opportunities the offender may have had to address the condition prior to offending and the offender's insight into their condition, alongside evidence concerning the nature and strength of the impairment.[36]

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31 Walvisch et al, 'Whydunnit?', 171.
32 Walvisch et al, 'Whydunnit?', 171.
33 Walvisch et al, 'Whydunnit?', 172 (emphases in original).
34 Walvisch et al, 'Whydunnit?', 172–5.
35 Walvisch et al, 'Whydunnit?', 173–4.
36 Walvisch et al, 'Whydunnit?', 174 (emphasis in original).

As a judge, I find the authors' analysis helpful. If I am sentencing the 'whole person', I want their story, not just a diagnosis and a form of words that satisfies the causal test in *Verdins*. But, whether this story should be relayed exclusively in a report by a person whose expertise is medical or clinical is another matter, which brings me to my next point.

The Prevalence and Centrality of Psychological Reports in Sentencing

Psychological reports are valuable tools in sentencing. They are important for understanding prospects for rehabilitation, the need for community protection, how the offender will manage a custodial sentence and so on. In assessing culpability, which is a complex evaluative exercise with a heavy moral or ethical dimension, sentencing courts have become very dependent on reports prepared by psychologists and psychiatrists. It is my experience that these reports are ubiquitous and sometimes of poor quality. Moreover, they are routinely accepted in place of evidence from the offender about their circumstances, their remorse, their willingness to engage in rehabilitation and other matters relevant to the sentence that is imposed.

However, if we put that to one side, the ubiquity and reach of psychological reports also raises the concern that the 'whole person' who is being sentenced comes to be viewed by the judge almost exclusively through the lens of the mental health expert, and the particular analytical or assessment framework used by that expert. Not only does this have an air of unreality to it, but focussing on the results of psychometric testing and diagnosis risks masking or eliding social and cultural factors that may be relevant to assessing the offender's blameworthiness for offending. So what might a more complete and nuanced picture of the 'whole person' include?

There is an important line of cases that consider the offender's culpability by reference to a broader range of factors than impaired mental functioning. These cases, for the most part, concern Aboriginal offenders, for that is where the contradictions and stresses in the sentencing regime tend to be the most pronounced. *Bugmy* is the leading case and the facts are as follows.[37]

Mr Bugmy is an Aboriginal man who was raised in far-western New South Wales. He grew up in a household in which alcohol abuse and violence were commonplace. He had little formal education and started drinking alcohol and taking prohibited drugs when he was 13 years' old. He spent much of his young life in juvenile detention centres and his adult life in prison. While Mr Bugmy was a remand prisoner at Broken Hill Correctional Centre, he became upset with a prison officer and threw pool balls at him. As a result, the prison officer lost the sight in his left eye and suffered facial and psychological injuries.

Mr Bugmy was seen by a psychiatrist, Dr Westmore, who diagnosed a conduct disorder arising in adolescence; alcohol and substance abuse; and probable episodes of depression. Dr Westmore also queried whether Mr Bugmy might be suffering from early alcohol-related or head-injury related brain damage.

The trial judge found that 'there was no link between [Mr Bugmy's] mental condition and the offence'.[38] However, his Honour said he would allow some moderation in the weight to be given

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37 *Bugmy* (2013) 249 CLR 571, 583–4 [6]–[13] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

38 *Bugmy* (2013) 249 CLR 571, 585 [16] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

to general deterrence because of what he described as 'the totality of the psycho-social evidence'.[39]

The Crown appealed, arguing that with the passage of time, the extent to which social deprivation in a person's youth and background could be taken into account, had to diminish.[40] In response, Mr Bugmy's counsel submitted that the effects of childhood deprivation did not diminish with time or repeated incarceration.[41] He submitted that despite his age and long criminal record, it was open to the trial judge to impose a lenient sentence reflecting his reduced moral culpability.[42] The Court of Criminal Appeal accepted the Crown's argument.[43] Mr Bugmy appealed to the High Court.

