Sentencing Political Offenders

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This paper examines the question: how is political motivation relevant to the sentencing of those convicted of 'political offences'. Noting the lack of directly relevant case law on the subject, it argues that sentencing ought to be guided by analogies drawn from other areas of law. It notes areas of law in which political behaviour is treated as in some ways privileged, but argues that in each of these areas of law, one encounters limits to the law's tolerance of political behaviour. Conversely, it argues that there are some areas of law where political motivation appears to be treated as an aggravating factor, the most notable examples being provided by the criminal law. On the basis of this material, it argues that political motivation is mitigatory to the degree to which the offence represents an attempt to communicate a political message, and aggravating to the extent to which it involves an attempt to coerce a government. While arguing that political offences by the powerless ought to receive more lenient treatment, it notes the problems involved in giving legal force to such a contention. It concludes with an examination of the relevance of merits of the offender's cause and the appropriate role for taking special deterrence into account in political cases.

Introduction

Political offenders[1] pose particular problems for the sentencer. To a far greater degree than is usual among offenders, the wrongfulness or otherwise of their actions will be the subject of considerable community dispute. Moreover political offences raise questions which do not normally arise in the sentencing of 'common criminals'. In many ways political offenders loom as heroes in our historical tradition, and the life and death struggles that can take place over whether people are entitled to be called political prisoners highlights the contemporary salience of this consideration. But there is a flip side. The record of ex-political prisoners who have subsequently come to power has sometimes left much to be desired. Political crime can sometimes produce disorder, and very occasionally, revolution. Elites (from which sentencers are characteristically drawn) are not normally fond of disorder, and even the masses may well have good grounds for doubting that much can come of disorder, except perhaps in its early stages, when it can be exhilarating. How then should sentencers deal with

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1 For the purposes of this paper, a political offender is a person whose offence was committed in order to, or in the course of action intended to, wholly or in part influence, or show discontent about, the content of public policy or the structure of the political system. This definition is broader than the definitions of 'political offence' in the context of extradition law, and is similar to the definition of 'political' used in discrimination law. See below.

political offenders? Given that the directly relevant law is minimal, I shall argue that sentencers must be guided by analogies drawn from other areas of law, and that while these highlight the ambivalence which political crime can arouse, they also point to a set of propositions which can be supported with varying degrees of confidence. In particular, I argue that insofar as political offences are intended as forms of communication, political motivation is a mitigating circumstance. I argue further that insofar as political crime is intended to coerce, political motivation is arguably an aggravating factor. I argue that where political crime reflects political powerlessness, this ought to (but probably won't) be grounds of mitigation, even where the offence involves a degree of coercion. However, I conclude that one would be hard pressed to assert this as a legal proposition. I argue that the offender's cause can rarely be of any relevance, and I examine the degree to which sentence should reflect the likelihood of 'contagion'.

Sentencers vary in the relevance they attach to the fact that a crime is politically motivated. One approach is to treat political motivation as a mitigating circumstance. For example, in *O'Shanassy v Taylor*,[2] Blackburn J seems to have considered that political motivation could represent a mitigating circumstance.

> I do not imply that for the purpose of sentencing, a conscientious law-breaker must necessarily be equated with an unconscientious one. On the contrary the conscience of a convicted person may well be a relevant consideration.[3]

A second approach treats political motivation as irrelevant. This appears to have been the characteristic magisterial reaction to protests in the 1960s and 1970s.[4] A third (but rarer) approach involves treating political motivation as an aggravating circumstance. The sentencing at first instance of the 'agitator' Neal seems to provide one such example.[5] Others include *R v Anderson, Alister and*

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2 (1978) 21 ACTR 9 (SC ACT).

3 However, he upheld the Magistrate's 7 day sentence on the defendant who had trespassed in the course of a campaign for low cost housing, and who had previously been convicted of several similar offences. For examples of leniency in Magistrates' Courts, see R Douglas 'Timber cutting on trial: police, courts and the Rainforest Action Group' (1990) 2 *Interdisciplinary Peace Research* 74. See too: G Zdenkowski 'Civil liberties' in T Bonyhady (ed) *Environmental protection and legal change* (1992) Federation Press Sydney, 157-8.

