

LONE ANARCHISTS AND PEACE PILGRIMS: THE RELEVANCE OF POLITICAL MOTIVATIONS TO SENTENCING

JAMIE WALVISCH*

In late 2017, a Tasmanian ‘anarchist’ wearing a ‘Vote Yes’ [for same-sex marriage] badge headbutted former Prime Minister Tony Abbott. A few months later, six ‘peace pilgrims’ were sentenced for trespassing onto the Pine Gap military base as part of a political protest. These two cases raised the important question of what effect (if any) offenders’ political motivations should have on their sentences: an issue which has received surprisingly little academic attention in Australia to date.

This article examines the general relevance of political motivations to sentencing. It identifies two distinct approaches that have been taken in the Australian case law: a sympathetic approach, in which political motivations are considered to be mitigating; and an unsympathetic approach, in which politically motivated offences are seen to require strongly denunciatory and deterrent sentences. It explores the factors that influence sentencing judges’ adoption of a particular approach, and sketches out some key principles that should guide judges when determining whether an offender’s political motivations are mitigating, drawing on a combination of political philosophy and Australian constitutional law.

I INTRODUCTION

Two recent high-profile Australian criminal cases have drawn attention to the complex question of what relevance (if any) an offender’s political motivations should have when fashioning an appropriate sentence. The first involved an assault on former Australian Prime Minister, Tony Abbott, by a 38-year-old Tasmanian man named Astro Labe. Mr Labe approached Mr Abbott on the streets of Hobart, and asked to shake his hand. When Mr Abbott extended his hand, Mr Labe grabbed it and headbutted Mr Abbott in the face, causing him to suffer a swollen bottom lip.¹ This occurred at a time when people around Australia were being asked to vote in a postal plebiscite on the introduction of same-sex

* BA (Hons), LLB (Hons), PhD (Monash); Lecturer, Faculty of Law, Monash University. This article is based on a paper presented to a roundtable on the Law of Protest held at the Monash Law Chambers on 2 June 2017. I am grateful to Azadeh Dastyari, Maria O’Sullivan and Douglas Guilfoyle for organising the event. I am also grateful to Patrick Emerton and Maria O’Sullivan for their assistance with aspects of the article, and to the anonymous referees for their comments.

1 See, eg, Georgie Burgess et al, ‘Tony Abbott: Hobart DJ Astro “Funknukl” Labe Charged over Alleged Headbutt Assault of Former PM’, *ABC News* (online), 22 September 2017 <<http://www.abc.net.au/news/2017-09-22/astro-labe-charged-over-alleged-assault-of-tony-abbott/8975454>>; Sharri Markson, ‘Tony Abbott Headbutt Attacker to Face Court on Charge of Common Assault’, *The Daily Telegraph* (online), 23 September 2017 <<https://www.dailytelegraph.com.au/news/nsw/tony-abbott-headbutt-attacker-to-face-court-on-charge-of-common-assault/news-story/4c7a380dfa3a696ef8deb1ee9745e57>>.

marriage. Mr Labe was wearing a ‘Vote Yes’ badge on his lapel, and Mr Abbott (a prominent supporter of the ‘no’ campaign) initially suggested that it was Mr Labe’s political support for same-sex marriage that motivated the attack.²

People from all sides of the political spectrum quickly condemned what Mr Abbott had labelled a ‘politically-motivated’ assault.³ Prime Minister Malcolm Turnbull, a supporter of the ‘yes’ campaign, called the attack ‘un-Australian’, and stated that ‘any violence coming into our political lives is absolutely to be condemned’; opposition leader Bill Shorten described the assault as ‘unacceptable’; and Independent Member of Parliament (‘MP’) Alex Greenwich (co-chair of the Australian Marriage Equality advocacy group) said that there was ‘no room for any disrespect either physical or verbal in this national debate’.⁴ These sentiments were echoed by numerous senior Liberal and Labor MPs.⁵

When Mr Labe was apprehended the following day, he admitted headbutting Mr Abbott. He strongly denied, however, that he was motivated by his views on same-sex marriage. He said it was merely coincidental that he was wearing a ‘Vote Yes’ badge at the time of the assault.⁶ Instead, he claimed that he was a ‘lone anarchist’ who was ‘six out of 10 drunk’ at the time,⁷ and that his actions were motivated by his ‘personal hatred’ for the former Prime Minister:⁸

It was nothing really remotely to do with [marriage equality]. It’s just about Tony Abbott — [t]he f***ing worm that he is. All it was is I saw Tony Abbott and I’d had half a skinful and I wanted to nut the c***.⁹

It is clear that Mr Labe’s denial that his actions were motivated by his views on same-sex marriage was *politically* significant, as it allowed proponents of the ‘yes’ campaign to distance themselves from those actions. For example, Attorney-General George Brandis was able to label the attack a ‘violent criminal act’,

- 2 See, eg, Gareth Hutchens, “‘He Headbutted Me’: Tony Abbott Says He Was Assaulted by Yes Campaigner”, *The Guardian* (online), 21 September 2017 <<https://www.theguardian.com/australia-news/2017/sep/21/tony-abbott-assaulted-on-street-in-hobart>>; Sharri Markson and Jack Houghton, ‘Police Catch Man Who Allegedly Headbutted Tony Abbott’, *The Daily Telegraph* (online), 22 September 2017 <<https://www.dailytelegraph.com.au/news/nsw/tony-abbott-headbutted-by-samesex-activist/news-story/73f1909d2ed3280009746389d55f2f68>>.
- 3 Michael Koziol and Matt Maloney, “‘Nothing to Do with Same-Sex Marriage’: Anarchist DJ Who Headbutted Tony Abbott”, *The Sydney Morning Herald* (online), 22 September 2017 <<https://www.smh.com.au/politics/federal/it-was-nothing-to-do-with-samesex-marriage-anarchist-dj-who-headbutted-tony-abbott-speaks-out-20170922-gymu2z.html>>.
- 4 Ibid; Claire Bickers et al, ‘Malcolm Turnbull Condemns “Un-Australian” Headbutt Attack on Tony Abbott by Gay Marriage Supporter’, *The Daily Telegraph* (online), 22 September 2017 <<https://www.dailytelegraph.com.au/business/work/mps-condemn-unaustralian-attack-on-tony-abbott-by-gay-marriage-supporter/news-story/c1008ff94c48135805722cdbf645c307>>.
- 5 See Bickers, above n 4.
- 6 Nic White, ‘Anarchist DJ Who “Headbutted Tony Abbott” while Wearing a “Vote Yes” Sticker Faces 10 Years Jail under Upgraded Assault Charges’, *Daily Mail Australia* (online), 23 October 2017 <<http://www.dailymail.co.uk/news/article-5007701/Astro-Labe-charges-upgraded-Tony-Abbott-headbutt.html>>.
- 7 Rhiannon Shine, ‘DJ Astro Labe Admits Headbutting Tony Abbott after Hobart Drinking Session’, *ABC News* (online), 18 January 2018 <<http://www.abc.net.au/news/2018-01-18/astro-labe-admits-headbutting-tony-abbott/9338426>>.
- 8 Markson, ‘Tony Abbott Headbutt Attacker to Face Court on Charge of Common Assault’, above n 1.
- 9 White, above n 6, quoting Astro Labe.

which had ‘nothing whatsoever to do with the point of view of those of us who favour a yes vote’, and same-sex marriage advocate Rodney Croome could urge the community not to use the ‘delinquent actions’ of someone unconnected to the ‘Yes campaign’ to ‘cast ill judgement’ on that campaign.¹⁰ What is less clear is whether that denial should be considered to be *legally* significant: should the fact that this was an assault committed out of personal hatred for Mr Abbott, rather than an assault motivated by Mr Labe’s support for same-sex marriage, make any difference to the legal outcome of the case (eg, the sentence to be imposed on Mr Labe)?

Similar issues were raised in the trial of the ‘Pine Gap peace pilgrims’.¹¹ That case involved six religious activists who travelled from Queensland to central Australia as part of a protest against the ‘Joint Defence Facility Pine Gap’, a military communications base that is jointly run by the Australian and United States governments.¹² On 29 September 2016, five of the self-proclaimed ‘peace pilgrims’ climbed through the Facility’s perimeter fence, in order to sing a lament composed in the memory of people they believed had been killed by Facility-assisted drone strikes. A few days later, the sixth ‘pilgrim’ also breached the perimeter. When found by Australian Federal Police officers he was carrying a rattle and flowers, and was praying.¹³ All six individuals were charged with entering the Joint Defence Facility Pine Gap prohibited area contrary to s 9(1) of the *Defence (Special Undertakings) Act 1952* (Cth).¹⁴

The public response to these offences differed greatly from the response to Mr Labe’s actions, which had been largely negative. While the prosecution described the offenders’ actions as ‘serious offences, potentially striking at the heart of national security’,¹⁵ others reserved their condemnation for the Australian

10 Burgess et al, above n 1.

11 See, eg, Kieran Finnane, ‘Trial of Peace Pilgrim Begins’, *Alice Springs News* (online), 13 November 2017 <<http://www.alicespringsnews.com.au/2017/11/13/trial-of-peace-pilgrim-begins/>>; Jackie Dent, ‘An American Spy Base Hidden in Australia’s Outback’, *The New York Times* (online), 23 November 2017 <<https://nyti.ms/2jV3Yh1>>; Steven Schubert, ‘Pine Gap Activists Found Guilty over Entering Top-Secret US-Australian Facility’, *ABC News* (online), 24 November 2017 <<http://www.abc.net.au/news/2017-11-24/pine-gap-activist-found-guilty-over-entering-top-secret-facility/9188980>>.

12 The protest was organised by the Independent and Peaceful Australia Network (‘IPAN’) to mark 50 years since the signing of the treaty between the Australian and United States governments to establish the Pine Gap facility: Transcript of Proceedings, *R v Webb* (Supreme Court of the Northern Territory, SCC 21712099; 21712105; 21712103; 21701649; 21712100; 21712113, Reeves J, 4 December 2017) 7.

