
Aggravating and Mitigating Factors in Sentencing: Comparing the Views of Judges and Jurors

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This article reports the findings of the first study in Australia to compare the responses of judges and jurors in 122 real cases who were asked to identify the appropriate relevance and weight that should be given to some of the most commonly listed aggravating and mitigating factors in sentencing. The research reveals that, while jurors and judges in Victoria are alike in giving more weight to aggravating factors than mitigating factors and in supporting an individualised approach to sentencing, jurors give less weight than judges to some mitigating factors, including good character, being a first offender, youth, old age and physical illness. Jurors also adopted broader interpretations of aggravating factors like breach of trust and the relevance of prior convictions. They also preferred a different rationale for discounting sentences due to family hardship.

Acknowledgment

This research was supported by the Australian Research Council's Discovery Projects funding scheme [Project DP 130110154]

INTRODUCTION

The circumstances that justify harsher or more lenient sentences are under-researched empirically.¹ Moreover, no study has examined the public's views of factors that may aggravate and mitigate sentences and compared them with judicial sentencing practice in real cases. One of the aims of the Victorian jury sentencing project² was to fill this gap in existing research by ascertaining jurors' views about the relevance of aggravating and mitigating factors and comparing them with those of the judges. Having more information about how the public views these factors regarded by judges as aggravating and mitigating can advance our understanding of the public perception of sentencing factors and serve to stimulate debate on the reasons why some factors are

¹ J Roberts ed, *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011), 1.

² This project surveyed and interviewed jurors from jury trials in the Victorian County Court in 2013-2015 to gauge their views on a range of sentencing issues. Sentencing remarks were received for 122 trials relating to 140 offenders.

relevant, or not, thereby providing a basis for modifying, or better explaining, sentencing practices where community and judicial views diverge widely. It may also assist judges in explaining to the public in their sentencing remarks why certain factors are relevant to sentence and the weight that may be accorded to them.

An earlier article, which focused primarily on comparing the judge's sentence in each case with the juror's suggested sentence, found that 62% of jurors suggested a sentence that was more lenient than the judge's sentence and that (after reading the judges' reasons for sentence) 87% said the sentence was appropriate. It also included an overview of jurors' responses to the questions about aggravating and mitigating factors and reported that jurors gave much more weight to aggravating factors than to mitigating factors.³ This article further explores these findings by comparing the judges' treatment of aggravating and mitigating factors with those of jurors. Quantitative data from the surveys are supplemented by qualitative data from the judges' sentencing remarks and interviews with jurors.

This study aimed to examine whether the views of jurors and judges on these sentencing factors can be compared in the context of actual trials. Although we encountered some problems in this analysis, the results revealed some areas where the views of jurors and judges were not in harmony, including such factors as the scope of breach of trust, the relevance of some kinds of prior convictions, and the weight given to youth, old age and ill-health and family hardship. These findings will be of interest, not only to sentencing judges and scholars, but also to law reform bodies and legislatures engaged in reviewing the relevance of sentencing factors and embodying them in legislation. The article starts by introducing the research method and explaining how we resolved the problems with the data analysis. The second part reports on the quantitative and qualitative results; and the third part discusses the findings, relates them to the relevant case law and explores the normative and policy implications of this research.

METHOD

³ K Warner, J Davis, C Spiranovic, H Cockburn and A Freiberg, "Measuring Jurors' Views on Sentencing: Results from the second Australian jury sentencing study" (2017) 19 *Punishment & Society* 180; see also K Warner et al, "Why sentence? Comparing the views of jurors, judges and the legislature on the purposes of sentencing in Victoria and Australia" (2017) *Criminology and Criminal Justice* (in press).

The study recruited jurors from trials in the County Court of Victoria after the return of a guilty verdict but before sentence was imposed. The first survey (Stage 1) began by asking jurors to suggest an appropriate sentence for the offender in their trial and followed up by asking a range of general questions about sentencing and by gathering demographic details about each respondent. Stage 1 jurors were also asked if they were willing to participate in Stage 2 of the study by receiving a copy of the judge's sentencing remarks and completing a second survey. In Victoria, sentencing submissions are routinely adjourned, so the participating jurors were not present in court to hear the sentencing submissions.

At the time of sentence, judges were asked to fill in a form which listed eight aggravating and ten mitigating factors, to indicate the weight given to each factor ('no weight', 'a little weight' or 'a lot of weight') or to indicate if the factor 'did not arise' in the case. They were able to add any other factors that they considered 'increased [or reduced] the seriousness of the offence'. Where there were co-offenders, we asked the judges to complete a separate form for each offender.

The Victorian *Sentencing Act 1991* contains no list of aggravating and mitigating factors that could provide a basis for the survey questions, so we compiled a list of the more common aggravating and mitigating circumstances likely to arise. The mitigating factors related to personal mitigation rather than to factors diminishing the gravity of the offence and were:

- no prior convictions
- good character
- good prospects of rehabilitation
- remorse
- youth
- old age
- physical illness/impairment
- family dependence on offender
- social disadvantage
- childhood abuse

The aggravating factors were:

- abuse of trust or power

- victim vulnerability due to age or disability
- substantial harm
- planning
- prior convictions
- offender on bail
- offender on parole
- offender in breach of suspended sentence or a community order.

A separate question related to four other sentencing factors, which could be regarded as either mitigating or aggravating, namely: mental disorder, intellectual disability, drug addiction and intoxication. For reasons of space this article does not report on this question.

Stage 2 jurors were sent a copy of the judge's sentencing remarks and a booklet containing a section titled 'Relevant sentencing factors', which included some general information about aggravating and mitigating factors. Using the same lists given to the judges, the Stage 2 survey asked jurors to indicate how much weight they considered the judge should have placed on the aggravating and mitigating factors. Where there were multiple offenders, jurors were asked to complete the form for the offender they had selected in the first survey (and Survey 2 reminded them who this was).

At the end of the Stage 2 survey, respondents were asked if they would be willing to be interviewed. Fifty jurors were selected for interview. The semi-structured interviews fleshed out the juror's answers and explored their views on the aggravating and mitigating factors that arose and the judge's treatment of those factors in the sentencing remarks.

ANALYSIS

The preliminary analysis revealed three problems relating to the low response rate by judges, the subjective nature of the assessment task, and several instances of respondent error.

Poor response rate by judges

Out of a possible 122 trials relating to 140 offenders for which sentencing remarks were supplied, we received only 39 forms from judges relating to 36 trials. Rather than abandoning the aim of comparing the judges' answers to the jurors' answers, the poor

response rate was addressed by using ‘pseudo judges’ to complete the judges’ forms for the remaining offenders. The pseudo judges were legal scholars with expertise in sentencing who analysed the judges’ sentencing remarks. Two pseudo judges independently completed forms for each offender and any inconsistencies were checked with the remarks. Once the inconsistencies were resolved, the remarks were analysed using qualitative analysis software (N-Vivo) to compare the text attached to the weighting for each of the factors. This analysis was then cross-checked with the pseudo judges’ forms before the data were entered into a software package used for statistical analysis (SPSS). As a further check, the results from the forms completed by the judges were compared with results from those completed by the pseudo judges. This showed a similar pattern of responses.

