DEAKIN LAW LECTURE — 28 AUGUST 2024

"Socially Disadvantaged Accused: How (or Should) Courts Take This into Account?"

A. Introduction

The problem of disparate offenders.

A crime is a crime because, generally, a law of Parliament says so. When stating that particular conduct, accompanied by a certain mental state, is a crime, Parliament specifies a penalty. That penalty will be stated in terms of a sum of money or a length of imprisonment. But that sum and that prison term is not necessarily the penalty to be applied: it is generally only a maximum.

As well, other legislative provisions allow a sentencing court to impose a sanction that does not involve imprisonment. For example, a court might make a community correction order; a drug treatment order; or order the offender to pay compensation to the victim. These can be imposed instead of or together with a fine or imprisonment. A court might even choose not to impose a conviction, despite a finding of guilt. It may, instead, release the offender on a promise to be of good behaviour.

When a court comes to sentence a person, that person has already been found guilty of an offence. No occasion arises to challenge or question guilt.

An offender may:

- be old or young or somewhere in between;
- male or female;
- a seasoned offender or a first-time offender;
- they may have experienced custody, perhaps many times, or never;
- they may have committed a victimless crime (attempt) or one that has ended a life or imposed lifelong suffering on a victim or victims;
- they may have acted impulsively or with great planning;
- they may have acted alone, or together with other offenders;
- they may have pleaded guilty to the charge, or disputed it;
- have expressed great remorse afterwards, or refused to acknowledge any wrongdoing;
- they may have been affected by substance abuse, or been completely clear headed;
- they may have been cognitively impaired or mentally ill, or free of any disability at all;
- they may be a person whose life background has left them with little impulse control, a compromised ability to reason clearly in stressful circumstances, or a

violent reflex to confrontation burnt into them from hard experience (perhaps as a victim themselves of violent or abusive conduct): OR

- they may be well-adjusted, generally well controlled and have had little or no experience of personal violence or abuse.

In various studies, authors have identified somewhere between 200 and 300 factors that judges have acknowledged are relevant when sentencing offenders.

In other words, although offenders may have been found guilty of exactly the same crime, no two individual offenders are likely to be exactly the same, or have committed an offence in exactly the same circumstances or with the same consequences.

What is the correct approach to sentencing these disparate offenders?

Purposes of sentencing

In Victoria, as in all Australian States, we have a system of sentencing that involves a combination of legislative prescription, on the one hand, and judicial discretion on the other. In the *Crimes Act*, Parliament has prescribed maximum penalties, and judges decide an appropriate penalty up to that maximum, perhaps substituting (where permitted) one of the alternative sanctions I mentioned, or using a combination of them.

In the *Sentencing Act* — at least since reforms introduced in1991 — the legislature has set out the '**only purposes'** for which a sentence may be imposed. It has stated the factors that a court MUST, MAY and MUST NOT take into account when sentencing. And it has prohibited courts from imposing a sentence that is more severe than 'necessary to achieve the purpose or purposes' set out in the Act. Originally, the legislative guidance did not extend much beyond setting out these principles.

The 'purposes' in the *Sentencing Act* are as follows: punishment, deterrence (general and specific), rehabilitation, denunciation and community protection. These purposes are underpinned by different theories of punishment which, in turn, lead to different views about the aims of sentencing and the outcomes that should be preferred.

Philosophical underpinnings

Briefly stated, the **utilitarian** theory of punishment holds that punishment is justified because its beneficial effects outweigh its detrimental effects. Proponents of this theory consider that punishment has the potential to reduce crime. So, in this sense, the theory sees punishment as 'forward-looking'. How will the punitive sanction **deter** others in the future, or this offender in particular? How will it promote the **reform** of the offender so that they do not commit offences again? How will it **protect the community** in the future by restricting the offender's capacity to re-offend? This theory has no specific 'moral' dimension that seeks purely to chastise a person because they have done the 'wrong' thing.

The more that you view people as *determined* by their background and upbringing, and having had their freedom to choose how to behave restricted and limited by that background, the more you might be attracted to a utilitarian view. That is because the idea of chastising a person for choosing to do wrong when they are deprived of real choice seems innately unfair.