While the appeal was upheld on other, technical, grounds, the High Court took the opportunity to say something about the effects of profound childhood deprivation and the purposes of punishment. The majority said:

> The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.[44]

The majority went on to say:

> The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
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> Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving 'full weight' to an offender's deprived background in every sentencing decision.[45]

The majority warned, however, that an offender's deprived background may not have the same mitigatory relevance for all the purposes of punishment.[46] While 'an offender's childhood

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39 *Bugmy* (2013) 249 CLR 571, 585 [16] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

40 *Bugmy* (2013) 249 CLR 571, 589 [25] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

41 *Bugmy* (2013) 249 CLR 571, 589 [27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

42 *Bugmy* (2013) 249 CLR 571, 589 [27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37..

43 *Bugmy* (2013) 249 CLR 571, 589 [25] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

44 *Bugmy* (2013) 249 CLR 571, 594 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

45 *Bugmy* (2013) 249 CLR 571, 594–5 [43]–[44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

46 *Bugmy* (2013) 249 CLR 571, 595 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

exposure to extreme violence and alcohol abuse may explain [their] recourse to violence when frustrated such that [their] moral culpability for the inability to control that impulse may be substantially reduced', this might also 'increase the importance of protecting the community from the offender'.[47]

Counsel for Mr Bugmy invited the High Court to recognise systemic disadvantage in Aboriginal communities as a sentencing factor. She relied on Canadian authority as persuasive for 'two larger propositions':[48]

> First, sentencing courts should take into account the 'unique circumstances of all Aboriginal offenders' as relevant to the moral culpability of an individual Aboriginal offender. Secondly, courts should take into account the high rate of incarceration of Aboriginal Australians when sentencing an Aboriginal offender. That rate was said to reflect a history of dispossession and associated social and economic disadvantage.[49]

The High Court rejected this submission. It distinguished the Canadian position and said that in sentencing an Aboriginal offender in New South Wales, there was 'no warrant … to apply a method of analysis different from that which applie[d] in sentencing a non-Aboriginal offender'.[50] 'Nor [was] there any warrant to take into account the high rate of incarceration of Aboriginal people'.[51] The Court stated that if these were to be considerations, the sentencing of Aboriginal offenders 'would cease to involve individualised justice'.[52] While 'Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, … to recognise this is to say nothing about a particular Aboriginal offender'.[53] The Court held that in cases where 'it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background'.[54]

Despite rejecting the relevance of structural inequality and disadvantage as a consideration relevant to sentencing individual offenders, the High Court in *Bugmy* paved the way for a more nuanced assessment of criminal responsibility. That development, I would argue, was amplified in *Herrmann*. There, the Victorian Court of Appeal considered the application of *Verdins* and *Bugmy* together, but did not treat them as co-extensive, holding that the different sets of principles had different work to do.

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47 *Bugmy* (2013) 249 CLR 571, 595 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37..

48 *Bugmy* (2013) 249 CLR 571, 589 [28] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

49 *Bugmy* (2013) 249 CLR 571, 589 [28] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

50 *Bugmy* (2013) 249 CLR 571, 592 [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

51 *Bugmy* (2013) 249 CLR 571, 592 [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

52 *Bugmy* (2013) 249 CLR 571, 592 [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

53 *Bugmy* (2013) 249 CLR 571, 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37 (citations omitted).

54 *Bugmy* (2013) 249 CLR 571, 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2013] HCA 37.

Director of Public Prosecutions v Herrmann

Cody Herrmann was 20 years' old when he raped and murdered a 21-year-old woman in a savage, sustained and random attack.[55] Like Mr Bugmy, Mr Herrmann was an Aboriginal man whose early childhood had been blighted by drug and alcohol fuelled violence and neglect. On a plea of guilty, Mr Herrmann was sentenced to 36 years' imprisonment with a non-parole period of 30 years.[56] The trial judge concluded that '[his] moral culpability for the offending was reduced by reason of two distinct, but closely related, factors'.[57] The first was the 'profound childhood deprivation and trauma' from which he suffered; and the second was 'his severe personality disorder', which impaired his mental functioning.[58] The trial judge found that each of those factors reduced Mr Herrmann's moral culpability to some degree.[59]