The subjective nature of the assessment

The coding of judges’ reasons for sentence quickly revealed that determining whether a factor had actually arisen was not always straightforward. With the exception of three unambiguous factors (offence committed while on bail, breach of parole or a sentencing order), all other factors appeared to be affected by varying degrees of subjectivity. For example, ‘convictions’ in ‘prior convictions’ could be interpreted as referring to any conviction, including a conviction for a different type of offence committed many years ago, or only to ‘prior relevant convictions’. And ‘prior’ could be taken to mean either an offence which resulted in a conviction before the commission of the current offence or it could include convictions for offences committed after the commission of the current offence.

Respondent error

Analysis of the aggravating and mitigating factors revealed that, even allowing for subjective interpretations, jurors indicated that some factors arose more often than was technically possible. For example, 61% of jurors said that the offender was young and 60% said that the offender was old. Checking juror responses for one of the objective aggravating factors (on bail at the time of the offence) revealed that jurors had made four kinds of error: entering ‘no weight’ instead of ‘did not arise’; misunderstanding the question; answering the question as a general one instead of relating it to the specific offender; or entering ‘did not arise’ incorrectly. The sentencing remarks were often lengthy (more than 3000 words on average) and relevant details of the offender’s antecedents or background could have been missed.

Of course, for factors open to a subjective interpretation, stating that a factor arose where the judge had indicated that it ‘did not arise’ does not necessarily mean that the juror had erred. Nevertheless, the possibility of false positives in jurors’ responses led to the decision to focus the quantitative analysis primarily on juror responses for those offenders for whom the judge said that the factor arose.

RESULTS

Most important sentencing factors

Both judges and jurors gave more weight to aggravating than mitigating factors and analysis of the sentencing remarks and judges’ ranking forms indicated that aggravating factors arose more often than mitigating factors. Aggravating factors were mentioned for each of the 140 offenders, but for 13% of these cases no mitigating factors were mentioned by the judge as attracting weight. The aggravating factors most likely to attract ‘a lot of weight’ from judges were breach of trust, victim vulnerability and substantial injury. For these aggravating factors, the jurors’ reactions mirrored the judges’ reactions. The three mitigating factors most likely to attract ‘a lot of weight’ for both judges and jurors were youth, being a first offender and good prospects of rehabilitation. We also found that in those cases where the judge indicated a mitigating factor arose, a majority of jurors gave each of those factors at least some mitigatory weight.

Judges’ sentencing remarks revealed 28 additional aggravating factors and the most commonly mentioned were subsequent offences (n=19) and use of a weapon (n=13). Of the 20 additional mitigating factors, delay was the most commonly mentioned (n=64). While analysis of the sentencing remarks revealed that delay was a significant factor, this pattern did not emerge from jurors’ surveys, with only three jurors including delay as an additional mitigating factor. This result was possibly because the question did not prompt for facts unrelated to the offence itself or the offender.⁴

Jurors’ lists of aggravating and mitigating factors were longer than those of the judges. The most commonly mentioned aggravating factors were a lack of remorse (n=12) and substantial risk of harm (n=11). The list of mitigating factors included a diverse list of

⁴ Because analysis of the sentencing remarks revealed delay to be a significant mitigating factor for judges, it will be explored in a separate article.

offence and offender related factors. The next sections analyse the data in more detail and include findings from the interviews with jurors and the sentencing remarks to illuminate the quantitative findings.

Aggravating Factors

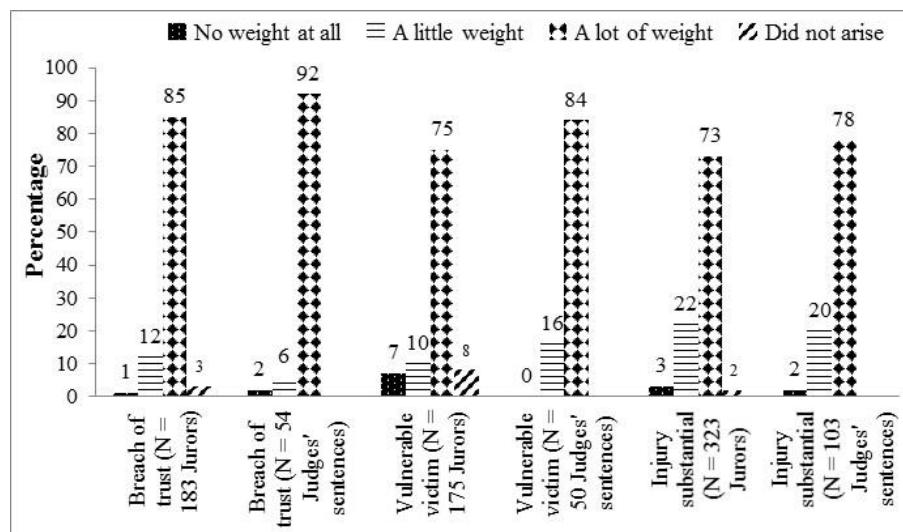
Breach of Trust, Vulnerable Victim, and Harm

The wording for these three factors was:

- The offender abused their position of trust or power
- The victim was vulnerable due to age and/or disability
- The injury, emotional harm, loss or damage caused was substantial.

For each of these factors there is a degree of subjectivity in the judgement as to whether the factor arose or not.⁵ Figure 1 shows that for the offenders for whom the judge indicated that these factors arose, the weight given by judges and jurors was similar, although judges were more inclined than jurors to give each factor a lot of weight.

Figure 1: Juror and judge weightings of breach of trust, vulnerable victim and injury substantial



Notes: ¹ Figures pertaining to judges are weightings given by a judge (pseudo or actual) in those cases where the judge said the factor arose. It follows there are no instances of the category 'Did not arise' for the weightings by judges.

⁵ Substantial injury was difficult to code because the point at which harm becomes aggravating for offences which have violence or injury as an element is often unclear.

² A number of jurors attributed weight in additional cases to those identified by the judge for breach of trust (N = 105 jurors), vulnerable victims (N = 80 jurors) and injury substantial (N = 57 jurors).

For each factor at least some jurors identified additional cases in which these factors arose. Planning, the other offence-related factor in the list of aggravating factors, also revealed a similar pattern between judges and jurors, although in this instance jurors were a little more likely to give the factor ‘a lot of weight’ than judges (63% compared with 57%).

Figure 1 shows that the weight given to breach of trust by judges and jurors in those cases where the judge considered this factor arose was similar, with more than 80% giving breach of trust a lot of weight. However, there were 105 jurors who gave weight to breach of trust in cases which were not identified by judges as giving rise to a breach of trust. The analysis of the sentencing remarks in the cases where breach of trust was given weight by the judge showed that more than half of these offenders were sentenced for child sexual assault: some for adult sexual assault such as date rape; a few for family violence and other violent offences; and one case each for theft from an employer, financial fraud, and workplace health and safety offences.

The interviews were useful in illuminating differences between judges and jurors as to whether an offence amounted to an abuse or breach of trust. In a case where the offender raped a woman who, like the offender, was also staying in the house of a mutual friend, the judge made no mention of breach of trust (coded as did not arise) but Juror 326 thought a little weight should be given to this factor. In his interview, he said that it was aggravating because it would be likely to affect the victim’s trust in people she knew:

[I]n terms of ... the victim’s later life it would have a bigger impact on her than on a complete stranger. You could almost say, ‘Well, I was an unlucky victim’, but if someone knows you, this ... is a deliberate thing.

