A RATIONAL APPROACH TO THE ROLE OF PUBLICITY AND CONDEMNATION IN THE SENTENCING OF OFFENDERS

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ABSTRACT

The punishment imposed on criminal offenders by courts often does not exhaust the hardship they experience. There are a number of collateral forms of punishment that many offenders are subjected to as a result of their offense(s). Some of these deprivations are institutional, such as being dismissed from employment or being disqualified to vote. Other hardships are less predictable and harder to quantify. Public scorn—often directed towards high profile offenders, such as O.J. Simpson and Anthony Weiner—can be the cause of considerable, additional suffering to offenders. It can engender feelings of shame, embarrassment, and humiliation. At the same time, the high-profile nature of the cases provides courts with an opportunity to demonstrate to the wider community the consequences of violating the law. There is no established jurisprudence regarding the role that public criticism of offenders should have in sentencing decisions. Some courts take the view that it should increase the penalty imposed on high-profile offenders to deter others from committing similar offences. By contrast, it has also been held that public condemnation should reduce penalties because the offender has already suffered because of the public condemnation. On other occasions, courts have held that public condemnation is irrelevant to sentencing. The issue is increasingly important because the Internet and social media have massively increased the amount of publicity that many criminal offenders receive. Simultaneously, this is an under-researched area of the law. This Article develops a coherent jurisprudential and evidence-based solution to the manner in which public opprobrium should be dealt with in sentencing decisions. Arguably, sentencing courts should neither increase nor decrease penalties in circumstances where cases have attracted wide-ranging media attention. The hardship stemming from public condemnation is impossible to quantify and, in fact, causes no tangible suffering to some offenders. Thus, the extent of publicity that an offender receives for committing a crime should be an irrelevant consideration with respect to the choice of punishment. In proposing this reform, this Article carefully analyzes the jurisprudence in the United States. It also considers the position in Australia, where the issue has been contemplated at some length.

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I. INTRODUCTION

Sentencing is the area of law where the state acts in its most coercive manner.[1] The interests targeted by criminal sanctions include wealth and liberty.[2] It is crucial that sentencing decisions are normatively sound and comply with fundamental notions of fairness and justice. The reality is otherwise. A key failure of sentencing law is the absence of a principled or coherent approach to dealing with the collateral consequences associated with offending.[3]

Offenders can experience numerous forms of collateral punishment. These include direct physical hardships stemming from the offense, such as breaking a leg while slipping in the course of committing a robbery or being seriously assaulted or raped in prison while serving time for an offense. Public opprobrium and disgrace stemming from a crime is another form of hardship that high-profile offenders sometimes experience. A recent example involves former U.S. Congressman Anthony Weiner, who in September 2017 was sentenced to twenty-one months in federal prison for sexting a 15-year-old girl.[4] Weiner's crime and punishment generated a mass amount of media commentary. The disgrace and shame that he was subjected to arguably caused him more suffering than other offenders who committed the same act but who had no public profile and hence whose crimes received no media coverage.

Although many offenders experience some form of collateral punishment, there is no coherent or settled manner in which these forms of hardships are dealt with in the sentencing process.[5] This Article

1. MIRKO BAGARIC, PUNISHMENT AND SENTENCING: A RATIONAL APPROACH (2001).

2. *See id.* at 3, 220.

3. *See, e.g.*, David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 ANN. REV. CRIMINOLOGY 171, 171-77 (2018).

4. *See infra* Part II.

5. Brian Jacobs, *The Role of Publicity in Sentencing*, FORBES (Oct. 23, 2017, 4:44

focuses on the manner in which public condemnation impacts sentencing outcomes. This is an increasingly important issue given the massive increase in the reach and depth of all forms of media, including social media, since the advent of the internet.[6] Because information on the internet is easily accessible and remains available for a long period of time, the internet not only facilitates the proliferation of information but also increases the overall impact of that information. The manner in which public shame influences sentencing outcomes is an especially important area of research given there is no settled approach to this issue.

Offenders whose crimes the media widely promulgates are subjected to a large degree of condemnation and are often shamed and humiliated. This can arguably constitute a considerable hardship. Given that offenders have already suffered, arguably, and logically, this suffering should be reflected by a reduction in the sanction imposed by the court. On some occasions, this approach has in fact been adopted by the courts.[7] However, typically courts adopt the opposite conclusion and, on some occasions, hold that public opprobrium should increase the penalty. The main rationale used to justify this approach is that a high level of media coverage of a crime provides the court with an opportunity to illustrate to the community the unsavoury consequences that will occur if people violate the criminal law.[8] Thus, two diametrically opposite positions are taken regarding the impact of media coverage to the sanctions that criminal courts should impose.

This Article undertakes a jurisprudential and empirical analysis of both positions. We conclude that both are unsound for different reasons. The approach of increasing penalties as a result of media publicity is flawed because the weight of empirical data establishes that harsher penalties do not reduce crime. On the other hand, public opprobrium should not reduce penalty severity. The main reasons for this are that the hardship stemming from public condemnation is impossible to quantify and, in fact, causes no tangible suffering to some offenders.

In Part II of this Article, we provide an overview of the approach that is taken to deal with public shaming and condemnation in the sentencing calculus, particularly in the United States. By way of con-

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PM), https://www.forbes.com/sites/insider/2017/10/23/the-role-of-publicity-in-sentencing/#171fd9323e5c [https://perma.cc/834G-Q9TY].

6. For an overview of the increasing use of the internet, see Mirko Bagaric et al., *The Hardship That Is Internet Deprivation and What It Means for Sentencing: Development of the Internet Sanction and Connectivity for Prisoners*, 51 AKRON L. REV. 261, 268-69 (2017).

7. *See infra* Part II.

8. *Id.*

trast, we also examine the position taken in Australia. In Part III, we evaluate the arguments in favour of treating public condemnation as an aggravating sentencing factor. Part VI sets out the reform proposals for the manner in which media publicity should impact a criminal sanction. Key proposals are summarized in the conclusion.

II. THE CURRENT STATE OF THE LAW

A. The United States

This Part analyses the current role of extensive media publicity in the sentencing calculus. We start with the United States federal jurisdiction, and then look at the position of the three largest states—California, Texas, and New York. This is followed by a consideration of several other notable cases in the United States that have discussed the role of publicity in the sentencing calculus. It also considers the existing, albeit brief, legal scholarship relating to the role of publicity in sentencing.

What emerges is a lack of consistency in approaching the role of public opprobrium in sentencing. In some instances where a case has received saturated media coverage, we see courts that do not even make reference to the publicity as a sentencing consideration. In other cases, media publicity increases the penalty imposed on the offender. This is despite the fact that arguments can be made that media publicity should have the opposite effect and reduce the penalty that is imposed. As discussed in the reform proposals below, this is in itself illuminating because it demonstrates that the role of publicity in sentencing does not have an established jurisprudential operation. Therefore, courts have the capacity to craft the law in the manner that best accords with normative principles and empirical findings. After reviewing the position in the United States, this Article then examines the approach that many Australian courts take to publicity in the sentencing calculus.

1. Federal Approach

(a) Overview of Federal Criminal Sentencing

Before analyzing the role of publicity in sentencing, it is necessary to contextualize the discussion with an overview of the federal sentencing process. U.S. Congress's passage of the Sentencing Reform Act of 1984 (SRA) created a new federal sentencing system based predominantly on sentencing guidelines.[9] Before the SRA went into

9. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987-90.

effect on November 1, 1987, federal judges imposed indeterminate sentences with vast discretion, limited only by broad statutory ranges of punishment; when a term of imprisonment was imposed, the U.S. Parole Commission decided later when offenders were to be released on parole.[10] This largely unfettered discretion reposed on sentencing courts was heavily criticized.[11] The U.S. Supreme Court acknowledged that sentencing courts' broad discretion resulted in significant sentencing disparities between similar offenders with similar offenses, and members of Congress noted that this stemmed from individual judges being left to apply their individual beliefs about the purposes of sentencing.[12] Accordingly, Congress created the U.S. Sentencing Commission—a bipartisan expert agency housed in the judicial branch—which enacted the SRA and its accompanying federal Sentencing Guidelines. The goal was simple: "to increase transparency, uniformity, and proportionality in sentencing."[13] We turn now to a brief overview of the federal Sentencing Guidelines.[14]

In the landmark U.S. Supreme Court case *United States v. Booker*, the Court found some constitutional defects in the SRA (for example, certain provisions unconstitutionally allowed judges to use lower evidentiary thresholds at sentencing than those required at trial).[15] As a result, the Court struck down those provisions of the SRA that made the guidelines "mandatory," leaving the guideline system as one the Court labelled, "effectively advisory."[16] This is the current state of federal criminal sentencing law, and the term "guidelines" emphasizes that federal Guidelines are recommendations, not requirements.

The Guidelines establish a series of increasing sentencing ranges based mainly on two factors: 1) the seriousness of the offense; and 2) the offender's criminal history.[17] The Guidelines use a score-keeping procedure where offenses are assigned a base level number (the more

10. Mistretta v. United States, 488 U.S. 361, 363-64 (1989) (detailing the federal sentencing system before the SRA).

11. *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 8 (1973).

12. Peugh v. United States, 569 U.S. 530, 535 (2013) (Supreme Court recognizing sentencing disparities); S. REP. NO. 98-225, at 38, 41, 49 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 (the Senate Judiciary Committee's report, the primary legislative history of the SRA, noting the views of Congressmen on sentencing disparities).

13. Dorsey v. United States, 567 U.S. 260, 265 (2012).

14. *See generally* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2016).

15. *See* United States v. Booker, 543 U.S. 220, 245-46, 259 (2005).

16. *Id.* at 222.

17. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf [https://perma.cc/T927-SA4T].

serious the offense, the higher the number), while offenders are given a criminal history category (the worse the criminal history, the higher the category).[18] Factors such as an offense's characteristics and the offender's level of participation in the offense can move the base offense level up or down.[19] The two metrics of base offense level and criminal history comprise the Y- and X-axis, respectively, of a table in the Guidelines, and the grids of boxes provide recommended sentencing ranges (for example, 33-41 months).[20]

Although the Guidelines are no longer mandatory, the guideline range remains an influential sentencing reference point. Until recently, sentences within the Guidelines were still the norm.[21] In 2014, however, federal courts, for the first time, imposed more sentences that were outside the federal Sentencing Guidelines than sentences that were within them.[22] The margin was small (fifty-four percent to forty-six percent), but it does reflect a trend by the judiciary to deviate from the federal Sentencing Guidelines,[23] notwithstanding a very slight increase in the imposition of sentences that have fallen within the guideline range more recently. In 2016, 48.6 percent of sentences were within the guideline range, and this increased slightly to 49.1 percent in 2017.[24]

This historical context provides an important backdrop as we shift from the general federal approach to a more specific discussion of how media publicity is factored into this system. First, it underscores that today's federal Sentencing Guidelines are advisory rather than mandatory, which might account, in part, for why there is no consistent approach to how federal judges incorporate significant media

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18. *Id.*

19. *Id.*

20. *Chapter Five – Determining the Sentence*, UNITED STATES SENTENCING COMM'N, https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-5 [https://perma.cc/VY4J-ACPY].

21. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); *see also* Amy Baron-Evans & Jennifer Niles Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines' Prohibitions and Restrictions on Mitigating Factors*, DEF. SERV. OFF. TRAINING DIVISION 1 (Nov. 1, 2010), fln.fd.org/files/training/no-more-math-without-subtraction.pdf [https://perma.cc/P3SK-F25E]. For a discussion regarding the potential of mitigating factors to have a greater role in federal sentencing, see William W. Berry III, *Mitigation in Federal Sentencing in the United States*, *in* MITIGATION AND AGGRAVATION AT SENTENCING 247-48 (Julian V. Roberts ed., 2011).

22. U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT 1 (2014) [hereinafter U.S. SENTENCING COMM'N REPORT], http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf [https://perma.cc/3F6Y-HP42].

23. *Id.*

24. U.S. SENTENCING COMM'N, ANNUAL REPORT: FISCAL YEAR 2017, https://www.ussc.gov/about/annual-report-2017 [https://perma.cc/CN4Y-BBVU].

publicity into their sentencing determinations. Second, the U.S. Supreme Court has made clear that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range."[25] That directive points to the Guidelines as the starting point for federal sentencing, regardless of the level of media publicity. Finally, the SRA enacted Title 18 of the U.S. Code, where section 3553(a) sets forth several factors that a sentencing court must consider. This section provides:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence *sufficient, but not greater than necessary,* to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide *just punishment* for the offense;
>
> (B) to afford adequate *deterrence* to criminal conduct;
>
> (C) to *protect the public* from further crimes of the defendant; and
>
> (D) to provide the *defendant with needed educational or vocational training, medical care, or other correctional treatment* in the most effective manner . . . .[26]

By understanding that the Guidelines are advisory, that judges should start with the applicable Sentencing Guidelines range, and that judges must consider the factors in section 3553(a), we can now properly examine how federal courts approach extensive media publicity during sentencing. This examination focuses on how the required section 3553(a) factors help illuminate the rationale behind judges' sentencing decisions in high-profile cases.

(b) Federal Approach to Extensive Media Publicity in Sentencing

There is no express statutory guidance on how judges are to deal with large-scale media publicity in the sentencing calculus. However, the statutory factors in section 3553(a) provide guidance regarding the broad considerations that judges *should* consider in their sentencing decisions.[27] The second factor—the need for the sentence im-

25. Gall v. United States, 552 U.S. 38, 49 (2007).

26. 18 U.S.C. § 3553(a) (2012) (emphasis added).