The Director of Public Prosecutions ('Director') appealed the sentence on the ground that it was manifestly inadequate, calling instead for a sentence of life imprisonment on the basis that that was the only sentence reasonably open if proper weight was given to the gravity of the offence and to the sentencing purpose of community protection.[60]

In dismissing the Director's appeal, the Court of Appeal discussed the separate frames of reference that were engaged: childhood deprivation and impaired mental functioning. Having carried out a close reading of *Bugmy*, the Court identified two different ways of expressing the role that childhood deprivation had to play in the assessment of moral culpability: what it described as a more general expression and what it described as a more specific expression.[61] The more general expression of the role of childhood deprivation recognised that the fact that an offender was raised in a community surrounded by alcohol abuse and violence may mitigate the sentence.[62] The offender's moral culpability is likely to be less than that of an offender whose formative years have not been marred in that way.[63]

Another example of the general expression, the Court said, was to be found in its earlier decision in *Director of Public Prosecutions v Drake*:[64]

> [T]he profound dysfunction, disadvantage and abuse experienced by the [offender]

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55 The circumstances of Mr Herrmann's offending are set out at *Herrmann* (2021) 290 A Crim R 110, 115–16 [20]–[24] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

56 *Herrmann* (2021) 290 A Crim R 110, 113 [5], 117 [32] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160

57 *Herrmann* (2021) 290 A Crim R 110, 114 [12] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

58 *Herrmann* (2021) 290 A Crim R 110, 114 [12] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

59 *Herrmann* (2021) 290 A Crim R 110, 114 [12] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

60 *Herrmann* (2021) 290 A Crim R 110, 113 [6] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

61 *Herrmann* (2021) 290 A Crim R 110, 118–19 [36]–[37] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

62 *Herrmann* (2021) 290 A Crim R 110, 119 [36] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

63 *Herrmann* (2021) 290 A Crim R 110, 119 [36] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

64 [2019] VSCA 293 ('*Drake*'), cited in *Herrmann* (2021) 290 A Crim R 110, 120 [41] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

> during his formative years were relevant to an appropriate evaluation of his moral culpability. As recognised by the High Court in *Bugmy*, those experiences, none of which were of his making, all played a significant role in shaping the respondent's personality and his responses. As a consequence, his subjective culpability for the offending in which he engaged could not be equated with that of a person who committed the same offence but had had the advantage of a normal, stable and regular home environment during his or her childhood years.[65]

The significance of this general expression, the Court said, is that 'the relevance of childhood deprivation to sentencing does not depend on proof of … a nexus' between the offending and the relevant background circumstances.[66]

The Court of Appeal agreed with the submission made by Victoria Legal Aid as amicus curiae, that 'the impact of disadvantage is complex, multilayered, non-linear and not easily "diagnosed" or measured'.[67] It also observed that '[t]he High Court's recognition that serious childhood deprivation is likely to make an offender less morally culpable than "an offender whose formative years were not marred in that way" reflects the principle of equal justice'.[68] Equal justice does not require everyone to be treated in the same way. Where there are relevant differences, allowance must be made for those differences. The Court of Appeal said this:

> It is the mark of a humane society that the moral judgment expressed through sentencing should take account of the lifelong damage that may result from exposure to violence or abuse or parental neglect in an offender's formative years. As the present case graphically illustrates, childhood trauma can permanently damage — and seriously distort — a person's view of the world around them and their understanding of social norms.[69]

Addressing the overlap between *Bugmy* and *Verdins*,[70] the Court identified the 'common feature' of the two sets of principles as permitting the Court 'to view an offender's moral culpability as reduced where, through no fault of the offender, his or her psychological functioning or personality structure had been impaired'.[71]

While this formulation focuses on impaired mental functioning rather than on the social circumstances that have shaped the individual, the more general expression of the relevance of childhood deprivation in *Herrmann* potentially opens a pathway to a broader and more holistic assessment of subjective culpability in appropriate cases. Indeed, the Court concluded by

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65 *Drake* [2019] VSCA 293, [32] (Maxwell P, Priest, Kaye, T Forrest and Emerton JJA) (citations omitted), cited in *Herrmann* (2021) 290 A Crim R 110, 120 [41] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA) (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

66 *Herrmann* (2021) 290 A Crim R 110, 121 [45] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

67 *Herrmann* (2021) 290 A Crim R 110, 121 [45] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

68 *Herrmann* (2021) 290 A Crim R 110, 121 [45] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160 (citations omitted).