Breach of trust or power was also given a lot of weight by two of the interviewed jurors in cases where the victim of the violence was the offender’s estranged partner and where the judge had not indicated that breach of trust was an aggravating factor. Juror 598 confirmed that for him breach of trust was the most important aggravating factor in the case. It was also given a lot of weight by the three other jurors from that trial who completed Survey 2. Juror 194 explained in his interview that the breach of trust was

more a breach of the emotional and physical power that the offender had over his younger victim, who was an international student.

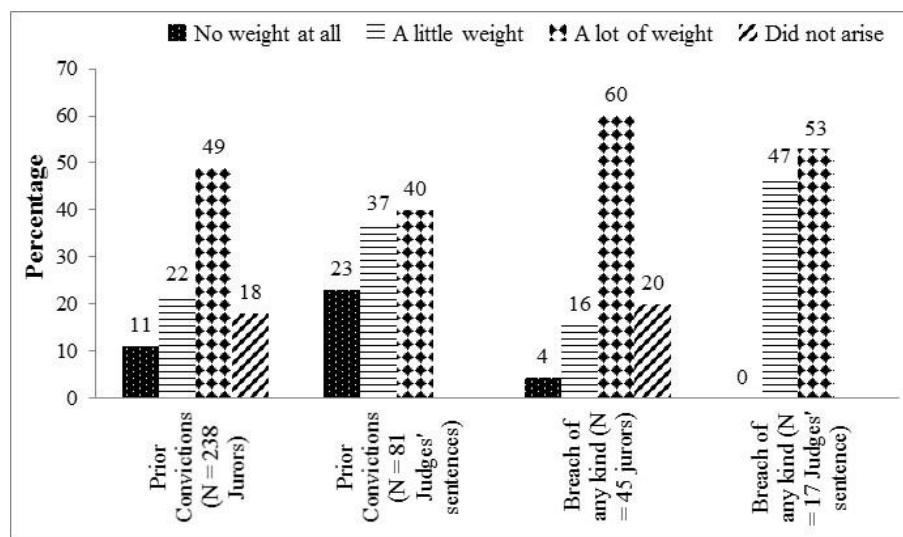
Antecedents

Figure 2 shows the results for aggravating factors related to the offender's antecedents. These factors were worded:

- The offender had prior convictions
- The offender was on bail for a prior offence when they committed the current offence
- The offender was on parole for a prior offence when they committed the current offence
- The offender was on a suspended sentence or community corrections order for a prior offence when they committed the current offence.

Given the low numbers for the bail and breach factors, these were combined in Figure 2.

Figure 2: Juror and judge weightings of antecedents: priors, bail, breach of parole and court orders



Notes: ¹ See Note 1 to Figure 1.

² A number of jurors attributed weight in additional cases to those identified by the judge for prior convictions (N = 52 jurors) and breach of any kind (N = 116 juror responses).

The ambiguity of the term 'prior convictions' has been referred to above. For coding purposes, this was interpreted as meaning a criminal record of any kind prior to the commission of the offence the subject of the current trial, even if the judge gave 'no

weight' to these convictions. Figure 2 shows that jurors were more likely than judges to give 'a lot of weight' to prior convictions and less likely to give them 'no weight' although there was little difference overall in the proportion of jurors and judges attributing weight to priors (71% for jurors compared with 76.5% for judges). As Figure 2 indicates, there were only 17 offenders who had offended while on bail or breached parole or a sentencing order and fewer than 50 juror responses in those cases. Even so, Figure 2 shows that jurors were more likely than judges to give a lot of weight to these factors.

Analysis of the sentencing remarks showed that judges, in accordance with authority,⁶ gave no weight to prior convictions in cases where the offender's criminal record was for dissimilar offences or where the offender had convictions which the judge found to be irrelevant to sentence because of their age. However, jurors' responses for these offenders revealed that almost half considered that the prior convictions were aggravating. Two rape cases, where there were interviews, provide examples illuminating this finding. *C* was convicted of the rape and indecent assault of his cousin who was mildly intellectually disabled. He had prior convictions attracting no significant terms of imprisonment for offences of dishonesty, driving and assault, to which the judge gave no weight. Eight jurors completed Survey 2. Five gave priors a little weight, two gave them no weight and Juror 618 gave them a lot of weight. In interview, he said this was because a failure to learn to abide by the law indicated the need for a heavier sentence. *H*, a case of marital rape, was another case where the judge gave priors no weight, saying: 'You have several prior convictions but they are of no consequence to my sentencing task'. Of the five jurors who completed Survey 2, two gave prior convictions no weight, two gave them a little weight and one, Juror 354, gave them a lot of weight, maintaining in her interview that they 'should play a role in sentencing'.

The interviews provided an opportunity to explore the reasons that jurors gave for considering prior convictions to be aggravating. The relevance of the offender's criminal record was discussed in those cases where the juror had said that it was an aggravating factor. We encouraged jurors to explain *why* they thought prior convictions

⁶ A Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed, Lawbook Co, Sydney, 2014), 344.

should be aggravating rather than merely reiterating that they should be. For many jurors it was simply an instinctive response. For example, Juror 477 said:

If you keep doing things more, then you should be penalized more for doing the wrong thing. That's the way I see it.

When pressed as to why, he said:

I hadn't thought about that part of the 'why' because I was just thinking one-dimensionally, you know.

Eventually he added that he wanted 'people to be educated and learn'. The rationale that a heavier sentence was necessary to teach offenders a lesson to ensure that they did not re-offend was a common theme. For example, Juror 173 explained that,

it's sort of like, ... you get a little kid and you say 'don't do that', slap the hand, and they do it again, so it's a bigger slap ... And it's sort of just a grown up upscale version of that.

Similarly, Juror 598 said:

It's like disciplining a child. If they're not quite getting it you need to up the ante a little bit.

Juror 599 thought that an offender's record increased his culpability for the offence, 'because he knows he's not supposed to do it'. He also thought an increased penalty was justified 'to make him pay'. Several jurors justified increasing the penalty on re-offenders in terms of desert as well as specific deterrence. Juror 801 said:

it's not just a once-off ... it's clear that that's not right, that he's done it again, it's a repeat'. ... [We need to do something] to make him go, 'Oh it's serious' – to understand the seriousness.

For some jurors, protection of the public was a reason for increasing punishment. *F* was convicted of causing serious injury by shooting his victim in the thigh when trying to recover a drug debt. He had a prior history of violent and firearms offences. Juror 975 explained that,

if someone is a repeat offender and are likely to repeat again, then they are a danger to society and they don't deserve their freedom.

Mitigating Factors

Remorse was one of the ten mitigating factors. According to the judges, remorse was a mitigating factor for only nine offenders, which was not surprising given that all cases in our study were pleas of not guilty. Given these small numbers, no further analysis was undertaken of this factor.