13 Ibid 8.

14 One of the protesters was also charged with being in possession of a photographic apparatus while in the prohibited area: *Defence (Special Undertakings) Act 1952* (Cth) s 17. He had used an iPhone to live stream the offence on Facebook: see Transcript of Proceedings, *R v Webb* (Supreme Court of the Northern Territory, SCC 21712099; 21712105; 21712103; 21701649; 21712100; 21712113, Reeves J, 4 December 2017) 3.

15 Kieran Finnane, ‘Fines for Pine Gap “Peace Pilgrims”’, *The Saturday Paper* (online), 9 December 2017 <<https://www.thesaturdaypaper.com.au/news/politics/2017/12/09/fines-pine-gap-peace-pilgrims/15127380005614>>.

government's complicity in 'illegal extrajudicial killings or assassinations',¹⁶ or for the harsh laws under which the offenders were charged, which were seen to disproportionately penalise dissent.¹⁷ The decision to prosecute the 'peace pilgrims' was characterised as 'uncompromising',¹⁸ and the offenders provided the court with 86 letters of support from prominent individuals, organisations and members of the public asking for clemency.¹⁹

As with Mr Labe's case, the trial of the 'peace pilgrims' raised the question of what effect (if any) offenders' political motivations should have on their sentences. Does it matter that the offenders committed a national security offence due to concerns about the military alliance between Australia and the United States, or should the sentencing judge disregard that motivation and focus solely on their actions? If their political motivations *should* be considered mitigating, as suggested by those individuals and organisations that sought clemency, should Mr Labe's motivations also mitigate his offence? If not, why not? Is there some key feature that differentiates these two cases?

These types of questions have received surprisingly little academic or judicial attention in Australia to date. To a large extent, this is likely to be due to the fact that politically motivated offenders in Australia have traditionally committed relatively minor offences, and so have been sentenced in Magistrates' Courts, where the sentencing decisions have not been reported or commented upon.²⁰ This does not, however, mean that the issue is unimportant. While the sanctions available to magistrates may be limited, they can still seriously affect the liberty, property and reputation of affected individuals, making it crucial that sentencing decisions are grounded in properly reasoned guiding principles.

This article examines the general relevance of political motivations to sentencing. It starts by considering two preliminary issues: how motive is ordinarily relevant to sentencing (Part II), and when should an offence be considered 'politically motivated' (Part III). It then outlines two divergent approaches that have been taken to sentencing politically motivated offenders in the case law (Part IV), and identifies the various factors that appear to influence the approach that is taken to this complex issue (Part V). It concludes by briefly sketching out some principles that could guide judges when determining whether an offender's political motivations should mitigate his or her sentence, drawing on a combination of political philosophy and Australian constitutional law (Part VI).

16 Ibid, quoting Professor Richard Tanter. Professor Richard Tanter, Senior Research Associate at the Nautilus Institute for Security and Sustainability, and President of the Australian Board of the International Campaign to Abolish Nuclear Weapons (which was awarded the Nobel Peace Prize in October 2017), gave evidence in the pilgrims' trial that data collected and analysed at the Pine Gap facility are used in US drone attacks. According to Professor Tanter, these data have been used for illegal attacks in countries with which neither Australia nor the US are at war: *ibid*.

17 Felicity Ruby, 'Fate of Pine Gap Protesters Could Set an Ugly Precedent for Free Speech', *Crikey* (online), 29 November 2017 <<https://www.crikey.com.au/2017/11/29/fate-of-pine-gap-protesters-will-show-how-australia-deals-with-dissent/>>.

18 Dent, above n 11.

19 Ruby, above n 17.

20 Roger Douglas, 'Sentencing Political Offenders' (1994) 1(1) *Australian Journal of Human Rights* 86, 88.

It is important to note that this article is concerned with the general principles that apply when sentencing people who commit ordinary criminal offences with a political motivation. It does not examine the sentencing of offenders who are convicted of offences which are specifically targeted at political acts, such as the terrorist offences contained in pt 5.3 of the *Criminal Code Act 1995* (Cth) sch 1 (*'Criminal Code'*).²¹ It also does not address cases in which the offender's specific type of political motivation is included in sentencing legislation, such as cases in which the relevant offence was motivated by hatred against a group of people to which the victim belonged.²²

II THE ROLE OF MOTIVE IN SENTENCING

It is often stated that motive is irrelevant to criminal liability,²³ and this is largely true. While there are a few offences which explicitly require proof of the accused's *motivations*, the vast bulk of offences only require proof of the accused's *intentions*.²⁴ Consequently, when a jury decides, for example, whether to convict an alleged killer of murder, they do not need to decide whether the killing was committed out of 'jealousy, fear, hatred, desire for money, perverted lust ... compassion or love'.²⁵ It is sufficient if they are satisfied that the killer intended to kill the victim.

This does not mean that motive is entirely irrelevant to the criminal justice process: it may influence the course of the police investigation; it may affect charging decisions; and it may be relevant to disproving any defences that are open on the evidence.²⁶ Of key importance in the current context, motive may also play a role in the sentencing process. An offender's motives will often be relevant to determining his or her culpability (and thus the punishment that is considered just in the circumstances), to identifying which sentencing objectives

21 These offences are targeted at threats or actions made 'with the intention of advancing a *political, religious or ideological cause*': *Criminal Code* s 100.1 (definition of 'terrorist act') (emphasis added).

22 This motivation is included as an aggravating factor in various sentencing schemes: see, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 1991* (Vic) s 5(2)(daaa); *Sentencing Act 1995* (NT) s 6A(e). Only some offences of this type will be considered 'politically motivated' under the definition proposed in Part III below.

23 See, eg, Michael T Rosenberg, 'The Continued Relevance of the Irrelevance-of-Motive Maxim' (2008) 57 *Duke Law Journal* 1143; Jerome Hall, *General Principles of Criminal Law* (Lawbook Exchange, 2nd ed, 2010) 88.

24 In this article, I follow Hessick in using the term 'intention' to refer to 'an actor's state of mind toward her illegal action: whether she performed the act purposefully, knowingly, or recklessly', and 'motive' to refer to an actor's 'reasons for acting': Carissa Byrne Hessick, 'Motive's Role in Criminal Punishment' (2006) 80 *Southern California Law Review* 89, 94–5 (emphasis altered). I note, however, that there is significant disagreement about how to define and differentiate these terms: see, eg, Whitley R P Kaufman, 'Motive, Intention, and Morality in the Criminal Law' (2003) 28 *Criminal Justice Review* 317; Elaine M Chiu, 'The Challenge of Motive in the Criminal Law' (2005) 8 *Buffalo Criminal Law Review* 653.

25 *Hyam v DPP* [1975] AC 55, 73 (Lord Hailsham).

26 For example, duress is only available as a defence where the accused's actions were motivated by the threat made against them: see, eg, *R v Hurley* [1967] VR 526, 533.

are of primary importance in the case (for example, deterrence or rehabilitation), and to deciding upon an appropriate sanction.²⁷

In this regard, sentencing legislation often sets out certain aggravating and mitigating motives which a sentencer must take into account. For example, the *Crimes (Sentencing Procedure) Act 1999* (NSW) states that an offence is aggravated if the offender was ‘motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability)’.²⁸ By contrast, an offence is mitigated if it was motivated by the fear that another person would be harmed if the offence was not committed.²⁹ Even where a particular motive is not legislatively specified as being aggravating or mitigating, it will often be relevant when determining an offender’s sentence. For example, it is commonly accepted that ‘[a] crime committed out of need warrants a lesser sentence than one committed out of greed’.³⁰

While it may seem obvious that some instances of an offence (such as killing a person for financial gain) deserve a harsher sanction than others (such as killing a person for compassionate reasons), it is important to be clear about why this is the case. It is because an offender’s motivations may be relevant to one (or more) of the five main objectives that sentencing systems seek to achieve: community protection, rehabilitation, deterrence, just punishment and denunciation.³¹ For example, a financially motivated offender is likely to be seen to pose a greater threat to the community than an offender who acted out of compassion, to have less prospects for rehabilitation, and to be in more need of deterrence. A financially motivated offence is also likely to be considered more reprehensible than a compassion motivated offence, requiring harsher punishment and stronger denunciation. Each of these factors points towards the imposition of a more severe sentence.

What is not clear is how a sentencer is supposed to judge the reprehensibility of various motives. Although it seems obvious that a motive of greed is more reprehensible than one of compassion, why is that the case? This is a largely un-theorised area of law. There is no authority that specifies a hierarchy of motivations, or which explains how motives should be measured. Instead, sentencing judges tend to simply assume that some motives are ‘worse’ than others. In doing so, they may be implicitly relying on key societal values, such as tolerance, respect and equality, with offences which demonstrate a greater

27 On the role of motive in sentencing, see Arie Freiberg, *Fox & Freiberg’s Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 314–16.

28 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h). This reflects the position at common law: see *R v Chong* [2008] VSCA 119 (26 June 2008) [14]–[18], [29]. Similar provisions are contained in sentencing legislation in Victoria and the Northern Territory: *Sentencing Act 1991* (Vic) s 5(2) (daaa); *Sentencing Act 1995* (NT) s 6A(e).

29 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(d).

30 Freiberg, above n 27, 314.

31 See, eg, *Sentencing Act 1991* (Vic) s 5(1); *Criminal Code*, RSC 1985, c C-46, s 718; *Criminal Justice Act 2003* (UK) c 44, s 142(1); *Sentencing Act 2002* (NZ) s 7.

disrespect for such values considered more reprehensible.³² Alternatively, they may be engaging in an interest analysis, with certain interests (such as the interest in ending suffering) being considered more important than other interests (such as the interest in personal profit).³³ However, they have made no attempt to spell out the values or interests involved.

This failure to explicitly explain the way in which motives should be assessed will not usually pose a problem for sentencing judges, as there will frequently be widespread agreement amongst participants in the criminal justice process and the broader community about the relative reprehensibility of various motivations. For example, there is likely to be a general consensus that crimes committed out of greed are more reprehensible than crimes committed out of need. Even where there is no such consensus, it will rarely be necessary for a sentencing judge to draw fine-grained distinctions between motivations. For example, while it may not be clear whether a crime motivated by revenge is more or less reprehensible than a crime motivated by greed, this is unlikely to matter: it is difficult to conceive of a case where the distinction would have a significant impact on the sentence imposed.