27. The seven factors detailed in section 3553(a) are as follows: 1) "the nature and

posed[28]—is critical to the analysis of how extensive media publicity influences sentencing.

This second factor contains four subsections that help measure the "need" for a sentence in a given case, and two are of particular importance: section 3553(a)(2)(B)—the need "to afford adequate deterrence to criminal conduct"—and section 3553(a)(2)(C)—the need "to protect the public from further crimes of the defendant."[29] Thus, courts have long interpreted section 3553(a)(2)(B) as the provision for "general deterrence" and section 3553(a)(2)(C) as that for "specific deterrence." U.S. District Judge Jack B. Weinstein opined in a recent opinion that specific deterrence is the degree a sentence will "persuade [the] defendant to resist further criminal behavior,"[30] while the "theory of general deterrence is that imposing a penalty on one person will demonstrate to others the costs of committing a crime, thus discouraging criminal behavior"[31] more broadly across society.

To the extent publicity factors into sentencing, it mainly derives from the role of deterrence in the sentencing calculus. This point is illustrated by exploring how federal courts have addressed publicity in two recent cases featuring extensive national media coverage.

United States v. Ulbricht

In 2015, thirty-one-year-old Ross Ulbricht was sentenced to life in prison for creating and operating "Silk Road," a massive, anonymous online marketplace where users bought and sold illegal goods and services, namely illegal narcotics.[32] In affirming Ulbricht's life sentence, the Second Circuit Court of Appeals noted the district court's observation "that 'general deterrence plays a particularly important role' in Ulbricht's case because Silk Road is 'without serious precedent' and generated an unusually large amount of public interest."[33] The appellate court deferred to that observation, stating, "[t]he [dis-

circumstances of the offense and the history and characteristics of the defendant"; 2) "the need for the sentence imposed"; 3) "the kinds of sentences available"; 4) "the kinds of sentence and the sentencing range established for [applicable categories]"; 5) "any pertinent policy statement"; 6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and 7) "the need to provide restitution to any victims of the offense." *Id.*

28. 18 U.S.C. § 3553(a)(2) (2012).

29. *Id.* § 3553(a)(2)(B); *Id.* § 3553(a)(2)(C).

30. United States v. Lawrence, 254 F. Supp. 3d 441, 447 (E.D.N.Y. 2017).

31. *Id.* at 442.

32. United States v. Ulbricht, 858 F.3d 71, 82 (2d Cir. 2017).

33. *Id.* at 133.

trict] court . . . carefully analyzed the role that general deterrence played in Ulbricht's individual case."[34]

Two key takeaways emerge. First, the appellate court shows significant deference to the trial court's general deterrence rationale for sentencing. Indeed, the Court of Appeals proclaimed that general deterrence, "as explained by the district court, can bear the weight assigned it under the totality of circumstances in this case."[35] This illustrates how appellate courts often leave untouched the application of considerations such as general deterrence by district courts.

Second, and more pointedly for the purposes of this Article, the statement "without serious precedent," coupled with the statement "unusually large amount of public interest," sheds light on the approach taken to public opprobrium in the sentencing calculus.[36] This case presented an opportunity to leverage a new, pressing issue[37] that received large-scale media publicity to promulgate a strong message of general deterrence. The Court of Appeals, without a deep analysis of the possible competing approaches to the appropriate role of publicity in sentencing, somewhat instinctively meted out a harsh sentence, thereby making an example of Ulbricht. And due to the extensive publicity of the case, that example was broadcast throughout the nation. As a result, others were presumably put on notice that should they choose to engage in similar activity, they might meet a similar fate.[38]

United States v. Weiner

Disgraced former U.S. Congressman Anthony Weiner was sentenced to twenty-one months in federal prison in September 2017 for engaging in sexually explicit online chats with minor females.[39] Dur-

34. *Id.*

35. *Id.* (quoting United States v. Rigas, 583 F.3d 108, 122 (2d Cir. 2009)); *see also id.* at 122 (citing United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008)).

36. *Ulbricht*, 858 F.3d at 133.

37. New because it was without precedent and pressing because of the globalization of technology and online anonymity as a burgeoning catalyst for illicit activity.

38. Ironically, at least some research suggests that the intent of the harsh life sentence to deter would-be illicit online traffickers actually had the opposite effect, according to sociologist Isak Ladegaard. *See* Andy Greenberg, *The Silk Road Creator's Life Sentence Actually Boosted Dark Web Drug Sales*, WIRED (May 23, 2017, 10:00 AM), https://www.wired.com/2017/05/silk-road-creators-life-sentence-actually-boosted-dark-web-drug-sales/ [https://perma.cc/HE4F-XBM8]. Ladegaard says of one study: "The data suggests that trade increased. And one likely explanation is that all the media coverage only made people more aware of the existence of the Silk Road and similar markets." *Id.*

39. Brian Jacobs, *The Role of Publicity in Sentencing*, FORBES (Oct. 23, 2017, 4:44 PM), https://www.forbes.com/sites/insider/2017/10/23/the-role-of-publicity-in-sentencing/#171fd9323e5c [https://perma.cc/2ZSU-GWUZ].

ing Weiner's sentencing hearing, U.S. District Judge Denise Cote seemed less than persuaded by a desire to reform Weiner (whom she acknowledged was receiving treatment) and more influenced by the perceived need to send a strong message of general deterrence. Judge Cote stated:

> Because of the defendant's notoriety, gained well before he engaged in this criminal activity, there is intense interest in this prosecution, in his plea, and his sentence, and so there is the opportunity to make a statement that could protect other minors . . . . General deterrence is a very significant factor in this sentence.[40]

Anthony Weiner became for sex offenses involving underage victims what Ross Ulbricht was for illicit online narcotics marketplaces. Both men became personifications of certain types of crimes and figureheads for a specific type of wrongful behavior. The two cases' high-profile nature and extensive publicity served the same function during sentencing: a vehicle with which the court could promote general deterrence to a large, national audience.

(c) Summary of Federal Approach

A consistent, formalized approach to factoring extensive media coverage into U.S. federal sentencing calculations does not currently exist. Judges begin their sentencing analysis with the Sentencing Guidelines, which are, as mentioned, advisory. The rationales which drive judges' sentencing decisions in high-profile media cases can be traced to section 3553(a) of 18 U.S.C., "Factors To Be Considered In Imposing a Sentence," and in particular subsection 3553(a)(2)(B), the provision for general deterrence.[41] Federal sentencing essentially functions as a discretionary balancing act on the part of the judge and, as cases such as *Ulbricht* and *Weiner* demonstrate, general deterrence has emerged as the most common rationale for publicity-related considerations during sentencing. A theme has materialized: the more media publicity surrounding a case, the more inclined a federal court will be to impose a harsher sentence. This is due to the fact that extensive media coverage allows courts to make an example of notorious defendants in order to send a supposedly powerful and effective message of general deterrence.

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40. Kaja Whitehouse & Bruce Golding, *Anthony Weiner Gets Hard Time*, N.Y. POST (Sept. 25, 2017, 10:45 AM), https://nypost.com/2017/09/25/anthony-weiner-gets-hard-time/ [https://perma.cc/U9X9-7YTP] (quotation marks omitted).

41. 18 U.S.C. § 3553(a)(2)(B) (2012); *see also* United States v. Ulbricht, 858 F.3d 71, 133 (2d Cir. 2017) (first quoting 18 U.S.C. § 3553(a)(2)(B); then citing United States v. Tran, 519 F.3d 98, 107 (2d Cir. 2008)) ("[T]he ability of a sentence to 'afford adequate deterrence to criminal conduct' is a factor that district courts are *required* by Congress to consider in arriving at the appropriate sentence.").

2. State Approach

Sentencing differs across U.S. states, but all states share the same core objectives, including general and specific deterrence, protecting the community (incapacitation), and retribution and rehabilitation of the offender.[42] Aggravating and mitigating considerations stem from both statutes and common law, but states do not have statutory provisions that expressly set out how extensive media publicity should impact sentencing decisions.

A pattern that emerges at the state level is a striking oversight in case law relating to the relevance of publicity to sentencing. State legislation does not expressly touch on the issue, and moreover, courts often do not directly broach the matter, irrespective of the extent of media saturation that a case has received. Judges commonly do not expressly increase sentences with a large amount of surrounding publicity, and, surprisingly, nor do they identify media attention as a potentially relevant sentencing consideration. A second pattern has emerged too: offenders in high-profile cases generally receive harsh sentences, raising the suspicion that judges do, in fact, use media coverage as an aggravating factor.

We now review the current sentencing laws of the three largest U.S. states by population—California, Texas, and New York—and demonstrate the patterns noted above by examining the sentencing proceedings from a high-profile case within each.

(a) California

Most convicted criminal offenders in California are sentenced pursuant to the Determinate Sentencing Law (DSL). The DSL finds its statutory authority in section 1170 of the California Penal Code—a section which includes sentencing guidelines, mandatory minimum sentences, and enhanced sentences for certain crimes.[43] Crimes contain a base term (length of time) that includes a lower term, a middle term, and an upper term.[44] Judges are directed to presume the middle term unless there are specific reasons for sentencing an offender at or toward the lower or upper term.[45] Reasons for increasing the

42. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL 1 (2014) [hereinafter U.S. SENTENCING COMM'N MANUAL], http://www.ussc.gov/guidelines-manual/2014/2014-ussc-guidelines-manual [https://perma.cc/XH98-4CRV].

43. CAL. PENAL CODE § 1170 (West 2018); *see also* Jonathan Grossman, *Four Easy Steps to Understanding Determinate Sentencing Law*, http://www.sdap.org/downloads/research/criminal/sentence.pdf [https://perma.cc/5ZJZ-J2ZQ].

44. CAL. PENAL CODE § 1170 (West 2018).

45. *Id.* § 1170(b); CAL. R. CT. 4.420(a) (2019); People v. Keaton, 13 Cal. Rptr. 2d 155, 157 (Cal. Ct. App. 1992).

length of a sentence are termed "specific enhancement[s]" or aggravating circumstances.[46] These special enhancements are conduct enhancements specific to the crime and not the person, such as using a weapon or causing great bodily harm.[47] Mitigating circumstances contribute to a decreased sentence and include both factors relating to the crime (such as the defendant's role and motivation in the crime) and factors relating to the defendant (like criminal history and accepting responsibility).[48]

California's criminal punishment objectives are best summarized by the first sentence of section 1170: "[t]he Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice."[49] Identifying which factor is present becomes most significant during sentencing for a high-profile case in California, and it can be difficult to measure because many such cases often involve extremely serious crimes that statutorily mandate a correspondingly serious sentence. A judge's discretion can thus be confined to a small number of options, most of which constitute a significant hardship.

California v. Scott Peterson

In one of the United States' most high-profile cases in the last few decades, Scott Peterson was convicted of two counts of murder in November 2004 for killing his pregnant wife and their unborn child.[50] Peterson showed little emotion during his "anguished" pleas for help through media outlets while his wife was missing, and his nine-month long trial featured numerous salacious twists and turns, including reports of multiple extramarital affairs, 184 testifying witnesses, and three separate jury panels during deliberations.[51] Post-conviction, Judge Alfred Delucchi had to determine whether Peterson would be sentenced to death or life in prison without parole. Judge Delucchi opted for the death penalty, and during sentencing he described the murders as "cruel, uncaring, heartless[,] and callous,"

46. CAL. PENAL CODE § 1170.1 (West 2018).

47. *Id.* § 1170.1; CAL. R. CT. 4.421(a) (2019); CAL. R. CT. 4.405(3)-(4) (2019); *see also* CAL. PENAL CODE § 1170.7 (West 2018) (example of an aggravating circumstance).

48. CAL. R. CT. 4.423 (2019).

49. CAL. PENAL CODE § 1170(a)(1) (West 2018).

50. *Scott Peterson Trial Fast Facts*, CNN (Apr. 15, 2018, 12:52 PM), https://www.cnn.com/2013/10/15/us/scott-peterson-trial-fast-facts/index.html [https://perma.cc/HK98-T7XQ].

51. Jess Scherman, *6 Intriguingly Famous Court Cases That Captivated the Nation*, RASMUSSEN COLL. (Aug. 29, 2017), http://www.rasmussen.edu/degrees/justice-studies/blog/famous-court-cases/ [https://perma.cc/9KM2-R78N].

adding that "[t]he factors in aggravation [such as deliberateness, lack of remorse, killing an innocent unborn child] are so substantial when compared to the factors of mitigation that death is warranted."[52]

Judge Delucchi's tough words directed specifically at the actions and character of the defendant suggest at least two plausible sentencing rationales: 1) punishment as retribution (through holding Peterson accountable for his actions by demanding his life in exchange for the two he took); and 2) punishment as specific deterrence (by keeping Peterson incarcerated for the rest of his life). General deterrence arguably applies as well—life without parole and the death sentence are both exceptionally heavy sentences and send the strongest possible message to the public. At any rate, Judge Delucchi did not attribute any of the harsh sentence he imposed to the case's pervasive media publicity, nor did he even raise publicity as a prospective sentencing consideration.[53] This case helps to support the contention that publicity does not have an established role in sentencing in California.