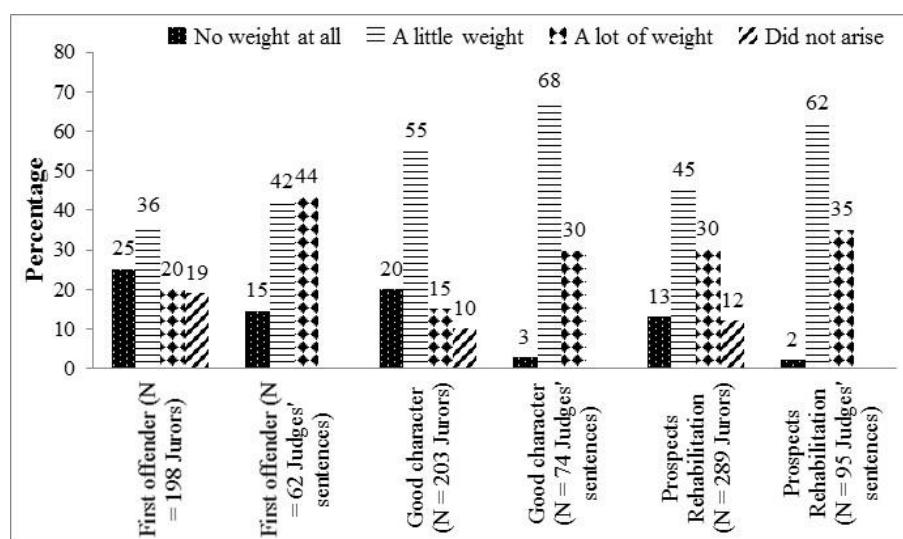
First offender, good character, and good prospects of rehabilitation

The wording for these factors was:

- This was the first time the person had offended
- The offender was a person of good character
- The offender had good prospects of rehabilitation.

All of these factors involved subjective judgements as to whether the factor arose or not. Being a first offender has similar problems of interpretation as prior convictions. To capture all cases where antecedents were mitigatory, the pseudo judges adopted a liberal interpretation of a ‘first offender’ when completing the ranking forms. This conformed with the approach taken by most judges who filled out the forms. Good character and good prospects of rehabilitation were even more open to a subjective interpretation than first offender. Fig 3 shows that jurors were distinctly less likely than judges to give each of these factors ‘a lot of weight’ and more likely to give them ‘no weight’.

Figure 3: First offender, good character and prospects of rehabilitation



Notes: ¹ See Note 1 to Figure 1.

² A number of jurors attributed weight in additional cases to those identified by the judge for first offender (N = 60 jurors), good character (N = 76 jurors) and rehabilitation (N = 63 jurors).

Jurors were much more likely than judges to give no weight to ‘good character’ (19.9% compared with 2.7%). There was least divergence between judges and jurors for ‘good prospects of rehabilitation’. Analysis of the sentencing remarks showed that judges gave no weight to being a first offender where there were subsequent offences, usually of the same kind or where the offence was part of long term or repeated sexual abuse. In the two cases where no weight was given to good character, one was a case of drug trafficking and one a case of serial sex offending by a priest.

The interviews with jurors who gave no weight to the factors of being a first offender or being of good character throw some light on why jurors tended to place less weight on these two factors than the judges. *M*, a business man, was a first offender convicted of aggravated burglary and kidnapping the former lover of a female friend. The judge gave lot of weight to both the fact that he was a first offender and of good character. Only one of the five jurors who completed Survey 2 gave any weight to being a first offender and only two to good character (a little weight). We interviewed two jurors from this trial. Each gave no weight to either of these factors. Juror 878 said no weight should be given to good character or to the fact that *M* had no relevant criminal history because the offence was premeditated and planned. And when asked why she gave no weight to good character Juror 882 said:

I think in this case because it was so unprovoked and who cares if he was a good family man? He beat the crap out of a guy with a baseball bat for no good reason whatever. So quite frankly I really don’t care... if he’s great to his kids.

This juror was also opposed to giving weight to good character in cases where the offender’s victim is a child or a victim of family violence.

In *R*, a paedophile priest case, the judge gave ‘no weight’ to the otherwise good character of the offender and none of the eight Stage 2 jurors gave it any weight. Juror 290 said:

I don’t think it’s really got much to do with it, you know, bringing up how good you are and this character stuff.

H was a pharmacist convicted of an indecent act with a young female employee. Professionally, he was held in high regard and the judge gave this a little weight. However, Juror 648 gave no weight to his good character because:

as a professional person with the training [he] had ... he just should have known better.

However, two of the other three Stage 2 jurors did give his good character a little weight and we also interviewed several jurors who regarded these factors as mitigating in cases dealing with child sexual assault, stranger rape and family violence. For example, four of the seven Stage 2 jurors, including Juror 845 and Juror 801, agreed with the judge that good character should be given a little weight in a case where the offender had led a normal and constructive life before his arrest for two violent rapes committed 20 years earlier. Juror 845 said that the evidence of his good character in the intervening period indicated that he was not going to re-offend. Similarly, Juror 801, who said the fact that the offender's family and friends regarded him highly, showed that:

[H]e's not just a total nasty ... if his wife and his children and his friends are ... very supportive of him and see him as a good person, surely that would be some positive for [the] future.

Youth, old age, and physical illness

These factors were worded:

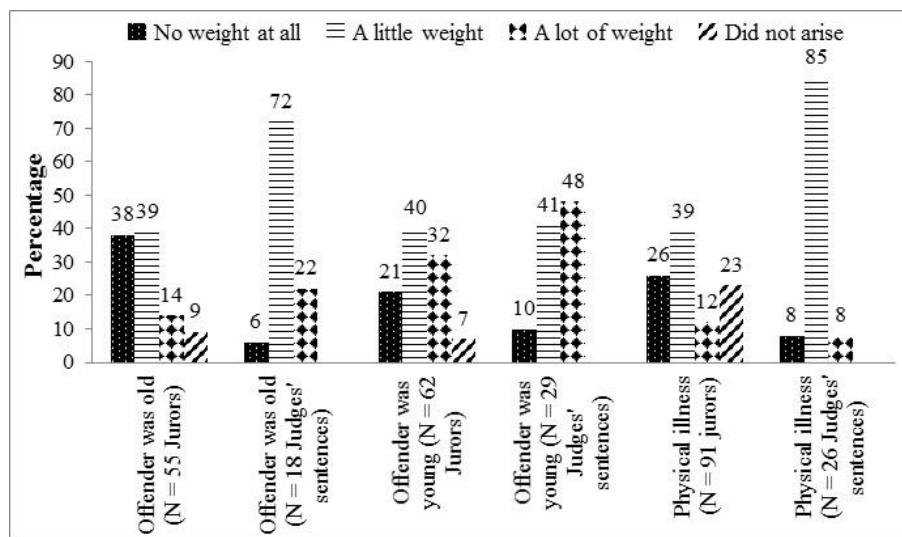
- The offender was young
- The offender was old
- The offender has a physical illness/impairment.

There is a degree of subjectivity in the assessment of what qualifies as 'old' and what qualifies as 'young'. For judges, old age was said to arise when the offender's age ranged from 55 to 81 (at the time of sentence) and young offenders ranged in age from 18 to 28 at the time of the offence. The median age was 23 for 'young' offenders and 63 for 'old' offenders.

Figure 4 shows a sharp contrast between judges and jurors in the weight given to old age. Judges gave mitigatory weight to old age for over 90% of offenders whom they identified as 'old'. However, only half of jurors from these cases gave old age mitigatory weight. As Figure 4 shows, 38% of jurors gave it 'no weight' in contrast with judges who gave no mitigatory weight to old age for just 5% of these offenders.