On the other hand, the **retributive** theory of punishment states that punishment is an appropriate moral response to the voluntary commission of an offence and should be imposed regardless of its effects. There are different explanations for this theory; one is simply that a person who engages in criminal activity deserves to suffer a penalty. A fuller explanation is that when a person freely chooses to gain an advantage over others in the community, regardless of the law and the rights of others, by engaging in criminal activity, that person disrupts the community's order of fairness. The only way to restore that 'fairness' is to impose on the offender a corresponding disadvantage, otherwise they will profit from their wrongdoing.

The retributive theory looks 'backward', to the nature of the conduct itself. It looks to '**punishing'** the offender and, perhaps, **denouncing** his or her conduct as unacceptable. Proponents of this theory emphasise *free will* or *free agency* as a valued characteristic of what it is to be human. Consequently, they are more prepared to hold people accountable for their choices regardless of background.

Our sentencing system features a mixture of both the utilitarian and retributive theories. It lists 'punishment' and 'denunciation' as its purposes. But it also lists deterrence, rehabilitation and community protection. In the cases we will look at, watch out for elements of 'freedom to choose' and 'human dignity', on the one hand, and the limitations on real choice imposed by environmental circumstances, on the other. In other words, watch out for the philosophical undercurrents behind what seem to be straightforward developments in the law.

Parliamentary/judicial dynamic

Returning to the description of the sentencing process, the Victorian model allows for the sentencing judge to *synthesise* all of the factors considered to be relevant, having regard to what Parliament has said must, may or may not be considered. Then they are to fashion a sentence that is designed to achieve the purposes that Parliament has listed.

This method replicates a longstanding and well-developed common law approach to sentencing that also identified the purposes and the synthesising technique that I have just described.

In ***R v Williscroft***[1] in 1975, Justices Adam and Crockett described every sentence as the product of a sentencing judge's **'instinctive synthesis'** of all the various aspects involved in the punitive process.

That phrase, 'instinctive synthesis' or sometimes 'intuitive synthesis', describes the judicial contribution to the sentencing process. Parliament lays out the guidelines and boundaries, and judges synthesise a large range of factors, using their own instinct or intuition, to arrive at the sentence that they consider just and appropriate in the circumstances of the particular case. This might be described as the legislative/judicial dynamic: the interplay between legislative prescription and judicial discretion.

Over the past 35 years in Victoria — from early 1990 until now — the legislative/judicial dynamic has progressively shifted in favour of legislative prescription as Parliament has increasingly dictated how a judge may treat a particular sentencing consideration. This is evident from the way in which the *Sentencing Act* has grown in size.

But this is not to say that the realm of judicial discretion has been ousted. As this lecture will display, judges continue to play a vital role in identifying, fleshing out and placing boundaries around factors that are to be taken into account in the sentencing process. Their contributions inevitably throw up questions about the purpose and effectiveness of punishment. In the same way that they have always done, these considerations, in turn, reach back to the contemplation about the motivation for human behaviour and thus the very question of what it is to be human.

B. The socially disadvantaged offender

Legislative guidelines

These thoughts bring me to the topic of this lecture: how (and should) courts take the social disadvantage of an accused into account. Even though the topic uses the word 'accused', I am going to take that to mean 'offender': that is, a person who has been found guilty of an offence, rather than a person merely accused of an offence.

How has Parliament said that the courts must take into account the social disadvantage of an offender in the course of the sentencing process?

In stating that one of the purposes of sentencing is to 'punish the offender', the *Sentencing Act* adds this important rider, 'to an extent and in a manner which is **just in all the circumstances**'. The Act also provides that a court *must* have regard to: 'the offender's culpability and degree of responsibility for the offence' and 'the presence of any mitigating factor concerning the offender'.

In other words, Parliament has not said anything specifically about taking into account the social disadvantage of an offender. Apart from directing attention to 'all the

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[1] *R v Williscroft* [1975] VR 292.

circumstances', the offender's 'culpability' and the possibility of any 'mitigating factor concerning the offender', Parliament has left it to the courts to determine if and how a background of social disadvantage might be relevant in the sentencing process.

Judge-developed consideration

Pre-Bugmy

The recent story of courts in Australia considering the impact of an offender's background of social deprivation emerges from the sentencing of Indigenous Australians.