4 See R Douglas 'Restrained dissent; restrained repression: political offenders and the Victorian criminal courts' (1989) 22 *Australian and New Zealand Journal of Criminology* 237, 252. See too Lord Hailsham in *R v Kamara* [1974] AC 104, 115. However, it is not clear whether in stating that the court was not concerned with the defendants' motives, his Lordship was considering their relevance to sentence. For an argument to the effect that this should be the case, see C Cohen 'Civil disobedience and the law' (1966) 21 *Rutgers Law Review* 1, 7.

5 *Neal v R* (1982) 149 CLR 305. The fact that in that case, the sentencing magistrate referred to the defendant as 'an aggressive agitator' suggests that this was probably taken into account as an aggravating circumstance, as did the heavy sentence that was imposed. However, as is apt to be the case when political offenders are sentenced, there was no explicit reference to whether the fact of Neal being an agitator was treated as aggravating. Moreover, while the sentence imposed was a heavy one, the Queensland Court of Criminal Appeal considered it inadequate (without, apparently, referring to whether the defendant was an agitator) and the statutory majority in the High Court considered that it was one which the magistrate had the power to impose. Murphy J (dissenting) considered that the magistrate had treated agitation as aggravating, and that this was indefensible: 'If he is an agitator, he is in good company. Many of the great religious and political figures have

Dunn, where Lee J, in sentencing three people found guilty of involvement in a bombing said:

> acts of terrorism of a kind intended by you ... constitute an offence of a kind that admits of no mitigation of the penalty by the specification of a non-parole period. Let it be plain to all who are minded to assert their political or religious beliefs by means of the bomb or other deadly weapon, that parole is out.[6]

Dixon-Jenkins may provide yet another example.[7]

A fourth possibility is that the relevance of political motivation will vary by context.[8] However, there is little legal authority bearing directly on the relevance that sentencers should attach to treat political motivation. In Australia, political offenders are typically sentenced in the Magistrates' Courts,[9] and while there are occasional appeals to the intermediate courts, it is only in the most exceptional cases that Supreme Courts pronounce on the sentences which should be imposed on political offenders.[10] It is, of course, possible to discuss the implications of standard sentencing principles for political cases. However, as I shall show below, this can give rise to considerable difficulties. For instance, is it appropriate to apply these principles in the same way in political as in non-political cases? Granted that offence seriousness is a major determinant of sentence, are political offences more serious than analogous non-political offences? Do different sentencing goals come into operation in political cases and if so, which goals and how? Given the small body of relevant case law, it is not possible to point with

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been agitators, and human progress owes much to the efforts of these and the many who are unknown .... Mr Neal is entitled to be an agitator': 316-7.

6. Unreported, Supreme Court of NSW, 8 August 1979.
7. (1985) 14 A Crim R 372. In that case, the Victorian Court of Criminal Appeal considered that the nature of the offence made general deterrence a relevant consideration, and a severe sentence appropriate. (Defendant had written letters to schools and commercial establishments threatening dire consequences unless the recipients agreed to aid the anti-nuclear cause. He had placed a number of imitation bombs in schools, but there was no evidence that he intended to carry out his threats.) For foreign examples see eg *State v Wentworth* 118 NH 832, 395 A 2d 858 (1978), cited in M Lippman 'Civil disobedience: the dictates of conscience versus the rule of law' (1987) 26 *Washburn Law Journal* 233 at 251; Judge Stevens in *US v Cullen* 454 F 2d, 392 (7 Cir 1971) cited by SJ McEwan Jr 'The protestor: a sentencing dilemma' (1991) 5 *Notre Dame Journal of Law, Ethics and Public Policy* 987 at 991-2. Until 1968, there was statutory provision for more serious sentencing in West German political cases, and Cobler claims that political offenders continue to be sentenced more severely: S Cobler *Law, order and politics in West Germany* (1978) Trans F McDonogh Penguin Books Harmondsworth UK.
8. For instance, Judge McEwan considers that guilty pleading, civil disobedients should be sentenced more leniently than those convicted after an unsuccessful not guilty plea based on, for example, a necessity defence. (It is not clear whether this is because, less mitigating weight is to be attributed to the political motivation of the latter offenders, or whether it is because the latter offenders are unable to rely on the guilty plea discount). He also seems to consider that for relatively serious political offences, political motivation might be an aggravating circumstance.
9. See Douglas (1989), 249.
10. Examples include *O'Shanassy v Taylor* (1978) 21 ACTR 9; *R v Anderson* (unreported, Supreme Court, NSW, 8 August, 1979); *Dixon-Jenkins* (1985) 14 A Crim R 372; *Rouse* (unreported, Tasmanian Court of Criminal Appeal, 19 October 1990: The facts of *Rouse* were that following a Tasmanian election in which the ALP won 13 seats, the Green independents 5, and the Liberals, 17. Rouse, a company director, attempted to bribe an ALP MHA — one of his company's former employees — to cross the floor); *Neal* (1982) 149 CLR 305.

