THREE THINGS THAT A BASELINE STUDY SHOWS DON'T CAUSE INDIGENOUS OVER-IMPRISONMENT; THREE THINGS THAT MIGHT BUT SHOULDN'T AND THREE REFORMS THAT WILL REDUCE INDIGENOUS OVER-IMPRISONMENT

Abstract: *Indigenous offenders are grossly over-represented in Australian prisons. It is a problem that has persisted for many years and in fact has worsened over the past few decades. Few pragmatic reforms to the sentencing system have been suggested or implemented. To some extent, this is because the reasons for the problem are not clear. Previous controlled studies analysing the reasons for the high rate of Indigenous incarceration have reached different conclusions regarding the reasons for sentencing disparity in this area. I argue that this is because the studies have not used standardised variables and, moreover, the number and types of controls that have been used are not suitable. In light of this, it is illuminating to interrogate the raw data. This article sets out the findings of a wide-ranging baseline study regarding the impact of Indigeneity in sentencing determinations. Baseline studies are often criticised because they are too crude. However, in a discipline such as sentencing where there are too many variables to accurately control, I suggest that the baseline study in this paper is revealing. The study uses the most current data available and has a considerably larger sample size than other studies. The results of the analysis suggest that the key point in the sentencing calculus, where Indigenous offenders are disadvantaged comparative to other offenders, is the decision whether or not to impose a term of imprisonment. They are not disadvantaged when it comes to setting the length of jail terms. The findings that I make are supportive of specific reforms that should be undertaken to reduce Indigenous imprisonment rates. The key recommendations are (i) reducing the weight accorded to prior convictions; (ii) providing a numerical discount when sentencing Indigenous offenders; and (iii) entrenching and taking seriously the parsimony principle. African Americans are also grossly over-represented in prisons in the United States, by a ratio of more than six to one. The solutions offered to reducing Indigenous incarceration in Australia are equally apposite to the United States sentencing system.*

1 INTRODUCTION

Indigenous Australians are over-represented in Australian prisons by a factor of 15.8:1 when compared to the rest of the Australian community.[1] The Law Council of

[1] *See* AUSTRALIAN BUREAU OF STAT, 4517.0 – PRISONERS IN AUSTRALIA, 2014 tbl.19 (2014), http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02014?OpenDocument.

Australia has described Indigenous incarceration rates as being at "catastrophic levels."[2] Due to the extreme nature of these disparities Australia has been harshly condemned by the international human rights community.[3]

The problem of indigenous over-imprisonment is not new to Australia. In fact, it has plagued the Australian criminal justice system for several decades,[4] and has been subject to a considerable degree of analysis.[5] Among such studies, the most systematic and extensive analysis was one undertaken as part of the *Royal Commission into Aboriginal Deaths in Custody* which was completed 25 years ago.[6]

The Royal Commission made 339 recommendations, including recommendation 92 which provides that, in respect to Indigenous offenders, a sentence of imprisonment should be a sentence of last resort.[7] This recommendation does not seem to have been heeded. Since the recommendation was made, the rate of Indigenous over-representation in prisons has nearly doubled.[8] Despite this, there has been a shortage of concrete reform proposals to the *sentencing* system.[9] In order to curtail Indigenous prisoner numbers, the starting point is to

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[2] LAW COUNCIL OF AUSTRALIA, INQUIRY INTO ABORIGINAL AND TORRES STRAIT ISLANDER EXPERIENCES OF LAW ENFORCEMENT AND JUSTICE SERVICES 4 (2015), https://www.lawcouncil.asn.au/lawcouncil/images/2994_-S_-_Submission_ATSI_experience_of_law_enforcement_and_justice_services.pdf.

[3] *See* Press Release, Comm. on the Elimination of Racial Discrimination, International Convention on the Elimination of All Forms of Racial Discrimination (Mar. 19, 1999), http://www.un.org/press/en/1999/19990319.rd893.html (concerning disproportionately high incarceration of indigenous Australians); U.N. COMM. AGAINST TORTURE, CONCLUDING OBSERVATIONS ON THE COMBINED FOURTH AND FIFTH PERIODIC REPORTS OF AUSTRALIA 4 (2014), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/CAT_C_AUS_CO_4-5_18888_E.pdf (criticizing mandatory sentencing laws that disproportionately impact Indigenous offenders); *see also Australia Must Back Indigenous Expertise*, AMNESTY INT'L (June 2, 2015, 1:30 PM), http://www.amnesty.org.au/news/comments/37303/ (addressing crisis of indigenous children's incarceration).

[4] LAW COUNCIL OF AUSTRALIA, *supra* note 2.

[5] *See generally* DON WEATHERBURN, ARRESTING INCARCERATION: PATHWAYS OUT OF INDIGENOUS IMPRISONMENT (2014); Thalia Anthony, *Is There Justice in Sentencing Indigenous Offenders?*, 35 UNSW L.J. 563 (2012).

[6] The Royal Commission into Aboriginal Deaths in Custody (the "RCIADIC") was established in 1987 to investigate the deaths of 99 Indigenous persons who had died in police and prison custody. The RCIADIC publication (FEDERAL GOVERNMENT, ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY (1991)), found that Indigenous persons did not die at a greater rate in custody than non-Indigenous persons; rather, it was due to the vastly disproportionate over-representation of Indigenous persons in police and prison custody. The RCIADIC produced a final report with 339 recommendations that were focused at two levels. *See* ROYAL COMM'N INTO ABORIGINAL DEATHS IN CUSTODY, RECOMMENDATIONS (1991) [hereinafter RECOMMENDATIONS], http://www.alrm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf. The first level's recommendations there were directed towards the operation of the criminal justice system. Those recommendations were further divided into separate categories: firstly, those aimed at reducing the contact of Indigenous persons with the criminal justice system by means of diversion; and secondly, those recommendations directed towards ensuring that if an Indigenous person became involved in the criminal justice system, there were proper procedures and protocols to protect him or her from harm while in custody.

[7] *See* RECOMMENDATIONS, *supra* note 6, at 10. This recommendation has been criticised for being too vague and effectively going no further than restating the common law sentencing principle of parsimony. *See* CHRIS CUNNEEN & DAVID MCDONALD, KEEPING ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE OUT OF CUSTODY 12 (1997).

[8] At the time of the Royal Commission, the Indigenous incarceration rate was seven times that of the broader population. LAW COUNCIL OF AUSTRALIA, *supra* note 2.

[9] Certainly, there has been a range of other recommendations to reduce Indigenous incarceration, such as reducing the over-policing of Indigenous communities; improving the social and economic disadvantage experienced by many Indigenous offenders; and improving access to lawyers and interpreters and expanding the

better understand any relevant patterns of Indigenous offending and trends regarding how courts deal with Indigenous offenders.

In this article, I have two goals. The first is to provide insight into why Indigenous offenders are grossly over-represented in Australian prisons. The second is to propose several reforms that are likely to, at least partially, address the problem.

This article suggests, first, that Indigenous over-imprisonment is not caused by more serious offences being committed by Indigenous offenders. The opposite seems to be true. The data suggest that Indigenous offenders typically commit less serious offences than non-Indigenous offenders. Second, the evidence suggests that the incarceration problem cannot be explained by the fact that Indigenous offenders commit a higher number of offences than the rest of the community. Third, the data show Indigenous offenders are not over-represented in prison because of considerations relating to sentence length. In fact, the prison sentences of Indigenous offenders are normally shorter than those of non-Indigenous offenders.

It emerges that the main reason for the over-representation of Indigenous offenders in prison relates to the "in/out of prison" decision (the decision whether or not an offender should be sentenced to imprisonment or dealt with by way of another type of sanction, such as a fine) made by courts when considering the appropriate sentence. The data show that Indigenous offenders are more than twice as likely to be sentenced to prison than non-Indigenous offenders each time they appear in court. The determination regarding sentence length is not the cardinal consideration.

There are at least three predictable reasons that might result in this in/out decision disadvantaging Indigenous offenders. The first is the weight placed on prior convictions, since Indigenous offenders generally have more prior convictions than other offenders.[10] The second is that Australian sentencers currently consider several aggravating and mitigating sentencing factors that might perpetuate existing disadvantages to Indigenous peoples. For example, the fact that a greater portion of Indigenous offenders are homeless and unemployed may lead courts to negatively view their prospects of rehabilitation. A related possibility is that some sentencing principles, such as the principle of totality, are being applied incorrectly so that multiple offending (which occurs more frequently in the case of Indigenous offenders)[11] is being treated more punitively than is stipulated by the sentencing principle. These considerations might explain some of the existing disparity as a factual reality, but this would be inconsistent with established sentencing principles. The third possible reason for the over-incarceration of Indigenous offenders is sub-conscious bias against them.

In light of the findings in this article, I argue that part of the solution to lowering Indigenous prison numbers requires legislatures to clarify and preferably reduce the weight accorded to prior reconvictions in the sentencing calculus.[12] Legislatures should also confer a

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operation of Koori courts. *See generally* LAW COUNCIL OF AUSTRALIA, *supra* note 2; WEATHERBURN, *supra* note 5. However, most of the recommendations are not focused on changes to the sentencing system, which is the sharp end of the cause of the problem.

[10] *See* discussion *infra* Parts IV.A, VI.A.

[11] *See* discussion *infra* Part V.D.

[12] The exception to this is serious sexual and violent offences. The reason for this is discussed further in Part VII of this article.

concrete sentencing discount in relation to Indigenous offenders who commit certain crimes. Finally, the parsimony principle[13] should be given more weight.

The key empirical findings in this paper stem from a baseline study into the patterns of Indigenous offending and trends in the sentencing of Indigenous offenders. The study compares different (but linked) data from the Australian Bureau of Statistics sources and is the most wide-ranging baseline study of Indigenous offending patterns in Australia ever undertaken. It casts doubt over several possible tenable explanations regarding the Indigenous incarceration crisis, and logically entails several partial but still concrete solutions. At the same time, the study provides a firmer indication of where future research should be directed.

Baseline studies are often considered irrelevant because they do not control for certain important variables. Indeed, the handful of studies that have been undertaken to explore the relevance of Indigeneity in sentencing are deliberately not baseline in nature and instead have attempted to control for various well-known sentencing considerations, such as gender, age, prior convictions and the number of offences. However, I argue that the utility of these non-baseline studies is limited. In the sentencing realm, there are more than 200 aggravating and mitigating considerations,[14] and unless most of them are taken into account, the results are necessarily compromised, inconclusive, and potentially misleading because of the veneer of statistical rigour of the studies.[15]

The controlled studies are additionally insufficient because they do not standardise the control variables. It is, perhaps, for this reason that they reach different conclusions; some studies indicate racial disparity in sentencing; others do not.[16] The conclusions are directed by the controls that are used. Given that these controls differ from study to study, it is unsurprising that different conclusions will be reached.

Furthermore, the design of all of the controlled studies is deficient in that different sentencing principles sometimes apply in relation to different offence types. For example, general deterrence has considerable weight in relation to drug offences.[17] All purportedly controlled studies to date pay no regard to such differences in sentencing methodology.

Conversely, there are two essential advantages of a primarily baseline study: (1) the large sample size and (2) the most recent data can be interrogated. The very large sample size of the baseline study often serves as a de facto control for many potentially relevant variables. Likewise, the limitations of the baseline study, discussed above, are manifest and,

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[13] The parsimony principle states that, in sentencing offenders, courts should impose the least harsh sanction that is necessary to achieve the objectives of sentencing. This principle is discussed further in Part VII of this article.
[14] JOANNA SHAPLAND, BETWEEN CONVICTION AND SENTENCE: THE PROCESS OF MITIGATION 43 (1981) (identifies 229 factors); s*ee also* LA TROBE UNIVERSITY, GUILTY YOUR WORSHIP: A STUDY OF VICTORIA'S MAGISTRATES' COURTS (1980) (identifies 292 relevant factors).
[15] Most of the studies in this area expressly note limitations of the research, but these limitations are not extensive enough to accommodate the shortcomings highlighted in Part IV of this article.
[16] *See infra* Part IV.
[17] *See generally Tulloh v The Queen* [2004] WASCA 169; *Aconi v The Queen* [2001] WASCA 2112; *R v Nguyen* [2010] NSWCCA 238; *Barbaro v The Queen* [2012] VSCA 288.

thereby, reduce the tendency to overstate the degree of certainty that should be accorded to the findings.[18]

Finally, it is important to note that the analysis in this article mainly focuses on the over-representation of Indigenous offenders in Australian prisons. Indigenous Australians are the most disadvantaged group in the Australian community.[19] The United States has a similar incarceration crisis regarding its most socially and economically disadvantaged group: African Americans, who are imprisoned at the rate six times that of white non-Hispanic males.[20] While the key focus in this article is on Indigenous over-incarceration, the solutions are equally applicable to over-representation of African American offenders in American prisons.

Following this introduction, Part II of this paper describes the current overall incarceration landscape in Australia. Part III focuses specifically on Indigenous over-imprisonment. In Part IV, I analyse earlier studies that have been undertaken regarding Indigenous imprisonment over-representation. This is followed in Part V by an examination of current Indigenous offending and sentencing patterns. In Part VI, I suggest that the reasons for the Indigenous incarceration crisis can be explained by a number of considerations, including the treatment of prior convictions, the inappropriate application of several aggravating and mitigating considerations and the possibility of sub-conscious sentencing bias. Finally, Part VII discusses partial solutions and the direction of necessary future research.

II OVERALL INCARCERATION RATES AND TRENDS

The most recent statistical analysis regarding incarceration rates in Australia is from the Australian Bureau of Statistics (the "ABS") and relates to the March quarter of 2015. Before analysing Indigenous imprisonment in detail, it is helpful to view a snapshot of the general sentencing trends.

Imprisonment numbers in Australia, in terms of both the number of offenders presently incarcerated and the growth in incarceration numbers, are at a record high. Incarceration rates have fluctuated considerably since federation. At the turn of the twentieth century, the imprisonment rate per 100,000 of the adult population was relatively high: 126 persons per 100,000 adults.[21] During the next quarter of a century there was a significant reduction in prison numbers. In 1925, the rate was 52 per 100,000 and remained relatively

18 Of course the ideal approach would be to do a very sophisticated controlled study, which factors in a far greater number of variables and accommodates for them by means of an appropriate statistical analysis. However, this option is not available for reasons set out in Part IV.

19 *See infra* Part VII.A.

