ROLL THE DICE, RATIONAL AGENT: SHOULD EXTRA-CURIAL PUNISHMENT MITIGATE AN OFFENDER'S SENTENCE?

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I INTRODUCTION

It was rugby league State of Origin night 2008 and a group of adults had descended upon a house in Eagleby, Brisbane to have some drinks and to celebrate the game. At 11pm that evening, Shane Thomas Davidson entered the bedroom of the homeowner's 10-year-old son, TC. Davidson approached the bed and began to massage the boy's penis under his clothing, which caused TC to wake. Davidson stated, 'Show me how big your willy is and I'll show you how big mine is'. TC refused the request and after a small period of time, left the bedroom and told his father what had happened.

On hearing this turn of events, the father, BC, dragged Davidson outside the house and onto the driveway. He threw Davidson onto the ground and kicked him numerous times in the head. Throughout the incident, BC called out to his wife to bring him a knife. BC admitted that his intention was to castrate Davidson. His wife refused to intervene.

As a result of the assault, Davidson needed surgery to reconstruct his face. At the time of sentencing evidence was led that Davidson had 'suffered a closed head injury resulting in cognitive deficits and chronic post-traumatic headaches'.[1] Davidson was forced to sell his boat repair business of 14 years and was left with permanent facial injuries. In his Honour's sentencing remarks, Dearden DCJ took account of the significant injuries that Davidson had received at the hands of the victim's father. These injuries were treated as a mitigating factor and Davidson's sentence was reduced. Instead of facing a period of incarceration, Davidson was sentenced to a nine-month intensive correction order.

The matter was the subject of an Attorney-General's appeal against sentence and was heard by the Queensland Court of Appeal.[2] In an ex tempore judgment delivered by Holmes JA (Keane and Chesterman JJA concurring) her Honour dismissed the appeal. Whilst acknowledging that the sexual abuse of children would ordinarily result in detention in custody, it was held that Davidson's suffering and lasting disability combined with his economic loss represented 'exceptional circumstances'. Her Honour stated that had it not been for these factors 'the result might have been something in the order of a sentence of nine months imprisonment, with release after three months'.[3]

R v Davidson is not the first example of a case in which injury to an offender has resulted in a reduction in sentence. This article will explore whether extra-curial punishment *should* be regarded as a factor that can mitigate the sentence of an offender. It will be argued that the current theoretical rationales (retribution and deterrence) used to justify the acknowledgment of extra-curial punishment are problematic. It will further be suggested that the recognition of extra-curial punishment

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1 *R v Davidson* (Unreported, District Court of Queensland, Dearden DCJ, 15 June 2009), [15].

2 *R v Davidson; ex-parte A-G (Qld)* [2009] QCA 283.

3 Ibid 5.

erodes the important symbolism involved in a court sanction. The moral issues stemming from the courts' acknowledgment of extra-curial punishment will be canvassed, with the ultimate conclusion being drawn that extra-curial punishment should continue to operate as a mitigating factor upon sentence, with its theoretical underpinnings in need of re-examination.

A *Definition*

Extra-curial punishment (sometimes referred to as extra-judicial punishment or 'natural punishment')[4] can broadly be defined as punishment inflicted upon an individual, which occurs outside of a court of law. Extra-curial punishment has been treated as a relevant mitigating factor in the sentencing of an offender, where the offender has suffered 'serious loss or detriment as a result of having committed the offence'.[5] This will be the case even when the detriment is suffered as a result of individuals exacting retribution or revenge for the crime committed.[6] In order to function as a mitigating circumstance on sentence, the injuries suffered by an offender must be connected with the commission of the offence[7] and must not be self-inflicted.[8]

B *Legal Recognition of Extra-Curial Punishment*

The creation and acknowledgment of extra-curial punishment as a mitigating factor in sentencing is rooted in the common law. Whilst all states and territories in

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4 Andrew Ashworth (Vinerian Professor of English Law at the University of Oxford) uses the phrase 'natural punishment' as a synonym for 'extra-curial punishment' when considering how the criminal law of England and Sweden deals with offenders who have been injured during the commission of a crime. See Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th ed, 2005) 174-175.

5 *R v Daetz; R v Wilson* [2003] NSWCCA 216 at [62]. From the outset of this article, it is important to acknowledge the strong parallels between extra-curial punishment and traditional indigenous customary punishment. It is not within the scope of this article to discuss customary punishment, but as a potential area of future research it is noted that the literature on customary punishment would be of benefit in further analysing extra-curial punishment. Cases such as R v Mamakika (1982) 5 A Crim R 354, *Jadurin v R* (1982) 7 A Crim R 182, *R v Minor* (1992) 59 A Crim R 227, *Munugurr v R* (1994) 4 NTLR 63, *R v Walker* (unreported NT SC 10/2/1994 SCC No. 46 of 1993), *R v Miyatatawuy* (1995) 87 A Crim R 574, *R v Poulson* (2001) 122 A Crim R 388 show that courts have been willing to treat customary punishment (such as shaming, exile, spearing etc) as a mitigating factor on sentence. As an interesting response to these cases, section 91 of the *Northern Territory Emergency Response Act 2007* (Cth) prohibits the recognition of customary punishment as a mitigating factor. Section 91 states:

'In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(b) aggravating the seriousness of the criminal behaviour to which the offence relates.'

6 *R v Daetz; R v Wilson* [2003] NSWCCA 216 at [62].