In 1982, in ***Neal***,[2] the High Court considered an appeal against a sentence imposed by the Court of Appeal in Queensland on an Indigenous man. He had been living on an Indigenous reserve in Queensland. He had assaulted the non-Indigenous manager of a store on the reserve. He had been sentenced, initially to 2 months imprisonment, increased to 6 months by the Court of Appeal.

The question before the High Court was the relevance or otherwise of the emotional stress suffered by the offender arising from the 'paternalistic system' of life on the reserve. Justice Brennan emphasised that the same sentencing principles are to be applied irrespective of the identity of a particular offender or his membership of an ethnic or other group. However, that was not to say that facts which exist *only* because of the offender's membership of an ethnic or other group should not be taken into account. They should be. The fact that the incident was to be *accounted for* by the problems of life on the reserve was a material factor for consideration. It was material to the assessment of the '*proper retribution*', and may be relevant to *deterrence* for those likely to be subjected to similar emotional stress. The High Court allowed the appeal against the increase of sentence.

Building upon Justice Brennan's judgment in ***Neal***, Justice Wood as a trial judge in New South Wales, gave an influential judgment in ***Fernando***[3] in 1992. He was sentencing an Indigenous man who had pleaded guilty to malicious wounding by attacking his *de facto* partner with a knife. The offender was heavily intoxicated at the time and claimed to have no recollection of the incident. He had a long history of alcohol abuse, a relatively extensive criminal record, and was described as semi-educated. His parents and siblings had abused alcohol. He had been sent away to an isolated property by welfare authorities at the age of 14. He escaped at the age of 16 and began drinking spirits and wine. He was said to be of low/average intelligence, with possible signs of brain damage consistent with alcohol abuse.

Justice Wood spelt out what he considered to be the relevant principles for sentencing Indigenous offenders from disadvantaged communities. He emphasised, as

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2 *Neal v The Queen* (1982) 149 CLR 305.

3 *R v Fernando* (1992) 76 A Crim R 58.

Justice Brennan had done in ***Neal***, that the same sentencing principles are to be applied in every case irrespective of the identity of the offender. Aboriginality did not of itself mitigate punishment, but it may explain or throw light upon a particular offence. Whilst drunkenness is not normally an excuse or mitigating factor, Justice Wood said that where the abuse of alcohol by a person facing sentence **reflects the socio-economic circumstances and environment in which they have grown up**, that can and should be taken into account as a mitigating factor.

In 2010, in a case called ***Kennedy***,[4] the New South Wales Court of Criminal Appeal reduced a sentence that had been imposed upon a 23-year-old Indigenous man convicted of a series of 'break and enter' type offences. Although he was not from a reserve or a remote Aboriginal community, he had a severely impoverished upbringing.

The court considered the previous cases of ***Neal*** and ***Fernando***. In a paragraph later quoted by the High Court in the seminal decision of ***Bugmy***, Simpson J, with whom the other judges agreed, said:

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

We can see here the beginnings of the extension of a mitigatory principle — first developed with respect to one particularly deprived segment of the community — to one of more universal application.

Bugmy and Munda

Next came two important High Court decisions handed down on the same day in 2013. The first has received great attention, ***Bugmy***,[5] and the other, ***Munda***,[6] has received somewhat less attention.

Bugmy concerned a sentence of a 29 year old Aboriginal man who had thrown a billiard ball at a correctional officer, causing blindness. He pleaded guilty to causing grievous bodily harm. The Court of Criminal Appeal increased his initial sentence after an appeal by the Crown. Mr Bugmy appeal to the High Court, which allowed the appeal, sending the matter back to the Court of Criminal Appeal to reconsider.

Mr Bugmy had little formal education, was unable to read or write and started drinking alcohol and taking prohibited drugs when he was 13. He reported having witnessed his father stabbing his mother 15 times. He and his siblings all had records for violence. He had a history of offending from age 12 and was regularly detained in juvenile detention

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4 *Kennedy v The Queen* [2010] NSWCCA 260.
5 *Bugmy v The Queen* (2013) 249 CLR 571.
6 *Munda v State of Western Australia* (2013) 249 CLR 600.

centres. At 18 he was transferred to an adult prison. He had a long record of convictions including for offences of violence. He spent much of his adult life in prison with repeated suicide attempts. He also had a history of head injury and of auditory hallucinations. He and his partner were both alcoholics.