69 *Herrmann* (2021) 290 A Crim R 110, 121 [46] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

70 *Herrmann* (2021) 290 A Crim R 110, 127–9 [78]–[88] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

71 *Herrmann* (2021) 290 A Crim R 110, 127 [79] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160.

observing that '[e]xperience overseas [had] demonstrated that reports such as the Canadian Gladue Reports were important aspects of the criminal justice system, particularly in the case of Aboriginal offenders'.[72] The Court noted that a project had recently commenced in Victoria to trial Aboriginal Community Justice Reports ('ACJRs').[73] I will come back to the use of ACJRs in a moment.

I want first to mention an article entitled 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' published in the *Melbourne University Law Review*,[74] in which the authors argue that *Bugmy* was a 'missed opportunity … to grapple with the complex interrelationship between individualised justice and Indigenous circumstances in the sentencing of Indigenous offenders'. The authors — Thalia Anthony, Lorana Bartels and Anthony Hopkins — make the case that 'consideration of systemic and specific Indigenous circumstances is consistent with sentencing principles in Australia, including the principles of equal justice and individualised justice'.[75] They argue that 'recognition of systemic disadvantage provides a fuller picture of the individual's circumstances', as the Supreme Court of Canada has accepted.[76]

According to the authors, focusing on the link between 'the group and individual experiences' is key to realising the principle of individualised justice.[77] The authors argue that recognising 'that rates of Indigenous offending are a consequence of the impact of colonisation', and the socioeconomic disadvantage and psychological trauma that goes with it, may support 'a claim that it is principally the offender's circumstances that have produced the offending, rather than their individual choices'.[78]

Since that article, the Yoorrook Justice Commission has published its report and recommendations on the criminal justice system.[79] Among the recommendations is a call to amend the *Sentencing Act* to include a statement of recognition acknowledging, among other things:

> [T]hat First Peoples have been disproportionately affected by the criminal justice system in a way that has contributed to criminalisation, disconnection, intergenerational trauma and entrenched social disadvantage[; and]
>
> …
>
> [T]hat ongoing structural inequality and systemic racism within the criminal justice system continues to cause harm to First Peoples, as expressed through decision-making and the over-representation of First Peoples in the criminal justice

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72 *Herrmann* (2021) 290 A Crim R 110, 128–9 [88] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160 (citations omitted).

73 *Herrmann* (2021) 290 A Crim R 110, 128–9 [88] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); [2021] VSCA 160 (citations omitted).

74 Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) *Melbourne University Law Review* 47 ('Lessons Lost in Sentencing').

75 Anthony, Bartels and Hopkins, 'Lessons Lost in Sentencing', 53.

76 Anthony, Bartels and Hopkins, 'Lessons Lost in Sentencing', 49.

77 Anthony, Bartels and Hopkins, 'Lessons Lost in Sentencing', 69.

78 Anthony, Bartels and Hopkins, 'Lessons Lost in Sentencing', 52.

79 Yoorrook Justice Commission, 'Yoorook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems' (August 2023) <https://yoorrookjusticecommission.org.au/wp-content/uploads/2023/09/Yoorrook-for-justice-report.pdf> ('Report into Victoria's Child Protection and Criminal Justice Systems').

system.[80]

The Commission recommends that the *Sentencing Act* be amended to 'require courts to take into account the unique systemic and background factors affecting First Peoples', and to 'require the use of Gladue-style reports for this purpose',[81] which brings me to the final part of this review.

Aboriginal Community Justice Reports

Consistently with the call to examine the link between the group and individual experiences when sentencing an Aboriginal offender, the County Court of Victoria has commenced a three-year pilot project for the provision of ACJRs to the sentencing judge.