7 In the case of *R v Silvano* [2008] NSWCCA 118, a prisoner was anally raped and punched in the head whilst serving time for several offences, the most serious being murder. These injuries were not taken into account on sentence as there was nothing 'to suggest that the injuries were inflicted on the applicant by the other prisoners for the purpose of punishing him for having committed the offences' [34].

8 In *Christodoulou v R* [2008] NSWCCA 102, the Court held that where the offender deliberately injected himself with battery acid at the time of being arrested, this would not be a factor that mitigated sentence.

Australia have enacted legislation to guide the sentencing process, no jurisdiction specifically lists extra-curial punishment as a circumstance of mitigation. This is not to say that recognition of extra-curial punishment is inconsistent with the legislation. The legislation in each Australian jurisdiction specifies factors that *might* go towards mitigation of sentence:

Jurisdiction	**Legislation**	**Section dealing with mitigating factors**
Commonwealth	*Crimes Act 1914* (Cth)	Section 16
Australian Capital Territory	*Crimes (Sentencing) Act 2005* (ACT)	Section 33
New South Wales	*Crimes (Sentencing Procedure) Act 1999* (NSW)	Section 21A
Northern Territory	*Sentencing Act* (NT)	Section 5
Queensland	*Penalties and Sentences Act 1992* (Qld)	Section 9
South Australia	*Criminal Law (Sentencing) Act 1988* (SA)	Section 10
Tasmania	*Sentencing Act 1997* (Tas)	No relevant section
Victoria	*Sentencing Act 1991* (Vic)	Section 5
Western Australia	*Sentencing Act 1995* (WA)	Section 8

None of the legislative provisions that deal with mitigating factors purports to provide an exhaustive list of matters that will reduce sentence. It would not be practical (or even possible) to do so. Instead, most jurisdictions have included a 'catch all' style section that allows a court to consider any matter it wishes, as being either aggravating or mitigating. For example, section 9(2) of the *Penalties and Sentences Act 1992* (Qld) states that in sentencing an offender, a court must have regard to:

> (g) the presence of any aggravating or mitigating factor concerning the offender; and
> (r) any other relevant circumstance.

In *R v Daetz*,[9] James J sitting in the New South Wales Court of Criminal Appeal noted:

9 [2003] NSWCCA 216.

> The concept of extra-curial punishment is not expressly referred to in the present s 21A of the Crimes (Sentencing Procedure) Act … However it is clear from the terms of the section that … the matters expressly stated do not exhaust the matters which a sentencing judge may properly take into account.[10]

The purpose of acknowledging the different statutory sentencing regimes in Australia is to highlight the largely uniform way in which the states and territories deal with mitigating factors in the sentencing process. Some states have a more prescriptive and detailed list of sentencing considerations than others, but the recognition of extra-curial punishment as a potentially mitigating factor on sentence is not inconsistent with any sentencing legislation in Australia. The discussion of extra-curial punishment in this article is therefore applicable to all Australian jurisdictions.

II The Challenge to Extra-Curial Punishment as a Mitigating Factor

Whilst extra-curial punishment is predominantly a common law creature, its effect as a mitigating factor on sentence is a relatively new phenomenon. The 1990s and early 2000s witnessed a string of cases involving offenders injured during, or soon after, the commission of their crimes. Judges initially grappled with the role extra-curial punishment should play in the sentencing process and appeared unclear as to its theoretical underpinnings. This confusion was highlighted in the landmark case of *R v Daetz*.[11] Daetz was charged with the offence of robbery in company and two counts of demanding money with menaces with intent to steal. In November 2002, Daetz and his co-offender Wilson approached two males (Cottee and Ross) with the view to obtaining money. Unhappy with the offer of some coins, Daetz attempted to forcibly steal Ross' mobile phone. When Ross resisted, he was punched in the head several times and then kicked in the head repeatedly.

Later that same evening, a group of males armed with metal poles and garden stakes approached Daetz and Wilson at the same location. After asking Daetz whether he knew Ross, the group then attacked Daetz and Wilson. Daetz was hit over his head with the poles and stakes and suffered 'traumatic bilateral extradural haemorrhages and left cerebral contusions, skull fracture and scalp laceration'.[12]

The case of *Daetz* is significant because the judge at first instance[13] refused to take into account the extra-curial punishment suffered by Daetz as a mitigating factor. His Honour stated (in the context of examining mitigating factors) that 'any such general rule allowing a mitigatory effect to revenge punishments would be potentially subversive of the rule of law'.[14] His Honour held that Daetz had gained a deeper insight into the effect of his offending as a result of becoming a victim himself, and reduced the sentence on the basis of Daetz's new found contrition. The sentence was not reduced on the basis of extra-curial punishment and his Honour made this perfectly clear when he stated:

> I do not allow any separate mitigatory effect by way of a reduction of the sentence which I will otherwise impose due simply to the fact that he has had his skull fractured in a revenge attack after he, himself, had been engaged in a violent and a vicious attack on a person.[15]

[10] Ibid [63].
[11] Ibid.
[12] Ibid [25].
[13] His Honour Judge Woods QC, District Court New South Wales.
[14] [2003] NSWCCA 216, [26].
[15] Ibid.

The misgivings with extra-curial punishment voiced by his Honour Judge Woods QC in the New South Wales District Court had been echoed previously by the South Australian Court of Criminal Appeal. In *R v Gooley*[16] Doyle CJ considered the effect of a revenge assault directed at a 23 year old offender who had unlawful sexual intercourse with a 14 year old woman. His Honour stated:

> I do not consider that ordinarily illegal acts of other people can affect the punishment which an offender must receive. The law must do what it can to protect the appellant, as must prison authorities … The conduct of the victim's friends or family cannot reduce the appropriate sentence, in my opinion. To allow it to do so would be to allow private revenge or punishment to replace punishment by the state.