Jurors were more sympathetic to youth as a mitigating factor than to old age and for jurors it was the mitigating factor most likely to be given ‘a lot of weight’. Nevertheless, they still gave it less weight than the judges.

Figure 4: Juror and judge weightings of offender old, offender young, and physical illness



Notes: ¹ See Note 1 to Figure 1.

² A number of jurors attributed weight in additional cases to those identified by the judge for offender old (N = 66 jurors), offender young (N = 79 jurors) and physical illness (N = 67 jurors).

For judges the responses to ill-health were similar to those for old age, and in fact, for about half of the offenders attracting mitigation for old age, mitigatory weight was also given to ill-health. As with their response to old age, only half of the jurors gave mitigatory weight to ill-health.

The interviews were unhelpful in explaining why jurors gave less weight to youth than judges. However, we did interview Juror 458 (the only Stage 2 juror from his trial), who confirmed that he gave a little weight to the youth of the offender who was 29 at the time of a violent home invasion (33 at sentence), which illustrates the subjectivity associated with this factor. The judge gave no indication that youth was a mitigating factor in this case. Examining the individual cases where the judge indicated that youth

arose, and which also had at least six responses from jurors at Stage 2, showed that jurors had a range of views about the weight and relevance of youth as a mitigating factor. *M* was 21 at the time of the armed robbery and the judge indicated that youth was an important mitigating factor. Juror 568, whom we interviewed, agreed with the judge about this, but of the six other jurors who completed Survey 2, five gave youth only a little weight and one indicated that it did not arise. The diversity of views is also illustrated in a case of a 23-year-old offender where the judge emphasised the importance of youth as a mitigating factor. Two jurors at Stage 2 also gave a lot of weight to youth, with two giving it a little weight and two no weight at all.

The interviews were more revealing in relation to old age. Juror 6 had given old age a little weight at Stage 2 (as did the judge on the grounds of additional hardship of prison)⁷ but changed his mind at interview:

[W]ell hang on, it doesn't matter whether he's 25 years of age or 75 years of age, if he's involved in a crime of that magnitude [conspiring to import drugs] ... he should pay the punishment.

In *A*, the judge gave a little weight to old age where the offender was 62. Juror 603 thought that, because the offender would be in his late sixties or seventies when released and he would have no one to care for him, he would be better off in prison. Similarly, in *W*, where the judge had said the offender's age (nearly 69) was a significant mitigating factor, Juror 522 thought he would probably be better off in prison than 'on his own out in society'. But again there was a diversity of views from Stage 2 jurors in these two cases. In *W*, two jurors gave old age no weight and one said it did not arise; and in *A*, two of the three Stage 2 jurors gave old age a little weight.

Just as jurors were less sympathetic than judges about old age being mitigating, Figure 4 shows they also showed less sympathy in relation to ill-health. We interviewed two jurors from trials where the sentencing judge gave a little weight to the offender's physical illness.⁸ *B* was convicted of incest and indecent acts with his step-daughter

⁷ Old age is mitigating: *R v Hunter* (1984) 36 SASR 101; *R v Iles* [2009] VSCA [15]-[20]. That imprisonment will be more onerous for an elderly offender is the "more secure basis" for this ground of mitigation: A Ashworth, *Sentencing and Criminal Justice* (5th ed, Cambridge University Press) 185.

⁸ Physical illness is mitigating when it causes imprisonment to be a greater burden on the offender or when it will aggravate the offender's condition: *R v Smith* (1987) 44 SASR 587, 589.

when she was aged 14 to 16. Juror 487 disagreed with the judge who gave a little weight to the fact that prison would be more onerous because of the offender's heart condition and asthma. Juror 487 thought it was unfair for health to be relevant to sentence:

[T]he condition of your health shouldn't be a determining factor. I mean just because you're unwell for whatever reason doesn't mean that should offset any sentencing. I mean you've committed the crime.

Juror 6, who had dismissed old age as a mitigating factor in his interview, was also sceptical about giving weight to ill-health. He made two points: first, that the judge mentioned a medical report which said that the offender's mental health problems may be better controlled in prison; and secondly, he was ill before he started on this criminal project and 'went into this knowing his health'. However, three of the five Stage 2 jurors were prepared to give ill-health at least some weight.

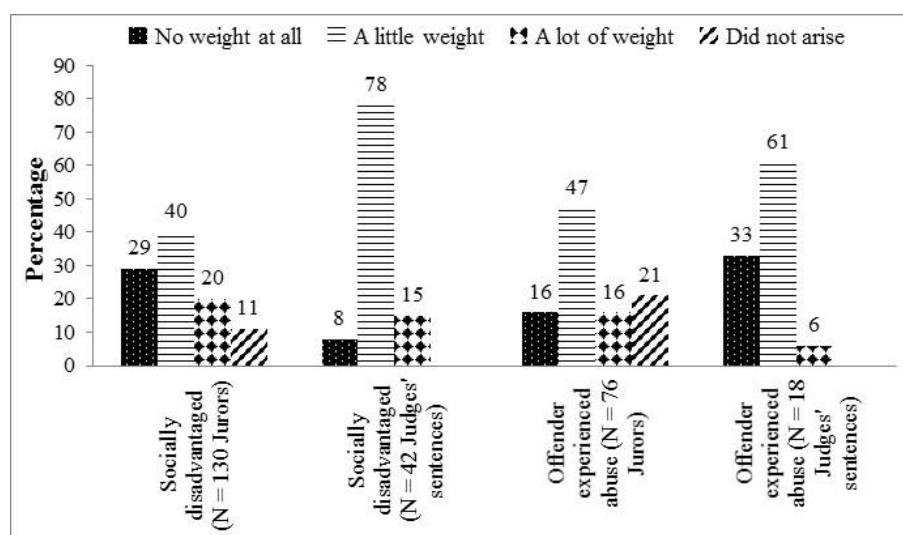
Disadvantaged background and being a victim of abuse

The wording for these two factors was:

- The offender comes from a socially disadvantaged background
- The offender was a victim of physical and/or sexual abuse.

Almost all of the offenders identified by the judge as having suffered sexual or physical abuse also were described as coming from a socially disadvantaged background.

Figure 5: Juror and Judge weightings of disadvantaged background and abuse



Notes: ¹ See Note 1 to Figure 1.

² A number of jurors attributed weight in additional cases to those identified by the judge for offender socially disadvantaged (N = 91 jurors) and offender experienced abuse (N = 53 jurors).

Figure 5 shows that judges were more likely to give mitigatory weight to the offender's disadvantaged background than to being a victim of abuse.⁹ Jurors, however, responded similarly to these factors, with around 60% giving them some weight. Being a victim of abuse was the only mitigating factor that judges were more likely to give 'no weight' to than jurors.

The interviews with jurors who gave 'a lot of weight', 'a little weight' and 'no weight' to the offenders' disadvantaged background and being a victim of abuse, reflected quite divergent views about the relevance of these factors to sentence. For Juror 57, who gave disadvantaged background a lot of weight in a money laundering case (compared with the judge's little weight), disadvantage related to the fact the offender was, according to Juror 57, on a Temporary Protection Visa and had offended to support his family. Juror 81, who had been a foster parent to many children, understood the effects of social disadvantage and explained that this was why he agreed with the judge that this factor attracted a lot of weight. Juror 236 and Juror 184 gave no weight to this factor in cases where the judge had given it a little weight. In explaining why, Juror 236 said:

Everyone's got the choice to be good or bad.