(b) Texas

Texas, the second most populous state after California,[54] divides criminal offenses into tiers. The eight "Offense Tiers" increase in severity: misdemeanours (lower-level crimes with a maximum punishment of up to one year in jail) are sorted by Class C, Class B, and Class A, and felonies are sorted by State Jail Felony, Third Degree, Second Degree, First Degree, and Capital Felony.[55] This sentencing structure affords massive discretion to judges. For example, the sentence for a Third Degree felony is two to ten years; for a Second Degree Felony it is two to twenty years; and for a First Degree Felony it is five years to life.[56]

Aggravating factors are captured by the statutory elements defining specific crimes and are therefore factored into the sentencing range a judge receives following conviction for an offense.[57] In addi-

52. *Scott Peterson Sentenced to Death*, NBC NEWS (Mar. 17, 2005, 12:28 AM), http://www.nbcnews.com/id/7204523/ns/us_news-crime_and_courts/t/scott-peterson-sentenced-death/#.WnDAMZM-c0o [https://perma.cc/8T7N-2WVD].

53. *Id.*

54. As of 2017, California was the most populous U.S. state with 39.5 million residents; Texas ranked second with 28.3 million residents. *See State Population Totals and Components of Change: 2010-2017*, U.S. CENSUS BUREAU, https://www.census.gov/data/datasets/2017/demo/popest/state-total.html [https://perma.cc/UQQ2-4TBR] (tbl.1).

55. TEX. PENAL CODE ANN. §§ 12.03-12.04 (West 2018).

56. *Id.* §§ 12.32-12.34.

57. *See, e.g.*, *id.* § 22.02(b)(1). Causing serious bodily injury or using a deadly weapon during the commission of an assault are examples of aggravating assault factors. *Id.*

tion, offenses may substantively qualify under more than one tier (for example, "theft of service" under section 31.04 of the Penal Code can be charged from a Class C Misdemeanour up to a First Degree Felony, depending on the monetary value involved)[58] thus affording prosecutors tremendous discretion in choosing what charges to bring in a given case. This prosecutorial discretion considerably shapes the ultimate sentence. So too does the fact that defendants in Texas can decide before trial that a jury and not the judge will determine the sentence.[59]

Texas v. Threet

On Saturday, October 6, 2001, Brandon Threet went to a party outside Austin, Texas in Williamson County. Late that night, Threet found himself in a drunken confrontation with Terence McArdel. This confrontation led to blows, then to McArdel lying in the dirt, and then to Threet, for no apparent reason, kicking McArdel in the head.[60] McArdel died a week later, and nineteen-year-old Threet, who had no violent criminal background, became a national face for teenage hooligans.[61] Texas media eagerly tracked "the story of the 'beating death' at the drunken party";[62] The Oprah Winfrey Show played video from the party that captured the gruesome act; and the County District Attorney himself tried the case, depicting Threet as a racist menace prone to violence.[63]

Threet was convicted of manslaughter, and the jury sentenced him to a maximum of twenty years after deliberating for only two hours.[64] The prosecutor's impassioned plea to the jury drew on deterrence principles as he advocated sending a strong law-and-order message about Williamson County: "Maybe over there in some places the rules are a little softer, a little different . . . . But you and I both know that it's different here. It's different for a reason."[65]

The jury never outwardly identified the case's extensive media coverage as a sentencing consideration, but Threet's harsh sen-

58. *Id.* § 31.04.

59. TEX. CODE CRIM. PROC. ANN. art. 37.07(2)(b)(2) (West 2018).

60. Kevin Brass, *Justice or Vengeance? A Tale of Tragedy and Punishment in Williamson County*, AUSTIN CHRON. (Nov. 4, 2005), https://www.austinchronicle.com/news/2005-11-04/306945/ [https://perma.cc/G6ZL-WLR5].

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* The jury deliberated for just two hours before sentencing Threet to twenty years in prison—the maximum term. Because Threet's foot was found to constitute a "deadly weapon," he would not be eligible for parole for at least ten years. *Id.*

tence—twenty years for a teenage fight where the deadly weapon was Threet's leg—suggests that the jury perhaps used publicity as an aggravating factor.[66] Moreover, it seems that the effects of significant publicity might continue long after sentencing. Threet was most recently denied parole in November 2017; he has served over fifteen years of his twenty-year maximum sentence and remains incarcerated.[67]

(c) New York

Most convicted felons in New York receive an indeterminate sentence, meaning they are sentenced to a range (such as fifteen years to life) as opposed to a fixed length of time (such as eight years). New York labels felonies "Violent" or "Non-Violent" and classifies them from "A" to "E," with "A" being the most serious.[68] The letter classifications correspond to the maximum end of a sentencing range: for a Class E felony, the term "shall not exceed four years"; for a Class D felony, no more than seven years; Class C no more than fifteen years; Class B no more than twenty-five years; and Class A up to life imprisonment.[69] The "Violent" and "Non-Violent" labels correspond to the minimum end. For instance, the minimum sentence for a Class C felony (first-time offender with a "Non-Violent" felony conviction) could be no jail time, but the minimum for that same offender for a "Violent" felony conviction is three-and-a-half years.[70] New York law authorizes sentencing courts to consider deterrence.[71]

As in Texas, aggravating factors are typically defined in the statutory elements for specific crimes[72] and thus are incorporated in a conviction and accounted for in the sentencing range provided to judges. Mitigating factors are also often outlined in crime-specific statutes. However, unlike aggravating factors, which can determine what classification and what sentencing range a defendant receives, New York

66. Texas is one of just six states with jury sentencing systems. *See* Melissa Carrington, *Applying* Apprendi *to Jury Sentencing*: *Why State Felony Jury Sentencing Threatens the Right to a Jury Trial*, 2011 U. ILL. L. REV. 1359, 1360 (2011).

67. *Brandon Threet Parole Review Information*, TEX. DEP'T CRIM. JUST., https://offender.tdcj.texas.gov/OffenderSearch/reviewDetail.action;jsessionid=277d1a9fb4c7e76b6c9f0b6bfc4c?sid=06768247&tdcj=01115991&fullName=THREET%2CBRANDON [https://perma.cc/R7WB-9WCV].

68. N.Y. PENAL LAW §§ 70.00, 70.02 (McKinney 2018).

69. *Id.* § 70.00(2).

70. *Id.* §§ 70.00, 70.02.

71. *See id.* § 1.05(6) (stating that one of the purposes of sentencing is to "insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized").

72. *See, e.g.*, *id.* § 125.26(1)(a)(i) (aggravated murder if the victim is a police officer).

statutes tend to list mitigating factors without detailing their role in reducing a specific sentence.[73]

New York v. Hernandez

Six-year-old Etan Patz disappeared on his way to school in 1979. Although his body was never found, it is assumed that he was murdered, and it went unsolved for almost forty years.[74] The case captivated the nation at the time. Etan's case led to photographs of missing children appearing on milk cartons in the early 1980s—the first instance of that once-ubiquitous method. Now May 25, the anniversary of Etan's disappearance, is declared as the National Missing Children's Day.[75] The case captured the country again in 2015 when new suspect Pedro Hernandez was tried, and the jury hung (due to a lone holdout juror), and again in 2017 when Hernandez was finally convicted of kidnapping and murder.[76] Justice Maxwell Wiley, in sentencing Hernandez to twenty-five years to life in prison, noted that prosecutors had presented "an extremely convincing case of the defendant's guilt," and, moreover, that "[t]he defendant kept a terrible secret for 33 years . . . . [And] [h]is silence caused the Patz family indescribable anguish and served to compound their grief."[77]

While California's Judge Delucchi used language during sentencing that targeted the heinousness of Scott Peterson's acts,[78] New York's Justice Wiley focused on a different sentencing consideration: the pain caused to the victim's family. Justice Wiley's focus—the defendant's terrible secret and the victim's family's extreme anguish and immense grief[79]—emphasized the decades of suffering the victim's family had to endure from not knowing what became of their missing son. Justice Wiley seemed to be punishing Hernandez, at least in part, for the suffering Hernandez caused through his silence.

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73. *See, e.g.*, N.Y. CRIM. PROC. LAW § 400.27(9) (listing six mitigating factors for a first-degree murder conviction, including the defendant's criminal history and mental state at the time of the offense, but without tying specific mitigating factors to specific reductions in sentence).

74. *See* Lauren Del Valle, *Etan Patz Case: Hernandez Gets 25 to Life in Prison*, CNN (Apr. 18, 2017, 9:02 PM), https://www.cnn.com/2017/04/18/us/etan-patz-hernandez-sentenced/index.html [https://perma.cc/UW6H-TMBX].

75. *Id.*

76. James C. McKinley Jr., *Pedro Hernandez Gets 25 Years to Life in Murder of Etan Patz*, N.Y. TIMES (Apr. 18, 2017), https://www.nytimes.com/2017/04/18/nyregion/pedro-hernandez-etan-patz-sentencing.html [https://perma.cc/BVU7-UCLW]. For more information on these cases, see the "related coverage" links at the end of this Article.

77. *Id.*

78. *See Scott Peterson Sentenced to Death*, *supra* note 52.

79. McKinley Jr., *supra* note 76.

Following Hernandez's conviction, Manhattan District Attorney Cyrus Vance Jr. alluded to the case's years of high publicity, asserting that it would "no longer be remembered as one of the city's oldest and most painful unsolved crimes."[80] But the sentencing judge did not expressly mention media attention as a consideration.

3. Other U.S. States

As the Peterson, Threet, and Hernandez cases show, state courts often do not expressly use or even discuss publicity as a factor during sentencing. Yet the offenders in those very high-profile cases received long sentences, suggesting that perhaps judges do apply media coverage as an aggravating factor. Certainly, numerous studies show that subconscious considerations often influence the sentencing decisions of judges.[81] And while state cases that directly discuss publicity at sentencing exist, they seem more high-profile within a given state than nationally. We now provide a number of examples where courts seem to take one of two roads in relation to the role of publicity in sentencing: 1) using publicity to promote general deterrence; or 2) expressly stating that publicity should not and would not be a sentencing consideration.

(a) Minnesota

State v. Staten

In *State v. Staten*, the defendant pleaded guilty to felony theft and received "a stayed sentence of 90 days"—"a substantial downward departure from the presumptive sentence."[82] The trial court cited publicity as a factor at sentencing, noting that the defendant Staten, a member of the Minnesota House of Representatives, had suffered because his case was widely publicized in the news media.[83] The appellate court rejected this reasoning and ruled instead that Staten's job as an elected state lawmaker was an employment factor "that should not be used as a reason for [a sentence] departure. Sentencing under the guidelines is to be neutral with respect to race, gender, employment, social or economic status."[84]

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80. Ray Sanchez, *Etan Patz Case: Pedro Hernandez Found Guilty of Murder, Kidnapping*, CNN (Feb. 14, 2017, 8:04 PM), http://www.cnn.com/2017/02/14/us/etan-patz-case-conviction/ [https://perma.cc/98PN-SV8L].

81. *See* Mirko Bagaric, *Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain That Is the Instinctive Synthesis*, 38 U.N.S.W. L.J. 76, 105-09 (2015).

82. State v. Staten, 390 N.W.2d 914, 914-15 (Minn. Ct. App. 1986).

83. *Id.* at 916.

84. *Id.*

Thus the *Staten* court, citing legislative guidelines, denounced publicity stemming from a defendant's public image as inappropriate for sentencing.[85] The dissent disagreed with the majority's conclusion that Staten's status as a house representative improperly favored him, and it argued that, on the contrary, he "was subjected to much more extensive publicity and public embarrassment than one not an elected official would have been subject to."[86] The dissent sided with the trial court, holding Staten's public position had worked against him, thereby justifying a more lenient sentence.[87] The majority responded by reinforcing its position that publicity surrounding a high-profile defendant had no place in the sentencing calculus, stating:

> Defendant's second point about his public humiliation is the frequently heard contention that he should not be incarcerated because he 'has been punished enough.' The thought is not without some initial appeal. If punishment were wholly or mainly retributive, it might be a weighty factor. In the end, however, it must be a matter of little or no force. Defendant's notoriety should not in the last analysis serve to lighten, any more than it may be permitted to aggravate, his sentence.[88]

Staten is an illuminating decision so far as the role of publicity in sentencing is concerned. It is one of few decisions where a court expressly considered whether publicity should result in a sentencing discount. Notably, the court reached this approach without an extensive analysis of the issue, and the position taken by the majority was at odds with the approach taken in the federal jurisdiction. The fact that the court in *Staten* did not expressly discuss the federal position highlights the embryonic nature of jurisprudence on this issue.

(b) Wisconsin

State v. Gonzales

The defendant in *State v. Gonzales* was convicted of sexual assault, and the case attracted significant publicity before sentencing because the presiding judge had admonished the victim for crying while on the witness stand.[89] The judge sentenced Gonzales to seven out of a maximum of ten years, stating, "I'm not going to

85. *Id.*

86. *Id.* at 919 (Randall, J., dissenting).

87. *Id.*

88. *Id.* at 916 (majority opinion) (quoting United States v. Bergman, 416 F. Supp. 496, 502-03 (S.D.N.Y. 1976)).

89. State v. Gonzales, 85-195-CR, 1985 WL188162, at *1 (Wis. Ct. App. Sept. 25, 1985) (unpublished disposition).

modify or change my sentence because of the publicity involved in this case." The judge further stated that any perceived sentence harshness was not the judge overcompensating for appearing unsympathetic to the victim, but rather due to the defendant's own failure to acknowledge his problems, his lack of truthfulness, and his lack of promise for rehabilitation.[90] The trial court again referenced publicity during hearings on post-conviction motions ten days later.[91] The judge commented that the defendant's own heinous behavior and history "made the [c]ourt's decision on sentencing pretty easy," and that while [the judge] "certainly was unhappy to see the publicity . . . that had nothing to do with the jury trial . . . [and] it didn't make the [c]ourt's job of sentencing any easier or harder."[92] Here again, we see an express renunciation of publicity as a sentencing factor.