The decision of Judge Woods QC in *Daetz* was ultimately overturned by the New South Wales Criminal Court of Appeal, but the criticisms of extra-curial punishment as a mitigating factor on sentence have never been explicitly addressed. No Australian court has addressed or rebutted the claim that the recognition of extra-curial punishment is potentially subversive of the rule of law.[17] No Australian court has considered whether the recognition of extra-curial punishment, in substance, allows private revenge to replace punishment by the state. This article contends that judges have been too quick to acknowledge extra-curial punishment as a factor in mitigation without identifying the sentencing goals or purposes that such an acknowledgment achieves.[18] It is acknowledged that the process of sentencing involves intuitive synthesis[19] and that it can be difficult to point to the effect of one particular factor on the final sentence. Intuitive synthesis, however, should not be proffered as a reason why mitigatory factors are employed, without meaningful consideration of their theoretical rationale.

Bagaric and Edney note that the conventional and accrued wisdom of appellate courts, in combination with the professional practice of advocates, contribute to the identification and relevance of potential mitigating factors.[20] The list of factors that may be considered mitigating is fluid and susceptible to challenge and change. Judicial reasoning, academic writing, political action and community views all impact upon the

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[16] (1996) 87 A Crim R 209.

[17] A V Dicey's classical formulation of the rule of law entails 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power … It means equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts'. A V Dicey, *Introduction to the Study of the Law of the Constitution* (1959) 202-203. We can only speculate what his Honour Judge Woods was implying when he suggested that the recognition of extra-curial punishment is potentially subversive of the rule of law. Given that the rule of law seeks to ensure that 'authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps', perhaps the assertion is that extra-curial punishment occurs outside of a court of law, without any sense of procedure and with little correlation to the punishment that would otherwise be ordered by a judge.

[18] Edney and Bagaric note that when 'considering selective mitigating factors it is important to bear in mind their relationship to particular sentencing objectives. To do otherwise is to permit the task of sentencing to be independent of its theoretical rationale. It is important to bear in mind that the mitigating factors are directed towards reducing the culpability of the offender. Thus specific mitigating factors are ultimately derived from the ends or objectives of sentencing and must be considered as directed to securing particular sentencing ends or objectives.' Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 1st ed, 2007) 149.

[19] *R v Markarian* (2005) 215 ALR 213.

[20] Edney and Bagaric, above n 19, 150-151.

acceptance of certain circumstances as having a mitigatory quality. It is the communal acceptance of mitigating factors that gives them their relevance and persuasiveness, rather than any intrinsic characteristics of an accused, or the offence they have committed.[21]

Whilst extra-curial punishment as a circumstance of mitigation has received appellate court approval, it is still a relatively new common law concept. If we accept the proposition that '[m]itigating factors and their particular content are not immutable and fixed; rather, they are the product of creative and interpretive activities of the key participants in the process of sentencing', then we should also accept that extra-curial punishment as a mitigating factor could lose currency as quickly as it has gained traction. Media scrutiny[22] and community disquiet over the decision of *R v Davidson* suggests that as the public becomes better informed about extra-curial punishment (and its potential impact upon sentencing), there will be a stronger need for the legal community to justify its existence as a mitigating factor upon sentence.

III Extra-Curial Punishment and the State as Punisher

Given the potential severity of extra-curial punishment and the effect it *may* have on an offender, there are still strong reasons for limiting the role of punishment solely to the State. Australian courts' recognition of extra-curial punishment as a mitigating factor is an implicit acceptance that private vengeance meted out by individuals can, indirectly, form part of an offender's sentence. The courts are sending a mixed message to the Australian public: while they do not condone private vengeance or vigilante attacks on an offender, they are still willing to acknowledge that it is a way to achieve a desired sentencing purpose.[23] The symbolic nature of a sanction imposed by the State can be eroded and reduced in severity by the actions of one vengeful individual. When discussing the issue of sentencing purposes and the inhibition of private vengeance, McGarvie J in the Victorian Criminal Court of Appeal noted:

> [There is a] community expectation that particular offences merit substantial punishment. This expectation if denied brings with it a risk that community respect for the administration of the law will be reduced … The danger of such a situation is that if the community lacks confidence in its criminal law it tends to take punishment into its own hands, inflicting harsh and unreasonable retribution upon offenders.[24]

The symbolic nature of *the State* sentencing an offender cannot be downplayed. There is intrinsic value in a judicial pronouncement that reaffirms shared values and censures an offender.[25] When an individual decides privately to seek retribution on an offender, it is that individual who determines the type and severity of the punishment.[26]

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21 Ibid 152.

22 See for example Robyn Ironside, David Earley and Neale Maynard, 'Molester free while dad who bashed him could be jailed', *The Courier Mail* (online) , 18 September 2009 <http://www.news.com.au/couriermail/story/0,23739,25651579-952,00.html>.

23 See in particular the discussion below concerning *R v Hannigan* [2009] QCA 40.

24 *R v Woolnough* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, McGarvie J, 4 June 1981).