And Juror 184 explained that this factor was relevant for a young first offender, but not later:

Once you've gone past 18 ... You've burnt all those bridges.

Four of the jurors we interviewed were sympathetic to giving mitigatory weight to being a victim of abuse. In a case of child sexual abuse, the judge explained how the offender's disadvantaged background, which included childhood sexual abuse, was related to his offending. Three of the five Stage 2 jurors also gave mitigatory weight to childhood sexual abuse. Juror 624 gave it a lot of weight and said in his interview that it was a factor he was not aware of at Stage 1, adding that this highlighted the reason why mandatory sentencing was 'so wrong'.

⁹ Deprived background is mitigating: *Bugmy v The Queen* [2013] HCA 37 at [43]-[44]; childhood abuse is mitigating at least where there is a causal connection between the abuse and the offending: *R v AWF* (2000) 2 VR 1.

We also interviewed two jurors who gave childhood sexual abuse no weight in cases where the judge considered it mitigating. In their view, the fact that the offender had been sexually abused as a child should have alerted him to the harmfulness of such conduct. Juror 111 (the only Survey 2 juror in his case) said it would not make the offender less culpable:

Because I'm sure he wouldn't have liked it being done to him.

And Juror 845, in a case where jurors were divided over the relevance of abuse, said:

Personally I would kind of think that it's something if he realised it was bad he should have realised how awful it can be for somebody else.

He was sceptical about there being any link between sexual abuse and offending adding:

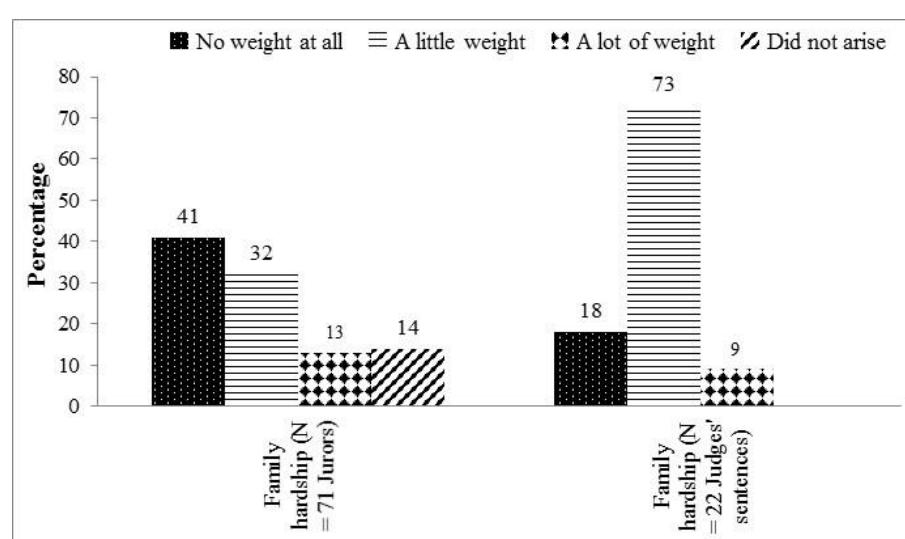
I don't know, I reckon girls probably get abused more than guys and they don't do the same things. ... I think it's a bit of an excuse.

Family hardship

This factor was worded:

- The offender's family are dependent on the offender either financially or as a carer.

Figure 6: Juror and judge weightings for family hardship



Notes: ¹ See Note 1 to Figure 1.

² 97 jurors attributed weight to family hardship in additional cases to those identified by the judge.

There were only two cases where the sentencing judges accepted that imprisonment of the offender would impose exceptional hardship on the offender's family and gave 'a lot of weight' to this factor.¹⁰ Family hardship was given 'a little weight' in mitigation by judges on a variety of grounds, including: because family hardship would make imprisonment more onerous *for the offender*; because the effect *on the offender* of family hardship indicated a strong motivation to abide by the law in the future; or for reasons of mercy. The latter example was illustrated in a case where the judge imposed a shorter non-parole period because imprisonment would leave the offender's 12 year old son without a mother and in the care of a father with a history of violence, dishonesty and drug offending.¹¹

The interviews allowed us to compare judges' and jurors' reasons for giving mitigatory weight to family hardship. While the sentencing remarks revealed that judges generally explained this in terms of the added burden *to the offender* of imprisonment caused by the knowledge of family hardship, this was not how mitigation was justified by jurors. Instead they relied upon the effect of hardship *on the family*, rather than its effect on increasing the burden of imprisonment on the offender. We interviewed four jurors who had given mitigatory weight to family hardship in cases where the judge had either given no weight to family hardship or had indicated on their form that it did not arise. For example, Juror 57, who gave hardship to family a lot of weight, was clearly affected by the presence of the offender's family in the court. She said:

[Despite the fact they were separated] his wife still sat in the court every day and it must have been really hard on her ... Yeah, and the kids, that was really hard seeing them in the court. ... And that must be really hard for a young boy especially. He was the only male child. That'd be just so hard to grow up without your dad.

L's case also illustrates the different approaches taken to family hardship by judges and jurors and the effect on jurors of the presence in court of the offender's family. *L* was

¹⁰ According to decisional law in Victoria, hardship to third parties must be exceptional for it to be mitigating: see Freiberg, n 6, 420-423 and discussion below.

¹¹ To achieve consistency, in cases where the judge stated they gave weight to the effect on the offender of hardship to family, this factor was coded as 'a little weight' (because this is how some judges coded it, but others ticked 'no weight' or 'did not arise').

convicted of rape of two victims in separate trials before the same judge who said in passing sentence that she would give weight,

to the fact that you will suffer greatly while you [are] in prison due to your concern for your family who will be left without support while you are in prison.

A juror was interviewed from each of the two trials and both gave ‘a little weight’ to the fact that the offender’s family were dependent on him (of the eight Stage 2 jurors who responded to his question, three gave it ‘a lot of weight’, three ‘a little’ and two ‘no weight’). The two interviewed jurors said that they were affected by the presence of the offender’s wife and son in the court room during the trial. In explaining why she considered family hardship mitigating, Juror 102 simply said:

Yeah, that’s the heart strings, isn’t it.

DISCUSSION

Jurors are not averse to giving weight to factors of personal mitigation although, like judges, they give more weight to aggravating factors than mitigating factors

Research in England and Wales has shown an asymmetry in public attitudes to sentencing factors, with aggravating factors being more important than mitigating factors.¹² This accords with the attitudes of our jurors. We also found this asymmetry in the judges’ treatment of aggravating and mitigating factors. However, jurors gave somewhat less weight than the judges to most aggravating factors and considerably less weight to most of the mitigating factors than the judges.