However, in some cases the courts' failure to spell out the process for assessing motives may assume much greater significance. One example — and the focus of the remainder of this article — is offences committed for political reasons.

III WHAT IS A 'POLITICALLY MOTIVATED OFFENCE'?

The notion of a 'politically motivated offence' is not formally defined anywhere in Australian sentencing jurisprudence. There is no Act which specifies when a crime should be considered 'politically motivated', nor is there case law which directly addresses this issue. However, the question of which crimes should be considered 'political' has received considerable judicial attention in the context of refugee law, due to the fact that the *Convention Relating to the Status of Refugees* ('*Refugee Convention*') does not protect people who have committed serious 'non-political' crimes.³⁴ While decisions in this area are not binding in the sentencing context, they provide a useful guide for determining when an offence should be considered to be politically motivated.

32 Warner argues that crimes which are motivated by hatred or prejudice are aggravated because they negate these fundamental values: Kate Warner, 'Sentencing Review 2009–2010' (2010) 34 *Criminal Law Journal* 386, 389. See also Dan M Kahan, 'What Do Alternative Sanctions Mean?' (1996) 63 *University of Chicago Law Review* 591, 602.

33 See, eg, Hessick, above n 24, 114.

34 Article 1F states that the provisions of the *Convention* 'shall not apply to any person with respect to whom there are serious reasons for considering that: ... (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee': *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954). The question of which crimes should be considered 'political' has also received considerable attention in the context of extradition laws, which frequently contain a 'political offence' exception. However, due to the complexity of the laws in this area, and their limited relevance to the arguments presented below, they will not be discussed in this article.

In *Minister for Immigration and Multicultural Affairs v Singh* ('*Singh*'),³⁵ the leading High Court case on this issue, Kirby J noted the grave difficulties in differentiating between political and non-political crimes. He suggested that:

The difficulties of definition derive, in part, from the absence of any settled international consensus about the expression ['serious non-political crime'] and the changing views of national courts and tribunals about its meaning. The content of the expression depends on an almost infinite variety of factors. It has been influenced by the changing nature of crimes, of weapons, of the transport of criminals and of the global political order, and the increased vulnerability of modern societies to violent forms of political expression.³⁶

Despite these definitional difficulties, it is generally accepted that the notion of a 'political crime' is not confined to 'pure' political offences, such as treason or sedition. Any crime can potentially be considered 'political'.³⁷ In determining whether a particular crime deserves this moniker, a primary consideration is whether the action had a political *purpose*.³⁸ While the House of Lords has framed this issue in terms of whether the action was committed 'with the object of overthrowing or subverting or changing the *government* of a state or inducing it to change its policy',³⁹ in *Singh* Gaudron J noted that in some countries 'power and political influence are exercised by bodies and organisations that are not organs of government'.⁴⁰ In her Honour's view, the notion of a 'political' offence should thus not be limited to actions directed at the government. An offence should be considered political 'if a significant purpose of the act or acts involved is to alter the practices or policies of those who exercise power or political influence'.⁴¹

In the refugee law context, for an offence to be considered 'political' it does not need to have been *solely* motivated by a political purpose: it is sufficient if that purpose was a significant motivating factor.⁴² However, the fact that a crime was purportedly committed for a political purpose does not necessarily mean that it was a 'political' crime. For a crime to be classified as 'political', there must also have been a 'sufficiently close and direct link between the crime and the alleged political purpose'.⁴³ In determining whether there was a sufficient link, a court may take into account various factors, including:

35 (2002) 209 CLR 533.

36 Ibid 557–8 [65] (citations omitted).

37 *T v Immigration Officer* [1996] AC 742, 754–5 (Lord Mustill), 786–7 (Lord Lloyd, Lord Keith agreeing at 752, Lord Browne-Wilkinson agreeing at 752); *Singh* (2002) 209 CLR 533, 545 [21] (Gleeson CJ), 550–1 [40]–[42] (Gaudron J), 578–9 [141] (Kirby J).

38 James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 555–6.

39 *T v Immigration Officer* [1996] AC 742, 786–7 (Lord Lloyd, Lord Keith agreeing at 752, Lord Browne-Wilkinson agreeing at 752) (emphasis added).

40 (2002) 209 CLR 533, 551 [45].

41 Ibid.

42 Ibid 551 [44].

43 *T v Immigration Officer* [1996] AC 742, 787. See also *ibid* 545 [21] (Gleeson CJ), 551 [45] (Gaudron J), 578–9 [141] (Kirby J); Office of the United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, UN Doc HCR/IP/4/ENG/REV.3 (December 2011) 30 [152].

- the target of the crime (eg military, governmental or civilian);
- the weapons and means used to commit the crime;
- the risk of indiscriminate harm to members of the public; and
- whether the crime was proportionate to the political objective pursued.⁴⁴

Where the criminal action is seen to be excessive and disproportionate to the political objective pursued, the court may infer that it was not really committed for a political purpose, and so should be classified as a ‘non-political crime’.⁴⁵ For example, the court may conclude that the act was really committed for personal vengeance, rather than in pursuit of a political objective.

There is also a strand of refugee law which suggests that crimes should not be considered ‘political’ if they are particularly ‘atrocious’.⁴⁶ This includes ‘terrorist’ offences,⁴⁷ as well as crimes committed by ‘unacceptable means’.⁴⁸ These cases will generally fail to meet the connection requirement outlined above (and thus be considered ‘non-political’), as the crimes committed are likely to be considered disproportionate to the political objectives pursued. However, it seems theoretically possible for an ‘atrocious’ act to be closely and directly linked to a political objective.⁴⁹ Courts appear to have held that in such circumstances, the criminal acts should nevertheless be classified as ‘non-political’ because they are so ‘beyond the pale ... that they will not be condoned, as they could appear to be if one country were obliged to offer sanctuary to the perpetrator’.⁵⁰

This limitation on what is considered to be a ‘political’ crime has been directly influenced by the context in which the term has been defined. Courts have been concerned to ensure that countries remain entitled to exclude people convicted of particularly grave offences, both to ensure public safety and to prevent the protective objectives of the *Refugee Convention* from being undermined by popular and political resentment.⁵¹ The only way to achieve this objective is by defining ‘atrocious’ crimes as ‘non-political’ (thereby taking them outside the scope of the *Refugee Convention*), even if they were clearly politically motivated.

44 *Singh* (2002) 209 CLR 533, 579 [141] (Kirby J), 593 [165] (Callinan J). See also *T v Immigration Officer* [1996] AC 742.

45 *Singh* (2002) 209 CLR 533, 551–2 [46] (Gaudron J), 579 [141] (Kirby J).

46 See, eg, *McMullen v Immigration and Naturalization Service*, 788 F 2d 591, 596–8 (9th Cir, 1986); *Immigration and Naturalization Service v Aguirre-Aguirre*, 526 US 415, 429–30 (1999); United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee*, UN Doc HCR/IP/4/ENG/REV.3 (December 2011) 30 [152].

47 See, eg, *T v Immigration Officer* [1996] AC 742, 772; *Eain v Wilkes*, 641 F 2d 504, 520–1 (7th Cir, 1981).

48 See, eg, *Gil v Canada (Minister of Employment and Immigration)* [1995] 1 FC 508, 535.

49 One example might be torturing a government official responsible for implementing state-sanctioned torture on a widespread scale, to make the point that torture is wrong and government policy should be changed. While such an act can be characterised as ‘atrocious’, it appears closely and directly linked to a political objective and is not clearly disproportionate to that objective.

50 *Singh* (2002) 209 CLR 533, 569 [109] (Kirby J).

51 *Ibid* 568 [109], 571 [117], 573 [121] (Kirby J).

There is no similar reason for reading down the definition of ‘political’ in the sentencing context, and so this article departs from refugee law jurisprudence in this regard. It considers any crime, no matter how atrocious, to potentially be ‘politically motivated’. However, this article otherwise follows the lead of refugee law jurisprudence on this issue, and considers a crime to have been ‘politically motivated’ if: (1) a significant purpose of the act was to alter the practices or policies of those who exercise power or political influence; and (2) there was a sufficiently close and direct link between the crime and the political purpose.

Under this approach, it is clear that the offences committed by the ‘Pine Gap peace pilgrims’ were politically motivated. Their purpose was to change government policy concerning the Pine Gap military base, and their actions were closely and directly linked to this purpose. Similarly, had Mr Labe been seeking to influence the same-sex marriage debate, his assault of Mr Abbott would have clearly been politically motivated. What is less clear is whether Mr Labe’s actions should be considered politically motivated, given they were seemingly committed due to his personal hatred of Mr Abbott, rather than being guided by the pursuit of a specific political purpose.⁵²

While it could be argued that Mr Labe’s lack of a specific political agenda means that this was *not* a politically motivated offence, this argument ignores two key factors: that Mr Abbott is a politician, and that he was assaulted because of a difference of political opinion. This was *not* a case of a random attack on a person who simply happened to be a politician. Mr Labe specifically targeted Mr Abbott because he was an ‘ideological opponent’.⁵³ In assaulting Mr Abbott, Mr Labe was clearly and directly communicating his opposition to the actions Mr Abbott had taken whilst in government, as indicated by his parting words to Mr Abbott: ‘you deserve everything you f***ing get *for the things you’ve done*’.⁵⁴ Implicit within this communication is an attempt to persuade Mr Abbott, or others with political influence, to act differently in the future. Consequently, even though Mr Labe’s actions were not motivated by an explicit political objective, they should nonetheless be considered to have been politically motivated.

IV TWO APPROACHES TO SENTENCING POLITICALLY MOTIVATED OFFENDERS

Politically motivated offences defy easy categorisation, as can be seen by comparing the cases of Mr Labe and the ‘Pine Gap peace pilgrims’. Not only can it be difficult to determine where politically motivated offences lie on a scale of

52 It is often difficult to know an offender’s ‘true’ motivations, and Mr Labe’s motives were the source of some contestation. For the purposes of this article, it will be assumed that Mr Labe’s actions were motivated by his personal hatred of Mr Abbott, as that was his avowed reason for acting in the way he did, and the basis on which he was ultimately sentenced (see below).