ACJRs are community-based reports that come from within an Aboriginal community and are written from an Aboriginal perspective.[82] The point is to provide a holistic overview of the offender and to allow the court to consider not only the individual's personal experiences and environment, but also the impacts of historical and systemic factors.[83] ACJRs may cover such things as the impacts of poverty, the history of incarceration in the family or community, the impact of Stolen Generations and intergenerational trauma, and address family connections to traditional lands, missions and reserves.[84]

Judges in the County Court of Victoria have been sentencing with the benefit of ACJRs. I will mention just one example. In the case of *Director of Public Prosecutions v Muir*,[85] which involved trafficking in drugs of dependence, Judge Johns referred to the fact that the ACJR set out the offender's personal history in 'very fine and eloquent detail',[86] including his deep connection to the Barkindji country of his forebears.[87] His Honour said:

> Some understanding of the history of the Barkindji nation assists me in understanding you and your circumstances and the forces that have shaped your circumstances and experiences … In 1839 massacres took place and records indicate the recording of deaths where 46 Aboriginal people were killed by Europeans along the river division in Wentworth. Your grandparents used to talk about these massacres with you and it is a matter that has clearly been carried down through the generations and the impact upon them was apparent to you as a young person.
>
> The establishment of the *Aborigines Protection Act* [*1909* (NSW)] and the

80 Yoorook Justice Commission, 'Report into Victoria's Child Protection and Criminal Justice Systems', 37 (Recommendation 37).

81 Yoorook Justice Commission, 'Report into Victoria's Child Protection and Criminal Justice Systems', 37 (Recommendation 37).

82 See generally Victorian Aboriginal Legal Service, 'Aboriginal Community Justice Reports: Addressing Over-Incarceration' (Discussion Paper, October 2017) <https://vals73.wpengine.com/wp-content/uploads/2021/03/Aboriginal-Community-Justice-Reports-Addressing-Overincarceration-2017-Discussion-Paper.pdf> ('Addressing Over-Incarceration'); Australian Law Reform Commission, 'Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (Report No 133, December 2017) 185–227 ('Pathways to Justice').

83 See Australian Law Reform Commission, 'Pathways to Justice', 204–5.

84 See generally Victorian Aboriginal Legal Service, 'Addressing Over-Incarceration', 6–7.

85 [2023] VCC 611 ('*Muir*').

86 *Muir* [2023] VCC 611, [19].

87 *Muir* [2023] VCC 611, [22].

> consequences of that, living under those conditions, having lives controlled, and not in a beneficial way, are also matters set out in the report.
>
> …
>
> The misguided policy of assimilation and the enduring trauma of the Stolen Generations which is set out in the Bringing Them Home Report was a matter that was central to the Barkindji experience as well.[88]

The judge also mentioned the subjection of Aboriginal families in the offender's community to 'generations of State institutional interventions', resulting in the offender's repeated removal from his kin throughout his childhood and during his formative years.[89] His Honour recorded that the ACJR had provided him with 'a far deeper insight into [the offender's] past, [his] strengths, [his] resilience and the positive features of [his] personality.[90] He described the ACJR as a 'very useful document'.[91]

It is plain that some judges have already found ACJRs helpful in sentencing Aboriginal offenders in a way that takes into account their unique circumstances. This is not to move away from equal justice or individualised justice in sentencing. Rather, the aim is to enhance the application of those principles.

Conclusion

Sentencing is a complex exercise. The central goal of imposing a sentence that is just and proportionate is critical, but elusive. There is no one correct sentence for any offending. Different sentencing purposes may point the judge in different directions, and how the judge balances those competing demands is a question of instinct or intuition, not science. How one conceives of the task required by the principle of individualised justice — and sentencing the 'whole person' — is important. It is particularly important when considering Aboriginal offenders, given their over-representation in the justice system and the clear structural inequalities that Aboriginal people face in every day life in Australia.

In dispensing individualised justice, that is, in sentencing the 'whole person', judges are not faced with a human prototype, but with a multifaceted personality carrying not only their own life history, but sometimes also the burden of history itself.

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88 *Muir* [2023] VCC 611, [23]–[25] (citations omitted).
89 *Muir* [2023] VCC 611, [25].
90 *Muir* [2023] VCC 611, [32].
91 *Muir* [2023] VCC 611, [32].