20 *See* HEATHER C. WEST ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2009 9 (2010), http://bjs.gov/content/pub/pdf/p09.pdf. African American men are the most over-represented group in American prisons. *Id.* Hispanic and Native American men are also over-represented in American prisons by rates of 1.5 and two times more than white non-Hispanic males, respectively. NATIONAL COUNCIL OF CRIME AND DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 3 (2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

21 AUSTRALIAN BUREAU OF STAT., 1301.0 – YEAR BOOK AUSTRALIA, 2001: CRIME IN TWENTIETH CENTURY AUSTRALIA (2001), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4524A092E30E4486CA2569DE00256331.

steady for over eighty years apart from a spike in the mid-1930s and early 1970s.[22] In 1935, the rate was 71 per 100,000, falling back to 51 per 100,000 by 1940.[23] The rate rose to 80 per 100,000 in 1970 but dropped back to 66 per 100,000 by 1985.[24] By 1995, the imprisonment rate had increased to 87 per 100,000 and by the end of the century it had climbed to 108.85.[25] Thus, there had been a tripling of the imprisonment rate over three decades—an unprecedented occurrence in Australian history.[26]

The number of people imprisoned in Australia broke the 30,000 mark for the first time in 2013 at which point the rate of imprisonment had reached 172 prisoners per 100,000 adults.[27] The rate has grown rapidly since then. By June of 2015, 36,134 Australians were in jail, which represents an imprisonment rate of 196 prisoners per 100,000 adults.[28] This was an increase of six percent from the June 2014 rate and a nearly twenty percent increase (from 164 per 100,000) over the past decade.[29]

There is considerable regional variation in these numbers, with the highest imprisonment rates as of June 2015 being in Northern Territory (904 per 100,000 adults) followed by Western Australia (277 per 100,000). The next highest rates are South Australia (202 per 100,000), Queensland (199 per 100,000) and New South Wales (199 per 100,000). The lowest imprisonment rates are in the Australian Capital Territory (118 per 100,000), Tasmania (126 per 100,000) and Victoria (136 per 100,000).[30]

While the Australian imprisonment rate is much less than that of the United States in absolute and relative terms, the increase in the incarceration rates in both countries in recent decades is not dissimilar. As of 2014, the incarceration rate in the United States was 900 adults per 100,000 of the adult population.[31] This rate has increased more than four-fold over the last forty years.[32]

III INDIGENOUS INCARCERATION NUMBERS

As noted above, Indigenous people in Australia are approximately sixteen times more likely to be in prison than the rest of the community.[33] In March 2015, there were 9,838 Aboriginals in prison, an increase of almost seven percent since March 2014.[34] The recent

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[22] *See id.*
[23] *See id.*
[24] *See id.*
[25] *See id.*
[26] It took nearly 50 years for the rate to go from 50 per 100,000 (in 1940) to 100 per 100,000 (in 1998). *See id*
[27] *See* AUSTRALIAN BUREAU OF STAT., 4517.0 - PRISONERS IN AUSTRALIA, 2015 (2015), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Prisoner%20characteristics,%20Australia~28.
[28] *See id.*
[29] *See id.*
[30] *See* AUSTRALIAN BUREAU OF STAT., 4512.0 – CORRECTIVE SERVICES, AUSTRALIA, JUNE QUARTER 2016 (2016), http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0.
[31] *See* DANIELLE KAEBLE ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014 4 (2015), http://www.bjs.gov/content/pub/pdf/cpus14.pdf.
[32] *See* NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1 (Jeremy Travis et al. eds., 2014).
[33] *See supra* note 1.
[34] *See* AUSTRALIAN BUREAU OF STAT., 4512.0 – CORRECTIVE SERVICES, AUSTRALIA, MARCH QUARTER, 2015 (2015),

increase in the growth in Indigenous imprisonment is summarised in an Australian Bureau of Statistics report as follows:

> Three states accounted for nearly three-quarters of the total Aboriginal and Torres Strait Islander prisoner population: New South Wales (2,702 prisoners or 28%), Queensland (2,300 prisoners or 23%) and Western Australia (2,150 prisoners or 22%). (Table 13)
>
> In the March quarter 2015, the national average daily Aboriginal and Torres Strait Islander imprisonment rate was 2,241 prisoners per 100,000 adult Aboriginal and Torres Strait Islander population. This was an increase of 77 prisoners per 100,000 adult Aboriginal and Torres Strait Islander population from the March quarter 2014, and an increase of 15 prisoners per 100,000 adult Aboriginal and Torres Strait Islander population from the December quarter 2014. (Table 14)[35]

In terms of further data analysis, I focus on information relating to the 2013/2014 financial year given that the ABS only provides detailed data annually, and this was the most recent year for which the data has been published at the time of writing. The data is obtained principally from two sources:

- 4513.0 - Criminal Courts, Australia, 2013-14;[36] and
- 4517.0 - Prisoners in Australia, 2014.[37]

In broad terms, at the end of the 2014 financial year, nationwide, there were 33,791 prisoners, which was a rate of 186 per 100,000 of the adult population.[38] This consisted of 24,453 non-Indigenous and 9,264 Indigenous prisoners.[39] This meant the rate of non-Indigenous imprisonment was 138 per 100,000 and the Indigenous rate was 2,175 per 100,000. The Indigenous incarceration rate was at its highest level in over ten years.[40] The lowest Indigenous imprisonment rate in the past decade occurred in 2004, when it was 1,590 per 100,000. At that time, the ratio of Indigenous to non-Indigenous imprisonment was 12.6:1.[41] With some minor exceptions, the Indigenous rate has increased gradually from then, although there are minor declines in 2008, 2010, 2011 and 2012.[42] By contrast, the highest non-Indigenous imprisonment rate was 138 per 100,000 in 2014, when it increased from 127 in 2013. Apart from that increase, the rate has remained remarkably stable during this decade, at around 129 per 100,000 – only slightly above the 126 mark in 2004.[43]

IV PREVIOUS STUDIES EXAMINING DIFFERENT SENTENCING PATTERNS FOR INDIGENOUS AND NON-INDIGENOUS OFFENDERS

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http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4512.0Main+Features1March%20Quarter%202015?OpenDocument.

[35] *See id.*

[36] AUSTRALIAN BUREAU OF STAT., 4513.0 – CRIMINAL COURTS, AUSTRALIA, 2013-14 (2015), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2013-14~Main%20Features~Key%20findings~1 [hereinafter AUSTRALIAN BUREAU OF STAT., CRIMINAL COURTS].

[37] AUSTRALIAN BUREAU OF STAT., 4517.0 – PRISONERS IN AUSTRALIA, 2014 (2014), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Key%20findings~1 [hereinafter AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA].

[38] *See id.*

[39] *See id.*

[40] *See id.* at tbl.19.

[41] *See id.*

[42] *See id.*

[43] *See id.*

A *Summary of Existing Studies Regarding Impact of Indigeneity in Sentencing*

There have been a relatively small number of studies that have previously examined the impact of Indigenous status in the sentencing calculus.[44] The first Australian studies to examine the relevance of Indigeneity in sentencing using multivariate statistical analysis were undertaken by Lucy Snowball and Don Weatherburn, and published in 2006 and 2007.[45] Snowball and Weatherburn's first study found that Indigenous status played no meaningful role in the likelihood of imprisonment being imposed.[46] Their second study, using different control variables, suggested that "racial bias may influence the sentencing process, even if its effects are only small,"[47] such that Indigenous offenders were slightly more likely to be sentenced to imprisonment.[48]

In a subsequent study focusing on sentencing in the South Australian Higher Courts, Samantha Jeffries and Christine Bond concluded that there was positive discrimination in favor of Indigenous offenders in the decision of whether a custodial sentence should be imposed.[49] Indigenous offenders were sentenced to imprisonment less frequently than matched non-Indigenous offenders.[50] However, when it came to prison length, Indigenous offenders fared worse than non-Indigenous offenders.[51]

A later study by Bond, Jeffries and Weatherburn, focusing on sentencing outcomes in New South Wales courts, found no evidence of sentence length disparity based on Indigeneity in the lower court (the Local court) nor the higher courts (District and Supreme Court).[52] The variables that were factored into this assessment were sex, age, criminal history, prior sentences of imprisonment, prior breaches of a court order, offence seriousness, presence of concurrent offences and plea of guilty.[53] The authors conclude:

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[44] The nature of the studies and their conclusions are summarised in two relatively recent papers. The first is an article by Samantha Jeffries and Christine Bond in 2012: Samantha Jeffries & Christine E.W. Bond, *The Impact of Indigenous Status on Adult Sentencing: A Review of the Statistical Research Literature from the United States, Canada, and Australia*, 10 J. ETHNICITY CRIM. JUST. 223 (2012) [hereinafter Jeffries & Bond, *The Impact of Indigenous Status on Adult Sentencing*]. *See also* Christine Bond & Samantha Jeffries, *Differential Sentencing of Indigenous Offenders: What Does Research Tell Us?*, INDIGENOUS LAW BULL., July / August 2013, at 15 [hereinafter, Bond & Jeffries, *Differential Sentencing*]. The second is an even more recent report by the Victorian Sentencing Advisory Council in 2013. *See* VICTORIAN SENTENCING ADVISORY COUNCIL, COMPARING SENTENCING OUTCOMES FOR KOORI AND NON-KOORI ADULT OFFENDERS IN THE MAGISTRATES' COURT OF VICTORIA (2013), https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Comparing%20Sentencing%20Outcomes%20for%20Koori%20and%20Non-Koori%20Adult%20Offenders%20in%20the%20Magistrates%E2%80%99%20Court%20of%20Victoria.pdf.

[45] *See* Lucy Snowball & Don Weatherburn, *Indigenous Over-Representation in Prison: The Role of Offender Characteristics*, 99 CONTEMP. ISSUES CRIME & JUST. 1 (2006) [hereinafter Snowball & Weatherburn, *Indigenous Over-Representation*]; Lucy Snowball & Don Weatherburn, *Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?*, 40 AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY 272 (2007) [hereinafter Snowball & Weatherburn, *Racial Bias in Sentencing*].

[46] *See* Snowball & Weatherburn, *Indigenous Over-Representation*, *supra* note 45, at 14.

[47] Snowball & Weatherburn, *Racial Bias in Sentencing*, *supra* note 45, at 286.

[48] *See id.* at 285.

[49] *See* Samantha Jeffries & Christine Bond, *Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia's Higher Courts*, 42 AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY 47, 62 (2009).

[50] *See id.*

[51] *See id.* at 64.

[52] *See* Christine EW Bond et al., *How Much Time? Indigenous Status and the Sentenced Imprisonment Term Decision in New South Wales*, 44 AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY 272, 281 (2011).

[53] *See id.* at 279–280.

> Overall, we find little evidence to support the claim that Indigeneity directly influences the length of imprisonment orders in the NSW courts for comparable offenders. Nor do we find much evidence to support the claim that courts place more weight on factors that tend to lengthen a sentence when dealing with Indigenous offenders than when dealing with non-Indigenous offenders. The evidence, if anything, suggests the contrary. Controlling for other factors, Indigenous offenders appearing in the NSW courts receive shorter sentences than their non-Indigenous counterparts.[54]

Despite the findings of these early studies, more recent studies suggest that Indigenous offenders are disadvantaged in sentencing determinations. A 2013 report by the Victorian Sentencing Advisory Council contained a study focusing on 8,647 people sentenced in Victorian Magistrate's Courts in the 2010/2011 financial year.[55] Of the 8,647 persons studied, 502 were Indigenous offenders and 7,069 were non-Indigenous offenders. The status of the other 1,076 offenders was unknown.[56]

In order to test for the relevance of Indigenous status, the study undertook a multivariate analysis of the relationship between sentence type (including imprisonment and non-imprisonment length) and length of prison term based on five relevant considerations: Indigenous status, gender,[57] age (less than 25 years or 25 years and above)[58], type of offence (person related offence as opposed to other type of offence)[59] and previous convictions.[60] These considerations were chosen "based on both the existing literature in the field and the data that were available in the reoffending database."[61] The multivariate approached enabled the researchers to discern the impact of any of these factors while holding constant the other factors.

The report noted that Indigenous offenders were more likely to have prior convictions than non-Indigenous offenders[62] and, on average, had more prior convictions.[63] Further, Indigenous offenders were more likely to have had prior episodes of imprisonment prison than non-Indigenous offenders (thirty-seven percent compared to twenty-five percent).[64] As mentioned, the study concluded that Indigenous offenders were considerably more likely to be imprisoned. The Sentencing Advisory Council stated:

> The results of the multivariate analysis . . . show that, even when taking account of offence and offender characteristics, Indigenous status is statistically significantly related to the type of sentence imposed: Koori offenders in this dataset are more likely to receive a custodial order (an imprisonment term or a partially suspended sentence) than non-Koori offenders.[65]

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[54] *Id.* at 286–87. Similar conclusions are reached in Christine Bond & Samantha Jeffries, *Indigeneity and the Judicial Decision to Imprison: A Study of Western Australia's Higher Courts*, BRIT. J. CRIMINOLOGY 1, 16–18 (2011) [hereinafter Bond & Jeffries, *Indigeneity and the Judicial Decision to Imprison*].
[55] *See* VICTORIAN SENTENCING ADVISORY COUNCIL, *supra* note 44, at 31.
[56] *See id.*
[57] *See id.* at 41. The report noted that consistent with earlier findings, men are 2.5 times more likely to be imprisoned than women.
[58] *See id.* The report noted that, consistent with earlier findings, people aged over twenty-five are more likely to go jail – by a factor of approximately fifty percent.
[59] *See id.* The report noted that offences against the person attract a slightly lower risk of imprisonment.
[60] *See id.* The report noted that prior convictions increase the likelihood of imprisonment—in this case by a factor of six.
[61] *Id.*
[62] *See id.* at 38.
[63] *See id.*
[64] *See id.*
[65] *Id.* at 41 (citations omitted). The report continued: "The effect of Indigenous status, while significant (increasing the likelihood of a custodial sentence by between 30% and 92%), is not as strong as the effects of the other factors in the model. Having a previous sentencing episode has the greatest impact on the type of sentence

The report concluded that there were a number of possible reasons for this disparity, including the occurrence of aggravating or mitigating considerations that were not factored into the study. Discrimination against Indigenous offenders was also suggested as being a possible contributing factor. The report stated:

> It is possible that Koori offenders are more likely to come before the court with a constellation of characteristics that increase their likelihood of receiving a term of imprisonment. Factors that are not measured in this multivariate analysis, such as substance use and mental illness, may play a role in sentencing outcomes that is not captured in these data. It is also possible that there remains some residual discrimination in the courts, although it is not possible to test this hypothesis with these data.[66]

When the same multivariate analysis was applied to sentence length, the study found that there was no meaningful difference between Indigenous and non-Indigenous offenders.[67]

Further evidence of sentencing disparity emerges from a more recent study by Bond and Jeffries, which examined sentencing trends in Queensland courts.[68] The study found that in the Magistrates' Court, Indigenous offenders were more likely (by approximately a factor of two) to be imprisoned. However, no such disparity was found in the Higher Courts.[69] The variables that were factored into this study for the Higher Courts were Indigenous status, sex, age, prior criminal history, seriousness of principal offence, number of counts, plea type, remand status, role in offence, location of offence, evidence of premeditation, employment status, childcare responsibilities, health status, substance use and past victimization.[70] Similar variables were included in the analysis of the Magistrate's Courts with the exception of location of offence, evidence of premeditation, employment status, childcare responsibilities, health status, substance use and past victimization.[71] Applying a logistic regression to the studies, the report concluded that:

> In the adult courts, Indigenous status initially had a direct impact on the decision to imprison with higher proportions of Indigenous versus non-Indigenous defendants receiving a prison sentence. In contrast, Indigenous/non-Indigenous parity was found in the likelihood of detention in Queensland's higher children's courts. Once we controlled for other variables known to influence sentencing (e.g. current and past criminality), we found that: (1) in the adult lower courts, Indigenous sentencing disparity reduced but continued; (2) in the adult higher courts, Indigenous sentencing disparity dissipated completely . . . .[72]

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imposed, increasing the likelihood of a custodial sentence six-fold. The next strongest effect is found for gender, with men being 2.5 times more likely to receive a custodial sentence than women. People aged less than 25 years are about half as likely to receive a custodial sentence as people aged 25 years and over, while people sentenced for an offence against the person are slightly less likely to receive a custodial term." *Id.* (citations omitted).

[66] *Id.*

[67] *See id.* at 45. The report concluded: "When considering all the available relevant factors in predicting sentence type and sentence length, the Council's analysis of its reoffending database shows that Koori people are statistically significantly more likely to receive a custodial sentence in the Magistrates' Court than non-Koori people, but that there is no difference in the length of the term that they receive."

[68] *See generally* Christine E.W. Bond & Samantha Jeffries, *Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts*, 19 PSYCHIATRY, PSYCHOL. & L. 169 (2012).

[69] *See id.* at 179–80.

[70] *See id.* at 181.

[71] *See id.* at 175.

[72] *Id.* at 181.

The pattern of the overall studies regarding possible racial disparity in sentencing was most recently summarised by Christine Bond and Samantha Jeffries, who note that in the lower courts disparity seems to occur:

> Disparity in sentencing outcomes for Indigenous defendants is of grave concern. In this paper, we briefly overviewed the findings of current research on Indigenous disparities in sentencing outcomes in Australia. There is good news. There is strong evidence of parity (and leniency in one jurisdiction) in the likelihood of a prison sentence in the higher criminal courts, as well as evidence that there is a lower likelihood of imprisonment for Indigenous defendants in the problem-solving and Indigenous courts. However, in the conventional lower courts, research suggests that Indigenous offenders may be more likely to receive a prison sentence compared to similarly positioned non-Indigenous offenders.[73]

In light of these studies, we see that, while no common trend emerges with regards to the relevance of Indigenous status to sentencing, the following conclusions arise:

- There is some disparity in the sentencing of Indigenous offenders in the lower courts but this does not seem to be the case in the higher courts;[74]
- There is no absolute consensus regarding the results of the studies; and
- None of the studies are conclusive in their findings.

B *Limitations of Previous Studies*

One possible reason for the inconclusive nature of the findings stemming from these studies is that the sentencing controls selected in the studies are not complete given that they do not accurately identify all the relevant sentencing variables that influence sentence and that might operate disproportionally within the respective offender cohorts. In order for multivariate and matched offender studies to be accurate, it is necessary for all relevant variables, especially the ones that apply frequently and powerfully and affect the outcome, to be identified and then factored into the analysis. Arguably, this cannot occur (at least not without a data set which is very complex and elaborate) in a discipline such as sentencing, where there is a wide range of factors, many of which are too subtle to be documented in existing databases and records that are not proactively designed to facilitate such studies. Understanding these limitations requires a brief overview of the framework of sentencing law in Australia.