any confidence to an authoritative body of relevant sentencing law which should be applied in political cases.

A second approach is to draw analogies from other areas of law. This procedure can sometimes give rise to considerable problems: when is an analogy an appropriate one?[11] In what circumstances is legislation prepared for one purpose an appropriate guide to sentencing in connection with a law passed in another context? How far is Commonwealth legislation a useful guide to sentencing in connection with state offences?[12] Despite these problems, analogies are likely to be of considerable assistance in this area. They throw light on the degree to which there are fundamental legal values which might bear on sentencing, and they can point to the conflicting policy considerations which inspire law makers (judicial and otherwise). I shall discuss these below.

In addition, there is a huge literature on the justifications for political disobedience,[13] and a sizeable literature which examines the question of whether 'civil disobedience'[14] enjoys protection under the US and US state constitutions.[15]

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11 In *Erven Warnink Besloton Vernootschap v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743, Lord Diplock said: "Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course". Here it might be argued that there has not been a steady trend in legislation and that the legislative examples come from different fields. However, it should be noted that in the case in question, the presence of the prescribed factors fortified his Lordship in his decision: his Lordship did not advert to the question of whether, in the absence of the steady trend, or a similar field, legislative analogies would be of no relevance to the nature of the common law in an area where there was little in the way of directly relevant precedent.

12 On this kind of question, see *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447 (NSW CA) and *Public Service Board of NSW v Osmond* (1986) 159 CLR 656. In the former case, Kirby P noted a tendency for legislatures to introduce a statutory right for people affected by administrative decisions to require the reasons for those decisions, and held that "it is appropriate for the judiciary in development of the common law in those fields left to it, to take reflection from the legislative changes and to proceed upon a parallel course": 465. However, the High Court rejected this use of statutes from outside one jurisdiction as a basis for developing the common law within that jurisdiction. It might well be more acceptable today.

13 Cohen; HA Freeman 'Civil disobedience and the law' (1966) 21 *Rutgers Law Review* 17; E van den Haag 'Civil disobedience and the law' (1966) 21 *Rutgers Law Review* 27; A Fortas *Concerning civil disobedience and dissent* (1968) World Publishing Co NY; H Zinn *Disobedience and democracy: nine fallacies on law and order* (1968) Vintage Books NY; HA Bedau (ed) *Civil disobedience* (1969) Pegasus NY; RT Hall *The morality of civil disobedience* (1971) Harper & Row NY; J Rawls *A theory of justice* (1973) Oxford UP London 363-91; P Singer *Democracy and disobedience* (1973) Clarendon Press Oxford; B Zwiebach *Civility and disobedience* (1975) Cambridge UP NY esp ch 5; SR Schlesinger 'Civil disobedience: the problem of selective obedience to law' (1976) 3 *Hastings Constitutional Law Quarterly* 947; AD Woozley 'Civil disobedience and punishment' (1976) 86 *Ethics* 323; R Dworkin *Taking rights seriously* (1977) Duckworth London ch 8; MJ Perry 'Conscientious objection'(1988) 11 *Hamline Law Review* 1.

14 The quotation marks are deliberate: the definition of 'civil disobedience' is a matter of dispute, with questions of definition being closely intertwined with questions of when disobedience (civil or otherwise) can be justified.