State v. Kenney

In *State v. Kenney*, the defendant was convicted of enticing a child for sexual contact when he met in-person with a thirteen-year-old boy that he met online to engage in sexual activity—the boy was an undercover police officer.[93] The case received significant in-state publicity, and one of the defendant's arguments on appeal was that the trial court had erroneously exercised its discretion by imposing an overly harsh four-year sentence because of the media attention.[94] The appellate court agreed that media coverage played a role in the sentence but held that it was appropriate, stating, "[t]he trial court imposed a lengthy sentence in the hopes of deterring this type of activity, noting that the media attention would facilitate that purpose. This was not an erroneous exercise of discretion."[95] In contrast to *Gonzales*, *Kenney* expressly approves of publicity as a sentencing consideration with respect to general deterrence.

Thus, even within the same state there is palpable inconsistency regarding the approach to publicity in sentencing. This again underlines the rudimentary and ad hoc approach taken by courts in relation to the role of publicity in sentencing.

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90. *Id.* at *5.

91. *Id.* at *5-6.

92. *Id.*

93. State v. Kenney, No. 01-0810-CR, 2002 WL 31302984, at *1 (Wis. Ct. App. Oct. 15, 2002) (unpublished disposition).

94. *Id.* at *4.

95. *Id.*

(c) Tennessee

State v. Bennett

The defendant in *State v. Bennett* pled guilty to criminal exposure of HIV to unknowing sexual partners, and the appellate court acknowledged that the sentencing record indicated that the case received "publicity by the media beyond that normally expected in the typical case."[96] The court cited the Tennessee Supreme Court's prior enumeration of five sentencing factors to consider whether a need for deterrence existed, and if so, whether incarceration was "particularly suited" for achieving deterrence.[97] The third of the five factors is "[w]hether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case."[98] So, in at least one instance, Tennessee's highest court has expressly deemed publicity an appropriate—even desired—justification for a sentence increase. The appellate court in *Bennett* arguably went even further, holding that there was sufficient evidence to support the defendant's incarceration "based solely upon deterrence grounds."[99]

(d) Summary of State Approach

There is no consistent state approach in the United States on how to factor extensive media publicity into the sentencing scheme. Crimes are often categorized by seriousness of offense, statutes contain aggravating factors, and sentencing guidelines have minimum and maximum lengths and mitigating factors. But state legislation does not expressly incorporate the issue of publicity into sentencing. Further, state courts often do not directly address the effect of publicity, regardless of how much media attention a case has received. Additionally, judges often do not overly increase sentences for high-publicity cases, nor do they identify publicity as a possible relevant sentencing consideration. There are limited exceptions—such as when publicity does receive express discussion—but the approach in those instances remains inconsistent as well. Some courts condone publicity as a sentencing consideration (and use it as a basis to increase penalty) and others reject it as being relevant to the sanction that should be imposed. And while states share similar punishment rationales for sentencing, such as community protection, retribution,

96. State v. Bennett, No. E2000-02735-CCA-RM-CD, 2000 WL 1782763, at *3 (Tenn. Crim. App. Dec. 6, 2000).

97. *Id.* at *2.

98. *Id.*

99. *Id.* at *3.

and deterrence, the only (albeit weak) pattern to emerge between high-profile cases across states is that the offenders in such cases sometimes receive harsher sentences.

4. Other High-Profile Sentencing Cases

Several other recent very high-profile United States' criminal cases do not fit neatly within the federal or the other state approaches discussed above but have had noteworthy sentencing proceedings. We briefly examine a few of these cases now.

Nevada v. Simpson

Perhaps the most famous criminal case in United States' history is *People v. O.J. Simpson*, in which former professional American football player, broadcaster, and actor O.J. Simpson was acquitted in 1995 of brutally murdering his ex-wife and her friend.[100] The eleven-month trial was a massive daily media spectacle, and many believed the state of California had overwhelming evidence against Simpson. Thirteen years later, Simpson was sentenced to thirty-three years in prison for his role in an armed robbery in a Las Vegas, Nevada hotel room, with eligibility for parole after nine years.[101]

Judge Jackie Glass emphasized that the sentence for the Las Vegas case was unrelated to Simpson's 1995 murder acquittal, explicitly stating, "I'm not here to try and cause any retribution or any payback for anything else,"[102] and "I'm not here to sentence Mr. Simpson for what happened previously."[103] Judge Glass noted that a violent confrontation was involved, at least one gun was drawn, and that someone could have been shot.[104] Yet the question arises whether even the most fair-minded judge could completely disregard Simpson's notorious high-profile past—his 1995 murder case has become so entrenched in U.S. history that "he's as guilty as O.J." is today presumably a well-known American colloquial expression for saying someone was caught red-handed. *Simpson* raises the potential issue of pervasive media coverage and a controversial verdict in one case improperly influencing sentencing for a separate, subsequent case. Perhaps the Nevada Board of Parole Commissioners thought that the judge had been improperly influenced, as the

100. Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 497 (Cal. Ct. App. 2001).

101. *O.J. Simpson Sentenced to Long Prison Term*, NBC NEWS (Dec. 5, 2008, 7:13 PM), http://www.nbcnews.com/id/28067187/ns/us_news-crime_and_courts/t/oj-simpson-sentenced-long-prison-term/#.Wnj3fJM-c0p [https://perma.cc/K5TY-44FU].

102. *Id.*

103. *Id.*

104. *Id.*

Board unanimously paroled Simpson in October 2017, his first parole hearing, after he served the minimum (nine years) of his thirty-three-year sentence.[105]

United States v. Bowe Bergdahl

The most famous U.S. military case in recent years involved Sergeant Bowe Bergdahl, who lived as a Taliban prisoner for five years after voluntarily walking off his Army base in Afghanistan in 2009. Bergdahl was dishonourably discharged from the Army in November 2017 (which included a rank and pay reduction), but he received no prison time for desertion or endangering troops.[106] The media and public opinion debate centered on whether Bergdahl deserved more punishment because the troops who went searching for him were injured, or whether he had suffered enough as a five-year prisoner of war subjected to torture and brutal living conditions.

Military Judge Colonel Jeff Nance had wide sentencing discretion—he could have imposed anything from no time (as he did) to life in prison. He in fact offered no explanation into his reasoning after handing down the minimum sentence and no explanation of any mitigating factors.[107] An interesting aspect of this case was that President Trump frequently condemned Bergdahl on the campaign trail in 2016, calling for him to be executed.[108] Judge Nance called President Trump's comments "disturbing" and ruled that he would consider them as mitigation evidence at sentencing.[109] *Bergdahl* shows that even in cases involving saturated media coverage, judges might (and can) decline to explain the rationale for a particular sentence. That is part of the reason why it is often difficult to identify the role of publicity in the choice of penalty. *Bergdahl* also illustrates that in high-profile cases, even the most visible public figures—in this case the President of the United States—can potentially influence the United States' criminal sentencing process in an unintended manner.

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105. Amanda Holpuch, *OJ Simpson Granted Parole After Serving Nine Years of Armed Robbery Sentence*, GUARDIAN (July 20, 2017, 3:06 PM), https://www.theguardian.com/us-news/2017/jul/20/oj-simpson-parole-granted-prison-release-october [https://perma.cc/9CAM-XSBF].

106. Richard A. Oppel Jr., *Bowe Bergdahl Avoids Prison for Desertion; Trump Calls Sentence a 'Disgrace'*, N.Y. TIMES (Nov. 3, 2017), https://www.nytimes.com/2017/11/03/us/bowe-bergdahl-sentence.html [https://perma.cc/3N93-YVJL].

107. Merrit Kennedy, *Bowe Bergdahl's Sentence: No Prison Time*, NPR (Nov. 3, 2017, 11:44 AM), https://www.npr.org/sections/thetwo-way/2017/11/03/561852721/bowe-bergdahls-sentence-no-prison-time [https://perma.cc/E426-HL2X].

108. *Id.*

109. Oppel Jr., *supra* note 106.

United States v. Larry Nassar

Arguably the most notorious criminal sentencing in the United States in 2017 and 2018 was that of Larry Nassar. Nassar is a former U.S.A. Gymnastics and university sports medicine doctor who was convicted of multiple counts of sexually assaulting more than 150 young women and girls (including famous Olympic athletes) under the guise of medical treatment.[110] Nassar was sentenced to hundreds of years in prison across both state and federal sexual offenses, with Judge Cunningham, during his most recent sentencing, describing the unfathomable gravity and tragedy of the case: "It spans the country, and the world . . . . It has impacted women, children and families of varying ages, races and walks of life. Individuals that have suffered physical and emotional harm as a result of your actions live all over the country and the world."[111]

More than sixty young women and teenagers delivered victim impact statements during sentencing, and more than 150 victims publicly confronted Nassar during a separate seven-day sentencing hearing in a neighboring jurisdiction the month before.[112] One presiding judge said that the number of victims who had come forward had climbed to 265.[113] In no other case in recent American history has the sentencing process received such media and public exposure. Nassar's acts were not only heinous but were so widespread and so voluminous that the length of his sentence was in essence a formality—it was a foregone conclusion that he would spend the rest of his life in prison. His sentencing and the accompanying media attention instead served as an opportunity for victims to have a voice—to be heard—and it was a chance for the American judicial system to denounce these crimes on a national level. *Nassar* further highlights how the media can heavily cover a case but ultimately not overtly impact a sentencing length when the seriousness of the convicted offenses demands a life term anyway.

Summary of Other High-Profile Sentencing Cases

These three cases—*Nevada v. Simpson*, *United States v. Bergdahl*, and *United States v. Nassar*—further accentuate the lack of a consistent approach in the United States for factoring publicity into sentencing. These cases also hint at how idiosyncratic sentencing can be,

110. Christine Hauser, *Larry Nassar Is Sentenced to Another 40 to 125 Years in Prison*, N.Y. TIMES (Feb. 5, 2018), https://www.nytimes.com/2018/02/05/sports/larry-nassar-sentencing-hearing.html [https://perma.cc/E9NQ-J6YE].

111. *Id.*

112. *Id.*

113. *Id.*

as demonstrated by the seven-day sentencing hearing in *Nassar* where the judge offered no sentencing explanation or commentary at all. Moreover, these cases raise important and unanswered questions, such as how a past high-profile case might wrongly influence a later one (*Simpson*); how public attention from the highest ranking government officials might affect sentencing (*Bergdahl*); and how some crimes are so heinous that the sentence becomes automatic, irrespective of media attention (*Nassar*). The cases also demonstrate that even in cases that receive near-saturation levels of media publicity, courts often do not even broach the impact the condemnation should have in the sentencing calculus. This observation further demonstrates that this area of law is unsettled and, accordingly, can be framed or reshaped by the courts without the need to overrule precedent or previous well-established legal principles.

5. Current Legal Scholarship Relating to the Role of Publicity in Sentencing

To supplement the analysis of federal and state sentencing guidelines and trends, we surveyed the current landscape of scholarly articles on the role of publicity in sentencing throughout the United States. Many related articles focus on the effects of pre-trial publicity on verdicts and sentencing. Other articles explore more hyper-niche scenarios and arguments, such as why widespread media publicity of terrorist attacks makes a capital punishment sentence unconstitutional,[114] or why shaming should be an institutionalized form of punishment in sentencing federal white-collar criminals.[115] The same themes emerge through the articles we saw at the federal and state level: uncertainty and inconsistency around an under-researched and under-developed issue. There are two articles which are of some relevance to the discussion at hand.

One study analyzed all federal First Degree murder and robbery cases between 1993 and 1995 (891 total cases, five of which were First Degree murder), seeking to answer whether pre-trial publicity biases trials against defendants.[116] The authors tracked newspaper coverage in terms of number of articles and word counts, and they examined cases that pled out, cases that went to trial, verdicts, and sentence lengths.[117] Some key findings materialized. First, pre-trial

114. *See* Pearl Pandya, *The Fallacy of Executing Terrorists*, 26 KAN. J.L. & PUB. POL'Y 66, 76 (2016).

115. *See* Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 387 (1999).

116. Jon Bruschke, *Pretrial Publicity: The Invisible Elephant in the Mist*, ORANGE COUNTY L., Sept. 2005, at 52, 54.

117. *Id.*

publicity did not influence verdicts (guilty verdicts were roughly eighty percent across various levels of publicity) but maybe influenced sentence lengths.[118] The authors concluded that between nine to twenty-five percent of a sentence length could be accounted for by pre-trial publicity, and, moreover, that increased media coverage resulted in longer sentences.[119] Second, publicity was more likely to influence sentence length in jury trials than in plea-bargained cases.[120] But the authors concluded via other analyses that extensive media coverage generally resulted in lower sentences; defendants in a small portion of high-profile cases received extremely harsh sentences (including life in prison and death); and that social scientists have overestimated the negative influences of publicity.[121] In short, the authors found both support for publicity influencing sentencing and also for the opposite conclusion that publicity has no impact on the ultimate sanction imposed by the court. In light of this, the authors note that "more and better social science can clear up what appear at present to be confusing findings."[122]

A second article examined whether famous athletes convicted of violent crimes should be sentenced differently than other violent offenders.[123] One justification considered for increasing elite athletes' sentences is familiar already—general deterrence. The authors outlined two forms that this general deterrence argument could take. First, media coverage in cases involving athletes creates a highly visible public forum for reinforcing legal norms, and thus a long sentence might more effectively deter prospective offenders than a comparable sentence for a less well-known defendant.[124] Second, because athletes are role models whose actions on and off the field are imitated, sentencing them harshly might have a disproportionately positive deterrent impact.[125] But the article acknowledges that these general deterrence justifications might face conflict in a state that prohibits socioeconomic status (where famous athletes rank highly) as a sentencing factor,[126] as we saw with *Staten*[127] in Minnesota. The authors

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 55-57, 59.