In Australia, the main sentencing objectives are incapacitation or community protection, general deterrence, specific deterrence, rehabilitation and retribution.[75] Thus, the

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[73] Bond & Jeffries, *Differential Sentencing*, *supra* note 44, at 16–17. The authors offer a range of speculative reasons for the disparity in the Magistrates' Court, including: shorter plea times in these courts might incline magistrates to "attribute a higher degree of risk to Indigenous than non-Indigenous defendants, as perceptions of Indigenous peoples as 'deviant' are pervasive in Australian popular and governmental discourses"; the limitations of their research design (i.e. not including sufficient sentencing considerations) and the possibility of negative discrimination. *See* Bond & Jeffries, *supra* note 68, at 181–82.

[74] For even further discussion, see generally Christine E. W. Bond & Samantha Jeffries, *Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts*, 17 PSYCHIATRY, PSYCHOL. & L. 70 (2010), a study of Indigenous female offenders sentenced in Western Australian higher courts which found that they were in fact treated more leniently than Non-Indigenous women offenders.

[75] *See generally* MIRKO BAGARIC & RICHARD EDNEY, SENTENCING IN AUSTRALIA (2d ed. 2014). For a more extensive comparison of the sentencing systems in the United States and Australia, see generally Mirko Bagaric, *The Punishment Should Fit the Crime – Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343 (2014) [hereinafter Bagaric, *The Punishment Should Fit the Crime*].

broad aims of Australian sentencing law are similar to those found in the United States. In Australia, the key determinant to determining sentencing severity is the proportionality principle.[76] While each of the nine Australian jurisdictions has its own sentencing system, there is sufficient convergence to ensure that a nationwide study on sentencing disparity is illuminating. Sentencing in each jurisdiction is governed by a combination of legislation and the common law.

Each key sentencing statute deals with three main dimensions of sentencing. Firstly, it sets out the purposes and aims of sentencing.[77] Secondly, it describes aggravating and mitigating factors that affect sentencing. There is a considerable degree of variation in the extent to which these factors are set out in each individual statute. These considerations are set out, most expansively, in the *Crimes (Sentencing Procedure) Act 1999* (New South Wales (NSW)),[78] which lists thirty relevant factors. Most sentencing statutes only sparsely deal with these considerations. This is not, however, indicative of a legal divergence between the respective jurisdictions. This is because, as is discussed below, aggravating and mitigating factors are mainly defined by the common law, which continues to apply in all jurisdictions.[79]

The third main aspect covered by the sentencing statutes is the type of sanctions that can be imposed on offenders. These are similar across Australia.[80] Typically, there is a range of sanctions; however, in essence, there are four different types. The least serious is a finding of guilt without any further harshness being imposed on the offender, apart from a promise to the sentencing court not to re-offend during the period of the order, which is typically in the range of twelve months. These sanctions are variously labelled as dismissals, discharges, or bonds. The second, and most common, sanction imposed in Australia is a fine, which is a monetary exaction against the offender. The third, and harshest, form of punishment in Australia is imprisonment. The fourth general form of sanction consists of what are collectively known as intermediate punishments. These are generally imposed when the offense is too serious to be dealt with by a fine, but is not serious enough to warrant a term of imprisonment. Intermediate sanctions often involve a work component and an order to undertake some form of counselling or training, which is designed to have a rehabilitative effect. These come under various labels including community-based orders, home detention, suspended sentences and intensive corrections orders.[81]

A defining feature of Australian sentencing law is the largely discretionary nature of the sentencing calculus.[82] This places the Australian system into sharp contrast with the American system, which over the past forty years has become more prescriptive. All U.S.

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[76] See further discussion below in this section of the article.

[77] *See generally Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes Act 1914* (Cth) s 16A(1)(2); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A; *Sentencing Act* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

[78] *Crimes (Sentencing Procedure) Act* 1999 (NSW) ss 21A, 24.

[79] *See Bui v DPP (Cth)* (2012) 244 CLR 638.

[80] *See generally* MIRKO BAGARIC & RICHARD EDNEY, AUSTRALIAN SENTENCING (2011).

[81] *See id.*

[82] The discretionary nature of the Australian sentencing calculus is similar to the largely uncontrolled sentencing process in the parts of the United States fifty years ago, which led Judge Marvin Frankel to describe the system as "lawless." *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 8 (1972).

states and the federal system have some fixed or presumptive sentencing laws which reduce the number of variables that American courts can take into account in setting a sentence.[83]

The overarching methodology and conceptual approach that Australian sentencing judges undertake in making sentencing decisions is the same in each jurisdiction. This approach is known as "instinctive synthesis." The term originates from the Full Court of the Supreme Court of Victoria decision of *R v Williscroft*,[84] nearly forty years ago where Judges Adam and Crockett stated: "Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process."[85]

The instinctive synthesis requires sentencers to make a decision regarding all of the considerations that are relevant to sentencing and then set a precise penalty. In the process, they must incorporate considerations that incline to a heavier penalty and offset against them factors that favor a lesser penalty. The hallmark of this process is that it does not require nor permit judges to set out with any particularity the weight—in mathematical terms—accorded to any particular consideration.[86] Patent subjectivity is incorporated into the sentencing calculus. Current orthodoxy maintains that there is no single correct sentence[87] and that "the method of instinctive synthesis will by definition produce outcomes upon which reasonable minds will differ."[88] Under this model, courts can impose a sentence within an 'available range' of penalties. The spectrum of this range is not clearly designated. Evaluating the matters that influenced a sentence is made more opaque by the fact that courts are not required to state every consideration that influenced the penalty in their decisions.[89]

The breadth of the sentencing discretion is underlined by the fact that there are more than 200 considerations that can either mitigate or aggravate penalty.[90] Ascertaining the real influences underpinning a particular sentence is made inextricably harder because it is for the court to determine the weight to be accorded to any particular aggravating or mitigating factor.[91] There is no effective fetter to prevent courts from giving, say, thirty percent or two percent weight to a particular consideration, such as remorse,[92] in order to mitigate a penalty, or an aggravating factor, such as prior criminality, in order to increase the penalty.[93] As noted in *DPP v Terrick*: "The proposition that too much – or too little – weight was given to a particular sentencing factor is almost always untestable. This is so because quantitative significance is not to be assigned to individual considerations."[94]

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[83] The two main variables are normally the circumstances of the offence and criminal history of the offender. For a more extensive comparison of the sentencing systems in the United States and Australia, see generally Bagaric, *The Punishment Should Fit the Crime*, *supra* note 75.
[84] *R v Williscroft* [1975] VR 292.
[85] *Id.* at 300.
[86] *See Markarian v The Queen* [2005] HCA 25 ¶ 52.
[87] *See id.* ¶ 27.
[88] *Hudson v The Queen* (2010) 205 A Crim R 199, 206.
[89] *See R v Koumis* [2008] VSCA 84 ¶¶ 62-65; *Valayamkandathil v The Queen* [2010] VSCA 260; *Ollis v The Queen* [2011] NSWCCA 155.
[90] *See* JOANNA SHAPLAND, BETWEEN CONVICTION AND SENTENCE: THE PROCESS OF MITIGATION 43 (1981); LA TROBE UNIVERSITY, GUILTY YOUR WORSHIP: A STUDY OF VICTORIA'S MAGISTRATES' COURTS (1980).
[91] *See Pesa v The Queen* [2012] VSCA 109 ¶¶ 11-12.
[92] For an example of a case in which a considerable amount of weight was given to remorse, see *CD v The Queen*, [2013] VSCA 95.
[93] The amount of weight given to a sentencing factor is only erroneous if it results in a sentence being manifestly excessive or inadequate. *See DPP (Vic) v Terrick* [2009] VSCA 220.
[94] *Id*. ¶ 5.

In *Pesa v The Queen,* the Court acknowledged that the absence of clear attributions of weight to considerations in sentencing decisions made them "opaque."[95] While there are more than 200 aggravating and mitigating considerations, all of the previous controlled studies regarding the impact of Indigenous status on sentencing include less than ten percent of these considerations. The controls are, at best, partial and typically relate to factors that can, most readily, be identified through crude court data, such as prior convictions, plea status, age and sex. But these barely touch upon the richness of established mitigating and aggravating considerations, many of which are very common. To this end, it is notable that the most statistically weighty mitigating factor is cooperating with authorities. In conjunction with a plea of guilty, this can attract a fifty percent sentencing discount.[96] None of the studies controlled for this consideration.[97]

The inadequacy of the control factors that have been selected in previous studies is partly reflected in the fact, as indicated above, that most studies use different controls. Thus, a fundamental problem with multivariate analysis in the case of sentencing is determining what variables are identified at the outset of the study. This is an issue expressly noted by Samantha Jeffries and Christine Bond in 2012:[98]

> Like much international research, these Australian studies did not include important information about the context of the commission of the offenses (e.g., the presence of co-offenders, evidence of premeditation) and other mitigating and aggravating circumstances (e.g., substance abuse, health, familial situation, employment status, past victimization experiences) that judges may consider in making their decisions. Furthermore, remand (i.e., pretrial release) status, an especially strong predictor of sentencing, was missing from the New South Wales and Western Australian studies discussed here. The inclusion of remand status, contextual factors, and other mitigating and aggravating variables might explain findings of discrimination.[99]

In a similar vein, Jeffries and Bond made the same criticisms of United States studies that show racial disparity in sentencing against Native American offenders.[100]

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[95] *Pesa v The Queen* [2012] VSCA 109 ¶ 10 ("[So far as weight is concerned] the ultimate sentencing decision is entirely opaque. While the sentencing reasons record the judge's consideration of the various matters relevant to sentence, the sentencing decision itself is a conclusion arrived at by the process of intuitive synthesis, without the attribution of weight to any individual factor.").

[96] For an example of where a 50 percent discount was allowed, see *R v Johnston* (2008) 186 A Crim R 345, 349–51. For an application of these principles, see *Wang v R* [2010] NSWCCA 319; *Ma v R* [2010] NSWCCA 320; *R v Nguyen* [2010] NSWCCA 331.

[97] *See R v Holland* (2011) 205 A Crim R 429 (upholding a 45% discount for cooperation and pleading guilty following a prosecution appeal). The *Holland* court noted: "In *SZ v R* [2007] NSWCCA 19, (2007) 168 A Crim R 249, Howie J expressed the view that in general, a combined discount should not exceed 50%." *Id.* ¶ 42 (citation omitted). *See R v Baldock* [2010] WASCA 170 ¶ 6 (noting that the discount could exceed fifty percent in rare cases). *See also R v Ehrlich,* (2012) 219 A Crim R 415 (2012), [2012] NSWCCA 38 ¶ 6 (acknowledging the range in discount rates given by courts for assistance to authorities); *Isaac v R* [2012] NSWCCA 195 ¶ 56 (discounting a sentence by fifteen percent for assistance to authorities); *R v Lamella*, [2014] NSWCCA 122 ¶ 73 (upholding a sentence in which a fifty percent combined discount was given for a guilty plea and assistance to authorities).

[98] Jeffries & Bond, *The Impact of Indigenous Status on Adult Sentencing*, *supra* note 44.

[99] *Id.* at 236.

[100] *See id.* at 232 ("However, the findings of these two studies are limited because of a failure to include measures of factors known to have significant effects on sentencing decisions. In particular, Alvarez and Bachman (1996) used a rough measure of current offense seriousness (i.e., offense type), whereas Munoz and McMorris (2002) omitted prior criminal history from their study. Using less precise measures of the seriousness of the offense and not using a measure for criminal history can produce an overestimation of direct racial disparity (see, e.g., Mitchell, 2005). Furthermore, the lack of a prior criminal history measure is especially concerning given the significant impact of past criminality on sentencing outcomes"). Jeffries and Bond

The brevity and inadequacy of the variables that are used in previous studies is further underlined by the fact that there is no methodological process (at least not one that is articulated in the studies) that underpins the choice of variables, which are then used as supposed controls.[101] Absent a well-defined and doctrinally justifiable methodology that supports the choice of controls, the conclusions from the studies are necessarily compromised. To this end, it is important to note that the methodology would need to justify which factors are expressly selected and which ones are excluded. As an example, in one study, Bond, Jeffries and Weatherburn use as their controls sex, age, criminal history, prior terms of imprisonment, prior breaches of court orders, offence seriousness, presence of current charges, plea of guilty.[102] By contrast, Jeffries and Bond include more variables in one of their most recent studies.[103]

Further, most studies do not factor in subtle sentencing considerations, such as mental

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contend that "three statistical studies have been able to include the most comprehensive set of control variables." *Id.* at 236. These studies all related to previous research undertaken by the same authors in the Higher Courts (South Australian, Queensland and Western Australia) and did not find evidence of Indigenous sentencing disparity, except for the in/out decision where Indigenous males were found to be 1.93 times more likely to be sentenced to imprisonment in Western Australia. The studies are reported respectively in Jeffries & Bond, *supra* note 49; Jeffries & Bond, *supra* note 68; and Bond & Jeffries, *Indigeneity and the Judicial Decision to Imprison*, *supra* note 54.

[101] For example, Bond & Jeffries, *supra* note 68, at 174–76, set out their methodology for incorporating controls in the following manner:

> Past studies suggest that the circumstances in which the offence occurred may impact on judicial perceptions blameworthiness and future risk posed by the offender (Ashworth, 1995). For example, offenders who have clearly engaged in a level of criminal premeditation may be held more culpable for their actions than those who act 'in the heat of the moment' (Ashworth, 1995). Further, offences committed in public may be perceived as more serious than those committed 'behind closed doors' in the privacy of peoples' homes (Jeffries et al., 2003). The role played by an offender in the crime may impact on sentencing with sole offenders or key protagonists being perceptually more blameworthy than offenders who have played an ancillary role (White & Perrone, 2005, p. 155). We were only able to collect evidence of premeditation, offence location, offenders' role, and co-offenders for the higher courts. This information was coded from the District and Supreme Court sentencing transcripts. In Queensland's Magistrates' Courts, sentence hearings are not transcribed into written documents and are only available in audio format to which we were not permitted access. . . .
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> . . . Offenders' social histories are key elements in explanations of sentencing decisions. For example, some research shows that poor health and substance abuse/misuse may mitigate sentences, as they may change judicial assessments of offenders' level of culpability and future risk. Further, offenders with health problems may find prison especially difficult (Allen, 1987; Birmingham, 2003). The social cost of removing primary caregivers (usually mothers) from their families has been found to mitigate sentencing outcomes (Daly, 1989). Further, childcare and employment may reduce the likelihood of imprisonment because these social factors are seen to exert a degree of informal social control over an offender's life and therefore might operate to reduce the possibility of re-offending (Jeffries, 2002a; Jeffries, 2002b). For our analysis of the adult higher courts, we coded offenders' childcare responsibilities, substance abuse history, employment, health statuses, and past victimisation experiences. For the higher children's courts, we also coded young offenders' family structure and school attendance as indicators of informal social control in the lives of young defendants. Social history information was coded from the higher court sentencing transcripts and again not available at the Magistrate's Court level.

[102] *See* Bond et al., *supra* note 52, at 279–80.