25 Richard G Fox and Arie Frieberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) 215.

26 It is important to acknowledge the dichotomous nature of private justice and public justice. It is not surprising that the courts are having difficulty dealing with extra-curial punishment given the broader rationale of criminal justice as public or state justice. Private perspectives are clearly significant, but are assumed to be incompatible with current sentencing doctrine. On the competing tensions of public and private ideals in relation to the trial and sentence of

If an offender's sentence is mitigated on this basis, it downplays the stake that the rest of the community has in seeing an offender properly punished. Bagaric and Edney note:

> … criminal law punishes behaviour that is supposedly so repugnant that it is an affront to society as a whole, not merely to the victim. It is for this reason that the state steps in to conduct criminal prosecutions, rather than leaving enforcement to victims.[27]

Individuals do not have the time, resources or sentencing options available to them to mete out a punishment to an offender that is fair in all the circumstances. The State practically and symbolically steps in to break the criminal nexus between the accused and the victim[28] because *it* is in the best position to sentence an offender. Wilson suggests that State punishment represents the 'social clout of the norm'.[29] In this fashion, State imposed sanctions are a 'symbolic stick that helps to keep the community in order'.[30]

According to Freiberg and Moore, 'sentencing is a process of communication, both to offender, victims and the public'[31] and all parties have a vested interest in the result. The acknowledgment of extra-curial punishment as a mitigating factor on sentence over-emphasises the punitive punishment dispensed by a vengeful individual and downplays the interest that the community as a whole has in seeing an offender punished in an appropriate fashion.

The symbolic role the State plays in punishing an offender is strongly interlinked with the sentencing aim or purpose of denunciation. Denunciation has been described as the 'imposition of sanctions that are of a nature and of sufficient degree of severity to adequately express the public's abhorrence of the crime for which the sanction was imposed'.[32] Denunciation is recognised as a sentencing purpose in the legislation of most States and Territories. By way of example, section 9(1)(d) of the *Penalties and Sentences Act 1992* (Qld) states that a sentence may be imposed on an offender 'to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved'. Section 5(1)(d) of the *Sentencing Act 1991* (Vic) requires a judicial officer 'to manifest the denunciation by the court of the type of conduct in which the offender engaged'. The Victorian Sentencing Committee recognises the concept of denunciation as predicated

> … on the notion of a symbolic statement intended to convey a message that … society considers a particular crime as being sufficiently serious to warrant punishment [and] society will not tolerate the law-breaking conduct of the offender.[33]

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an accused, see Jonathan Doak 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294 and Ian Edwards, 'Victim Participation in Sentencing: The Problems of Incoherence' (2001) 40(1) *Howard Journal of Criminal Justice* 39.

[27] Edney and Bagaric, above n 19, 13.

[28] Ibid.

[29] William Wilson, *Central Issues in Criminal Theory* (Hart Publishing, 2002) 45.

[30] Heather Douglas and Sue Harbidge, *Criminal Process in Queensland* (Law Book Company, 2008) 233.

[31] Arie Freiberg and Victoria Moore, 'Disbelieving Suspense: Suspended Sentences of Imprisonment and Public Confidence in the Criminal Justice System' (2009) 42 *The Australian and New Zealand Journal of Criminology* 101, 104.

[32] John Tomaino, 'Punishment Theory' in Rick Sarre and John Tomaino (eds), *Exploring Criminal Justice: Contemporary Australian Themes* (1999) Chapter 6, 162.

[33] Victorian Sentencing Committee, *Report: Sentencing*, Melbourne, VGPO, 1988, 105.

Denunciation has also been recognised as an important sentencing tool in the High Court decision of *Ryan v The Queen*.[34] In *Ryan* a catholic priest was convicted of sexually assaulting a number of boys under the age of 16, over a period of 20 years. One of the issues that the High Court commented on was the contribution that 'denunciation' should play in the final sentence of the offender. Kirby J remarked:[35]

> A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law".[36]

In this context, it is difficult to justify extra-curial punishment as a valid form of punishment worthy of recognition by the courts. Extra-curial punishment is by no means a collective statement as to whether (or to what extent) an offender should be punished. At best it represents the punitive views of an individual or small group who decide to seek retribution upon an offender. At worst, where an offender is unintentionally injured through their own misadventure, the injury received does not reflect anybody's view as to an appropriate punishment. 'When a court passes sentence, it authorises the use of State coercion against a person for committing an offence'.[37] The symbolic power of a sentence can only be achieved by (and through) a body with the time, resources, sentencing options and popular mandate to sentence those who have committed a crime. The only body with the symbolic power and collective voice to adequately sentence an offender is the court system.

Mitigation of a sentence due to extra-curial punishment means that the social solidarity[38] achieved through the denunciation of a crime can be weakened by the behaviour of an individual or group acting under their own notions of justice. In an extreme example, the power of a sentence that could adequately express the community's indignation and outrage over an offence could be thwarted because the offender is accidentally injured in the commission of a crime.

In the case of *Alameddine v R*,[39] the applicant pleaded guilty to one count of knowingly taking part in the manufacture of a prohibited drug (methylamphetamine) and one count of possessing a precursor (pseudoephedrine) intended for illegal manufacture. Alameddine was visited by his parole officer whilst serving a five month home detention sentence for driving offences. When the parole officer arrived at the applicant's home, she believed he was under the influence of amphetamines and began to search the premises for drugs. This search uncovered several bags of drugs and the parole officer called the police.