In ***Bugmy***, two judgments were given in the High Court. Six judges formed what we call "the plurality", with Gageler J giving a separate judgment.

The plurality reiterated that the principles derived from *Neal* and *Fernando* were of general application — that is, that social disadvantage is a relevant consideration in the sentencing of both non-Indigenous and Indigenous offenders.

The specific issue that brought the matter to the High Court arose from a statement made in the appeal court below. That court had said that, with **the passage of time**, the extent to which the social deprivation in a person's youth and background can be taken into account in sentencing **must diminish**. In the High Court, the plurality said that the effects of profound childhood social disadvantage do *not* diminish over time and are always to be given *full weight* in the sentencing exercise. They said:

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

Even so, the plurality rejected a submission made on behalf of Mr Bugmy that courts should take judicial notice of the **systemic** background of deprivation of Aboriginal offenders. The court found that that submission was 'antithetical to individualised justice'.

Importantly for present purposes, the plurality spoke of the relationship between social disadvantage and moral culpability:

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

But, there was this important qualification:

> *…Giving weight to the **conflicting purposes of punishment** is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may **explain** the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced.*
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> …
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> *However, the **inability to control the violent response** to frustration may increase the **importance of protecting the community** from the offender.*

This observation is important. Often, the mitigatory effect of taking into account social disadvantage to reduce both moral culpability and the weight to be given to deterring others, is matched or outweighed by the need to give effect to another sentencing purpose that tends to increasing the sentence: that is, the need to protect the community.

There are a couple of other things I wish to say about the High Court's judgments in ***Bugmy***.

First, courts have returned to the plurality's statement that the offender's circumstances '**may'** mitigate the sentence by reducing moral culpability; and that an offender's childhood exposure to violence and alcohol abuse '**may'** explain their recourse to violence. Later cases have grappled with whether this principle requires clear proof of a causal connection between childhood deprivation and engagement in criminality, or whether the background of social disadvantage may be taken into account in some way even without proof of such causal connection.

Secondly, I mentioned that Justice Gageler gave a separate judgment. He was not prepared to accept either that the effect of childhood deprivation necessarily does, or does not, diminish with the passage of time. His Honour preferred to say that the weight to be given to the effects of social deprivation in an offender's youth is in each case for individual assessment.

This may be seen as an innocuous enough point of distinction. But it's useful to tease this out a little. The plurality was of the view that profound social deprivation does not diminish as a mitigating factor with the passage of time. That is to say, the reason why the moral culpability of the offender *remains* lowered is because social deprivation is **deemed to persistently compromise their ability to exercise self-control** over antisocial impulses. In terms of the debate between determinism and free agency, this view may be analysed as tending toward the more deterministic end of the spectrum. Justice Gageler's view might be interpreted as staying somewhat more towards the middle.

Let us now turn quickly to **Munda**. In this case, the High Court rejected Mr Munda's appeal against the increased sentence the Court of Appeal in Western Australia had given him after he pleaded guilty to the manslaughter of his *de facto* spouse. It was a dreadful, drunken assault. Mr Munda was described as a 'traditional Aboriginal man'. Without going into the detail, he too had a childhood background associated with exposure to alcohol abuse and violence.

The judgment was given by all seven members of the court, including Gageler J. Mr Munda argued that he deserved a mitigating allowance because of the disadvantage generally associated with the social and economic problems that commonly attend Aboriginal communities. The court rejected any 'systemic' approach and laid some emphasis on the notion of 'human dignity', saying that…

> …*To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of* ***human dignity***.

Post Bugmy and Munda

In 2018, a matter called ***Perkins***[7] came before the New South Wales Court of Criminal Appeal. An 18-year-old man had pleaded guilty to murder. There was no suggestion he was Indigenous. While heavily intoxicated he stabbed a friend's boyfriend with a kitchen knife at least six times. After being sentenced he appealed on the ground that the judge had failed to take into account, in mitigation, his childhood disadvantage. **The appeal was dismissed**. **Why?**

Perkins never met his father but had lived with his mother. In the first nine years of life, his mother's partner subjected him and his mother to family violence. The relationship between his mother and her partner was marred by alcohol abuse.