[103] *See* Jeffries & Bond, *supra* note 49, at 57 (using the following variables: offenders' social history; sex, age, familial situation, employment status, criminal history, number of prior imprisonment terms, seriousness of principal offence, offender's role in principal offence, presence of co-offenders, offence location, evidence of premeditation, plea of not guilty, number of conviction counts, remand status, culpability or blameworthiness variables, substance abuse, health, and victimisation experiences).

impairment or intellectual disability.[104] This is a particularly important oversight, given that a report in 2012 noted that nearly half (forty-nine percent) of the sampled prisoners were experiencing a diagnosable mental disorder.[105] This was approximately 2.5 times the rate of mental disorder in the general Australian population.[106] A study focusing on Victorian prisoners in 2009–10 showed that the prevalence of schizophrenia and bipolar disorder was ten times that of the rest of the community.[107] The courts have often held that this is a powerful mitigating factor.[108] The position becomes even more complex by the fact that the mental impairment is not always mitigating. It can be a neutral factor in sentencing,[109] and even aggravating in some circumstances, for example, where the mental illness is deemed so disturbing and pointed that it results in the offender being a significant risk to community safety.[110] No study of the impact of Indigeneity in sentencing has even attempted to control for these nuanced but important variations. This is a considerable omission given that according to the ABS:

> After adjusting for differences in age structure between the two populations, Aboriginal and Torres Strait Islander people aged 18 years and over were nearly three times as likely as non-Indigenous people to have experienced high/very high levels of psychological distress (rate ratio of 2.7). This pattern was evident for both men and women across all age groups.[111]

Similar considerations apply in relation to substance involvement. According to an Australian Institute of Criminology report, approximately half of all detainees (forty-five percent) attributed their offending to either drug or alcohol use, or both.[112] And to the extent that some studies incorporate this consideration in the Indigenous sentencing analysis, the variable is used too crudely to be determinative. This is because the courts have held that

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[104] *See R v Verdins* [2007] VSCA 102 ¶¶ 5, 8 (defining these terms broadly).
[105] *See* Lubica Forsythe & Antonette Gaffney, *Mental Disorder Prevalence at the Gateway to the Criminal Justice System*, TRENDS & ISSUES IN CRIME AND CRIM. JUST., July 2012, 1, 6.
[106] *See id.*
[107] The study is noted in Dion G. Gee & James R.P. Ogloff, *Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface*, 21 PSYCHIATRY, PSYCHOL. & L., 46, 56–57.
[108] *See generally R v Verdins* [2007] VSCA 102; *Monfries v The Queen* [2014] ACTCA 46; *R v Barratt* [2014] QCA 227; *Papas v Western Australia* [2011] WASCA 3; *Melham v The Queen* [2011] NSWCCA 121; *R v Flentjar* [2013] SASCFC 11; *McCulloch v Tasmania* [2010] TASCCA 21; *Groenewege v Tasmania* [2013] TASCCA 7; *Mack v Western Australia* [2014] WASCA 207; *Western Australia v Khasay* [2014] WASCA 58.
[109] *See Western Australia v Khasay* [2014] WASCA 58 ¶ 5 (stating, "In *Leach v The Queen* [2008] NSWCCA 73; (2008) 183 A Crim R 1, Basten JA pointed out that although mental impairment will often tend to diminish moral blameworthiness or culpability and, in consequence, tend to diminish the otherwise appropriate sentence, it may in some circumstances have other effects. His Honour referred to the observation of Gleeson CJ in *R v Engert* (1995) 84 A Crim R 67 that 'the existence of a causal connection between the mental disorder and the offence might reduce the importance of general deterrence, and increase the importance of particular deterrence or the need to protect the public'. See also, *Wheeler [No 2]*, where McLure P said, citing *Engert*, that a sentencing consideration may be relevant in more than one respect and not affect the outcome because it weighs both positively and negatively in the balance.") (citations omitted). Similar sentiments are expressed in *Freeman v The Queen* [2011] VSCA 349 ¶¶ 27–28.
[110] *See Channon v The Queen* (1978) 33 FLR 433, 439; 20 ALR 1; *see also Veen v The Queen [No. 2]* (1988) 164 CLR 465 ¶ 16 (finding that defendant's "mental abnormality makes him a "grave danger to society").
[111] AUSTRALIAN BUREAU OF STAT., 4727.0.55.001 - AUSTRALIAN ABORIGINAL AND TORRES STRAIT ISLANDER HEALTH SURVEY: FIRST RESULTS, AUSTRALIA, 2012-13 (2013), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/9F3C9BDE98B3C5F1CA257C2F00145721?opendocument.
[112] *See* Jason Payne & Antonette Gaffney, *How Much Crime is Drug or Alcohol Related? Self-Reported Attributions of Police Detainees*, TRENDS & ISSUES IN CRIME AND CRIM. JUST., May 2012, 1, 3, http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi439.pdf.

substance involvement can mitigate penalty,[113] but, at times, it can aggravate the sentence.[114] On other occasions, it is totally irrelevant to the sentence. Thus, substance involvement or abuse is also not a variable that lends itself to being a binary control variable,[115] unless it is applied in a manner which accommodates the very complex manner in which the consideration is applied by the courts.

This is a considerable limitation to the previous controlled studies, given that the literature establishes that Indigenous Australians have a greater rate of alcohol abuse than other people. ABS data shows that in 2008, seventeen percent of Indigenous people aged fifteen years and over reported drinking at chronic risk/high risk levels in the last twelve months.[116] Moreover, the same report noted that there is a strong link between excessive drinking and offending:

> Among the Aboriginal and Torres Strait Islander population, there is a strong link between alcohol consumption and representation in the criminal justice system, particularly for men. The 2008 NATSISS shows that chronic risky/high risk drinkers were more likely than low risk drinkers to have been arrested in the last five years (29% compared with 15%), to have been formally charged by police (55% compared with 36%) and to have been incarcerated at some point in their lifetime (18% compared with 7%). They were also more likely to have been a victim of violence in the last 12 months (35% compared with 25%). Aboriginal and Torres Strait Islander men who were chronic risky/high risk drinkers were two and a half times as likely as women drinkers to be arrested; twice as likely to be charged by police and nearly five times as likely to have been incarcerated.[117]

The inadequacy of controls that have been incorporated into the design of previous studies is underscored by the fact that Indigeneity can, of itself, be a mitigating consideration. This was a matter that the High Court of Australia only made clear in *Bugmy v The Queen* in 2013; accordingly, it is not a variable that previous studies are likely to have been able to discern. But, the fact that the key objective of these studies (to ascertain the impact on Indigeneity on penalty) is indeed a variable that affects penalty, makes it untenable to do a controlled study that properly accommodates this, given that the law is not settled on how much weight should normally be accorded to Indigenous status.

There are still two more fundamental problems with the controlled studies that attempt to discern the relevance of Indigeneity. Firstly, they do not control for offence classification in a relevant manner. Different sentencing approaches have been taken in relation to certain offence types. For example, it has been held that in relation to drug and

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[113] *See Arbili v The Queen* [2012] NSWCCA 48 ¶ 38 (citing *R v Henry* [1999] NSWCCA 111 revised ¶¶ 173–74) (quoting *R v Valentini* (1989) 46 A Crim R 23, 25); *see also Waters v Regina* [2007] NSWCCA 219 ¶ 38 (finding that lack of premeditation was a mitigating factor for an intoxicated offender).

[114] Especially when the offender is aware that he or she may behave inappropriately when under the influence of drugs or alcohol. *See R v Martin* [2007] VSCA 291 ¶¶ 30, 53; *R v McCullagh* (2003) 141 A Crim R 150, 158; *R v Currie* (1988) 33 A Crim R 7, 9; *Baumer v The Queen* (1987) 27 A Crim R 143, 5, 6, 39; *R v Laffey* [1998] 1 VR 155, 162.

[115] As it is used in some of the studies. *See, e.g.* Jeffries & Bond, *supra* note 49, at 58.

[116] AUSTRALIAN BUREAU OF STAT., 4704.0 – THE HEALTH AND WELFARE OF AUSTRALIA'S ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES, OCT 2010 (2011), http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter756Oct+2010.

[117] *Id.* (citation omitted). In light of this, it is not surprising that, as noted above, the Victorian Advisory Council Report expressly noted that the fact that its report did not accommodate for mental illness and substance involvement casts doubt on its conclusions. *See also* VICTORIAN SENTENCING ADVISORY COUNCIL, *supra* note 44, at 41.

white-collar offenses, general deterrence is the most important sentencing consideration.[118] In relation to these offences, mitigating considerations such as the absence of a prior criminal record and good prospects of rehabilitation are normally less weighty. This is especially important given that, as we shall see below in Part V of this article, non-Indigenous offenders commit drug offences far more frequently than Indigenous offenders.

Finally, other statistical studies in this area do not explore whether possible explanations for difference in baseline sanctions for the respective cohorts of offenders are jurisprudentially or normatively sound.[119] Thus, for example, it has been contended that the higher rate of Indigenous imprisonment is explained largely by the fact that this cohort commits more offences and has more prior convictions.[120] While this explanation might logically explain the fact that Indigenous offenders are far more likely to be imprisoned, it ignores a second question of whether prior convictions and multiple offending should, in principle, have such a distorting effect. If the answer is no, and Indigenous offenders happen to have more prior convictions or instances of multiple offending than other offenders, then the current operation of these variables is operating in a discriminatory manner against Indigenous offenders. An unjustifiable sentencing consideration, which happens to apply to Indigenous offenders more frequently than to other offenders, is a clear example of indirect discrimination. This issue is explored further, in the next section of this article.

V RESULTS OF A BASELINE STUDY OF INDIGENOUS OFFENDING AND SENTENCING

A Relatively Uniform Sentencing Principles and Practices Facilitate Nation-Wide Snapshot

As noted above, given the complexity of the sentencing calculus, it is insightful to reduce the analysis to one that is baseline in nature. The following analysis does not attempt to control for any considerations that are not objective and binary, namely, offence type, sentence type and length. The advantages of this study are that it relates to the most recent data that is available, and uses the largest sample size that is available. Further, while the study is crude, in that it does not purport to control for speculative variables, it is the same in all jurisdictions. Hence, given the large number in the sample size, it provides the opportunity to ascertain any different broad sentencing trends across Australia. The large sample size is, in fact, a de facto control for many relevant variables, at least within the respective offender cohorts. The total number of prisoners is over 33,782 prisoners, with 9,260 of these being Indigenous.[121] The total sample size of sentenced offenders is 482,630.[122] As noted below, much of the research focuses on offenders sentenced in New

[118] *See DPP (Cth) v Gregory* (2011) 250 FLR 169 ¶ 53; *DPP v Hamman* (Unreported, New South Wales Court of Criminal Appeal, Sheller JA, 1 December 1998) 30.
[119] Of course, this simply stems from the objective and focus of the studies. In principle, the conclusions stemming from the studies could be used to then undertake this further analysis.
[120] *See* discussion *infra* Part VI.A
[121] *See* AUSTRALIAN BUREAU OF STAT., *supra* note 37, at tbl.15. These figures only include adult prisoners.
[122] *See* AUSTRALIAN BUREAU OF STAT., 4513 – CRIMINAL COURTS, AUSTRALIA 2013-2014, FINALISED DEFENDANTS (2015), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2013-14~Main%20Features~Finalised%20defendants~10005]. This statistic refers to all sentences imposed in the lower and higher adult courts. In addition, there were 23,641 sentences handed down in the Children's Courts. *See id*.

South Wales, the Northern Territory, Queensland and South Australia. These jurisdictions account for more than half of all sentenced offenders.[123]

Prior to analysing the results of the data, it is pertinent to note that a baseline study of sentencing nationwide is plausible because, as noted above, while sentencing law differs in each Australian jurisdiction, considerable convergence exists in relation to important areas.

In order to highlight the reasons for the higher rate of indigenous imprisonment, I will now evaluate the ABS data. My starting point is to examine the offence types for which offenders are being imprisoned because information regarding patterns and rates of Indigenous offending can be obtained by focusing on and comparing the nature of the offences committed by non-Indigenous and Indigenous offenders. In order to identify these patterns, it is important to note that the ABS breaks down offences into fifteen different (generic) standardised categories.[124]

The offence categories and the portion of offenders imprisoned for each category is set out below, in Table 1. This table relates to the overall prisoner population as of 30 June 2014. If an offender is sentenced for more than one offence, the offence type that is chosen is the most "serious offence."[125]

[123] *See id.* at tbl.2. There is of course no exact correlation between the sentenced offenders in a relevant year and the prisoners counted for the same year, given that many prisoners are sentenced in earlier years. However, it is assumed that given the large number of sentenced defendants in each year, their relevant profiles are relatively consistent from year to year.

[124] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, at tbl.15. There is also a miscellaneous category, which includes offences such as defamation, libel and privacy offences. This miscellaneous category accounts for less than 0.1% of all offences and hence is not included in Table 1. *See id.* Within each of the offence categories, there are more particular offence types. Thus, for example, "homicide and related offences" include murder, attempted murder, manslaughter and "driving causing death." *See* AUSTRALIAN BUREAU OF STAT., CRIMINAL COURTS, *supra* note 36, at Appendix 1, Australian and New Zealand Standard Offence Classification. A limitation of the analysis below is that it relates to the crude offence classifications as opposed to a break down by more specific type. However, it is not likely that this is a significant limitation given that there is no reason to suggest that non-Indigenous offenders and Indigenous offenders commit statistically different types of offences within the respective generic offence classifications. *See also* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, Explanatory Notes at ¶ 69 (explaining the classification hierarchy).

[125] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, Explanatory Notes ¶ 78 ("For sentenced prisoners in all states and territories except Tasmania, the Most Serious Offence (MSO) is the offence for which the prisoner has received the longest sentence in the current episode for a single count of the offence, regardless of the possible result of any appeals, and regardless of whether the sentence for that offence has actually expired at census date. Where sentences are equal, or the longest sentence cannot be determined, the MSO is the offence with the lowest (numerical) ANZSOC code. For example, if a prisoner has two offences coded at the ANZSOC Group level: 0711 *Unlawful entry with intent*, and 0412 *Dangerous or negligent driving*, the MSO would be allocated as 0412 *Dangerous or negligent driving*, as this is the lowest ANZSOC code.").

TABLE 1: THE MOST SERIOUS OFFENCES FOR WHICH INDIGENOUS AND NON-INDIGENOUS OFFENDERS ARE IMPRISONED IN AUSTRALIA AS JUNE 30, 2014[126]

Offence Type	**Percentage of Offenders Imprisoned for This Offence Type** (rounded to the nearest whole number)
01 Homicide and related offences	9%
02 Acts intended to cause injury	21%
03 Sexual assault and related offences	11%
04 Dangerous or negligent acts endangering persons	3%
05 Abduction, harassment and other offences against the person	1%
06 Robbery, extortion and related offences	9%
07 Unlawful entry with intent	12%
08 Theft and related offences	4%
09 Fraud, deception and related offences	2%
10 Illicit drug offences	12%
11 Prohibited and regulated weapons and explosives offences	1%
12 Property damage and environmental pollution	1%
13 Public order offences	1%
14 Traffic and vehicle regulatory offences	2%
15 Offences against justice procedures, government security and operations	10%

It emerges from Table 1 that eight offence categories (dangerous or negligent acts endangering persons; abduction, harassment and other offences against the person; theft and related offences; fraud, deception and related offences; prohibited and regulated weapons and explosives offences; property damage and environmental pollution; public order offences; and traffic and vehicle regulatory offences) constitute only fifty percent (when rounded) of the all offences for which offenders are imprisoned, and none of these offences individually accounts for more than four percent of the total prison population. Hence, in order to ensure that the data analysed in this article is statistically relevant, I focus the analysis on the other seven offence categories (which comprise more than eighty percent of all criminal offences). For reasons discussed later, it is notable that approximately half (forty-five percent) of all prisoners are detained for an offence that is non-violent and non-sexual in nature.

In attempting to ascertain why Indigenous offenders are imprisoned at higher rates, I start by examining the type of offences for which they are imprisoned, and contrast this with Non-Indigenous offenders.

[126] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, at tbl.4. The sample size is 33,783 prisoners. The percentages in each cell are derived by dividing the number of offenders jailed for that offence by the total number of prisoners imprisoned (i.e. 33,783).

B Rejection of Hypothesis 1: Indigenous Offenders Do Not Commit More Serious Offences

The first hypothesis that I seek to test is whether Indigenous offenders have a higher incarceration rate because they commit a disproportionately higher number of serious offences. There is no formal ranking of crime severity. One measure is the maximum penalty, but the courts have stated that this is a poor indicator of the relative seriousness of an offence.[127] Another indicator that is tenable is the 'tariff,' or range of possible sentences that courts have stated applies for certain offences or offence types. Again, this is not a strong indicator of crime seriousness because most offences do not have clear tariffs, and in any event, the tariffs are malleable.[128] The best proxy for offence seriousness would seem to be the average prison term that is imposed for the offence.[129] This data is set out in Table 2.[130]

TABLE 2: MEAN LENGTH OF PRISON SENTENCES FOR MAIN OFFENCES FOR WHICH OFFENDERS ARE IMPRISONED[131]

Offence Type	**Mean Imprisonment Length for All Prisoners (years)**
01 Homicide and related offences	15.8
02 Acts intended to cause injury	3.0
03 Sexual assault and related offences	7.9
06 Robbery, extortion and related offences	5.4
07 Unlawful entry with intent	3.1
10 Illicit drug offences	6.2

[127] *See, e.g.*, *Elias v The Queen* (2013) 87 ALJR 895; [2013] HCA 31 ¶ 27 (stating that although the maximum penalty for the offense may be regarded as a legislative designation of the "seriousness of the offense," this designation does not necessarily determine the seriousness of the offense as committed in the particular instance, and therefore does not determine the sentence to be imposed by the judge).

[128] *See Hili v The Queen* [2010] HCA 45 ¶ 54 (stating that judges are not required to impose a sentence within the historical range).

[129] Another guide is the frequency with which an offence attracts a term of imprisonment, however, this information is not available from the ABS data.