Whilst waiting for the police, the parole officer heard an explosion and saw a portable shed in the applicant's backyard engulfed in flames. She also saw the applicant emerge from the shed badly burnt and bleeding. The applicant later admitted (confirmed by forensic testing) that the shed was used as a laboratory to manufacture

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[34] (2001) 206 CLR 267.
[35] Ibid [118].
[36] *R v M* [1996] 1 SCR 500, 558 per Lamer CJ.
[37] Andrew Ashworth, 'Sentencing' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 2002) 1076, 1077.
[38] Tomaino, above n 33, 162. French Sociologist Émile Durkheim has previously explored the institution of punishment and its ability to promote social solidarity and moral consensus amongst a community. This theme is evident in his works *The Division of Labor in Modern Society* (1893) and *Two Laws of Penal Evolution* (1901).
[39] [2006] NSWCCA 317.

amphetamine. As a result of his injuries the applicant was hospitalised for three months, was required to wear a burns suit for two years, and required ongoing visits to the hospital for dressings and further treatment.[40]

On appeal, the applicant claimed that the sentencing judge failed to adequately recognise the extra-curial punishment that he had suffered – the burns and the ongoing treatment regime. Grove J noted that 'the authorities concerning mitigation of punishment by reason of the offender having suffered non judicial punishment have generally dealt with situations where it was caused by external forces rather than by being triggered by the offender's own actions'.[41] Nevertheless, his Honour held that there was no 'judicial opinion against outright rejection of the possibility of mitigation, even where the injury is self inflicted or induced by the activity of the offender'.[42] The New South Wales Court of Criminal Appeal altered the original sentence, with the *effect* that Alameddine would be released from prison earlier than the original sentence anticipated.

Groves J qualified his position in the New South Wales Court of Criminal Appeal decision of *Christodoulou v R*.[43] In *Christodoulou*, the applicant was charged with a number of offences involving intimidation and actual violence towards his direct and extended family. When the police arrived in response to the offending, the applicant deliberately impaled his arm on the needle of a syringe containing battery acid. When dealing with the issue of extra-curial punishment Groves J stated:

> It is a step beyond *Alameddine* … to seek to extend the availability of a mitigatory element to a deliberately self inflicted injury as distinguished from occasions where the injury was, although self inflicted and in the course of crime commission, unintentional. Insofar as the taking into account of extra-curial punishment may be described as a principle, there is no authority for extending it to deliberately caused injury and such an extension should not, in my opinion, be recognised.[44]

The decision in *Christodoulou* is logical. An offender should not have their sentence mitigated because they deliberately injure themselves during the commission of an offence. It is argued, however, that the distinction drawn between a deliberately self inflicted injury and an injury unintentionally suffered in the commission of a crime is a very fine one.[45] This article suggests that it is artificial to mitigate, or not mitigate a sentence, based on this distinction. In *Alameddine*, the applicant admitted that the explosion in his shed (amphetamine lab) was caused by his attempt to use as much amphetamine as he could before he was returned to gaol.[46] When an offender puts themselves in a deliberately dangerous situation in order to commit a crime, the courts should not rush to mitigate a sentence if the offender is injured. If an offender is willing to take the risks involved in a criminal enterprise, we should think very carefully about removing the 'downside' of those risks if the crime does not go to plan.

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40 Ibid [6].
41 Ibid [18].
42 Ibid [23].
43 [2008] NSWCCA 102.
44 *R v Christodoulou* [2008] NSWCCA 102, [41]-[42]. During the original sentencing hearing in *Christodoulou*, the defence counsel led evidence that the applicant: 'has now as a consequence of the ingestion or the injection of that material, a substantial and permanent disability to his arm. His upper arm effectively has a crater in it where the acid was injected, and that is something that is a constant physical reminder to him of his behaviour on this day.'
45 See for example the discussion of Kirby J in *R v SS* [2010] NSWSC [48]-[59], where the defendant was horribly burned as a result of an attempted suicide (house fire) that killed her partner.
46 *R v Alameddine* [2006] NSWCCA 317, [4].

It must be acknowledged that 'there are certain collateral consequences of being convicted of an indictable crime that must be accepted as an integral part of the punishment, rather than a basis for mitigating it'.[47]

This is not to suggest that extra-curial punishment has no role to play as a mitigating factor on sentence. Indeed, it is conceded that in circumstances where the injury suffered by an offender *far* outweighs the seriousness of the crime committed, it may be unjust not to take account of injuries suffered. This is exactly the point the Queensland Court of Appeal was attempting to make in *R v Noble; R v Verheyden*.[48] This article contends that there should be more than just 'serious loss or detriment' to an offender before extra-curial punishment is recognised as a mitigating factor. Courts need to reach a consensus as to *why* extra-curial punishment should mitigate an offender's sentence, ideally with reference to the theoretical aims or purposes of the sentencing process. Extra-curial punishment is a newly recognised mitigating factor. If its theoretical underpinnings are not sound, there is danger in blindly acknowledging it without questioning its utility to the sentencing process.

If acknowledgment of extra-curial punishment as a mitigating factor is not consistent with any of the theoretical aims of sentencing, we need to consider why it should justifiably reduce an offender's sentence.

IV Extra-Curial Punishment and the Theoretical Rationale

The 2009 Queensland Court of Appeal decision of *R v Hannigan*[49] represents the most explicit attempt to provide a theoretical rationale for the acknowledgment of extra-curial punishment as a mitigating factor. In *Hannigan* the applicant pleaded guilty to one count of dangerously operating a motor vehicle and a number of summary offences relating to inappropriate use of a motor vehicle. The applicant led the police on a chase that involved excessive speeding, running a red light and driving on the wrong side of the road. Ultimately a collision with a traffic sign on a median strip damaged the vehicle to such an extent that it came to a stop.[50] Two days after the offending, the police learnt that the applicant had consumed four cans of mid-strength beer and three cans of rum before driving. He knew that he was too intoxicated to drive.[51]

Hannigan sought leave to appeal on the basis that the original sentence was excessive, as it did not take into account extra-curial punishment he had received as a result of being assaulted by the arresting police officer. This information was not before the sentencing judge because the applicant, due to his intoxication, had no

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[47] Richard G Fox, 'Ryan v The Queen: Paradox and Principle in Sentencing a Paedophilic Priest: Ryan's Case in the High Court', Case Note (2002) 26 *Melbourne University Law Review* 178, 189.