Perkins's mother, however, separated from that partner, and became involved with a new partner who was stable and supportive of him. Perkins performed reasonably well at school, had an extensive social circle, completed a TAFE course and was about to begin university at the time of offending. He experienced cancer at 16, as a result of which he developed depression and distress and took up substance abuse as a coping mechanism. He had had no contact with the criminal justice system prior to the offence.

Pausing here, you will have immediately noticed a difference in the severity of the disadvantage in Perkins' background compared to the stories of those we have heard about so far, particularly in *Bugmy*. In a sense, this illustrates several problems that the courts encounter. What degree of deprivation is required before the principles that emerged from *Bugmy* are engaged? How does one rate or rank the level of deprivation a

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7 *Perkins v The Queen* [2018] NSWCCA 62.

person has experienced in life? And how does one assess the impact of that experience on their ability to exercise self-control and, in turn, the degree to which they should be blameworthy for their 'choice' to engage in criminal offending?

Returning to the case, the argument in favour of Perkins was that inferences could be drawn from the violence inflicted upon him and his mother in the first nine years of his life because, as stated in *Bugmy*, the effects of such experience in formative years do not diminish with time. Full weight, he argued, should have been given in the exercise of the sentencing discretion. The question the court grappled with was whether a causal connection between early childhood deprivation and the offence in question must be proven by evidence. Different members of the bench gave different accounts of what the High Court said in ***Bugmy***.

One said that some evidence *had* to be given to show that the deprived upbringing could explain recourse to violence when frustrated in order to gain some reduction in moral culpability; another said that the High Court had *not given any clear answer* whether a causal link must be established; according to the third, the High Court *had not said* that social deprivation would only be a mitigating factor if a causal link was established.

That brings me to the last case I want to discuss in detail, the case of ***Herrmann***[8] in Victoria. Herrmann was heard by a 5 judge bench of the Victorian Court of Appeal in 2021. It concerned a 20 year old Aboriginal man who was convicted of rape and murder following a brutal random attack on a young woman. He was sentenced to 36 years in prison with a non-parole period of 30 years. The Crown appealed on the ground that the penalty was manifestly **inadequate**. The Court dismissed the appeal.

Herrmann is particularly significant for the Court's comments on:

1. the relationship between social disadvantage and moral culpability; and
2. whether and to what extent a causal 'nexus' must be proven between the offending and the offender's background of disadvantage.

Herrmann had prior convictions, but no history of violence. He was born to 19 year old parents. His mother was Aboriginal and his maternal grandparents were from the Cape York Peninsula in Far North Queensland. His mother experienced significant alcohol and substance abuse issues. Herrmann spent his infancy in an environment described by a forensic psychiatrist as 'unsafe, unpredictable and unresponsive to his basic needs'. His early upbringing with his biological parents was 'bereft of normal levels of nurture, of ensuring his safety, of making him feel secure, and of emotional reciprocity'. Herrmann experienced neglect and intermittent abandonment by his mother throughout childhood. She died when he was aged 13. His father completely abandoned him. At the time of offence, he was homeless and unemployed; spent most

[8] *DPP (Vic) v Herrmann* (2021) 290 A Crim R 110.

of his time with peers who used illicit substances; and was addicted to methamphetamine.

The original sentencing judge found that Herrmann had suffered from 'profound childhood deprivation and trauma'. She considered that Herrmann's moral culpability for his offending was reduced for two 'closely related factors': first, his profound childhood deprivation and trauma, and secondly a personality disorder and psychiatric condition which impaired his mental functioning.

Again I pause. There is a whole other body of jurisprudence related to the impact of an offender's mental impairment on sentencing. The leading case, ***Verdins***,[9] is among the most cited cases in Australia, and judges frequently attempt to dissect the complex role of mental impairment in explaining a particular offence.