[130] Another measure of offence severity is the National Offense Index established by Australian and New Zealand Standard Offence Classification (ANZSOC), which is used by the ABS, an index developed based upon research conducted into public perceptions of offence seriousness. *See* AUSTRALIAN BUREAU OF STAT., AUSTRALIAN AND NEW ZEALAND STANDARD OFFENCE CLASSIFICATION (ANZSOC), 2011 (2011), http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/E6838CDEE01D34CBCA25722E0017B26B?OpenDocument. This measure is flawed because the courts have established that public opinion is not relevant to offence severity. *But see Channon v The Queen* (1978) 33 FLR 433, 437, (noting that sentences should "accord with the general moral sense of the community"); *Dawson v The Queen* [2013] NSWCCA 61 ¶ 37 (finding that a court should impose a more severe sentence in order to carry out Parliament's "[d]enunciation" of an offence); *DPP v T* [2012] TASCCA 15 ¶ 23 (listing "denunciation" as a factor justifying longer sentences). Moreover, this is a measure that even the ABS ultimately subordinate to sentence length.

[131] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, at tbl.23. The sample size of non-Indigenous sentenced prisoners is 18,612 and Indigenous sentenced prisoners is 6,872. *See id.* at tbl.24.

15 Offences against justice procedures, government security and operations	1.6

Thus, we see that the most serious offences in terms of average length of jail term are (most to least serious):

1. Homicide;
2. Sexual offences;
3. Drug offences;
4. Robbery;
5. Burglary offences;
6. Assault offences; and
7. Offences against justice.

I now examine the extent to which the respective offender cohorts are imprisoned for these offences.

TABLE 3: THE MOST COMMON OFFENCES FOR WHICH INDIGENOUS AND NON-INDIGENOUS OFFENDERS ARE IMPRISONED[132]

Offence Type	**All Offenders**	**Non-Indigenous Offenders**	**Indigenous Offenders**
01 Homicide and related offences	9%	10%	6%
02 Acts intended to cause injury	21%	16%	35%
03 Sexual assault and related offences	11%	12%	8%
06 Robbery, extortion and related offences	9%	9%	10%
07 Unlawful entry with intent	12%	10%	15%
10 Illicit drug offences	12%	16%	2%
15 Offences against justice procedures, government security and operations	10%	10%	11%

It emerges from Table 3 that the offence types for which the respective cohorts are imprisoned is considerably different (i.e. by more than 2%) in relation to five offence categories. The two offence classifications where there is the greatest discrepancy regarding offending patterns, are drug crimes and assault offences. It is evident that Indigenous offenders, as a cohort, are imprisoned far less for homicide, drug, and sexual offences, but are imprisoned more frequently for assault related offences and acts of burglary. The interesting aspect of this finding is that Indigenous offenders, on the basis of offending patterns for crimes which result in imprisonment, in fact commit a disproportionately lesser amount of the

[132] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, at tbl.15. The sample size of non-Indigenous offenders is 24,449 and Indigenous offenders is 9,260. The percentages in each cell are derived by dividing the number of offenders jailed for that offence for each cohort by the total number of prisoners imprisoned for each cohort. Thus, for non-Indigenous offenders the denominator is 24,449 and for Indigenous offenders it is 9,260.

three most serious crimes. The two offence types for which Indigenous offenders are over-represented (assault and burglary related offences) are in fact the two least serious offence categories of the five categories for which there is a considerable disparity between Indigenous and non-Indigenous offending.

This data inclines in favor of the argument that in fact, Indigenous offenders generally commit less serious forms of crime. Certainly, there is nothing to suggest that as a cohort, Indigenous offenders generally commit more serious offences than non-Indigenous offenders. This conclusion is supported by the data shown in Table 4, which sets out the percentages of defendants' criminal matters that are finalized at the two different court levels for Indigenous and non-Indigenous offenders.[133]

TABLE 4: COURTS IN WHICH CRIMINAL MATTERS ARE FINALISED[134]

	Higher Courts		Magistrates' Courts	
	Non-Indigenous Defendants	**Indigenous Defendants**	**Non-Indigenous Defendants**	**Indigenous Defendants**
NSW	4.8%	5.3%	95.2%	94.7%
QLD	4.4.%	3.1%	95.6%	96.9%
SA	6.9%	4.3%	93.1%	95.7%
NT	8.3%	3.6%	91.7%	96.4%

The data in Table 4 shows that in Queensland, South Australia and the Northern Territory, Indigenous defendants are more commonly dealt with in the Magistrates' Courts than non-Indigenous defendants. In New South Wales, Indigenous offenders appear more commonly than other offenders, in the Higher Courts, but the disparity is small.

C Rejection of Hypothesis 2: Indigenous Offenders Do Not Receive Longer Jail Terms and Further Negation of Hypothesis 1

The above conclusion that Indigenous offenders do not, in fact, commit more serious offences is further supported by the data in Table 5, which focuses on the average prison lengths received by the two prisoner cohorts.

TABLE 5: AVERAGE PRISON SENTENCES FOR NON-INDIGENOUS AND INDIGENOUS OFFENDERS[135]

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[133] This only relates to four Australian jurisdictions where the relevant data was available: New South Wales, Queensland, South Australia and the Northern Territory. *See* discussion *infra* Part V.D.

[134] *See* AUSTRALIAN BUREAU OF STAT., CRIMINAL COURTS, *supra* note 36, at tbl.8. These figures were calculated by dividing the number of the specific cohort of defendants (non-Indigenous or Indigenous) sentenced in the specific court system (Higher or Magistrates' Courts) by the total number of that cohort of defendants sentenced in the Higher Courts or Magistrates' Courts in that jurisdiction. For example, in Queensland the total number of non-Indigenous offenders finalized in adult courts was 71,009 of which 3,144 were dealt with in Higher Courts and 67,865 in the Magistrates' Court. After dividing 3,144 and 67,865 by 71,009, we find that 4.4% of Queensland's non-Indigenous defendants had their matters finalised in the Higher Courts and 95.6% of these defendants had their matters finalised in the Magistrates' Courts.

[135] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, at tbl.10.

Offence Type	Average Imprisonment Length for All Prisoners (years)	Average Imprisonment Length for Non-Indigenous Offenders (years)	Average Imprisonment Length for Indigenous Offenders (years)
01 Homicide and related offences	15.8	16.5	13
02 Acts intended to cause injury	3.0	3.5	2.3
03 Sexual assault and related offences	7.9	7.8	8.2
06 Robbery, extortion and related offences	5.4	5.5	5.1
07 Unlawful entry with intent	3.1	3.3	2.9
10 Illicit drug offences	6.2	6.3	3.9
15 Offences against justice procedures, government security and operations	1.6	1.7	1.3

We see from Table 5 that for nearly all offences, Indigenous offenders receive on average shorter terms of imprisonment, and in fact, in some cases, significantly shorter terms. In relation to all offences for which the respective cohorts are imprisoned,[136] the difference in the average term for the two cohorts of prisoners is stark: overall, the average term of imprisonment for Indigenous offenders is 3.4 years and for non-Indigenous offenders it is 5.2 years.[137] The only offence for which Indigenous offenders were sentenced to a longer average term than non-Indigenous offenders is sexual offences.

The information in Table 5 gives further support to the suggestion that Indigenous offenders generally commit less serious forms of offending. Table 3 indicated that this was the case by reference to offence category (i.e. Indigenous offenders commit less instances of the most serious form of offences (homicide, sexual offences and drug offences)). Table 5 suggests that even within offence categories, Indigenous offenders commit less serious forms of the relevant offence. For example, Indigenous offenders might commit offences that are typically less well planned or cause less harm to the victim. Other alternative explanations are that when it comes to setting the length of a prison term, there is a subconscious bias in favor of Indigenous offenders or there are some mitigating factors that apply disproportionately in the case of Indigenous offenders or the types of offences which they commit. It could also be the case that there are aggravating factors that apply more commonly in relation to non-Indigenous offenders or offences they disproportionately commit. However, until information of this nature is forthcoming the default position is that Indigenous offenders typically commit less serious offences than other offenders.

Irrespective of the reasons why Indigenous offenders receive on average shorter jail terms, the above data is contrary to the hypothesis that higher Indigenous incarceration is

[136] This includes all 15 offence categories plus miscellaneous offences (category 16).
[137] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, at tbl.10.

caused by Indigenous offenders committing more serious forms of offences. It also contradicts hypothesis two—that Indigenous offenders have a higher incarceration rate because they are typically sentenced to longer terms of imprisonment.

D *Rejection of Hypothesis 3: Indigenous Offenders Do Not Commit a Sufficiently Higher Number of Offences*

I now explore an alternative plausible explanation for the reason that Indigenous offenders have a higher imprisonment rate. This is hypothesis three, and is the suggestion that the reason Indigenous offenders are over-represented in prisons is because they commit more crime.

In order to assess possible explanations for Indigenous over-imprisonment, I further interrogate the Australian Bureau of Statistics data. The ABS has wide-ranging data regarding Indigenous status of all prisoners (and hence information in Tables 2, 3 and 5 above). It also collates and reports data regarding the number of defendants that appear in courts throughout Australia. However, the Indigenous status of defendants appearing in courts is not complete, presumably because courts in some jurisdictions do not maintain accurate records regarding the Indigenous status of offenders. There is only relevant data on this in four jurisdictions: New South Wales, Queensland, South Australia, and the Northern Territory. Nevertheless, the data is still illuminating because it relates to the two jurisdictions that have the largest defendant numbers overall (Queensland and New South Wales),[138] and also the jurisdiction with the greatest Indigenous and overall incarceration rates (the Northern Territory).[139] The following two tables, Tables 6 and 7, relate to these four jurisdictions only.[140]

Against this backdrop, I now focus on testing the third hypothesis: that the reasons for the Indigenous over-imprisonment rate is that Indigenous offenders commit a greater number of offences and, in particular, that the over-offending rate is similar to the over-imprisonment rate, i.e. approximately sixteen times higher. In order to test this, it is necessary to compare ABS statistics for the portion of defendants who appear in court and the portion that are imprisoned. This data is presented in Table 6.

[138] *See* AUSTRALIAN BUREAU OF STAT., CRIMINAL COURTS, *supra* note 36, at tbl.8.
[139] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, at tbl.10.
[140] As does Table 4. The data below does not include offenders whose Indigenous status was not ascertained. In NSW this accounted for 11.2% of defendants; Qld, 4.5%; SA, 7.8% and NT 2.8%. *See* AUSTRALIAN BUREAU OF STAT., CRIMINAL COURTS, *supra* note 36, at tbl.8.

TABLE 6: IMPRISONMENT RATE FOR INDIGENOUS AND NON-INDIGENOUS OFFENDERS FOR ALL OFFENCE TYPES[141]

	Sentenced Non-Indigenous Offenders	Imprisoned Non-Indigenous Offenders	Percentage of Non-Indigenous Offenders Imprisoned	Sentenced Indigenous Offenders	Imprisoned Indigenous Offenders	Percentage of Indigenous Offenders Percentage Imprisoned	Ratio of Indigenous: Non-Indigenous Offenders Imprisoned Per Crime	Ratio of Indigenous: Non-Indigenous Imprisonment Rate[142]
NSW	48630	6040	12%	9528	2305	24%	2:1	11.3
QLD	65614	5261	8%	22070	2949	13%	1.6:1	10.9
SA	14063	904	6%	3353	412	12%	2:1	12.2
NT	1165	267	23%	5224	2748	53%	2.3:1	15.4

The data in Table 6 is striking. It demonstrates that the likelihood of being sentenced to imprisonment in each of the above four jurisdictions is much higher for Indigenous offenders. And what is more, the increased rate is relatively consistent. As can be seen in Table 6, Indigenous offenders are sentenced to imprisonment in New South Wales and South Australia at double the rate of non-Indigenous offenders, and slightly less than double the rate in Queensland. In the Northern Territory, the likelihood of imprisonment is 2.3 times that compared to non-Indigenous offenders.

In each of these jurisdictions we see that the Indigenous to non-Indigenous imprisonment ratio ranges from 10.9:1 to 15.4:1. The reason that these disproportionate ratios exist cannot be explained by reference to the fact that Indigenous offenders commit an equally disproportionate number of offences. As discussed above, this hypothesis seems to be incorrect. Rather, the data analysed supports the conclusion that a key part of the reason for high Indigenous incarceration levels is simply that whenever Indigenous offenders appear before a court, their likelihood of receiving a custodial sentence is approximately double that of other offenders.

This trend of being manifestly more over-represented in the *imprisonment rate* than the *crime rate,* is supported by data from a separate ABS series on Recorded Crime.[143] The data shows that for the 2013-2014 year, the Indigenous offender "age-standardised" *crime rate*[144] was the highest in the Northern Territory and South Australia where it was approximately eight times the non-Indigenous rate; while the ratio was only about 5:1 in

[141] *See* AUSTRALIAN BUREAU OF STAT., CRIMINAL COURTS, *supra* note 36, at tbl.9. The data does not align fully with that in Table 5 as it also includes defendants who are children (i.e. less than eighteen years old). However, there were only 16713 defendants finalized in the Children's Courts in these four jurisdictions, *see id.* at tbl.8, compared to over 200,000 adult defendants, and hence, the fact that matters which are finalized in the Children's court is included in some of the data is not likely to have a considerable distorting effect. *See id.*

[142] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, at tbl.16.

[143] *See* AUSTRALIAN BUREAU OF STAT., 4519.0 – RECORDED CRIME – OFFENDERS, 2013-14 (2015), http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4519.0Main+Features12013-14?OpenDocument [hereinafter AUSTRALIAN BUREAU OF STAT., RECORDED CRIME].

[144] *See id*. at Explanatory Notes ("Age standardisation is a statistical method that adjusts crude rates to account for age differences between study populations. There are differences in the age distributions between Australia's Aboriginal and Torres Strait Islander and non-Indigenous populations, with the former having a much younger population.").

Queensland and New South Wales.[145] Although these ratios suggest that a greater number of Indigenous persons are found to have committed an offense, they cannot explain why the Indigenous imprisonment rate is almost *sixteen* times that of non-Indigenous offenders.

A limitation of the above analysis in rejecting hypothesis three is that the data focuses on the most serious offence committed by the respective cohorts.[146] The offender rate records and counts the principal offence for which an individual was proceeded against by police.[147] It does not look at the total number of offences. If Indigenous offenders are typically sentenced for more offences when they appear in court, this could potentially be relevant to explaining their over-imprisonment.

In the time period in 2013-2014 analysed by the ABS, police proceeded against Indigenous offenders with more offences than other offenders by about forty percent. The exact rate of Indigenous to non-Indigenous charges was 2:1.4 with some variations in each recorded jurisdiction: NSW (2.3:1.6); Qld (2.3:1.6); SA (2.1:1.4); NT (2.1:1.4).[148]

The fact that on average, Indigenous offenders had forty percent more charges brought against them than non-Indigenous offenders cannot provide a significant explanation for the differences in the incarceration rates. This is because the forty percent disparity is minor when viewed in the context of the principle of totality in Australian sentencing law, which "requires a sentencing judge to impose a sentence or sentences which reflect the overall criminality of the offending for which the offender has been convicted."[149] The effect of the principle is to reduce the overall penalty, rather than aggregate the sentences for each offence.[150] The most straightforward situation where totality applies is when an offender is sentenced for a number of similar offences committed within a relatively short period of time. In such circumstances, concurrent sentences are normally imposed such that the sentence is not even slightly increased because of the number of offences.[151] Thus, the increased rate of Indigenous incarceration cannot be explained on the basis that Indigenous offenders are typically sentenced on more charges.

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[145] *See id.* at tbl.17.

[146] Moreover, "[d]ata relating to the number of court initiated police proceedings sourced from the Recorded Crime – Offenders collection are not strictly comparable to the number of defendants in the Criminal Courts collection. Not all court related actions initiated by police will proceed to a criminal court as police proceedings may be withdrawn or changed to other legal actions by police during the course of an investigation. Furthermore, a defendant appearing in a criminal court may be prosecuted via charges initiated by authorities other than police. There will also be lags between when the police initiate action via a court method of proceeding and when a criminal court finalises a defendant's case. For more information about offenders recorded by police, refer to Recorded Crime – Offenders, Australia (cat. no. 4519.0)." AUSTRALIAN BUREAU OF STAT., CRIMINAL COURTS, *supra* note 36, at Explanatory Notes.

[147] *See* AUSTRALIAN BUREAU OF STAT., RECORDED CRIME, *supra* note 144, at tbls.2 & 16 (including rates for all offenders aged 10 years and over but the number of offenders committed by individuals between 10 and 19 accounts for only 88,619 of the 405,692 principal offences).

[148] *See id.* at tbl.19.