53 Transcript of Sentencing Remarks, *R v Labe* (Magistrates Court of Tasmania, Magistrate Daly, 9 April 2018). I thank the Magistrates Court of Tasmania for providing me with an audio recording of the sentencing remarks given in this case.

54 *Ibid* (emphasis added).

reprehensibility (for example, would Mr Labe's assault have been more or less reprehensible if committed in support of same-sex marriage rather than due to his general disapproval of Mr Abbott's political views?), it can be difficult to know in which *direction* the fact that an offence is politically motivated pulls (is it mitigating, aggravating or neutral?).

This difficulty is reflected in the few reported court cases in which the issue of political motivation has been raised. These cases have not clearly set out any general principles to be applied when sentencing politically motivated offenders, with judges seemingly approaching the issue on an ad hoc basis. However, two divergent approaches can be discerned from the judgments in the area: a sympathetic approach, in which political motivations are considered to be mitigating; and an unsympathetic approach, in which politically motivated offences are seen to require strongly denunciatory and deterrent sentences. Examples of each these approaches are provided below.⁵⁵

It is important to note that not all cases involving politically motivated offenders fit neatly within one of these categories. The cases are multifaceted, and judgments sometimes evince traces of both approaches. It is also often difficult to know precisely what effect an offender's political motivations has had on the sentencing determination, due to the multiplicity of factors involved in such cases and the process of 'instinctive synthesis' applied by sentencing judges.⁵⁶ However, the dichotomy between sympathetic and unsympathetic approaches provides a useful device for drawing out the key themes that arise in the cases, and provides a basis for exploring (in Part V) the factors that appear to influence sentencing determinations.

A The Sympathetic Approach

As noted above, there are some cases in which judges have taken a sympathetic approach to sentencing politically motivated offenders, displaying a certain level of respect for their conscientious and principled behaviour. While it is acknowledged that they have broken the law, and are thus deserving of some punishment,⁵⁷ their actions are not considered to be as wrongful, or to carry the same stigma, as the actions of people who violate the law for less altruistic reasons. Where this

55 This section does not provide a comprehensive overview of all sentencing cases which address the issue of political motivations: it discusses a representative sample of those cases. The selected cases have been chosen as they provide useful illustrations of the divergent approaches that have been taken to sentencing politically motivated offenders, and include a cross-section of the key factors raised in the case (which are discussed in Part V). There is no 'leading case' in the area.

56 Under the process of 'instinctive synthesis', judges do not quantify the individual factors leading to their determination. Instead, they weigh all the competing factors and arrive at one final sentence. This approach has been endorsed by the High Court: *Markarian v The Queen* (2005) 228 CLR 357.

57 There is a significant literature which argues that in some circumstances, politically motivated offences are justifiable or excusable and should result in an acquittal: for a detailed overview and analysis, see Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford University Press, 2012). While I have some sympathy for this view, my focus here is on the sentencing context, which proceeds on the basis that the individual has been convicted of a wrongful act and deserves to be punished.

approach has been taken, lighter sanctions have been imposed, due to a reduced level of culpability and a lesser need for denunciation and rehabilitation. Four illustrations of this approach are provided below.

1 O'Shanassy v Taylor

In *O'Shanassy v Taylor*,⁵⁸ the offender (Mr O'Shanassy) was part of a campaign which sought to increase the availability of affordable housing in Canberra. He was convicted of trespassing on Commonwealth property, and refusing to leave Commonwealth premises when directed to do so by a constable.⁵⁹ In considering the appropriate sentence to impose, Blackburn CJ noted that the offences had been 'deliberately performed because of a conscientious concern to bring home to the government that action should be taken to provide ... "low-cost accommodation"'.⁶⁰ He accepted that Mr O'Shanassy and the other campaigners were 'genuinely moved by a deeply felt dissatisfaction, not only with the immediate target of their activities — the accommodation problem in Canberra — but with the state of society generally'.⁶¹

Blackburn CJ commented that Mr O'Shanassy, and many like him, 'share the attitude that the breaking of a law is a legitimate political activity when it serves the purpose of displaying the injustice of that law, or of the condition of society generally'.⁶² Although he said that he did not share this view, he acknowledged that it has 'some intellectual respectability'.⁶³ He considered there to be a distinction between conscientious and unconscientious law-breakers, and held that an offender's conscience may be a mitigating factor.⁶⁴

2 R v Moylan

A similar conclusion was drawn in *R v Moylan*.⁶⁵ In that case, the offender (Mr Moylan) was part of an anti-coal mining protest group called Front Line Action on Coal. The group was opposed to the Maules Creek coal mining development in New South Wales, which was being funded by Whitehaven Coal Ltd ('Whitehaven').⁶⁶ As part of the group's protest activities, Mr Moylan disseminated a false media release stating that the ANZ bank had withdrawn its \$1.2 billion loan facility to Whitehaven.⁶⁷ This had the effect of temporarily reducing Whitehaven's market capitalisation by approximately \$300 million.⁶⁸

58 (1978) 21 ACTR 9.

59 Ibid 10–12, citing *Public Order (Protection of Persons and Property) Act 1971* (Cth) s 12.

60 *O'Shanassy v Taylor* (1978) 21 ACTR 9, 12.

61 Ibid 15.

62 Ibid.

63 Ibid.

64 Ibid.

65 [2014] NSWSC 944 (25 July 2014).

66 Ibid [6]–[10].

67 Ibid [24]–[26].

68 Ibid [28]–[29].

Mr Moylan pleaded guilty to making false and misleading statements in breach of s 1041E(1) of the *Corporations Act 2001* (Cth).⁶⁹

In sentencing Mr Moylan, Davies J noted that ordinarily, people commit the charged offence for the purposes of their own financial gain.⁷⁰ However, in the present case the benefit the offender wished to achieve was ‘publicity for his cause, to oppose the mine project and, perhaps a hope that by that publicity, that decisions would be made by the ANZ and others that might help to achieve the Offender’s aims of stopping the project’.⁷¹ This reduced the seriousness of the offence. While the damage caused by Mr Moylan’s actions was considerable, its gravity was mitigated by the fact that those actions were committed ‘in furtherance of his beliefs and principles’.⁷² Davies J further noted that Mr Moylan was ‘not a criminal in the classic sense of one who needs rehabilitation’.⁷³

3 The ‘Peace Pilgrims’ Case

Reeves J also adopted a sympathetic attitude towards the offenders in the ‘peace pilgrims’ case.⁷⁴ While he noted that the Australian Parliament regards the offences committed as ‘particularly serious ones’,⁷⁵ he rejected the prosecution’s submission that this instance of offending struck at the heart of national security, and that the offenders should be sentenced to imprisonment. Instead, he described the offending as being at the ‘lowest end of the scale of breaches of s 9 of the *Defence (Special Undertakings) Act*’,⁷⁶ and imposed fines ranging from \$1250 to \$5000.

Various factors influenced Reeves J’s conclusion in this regard: the fact that the offenders had caused no property damage to the Pine Gap facility or its perimeter fence; that they had done nothing to threaten the security of the facility or adversely affect its operations; that they did not resist arrest; and that they cooperated fully with the police.⁷⁷ Of particular relevance to the current discussion, he also seems to have been influenced by the fact that they were ‘conscientious protesters’.⁷⁸ This can be seen in his reference (with apparent approval) to the following passage from *R v Jones*,⁷⁹ in which Lord Hoffmann suggests that courts should exercise restraint when sentencing offenders who act with conscientious motives:

69 Ibid [1].

70 Ibid [62].

71 Ibid.

72 Ibid [89].

73 Ibid [100].

74 See above nn 11–14 and accompanying text.

75 Transcript of Proceedings, *R v Webb* (Supreme Court of the Northern Territory, SCC 21712099; 21712105; 21712103; 21701649; 21712100; 21712113, Reeves J, 4 December 2017) 3.

76 Ibid 8, citing *Defence (Special Undertakings) Act 1952* (Cth).

77 Transcript of Proceedings, *R v Webb* (Supreme Court of the Northern Territory, SCC 21712099; 21712105; 21712103; 21701649; 21712100; 21712113, Reeves J, 4 December 2017) 8.

78 Ibid. Reeves J accepted that all of the offenders were motivated by the grave concerns they had about the use to which they believed the Pine Gap facility was being used: see at 3.

79 [2007] 1 AC 136, cited in *ibid* 8–9.

My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account.⁸⁰

Reeves J accepted that the offenders in this case showed a ‘sense of proportion’, and did not ‘cause excessive damage or inconvenience’.⁸¹ While that did not justify the offenders deliberately breaking the law (they needed to ‘vouch the sincerity of their beliefs by accepting the penalties imposed by the law’),⁸² Reeves J showed restraint in the penalties he imposed.⁸³

4 Neal v The Queen

The clearest demonstration of sympathy for an offender’s political motivations can be found in Murphy J’s dissenting judgment in *Neal v The Queen*.⁸⁴ That case involved an Aboriginal offender (Mr Neal) who lived at the Yarrabah Aboriginal Community reserve in Northern Queensland. He became involved in an altercation with the manager of the local store at the reserve (Mr Collins) about management of the reserve and government policy. This culminated in Mr Neal telling Mr Collins that all whites should get off the reserve, and spitting at him.⁸⁵ He was convicted of unlawful entry onto Mr Collins property, and of assaulting him (by spitting). The stipendiary magistrate who heard the case considered Mr Neal to be an ‘aggressive agitator’, and sentenced him to two months’ imprisonment with hard labour for the assault.⁸⁶ This was later increased to six months’ imprisonment by the Queensland Court of Criminal Appeal: a decision which was subsequently appealed to the High Court.

80 *R v Jones* [2007] 1 AC 136, 177 [89].

81 Transcript of Proceedings, *R v Webb* (Supreme Court of the Northern Territory, SCC 21712099; 21712105; 21712103; 21701649; 21712100; 21712113, Reeves J, 4 December 2017) 9.

82 *R v Jones* [2007] 1 AC 136, 177, quoted in *ibid*.