15 Freeman, 23-5; BJ Katz 'Civil disobedients and the First Amendment' (1985) 32 *UCLA Law Review* 904; CE Gerdes 'Voting with our whole selves, not just our ballots: protecting civil disobedience under Oregon's Free Expression clause' (1989) 4 *Journal of Environmental Law and Litigation* 55. On the question of whether the law should be such that civil disobedients would be entitled to an acquittal, see DM Farrell (1977) 6 *Philosophy and Public Affairs* 163.

This literature is of only limited relevance to the question I am considering here. That it has largely been developed in the context of US constitutions is perhaps a less serious problem than was once the case: the current willingness of the High Court to recognise a (qualified) right to freedom of political expression as implicit in the Australian constitution suggests a possible basis for seeking constitutional protection for currently illegal forms of political communication. However, the right is a limited right and there is nothing in the relevant High Court judgments to suggest that the High Court contemplates that the protection afforded political speech extends to politically motivated public order offences or other acts of civil disobedience.[16]

A more serious problem is that even in the US, attempts to mobilise the Constitution to ' legalise' civil disobedience have been largely unsuccessful.[17] It is hard to avoid the sense that this must inevitably be the case, if only for reasons of logic.[18] However, a more fundamental reason for not relying completely on such arguments is that once one is examining the sentencing process, one is conceding that in some senses one has lost the argument: the fact is that the defendant has been convicted, political motivation notwithstanding.

However, the political disobedience literature is by no means irrelevant. First, it indirectly tells us something about political offenders, since some of it is the product of political offenders, and much of it was written with a view to justifying (or condemning) political offenders. Second, insofar as common themes emerge from the literature, these can be taken to represent a consensus among what might loosely be described as an intelligentsia. Sentencers may not be members of the intelligentsia, but they may be familiar with the views of its better known members. Moreover, if particular ideas command widespread support among intellectuals, such views are likely to command some respect from judges. There will of course be differences: judges' claims to legitimacy are predicated on different standards to those which regulate other intellectuals' claims to be taken seriously. Judges are restrained by law and by what others believe law to be in a way that social theorists are not.[19] Appearances to the contrary notwithstanding,

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16 Which is not to say that its judgments provide no basis for arguing thus. For more detailed discussion of these cases, see below.

17 Katz, 906; Gerdes, 60-3. However, certain forms of symbolic political protest have been treated as constitutionally protected: see, eg NF Douglas 'Freedom of expression under the Australian Constitution' (1993) 16 *UNSW Law Journal* 315, 315-6.

18 If civil disobedience is constitutionally protected, how can it amount to disobedience? See, eg Cohen, 7-9; van den Haag, 26; A Kaufmann 'Small scale right to resist' (1985-86) 21 *New England Law Review* 571. One answer is that it amounts to disobedience of orders from public officials, notwithstanding that these orders might be legal nullities: Freeman, 18; Zwiebach, 170. Moreover, under some formulations of the constitutionally protected civil disobedience principle, the civilly disobedient defendant will have to satisfy a jury of the genuineness of the claim: Gerdes, 74-8.

19 See eg Blackburn J: "What is not irrelevant is another argument put to me by the appellant, to the effect that the court may, and sometimes should, countenance breaches of laws which do not command the assent of a substantial number of members of the community. I totally reject this as inconsistent with the judicial function. When a law is such that its enforcement would be a breach of a standard required by his own conscience, the judge must resign. Nothing less is an option available to him: *O'Shanassy*, 15. See too *Re B* [1981] 2 NSWLR 372 where the NSW Court of Appeal

judges are under strong internal and external pressures to take the division of powers seriously, and in consequence, are bound by politics in a way that most theorists are not. Yet law and politics will be influenced by the intellectual climate of the times, so that while judges' attitudes to political disobedience will in part reflect their status and role, they will also reflect intellectual currents and the circumstances which give rise to these. A sub-theme of this paper will be the way in which the legal analogies lead to conclusions not unlike those suggested by the more conservative work on the justifiability of political disobedience. This will be apparent below, where I discuss five propositions relating to the sentencing of political offenders, propositions which I believe flow from the discussions of sentencing practice, and legal analogies.