[149] *Contin v. The Queen* [2012] VSCA 247 ¶ 38; *see also Johnson v. The Queen* (2004) 78 ALJR 616, 623; *R v. Richardson* [2010] SASC 88 ¶ 24 (stating that the totality principle requires the sentencer to review the aggregate sentence calculated and consider whether it is "just and appropriate").

[150] Thus, in Australia it is uncommon for courts to make prison terms that are imposed for different offences operate consecutively. This is in contrast to the United States where consecutive terms of imprisonment are common. *See* CONNIE DE LA VEGA ET AL., CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 7 (2012), http://fairsentencingofyouth.org/wp-content/uploads/2013/01/Cruel-And-Unusual-2.pdf.

[151] *See R v Faithfull* [2004] WASCA 39 ¶¶ 24, 28; *DPP v Grabovac* [1998] 1 VR 664, 665.

Another interesting observation from the above data is that while Indigenous offenders receive on average shorter terms, they are far more likely to be imprisoned once they are found guilty of an offence. This outcome cannot be explained by the proper application of the sentencing principle. The exact same considerations that inform the type of penalty also inform the length of the penalty. Doctrinally, both considerations (the in/out decision and the length of prison term decision) are principally guided by the principle of proportionality.

As alluded to above, in *Hoare v The Queen,* the High Court of Australia stated that a criminal sanction "should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances."[152] The principle of proportionality, at least in theory, operates to "restrain excessive, arbitrary and capricious punishment,"[153] requiring that punishment not exceed the gravity of the offence, even where it seems certain that the offender will immediately re-offend.[154] Proportionality is one of the main objectives of sentencing.[155] In *Veen v The Queen (No. 1)*[156] and *Veen v The Queen (No. 2)*,[157] the High Court stated that proportionality is an established aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which has also been declared as the most important aim of sentencing at times.[158] Proportionality has also been given statutory recognition in all Australian jurisdictions.[159]

It is not feasible that in a sentencing system which is operating in a doctrinally sound manner, one cohort of offenders would commit offences which are regarded as being so much more serious than another cohort, that they have double the imprisonment rate, and at the same time, for their same offences, to be calibrated as on average deserving of less prison time. This anomaly requires additional research.

To interrogate the available data further, I examine the respective offence patterns for Indigenous and on-Indigenous offenders. Unlike Table 3, the below table focuses on all defendants who commit a crime, as opposed to only those who are sentenced to imprisonment. Hence, the number of offences is much higher. The number in the respective cells reports the portion of all offences committed by that cohort of that offence type. Again,

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[152] (1989) 167 CLR 348, 354.
[153] Richard G Fox, *The Meaning of Proportionality in Sentencing*, 19 MELB. U. L. REV. 489, 492 (1994).
[154] *See id.* at 492–93; s*ee also Chester v The Queen* (1988) 165 CLR 611 ¶ 20 ("The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.").
[155] AUSTRALIAN LAW REFORM COMMISSION, SENTENCING, NO. 44 15–16 (1988).
[156] (1979) 143 CLR 458, 467.
[157] (1988) 164 CLR 465, 472.
[158] *See Channon v The Queen* (1978) 33 FLR 433 ¶ 8.
[159] *See Sentencing Act 1991* (Vic) s 5(1)(a) (providing that one of the purposes of sentencing is to impose just punishment). The Act also states that in sentencing an offender, the court must have regard to the gravity of the offence, *id.* at s 5(2)(c), and the offender's culpability and degree of responsibility, *id.* at s 5(2)(d). The *Sentencing Act 1995* (WA) section 6(1) states that the sentence must be "commensurate with the seriousness of the offence" and the *Crimes (Sentencing) Act 2005* (ACT) section 7(1)(a) provides that the sentence must be "just and appropriate." In the Northern Territory and Queensland, the relevant sentencing statute provides that the punishment imposed on the offender must be just in all the circumstances. *See Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a)). In South Australia, the emphasis is upon ensuring that "the defendant is adequately punished for the offence." *Criminal Law (Sentencing) Act 1988* (SA) s 10 (1)(j). The need for a sentencing court to "adequately punish" the offender is also fundamental to the sentencing of offenders for Commonwealth matters. *See Crimes Act 1914* (Cth) s 16A(2)(k). The same phrase is used in the New South Wales Crimes (Sentencing Procedure) Act 1999 section 3A(a).

we see that there is a relatively stark difference regarding the offences for which Indigenous and non-Indigenous offenders are sentenced.

TABLE 7: MAIN OFFENCES FOR WHICH INDIGENOUS AND NON-INDIGENOUS OFFENDERS ARE SENTENCED[160]

	NSW		QLD		SA		NT	
Offence type	Non-Indigenous Offenders	Indigenous Offenders	Non-Indigenous Offenders	QLD Indigenous Offenders	Non-Indigenous Offenders	Indigenous Offenders	Non-Indigenous Offenders	Indigenous Offenders
01 Homicide and related offence	0.3	0.3	0.2	0.1	0.4	0.4	0.5	0.4
02 Acts intended to cause injury	34.5	40	8.1	11.6	19.9	27.1	26.3	45.7
03 Sexual assault and related offences	2.9	1.2	2	1.1	4.0	1.7	5.3	1.8
06 Robbery, extortion and related	1.9	3.0	1.2	1.5	1.1	2.7	0.6	0.4
07 Unlawful entry with intent	3.4	8	3.9	7.4	5.1	8.1	3.0	7.4
10 Illicit drug offences	18	8.1	23.2	9.9	15.1	2.9	16.5	5.1
15 Offences against justice	6.3	7	16.3	14.1	7.7	8.2	10	16.3

This data is telling for several reasons. First, in relation to some offence types, it shows major differences regarding offence prevalence between the respective jurisdictions. For example, a far greater portion of offenders are sentenced for assault matters in New South Wales and the Northern Territory than in Queensland. Given that this relates to overall offending patterns, the possible reasons for this trend are beyond the scope of this article.

However, for the purposes of this article, it is notable that in each jurisdiction there are strong similarities between offending patterns of the two cohorts. Thus, we see that drug offences and sexual offenses are committed disproportionately by non-Indigenous offenders in all jurisdictions, while assault and burglary offences are committed disproportionately by Indigenous offenders. This data is broadly similar to the offending patterns of the respective cohorts when one looks solely at offenders who are imprisoned (i.e. Table 3). It confirms that the most serious types of offences are normally committed by Non-Indigenous offenders.

One significant difference in comparing Tables 3 and 6 relates to the fact that Table 3 shows that Indigenous offenders who are imprisoned committed more than twice the amount of assault offences as Non-Indigenous prisoners. The difference is nowhere near as significant in relation to sentenced offenders. In New South Wales in particular, and South

[160] *See* AUSTRALIAN BUREAU OF STAT., CRIMINAL COURTS, *supra* note 36, at tbl.9.

Australia to a lesser degree, there is only a minor difference between the portion of Non-Indigenous and Indigenous offenders. This suggests that Indigenous offenders who commit assault offences in particular are at far greater risk of incarceration than those who commit other offence types. This is another area in need of further research.

VI POSSIBLE EXPLANATIONS FOR THE HIGHER IMPRISONMENT RATE OF INDIGENOUS OFFENDERS

A *Indigenous Offenders Have More Prior Convictions*

A tenable partial explanation for the greater rate of Indigenous incarceration is that these offenders have more previous convictions, and, in particular, have more previously served time in jail. This in fact is the case. In 2014, the overall rate of prisoners who had been jailed previously was fifty-nine percent.[161] For non-Indigenous offenders the rate is fifty-two percent; whereas it is fifty percent higher for Indigenous offenders, at seventy-seven percent.[162] Further, a Victorian study comparing the rate of imprisonment for both Koori and non-Koori prisoners confirmed that the former were more likely to have a criminal record (eighty-four percent of Koori offenders had a prior conviction compared to seventy-five percent for non-Koori offenders).[163] Indigenous offenders also had on average more prior convictions: 3.9 compared to 2.9.[164]

The Victorian Sentencing Advisory Council stated that prior criminal history had a stronger impact on aggravating penalty severity than Indigenous status.[165] This is consistent with other prior research which indicates that prior offending is a strong indicator of likely sentence.[166]

As a pragmatic reality, the controlled studies in Part IV seem to demonstrate that considerable weight is placed on prior offending. However, while this might go some way to *explaining* the incarceration disparity, it cannot *justify* this disparity. This is true for two reasons. The first is accepted legal principle. The High Court has stated that prior convictions can influence a sentence, but they cannot dominate the sentencing calculus. A summary of the manner in which prior convictions are treated in sentencing law is as follows:

(a) There is no principle that requires offenders to be punished more heavily each time they reoffend;[167]
(b) Prior convictions do not increase the objective seriousness of the offence;[168]

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[161] *See* AUSTRALIAN BUREAU OF STAT., PRISONERS IN AUSTRALIA, *supra* note 37, at tbl.8.
[162] *See id.*
[163] *See* VICTORIAN SENTENCING ADVISORY COUNCIL, *supra* note 44, at 38.
[164] *See id*. This information is consistent with earlier studies. For example, Snowball and Weatherburn note that seventy-five percent of Indigenous offenders in their sample had prior convictions compared to forty-one percent of non-Indigenous offenders. *See* Snowball & Weatherburn, *Indigenous Over-Representation*, *supra* note 45, at 13. Further, Indigenous offenders were more likely to have five or more prior convictions (twenty-two percent compared to five percent). *See id.*
[165] *See* VICTORIAN SENTENCING ADVISORY COUNCIL, *supra* note 44, at 59.
[166] *See* Bond & Jeffries, *Indigeneity and the Judicial Decision to Imprison*, *supra* note 54, at 16–17.
[167] *See DPP v Vucko* [2008] VSCA 270 ¶ 18 ("It is true that there is no sentencing principle that requires a more severe sentence to be imposed because of an appalling criminal history. The sentence should never exceed what is proportionate to the gravity of the crime viewed objectively.").
[168] *See Baumer v The Queen* (1988) 166 CLR 51, 57.

(c) Prior convictions cannot result in an offender receiving a penalty which punishes him or her again for previous offences;[169]
(d) Prior convictions can disentitle an offender from the leniency that is sometimes accorded to first time offenders;[170]
(e) In addition to this, prior convictions can result in a heavier penalty because they can indicate that the offence is not an aberration; or they can increase the moral culpability of the offender; or demonstrate a dangerous propensity, thereby indicating that the offender's prospects of rehabilitation are poor; or make a more severe penalty appropriate to pursue the objectives of retribution, deterrence or protection of society.[171]
(f) However, *the sum total of the impact of prior convictions cannot be so significant to result in a penalty that is disproportionate to the objective gravity of offence.* Prior convictions can influence where, in the continuum of a proportionate penalty, the actual penalty is set; they cannot impact on where the upper range of the appropriate penalty lies.[172] As noted in *R v Darrell Terry McNaughton*[173]:

> The Crown submissions to this Court put forward a cogent case for accepting that prior convictions are relevant to the mens rea element of an offence and are particularly significant in the assessment of the moral culpability of the offender in the commission of the offence for which s/he stands to be sentenced. Nevertheless, such considerations can be taken into account in determining the appropriate level of punishment for the particular offence and for determining where in the spectrum of seriousness of offences of this character, the facts of the case lie. (See *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [85]- [99] and especially at [90]-[93].) However, on the authority of *Veen No 2* and *Baumer*, it is not open to this Court to adopt the approach submitted by the Crown so as to use prior convictions to determine the upper boundary of a proportionate sentence.[174]

Thus, jurisprudentially, prior convictions can increase penalty, but the premium is capped and cannot justify Indigenous offenders being twice as likely to be imprisoned as other offenders. If prior convictions are *in fact* having this effect, this is evidence of a misapplication of the law which happens to disproportionately disadvantage Indigenous offenders.[175] The manner in which this practice should be addressed is discussed below in Part VII of this article.

B *Sub-Conscious Bias by Judges*

Another possible explanation for the tendency of courts to disproportionately imprison Indigenous offenders is due to a sub-conscious bias against this cohort. Research into sub-conscious judicial bias in Australia is not well advanced,[176] but a greater number of studies in the area have been undertaken in the United States.

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[169] *Weininger v The Queen* (2003) 212 CLR 629, 640.
[170] *See DPP v Vucko* [2008] VSCA 270 ¶ 18.
[171] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 477–78.
[172] *Van Der Baan v R* [2012] NSWCCA 5 ¶ 30.
[173] [2006] NSWCCA 242.
[174] *Id.* ¶ 25
[175] In the United States, prior criminality can have a much heavier impact on the sentence – a bad criminal history score can add more than ten years to some prison terms. *See generally* Bagaric, *The Punishment Should Fit the Crime*, *supra* note 75.
[176] As noted above, some of the reports considered above raise subconscious bias as a possible explanation for racial disparity in Australian sentencing, however, this is merely raised as a tenable possible reason without any degree of certainty being expressed as to the validity of it being a sound explanation. *See, e.g.*, VICTORIAN

All humans, including judges, have preferences and biases. The most difficult to negate are those of which the holder is unaware. Judges, like all people, typically view themselves as being objective and fair while having a bias blind spot when it comes to their own decision-making.[177] Judge Richard Posner in his seminal work, *How Judges Think,* stated that "we use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behaviour to identify bias in others."[178] The default position of people "is to assume that their judgments are uncontaminated" by implicit bias[179] and "judges are inclined to make the same sort of favourable assumptions about their abilities as non-judges do."[180] The truth is otherwise. All people are influenced by their life journey and are "more favourably disposed to the familiar, and fear or become frustrated with the unfamiliar."[181]

The evidence regarding the impact of implicit judicial bias is considerable. The range of traits which influence the outcome of decisions is wide-ranging. Thus, we see that attractive offenders receive more lenient penalties than other offenders—except when the attractive appearance is used to facilitate the crime.[182] Judicial bias also extends to socioeconomic background with a recent study of child custody cases showing that judges favour wealthy litigants to those who are less well off.[183]

Victim traits also impact sentencing outcomes. Black offenders who harm white victims were found to receive heavier penalties than when the victim was black, presumably because "the judges were also white, and their in-group or worldview was more threatened by criminal conduct against persons from their in-group."[184]

Racial discrimination in sentencing has been long documented.[185] In one of the most wide-ranging surveys, using data from almost 60,000 offenders that were sentenced, the data revealed that even when variables related to the offence committed were controlled for, blacks were still twenty-two percent more likely to receive a longer sentence than whites.[186] A more recent study undertaken for the United States Bureau of Justice Statistics examined

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SENTENCING ADVISORY COUNCIL, *supra* note 44, at 1–2, 21; Snowball & Weatherburn, *Racial Bias in Sentencing*, *supra* note 45.

[177] *See* Jennifer K. Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 MONITOR ON PSYCHOL. 24, 24 (2010).

[178] RICHARD POSNER, HOW JUDGE'S THINK 25 (2008).

[179] Timothy Wilson et al., *Mental Contamination and the Debiasing Problem*, *in* HEURISTICS AND BIASES 185, 190 (Thomas Gilovich et al. eds., 2002).

[180] Jeffrey Rachlinski & Sheri Johnson, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1228 (2009).

[181] Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, 24 JUDGES J. 6, 52 (1985).

[182] *See* Birte Englich, *Heuristic Strategies and Persistent Biases in Sentencing Decisions*, *in* SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME 295 (Steffen Bieneck et al. eds., 2009). In one study, seventy-seven percent of unattractive defendants received a prison term, while only forty-six percent of attractive defendants were subjected to the same penalty. *See* John E. Stewart, *Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 J. APPLIED SOC. PSYCHOL. 348, 354 (1980).

[183] *See* Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 137 (2013).

[184] Siegfried L. Sporer & Jane Goodman-Delahunty, *Disparities in Sentencing Decisions*, *in* SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME 379, 390 (Margit E. Oswald et al. eds., 2009).

[185] *See generally* Ochi, *supra* note 182.