83 It is important to note that Reeves J did not *explicitly* state that the offenders’ political motivations were mitigating. However, this seems to be implicit in his reference to Lord Hoffmann’s passage from *R v Jones* [2007] 1 AC 136; his statement that the offenders showed a ‘sense of proportion’ and did not ‘cause excessive damage or inconvenience’: Transcript of Proceedings, *R v Webb* (Supreme Court of the Northern Territory, SCC 21712099; 21712105; 21712103; 21701649; 21712100; 21712113, Reeves J, 4 December 2017) 9; and his imposition of fines rather than sentences of imprisonment (as advocated by the prosecution).

84 (1982) 149 CLR 305.

85 *Ibid* 311–12.

86 *Ibid* 313.

In a split decision, the High Court reinstated the magistrate's sentence.⁸⁷ While Mr Neal's political motivations did not feature strongly in the judgments of Gibbs CJ, Wilson or Brennan JJ, they were central to Murphy J's dissenting view that the magistrate's sentence was excessive in the circumstances.⁸⁸ In reaching this decision, Murphy J noted that the magistrate's perception that Mr Neal was an 'agitator' clearly contributed to the severe penalty that was imposed.⁸⁹ Murphy J considered this approach to be wrong, taking a much more positive view of the role 'agitators' play in society:

Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown. As Wilde aptly pointed out in *The Soul of Man under Socialism*, 'Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation.'⁹⁰

Murphy J highlighted the fact that this was 'a race relations case, intimately related to the politics of Aboriginal communities and the system under which Aboriginals live in the communities'.⁹¹ He pointed out that 'Aborigines have a right to participate in and direct their own policies', and that people 'frustrated by powerlessness through the exercise of racist policies and practices ... feel their grievances deeply and sometimes express them in the only way possible — by protest or violence'.⁹² He held that the circumstances surrounding Mr Neal's case were highly mitigating, and that an appropriate sentence was a \$130 fine (one week's wages).⁹³

B The Unsympathetic Approach

In other cases, judges have displayed a far less sympathetic attitude towards politically motivated offenders. They have viewed such offenders as self-serving individuals who deliberately intend to undermine legitimate laws that society has created, in pursuit of their own idea of justice. Their culpability for such actions has not been considered to be diminished by their political motivations, and may in fact be enhanced. In addition, given the potentially broad-reaching consequences of their actions, these offenders have often been seen to be more

87 *Neal v The Queen* (1982) 149 CLR 305. Gibbs CJ and Wilson J held that the Queensland Court of Criminal Appeal had erred in increasing Mr Neal's sentence without formally granting leave to appeal to the prosecution, and that leave to appeal should have been refused (thereby reinstating the original sentence): at 309–10 (Gibbs CJ), 320–1 (Wilson J). Brennan and Murphy JJ agreed that the Queensland Court of Criminal Appeal had erred, but Brennan J held that the matter should be remitted to that Court for reconsideration, and Murphy J held that a fine of \$130 should instead be imposed: at 310–20 (Murphy J), 322–6 (Brennan J).

88 *Ibid* 314–20.

89 *Ibid* 315–16.

90 *Ibid* 316–17.

91 *Ibid* 316.

92 *Ibid* 318.

93 *Ibid* 319–20.

dangerous and harmful to the community than ‘common criminals’, who act in the selfish pursuit of motives such as personal wealth or vengeance. Consequently, judges who have taken this approach have frequently focused on the importance of deterrence and denunciation as sentencing considerations. Four illustrations of this approach are provided below.

1 R v Sari

In *R v Sari*,⁹⁴ Mr Sari was convicted of committing a number of offences (including aggravated burglary, criminal damage, riot and assault) while protesting at the Group of 20 (‘G20’) economic summit which was held in Melbourne in 2006.⁹⁵ The charges related to four separate incidents in which Mr Sari was involved:⁹⁶

- (i) a group of protesters unlawfully entered the Defence Force Recruiting Office, where they graffitied walls, overturned chairs and tables, and removed posters and displays;
- (ii) a group of protesters assaulted two traffic event controllers who were erecting barriers at locations specified by the police, and damaged their car;
- (iii) a group of protesters confronted police at a water-filled barricade, spat at them, and hurled glass bottles and objects at them; and
- (iv) a group of protesters damaged a police van, stole a police logbook from the van, and threw glass bottles and rocks at police officers.

The Court described these offences as ‘very serious’, and stated that their seriousness was ‘not reduced by the fact that [the] protestors were expressing dissent and loudly voicing strongly held views’.⁹⁷ In fact, the Court questioned the sincerity of Mr Sari’s political motivations, noting that ‘[t]errifying innocent people who are simply performing the duties of their employment seems impossible to reconcile with a commitment to fighting injustice’.⁹⁸ The Court differentiated the case from a typical case of affray or riot, which involves violence between individuals or opposing groups of civilians.⁹⁹ It held that this case was ‘worse’, due to the infliction of ‘gratuitous, repetitive and public violence ... against individuals who had actual or perceived authority’.¹⁰⁰

94 [2008] VSCA 137 (7 August 2008).

95 Ibid [40], [43].

96 Ibid [44]–[48].

97 Ibid [73].

98 Ibid [2]. These comments raise doubts about whether Mr Sari should be categorised as a ‘politically motivated offender’: see Part V below. The case is included in this Part because it is at least arguable that Mr Sari should be categorised in this way: his actions were aimed at expressing disapproval of the government’s decision to host the G20 summit in Melbourne; and they were committed in a time, place and manner directly connected with that summit. Moreover, the case provides a useful basis for the analysis presented below.

99 Ibid [18].

100 Ibid.

2 Deacon v Tudor-Stack

A similarly unsympathetic approach was taken by the magistrate and the Northern Territory Supreme Court in *Deacon v Tudor-Stack*,¹⁰¹ despite the fact that the circumstances of offending were very different. In that case, the offender (Mr Deacon) was part of a group of protesters who went to Parliament House in the Northern Territory to observe the debate about new laws concerning ‘drug houses’. During the debate members of the group entered the Assembly Chamber carrying placards and calling out. Some of the protesters climbed onto tables and chairs, while they continued shouting and waving placards. The Assembly was suspended, and security officers escorted the protesters out.¹⁰² Mr Deacon pleaded guilty to intentionally disturbing the Legislative Assembly.¹⁰³

In sentencing Mr Deacon, the magistrate emphasised the fundamental importance of Parliament and the courts to our system of government. He stated that ‘any physical attack or physical taking over of parliament or the courts strikes ... at the very foundation of our whole system of government. It is an offence of the most serious character’.¹⁰⁴ Given the potential of this offence to ‘strike at the heart of the system’, the magistrate held that it was essential that general deterrence play a central role in the sentence. To do otherwise would ‘encourage others to attack parliament or the courts [with] impunity. That cannot be encouraged or allowed’.¹⁰⁵

On appeal, the Supreme Court found that the magistrate had paid insufficient attention to the offender’s minimal involvement in the protest group’s activities,¹⁰⁶ and had imposed a manifestly excessive sentence.¹⁰⁷ However, it confirmed the importance of denouncing behaviour of this type, which it considered particularly grave:

People cannot flaunt the law with impunity and express their rights of free speech in a manner which is in breach of the law. The video of the incident shows what appears to be a blatant and intrusive disruption of Parliament which is against the law. That is a matter which must be taken seriously.¹⁰⁸

101 [2003] NTSC 15 (7 March 2003).

102 Ibid [6].

103 Ibid [2].

104 Ibid [19].

105 Ibid. A similar approach was taken in *R v Roche* (2005) 188 FLR 336, 360 [119] with the Court noting that ‘[a]n offence which threatens the democratic government and security of the State has a seriousness all of its own’.

106 Mr Deacon did not personally enter the floor of the Assembly Chamber, and left Parliament House before the conclusion of the incident: *Deacon v Tudor-Stack* [2003] NTSC 15 (7 March 2003) [12].

107 Ibid [32]–[45].

108 Ibid [41].

3 R v Labe

When sentencing Mr Labe for assaulting Mr Abbott, Magistrate Daly also held that general deterrence and denunciation should be prime considerations.¹⁰⁹ Of particular importance to Magistrate Daly was the fact that the offence was committed in a public place, against a politician. He noted that such conduct:

has the potential to create fear in situations where there ought to be none. It calls for a firm and deterrent sentence. Whatever the stripe of the politician, whatever the political sympathies of the assailant, intentionally causing an ideological opponent harm is not how such differences are to be addressed in our society. We're extraordinarily lucky to live in a peaceful open society. That people can easily approach their parliamentary representatives is a wholly desirable aspect of our society. And as submitted by the prosecutor, I accept that Commonwealth public officials, including parliamentarians, must be free to undertake their work without fear of being assaulted.¹¹⁰

Consequently, despite noting that only minor physical harm had been caused in this case, Magistrate Daly considered the offence to be of 'considerable seriousness'.¹¹¹ He held that the sentence he imposed needed to make it clear to those with similar impulses that to indulge those impulses would attract a deterrent sentence, and he sentenced Mr Labe to six months' imprisonment (with a two-month non-parole period).

4 The Dixon-Jenkins Cases

General deterrence was also emphasised in two cases involving John Dixon-Jenkins, an anti-nuclear campaigner who committed multiple criminal acts in the hope of furthering the anti-nuclear cause.¹¹² In the first case, Mr Dixon-Jenkins wrote a number of letters to schools, public authorities and businesses in Victoria, threatening to carry out certain violent actions (for example, bombings) unless they engaged in anti-nuclear activities. He also placed imitation bombs at various locations.¹¹³ He was convicted of 20 counts of threatening to damage property, seven counts of threatening to injure people, and two counts of having caused a public nuisance. He was sentenced to an effective sentence of six years' imprisonment, with a non-parole period of four years.¹¹⁴

At his sentencing appeal, Starke J noted that Mr Dixon-Jenkins had acted on the basis of his 'strong moral views'.¹¹⁵ However, he did not accept that this fact was

109 Transcript of Sentencing Remarks, *R v Labe* (Magistrates Court of Tasmania, Magistrate Daly, 9 April 2018).

110 Ibid.

111 Ibid.

112 *Dixon-Jenkins v The Queen* (1985) 14 A Crim R 372; *Dixon-Jenkins v The Queen* (1991) 55 A Crim R 308.