Concerning the relationship between social disadvantage and moral culpability, the Court in *Herrmann* said:

> *In assessing an offender's "moral culpability", the sentencing court is making a **moral judgment** on behalf of the community about the **degree of blameworthiness** to be attached to the offender for the offending conduct. … To the extent that offending conduct can be seen to reflect the operation of factors which are **beyond the offender's control**, the harshness of the **moral judgment is likely to be moderated**.*
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> *It is the mark of a humane society that the **moral judgment** expressed through sentencing should take account of the lifelong damage that may result from exposure to violence or abuse or parental neglect in an offender's formative years.*

A specific causal nexus between Herrmann's childhood deprivation and his offending was found to exist this way: (1) Herrmann's severe personality disorder was the product of his childhood deprivation; and (2) his impaired mental functioning associated with that disorder was causally connected to the offending. So it was a two-step connection, with impaired mental functioning as a sort of bridge between social deprivation and the offending behaviour.

But even if a causal nexus was not established, *Herrmann* construed *Bugmy* as recognising an alternative approach. On the alternative approach, a causal nexus between the deprivation and offending did *not* have to be established. Deprivation might be relevant, the court said, in a "general way" to reduce moral culpability, the need for deterrence (general or specific) or bear upon the offender's prospects of rehabilitation.

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9 *R v Verdins* (2007) 16 VR 269.

Without going to them, there is now a plethora of cases coming to the courts in which offenders maintain that their childhood background of social disadvantage, often manifested by exposure to longstanding physical or sexual abuse, or drug and alcohol use, or both, has left a mark, that does not diminish with time. That background, it is argued, has compromised their ability to make good choices when confronted with stress, or even temptation.

So, the answer to the question 'how is social disadvantage taken into account in sentencing' is *broadly* this: courts give full weight to an offender's history of profound social disadvantage, but that consideration may lead in different directions in the sentencing synthesis. Courts are still trying to work out the details.

C. The Practical application of the principles

Monash University study, 'Bugmy in the Courtroom', July 2023[10]

In 2023, Monash University conducted interviews with 15 criminal law barristers and 8 County Court judges with experience in criminal law. The idea was to explore the way in which the ***Bugmy*** principles are applied in practice, and the issues that have arisen in doing so. Interestingly, a review of a sub-set of 25% of the sentencing decisions in the County Court for 2022 showed that advocates for offenders argued the application of the *Bugmy* principles in 85% of cases. Whether or not that is a reliable percentage, there is no doubt that reliance upon the client's socially deprived background is now a very significant element in sentencing advocacy.

Among the practical problems that were identified by barristers and judges were these:

1. Is there some **threshold** of 'profound' deprivation that needs to be crossed before the *Bugmy* principles apply?
2. How are the **'general'** and **'specific'** approaches from *Bugmy*, as identified in *Herrmann*, to be properly understood and applied?
3. What **evidence** is necessary to establish the causal nexus for the specific approach?
4. How do you **measure** different 'grades' of deprivation in sentencing offenders?
5. What **qualifies** an 'expert' to give evidence in support of a *Bugmy* plea?

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[10] D McKenzie and H Forbes-Mewett, *Bugmy in the Courtroom: Ensuring Fair and Just Outcomes for 'Profoundly Deprived' Offenders: Preliminary Findings* (July 2023, Monash University).

Deprivation compared to whom?

In 'Brains, biology and socio-economic disadvantage in sentencing',[11] published in 2008, the authors (a lawyer/neuropsychologist and a neurologist/geriatrician) reported on research about the 'risk factors' for criminal behaviour. Identifying risk was a proxy for identifying 'causes'. The more **risk factors**, the greater the risk. They listed:

- Being male
- Being young
- Having low socio-economic status
- Being unemployed
- Living in poverty
- Abusing drugs and alcohol
- Having inadequate housing
- lacking education
- raised by a single-parent
- having had low levels of parental supervision
- being neglected and abused as a child.

According to the authors, recent science establishes that the frontal lobes are the last parts of a human brain to develop as a child grows up. They are the parts responsible for judgment, decision-making and impulse control. Child neglect and abuse is considered — so the authors say — to generally inhibit neuropsychological development.