[186] *See* Ronald Everett & Roger Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. Quantitative Criminology 189, 207 (2002); *see generally* David Abrams, *Do Judges Vary in Their Treatment of Race?*, 41 J. Legal Stud. 347, (2012) (describing a study of felony cases adjudicated in Cook County, Illinois between 1995 and 2001).

sentencing disparity in the federal jurisdiction for sentences pursuant to Federal Sentencing Guidelines in the eight year period between 2005 and 2012.[187] In 2005, the United States Supreme Court held in the case of *United States v. Booker*[188] that the Guidelines were not mandatory and instead were advisory in nature and hence study relates to a period where there was a degree of discretion available to judges in sentencing offenders.[189] The study found that after controlling for the variables recognised by the guidelines, black men received prison sentences which were approximately five to ten percent longer than white offenders for similar offenses.[190] Moreover, it was found that racial disparity has increased since *Booker*.[191] The report notes that it is "difficult to attribute racial disparity to skin color alone";[192] however, it also adds:

> We are concerned that racial disparity has increased over time since *Booker*. Perhaps judges, who feel increasingly emancipated from their guidelines restrictions, are improving justice administration by incorporating relevant but previously ignored factors into their sentencing calculus, even if this improvement disadvantages black males as a class. But in a society that sees intentional and unintentional racial bias in many areas of social and economic activity, these trends are a warning sign. It is further distressing that judges disagree about the relative sentences for white and black males because those disagreements cannot be so easily explained by sentencing-relevant factors that vary systematically between black and white males. . . . We take the random effect as strong evidence of disparity in the imposition of sentences for white and black males.[193]

As noted, most of the above studies relate to implicit biases or extra-legal influences of United States judges. No similar studies have been undertaken in Australia. While Australian judges are appointed differently from their U.S. counterparts, the judicial role is identical in both countries and hence, there is no reason to believe that the reasoning of Australian judges is any less impacted by such considerations.[194] In light of the possibility that judges are influenced by subconscious bias, consideration should be given to providing formal training to judicial officers to overcome any such considerations.[195]

VII PARTIAL SOLUTIONS TO INDIGENOUS OVER-REPRESENTION IN PRISONS

I now set out three recommendations which, if implemented, are likely to reduce the over-representation of Indigenous people in Australian prisons.

A *Conferring a Discrete Sentencing Discount in the Case of Indigenous Offenders*

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[187] *See* WILLIAM RHODES ET AL., BUREAU OF JUSTICE STAT. WORKING PAPER SERIES, FEDERAL SENTENCING DISPARITY: 2005–2012 (2015), http://www.bjs.gov/content/pub/pdf/fsd0512.pdf. This report also systematically documents previous studies in the United States, which support the conclusion that subconscious bias causes racial disparity in sentencing. *See id.* at 4–14.
[188] Booker v. United States, 543 U.S. 220 (2005).
[189] RHODES ET AL., *supra* note 188, at 4.
[190] *See id.* at 41.
[191] *See id*. at 67–68.
[192] *Id*. at 67.
[193] *Id*. at 68.
[194] Although without positive evidence of bias, it is necessary to be cautious about transposing United States research and experience to Australia.
[195] This training is becoming increasingly commonplace in other institutional settings. *See generally* Elizabeth G. Olson, *How Corporate America is Tackling Unconscious Bias*, FORTUNE, Jan. 15, 2015.

In *Bugmy v The Queen*,[196] the High Court of Australia stated that Indigenous offenders may be entitled to a sentencing discount. The Court reasoned that such offenders are sometimes less culpable because their formative years may have been marred by being subjected to negative influences, thereby impairing their capacity to mature and diminishing their moral culpability.[197] Moreover, it noted that this neither dissipates as the offender grows older nor with the accumulation of prior convictions.[198] The Court stated that social deprivation can constitute a basis for mitigation not only for Aboriginals, but all people subjected to disadvantaged upbringing.[199] Further, social deprivation and a different cultural upbringing can mitigate a penalty if they make prison more burdensome.[200] However, the court also noted that for mitigation to occur, the social deprivation was not assumed, but would need to be established.[201]

The rationale in *Bugmy* is supported by numerous studies that demonstrate a direct link between social disadvantage and crime, and consequently higher imprisonment rates for the poor.[202] It is manifestly clear that in Australia, the Indigenous community is the worst off in society according to a wide range of measures of flourishing.[203] The Indigenous community has the lowest life expectancy in Australia, with the gap between Indigenous males and non-Indigenous males estimated at 11.5 years, and 9.7 years for females.[204] In 2012, infant mortality was almost twice as high for Indigenous infants compared to non-Indigenous infants.[205] The rate of high school completion for non-Indigenous students was eighty-one percent, but only fifty-one percent for Indigenous students.[206] Indigenous Australians are far less more likely to be unemployed, with their unemployment rate at seventeen percent compared to four percent for non-Indigenous Australians.[207] The Indigenous homelessness rate is fourteen times that of non-Indigenous Australians,[208] and the average income for Indigenous Australians is 0.7 that of non-Indigenous Australians.[209]

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[196] *Bugmy v The Queen* [2013] HCA 37.
[197] *See id.* ¶ 40.
[198] *See id.* ¶ 27.
[199] *See id.* ¶ 39 (quoting *Neal v R* (1982) 149 CLR 305, 326).
[200] *See id.* ¶ 39 (citing Fernando (1992) 76 A Crim R 58, 63 (G)).
[201] *See id.* ¶ 41.
[202] *See, e.g.*, Stuart P. Green, Symposium, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders,* U. CHI. LEGAL F. 43, 48 (2010); Harry J. Holzer et al., *The Economic Costs of Childhood Poverty in the United States* 14 J. CHILD & POVERTY 41 (2008); William Alex Pridemore, *Poverty Matters: A Reassessment of the Inequality–Homicide Relationship in Cross-National Studies* 51 BRITISH J. CRIMINOLOGY 739 (2011); Avelardo Valdez et al., *Aggressive Crime, Alcohol and Drug Use, and Concentrated Poverty in 24 U.S. Urban Areas*, 33 AM. J. DRUG & ALCOHOL ABUSE 595 (2007).
[203] *See Closing the Gap in Indigenous Disadvantage*, COUNCIL OF AUSTRALIAN GOVERNMENTS, , http://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage (last visited Oct. 3, 2016).
[204] *See* AUSTRALIAN INST. OF HEALTH AND WELFARE, AUSTRALIA'S WELFARE 2013 409 (2013), http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129544075.
[205] *See id.* at 410.
[206] *See id.* at 425.
[207] *See id.* at 434.
[208] *See id.* at 418.
[209] *See* NICHOLAS BIDDLE, CAEPR INDIGENOUS POPULATION PROJECT: 2011 CENSUS PAPERS, PAPER 11 INCOME 5 (2013), http://caepr.anu.edu.au/sites/default/files/cck_indigenous_outcomes/2013/07/2011CensusPaper11_Income%20upd.pdf. In 2006, the portion of Indigenous people who had an annual income between $1 and $149 was 9.5%, while in 2011 about 12.5% had an annual income between $1 and $199. For the same time period and income bracket, the percentages of non-Indigenous people were 7.6% and 7.9%, respectively. *See id.* at 5–7; *see also* Brad Plumer, *These Ten Charts Show the Black-White Economic Gap Hasn't Budged in 50 Years*, WASHINGTON POST (Aug. 28, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/28/these-seven-charts-show-the-black-white-economic-gap-hasnt-budged-in-50-years/ (showing that African Americans

The reasons for the connection between poverty and crime are multi-faceted and not fully understood. However, some argue that the increased inclination toward crime resulting from disadvantage stems broadly from the lack of resources and opportunities that are an almost unavoidable aspect of economic deprivation.[210] Crime often results from "frustration-aggression,"[211] which can result from being subjected to inequality that is entrenched by poverty, poor schools, violent neighbourhoods, racism, and single-parent families.[212]

Poverty also limits the capacity of parents to nurture and correct aberrant behaviour before it becomes socially and individually destructive.[213] There is also a close connection between poverty and child neglect, which carries associated and considerable independent damaging effects.[214] Further, as noted by Don Weatherburn,

> From the data it is clear that Indigenous Australians fare much worse than non-Indigenous Australians in terms of four critical factors known to play a significant role in the onset, seriousness, duration and frequency of involvement in crime. The insidious thing about these factors is that they form a vicious cycle. Parents exposed to financial or personal stress, or who abuse drugs and alcohol, are more likely to abuse or neglect their children. Children who are neglected or abused are more likely to associate with delinquent peers and do poorly at school. Poor school performance increases the risk of unemployment, which in turn increases the risk of involvement in crime. Involvement in crime increases the risk of arrest and imprisonment, both of which reduce the chances of legitimate employment, while at the same time increasing the risk of drug and alcohol abuse. And so the process goes on, a vicious cycle of hopelessness and despair transmitted from one generation of Aboriginal people to the next.[215]

A broader reason for the link between poverty and crime is that social and economic deprivation limits choice, which can foster also frustration and rebellion.[216] This lack of choice also means that people have less to lose. By contrast, wealth confers freedom, opportunity and power. It also provides a reason to maintain and improve one's current situation. Financially prosperous people often do not commit crime because they have too much to lose from the incidental adverse consequences of a conviction, including the negative impact on their employment, reputation and resource base.[217] Poverty itself often

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are unemployed at approximately twice the rate of white Americans, median household income of African Americans is $32,068 is nearly half of that of white Americans, and high school completion rate of African Americans is approximately sixty-two percent compared to eighty percent. Further, white Americans live, on average, nearly four years longer than African Americans).

[210] *See* Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114, 126 (1982).

[211] *Id.* at 119 (explaining that substantial wealth disparities mean that "there are great riches within view but not within reach of many people destined to live in poverty . . . [causing] resentment, frustration, hopelessness and alienation" among the poor).

[212] *See* Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?* 3 LAW AND INEQ. 5, 23–24 (1985); *see also* Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 865–66 (2008).

[213] *See id.* at 33.

[214] *See generally* Julie L. Crouch & Joel S. Milner, *Effects of Child Neglect on Children*, 20 CRIM. JUST. & BEHAV. 49 (1993).

[215] DON WEATHERBURN, ARRESTING INCARCERATION: PATHWAYS OUT OF INDIGENOUS IMPRISONMENT 87 (2014).

[216] *See* Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 499–500, 507–10 (2013).

[217] It could be contended that part of the reason that wealthy people are under-represented in crime statistics is that they perhaps commit more white collar crimes, which are not policed as heavily as other forms of crime. However, this involves a large degree of speculation and the empirical data that is available is strongly suggestive of the fact that disadvantaged people do commit more crime. *See generally* STEVEN BOX, RECESSION, CRIME AND PUNISHMENT (1987).

does not lead to criminality; however, when combined with certain other immediate circumstances, it is more likely to do so.[218]

Thus, the reasoning in *Bugmy* is sound, but in order for the sentencing discount principle to be effective it should be operationalized in a manner which is more concrete and nuanced. This is not currently occurring, in part, because courts are not required to give any specific degree of weight to the principle when performing their sentencing calculus.[219] Furthermore, the principle should be narrowed to apply to a lesser range of offences.

As discussed above, from a pragmatic perspective, given that the disadvantaged have a number of factors that incline them towards crime, and have less to lose by engaging in such conduct, they are sometimes less culpable when they transgress the criminal law and accordingly they are entitled to a sentencing discount. However, it is not the case the deprived background should result in a sentencing reduction for all types of offenses.

While poverty limits choices,[220] and resources confer freedom, "freedom" is a relative concept.[221] Logically poverty does not incline people to all types of crime. It is understandable that the disadvantaged might be more inclined to engage in conduct that would expand their choices. Thus, the poor may resort to economic-related crime, such as property and drug offences, to overcome poverty.[222]

However, serious sexual and violent offences[223] are not a means of overcoming poverty. Poor people committing such offences is a demonstration of, at best, a demonstration of anger and frustration or, at worst, an utterly derelict value system. Even if the former is the more likely reason, this sort of "lashing out" has no place in a civilised community.

Thus, economic and social disadvantage tenably should be a mitigating factor for property and drug offences, but not for sexual and violent offences. This dichotomy is also supported by the fact that empirical data shows that serious sexual and violent offences often

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[218] *See* Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 863 (2008). *See also* Mirko Bagaric, *Rich Offender; Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 L. & INEQUALITY 1, 13–14 (2014).

[219] *See Namarnyilk v The Queen* [2013] NTCCA 17 ¶¶ 33–37 (holding that advanced age, an area of Aboriginal disadvantage, did not mitigate penalty); *see, e.g.*, *R v MBY* [2014] QCA 17 ¶ 67 (stating that the weight given to the deprived background of an offender will depend on the particular case); *R v Booth* [2014] NSWCCA 156 ¶¶ 26, 31 (noting that deprived background might militate a sentence but it is for the sentencing judge to determine the weight given to the circumstances); *R v Grose* [2014] SASCFC 42 ¶ 40 (stating that, beyond social and economic disadvantage, "the court may need to consider cultural factors or the unique history and treatment of a particular ethnic group" in sentencing decisions); *Kentwell v R (No. 2)* [2015] NSWCCA 96 ¶ 13 (noting that defendant's removal from his natural parents and his "consequent difficulty in adjusting to a 'white fella's world'" was evidence of deprived background and social disadvantage which could mitigate the sentence); *Miller v R* [2015] NSWCCA 86 ¶ 90 (stating that "real consideration must be given to evidence of a disadvantaged background in assessing moral culpability and whether special circumstances should be found).

[220] *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 57 (2d ed. 2012).

[221] For a short summary on the varying theories on free will and action, see Stephen J. Morse, *Deprivation and Desert*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE 114, 153 (William C. Heffernan & John Kleinig eds., 2000).

[222] *See* Barbara Hudson, *Punishing the Poor: Dilemmas of Justice and Difference*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE 189, 197 (William C. Heffernan & John Kleinig eds., 2000).

[223] By this I mean all offenses which involve the infliction of harm on victims, i.e. homicide and battery offenses.

have profoundly damaging impacts on the victims.[224] Moreover, rich or poor, it is almost universally believed that it is wrong to strike another person or to sexually coerce them. This provides a powerful argument for the imposition of stern punishment in response to these offences. Of course, it does not mean that mitigating factors cannot necessarily apply in relation to such behaviour.

Still, in relation to less serious offences, there is a stronger argument for mitigating the penalty of the disadvantaged offender.[225] Once the burden of considerable victim suffering and community safety is reduced, the scourge of poverty prevails in balancing the competing considerations.

There are obviously some fine lines involved here. One relates to the degree of impoverishment necessary to reduce culpability; however, this is not an overwhelming consideration for the purpose of this article. As noted above, Indigenous Australians are clearly the most disadvantaged group in the Australian community, and hence, as an ethnic group, they are likely to satisfy any reasonable criteria of poverty and disadvantage. It follows that there is a powerful argument for making Indigeneity a mitigating factor. In order to make the law workable and transparent, this consideration should apply to Indigenous offenders irrespective of their exact social and economic history and situation. In order for the discount to be conferred, it should not be necessary for a defendant to establish a direct causal link between the crime and his or her disadvantage. The exact explanation for human conduct is complex and multi-faceted. It would undercut the application of the mitigating consideration too drastically to require the defendant to prove that disadvantage caused his or her offending, in any particular case.

The other important operational consideration is the appropriate size of the discount.[226] It needs to be large enough to reflect the considerably lower culpability of impoverished offenders but, at the same time, not so large that the penalty would be grossly disproportionate to the seriousness of the crime. A reduction in the order of twenty-five percent satisfies these considerations. This is within the range of the typical penalty reduction that offenders in Australia receive if they plead guilty to an offence,[227] and has not resulted in patently disproportionate sanctions being imposed. At the same time, a twenty-

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[224] *See generally* Rachel F. Hanson et al., *The Impact of Crime Victimization on Quality of Life,* J. TRAUMATIC STRESS 189 (2010); MIKE DIXON ET AL., INST. FOR PUB. POLICY RESEARCH, CRIMESHARE: THE UNEQUAL IMPACT OF CRIME 25 (2006), http://www.ippr.org/files/images/media/files/publication/2011/05/crimeshare_1500.pdf?noredirect=1; Chester L. Britt, *Health Consequences of Criminal Victimization*, 8 INT'L REV. CRIMINOLOGY 163 (2001).

[225] For a discussion of this proposal, see generally Hudson, *supra* note 223.

[226] The desirability of a quantified discount is endorsed in *Marrah v The Queen (Vic*) [2014] VSCA 119 ¶¶ 17–18. I further elaborate on the reasons for a quantified discount in Bagaric, *supra* note 219, at 42–43.

[227] In several jurisdictions it is now either conventional or a statutory requirement to indicate the size of the discount. In New South Wales and Queensland, the Court must indicate if it *does not* award a sentencing discount in recognition of a guilty plea. *See Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2); *Penalties and Sentences Act 1992* (Qld) s 13(3)). In South Australia, Western Australia and New South Wales, the courts often specify the size of the discount given. In Victoria, *Sentencing Act 1991* (Vic) section 6AAA states that when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. The rationale and size of the typical discount in Victoria is discussed in *Phillips v The Queen* [2012] VSCA 140 ¶¶ 47–48, 55–67. In Western Australia, *Sentencing Act 1995* (WA) section 9AA permits a court to reduce a sentence by up to twenty-five percent for a plea entered into at the first reasonable opportunity. In South Australia, recent legislative changes allow for a guilty plea reduction of up to forty percent for an early guilty plea. *See Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA) (introducing sections 10B and 10C, regarding reduction of sentences for guilty pleas, into the *Criminal Law (Sentencing) Act 1988 (*SA)).

five percent discount is considerable enough to offer offenders a pragmatic incentive to plead guilty, and hence, it seems that it is a meaningful degree of mitigation.