Political motivation and conventional sentencing criteria

One approach to the sentencing of political offenders is to evaluate them according to the kinds of criteria which sentencers may and must take into account when sentencing.[20] Assessed according to several of these criteria, political offenders come out badly.[21] For instance, political offenders are rarely remorseful:[22] indeed, they are often proud of what they have done, having offended because they believed that it was their duty to do so. Political offenders are also likely to have pleaded not guilty. This follows partly from their lack of remorse, and partly because not guilty pleas can often provide a splendid opportunity for communicating a political message to the court (and with luck, a broader audience).[23] Moreover, political offenders will be disinclined to argue that their offences were one-off offences.[24]

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took it for granted that a person was unfit to be a barrister (and presumably, a fortiori, a judge!) if there was a real chance that she was likely to continue to commit politically motivated offences.

20 For examples of such lists, see *Crimes Act 1914* (Cth) s 16A; *Sentencing Act 1991* (Vic) ss 1, 5. These statutory lists are, on the whole, a reflection of the pre-existing case law — which continues to regulate sentencing in jurisdictions without formal sentencing codes.

21 See, eg van den Haag, 41.

22 This is more or less implicit in my definition of 'political offender'. There may however, be cases where what 'seemed like a good idea at the time' appears on sober reflection, to have been a rather embarrassing mistake. Offensive behaviour, insulting language and resisting arrest in the course of a demonstration might sometimes fall into this category.

23 This depends on the basis for the guilty plea. If the issue is a purely factual question (did the defendant say 'X'), political arguments are likely to be irrelevant. If, however, defendants seek to rely on the necessity defence, political arguments may be introduced on the basis that they bear either on the existence of the objective or subjective elements of the defence. For examples, see Douglas (1990), Zdenkowski, 157-9.

24 In fact, most political offenders (in Victoria at least) are one-off offenders. Data collected by the author suggests that approximately 85% of arrests for political offences involve first offenders and that over 90% of those people who are arrested for political offences will never be rearrested. However, for political offenders to argue that they are good risks would be to cast doubts on their level of political commitment and therefore on the value of their cause. For this reason, they rarely do so, and while it might seem somewhat hypocritical to pretend that one may offend when the odds are that one won't, it should also be noted that offenders who behave in this way are nonetheless making a sacrifice for their cause in the sense that they are foregoing the opportunity to rely on a mitigating circumstance legally open to them.

However, such considerations are damaging to the political offender only if courts approach sentencing in a relatively mechanical manner, treating lists of sentence-relevant variables as if they were variables in a multivariate, linear sentencing model, each of which is to be given a particular weight. This is certainly not the kind of sentencing model favoured by the higher courts. The Victorian Supreme Court's much mocked emphasis on sentencing as an instinctive synthesis[25] arguably captures the sentencing process better than the multivariate model. For instance, while most political defendants plead not guilty, their pleas will often coexist with acceptance of responsibility for what they did. They may be motivated not so much by a desire to avoid conviction, as by a desire to use a particular defence as a means of highlighting the justice of their cause. For instance, in recent protests, the 'necessity' defence has often provided such a peg and while its use might be regarded as unnecessarily time-consuming, it involves a form of acceptance of the authority of law, the courts and even the police.[26] While the offence will usually be deliberate, it will often be committed in circumstances which suggest that the offender nonetheless possesses considerable respect for the law. This will be the case, for instance, where the offender behaves in a manner which makes apprehension almost inevitable, and where there is no attempt made to resist arrest, either by fight or flight.[27] Offenders' refusal to

25 *R v Williscroft, Weston and Robinson* [1975] VR 292, 300 (Adam and Crockett JJ).