The finding that a majority of jurors gave each of the listed factors of personal mitigation at least some weight, accords with the results from a representative survey of members of public in England and Wales which found that, for 12 of a list of 13 offender-related mitigating factors, over half believed that they should result in a more lenient sentence.¹³ By showing that members of the public, including jurors, take an individualised approach to punishing offenders, these findings are a corrective to the generally punitive responses to sentencing opinion polls. When confronted with the offender in person and in many cases, with the offender’s family, they tend to support

¹² J Roberts and M Hough, Public attitudes to sentencing in England and Wales’ in J Roberts, *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011), 183

¹³ Roberts and Hough, n 11, 176.

mitigating factors more than their responses to general questions about leniency and severity would suggest.

It was in relation to breach of trust, prior convictions, old age and ill-health and family hardship that the most interesting findings emerged from the factor-by-factor comparison between judges and jurors. Youth, first offender and good character are also worthy of further discussion.

Jurors take a broader view of breach of trust than judges.

Judges and jurors gave similar weight to breach of trust in those cases where the judge said it arose. However, jurors identified a broader range of cases where breach of trust was aggravating and this was confirmed by the interviews. Breach of trust or confidence is a well-recognised aggravating factor in sentencing. However, the common law has adopted a restricted meaning of breach of trust that requires a particular relationship equivalent to a ‘position of trust’.¹⁴ It is a special relationship that transcends the usual duty of care arising between persons in the community in everyday contact or business and social dealings.¹⁵ Merely because the victim has erroneously trusted the offender, such as in a date rape scenario, does not give rise to a trust relationship.¹⁶ While there were some cases in our study where judges took a broader view of breach of trust and extended it to victims who had erroneously trusted the offender in a social setting, jurors took an even broader view and found a breach of trust in cases where there was no relationship with the victim (e.g. Juror 326) and in cases where a sexual relationship had ended and judges made no mention of breach of trust (Juror 194, Juror 598 and the other Stage 2 jurors in the same case).

These findings suggest there should be greater clarity as to whether an ongoing relationship of trust should be recognised in the context of a failed relationship. Given the volatility of many sexual relationships, there are good reasons for suggesting that despite a relationship breakdown, the trust relationship should nevertheless be a continuing one and its breach an aggravating factor. In addition, some jurors and some judges consider that trust is breached in the case of a date rape, although appellate

¹⁴ Freiberg, n 6, 325 citing *Suleman v The Queen* [2009] NSWCCA 70 at [22].

¹⁵ *Suleman v The Queen* [2009] NSWCCA 70 at [22].

¹⁶ *R v MAK* [2005] NSWCCA 369 [102]-[103].

guidance suggests there is no trust relationship in this situation. This too would benefit from greater clarity in appellate guidance. Whether it is appropriate to use breach of trust as a means of highlighting the seriousness of date rape is worthy of debate.

Jurors have a broader view of the relevance of prior convictions than judges

On the basis of previous research, it would perhaps be expected that jurors would give more weight to prior convictions than judges.¹⁷ However, our findings were more nuanced. Focusing on those cases which were strictly *prior* convictions (ie, convictions recorded before the commission of the current offence), jurors were more likely to give them ‘a lot of weight’ and less likely to give them ‘no weight’. Judges, in accordance with sentencing practice and appellate guidance, gave ‘no weight’ to prior convictions for offences of a kind that is different from the current offence. A significant proportion of jurors, however, regarded prior convictions in these cases as aggravating, a finding from the surveys that was supported by the interviews. Earlier research from England and Wales has also shown that members of the public take a broad view of the kind of prior convictions that are aggravating, with only 18% of the sample responding that prior unrelated convictions would make no difference to the seriousness of the crime.¹⁸

The interviews also showed why jurors found a criminal record to be aggravating. Although sometimes struggling to explain why, jurors tended to rely on increased culpability and desert (retribution), specific deterrence, and protection of the public to do so.¹⁹ Their views go well beyond ‘the progressive loss of mitigation’ approach to prior convictions that is sometimes put forward by commentators and legal theorists²⁰ and support the broader model of blameworthiness advocated by Roberts as a

¹⁷ Julian Roberts states that research in many jurisdictions over the past 30 years has shown that members of the public regard previous convictions as an important sentencing factor: JV Roberts, “Punishing Persistence: Explaining the enduring appeal of the recidivist sentencing premium” (2008) 58 British Journal of Criminology 468, 472; JV Roberts, *Punishing Persistent Offenders* (Oxford University Press, 2008), 167-172.

¹⁸ Roberts and Hough above, n 11, 174.

¹⁹ This finding appears to contrast with an Australia-wide study which suggested that there was no evidence that the public supported specific deterrence in the case of repeat offenders: C Spiranovic et al. “Public Preferences for Sentencing Purposes: What difference does offender age, criminal history and offence type make?” (2012) 12 Criminology and Criminal Justice 289, 302.

²⁰ J Roberts, “Revisiting the Recidivist Sentencing Premium” in A von Hirsch, A Ashworth and J Roberts, *Principled Sentencing: Readings on Theory and Policy* (3rd ed, Hart Publishing, Oxford, 2009), 106, 148.

retributive justification for the recidivist premium.²¹ The views of jurors, like other members of the public, accord with current sentencing practice, although jurors tend to take a broader view than judges about which prior convictions are relevant.

Jurors are more likely than judges to give no weight to good character and being a first offender

The law treats as mitigating, both the positive aspect of good character (as evidenced by reputation and contributions made by the offender to the community), and its negative aspect (an absence of prior convictions).²² Courts commonly link these two factors, as did the judges and jurors in our study, although good character was more often a relevant factor than being a first offender. Distillations of appellate guidance suggest that there are several situations where absence of a criminal record and good character are given little or no weight, such as when it enabled the offender to commit the offences or where the offender committed a series of offences over a lengthy period.²³ Our analysis of sentencing remarks reflects this approach. However, jurors were more likely than judges to give no weight to good character and to being a first offender. This was particularly so for good character — jurors were four times more likely than judges to give no weight to this factor. Moreover, judges were twice as likely as jurors to give a lot of weight to good character and being a first offender.

Absence of prior convictions as a mitigating factor is generally accepted as being theoretically sound in principle because it suggests that the offending is exceptional and out of character.²⁴ However, the positive aspect of good character as evidenced by such things as employment history and contributions to the community, has attracted criticism on the grounds of both principle (because it is unrelated to harm or culpability) and fairness (because it is socially inequitable).²⁵ In Victoria, the *Sentencing Act 1991*, s 5(2)(f), requires the court to consider ‘the offender’s previous character’. The court

²¹ Roberts, n 19.

²² *Sentencing Act 1991* (Vic) s 6; *Crimes (Sentencing Procedure) Act 1999* (NSW), s21A(3)(e) and (f).

²³ M Bagaric and R Edney, *Sentencing in Australia* (2nd ed, Lawbook Co, Sydney, 2015), 381-382; Freiberg, n 6, 350-352.

²⁴ *Weininger v The Queen* (2003) 212 CLR 629 at [58]-[59]; Ashworth, n 7, 201-202.

²⁵ Ashworth, n 7, 182-183; 249-251, 254-255; K Warner, “Sentencing Review 2008-2009” (2010) 34 Crim LJ 16, 18-24.

may consider, not only previous convictions, but also the offender's 'general reputation' and 'any significant contributions made by the offender to the community'.²⁶ Some Australian jurisdictions have introduced provisions that limit the relevance of good character as a mitigating factor. Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), provides that good character or lack of previous convictions is not relevant as a mitigating factor if it was of assistance to the offender in committing the offence.²⁷ The responses of jurors in this study tend to suggest that many would go further than limiting the relevance of good character only to cases where these factors facilitated the commission of the offence.