[48] [1996] 1 Qd R 329. In this case, the offenders were hit by shotgun pellets during the course of an attempted armed robbery. The Court (comprised of Davies and Pincus JJA and Williams J) stated: 'We would not accept, however, that any injury suffered in the course of committing an offence is necessarily a factor in sentencing. But it is easy to postulate circumstances in which an injury so suffered would be relevant. If an offender has assaulted another without causing significant injury, and the other has defended himself so vigorously as to cause the offender serious injury, it would ordinarily be right to treat the injury the offender has suffered as at least part punishment – whether or not the retaliation was within lawful bounds.' at 331.

[49] [2009] QCA 40.

[50] Ibid [4].

[51] Ibid [5].

recollection of the assault. A witness to the events came forward after reading an account of the story in the local media. In an affidavit the witness stated:[52]

> I witnessed the police officer vigorously punching the face of the person in the utility and swearing at him … several times. Whilst I did not see contact between the fist of the police officer and the person in the utility, I did see the police officer's elbow going in and out of the car from which action I formed the view that (he) was vigorously punching the person in the utility … he punched the person, I would say, in excess of 20 times in the face area and he was screaming in a hysterical manner.

Chesterman JA (with whom de Jersey CJ agreed) listed evidence of the injuries suffered by Hannigan as a result of the assault. Photographs taken at the watch house after arrest showed reddened skin on the applicant's right cheek. His right eye was partly closed and there had been bleeding from the right nostril, as well as broken skin underneath the right eye.[53]

In his Honour's judgment, Chesterman JA referred with approval to the requirement in *R v Daetz*[54] that an offender suffer 'serious loss or detriment as a result of having committed the offence' before extra-curial punishment could mitigate sentence. His Honour held that the injuries suffered by Hannigan did not amount to extra-curial punishment as they were 'minor and not serious'. Their effect went unnoticed and would in any event have been transient. More importantly the applicant did not know he had been hit.[55]

In obiter, Chesterman JA sought to explain the reason *why* extra-curial punishment should be viewed as a mitigating factor on sentence:

> In my opinion the theory which underlies the reliance of extra-curial punishment to sentence is that it deters an offender from re-offending by providing a reminder of the unhappy consequence of criminal misconduct, or it leaves the offender with a disability, some affliction, which is a consequence of criminal activity. In such cases one can see that a purpose of sentencing by the court, deterrence or retribution, has been partly achieved.[56]

Commentators have suggested 'that the disorder in sentencing law and practice … stems largely from the dissociation between it and theories of punishment'.[57] It is for this reason that the judgment of Chesterman JA in *Hannigan* should be lauded. In acknowledging the previous authorities that had contemplated extra-curial punishment, Chesterman JA attempted to ground this mitigating factor in sentencing theory. Judges should not have to explain in every set of sentencing remarks how their recognition of certain aggravating and mitigating factors reflect the purpose or sentencing end they are trying to achieve. With a newly recognised mitigating factor however, this theoretical justification does need to occur and it does need to receive a degree of judicial consensus. If we accept the premise that there is nothing inherently mitigating (or aggravating) in most sentencing factors, extra-curial punishment could be written off overnight as an opportunistic defence counsel submission that wrongly gained traction as a sentencing factor. If the acknowledgment of extra-curial punishment is justifiable and consistent with the aims and purposes of sentencing, it is much more difficult to disregard it as a groundless (yet creative) sentencing fiction.

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52 Sections of this affidavit are extracted at paragraph [10] of the judgment in *R v Hannigan*.
53 Ibid [22].
54 (2003) 139 A Crim R 398.
55 *R v Hannigan* [2009] QCA 40, [24].
56 Ibid [25]. This statement of principle has subsequently been relied upon by the New South Wales Court of Criminal Appeal in the case of *Jehad Jodeh v R* [2011] NSWCCA 194.
57 Edney and Bagaric, above n 19, 7.

A *Extra-Curial Punishment and the Sentencing aim of Deterrence*

This article suggests that there is a disconnect between extra-curial punishment as a mitigating factor and the sentencing theories of deterrence and retribution that supposedly underlie it.

The sentencing theory of deterrence has two components with slightly different objectives. A sentence promoting specific deterrence seeks to dissuade *the particular offender* from reoffending. A sentence promoting general deterrence aims to prevent *potential offenders* from committing a crime in the first place. These goals can be achieved by making the cost of offending outweigh any benefits, or by creating a fear of punishment in potential offenders contemplating criminal action.[58]