113 *Dixon-Jenkins v The Queen* (1985) 14 A Crim R 372, 374–6.

114 Ibid 373.

115 Ibid 379.

mitigating. Instead, he focused on the dangers posed by politically motivated offenders such as Mr Dixon-Jenkins:

There are large groups in present-day society of sincere, earnest but wrong-headed people who, because their convictions are so strong, or because they pretend their convictions are so strong, will stop at nothing in order to impose those views on the community, and this, in my opinion, just like hijacking, is calculated to become contagious, and if at the first step the courts do not show that such conduct, however well intended, will not be tolerated in this community, then it is unlikely that such behaviour will be stopped in its tracks.¹¹⁶

In light of this perceived risk, Starke J held that the principle of general deterrence was of fundamental importance, and should have an ‘overriding effect’ on Mr Dixon-Jenkins’ sentence.¹¹⁷

In the second case, Mr Dixon-Jenkins (whilst in prison for the abovementioned offences) took a number of prison-workers and prisoners hostage.¹¹⁸ In order to secure the release of the hostages, he demanded that ‘wide public notice must be given to a solution offered to the threat of nuclear destruction, and other problems facing human society, by the unified theory of existence’.¹¹⁹ He pleaded guilty to seven counts of kidnapping and seven counts of false imprisonment.¹²⁰ Once again, the court emphasised the importance of general deterrence in the circumstances, upholding the sentencing judge’s ‘heavy’ sentence of 12 years’ imprisonment (with a 10 year non-parole period).¹²¹

V FACTORS THAT INFLUENCE THE SENTENCING APPROACH

It can be seen from the analysis presented above that two distinct approaches have been taken to sentencing politically motivated offenders. In some cases, judges have shown sympathy for the fact that they have conscientiously stood up for their beliefs, and have found that they should not be punished as harshly as ‘common criminals’. Their political motivations have been held to lessen their culpability, and to reduce the need to focus on denunciation and rehabilitation as sentencing considerations. By contrast, in other cases sentencing judges have viewed politically motivated offenders less sympathetically, characterising their actions as grave and potentially contagious, and requiring strongly deterrent and denunciatory sanctions.

116 Ibid. For a similar statement, see *R v Demirian* [1989] VR 97, 129–30.

117 *Dixon-Jenkins v The Queen* (1985) 14 A Crim R 372, 379.

118 *Dixon-Jenkins v The Queen* (1991) 55 A Crim R 308, 309–10.

119 Ibid 311. The ‘unified theory of existence’ is a theory developed by Mr Dixon-Jenkins, which weaves together spirituality and physics.

120 Ibid 309.

121 Ibid 309, 315–17.

An examination of the higher court cases which have addressed the issue of political motivation, such as those outlined above,¹²² reveals four key factors which appear to influence the approach which is taken. The most significant factor seems to be the gravity of the offence. Those cases in which a sympathetic approach has been adopted have tended to involve relatively minor offences, such as spitting¹²³ or trespassing.¹²⁴ By contrast, a less sympathetic approach has generally been taken when more serious offences have been committed, such as those which pose a threat to life.¹²⁵ It should be noted, however, that there are exceptions in both directions. For example, Mr Deacon's political motivations were treated unsympathetically, despite the relatively minor placarding offence he committed;¹²⁶ and Mr Moylan's political motivations were considered mitigating despite the significant financial damage he caused.¹²⁷

The mitigating approach taken in Mr Moylan's case can perhaps be explained by a second (related) factor: the use or threat of violence. It seems that judges are prepared to take a sympathetic approach to serious crimes that are committed for political reasons, so long as no violence is involved. This can also be seen in the Pine Gap 'peace pilgrims' case.¹²⁸ While the prosecution argued that the offences struck at the heart of national security and were very serious, the peaceful nature of the offenders' actions led Reeves J to nevertheless impose a lenient sentence. However, judicial willingness to take a positive view of political motivations seems to evaporate when offenders use or threaten violence in pursuit of their goals, such as in the cases involving Mr Sari and Mr Labe.¹²⁹ The use of violence is seen to require strong denunciation, and the imposition of a deterrent sentence, despite any political motivations.

A third factor that can influence a judge's approach is the target of the offender's actions. Little sympathy has been shown for offences which have directly targeted Parliament, politicians or the courts, even if the offender's actions seem relatively trivial on the surface (such as Mr Deacon's non-violent placarding offence).¹³⁰ This is due to the fact that Parliament and the courts are institutions which are considered to be 'fundamental to our whole system [of government]', and are thus deserving of 'the most serious protection'.¹³¹ An unsympathetic attitude has

122 The analysis presented in this section is based on a broad review of the case law in this area, not just the cases discussed in the previous section. However, as noted in n 55, the cases discussed in Part IV were selected as they include a cross-section of the key factors raised in the case, and thus they provide the main support for the following analysis.

123 See, eg, *Neal v The Queen* (1982) 149 CLR 305.

124 See, eg, *O'Shanassy v Taylor* (1978) 21 ACTR 9.

125 See, eg, *Dixon-Jenkins v The Queen* (1985) 14 A Crim R 372; *R v Demirian* [1989] VR 97.

126 *Deacon v Tudor-Stack* [2003] NTSC 15 (7 March 2003).

127 *R v Moylan* [2014] NSWSC 944 (25 July 2014).

128 Transcript of Proceedings, *R v Webb* (Supreme Court of the Northern Territory, SCC 21712099; 21712105; 21712103; 21701649; 21712100; 21712113, Reeves J, 4 December 2017).

129 See, eg, *R v Sari* [2008] VSCA 137 (7 August 2008); Transcript of Sentencing Remarks, *R v Labe* (Magistrates Court of Tasmania, Magistrate Daly, 9 April 2018).

130 *Deacon v Tudor-Stack* [2003] NTSC 15 (7 March 2003). See also Transcript of Sentencing Remarks, *R v Labe* (Magistrates Court of Tasmania, Magistrate Daly, 9 April 2018).

131 *Deacon v Tudor-Stack* [2003] NTSC 15 (7 March 2003) [19].

also been displayed towards offenders who have targeted premises which are not directly related to the object of the protest, with judges inferring from that fact that they were ‘looking for trouble’ rather than being engaged in genuine protest.¹³² This was made clear in *R v Sari*, in which Lasry AJA commented that where damage is inflicted on property which is ‘in no way connected with the target of the demonstration, the legitimacy of the participation of the particular individuals in such dissent is destroyed and significant harm is done to the credibility of the broader protest’.¹³³

This is related to a fourth relevant factor: the perceived sincerity of the offender’s beliefs. Where judges have adopted a sympathetic approach, they have tended to highlight the offenders’ sincerity. For example, in *O’Shanassy v Taylor*,¹³⁴ Blackburn CJ accepted that Mr O’Shanassy was ‘genuinely moved by a deeply felt dissatisfaction’ with the accommodation problem in Canberra, as well as with the state of society in general.¹³⁵ He explicitly took into account Mr O’Shanassy’s sincerity in determining an appropriate sentence.¹³⁶ Similarly, in the ‘peace pilgrims’ case Reeves J took into account the fact that the offenders held their beliefs ‘sincerely and strongly’,¹³⁷ and were motivated by ‘genuine and deep concerns’ about the use of the Pine Gap facility.¹³⁸

By contrast, judges who have adopted a less sympathetic approach have frequently queried the sincerity of the offenders’ beliefs. This can be seen most clearly in *R v Sari*,¹³⁹ in which the sentencing judge considered Mr Sari’s violent behaviour to be ‘impossible to reconcile’ with his purported ‘commitment to fighting injustice’.¹⁴⁰ The court in the second *Dixon-Jenkins v The Queen* case also appeared to have doubts about Mr Dixon-Jenkins’ sincerity, as indicated by the following passage: ‘Whether the [offender’s criminal] activity is for well-meant purposes or is merely self-indulgent seeking of attention and enjoyment of power, it is unnecessary to decide. The latter view, however, is certainly open.’¹⁴¹

It may be thought that the purpose of the offender’s protest may also affect the sentencing determination, and there is some indication that this may be a relevant

132 See, eg, *R v Sari* [2008] VSCA 137 (7 August 2008) [3].

133 Ibid [66].

134 (1978) 21 ACTR 9.

135 Ibid 15.

136 Ibid.

137 Transcript of Proceedings, *R v Webb* (Supreme Court of the Northern Territory, SCC 21712099; 21712105; 21712103; 21701649; 21712100; 21712113, Reeves J, 4 December 2017) 9.

138 Ibid 12. See also *R v Moylan* [2014] NSWSC 944 (25 July 2014) [108].

139 [2008] VSCA 137 (7 August 2008).

140 Ibid [2].

141 (1991) 55 A Crim R 308, 317. The court in the first *Dixon-Jenkins v The Queen* case may also have doubted Mr Dixon-Jenkins’ sincerity, as indicated by its reference to offenders who ‘pretend their convictions are ... strong’: *Dixon-Jenkins v The Queen* (1985) 14 A Crim R 372, 379 (emphasis added). In neither of the *Dixon-Jenkins v The Queen* cases, nor in *R v Sari*, did the courts firmly conclude that the offences were *not* politically motivated: they merely expressed concern about the offenders’ sincerity. Where it is clear that an offence was not significantly motivated by a political purpose, the offender should not be considered to be a ‘politically motivated offender’, and their purported political motivations disregarded: see Part III above.

factor. For example, in *Neal v The Queen*¹⁴² Murphy J clearly had sympathy for the offender's cause, as seen in his comment that 'Aborigines have a right to participate in and direct their own policies', and his view that people like Mr Neal, who are frustrated by racism, 'feel their grievances deeply and sometimes express them in the only way possible — by protest or violence'.¹⁴³ However, it is difficult to discern any clear pattern in this regard. This is likely due to a judicial reluctance to explicitly express support or disapproval for a particular political cause, given the need for perceived objectivity in the judicial role. While it may be possible to infer approval or disapprobation for an offender's cause from a judgment or sentence, this generally cannot be done with any certainty.