The discount should be applied in a similar manner to that which is being used for the reduction for pleading guilty. It should serve to reduce the length of any prison term and also to lessen the seriousness with which an offence is calibrated, and hence, serve to reduce the circumstances in which imprisonment is imposed at the outset.

B *The Need to Abolish Sentencing Practices That Operate Unfairly Against Disadvantaged Offenders*

While it is contestable whether disadvantage should be a mitigating sentencing consideration, it is incontestable that it should not be an aggravating factor. There are two ways in which disadvantage can act to aggravate penalties. The first and most obvious way is by the direct operation of a legal rule of principle. This does not occur in Australia. The second way in which poverty can aggravate is if a trait, which exists disproportionally among disadvantaged offenders, serves to increase penalties.

To this end, as we have seen, there is one consideration that profoundly operates disproportionally against disadvantaged offenders: that the prior convictions of an offender are an aggravating sentencing consideration.[228] The doctrinal basis for this is, however, dubious. Punishing recidivists more harshly than first-time offenders is intuitively appealing. There is, however, no settled justification for this practice. Principally, the punishment should fit the crime, not the antecedent actions of the person who committed the crime.[229] There no convincing basis for according *considerable* weight to prior criminality in the sentencing calculus in relation to *all offences*.

The main argument that is used in support of punishing recidivists more heavily is specific deterrence, which aims to discourage crime by punishing individual offenders for their transgressions and thereby convincing them that crime does not pay.[230] It attempts to dissuade offenders from re-offending by inflicting an unpleasant experience on them (such as imprisonment), which they will (at least in theory) seek to avoid in the future.[231] The available empirical data suggests that specific deterrence does not work.[232] There is nothing to suggest that offenders who have been subjected to harsh punishment are less likely to re-offend than identically-placed offenders who are subjected to lesser forms of punishment.

Thus, there is no basis for pursuing the goal of specific deterrence. To the extent that a recidivist enhancement is justifiable, it should be confined to recidivist serious sexual and violent offenders, where a recidivist loading of twenty to fifty percent should be applied, given that this is consistent with their rate of re-offending.[233]

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[228] As noted above, this is also very much the case in the United States.
[229] *See generally* Bagaric, *supra* note 75.
[230] *See* Daniel S. Nagin et al., *Imprisonment & Re-offending*, 38 CRIME & JUST. 115, 124 (2009).
[231] *See* DONALD RITCHIE, SENTENCING ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE 18 (2011), https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf; Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159 (2012).
[232] *See generally* Nagin et al, supra note 232; Don Weatherburn, *The Effect of Prison on Adult Reoffending*, 143 CRIME & JUST. BULL. 1 (2010)
[233] *See* Bagaric, *supra* note 75, at 411.

Attaching less weight to prior convictions will ensure that every time such offenders are sentenced, their punishment will be no more than what is imposed on the affluent offender who has committed the same crime. Indigenous offenders will probably still appear in court more frequently than other offenders, but, unless they have committed a serious sexual or violent offence, their sentence would be determined on the basis of the instant offence—not according to other factors. And even when they have committed a serious sexual or violent offence, the sanction, in general, would be less harsh than is currently the case.

C *Taking Parsimony Seriously*

The last proposed response to the Indigenous over-imprisonment problem, is one that relates to all offenders; however, it will disproportionately assist Indigenous offenders as they are imprisoned more often. The third recommendation is that the parsimony principle should apply with greater effect and force.

Parsimony is the principle that in relation to any sentence, the least severe form of punishment should be implemented to achieve the proper objectives of sentencing. In *NOM v DPP & Ors*,[234] the Victorian Court of Appeal, set out the principle in the following terms: "The principle of parsimony requires giving effect to the 'least sentence that is commensurate with the offense committed and with the purposes for which punishment has to be imposed.'"[235]

The principle is part of the common law in most Australian jurisdictions, except New South Wales.[236] Despite its rejection in New South Wales, the parsimony principle is given legislative force in some Australian jurisdictions. Its widest and clearest expression is in section 5(3) of the *Sentencing Act* 1991 (Vic), which states that a court "must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed."

When the parsimony principle is applicable, it can potentially influence the outcome of all sentencing decisions. However, courts have noted that it is especially apposite in relation to the decisions about whether to impose a prison term[237] and the length of any term of imprisonment that is imposed.[238]

The operation of the parsimony principle in the context of whether to impose a prison term is, in fact, the context in which the principle receives its greatest legislative endorsement

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[234] [2012] VSCA 198.
[235] *Id.* ¶ 68 (quoting *R v Bell* (Unreported, Court of Criminal Appeal Victoria, O'Bryan J, 9 August 1990)). The principle has been recently reaffirmed in Victoria in *Boulton v The Queen* [2014] VSCA 342 ¶ 140; *Bowden v The Queen* [2013] VSCA 382 ¶45; *DPP v Fucile and Tran* [2013] VSCA 312 ¶104.
[236] *See Blundel v R (Cth)* [2008] NSWCCA 63 ¶ 47 (stating that the principle of parsimony is inconsistent with the notion of "a range of sentences" and the discretion properly open to sentencing judges). It is also a feature of United States sentencing law, for example, see 18 U.S.C. §3553(a) (requiring that judges "impose a sentence sufficient, but not greater than necessary" to serve the purposes of sentencing); U.S. v. Pennington, 667 F.3d 953 (7th Cir. 2012) (holding that a judge need not expressly refer to the "so-called parsimony provision" at sentencing, but his explanation of the sentence must be consistent with its meaning"); U.S. v. Chavez, 611 F.3d 1006, 1010 (9th Cir. 2010) (stating that the parsimony principle "is a guidepost, an overarching principle that directs judges in the appropriate exercise of their sentencing discretion within the sentencing range authorized and consideration of factors prescribed by Congress").
[237] *See Jabaltjari v Hammersley* (1977) 15 ALR 94, 99.
[238] *See Thorn v Laidlaw* [2005] ACTCA 49 ¶ 30; *see also NOM v DPP & Ors* [2012] VSCA 198 ¶ 68.

in Australia. Most jurisdictions, even New South Wales, have legislative provisions which mandate that imprisonment should be a sanction of last resort. Imprisonment should only be imposed when no other less onerous sanction is appropriate in all circumstances of the offense and the offender.[239]

However, in practice, the principle is readily overridden to the point of institutional irrelevance. This is made easy by the fact that judges do not need to give reasons for not imposing a parsimonious sentence. In *R v O'Connor* the Court stated:

> A sentencing judge is obliged to satisfy himself that no other sentence is appropriate before he imposes a sentence of imprisonment but he is not obliged to give his reasons for rejecting non-custodial alternatives so long as it appears from all that is said that he must have satisfied himself as required.[240]

An illuminating point to emerge from an analysis of the case law is the absence of the parsimony principle being invoked as a rationale for reducing the severity of a penalty. There are no reported Australian superior court decisions where a sentence has been reduced to comply with the dictates of the parsimony principle.

This indicates a lack of conviction towards the principle. This needs to change. Sentencing involves the deliberate infliction of suffering on individuals. It is the domain of the law which purposefully acts in a coercive manner. Given the intrinsic undesirability of suffering, its infliction in a humane society must be limited to the minimum extent necessary to achieve the purposes for which it is inflicted. Criminal sanctions are overly-severe if they are harsher than is necessary to fulfil the appropriate objectives of sentencing.

The parsimony principle commands that criminal sanctions must be confined to the intensity and duration that is necessary to achieve the goals of sentencing. Any punishment beyond that is gratuitous; it is also cruel and immoral. It violates the universally-accepted principle that it is repugnant to punish the innocent.[241]

The key to shoring up adherence to the principle is not only embedding it within a strong justification, but also sifting through the voluminous empirical data regarding the efficacy of sentencing to achieve its core objectives. Upon doing so, it emerges that the type and length of penalty should be principally determined by reference to the principle of proportionality, which requires that the diminution in well-being of the victim is matched by the extent to which the interests of the offender are set-back by the sanction.[242] It is not

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[239] For instance, the *Sentencing Act* 1991 (Vic) requires a sentencing court not to impose a sentence involving confinement unless the court considers that the purpose for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender. A similar provision exists under the *Crimes (Sentencing) Act* 2005 (ACT) section 10(2); the *Crimes (Sentencing Procedure) Act* 1999 (NSW) section 5(1) and the *Penalties and Sentences Act 1992* (Qld) section 9(2)(a)(i)–(ii). In Tasmania, the *Sentencing Act 1997* provides that where the only punishment provided for an offense is imprisonment, a sentencing court may nevertheless impose a non-custodial sentence if the court "considers that the justice of the case will be better met" through the imposition of such a penalty. *See Sentencing Act 1997* (Tas) s 12(2). Also, the requirement that imprisonment should be a sanction of last resort applies to federal offenders who are dealt with by State and Territory courts. This is an explicit requirement of the *Crimes Act* 1914 (Cth) section 17A(1). *See also Criminal Law (Sentencing) Act* 1988 (SA) s 11.

[240] [1987] VR 496, 501.

[241] *See* H. J. MCCLOSKEY, META-ETHICS AND NORMATIVE ETHICS 180 (1969). As Antony Duff points out, punishing the innocent also occurs where a person is punished more severely than is commensurate with the seriousness of the offense. *See* R. A. DUFF, TRIALS AND PUNISHMENTS 154–55 (1986).

[242] *See* BAGARIC & EDNEY, *supra* note 75, at chs. 6–7.

possible to exactly match the limbs of the proportionality principle. Given this, the default position is that criminal sanctions should err on the side of being less severe. In any decision-making calculus, certain consequences (in this case, infliction of suffering on offenders) must carry more weight than speculative consequences (in the form of attaining speculative sentencing objectives). In relation to substantive criminal law, the State has the burden of establishing guilt beyond reasonable doubt. Sentencing is the sharp end of criminal law, where the State acts in its most coercive manner against individuals. The principle of parsimony requires that a burden should be imposed on the State to demonstrate that any punishment that is imposed on offenders will satisfy the valid objectives of sentencing.

While this approach has a degree of vagueness, it is clear that generally, the courts should be very slow to sentence offenders to imprisonment for offences which do not involve serious encroaches on the sexual or physical integrity of victims.[243] This is out of keeping with the current approach, given that, as we have seen, forty-five percent of prisoners are in jail for non-sexual or non-violent offences. Adoption of this reform would fundamentally alter the outcome of sentencing determinations. It would result in a considerable reduction in the prison population without a diminution in community safety.

VIII CONCLUSION

Indigenous offenders are grossly over-represented in Australian prisons. This has been acknowledged for several decades, during which time the incarceration rate has continued to grow. The solutions that have been proposed thus far do not relate to concrete sentencing changes.

This article has examined whether the sentencing system operates in an unfair manner against Indigenous offenders. Previous research into this issue has been inconclusive, with the weight of findings suggesting a degree of racial disparity in sentencing. On analysing the methodology underpinning these findings, it emerges that the studies are compromised—perhaps so much as to make the findings irrelevant. The key problem with previous studies is that they do not appropriately factor in the vast array of sentencing variables that inform the sentencing calculus. While some of the studies incorporate well-known sentencing considerations, such as prior convictions and gender, there are numerous other well-known considerations which either are totally ignored or not appropriately factored into the study designs. Some of these considerations, such as substance involvement and mental impairment, are especially important because they apply disproportionately in relation to Indigenous offenders.

Moreover, given the complexity of the sentencing calculus in Australia, including the fact that Indigeneity itself is a mitigating factor; the large number of aggravating and mitigating factors; the different sentencing principles that apply to certain offence types; and the fact that no designated weight is accorded to any considerations (except a plea of guilty and cooperation with authorities), it is verging on untenable to design a controlled study that factors in all appropriate variables to test for the impact of Indigeneity.

Accordingly, the soundest position is to revert the raw data and look for broad-ranging patterns and differences. The advantage of this is that the sample size is substantial,

[243] *See* discussion *supra* Part VII.A.

the data is current and the limitations of the baseline study are made manifestly clear. On undertaking this analysis in this paper, some striking patterns were noticed. Most clearly, it was noted that each time an Indigenous offender is sentenced, the likelihood of being sentenced to imprisonment is approximately double that of other offenders. Further, this disparity cannot be explained on the basis that Indigenous offenders commit on average more serious offences or more offences. Finally, it also emerged that while Indigenous offenders are sentenced to imprisonment more frequently, they actually, on average, receive shorter jail terms.

There is no obvious explanation for these outcomes. It has been suggested that the higher rate of prior convictions and, perhaps, multiple offending can explain the disparity. However, the differences in these variables are relatively modest, and, according to sentencing principles, cannot accommodate the differences in incarceration rates especially when the fact that Indigenous offenders commit less serious offences is factored into the assessment.

In light of the problems identified in this paper, I make three recommendations that will lower Indigenous incarceration. The first two are "hard reforms" in that their impact can be monitored and will be immediately discernible. The third is less tangible, but if applied diligently by courts, will be effective to reduce incarceration levels. All of the reforms apply to non-Indigenous offenders but will disproportionately advantage Indigenous offenders as they more frequently possess the characteristics which attract the reform.

The first proposed reform stems from the fact that the underprivileged do not choose poverty and the difficulty associated with rising above impoverishment. Disadvantage limits opportunity and choice, and often leads to rebellious behaviour. This inclines to a sentencing discount for the disadvantaged. However, doctrinally speaking, the sentencing system should not always confer sentencing discounts to the poor. In relation to serious sexual and violent offences, the devastating effect that these offences often have on the lives of victims, plus the fact that all people rich and poor are aware of the heinous nature of such crime, militates against a sentencing discount for these offences.

The calculus is differently weighted regarding other forms of offences, such as drug and property offences. Once the suffering associated with violent and sexual injuries is removed from the equation, the stricture and pain of poverty is paramount and should be reflected in a twenty-five percent sentencing reduction for the poor who commit such crimes.

Second, poverty should never be an aggravating factor in sentencing. Presently, this is the case because of the sentence inflation that often stems from prior convictions. This is a cause of considerable discrimination against the poor and needs to be greatly curtailed, such that it only applies to sexual and violent offenders, and then, only to escalate the penalty by twenty to fifty percent. This would considerably reduce the rate and duration of prison terms imposed on the poor.

Third, the parsimony principle should be consolidated and taken seriously. Imprisonment should never be considered as a sentencing option until all other sanctions are excluded as being capable of tenably achieving the proper objectives of sentencing.

The recommendations in this article, if adopted, will not ameliorate all of the unfair burden experienced by Indigenous offenders.[244] Nevertheless, the proposed changes would decrease the suffering imposed on Indigenous offenders so far as sentencing is concerned, and could act as a catalyst for the implementation of other concrete changes to the criminal justice system, which would further reduce this burden.

Finally, while the discussion above focuses heavily on the over-representation of Indigenous offenders in Australian prisons, it, nevertheless, has considerable relevance to United States sentencing. This is for several reasons. First, both countries have a similar problem—the most socially and economically disadvantaged groups are disturbingly over-represented in incarceration numbers. Second, while there are considerable differences between the sentencing regimes in the United States and Australia, all of the proposed solutions to Indigenous over-incarceration in Australia stem from existing structural failings of the Australian system *and* all of these failings also exist in the United States. In fact, in relation to the (over-) emphasis of prior convictions in sentencing, the United States is even more flawed than the Australian system. The incarceration levels of Indigenous Australians and African Americans would be reduced considerably if both sentencing systems reduced the weight accorded to prior convictions; conferred a sentencing discount for offenders from these groups (except in the case of serious sexual and violent offenses) and only used imprisonment as a sanction of last resort.

[244] For example, problems associated with the over-policing of Indigenous communities and inadequate legal and interpreter services. *See* LAW COUNCIL OF AUSTRALIA, *supra* note 2, at 4; *see also* JUST REINVEST NSW, SUBMISSION TO INQUIRY INTO ACCESS TO LEGAL ASSISTANCE SERVICES 9 (2015) (calling for the funding and implementation of community based programs and services aimed at reducing offending behaviours and building community capacity); The Honourable Wayne Martin AC, Chief Justice of Western Australia, Indigenous Incarceration Rates, Strategies for Much Needed Reform, 2015 Law School Summer Speech 7–10 (2015), http://www.supremecourt.wa.gov.au/_files/Speeches_Indigenous_Incarceration_Rates.pdf.