In 1853, a book was published in England called 'Crime: Its Amount, Causes and Remedies'.[12] It was written by Frederic Hill, a barrister who had the title of 'Inspector of Prisons'. It is a fascinating book. I am mostly interested in his identification of the causes of crime, among which he lists:

- bad training and ignorance:
    - being orphaned: more generally, suffering parental neglect and inadequate parental responsibility;
    - having poor education skills;

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11 H Bennett and GA Broe, 'Brains, biology, and socio-economic disadvantage in sentencing: Implications for the politics of moral culpability' (2008) 32 *Criminal Law Journal* 167.

12 F Hill, *Crime: Its Amount, Causes and Remedies* (John Murray, 1853).

    - having poor employment prospects;
- drunkenness;
- poverty.

I mention this book mainly to demonstrate that the issues of crime, its causes, and its remedies are of very long standing. I also mention it to demonstrate the fundamental and long-recognised association between social disadvantage and crime.

One of the conundrums that emerges from this recognition is that **if**:

1. a person who has endured a disadvantaged social background is to be viewed as less morally culpable than a person who has *not had that background*, and
2. reduction in moral culpability is put forward as justifying a less severe sentence than would be given to a person without that background,

..how does the relativity-analysis work where the general cohort of offenders predominantly *share* disadvantaged backgrounds?

As I mentioned, 85% of the pleas conducted in a group of cases in the County Court raised *Bugmy* principles. And the profile of offenders for at least 170 years seem to demonstrate the correlation between disadvantaged backgrounds and offending. No wonder judges ask, what is the level of deprivation I am supposed to take notice of?

D. Summary and Conclusion

'Social disadvantage' is the product of emotional, psychological, material and physical deprivation, extending over a person's formative years. This sort of deprivation is thought to have a long-lasting impact on a person's capacity to control their behaviour. It is now one of the myriad factors that judges take into account when sentencing offenders.

Its evolution as a sentencing consideration stands as a good example of a judicially-developed principle, rather than one imposed by the legislature. It has been developed within the 'gaps' of specific legislative guidelines. In this way it illustrates the interplay between legislative prescription and judicial discretion.

Taking 'social disadvantage' into account might impact one or more of the required purposes of sentencing:

- It might moderate the weight given to **punishment** by lessening the offender's moral culpability;
- It might reduce the appropriateness of making this offender an example to **deter** others from offending in the same way because of the perception that this offender had less 'freedom to choose' how to behave than others might have;

- it might affect the prospect that the offender could realistically be **reformed**, and if they can, the means by which that reformation should best be approached;
- it might so heighten the danger to the community if the offender remains at large, that the need to 'incapacitate' the offender in some way assumes greater importance for the **protection of the community**, ie potential victims.

As a sentencing factor, social disadvantage conflicts to some degree with the idea that human beings are 'free agents' and are fully accountable for their conduct. It is more consistent with the idea that human beings are the product of their environments such that their freedom to choose how to behave is meaningfully constrained by their upbringing and background. Noticing this allows us to ponder what *we* each consider to be the hallmarks of human nature, and how that understanding should be reflected in the approach to dealing with criminal offenders.

A number of problems arise when applying this sentencing consideration in practice, in particular:

- whether and if so how some sort of causal connection is to be established;
- the type and quality of evidence that can be called to try to establish it;
- the problem of 'relativity', when a significant proportion of offenders come from a low socio-economic background and have experienced difficult upbringings; and
- the sheer difficulty of trying to assess human motivation.

I will conclude with these slightly more personal views:

1. At the coal face of sentencing, by adopting either a rigidly 'free agent' or 'deterministic' analysis I think we risk reaching an unsatisfactory result. Applied rigidly in particular situations, one approach will deny human dignity and the other will deny human reality.

2. Our present system of sentencing is aimed at achieving a mixed set of purposes that reflect a mixture of those philosophical underpinnings. Together with judicial discretion, the system allows 'human beings' to apply a very human process to each individual set of circumstances.

3. Ultimately, our criminal sentencing philosophy aims to achieve 'individualised justice'. To get there, we have built into our sentencing system the sentencing officer's 'instinctive synthesis' of a matrix of factors thought to be relevant.

4. Even though the synthesis is said to be 'instinctive', judges have to explain how and why different factors, including social deprivation, are to be taken into account in a given case. They should explain how they see factors affecting

specific sentencing purposes. If they do that, sufficient transparency should be achieved and the danger of arbitrariness minimised.