VI TOWARDS A PRINCIPLED APPROACH TO SENTENCING POLITICALLY MOTIVATED OFFENDERS

The discussion above has outlined two divergent approaches to sentencing politically motivated offenders (sympathetic and unsympathetic), and has identified four key factors which seem to influence the sentencing determination (gravity of the offence; use of violence; target of actions; sincerity of offenders' beliefs). Unfortunately, the cases do not explicitly reveal *why* these factors are relevant. No attempt has been made to clearly explain the principles (if any) which underlie the courts' approach to this issue. This final Part of the article starts to address that gap, by sketching out some key principles that could guide judges when determining whether an offender's political motivations are mitigating.¹⁴⁴

The passage from *R v Jones*¹⁴⁵ quoted above provides a useful starting point for this brief sketch. In that passage, Lord Hoffmann notes that there have been occasions in which people who broke the law 'to affirm their belief in the injustice of a law or government action' were vindicated by history.¹⁴⁶ He goes on to suggest, however, that there are 'conventions' which should govern the behaviour of the individuals involved: offenders should behave proportionately and accept the penalties imposed on them; police and prosecutors should exercise restraint; and magistrates should take the offenders' conscientious motives into account in sentencing.¹⁴⁷

142 (1982) 149 CLR 305.

143 Ibid 318.

144 It is not possible within the scope of this article to also address the question of when an offender's political motivations should be considered aggravating. I make some very brief comments on this issue at the end of this Part.

145 [2007] 1 AC 136, 177 [89]; see the text accompanying n 74 above. This passage was cited with apparent approval by Reeves J in the Pine Gap peace pilgrims case: Transcript of Proceedings, *R v Webb* (Supreme Court of the Northern Territory, SCC 21712099; 21712105; 21712103; 21701649; 21712100; 21712113, Reeves J, 4 December 2017) 8–9.

146 *R v Jones* [2007] 1 AC 136, 177 [89].

147 Ibid.

This passage resonates strongly with a deep philosophical literature on political protest which was developed in the 1960s and '70s.¹⁴⁸ According to that literature, criminal actions which are committed in order to engage people in a discussion about the moral merits of a political cause, with a view to prompting well-considered lasting political change, should be considered admirable rather than deserving of moral opprobrium. This is because such actions are seen to serve a vital social function.¹⁴⁹ For example, Rawls suggests that offences of this nature serve to 'inhibit departures from justice and to correct them when they occur' and considers them to be 'one of the stabilizing devices of a constitutional system';¹⁵⁰ and Markovits posits that such offences serve to undermine political complacency, by focusing attention on issues that may never have been meaningfully discussed, or by forcing the reconsideration of policies which have been obstructed by institutional stasis or powerful privileged interests.¹⁵¹ Consequently, these theorists argue (and this article contends) that where an offender commits such actions, the court should take that fact into account and reduce any legal sanctions that are imposed.

It is important to note that under this account, not all acts of dissent are considered commendable. It is only appropriately constrained criminal actions that are deserving of a lesser penalty. While there are various theories about precisely which criminal actions fall within this category, most accounts incorporate two key requirements: the relevant offence must have been *communicative*, and it must have been committed in the pursuit of *justice*. It is useful to consider each of these requirements in turn, as they can help provide judges with a principled basis for approaching the complex task of sentencing politically motivated offenders.

A Communication

For an offence to be viewed positively, and the offender's sentence mitigated, the offender must have been seeking to communicate his or her sincere disapproval of a law, policy or practice to policymakers, victims of the law, other dissenters or the community.¹⁵² While in some cases the offender will simply be seeking to express his or her condemnation of the law, policy or practice, in most cases he or she will also be seeking to change it, or to prevent similar laws, practices or policies being implemented in the future. It is not necessary that he or she have a

148 See, eg, Hugo A Bedau, 'On Civil Disobedience' (1961) 58 *Journal of Philosophy* 653; John Rawls, *A Theory of Justice* (Harvard University Press, 1971) ch 6. For a detailed overview of the literature in this area, see Brownlee, *Conscience and Conviction*, above n 57.

149 See, eg, Edwin M Schur, *Law and Society: A Sociological View* (Random House, 1968) 62; Rawls, above n 148, 383; Martin J Friedman, 'Criminal Responsibility and the Political' (1975) 24 *American University Law Review* 797, 823; Daniel Markovits, 'Democratic Disobedience' (2005) 114 *Yale Law Journal* 1897; Aidan Ricketts, 'Freedom from Political Communication: The Rhetoric behind Anti-Protest Laws' (2015) 40 *Alternative Law Journal* 234, 236.

150 Rawls, above n 148, 383.

151 Markovits, above n 149.

152 Kimberley Brownlee, 'Features of a Paradigm Case of Civil Disobedience' (2004) 10 *Res Publica* 337, 345–6.

specific goal in mind. It is sufficient if the offender sought to communicate his or her serious and sincere disapproval.

It is important to emphasise that the goal of the politically motivated offender should not simply be to effect change. He or she must be trying to *persuade* policymakers of the reasons for doing so: this is a *communicative* endeavour. This restricts the types of action that should be considered mitigating. For example, political objectives pursued through coercive means, such as the use of force or intimidatory actions, should not be included, as noted by Brownlee:

As a strategy, coercion is likely to turn policymakers against a dissenter's position. Therefore, presumably, to have the lasting effect upon policymakers' opinions and values that she desires, a dissenter must aim, not to force policymakers to adopt her views, but rationally to persuade them of the flaws in the law or policy she opposes. In short, to be sincere and serious in her aim to bring about a lasting change in governmental policies, she must recognise the importance of engaging policymakers in a moral dialogue.¹⁵³

The *Australian Constitution* provides support for considering acts of political communication to be mitigating, but for restricting the mitigating effect to non-coercive actions. As is well-known, the *Constitution* establishes (and guarantees) Australia's character as a representative democracy by virtue of requiring the two Houses of Parliament to be 'directly chosen by the people',¹⁵⁴ by requiring Commonwealth Ministers to be Members of Parliament,¹⁵⁵ and by requiring the alteration of the *Constitution* to be achieved only by popular referendum.¹⁵⁶ In the landmark case of *Lange v Australian Broadcasting Corporation*,¹⁵⁷ the High Court held that '[f]reedom of communication on matters of government and politics' is an 'indispensable incident' of this system of government, making clear the importance that is placed on political communications.¹⁵⁸

However, it is also clear that the freedom of political communication is not absolute. It is 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*'.¹⁵⁹ Thus, it has been considered acceptable to restrict that freedom for various

153 Ibid 347.

154 *Australian Constitution* ss 7, 24.

155 Ibid s 64.

156 Ibid s 128. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557–9.

157 (1997) 189 CLR 520.

158 Ibid 559. In this case the High Court consolidated the reasoning from a line of cases that began with *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. While recent decisions, such as *McCloy v New South Wales* (2015) 257 CLR 178 and *Brown v Tasmania* (2017) 261 CLR 328, have refined the details of the constitutional test, they have not altered the value that is placed on freedom of political communications. For a useful analysis of the reasoning in *Lange v Australian Broadcasting Corporation*, see Patrick Emerton, 'Political Freedoms and Entitlements in the *Australian Constitution* — An Example of Referential Intentions Yielding Unintended Legal Consequences' (2010) 38 *Federal Law Review* 169; Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143.

159 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

purposes, including to protect people's reputation,¹⁶⁰ to allow for the supervision of sexual offenders,¹⁶¹ and to stop parolees from committing offences.¹⁶² Of relevance to the current context, it has been held that while the freedom which 'the people' should have to communicate on political matters should not be restricted merely to prevent insult or offence, Parliament can override the freedom in order to prevent violence in public places:¹⁶³

That is an end the fulfilment of which is entirely compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people.¹⁶⁴

In holding that it is not permissible to impose restrictions even on communications which give *serious* offence, Hayne J emphasised the fact that political discourse is frequently passionate and emotional: 'It is not, and cannot be, free from insult and invective.'¹⁶⁵ Consequently, it is not possible to eliminate offensive communications without 'radically altering the way in which political debate and discourse is and must be continued if "the people" referred to in ss 7 and 24 of the *Constitution* are to play their proper part in the constitutionally prescribed system of government'.¹⁶⁶ However, the situation differs where violence is the likely result of the communication. As society also depends upon the prevention of violence, restrictions aimed at this purpose are directed to a legitimate end.¹⁶⁷

While sentencing judges are operating in a different context, these constitutional cases — along with the philosophical literature on political protest — can provide them with useful guidance. When read together, they strongly indicate that an offence should generally¹⁶⁸ be mitigated where the offender was genuinely seeking to communicate his or her disapproval of a law, policy or practice. While a broad interpretation should be given to the types of acts that can be considered communicative (including acts that give serious offence), a line should be drawn (as it currently is) at violent or intimidatory actions.

B Justice

The second requirement for an offence to be mitigated is that it must have been committed in pursuit of justice. Once again, this requirement finds support in both the philosophical literature and in Australian constitutional law. A clear

160 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

161 *Hogan v Hinch* (2011) 243 CLR 506.

162 *Wotton v Queensland* (2012) 246 CLR 1.

163 *Coleman v Power* (2004) 220 CLR 1. See also *Monis v The Queen* (2013) 249 CLR 92, 168–9 [198]–[199] (Hayne J).

164 *Coleman v Power* (2004) 220 CLR 1, 78 [198] (Gummow and Hayne JJ).

165 *Monis v The Queen* (2013) 249 CLR 92, 174 [220].

166 *Ibid.*

167 *Coleman v Power* (2004) 220 CLR 1, 26 [14]–[15], 32 [32]–[34] (Gleeson CJ), 78 [198] (Gummow and Hayne JJ), 98–9 [254]–[256] (Kirby J), 121–2 [322]–[324] (Heydon J).