122. *Id.* at 59.

123. Michael M. O'Hear, *Blue-Collar Crimes/White-Collar Criminals: Sentencing Elite Athletes Who Commit Violent Crimes*, 12 MARQ. SPORTS L. REV. 427, 428 (2001).

124. *Id.* at 441.

125. *Id.* at 441-42.

126. *Id.* at 447.

127. State v. Staten, 390 N.W.2d 914, 916 (Minn. Ct. App. 1986) (citing Minnesota Sentencing Guidelines I and II.D.1).

ultimately declined to take a specific position on how athletes should be sentenced, noting that "[t]here is no simple answer to the question"; that valid arguments "support both higher and lower sentences"; that "[t]he strength of these arguments may vary considerably from case to case"; and that the arguments "cannot be considered without regard to the sentencing jurisdiction."[128]

The authors' open-ended conclusions in these articles reveal the same theme that emerges from our federal and state analyses: the relevance of publicity as a sentencing consideration lacks uniformity and direct treatment in the courts, and it lacks sufficient attention from scholars and the broader legal community.

6. Summary of Relevance of Publicity to Sentencing in the United States

There is no consistent approach in the United States to address the impact that publicity should have on sentencing. At the federal level, to the extent a trend can be discerned, the most common approach is to increase penalties where the offense has attracted considerable media attention.[129] The rationale for this is general deterrence. There is no statutory treatment of the matter, and the case law is very sparse and the analysis perfunctory.

At the state level, an important trend emerging is that publicity is often *not* expressly taken into account in the sentencing calculus. This logically supports the conclusion that publicity is irrelevant to sentencing, a conclusion some state courts have expressly articulated.[130] But other state courts have held that publicity should and does support general deterrence considerations at sentencing.[131] In short, courts have been inconsistent in their treatment of how publicity should be considered in the sentencing calculus, and many have avoided directly discussing it. There are a number of tenable reasons for this, including the fact that courts perhaps implicitly or subconsciously[132] treat publicity as an aggravating factor, an observation supported by the harsh penalties that offenders in high-profile cases generally receive. Scholarship on the issue is similarly inconsistent and altogether scarce.

The lack of informed and detailed treatment of the relevance of publicity to sentencing signifies jurisprudential uncertainty regard-

128. O'Hear, *supra* note 123, at 446.

129. *See supra* Part A(1)(c).

130. *See id.*

131. *Id.*

132. For a discussion of the prevalence of subconscious bias in sentencing, see Bagaric, supra note 81, at 105-08.

ing the approach courts should take. The remainder of this Article focuses on how publicity *should* influence sentencing. Prior to doing so, we take a minor detour and review how the issue has been treated in Australia.

B. The Approach in Australia

Given the unsettled nature of the law concerning the impact that public condemnation should have on sentencing and the cursory analysis that the issue has received in the United States, it proves insightful to consider how the issue has been dealt with elsewhere. To this end, Australia is a relevant reference point given that it has similar sentencing objectives to the United States[133] and similar sentencing laws that combine statute and case law.[134]

Sentencing in each of the nine Australian jurisdictions (the six states, the Northern Territory, the Australian Capital Territory, and the federal jurisdiction) is governed by a combination of legislation and the common law. Sentencing law differs in each Australian jurisdiction; however, considerable convergence exists in key areas. As is the situation in the United States, the main sentencing objectives are community safety, general deterrence, specific deterrence, rehabilitation, and retribution.[135] For the purposes of this Article, the important point regarding sentencing in Australia is that it is largely a discretionary process where judges process potentially hundreds of aggravating and mitigating considerations.

In contrast to the United States, fixed penalties for serious offenses in Australia are rare.[136] The methodology Australian courts adopt in making sentencing decisions is termed the "instinctive synthesis."[137] The term originates from the forty-year-old Full Court of the Supreme Court of Victoria decision of *R v Williscroft*,[138] where Justices Adam and Crockett stated, "[n]ow, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process."[139]

The instinctive synthesis is a process whereby sentencers make a determination regarding all of the considerations that are relevant to a sentence, give appropriate weight to each consideration, and then

133. *See* MIRKO BAGARIC ET AL., SENTENCING IN AUSTRALIA 8-9 (5th ed. 2017).

134. *Id.* at 5.

135. *Id.* at 9.

136. An example is a smuggling offense. *See*, *e.g.*, *Migration Act 1958* (Cth) s 52 (Austl.).

137. *R v Williscroft* [1975] VR 292, 300 (Austl.).

138. *Id.*

139. *Id.*

set a precise penalty. The process does not require (nor permit) judges to set out the precise weight[140] (in mathematical terms) according to any particular consideration. A global judgment is made without recourse to a checklist process that demarcates the precise considerations that influence the judgment. The High Court of Australia has considered the general methodology for reaching sentencing decisions on several occasions. It has consistently endorsed the instinctive synthesis approach and rejected alternative approaches, which involve precisely demarcating the emphasis accorded to relevant aggravating and mitigating circumstances.[141]

The proportionality principle is adopted in all jurisdictions. In *Veen v The Queen [No 1]*[142] and *Veen v The Queen [No 2]*, the High Court of Australia (the apex of the Australian court system and equivalent of the U.S. Supreme Court) stated that proportionality is a primary aim of sentencing.[143] It is considered so important that it cannot be readily trumped by even the goal of community protection, which at various times has also been declared as the most important aim of sentencing.[144]

Another important commonality in all Australian jurisdictions is that aggravating and mitigating factors operate with relative uniformity throughout the country. There are between 200 and 300 such factors,[145] and this is a key reason why it is difficult to predict with confidence the exact sentence that will be imposed in any particular case.[146] The unfettered discretionary nature of the Australian sentencing calculus is similar to the largely uncontrolled sentencing process in parts of the United States approximately fifty years ago, which led Judge Marvin E. Frankel to describe the system as "lawless."[147]

Like the situation in the United States, there is no established or accepted theory of what should constitute mitigating and aggravating considerations, and there are no legislative provisions in Australia

140. Minor exceptions are discussed in Part VI.

141. *Barbaro v The Queen* [2014] HCA 2 ¶ 34 (Austl.).

142. (1979) 143 CLR 458, 467 (Austl.).

143. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472 (Austl.).

144. *See, e.g.*, *Channon v The Queen* (1978) 20 ALR 1, 1 (Austl.).

145. *See* Roger Douglas, *Sentencing*, *in* GUILTY, YOUR WORSHIP: A STUDY OF VICTORIA'S MAGISTRATES' COURTS 62 (La Trobe Univ. Legal Studies Dep't 1980) (using a study of Victorian Magistrates' Courts to identify 292 relevant sentencing factors).

146. A similar regime exists in the United Kingdom. *See* Andrew Ashworth, *Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing*, *in* MITIGATION AND AGGRAVATION AT SENTENCING 21, 22 (Julian V. Roberts ed., 2011).

147. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 85 (1973). For a critique of Frankel's impact, see generally Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239 (2008).

that govern how large-scale media publicity should be dealt with in the sentencing calculus. However, as a matter of common law, the issue has been considered on a number of occasions. The most expansive discussion of the issue by the High Court of Australia was in *Ryan v The Queen*, where Justices Kirby and Callinan stated that public opprobrium stemming from the publicity of a case was a factor that could mitigate a penalty.[148] Justice McHugh took the opposite approach.[149] Justice Hayne adopted a similar position to that endorsed by Justice McHugh.[150] The other member of the Court, Justice Gummow, did not address the issue.

Justice Callinan, in taking the position that publicity can mitigate, stated:

> Of course the abuse of an office to commit a crime is greatly to be deplored but the crime of a person occupying an office of some prominence will often attract much greater vilification, adverse publicity, public humiliation, and personal, social and family stress than a crime by a person not so circumstanced. When these consequences are attracted they should not be ignored by the sentencing court.[151]

Justice Kirby, in agreeing with the approach by Justice Callinan, emphasised that the reason that publicity can reduce a penalty is because it constitutes a special burden, but it is still necessary to have an evidentiary basis for the claim that it should reduce the sanction imposed by a court. His Honour Justice Kirby stated:

> [S]tigma [stemming from a conviction] will commonly add a significant element of shame and isolation to the prisoner and the prisoner's family. This may comprise a special burden that is incidental to the punishment imposed and connected with it. If properly based on evidence, it could, in a particular case, be just to take such considerations into account in fixing the judicial punishment required.[152]

Justice McHugh rejected the argument that public opprobrium should mitigate a penalty for two main reasons. First, he noted that the degree of opprobrium attaching to offences varies considerably from case to case and, hence, it is difficult to accommodate this consideration within the sentencing calculus. Second, he stated that it is inevitable that more serious crimes will attract a greater degree of stigma and opprobrium.[153]

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148. *Ryan v The Queen* (2001) 206 CLR 267 (Austl.).

149. *See id.* ¶¶ 49-54.

150. *Id.* ¶ 172.

151. *Id.*

152. *Id.* ¶ 118; *see also McDonald v The Queen* (1994) 120 ALR 629, 639 (Austl.).

153. *Ryan v The Queen* (2001) 206 CLR 267, ¶ 54(Austl.).

While there was no firm consensus in *Ryan* that negative publicity can mitigate a penalty, the general approach that courts subsequently adopted is consistent with the views of Justices Kirby and Callinan. Thus, in *R v Bunning*,[154] the Victorian Court of Appeal held that the fact that the offender had "lost his reputation, his career [as a police officer] . . . [and] suffered public humiliation"[155] served as mitigating factors in sentencing considerations. In *Kenny v The Queen*,[156] Justices Howie and Johnson on the New South Wales Court of Criminal Appeal held that opprobrium could reduce penalty severity if it adversely impacted the offender's physical or psychological wellbeing. *Einfeld v The Queen*[157] attracted a significant amount of publicity because it involved the sentencing of a former judge for dishonesty offenses. Justice of Appeal Basten noted, and Justices Hulme and Latham agreed, that the offender's status as a former judge attracted a degree of opprobrium and that this could mitigate the penalty that was appropriate.[158]

The Queensland Court of Appeal in *R v Nuttall; Ex parte Attorney-General (Qld)*[159] undertook a relatively wide-ranging analysis of the caselaw throughout Australia regarding the manner in which publicity impacts sentencing outcomes. Justice of Appeal Muir stated, and Justices Fraser and Chesterman agreed, that the Court "assum[ed]" public opprobrium was relevant despite the fact that it was unacknowledged that the sentencing judge failed to take it into account.[160] However, the justices noted that public humiliation was of little weight given its inevitability and stated that "[t]he attainment of high public office brings with it public exposure and media scrutiny as well as power, fame[,] and prestige. Criminal abuse of the office, if detected, will inevitably attract media attention and result in shame and distress to the offender and his family."[161]

Thus, the balance of authority indicates that public condemnation of an offender can be a mitigating factor in Australia, although the courts (consistent with the general approach to aggravating and mit-

154. [2007] VSCA 205 (27 September 2007) (Austl.). In *R v Dunne* [2003] VSCA 150, ¶ 37 (Austl.), the same court held that there is no conclusive authority that requires an opprobrium to be a mitigating consideration. In *DPP v Fucile* [2013] VSCA 312, ¶ 110 (Austl.), the Court appeared to recognize that stigma was a mitigating factor, although in this case it was coupled with the offenders losing their jobs.

155. *R v Bunning* [2007] VSCA 205 (27 September 2007) ¶ 47 (Austl.).

156. [2010] NSWCCA 6 (12 February 2010) ¶¶ 49-50 (Austl.); *see also R v Wilhelm* [2010] NSWSC 378 (29 April 2010) ¶¶ 16-17, 22-24 (Austl.).

157. *See* (2010) 266 ALR 598 (Austl.).

158. *See id.* at 621.

159. [2011] 2 Qd R 328 (Austl.).

160. *See Einfeld v The Queen* (2010) 266 ALR 598 (Austl.).

161. *R v Nuttall; Ex parte Attorney-General (Qld)* [2011] 2 Qd R 328 ¶ 65 (Austl.).

igating considerations) have not indicated the weight that should be generally accorded to this consideration.

Summary of Contrasting Positions in the United States and Australia

In both Australia and the United States, there is no definitive position regarding the role that public opprobrium should have in the sentencing calculus. However, the trend of authority in each jurisdiction supports a diametrically opposite position. In the United States, public opprobrium often increases penalty severity, whereas in Australia, it serves to reduce the harshness of sanctions. Even more illuminating—in terms of highlighting the confused state of the law—is that the reasons provided for these different positions have not been considered at length by the courts in either jurisdiction. Thus, the Australian courts have not canvased the role of general deterrence in high-profile cases, while the courts in the United States have not considered the argument that public shaming is itself a hardship. In light of this muddled state of affairs, we evaluate the justifications advanced in the United States and Australia for their respective approaches in dealing with public opprobrium in the sentencing calculus.

III. EXAMINING THE RATIONALES FOR INCORPORATING PUBLIC OPPROBRIUM INTO SENTENCING DECISIONS

As demonstrated above, in the United States, the key reasons provided for increasing penalties in high-profile matters center around general deterrence. We now consider whether that is a sound objective.