26 While the necessity defence has occasionally been used successfully in the US, the legal test for necessity is one which can almost never be satisfied by political offenders. There are problems facing those who wish to argue that intra legal behaviour is nonetheless an evil which people are justified in seeking to avoid (hence the difficulties of running this defence in cases of principled harassment of abortion clinics or indeed, in connection with anti-nuclear demonstrations). (This problem evaporates when protest is directed at illegal activities such as the shooting of protected ducks, or water pollution.) Moreover even if courts are willing to allow assertions that government policies are evil, protesters face the problem of establishing that their activities are calculated to avoid the evil (will warmongers really stop because a small group engages in a largely symbolic protest?), and if protesters can show that their behaviour could avert the evil, they may be hard pressed to show that they needed to protest (if change can so easily be achieved, then why assume that conventional political activity would not have been effective?). From a strictly legal point of view, there is much to be said for the proposition that necessity defences are often so lacking in merit that they ought not be put to the court. However, this being the case, one can scarcely contend that reliance on the necessity defence (especially in a trial by judge alone) constitutes anything but a slow plea of guilty. Moreover while such pleas may be seen as a waste of time or even an abuse of process, they are arguably better seen as communicative and as involving respect for the judge as a moral agent. In any case, a judge who allows the necessity defence to be pursued can scarcely complain when it is. On the necessity defence, see eg: SM Bauer and PJ Eckerstrom 'The State made me do it: the applicability of the necessity defence to civil disobedience' (1987) 39 *Stanford Law Review* 1173; TA Tierney 'Civil disobedience as the lesser evil' (1988) 59 *University of Colorado Law Review* 961; JL Cavallaro 'The demise of the political necessity defense: indirect civil disobedience and United States v Shoon' (1993) 81 *California Law Review* 351.

27 This argument corresponds closely with the argument that a condition for civil disobedience being justifiable is that the civil disobedient submit to punishment: Fortas, 47-9, 56-8; Wofford, King, Kristol and Rawls in Bedau (1969), 66; 74, 78-9; 208; 246-7; HA Bedau ed Civil disobedience in focus (1990) Routledge London, 5-8; Rawls, 364, 366; Bauer and Eckerstom, 1191-4; and Hall, 82-5, 93-5 and Greenawalt in Bedau (1990), 185-8, who accept this in general. Some commentators argue that this requirement is unduly rigorous (Zinn, 27-31) and note that it effectively precludes the civilly disobedient from raising what might be arguable legal defences: Woozley, 326. However, insofar as those who reject the requirement of submission to punishment require that civil disobedience be public, they are effectively requiring that the civilly disobedient submit to very high risk of punishment in the event of the authorities deciding that punishment is called for. While disobeying

commit themselves to an undertaking not to reoffend takes a different colouring when it clearly reflects the honesty and the integrity of the defendant. While willingness to offend may in one sense be evidence of bad character, it is at worst, ambiguous evidence. In contrast to the common criminal, the political criminal will normally be an altruist in the sense of being willing to risk paying a price in order to achieve an outcome which will benefit not only the offender, but numerous others.[28] Moreover, insofar as the offence is an offence of conscience, willingness to commit political offences is likely to be inversely related to willingness to commit common crimes.

Even if sentencing were to involve a relatively mindless mechanical process, it is still necessary to ask how political motivation bears on sentence-relevant variables. For instance, how does it affect the seriousness of the offence? Are political offences to be treated as more, less or no more serious than analogous non-political offences? (Or does the answer vary by context?) Do political offences tend to require that sentencers select different sentencing goals from those which are appropriate for nonpolitical offences? Here the paucity of the relevant case law poses serious problems.

There are certainly suggestions that in the case of some political offences, it may be particularly appropriate to take account of general deterrence as a sentencing objective. This was the case in *Dixon-Jenkins* where Starke J said:

> There are large groups in present-day society of sincere, earnest but wrong-headed people who, because their convictions are 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 intentioned, will not be tolerated in this community, then it is unlikely that such behaviour will be stopped in its tracks. I am therefore of the opinion that this is just the case where general deterrence has an overriding effect on the resultant sentence.[29]

While there is nothing in this decision to suggest that general deterrence must always be a relevant consideration in the sentencing of political offenders, and while the statement must be understood in the context of the offences in connection with which it was made, it indicates that there may be a point at which a political motivation may come to constitute an aggravating circumstance. However, even if general deterrence is adopted as the basis for sentencing, it does not follow that political offenders should be sentenced more severely than other offenders. Indeed, the opposite will often be the case. Insofar as political offenders characteristically commit their offences in public, their offences carry a

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in such cases may not involve submission to punishment, it will come very close to it: Cavallaro, 354.