In *Hannigan*, Chesterman JA suggested that extra-curial punishment could serve the goal of deterrence by providing an offender with a disability or affliction which reminds him or her of the unhappy and dangerous consequences of criminal misconduct.[59] Two points need to be made with respect to these comments. First, while his Honour makes broad reference to the sentencing aim of deterrence, it appears that his comments are only linking the acknowledgment of extra-curial punishment to the goal of *specific* deterrence. When a particular offender suffers extra-curial punishment during or after the commission of a crime, it is difficult to see how that punishment would deter other offenders from committing a similar crime. If offenders believe that they are clever enough to commit a crime, they arguably also believe that they are smart enough to avoid any extra-curial punishment that might flow from that crime. In any event, were they to be unlucky enough accidentally to injure themselves or to become the victim of a revenge attack, these would be factors that could mitigate their sentence. Richard Posner's economic analysis of criminal offending suggests that 'people make calculations about losses and gains when deciding whether or not to carry out a crime'.[60] It is suggested that a rational agent will not be deterred by the extra-curial punishment suffered by an unrelated offender. If anything, the acknowledgment of extra-curial punishment as a mitigating factor runs in opposition to the goal of general deterrence. The rational offender may be more inclined to 'roll the dice' and chance a criminal endeavour, knowing that any serious loss or detriment they suffer in the commission of their crime may mitigate their ultimate sentence.

Second, it is acknowledged that if a particular offender does suffer serious loss or detriment as a result of committing a crime, this may indeed achieve the goal of specific deterrence. If an offender is left with a disability or other serious affliction, they may no longer possess the physical ability to re-offend, let alone the mental desire to do so. Such a result, however, is not without its moral difficulties. It is one thing to acknowledge that extra-curial punishment has resulted in an offender becoming disabled. It is another thing to suggest that the imposition of this disability is consistent with achieving a valid sentencing aim enshrined in legislation. The moral ambiguity that flows from the acknowledgment of extra-curial punishment is discussed further below.

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[58] Andrew Von Hirsch and Andrew Ashworth 'Deterrence' in Andrew Von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 1998) 44, 44.

[59] *R v Hannigan* [2009] QCA 40 at [25].

[60] Richard Posner, 'An Economic Theory of Law' (1985) 85 *Columbia Law Review* 1193 as referred to in Heather Douglas and Sue Harbidge, *Criminal Process in Queensland* (1st ed, 2008) 247.

B *Extra-Curial Punishment and the Sentencing aim of Retribution*

Theories of retribution assert that an offender deserves to suffer and that the institution of punishment should inflict the suffering an offender deserves.[61] A characteristic of retributive theory is that the 'punishment must be equivalent to the level of wrong doing'.[62] Extra-curial punishment cannot guarantee any level of proportionality between punishment and the seriousness of the offence. Allowing victims of crime to influence the form of punishment given to an offender can lead to inconsistency and injustice.

Whilst theories of retributivism had previously fallen from favour due to their perceived connection with 'archaic and reactionary feelings of revenge',[63] the last 30 years have witnessed a 'revival of retributivist ideas under the guise of "just deserts"'.[64] The sentencing aim of just punishment[65] (or just deserts) holds that an individual offender should only be punished as severely as they deserve.[66] Findlay suggests that this aim of punishment 'relies on the potential to calculate and compare proportionality in punishment with the harm caused by the crime'.[67] The acknowledgment of extra-curial punishment as a mitigating factor is poorly compatible with these aims. Extra-curial punishment is inherently unpredictable … we simply cannot predict what form it might take and how serious it might be. An offender might be badly hurt in the commission of a crime. An offender might be viciously assaulted in a revenge attack. There is nothing that prevents extra-curial punishment from being a far more severe sanction than what would otherwise be warranted in the circumstances. There can be no safeguards put in place to ensure that extra-curial punishment is proportionate to the harm caused by the crime. If the acknowledgment of extra-curial punishment has the potential to compromise just punishment (an offender receives more or less than their just deserts), if its acknowledgment compromises the notion of proportionality in sentencing and if its acknowledgment compromises consistency in the sentencing process, then we have to question whether the ends or purposes of retribution are really being achieved.

C *Extra-Curial punishment and the Moral Justification*

The above arguments that relate to proportionality and just deserts suggest that the only concern with extra-curial punishment is its propensity to conflict with some of the fundamental tenets of retributivism. They say nothing about the moral quandary involved in acknowledging that the physical injury of an offender can achieve a valid sentencing end. The act of sentencing requires a moral justification because it involves the intentional infliction of harm upon an individual.[68] Zimring and Hawkins contend:

> The need to justify punishment is reflected in moral logic as well as history. Since penal practices are by definition unpleasant, the world is a poorer place for their

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[61] Edney and Bagaric, above n 19, 9.
[62] Ibid 3.
[63] Eamonn Carrabine et al, *Criminology A Sociological Introduction* (1st ed, 2004) 235.
[64] Ibid 235.
[65] As it is referred to in section 9(1)(a) of the *Penalties and Sentences Act 1992* (Qld).
[66] Carrabine et al, above n 64, 236.
[67] M Findlay, *Criminal Law: Problems in Context* (2nd ed, 2006) 386.
[68] Edney and Bagaric, above n 19, 7.

> presence unless the positive functions achieved by them outweigh the negative elements inherent in the politics.[69]

This need for moral justification is heightened ten-fold when the courts are dealing with extra-curial punishment. The Australian government, legislature and judiciary have long acknowledged that corporal punishment is an inhumane way to punish an individual. Foucault notes that '[p]hysical pain, the pain of the body itself is no longer the constituent element of the penalty. From being an art of unbearable sensations punishment has become an economy of suspended rights'.[70] No power exists for an Australian court to hand down a sanction that involves the physical infliction of pain or injury to an offender. Yet, if an offender sustains 'serious loss or detriment' during the commission of their crime, or as a result of a revenge attack, Australian courts are prepared to acknowledge that these injuries achieve a valid sentencing end. It is almost as if the courts are saying 'we will not physically punish you ourselves, but if somebody else decides to, we are happy to recognise that as a valid form of punishment'. At best, this represents a moral inconsistency that has yet to be fully justified. At worst, a court's acknowledgment that extra-curial punishment achieves a desired sentencing goal equates to an implicit sanctioning of corporal punishment.