A. General Deterrence Does Not Work

There are two forms of general deterrence: marginal and absolute. "Marginal general deterrence" concerns the correlation between the severity of the sanction and the prevalence of an offense.[162] "Absolute general deterrence" concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct.[163]

There are a large number of studies that seek to ascertain whether the theory of general deterrence actually works. As discussed below, these studies have not always delivered consistent findings, but

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

163. *Id.*

the clear weight of evidence suggests marginal deterrence does not work, and absolute general deterrence does work.

The failure of the death penalty to act as a marginal deterrent is exemplified by the experience in New Zealand. From 1924 to 1962, there were periods when the death penalty (for murder) was in force, then abolished, then revived, and then abolished again.[164] The changes generally followed some level of public debate and were well publicized. Although the murder rates fluctuated during this period, they bore no correlation to the prevailing penalty—whether capital punishment or life imprisonment.[165]

Similar findings have emerged in the United States.[166] Some commentators have attempted to establish a link between lower homicide rates and the death penalty in the United States.[167] However, the evidence used to support a connection between lower homicide rates and capital punishment has been debunked on the basis that the data is statistically insignificant, as well as the fact that the evidence goes against the overwhelming trend of the data. As Richard Berk[168] notes, the main findings used to support the hypothesis that capital punishment is a deterrent are based on eleven instances[169] from a sample size of one-thousand observations[170] where the homicide rate dropped in a U.S. state following an execution in that state the previous year. The data is statistically meaningless and contrary to the trend of ninety-nine percent of the observations. Berk states:

> Whatever one makes of those 11 observations, it would be bad statistics and bad social policy to generalize from the 11 observations to the remaining 989. So, for the vast majority of states for the vast majority of years, there is no evidence for deterrence in these

164. *See* NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60-61, 191 (1969); *see also* RICHARD HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 211-12 (2d ed. 1996).

165. WALKER, *supra* note 164, at 211-12.

166. *See, e.g.*, John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 129 (1994).

167. *See* Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569, 569 (2001); *see also* Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 163 (2004).

168. *See* Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 328 (2005).

169. Situations in which five or more executions occurred in a state in a single year (fewer than five executions is thought to be unlikely of having the capacity to act as a deterrent).

170. Each "observation" is the homicide rate in a U.S. state over a one-year period.

> analyses. Even for the remaining 11 observations, credible evidence for deterrence is lacking.[171]

Commenting on what clearly emerges from the literature, Berk concludes, "it is apparent that for the vast majority of states in the vast majority of years, there is no evidence of a negative relationship between executions and homicides."[172]

The strongest evidence in support of the theory of marginal general deterrence stems from the considerable drop in serious crime levels in the United States over the past thirty years. As noted in the discussion below, the drop coincided with a significant increase in the incarceration rate. The rate of violent crime in the United States dropped by more than sixty percent from 1990 to 2009.[173]

At face value, these figures suggest that imprisoning ever greater numbers of offenders effectively reduces the crime rate. Several detailed studies examine and explain this causal connection. One analyst, William Spelman, has stated that up to twenty-one percent of crime reduction is attributable to the increased rate of imprisonment.[174] However, it remains unclear whether this reduction is attributable to the incapacitation of offenders (who are thereby prevented from committing crimes while imprisoned) or to the effects of marginal deterrence.[175] Removing more than one million offenders from the community obviously makes it impossible for them to participate in crime and, hence, subtracts from the crime statistics during their period of incarceration.[176]

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171. Berk, *supra* note 168, at 328.

172. *See id.* at 313. For a more wide-ranging study with similar conclusions, see generally Dieter Dölling et al., *Is Deterrence Effective? Results of a Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL'Y RES. 201 (2009); *see also* John J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, *in* DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM 269 (Steven Raphael & Michael A. Stoll eds., 2009); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 143 (2003).

173. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING STATISTICS, https://www.bjs.gov/ucrdata/Search/Crime/State/RunCrimeStatebyState.cfm [https://perma.cc/7VLR-E6N8].

174. William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 CRIME & JUST. 419, 485 (2000); *see also* ALFRED BLUMSTEIN & JOEL WALLMAN, THE CRIME DROP IN AMERICA 123 (2000); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 177-78 (2004).

175. On balance, studies show that a ten percent increase in imprisonment rates produces a two to four percent reduction in the crime rate, most of which is in relation to nonviolent offenders. *See* Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F.L. REV. 585, 594 (2009) and the references cited therein.

176. As noted below, some of this reduction is also attributable to more police.

Further, it is noted that similar crime reduction trends occurred in one of the United States' nearest neighbors, Canada, over approximately the same period. During that period, the imprisonment rate in Canada actually fell.[177]

Empirical evidence not only questions the causal link between higher penalties and lower crime, but it also provides strong evidence of alternative explanations for falling crime rates. For example, economist Steven Levitt argues that up to fifty percent of the fall in the United States' crime rate can be attributed to the legalization of abortion in the 1970s. After that point, an increased number of women from disadvantaged groups (teenagers, the poor, and minorities) were able to abort unwanted pregnancies; thus, Levitt argues that the children from those unwanted pregnancies would have been likely to commit crimes as adults.[178] This ostensibly incredible finding is supported by the fact that states with higher abortion rates in the 1970s had larger drops in crime in the 1990s, with each ten percent rise in abortions corresponding to a one percent drop in crimes two decades later.[179]

Research from Germany is consistent with U.S. findings regarding the failure of marginal general deterrence.[180] Horst Entorf reviewed twenty-four years of criminal sentencing practices in West German states for correlations to the crime rate.[181] Entorf sought to examine the effect of each stage of the prosecution process, from investigation to conviction, on the commission rates of two specific crimes ("major property" and "violent crimes") in order to assess their relative contribution to the overall effect of the criminal prosecution process on crime rates. The results were analyzed by the theoretical econometric analysis methodology, which considered the deterrent effects of formal and informal, as well as custodial and noncustodial, sanctions.[182]

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177. *See* Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 803 (2010).

178. Levitt, *supra* note 174, at 186.

179. *See* Michael Ellison, *Abortion Cuts Crime Study Says*, GUARDIAN (Aug. 9, 1999), http://www.theguardian.com/world/1999/aug/10/michaelellison [https://perma.cc/X927-XMFG]; Levitt, *supra* note174, at 182-83.

180. *See generally* Horst Entorf, *Crime, Prosecutors, and the Certainty of Conviction* (Goethe Univ. Frankfurt & IZA, Discussion Paper No. 5670, 2011), http://ftp.iza.org/dp5670.pdf [https://perma.cc/9KYE-FKJG]. For a recent study supporting the inability of sanctions to deter domestic violence, see Frank A. Sloan et al., *Deterring Domestic Violence: Do Criminal Sanctions Reduce Repeat Offenses?*, SSRN (2013), http://ssrn.com/abstract=2213310 [https://perma.cc/8V5U-X6VK].

181. *See* Entorf, *supra* note 180.

182. Theoretical econometrics studies statistical properties of econometric procedures. Such properties include power of hypothesis tests and the efficiency of survey-sampling methods, experimental designs, and estimators. *See generally* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, ECONOMETRIC METHODS AND ECONOMIC FORECASTS (4th ed. 1998).

Entorf's analysis revealed that a deterrent effect was found at "the first two stages of the criminal prosecution process" (charge and conviction) rather than at the "less robust" severity of punishment stage (sentencing).[183] Entorf also found that

> [r]esults presented in [the] article suggest that crime is particularly deterred by the certainty of conviction. Here, contrary to popular belief, neither police nor judges but public prosecutors play the leading role. Extending the severity of sentences, however, does not seem to provide a suitable strategy for fighting crime. In particular, the *length of the imprisonment term proves insignificant*.[184]

In a recent review of relevant studies, the United States National Academy of Sciences concluded: "[t]he incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation."[185]

By contrast, the evidence relating to absolute general deterrence is more positive. The strongest empirical evidence in support of absolute general deterrence comes from the United States, which (as noted above) has seen a marked increase in police numbers and a sharp decrease in crime over the past two decades.[186] The near universal trend of data, which outlines this Article, supports the view that more police and the greater actual and perceived likelihood of detection has contributed to the reduction in crime.[187]

The connection is complex due to the multifaceted nature of the changes that occurred during this period, which may have also had an effect on the crime rate. These changes include effective police methods, a generally improving economy, and other variables such as abortion trends and higher rates of imprisonment.[188]

It is noted that the greatest reduction in crime occurs where police are highly visible. This accords with the ostensible success of "zero tolerance"[189] policing in locations such as New York City, which saw

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183. Entorf, *supra* note 180.

184. *Id.* at 4.

185. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 5 (Jeremy Travis & Bruce Western eds., 2014).

186. *See* Levitt, *supra* note 174, at 177 (estimating about a fourteen percent increase).

187. *See* John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, *in* BLUMSTEIN & WALLMAN, *supra* note 174, at 208.

188. *Id.*

189. Zero tolerance policing is founded on the "broken windows" theory, which provides that strict enforcement of minor crime and restoring physical damage and decay, such as

the greatest number of extra police employed and the sharpest decline in crime.[190] This trend was evident well over a decade ago. In a period of only a few years following the introduction of zero tolerance policing, the rates of violent and property crime fell by approximately thirty-five percent.[191]

After evaluating the large number of surveys analyzing the connection between increased police numbers and the crime rate, Raymond Paternoster concludes:

> What we are left with, then, is that clearly police presence deters crime, but it is probably very difficult to say with any degree of precision how much it deters. Let us take Levitt's estimate as a reasonable guess, that increasing the size of the police force by 10% will reduce crime by about 4% or 5%.[192]

The link between lower crime rates and higher perceptions of being caught supports the theory of absolute deterrence because the reason why the likelihood of being detected counteracts crime is the underlying assumption that some hardship awaits the offender *if* caught. The exact nature or magnitude of the hardship is not an important consideration.

Thus, general deterrence does work—at least to the extent that if there were no real threat of punishment for engaging in unlawful conduct, crime rates would soar. It follows that the threat of punishment discourages potential offenders from committing crime, which

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broken windows and graffiti, would prevent the fostering of an environment conducive to more serious offenses being committed. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. The reduction in the New York crime rate has been largely attributed to this policy. *See* JAMES AUSTIN & MICHAEL JACOBSON, BRENNAN CTR. JUST., HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? (2013), at 6-7, https://www.vera.org/publications/how-new-york-city-reduced-mass-incarceration-a-model-for-change [https://perma.cc/5VTR-Y6N8]; *see also* Peter Grabosky, *Zero Tolerance Policing*, AUSTL. INST. CRIMINOLOGY 1, 2 (Jan. 1999), https://aic.gov.au/publications/tandi/tandi102 [https://perma.cc/B34J-DCJQ].

190. *See* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 35, 149-51 (2007).

191. Grabosky, *supra* note 189. Grabosky notes that zero tolerance policing is not solely responsible for the drop in crime. *Id.* He suggests that there are numerous contributing factors, including sustained economic growth, a reduction in the use of crack cocaine, the aging of the baby-boomer generation beyond the crime-prone years, restricting the access of teenagers to firearms, and longer sentences for violent criminals. *Id. See also* Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 AM. ECON. REV. 584, 601 (2000); *see, e.g.*, Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1 (1998); Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 L. & SOC'Y REV. 163 (1988).

192. Paternoster, *supra* note 177, at 799; *see also* Levitt, *supra* note 174, at 177. *But see* Eck & Maguire, *supra* note 187, at 245-48 (arguing that these conclusions are not valid, principally because of the incomplete nature of the data and cursory analysis involved).

justifies the punishment of wrongdoers. However, the evidence does not support the view that this relationship operates in a linear fashion; that is, that the deterrent effect of sanctions does not increase in direct proportion to the severity of sanctions.

Accordingly, while the objective of deterrence justifies imposing punishment, it is at best a remote consideration when it comes to the question of how much punishment should be imposed. Absolute general deterrence provides a justification for imposing punishment, but it does not justify the imposition of penalties that exceed the objective gravity of the offense.

The fact that there is no correlation between harsh penalties and lower crimes is, admittedly, counterintuitive. Common sense suggests that people, as rational agents, make cost-benefit decisions about proposed courses of action. As such, the threat of a harsh punishment for engaging in certain conduct disincentivizes them from taking that course of action. However, the reality seems otherwise. In fact, the data suggests that people do generally engage in a cost-benefit analysis before committing a crime, but the decisionmaking process seems to be quite shallow. When contemplating committing crime, individuals seem to factor in the likelihood of being apprehended into their decisionmaking. If the likelihood is high, they often desist from the crime. However, a low-risk assessment of being caught will make it more probable that they will engage in criminal behavior.[193] This is consistent with the theory of absolute general deterrence. The crime decisionmaking process does not seem to generally progress beyond this analysis to the deeper question of what is likely to happen if the person decides to commit an offense *and* they are apprehended. The disinclination of most individuals to engage in this next evaluative step explains the failure of marginal general deterrence. The reason that most offenders do not contemplate the second step is uncertain; however, that does not undermine the empirical findings, which debunk the theory of marginal general deterrence.

It follows that the pursuit of general deterrence cannot justify the imposition of harsher penalties for offenders. Sentencing offenders more severely when they have been subjected to a large amount of publicity will not decrease the rate of offending by other people. The general deterrence rationale for increasing penalties in instances of high-profile cases is flawed. Therefore, so is the rationale adopted by some American courts for factoring in public opprobrium into the sentencing calculus. General deterrence, as we have seen, is a sen-

193. *See* Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work – and What it Means for Sentencing*, 35 CRIM. L.J. 269 (2011).

tencing objective in all American jurisdictions. However, this does not suggest that courts must therefore continue to accord it significant weight when sentencing offenders. The emphasis that courts are to accord to general deterrence, in the context of high-profile offenders and all other offenders, is not enshrined in statute. Because there is not an established jurisprudence mandating that marginal general deterrence must be given cardinal value in the context of high-profile offenders, the courts are free to substantially reduce the emphasis accorded to general deterrence in this context to the point where it is of negligible weight, in keeping with the relevant empirical evidence.