Jurors give less weight to youth, old age and physical illness than judges

The law's reasons for treating youth and old age as mitigating differ. Leniency is accorded to youth for several reasons²⁸ but the main reason is the primacy of rehabilitation in sentencing young offenders because of the capacity of youths to alter their behaviour. Privileging rehabilitation in such cases is seen as benefiting the community as well as the young offender. It is only in the circumstances of the gravest criminal offending where there is no realistic prospect of rehabilitation that youth is extinguished as a mitigatory factor.²⁹ It is not surprising then, that youth emerged as the most powerful mitigating factor for judges in this study. For jurors too, it was the mitigating factor most likely to be given a lot of weight.

The law accepts old age as a mitigating factor, particularly when it is combined with ill-health, on the grounds that imprisonment is likely to be more burdensome to an elderly person. That each year of imprisonment represents a substantial proportion of the remaining life expectancy of an older person is also relied upon to justify leniency. While this is sometimes attributed to mercy rather than the application of any specific sentencing principle,³⁰ it can arguably be explained in retributive terms: as a recognition that fixing a proportionate punishment should take account of different

²⁶ *Sentencing Act 1991* (Vic) s 6.

²⁷ See also *Sentencing Act 1997* (Tas) s 11A(2).

²⁸ Freiberg, n 6, 353

²⁹ *Azzopardi v The Queen* (2011) 35 VR 43 at [44].

³⁰ *Gulyas v Western Australia* [2007] WASCA 263 at [34]; *R v Hunter* (1984) 36 SASR 101, 103-104.

experiences of the burden of imprisonment. While some jurors in some cases agreed with the judge in treating old age as mitigating, jurors were much more likely to give no weight to old age. Reasons included (somewhat paradoxically) that the offender would be better off being cared for in a custodial setting. Jurors did not appear to be persuaded by the argument that old age can make imprisonment more burdensome. This could also explain why they were less willing than judges to give mitigatory weight to physical ill-health (as supported by the interviews with Juror 487 and Juror 6). From a normative perspective, it is preferable to explain giving mitigatory weight to old age and physical illness in terms of differences in experienced prison severity rather than simply mercy, because of mercy's attendant potential for inconsistency. The reaction of interviewed jurors suggests that the differential impact explanation may not be immediately palatable to members of the public, so the challenge for judges is to explain it as persuasively as possible.

Judges and jurors give different reasons for treating family hardship as mitigating.

This mitigating factor in our surveys referred to cases where members of the offender's family depended on the offender either financially or for care. The generally accepted common law position in Australia is that hardship to third parties, to the offender's family, or to dependents is relevant only in exceptional circumstances. The court's function is to impose a sentence that is appropriate to the gravity of the crime and so hardship to others is not regarded as a principled basis for reducing the penalty. Hardship to family is something that the offender should have considered before offending. Courts take it into account, only in exceptional cases where the hardship is considerably more severe than will normally arise from the imprisonment of a parent or carer. They do so on grounds of mercy rather than principle.³¹ It is not surprising then that there were only two cases in our study that satisfied the test of exceptional hardship and therefore justified the judge in giving 'a lot of weight' to this factor. However, there were an additional 16 cases where the judge gave 'a little weight' to hardship to others on the grounds of the effect *on the offender* of hardship caused to others by their imprisonment.

³¹ Freiberg, n 6, 420-423; *Markovic v The Queen* [2010] VSCA 105.

There is appellate support for giving mitigatory weight to the effect on the offender of family hardship in *Markovic v The Queen*³² where the Victorian Court of Appeal made it clear that the effect on the offender of hardship to family members caused by the offender's imprisonment is mitigating if the court is satisfied that it will make the experience of imprisonment more burdensome or that it materially affects the assessment of the need for specific deterrence or the offender's prospects of rehabilitation.

While the quantitative data suggests that the weight placed by judges and jurors on hardship to third parties is similar, the qualitative analysis revealed that judges and jurors do not agree on the reasons justifying its relevance. Jurors give it weight because of the effect of imprisonment *on the offender's family*, but the judges do on the basis of its effects *on the offender*. Judges are constrained by authority to tie relevance to conventional principles of mitigation but jurors are not so constrained and may invoke mercy alone. As mentioned above, mercy, divorced from principle, is an inappropriate basis for according leniency. Nevertheless, the different response to family hardship by judges and jurors requires consideration when the relevance of this sentencing factor is being reviewed. It may be that the law is too rigid in relation to family hardship and for pragmatic reasons some reduction should be made on these grounds.³³

CONCLUSION

One of the benefits of research comparing the intuitive responses to sentencing factors of lay members of the public with judges' responses is that it provides material to stimulate debate on the justification for aggravating and mitigating factors. And when mismatches occur between public views and judicial practice, change may be worth considering. At the very least, the logic of treating factors as aggravating and mitigating should be clearly explained because poorly understood sentencing factors can be a source of media and public criticism of sentencers.

The results of this study suggest several issues for consideration by Australian lawmakers and for future research by sentencing scholars. The first is whether there should be a broader basis for the aggravating factor of breach of trust. Arguably, it

³² [2010] VSCA 105 at [20]

³³ Ashworth, n 7, 187.

would serve to highlight the seriousness of gender violence if breach of trust included situations such as violence against a former partner. Given the salience of the issue of family hardship for our jurors, the second question is whether hardship to families should be accepted as a mitigating factor in its own right. The third issue concerns the significance of the fact that many jurors seem unconvinced by the reasoning that explains mitigation in terms of imprisonment being more onerous in cases of old age, physical illness and knowledge of family hardship.

In considering how to respond to these issues, and other questions relating to public responses to judicial sentencing, it is worth noting that the sentencing remarks in the County Court of Victoria are lengthy and many of the jurors in our study struggled to identify all of the mitigating factors mentioned in those reasons. This supports the suggestion of the former Chief Justice of Victoria that reasons for sentence should be written more simply and briefly, perhaps with accompanying summaries, if community understanding of sentencing is to improve.³⁴

There are broader conclusions that can be drawn from the empirical findings reported in this article. First, the finding that jurors give weight to a varying range of aggravating factors and mitigating factors, supports an individualised approach to sentencing rather than one which limits judicial discretion or restricts consideration to the severity of the offence and the offender's criminal record. Secondly, while we have teased out a number of areas for further debate and consideration in the factor-by-factor analysis, the correspondence of sentencing factors between judges and jurors was relatively close, particularly for aggravating factors. This provides additional evidence to support the conclusion based on our earlier reported results that the views of judges and jurors, and by implication, members of the public, are much more closely aligned in Victoria than mass public opinion polls suggest.

Acknowledgment: This research was supported by the Australian Government through the Australian Research Council's *Discovery Projects* funding scheme (project DP130101054). The views expressed herein are those of the authors and are not necessarily those of the Australian Government or Australian Research Council.

³⁴ The Hon Marilyn Warren AC, Chief Justice of Victoria, "Remarks on the Occasion of a Farewell Sitting in the Banco Court", 27 September 2017, 4.