168 As discussed in the following sub-Part, not all communicative offences should be considered mitigating. This should be restricted to communicative offences committed in pursuit of justice.

explanation of the philosophical grounding can be found in Rawls's *A Theory of Justice*, in which he notes that in justifying acts of political dissent:

one does not appeal to principles of personal morality or to religious doctrines, though these may coincide with and support one's claims; and it goes without saying that [they] cannot be grounded solely on group or self-interest. Instead one invokes the commonly shared conception of justice that underlies the political order.¹⁶⁹

It can be seen from this passage that Rawls is concerned to differentiate offences that are based on considerations of justice from offences which are committed for other reasons, such as religious ideology or self-interest. This flows from the view (outlined above) that such offences are justifiable because they serve to correct departures from justice when they occur, thereby helping to stabilise society. In order to do so, the offenders' actions must have been guided by a 'publicly recognized conception of justice',¹⁷⁰ rather than irrelevant considerations such as religious ideology or personal morality.

This raises the difficult question of when an offence should be considered to be one that is committed in pursuit of justice: what exactly does 'justice' mean in the current Australian context? As a society's shared conception of justice should underlie its constitution,¹⁷¹ the *Australian Constitution* provides a good starting point for answering this question. This may seem odd in the Australian context, given that the *Constitution* 'does not express a ringing declaration of commitment to a vision of the shared values of the Australian people'.¹⁷² It does not, for example, contain a bill of rights.¹⁷³ However, there is a growing body of jurisprudence and commentary which suggests that there are substantive values embedded within the *Constitution*.¹⁷⁴

Of particular relevance in the current context is the case of *Aid/Watch Inc v Federal Commissioner of Taxation*.¹⁷⁵ In that case, the High Court held that the system of law established by the *Constitution* 'postulates for its operation ... "agitation" for legislative and political changes', and that agitative actions can contribute to the

169 Rawls, above n 148, 365.

170 Ibid 386.

171 Ibid.

172 Justice Patrick Keane, 'The People and the *Constitution*' (2016) 42 *Monash University Law Review* 529, 542–3.

173 While the *Constitution* does not contain a bill of rights, Victoria and the ACT have passed charters of human rights: *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT). While this article focuses on the values contained in the *Constitution* (as these apply across Australia), sentencing judges in Victoria and the ACT could also rely on the values established in their respective charters when determining which offences have been committed in pursuit of justice.

174 For an overview of the jurisprudence in this field, see Elisa Arcioni, 'That Vague but Powerful Abstraction: The Concept of "The People" in the *Constitution*' (Research Paper No 14/15, Sydney Law School, 10 February 2014) <<http://ssrn.com/abstract=2393761>>. For an analysis of the relevant values, see Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the *Australian Constitution*' (2016) 14 *International Journal of Constitutional Law* 60; Justice Keane, above n 172; Emerton, 'Ideas', above n 158.

175 (2010) 241 CLR 539.

‘public welfare’.¹⁷⁶ However, the Court did not hold that *all* agitative actions are of constitutional value. It is only forms of political advocacy that are not at odds with the system of representative and responsible government established by the *Constitution* that fit this description.¹⁷⁷

Applied to the sentencing context, this line of reasoning suggests that when determining whether an offender was acting in pursuit of justice, judges should consider whether he or she was ‘agitating’ for reforms that comply with the values contained in the *Constitution*. It is not possible to exhaustively list the types of political advocacy that meet this requirement, but it is possible to provide some illustrations. For example, it would be met by offences which are directed towards ensuring that individuals are able to freely communicate on matters of government and politics, given that freedom of communication on such matters is an ‘indispensable incident’ of the Australian system of government.¹⁷⁸

Similarly, it seems that offences which are directed against laws which discriminate against certain segments of the population would qualify.¹⁷⁹ This follows from the constitutional requirement that the Houses of Parliament be ‘chosen by the people’ (ss 7 and 24). In extra-curial writing, Justice Keane has argued that these sections imply a notion of ‘political unity’ which:

denies the power of any organ of government to divide or segregate the people in terms of religion, race, gender or social condition, so far as their political sovereignty is concerned. And given the centrality of political sovereignty, the concept may also serve as a brake on introducing divisions of this kind in any aspect of public life.¹⁸⁰

By contrast, offenders who seek to create greater divisions between the Australian people, or who seek to overthrow the system of representative and responsible government established by the *Constitution*,¹⁸¹ are not acting in pursuit of justice. Even if their actions are communicative, and grounded in conscience, their political motivations should not be considered mitigating.

176 Ibid 556 [45].

177 Ibid 555–6.

178 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559. This would include offences which protest unwarranted invasions of privacy by the government, such as those committed by Edward Snowden. For an analysis of Snowden’s case, see Kimberley Brownlee, ‘The Civil Disobedience of Edward Snowden: A Reply to William Scheuerman’ (2016) 42 *Philosophy and Social Criticism* 965.

179 This would include (non-violent) offences committed in pursuit of same-sex marriage.

180 Justice Keane, above n 172, 539. For an argument that Australian terrorism offences go too far in criminalising conduct connected to political violence *because* they operate in a way that leads to this sort of division of the community, see Patrick Emerton, ‘Australia’s Terrorism Offences — A Case against’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 75.

181 This would include ‘terrorists’ who seek to create a religious theocracy. ‘Terrorist’ actions which are violent or coercive would also not meet the communication requirement.

C Relevant Considerations

Under the approach sketched out above, an offender's political motivations should be considered mitigating if (i) the offender was seeking to *communicate* his or her sincere disapproval of a law, policy or practice; and (ii) the offence was committed in pursuit of *justice*. In addressing these questions, judges should be guided by the shared values contained within the *Constitution*, including the importance of having an inclusive democracy and allowing for robust political debate.¹⁸²

While each of the factors identified in Part V of this article¹⁸³ will continue to be of relevance under this approach, their utility will differ. They will no longer simply be considerations that a judge takes into account in making a global sentencing determination. Instead, they will play a role in the judge's determination of whether the offender was genuinely seeking to communicate his or her disapproval of a law, policy or practice. For example, the sincerity of the offender's beliefs is likely to be relevant to the question of whether the offender was *genuinely* trying to undertake a communicative act; and offences which are particularly grave, or which involve the use of violence — especially violence directed towards elected Members of Parliament (such as Mr Labe's assault on Mr Abbott) — will not meet the 'communication' requirement.

In addition, the purpose of the offender's protest will also be a key consideration. In particular, sentencing judges will need to assess whether the protest was directed towards the pursuit of justice, as guided by the values contained in the *Constitution* rather than some other consideration. In this regard, it is important to emphasise that the values discussed above were provided for illustrative purposes only, and are not the only ones that can ground legitimate dissent. For example, it seems that protests aimed at ensuring Australia's freedom from unwarranted foreign involvement (such as the 'Pine Gap peace pilgrims' protest) will meet the 'justice' requirement, as it has been held that 'the polity which the *Constitution* established and maintains is an *independent nation state* with a federal system of government'.¹⁸⁴

While this approach can help guide judges to determine when an offender's political motivations should be considered mitigating, it says nothing about how a judge should sentence politically motivated offenders whose acts were not communicative, or which were not directed towards justice. Unfortunately, it is not possible to comprehensively address this issue within the scope of this article,

182 Arcioni and Stone, above n 174, 79. I acknowledge that it may initially be difficult for sentencing judges to be guided by the shared values contained within the *Constitution*, given that these values have not been fully spelt out by the High Court. However, I do not believe that this is an insurmountable problem. There is a growing body of constitutional law jurisprudence and commentary that sets out relevant values (as outlined above), and appeal courts are capable of drawing on this body of work to provide guidance to lower courts. Moreover, judges in states which have charters of human rights can also rely on the values established in those charters (see above n 173).

183 The gravity of the offence, the use of violence, the target of the offender's actions and the sincerity of offenders' beliefs.

184 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 84 [217] (emphasis added).

as it raises complicated questions concerning deterrence, danger and risk.¹⁸⁵ It is possible, however, to make two preliminary points on this issue.

First, it should not be assumed that simply because an offender's political motivations are *not* mitigating, that they are aggravating. Not all offenders who fail to meet the requirements outlined above should be considered dangerous to society and sentenced harshly. That should be a decision that is based on the particular facts of the case. Secondly, in determining whether an offence does require the imposition of a strongly deterrent or denunciatory sentence, recourse may again be had to the values contained in the *Constitution*. Consideration should be given to whether the offender acted in a way which was antithetical to those values (in which case his or her political motivations are likely to be aggravating), or whether the protest related to a matter about which the *Constitution* is silent (in which case his or her political motivations may be neutral).

VII CONCLUSION

The analysis of sentencing law presented in this article has revealed two different approaches that have been taken to politically motivated offenders. In some cases, they have been viewed sympathetically, as conscientious individuals who have stood up for their beliefs, and who are deserving of a reduced sanction. In the broader literature on political offending, this is the perspective that is often taken of acts of civil disobedience committed by civil rights activists, such as the suffragettes, Martin Luther King and Gandhi.¹⁸⁶ While it may be thought that their acts need to be punished (due to being in breach of the law), the individuals behind those acts are often seen to deserve praise rather than condemnation.

In other cases, politically motivated offenders have been viewed less sympathetically: as self-serving individuals who deliberately intend to undermine legitimate laws that society has created, in pursuit of their own idea of justice. Given the potentially broad-reaching consequences of their actions, such offenders have often been considered to be more dangerous and harmful to the community than 'common criminals', who act in the selfish pursuit of motivations such as personal wealth or vengeance. Consequently, deterrence and denunciation tend to feature strongly when sentencing such offenders.

The article identified four factors which currently seem to influence the approach that is taken to political motivations: the gravity of the offence; the use of violence; the target of the offender's actions; and the sincerity of the offenders' beliefs. However, there is a lack of clarity in this area, and a need for guiding principles. The article concluded by sketching out an approach to mitigation that is based on a combination of philosophical literature and constitutional law. With its focus on communication and justice, this approach provides a principled basis

185 For a useful introduction to the broad literature on these issues, see Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, and Practice* (Routledge, 2011).

186 See, eg, Douglas, above n 20, 86.

for differentiating between offenders such as Mr Labe (whose violent actions would preclude his motivations from being mitigating) and the 'Pine Gap peace pilgrims' (whose non-violent actions, committed in pursuit of justice, should result in a lesser sanction).