V Should Extra-Curial Punishment be acknowledged at all?

If there is difficulty in justifying the acknowledgment of extra-curial punishment under the heading of retribution or deterrence, then one option available to the courts is to stop acknowledging it as a mitigating factor. The position might be that if an offender is prepared to commit a crime, then they need to accept all of the risks that are attendant upon the commission of that crime. If an offender suffers serious loss or detriment due to some form of accident or misadventure, then it is the offender's own fault for putting himself or herself in a position of risk or danger. If an offender suffers some form of revenge attack, then that is a consequence that the offender has to deal with. It is certainly not unforeseeable that a victim (or acquaintance of a victim) might fight back when criminal behaviour is directed towards them. There is some attraction to this approach; if you are prepared to commit a crime, then you need to accept the consequences of committing that crime, even if those consequences are quite unpleasant.

Despite the appeal of this approach, it is contended that there are some circumstances where it would simply be unjust to ignore the extra-curial punishment suffered by an offender. This would particularly be the case where the injury suffered by an offender is completely disproportionate to the seriousness of the crime committed. The view might be that an offender has already suffered enough. Brennan J in *Channon v R*[71] stated that 'severity in sentencing is tempered by society's respect for the liberty and physical integrity of the offender and the weight given to these values frequently and inevitably limits the achievement of the ends of sentencing'.[72]

There is no doubt that the acknowledgment of extra-curial punishment as a mitigating factor frustrates some of the aims and purposes of sentencing, rather than aiding them. It has been argued above that acknowledging extra-curial punishment as

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[69] F E Zimring and G Hawkins, *Incapacitation: Penal Confinement and Restraint of Crime* (Oxford University Press, 1995) 5.

[70] Michel Foucault, *Discipline and Punish: the Birth of Prison* (1977) 11.

[71] (1978) 33 FLR 433

[72] Ibid 438.

achieving a valid sentencing end opens the courts to criticisms of moral inconsistency and ambiguity. This article suggests that the acknowledgment of extra-curial punishment cannot be justified under headings of retribution or deterrence – but it can be justified under principles of mercy. Windeyer J in *Cobiac v Liddy*[73] emphasised the importance of mercy to the sentencing process when his Honour stated:

> The whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy … This is not because mercy, in Portia's[74] sense should season justice. It is that a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice.[75]

The recognition of extra-curial punishment as a mitigating factor, underpinned by the tenets of mercy, permits values such as grace, compassion and understanding to play a role in the sentencing of offenders who have suffered serious loss or detriment.[76] Unlike most other mitigating factors, mercy is never 'owed to a defender as of right, nor are there recognised grounds for its existence, but its existence cannot be denied by the sentencer when invited to be merciful'.[77] Such an approach would not promote corporal punishment as achieving a valid sentencing end. It would simply acknowledge that corporal punishment had occurred. It would allow a court to weigh up the seriousness of the offending with the seriousness of the extra-curial punishment suffered. Such an approach would not mitigate an offender's sentence *as of right*, even if he or she had suffered serious loss or detriment. Indeed, such an approach may even have seen child sex offender Shane Thomas Davidson serve his time in prison (instead of in the community) despite the fact that he was seriously assaulted by the victim's father.

VI Conclusion

Sentencing an offender who has been injured during or after the commission of an offence is a difficult procedure. Emotion colours the entire exercise, and it can be difficult to know whether empathy should lie with the victim or the perpetrator of the crime. This article has suggested that there is a theoretical disconnect between the acknowledgment of extra-curial punishment as a mitigating factor and the purposes or goals of punishment that guide the sentencing process. It is acknowledged that 'without proper calibration between the offence, the offender and the object of the sentencing process, injustice is likely to result'.[78] The current theoretical rationales (deterrence and retribution) supporting extra-curial punishment as a mitigating factor create practical

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73 (1969) 119 CLR 257.

74 When referring to Portia in the context of mercy, Windeyer J is making reference to Portia the heroine of William Shakespeare's *The Merchant of Venice*. Portia delivers a courtroom speech espousing the virtue of mercy in Act 4 Scene 1:
'The quality of mercy is not strain'd.
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.'

75 (1969) 119 CLR 257, 269 (Windeyer J).

76 Edney and Bagaric, above n 19, 149.

77 Fox and Freiberg, above n 26, 232.

78 Edney and Bagaric, above n 19, 7.

difficulties and moral concerns that have yet to be judicially canvassed.[79] Rather than abandon extra-curial punishment as a mitigating factor on sentence, we should seek to justify its recognition through a more humane and principled approach; the principle of mercy. There is merit in constantly reassessing the reasons for, and the extent to which, we punish individuals who break the law. To borrow the poetic words of Sir Winston Churchill:

> A calm and dispassionate recognition of the rights of the accused against the state, and even of convicted criminals against the state, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.[80]

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[79] This is despite the fact that extra-curial punishment as a mitigating factor has continued to be acknowledged by Australian courts … the most recent examples being *Fernando v Balchin* [2011] NTSC 10 and *Jehad Jodeh v R* [2011] NSWCCA 194.

[80] Sir Winston Churchill, (Speech delivered in the House of Commons as Home Secretary, July 20 1910).