B. Is Public Opprobrium a Form of Punishment?

We now consider whether the position adopted in Australia is valid. Doctrinally, there are two means by which extra-curial hardships, such as shame and opprobrium, could be incorporated into the sentencing discretion. The first is as a discrete mitigating consideration. Mitigating factors can be divided into four main types: the circumstances of the offense, the offender's response to a charge, matters personal to the offender, and the impact of the sanction on the offender and his or her dependants.[194] However, there is no universally accepted theory of aggravation or mitigation,[195] and therefore it is difficult to mount an argument for the establishment of a new mitigating consideration.[196]

Further, criminal conduct normally attracts a degree of condemnation and opprobrium. In fact, it has been held that denunciation (the catalyst for opprobrium) is an important goal of sentencing. In *Channon v The Queen*, Justice Brennan said that "[p]unishment is the means by which society marks its disapproval of criminal conduct."[197] Justice Kirby noted that in addition to expressing disapproval of the conduct, denunciation also expresses the message that the conduct must be punished. He noted:

> A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also

194. *See generally* HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 453-54 (1979).

195. For an attempt to construct such a theory, see Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 BUFF. L. REV. 1159, 1161-62 (2014).

196. *See generally* 1 VICTORIAN SENTENCING COMM., SENTENCING: REPORT OF THE VICTORIAN SENTENCING COMMITTEE ch. 5 (1988).

197. *Channon v The Queen* (1978) 33 FLR 433, ¶ 8 (Austl.); *R v Channon* (1978) 20 ALR 1, 437; s*ee also O'Connell v W Austl* [2012] WASCA 96 (4 May 2012); *DPP (Tas) v T* [2012] TASCCA 15 (21 December 2012) (Austl.); *Dawson v The Queen* [2013] NSWCCA 61 (21 March 2013) (Austl.).

> communicate society's condemnation of the particular offender's conduct. The sentence represents "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law."[198]

Denunciation is a common law sentencing objective, and it is an express objective of several sentencing statutes in Australia and the United States.[199] Given that sentencing aims to elicit denunciation and opprobrium, it is contradictory to claim that this very goal should simultaneously be a stand-alone basis for mitigation. Justice Hayne of the High Court of Australia in *Ryan v The Queen*[200] noted this incongruity. He observed that [t]here is an irreducible tension between the proposition that offending behaviour is worthy of punishment and condemnation according to its gravity, and the proposition that the offender is entitled to leniency on account of that condemnation.[201]

The second manner in which it can be argued that opprobrium should mitigate a penalty is based on the operation of the proportionality principle. This is the theory that in determining the appropriate sanction, the severity of the crime should be matched by the harshness of the penalty.[202] As discussed throughout, proportionality is a bedrock of sentencing in Australia. Proportionality is also an important aspect of sentencing in the United States. Ten states require it in their sentencing regimes,[203] and proportionality is a core principle that informs (though does not strongly influence) the federal Sentencing Guidelines. Additionally, a survey of state sentencing law by Thomas Sullivan and Richard Frase shows that at least nine states have constitutional provisions relating to the prohibition of excessive

198. *Ryan v The Queen* (2001) 206 CLR 267, ¶ 118 (Austl.) (quoting *R v. M (CA)* [1996] 1 SCR 500, 558 (Austl.)); *see also, e.g.*, NIGEL WALKER, WHY PUNISH? 26-27 (1991).

199. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(f) (Austl.); *Crimes (Sentencing Procedure) Act 1999 No 92* (NSW) s 3A(f) (Austl.); *Sentencing Act 1995* (NT) div 2 s 5(1)(d) (Austl.); *Penalties and Sentences Act 1992* (Qld) div 2 s 9(1)(d) (Austl.); *Sentencing Act 1997* (Tas) s 3(e)(iii) (Austl.); *Sentencing Act 1991* (Vic) div 2 s 5(1)(d). There are no equivalent provisions in South Australia and Western Australia.

200. (2001) 206 CLR 267 (Austl.).

201. *Id.* ¶ 157.

202. *See* Mirko Bagaric & Sandeep Gopalan, *Sound Principles, Undesirable Outcomes: Justice Scalia's Paradoxical Eighth Amendment Jurisprudence*, 50 AKRON L. REV. 301, 303 (2016).

203. *See* Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241-42, 244 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington, and West Virginia); *see also* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 154 (2008).

penalties or treatment (an endorsement of proportionalism),[204] and that twenty-two states have constitutional clauses prohibiting cruel and unusual penalties, including eight states with a proportionate-penalty clause.[205]

It is more doctrinally and institutionally sound if incidental harms are viewed through the lens of the proportionality principle, as opposed to being a discrete mitigating consideration. This would make the role of extra-curial events such as opprobrium and shame more stable because there is no accepted coherent theory of aggravating or mitigating considerations. Thus, it is difficult doctrinally to entrench a consideration as being incontestably mitigatory. Evaluating the concept of public opprobrium from the perspective of the proportionality principle potentially grounds it within a well-established construct and in a manner where its role is clear: to inform more fully the sanction-severity side of the proportionality equation. Therefore, the key consideration is now whether public shaming, in fact, constitutes punishment.

That consideration is complicated by the fact that a universally-accepted definition of punishment does not exist. In defining punishment, some commentators focus on its association with *guilt*. Herbert Morris defines punishment as "the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person's guilty behavior."[206] R.A. Duff defines punishment as "the infliction of suffering on a member of the community who has broken its laws."[207] Similarly, John McTaggart defines punishment as "the infliction of pain on a person because he has done wrong."[208]

A wider definition is provided by Nigel Walker, who observes that while punishment generally requires that the offender voluntarily commit the relevant act, it is sufficient that the punisher believes or pretends to believe that he or she has done so.[209] This definition better reflects this aspect of punishment, given that there is no question that accused who are wrongly convicted and sentenced by courts undergo punishment. However, what is notable for the purpose of this

204. SULLIVAN & FRASE, *supra* note 203, at 154-55.

205. *Id.* at 154.

206. Herbert Morris, *Persons and Punishment*, *in* THEORIES OF PUNISHMENT 76, 83 (Stanley E. Grupp ed., 1971).

207. R.A. DUFF, TRIALS AND PUNISHMENTS 267 (1986); s*ee also id.* at 151 (where Morris states that punishment is suffering imposed on an offender for an offense by a duly constituted authority).

208. JOHN MCTAGGART & ELLIS MCTAGGART, STUDIES IN HEGELIAN COSMOLOGY 129 (1901).

209. WALKER, *supra* note 198, at 2.

discussion is that the above definitions, while focusing on the aspect of guilt, nevertheless require that the punishment is fit *for* the crime; that is, that there is the implicit requirement of a causal link between the two subject matters.

This link emerges also in relation to commentators who focus on the connection with *blame* as being cardinal to the concept of punishment. Andrew von Hirsch states that "[p]unishing someone consists of visiting a deprivation (hard treatment) on him, *because* he supposedly has committed a wrong, in a manner that expresses disapprobation of the person for his conduct,"[210] or "[p]unishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong, under circumstances and in a manner that conveys disapprobation of the offender for his wrong."[211] Further, it has been noted by John Kleinig that

> [p]unishment . . . involves a stigmatizing condemnation of the punished. It does so, because the person punished has been judged to be guilty *inter alia* of some *moral wrong-doing*, that is, of violating basic conditions of our human engagement. . . . punishment is *for* . . . a breach of standards that are believed to be of fundamental significance in our human intercourse.[212]

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

> [e]vill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience. . . . [T]he aym of Punishment is not a revenge, but terrour.[213]

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

211. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 35 (1985). C.L. Ten states that punishment is not merely the imposition of unpleasantness on the offender: "the imposition is made to express disapproval or condemnation of the offender's conduct which is a breach of what is regarded as a desirable and obligatory standard of conduct." C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 2 (1987).

212. John Kleinig, *The Hardness of Hard Treatment*, *in* FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH 273, 275 (Andrew Ashworth & Martin Wasik eds., Clarendon Press 1998). For a fuller account of Kleinig's definition of punishment, see JOHN KLEINIG, PUNISHMENT AND DESERT 41-42 (1973) (hereinafter KLEINIG, PUNISHMENT & DESERT).

213. THOMAS HOBBES, LEVIATHAN 353, 355 (Penguin Books 1968) (1651) (emphasis omitted).

Ted Honderich defines punishment as "*an authority's infliction of a penalty*, something involving deprivation or distress, *on an offender*, someone found to have broken a rule, *for an offence*, an act of the kind prohibited by the rule."[214] In the postscript to the same book, written over a decade later, he further defines it as "*that practice whereby a social authority visits penalties on offenders, one of its deliberate aims being to do so*."[215] If the imposition of the punishment by an authority is essential, it follows that most forms of extra-curial punishment are not relevant to sentencing.

Some scholars have defined punishment in terms of pain. Jeremy Bentham simply declared that "all punishment is mischief: all punishment in itself is evil."[216] Ten states that punishment "involves the infliction of some unpleasantness on the offender, or it deprives the offender of something valued."[217] Others have placed a somewhat emotive emphasis on the hurt that punishment seeks to bring about. Punishment has been described as pain delivery,[218] and, similarly, it has been asserted "[t]he intrinsic point of punishment is that it should *hurt* – that it should inflict suffering, hardship or burdens."[219] Nigel Walker is somewhat more expansive regarding the types of evil which can constitute punishment. Walker says that punishment "involves the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases death."[220]

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

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

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214. TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 15 (Penguin Books 1984).

215. *Id.* at 208 (emphasis omitted).

216. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J. H. Burns & H. L. A. Hart eds., 1970) (1789).

217. TEN, *supra* note 211, at 2.

218. NILS CHRISTIE, LIMITS TO PAIN 19 (1981).

219. Anthony Duff, *Punishment, Citizenship and Responsibility*, *in* PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT 17, 18 (Henry Tam ed., 1996).

220. WALKER, *supra* note 198, at 1.

> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[221]

Thus, there are numerous definitions of punishment. Most of them involve concepts that negate the possibility of extra-curial hardships, such as public opprobrium coming within the scope of the concept. Extra-curial hardship—while constituting a deprivation—is not imposed by an authority and does not require blame to be projected at the offender. However, this does not necessarily constitute an insurmountable obstacle to public opprobrium constituting a form of punishment. The accounts of punishment that leave little scope for the operation of extra-curial hardships might be flawed. In addition, there is a logical distinction between the definition of a term at its literal and justificatory levels. But in order to reject orthodox understandings of concepts, it is necessary to set out concrete reasons for doing so—explanation and justification are often closely linked. Thus, we now explore more fully the correct definition of punishment.

From the above accounts of punishments, there appears to be a consensus on two points. First, that punishment involves some type of unpleasantness. Second, that it is on account of actual or perceived wrongdoing.

The requirement that punishment must be imposed by a person of authority is less obvious. Walker takes the view that punishment can be ordered by anyone who is regarded as having the right to do so—such as certain members of a society or family,[222] not merely a formal legal authority—and that punishment stems not only from violation of legal rules, but also extends to infringements of social rules or customs.[223] This seems to accord with general notions regarding punishment and, indeed, there would appear to be many parallels between, for example, family discipline and legal punishment.[224] As Walker points out, punishment need not be by the state. He notes punishment has different names depending on the forum in which it is imposed, adding, "[w]hen imposed by English-speaking courts it is called 'sentencing.' " In the Christian Church it is 'penance.' In schools, colleges, professional organizations, clubs, trade unions, and armed forces its name is 'disciplining' or 'penalizing.' "[225]

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221. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4-5 (1968).

222. WALKER, *supra* note 198, at 2.

223. *Id.*

224. *See also, e.g.*, Morris, *supra* note 206.

225. WALKER, *supra* note 198, at 1; *see also* KLEINIG, PUNISHMENT & DESERT, *supra* note 212, at 17-22.

So in principle, there does not appear to be any reason that the practice of punishment does not extend to other situations (such as those beyond the court setting) where the punisher is in a position of dominance. For instance, where the punisher is a teacher, parent, or employer.

Guilt and blame are also not intrinsic features of punishment. Innocent people who are wrongly convicted and imprisoned are nevertheless punished. Blame is a broader concept than guilt but probably still not essential for punishment to occur. Nearly all criminal behavior engenders a degree of blame, but there are some types of behavior where it is arguably lacking. An example is "mercy killing" (that is, active voluntary euthanasia) which, strictly speaking, is murder but may not attract condemnation.[226] A more modest, and accurate, ingredient of this requirement in the context of punishment is that it is imposed for a wrong.[227]

Therefore, core aspects of punishment are that it consists of a hardship or deprivation: the taking away of something of value[228] for a wrong actually or perceived to have been committed.[229] This would typically be administered by another person, although it is not clear whether that is essential.

The first requirement is incontestable: an experience that benefits an individual or has no impact on them is not punishment. The second requirement is less germane but nevertheless essential. Without this stipulation, any experience that constituted a detriment could be termed a punishment. However, it is not credible to describe things such as illness, failure in an exam, or marriage as a form of punishment.

So in order for a hardship to constitute a form of punishment, it must be a form of deprivation, and there must be some connection between the deprivation and violation of a social norm (or law).

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226. Opinion polls in the United Kingdom, the United States, and Canada show approval rates for euthanasia of 78 percent, 68 percent, and 78 percent, respectively. THE RIGHT OF THE INDIVIDUAL OR THE COMMON GOOD?, VOLUME I: REPORT OF THE INQUIRY BY THE SELECT COMMITTEE ON EUTHANASIA, LEGISLATIVE ASSEMBLY OF THE N. TERRITORY (1995) 59-60, https://parliament.nt.gov.au/__data/assets/pdf_file/0007/367963/vol1.pdf [https://perma.cc/38P9-6HDL]. The results of a comprehensive range of surveys on euthanasia are detailed in Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Euthanasia Laws Bill 1996* (1997), at 81-92. More generally, see MARGARET OTLOWSKI, VOLUNTARY EUTHANASIA AND THE COMMON LAW (1997).

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

228. In this respect, we agree with Kleinig, who points out that punishment involves some deliberate imposition by the punisher on the punished. KLEINIG, PUNISHMENT & DESERT, *supra* note 212, at 22-23.

229. Apart from the qualification relating to the perception of the offense, this definition accords with that advanced by C.L. Ten. *See* C.L. Ten, *Crime and Punishment*, *in* A COMPANION TO ETHICS 366 (Peter Singer ed., 1991).

Public criticism, denunciation, and ridicule can lead to feelings of embarrassment, shame, and disgrace. Scientific evidence suggests that most people desire the approval of others.[230] This stems from the fact that human beings are social creatures. Shame and humiliation can negatively impact the flourishing of individuals and cause considerable levels of psychological distress.[231] Public shaming is therefore arguably a form of hurt and suffering; and this hurt can extend to tangible forms of undesirable conduct. Thus, people who are disgraced can be ostracized by others, and their extent of social and civic engagement and business and career opportunities can be curtailed.

Therefore, it can be argued that media publicity of an offender's crime and punishment constitutes a degree of suffering. This can be used as a basis to ground an argument that a high level of media publicity should be a mitigating factor when it comes to sentencing. If two offenders commit the same offense (say armed robbery) and are identically situated except that the first offender is a high-profile person and the second has no public presence, the first offender—in addition to the criminal sanction—will also bear the extra burden of public humiliation as a result of the public condemnation directed towards him. This condemnation, in addition to the court-imposed criminal sanction, arguably means that the first offender has been punished more than the second offender. The only way to circumvent that outcome (and ensure that the first offender is punished no more harshly than is proportionate with the severity of the offense) is to reduce the harshness of the court sanction by the amount of suffering that the offender has experienced as a result of the media publicity.

However, this position is not without difficulty. Opprobrium can emanate from numerous sources, including family, friends, associates, or the wider community. The level of opprobrium directed towards an offender depends mainly on the offense type in question and the notoriety of the offender and a given offense. While public criticism comes in degrees, it cannot ever be accurately measured or quantified. This matter is noted by Justice McHugh in *Ryan v. The Queen*, who states that giving weight to opprobrium in the sentencing calculus is unsound because "it would seem to place a burden on the sentencing judge which would be nearly impossible to discharge. The opprobrium attaching to offences varies greatly from one offender

230. *See* Daniel K. Campbell-Meiklejohn et al., *How the Opinion of Others Affects Our Valuation of Objects*, 20 CURRENT BIOLOGY 1165 (2010), http://www.cell.com/current-biology/fulltext/S0960-9822(10)00595-6 [https://perma.cc/E2Q8-TSMW].

231. *See* Mark A. Lumley et al., *Pain and Emotion: A Biopsychosocial Review of Recent Research*, 67 J. CLINICAL PSYCHOL. 942, 942-68 (2011); Steven J. Linton & William S. Shaw, *Impact of Psychological Factors in the Experience of Pain*, 91 PHYSICAL THERAPY 700 (2011).

and one offence to another. How a judge could realistically take such a matter into account is not easy to see."[232]

Not only is the level of opprobrium directed toward offenders impossible to quantify, but also, as discussed in greater detail below, so too is the impact of opprobrium on offenders. The vagueness and obscurity associated with measuring blame and its impact on offenders is one reason to doubt the persuasiveness of the position taken in Australia relating to publicity in sentencing. We now discuss this point more extensively in the next section, where we set out an appropriate approach to dealing with media publicity in the sentencing calculus.

IV. THE JURISPRUDENTIALLY-SOUND APPROACH TO PUBLIC OPPROBRIUM IN SENTENCING

The internet has facilitated a massive growth in the proliferation of information. As a result, many offenders find themselves in a position where their crimes are made known to a far greater number of people than at any point in human history. This adds a new dimension to the hardship that breaking the (criminal) law can have on offenders. Public criticism and shame can damage the psyche of offenders. Yet at the same time, it can be argued that this is a natural and foreseeable consequence of committing a crime and living in a society that has a free press and advanced media technologies.

There is no obvious answer to how adverse publicity should be dealt with in the sentencing calculus. Common sense provides support for the position sometimes taken in the United States, where it can operate as an aggravating factor. Criminal matters that attract a large amount of publicity provide an ideal vehicle for the courts to illustrate to the wider community the unsavory sanctions that will be meted out to people who break the law. Many people act in a rational manner and, hence, it is assumed that by imposing harsh sanctions, people will have a strong motivation not to break the law. However, like many common sense assumptions, the intuitive connection between higher penalties and lower crime is debunked by research. Punishing offenders more when their crimes receive a significant amount of media publicity will not reduce the incidence of these crimes in the future. It follows that the objective of general deterrence cannot support imposing harsher penalties on offenders whose crimes generate a high amount of media publicity. As we have seen, the main deterrent to crime is the increased perception in the minds of potential offenders that, if they offend, they will be apprehended

232. *Ryan v The Queen* (2001) 206 CLR 267, ¶ 53 (Austl).

(as opposed to the nature and magnitude of the sanction that they would face if they are prosecuted and convicted).

This leaves open for consideration the validity of the position taken in Australia, where offenders subject to a high level of adverse media publicity can receive a lower penalty. The sentiment behind this approach also has intuitive appeal, given that public shaming can cause offenders considerable distress.

However, there are three potential problems with this approach. First, some people are largely unaffected by the opinions of others. Shame can be a strong emotion that upsets people, but it has no physical presence or force in these types of situations. The views of other people have no tangible presence. The subject of the shame has considerable input into the impact that the negative sentiment will have on him or her. This is unlike hardships that are governed by the laws of biology, physics, or economics. An offender who is given a lethal injection will die; an offender who is sentenced to prison cannot leave the boundaries of the prison, and his or her liberty is curtailed; offenders who receive fines will have their finances depleted by the extent of the fine. All of these consequences are predictable, unchangeable, and certain, which is not so in the case of offenders subjected to adverse media coverage.

The opprobrium stemming from negative media coverage can cause people to cower and retreat from many aspects of society that would typically give their lives meaning and purpose. But, the impact of shame can also be controlled and negated to the extent that people can largely ignore the sentiments of others.[233] People have the capacity to shut out the intangible negative sentiments of the masses. They have no such option when it comes to the infliction of physical or financial hardships.

Second, it is not feasible, even in a crude sense, to calibrate the level of hardship experienced as a result of media publicity. Given this, it is not possible to reduce the sanction that is imposed by a court by the level of hardship stemming from the adverse media publicity. It is even more difficult to attempt to substitute a different sentence by reference to other criminal sanctions in order to determine the discount that should be conferred in high-profile cases. Thus, there is no rational approach that could be applied to reduce a prison term to, say, a term of probation as a result of public opprobrium that was experienced by an offender. The difficulty of substituting different forms of sanctions to accommodate the application of

233. *See* BRENÉ BROWN, DARING GREATLY: HOW THE COURAGE TO BE VULNERABLE TRANSFORMS THE WAY WE LIVE, LOVE, PARENT, AND LEAD 75 (2015) (discussing approaches for reducing the impact of shame).

aggravating or mitigating considerations is not unique to the hurt caused by adverse media exposure. There is no generally accepted methodology for comparing and calibrating the pain caused by different criminal sanctions. However, at least crude measures have been put in place for substituting, for example, fines for prison time.[234] There is not even a starting place for this conceptual inquiry when one of the integers is the amorphous concept of public opprobrium.

Third, if public shame is taken into account during sentencing, it would be an unacceptably fickle exercise because a key aspect of the inquiry would turn on the vagaries and inclinations of journalists and other people who report events and post information on the internet. The unpredictable and unaccountable judgments and actions of people relating to what is newsworthy should not impact important legal outcomes.

Public opprobrium directed at an offender may, of course, result in wider forms of deprivations being experienced by the offender. Most notably, it can result in reducing the offender's employment or career opportunities. If this occurs, there might be an argument for contending that the sanction imposed on the offender should be reduced. It has been previously argued that employment deprivations stemming from criminal guilt and punishment should be a mitigating factor, because the harm directly flowing from offending is measurable (at least in approximate terms) and is part of a systematic response to the offending. But as noted above, these criteria do not exist in relation to public opprobrium.[235]

Further, employment deprivations stemming from offending can occur even when public opprobrium does not. For example, lawyers who commit criminal offenses are often suspended or disqualified from continuing to practice.[236] This is irrespective of whether their misdeeds are reported in the media. Thus, in evaluating whether public opprobrium should be a mitigating sentencing consideration, it is important that the inquiry not be confused with the impact of other forms of harm that are sometimes associated with public shame and humiliation.

Thus, media publicity should have no role in the sentencing calculus. To reform the law in a way that prevents media coverage from impacting sentencing decisions, there is no need for legislative change. The role of media publicity in sentencing has not been ex-

234. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 122 (1976).

235. *See* Mirko Bagaric, *The Disunity of Employment Law and Sentencing*, 68 J. CRIM. L. 329 (2004).

236. *See, e.g.*, *New York Rules of Professional Conduct*, N.Y. ST. B. ASS'N (Jan. 1, 2017), https://www.nysba.org/DownloadAsset.aspx?id=50671 [https://perma.cc/4V4T-L3XP].

pressly addressed in the sentencing statutes throughout the United States. Instead, on occasion it has been the subject of judge-made law. Moreover, the law is not well-developed and does not have an established jurisprudence. As we have seen in many cases involving mass-media publicity, the courts have not even broached the issue of the impact it should, or could, have on the sentence. Given that the legal position is unsettled, fluid, and patchy, courts are not bound by the doctrine of precedent and are jurisprudentially free to adopt the normatively and empirically correct position regarding the role that media publicity should have in sentencing offenders. This means that courts should not use media publicity as an aggravating consideration.

V. CONCLUSION

The emergence of the internet and the growth of social media mean that events in the courts now often receive considerable publicity. The charges laid against people with a public profile and the criminal sanctions imposed on them can readily be brought to the attention of millions of people. Breaching the criminal law generally involves violating important societal norms and, hence, offenders who are the subject of media coverage are generally the subject of criticism, ridicule, and condemnation. This can cause individuals to feel ashamed, humiliated, subjected to disgrace, and it can additionally cause considerable suffering. It can significantly add to the burden associated with the court-imposed punishment. Nonetheless, the role of media publicity in sentencing is obscure; there is no settled approach. Moreover, the issue has not even been subject to careful analysis by courts or legal scholars.

As we have seen, arguably public opprobrium caused by publicity of a crime should be a mitigating factor because the public humiliation is itself arguably a form of punishment. It is suggested that offenders who have been subjected to large-scale public criticism should receive a discounted sentence to ensure that they are not punished more heavily than offenders who have committed a similar crime but whose actions have not attracted any publicity. This, so the argument runs, is necessary to ensure that high-profile offenders are not punished disproportionately to the severity of their crime. This, as discussed above, is the approach generally taken in Australia.

On the other hand, it can be argued that publicity should aggravate the penalty because it provides an opportunity for courts to illustrate the harsh penalties associated with offending and thereby provide a vehicle for achieving the goal of general deterrence. This approach has been adopted by a number of courts in the United

States, where the general view is that imposing harsh penalties in high-profile cases will lead to less crime.

Neither approach is sound. The aggravating approach favored in the United States is flawed because empirical evidence does not support the efficacy of state-imposed sanctions to achieve the goal of general deterrence. Increasing penalties in cases that generate large-scale media attention will not reduce the incidence of crime. The empirical data establishes that the key to reducing crime is to increase not the severity of criminal sanctions but the individuals' perceptions that committing an offense will lead to detection and apprehension. Punishing offenders in high-profile cases does nothing to increase the likelihood that people who transgress the criminal law will be detected and prosecuted for their conduct. Hence, the doctrinal underpinning for treating media publicity as a factor which aggravates the sanction that should be imposed on offenders is misconceived.

The Australian approach is flawed because it is untenable to even approximately measure the hardship caused by opprobrium. Further, opprobrium has no physical presence or force. This is unlike other criminal sanctions, which have a tangible dimension and are never inert in the manner in which they impact offenders. Offenders who are executed always die; offenders who are imprisoned necessarily have their liberty curtailed; and offenders who are fined have their financial resources diminished. There is no such unavoidable burden felt by offenders as the consequence of public opprobrium being directed towards them. Hardships that cannot be measured and whose impact can be negated to naught by resolute offenders do not satisfy the most important requirement of punishment: it must hurt offenders. Given that in some cases public opprobrium causes no hardship to offenders, it cannot be used as a basis for reducing penalty severity.

The jurisprudence relating to the role of publicity in sentencing remains very unsettled. It is so uncertain that when it comes to sentencing offenders in high-profile cases, courts often do not even refer to this consideration. Given the absence of settled legal principle in this area, the reforms that this Article recommends should be implemented by courts expressly recognizing that opprobrium directed at offenders must be disregarded as a sentencing consideration.