28 Dworkin, 207. Where offences involve attempts by the offenders to impose their will on the government, altruism may be less apparent than arrogance: see eg Wright J's succinct characterisation of Rouse's offence: *Rouse*, 1.

29 (1985) 14 A Crim R, 397.

far higher likelihood of punishment than most offences.[30] Given this, the objects of general deterrence can be achieved by correspondingly lighter sentences,[31] especially given the conventional wisdom that it is certainty of punishment rather than severity which best deters.

We are therefore left with at least two questions: how does the fact that an offence is political affect its seriousness (or otherwise)? And: in what circumstances and with what implications does politicality mean that general deterrence is an appropriate sentencing objective? To answer these questions, it is useful to examine several analogical areas of law.

Two sets of legal analogies

Politics as a privileged activity

There are at least four areas of law which lend support to the proposition that political crime should be treated sympathetically: extradition law, the common law with respect to statutory interpretation and contempt; the emerging constitutional protections for political expression; and statutory provisions precluding discrimination on political grounds. In addition, refugee and asylum law arguably provide relevant analogies.

Extradition law

Extradition law represents one of the rare examples of a body of law which actually tolerates political crime — albeit crime committed elsewhere.[32] The relevant legislation embodies the principle that people shall not be extradited in connection with political crimes. The *Extradition Act 1870* (Imp) embodied this principle and the rule has been included, albeit in a slightly attenuated form in successive pieces of Australian legislation. Implicit in the political offence exemption is the principle that politically motivated crime is to be treated sympathetically. Moreover, the protection extends to those whose crimes may well have been relatively serious. However, there are limits to the degree to which politically motivated offenders can rely on the political offence exemption.

30 In Australia, the vast majority of political arrestees' offences are public, both in the sense that the offences and the offenders are visible. The major exceptions relate to the handful of acts of serious political violence where the offence was public, but not the offender. There may, of course also be a considerable and unascertainable number of non-public offences.

31 In one sense, publicness is a two-edged sword. The very fact that behaviour is public might be seen as making its deterrence all the more necessary: invisible behaviour is unlikely to be imitated. However where the publicness of the behaviour means a high probability of arrest, and where it is accompanied by publicity not only for the offence, but for the arrests, general deterrence goals are arguably capable of being achieved even if sentences are less severe than usual.

32 For a discussion of the reasons why political offences were exempted from extradition agreements, see eg GC Perry "The four major Western approaches to the political offense exception to extradition: from inception to modern terrorism" (1989) 40 *Mercer Law Review* 709, 715-8.

The utility of the political offence exemption is somewhat restricted by the way in which courts have interpreted the term 'offence of a political character'. English courts have tended to give the term a highly restrictive interpretation. Violent offences do not count as political unless they are directed at changing government policy, and even then only if they are directly targeted at the government.[33] Moreover, offences may well be classed as political only if their political element explains why the requesting government is seeking extradition.[34] Complicating matters still further is a tendency on the part of English courts to require that the offence be committed in the course of 'civil war, insurrection or commotion'.[35] In *Schtraks*, only Lord Reid seemed prepared to accept that the political nature of the offence was to be inferred on the basis of the offender's motivations, and without reference to whether there was an accompanying commotion. The criteria for determining whether behaviour is political continues to be unclear. Since *Schtraks*, English courts have tended to treat Lord Radcliffe's dicta as authoritative, while simultaneously treating Lord Reid's test as substantially similar.[36] This extraordinary intellectual achievement is explicable only on the basis that on the facts before the courts on the relevant occasions, the outcome was largely independent of whose test was applied.[37] Not since Castioni's successful application for habeas corpus[38] has an allegedly violent offender been held by the English courts to have committed an offence of a political character.

In the US, a more generous interpretation of the political offender exemption prevailed until the 1970s. However, in response to growing concern about terrorism and growing reluctance on the part of the courts to give protection to violent offenders, the US courts have become increasingly sympathetic to narrower tests under which crimes of violence tend to lose their status as political crimes.[39] Parallelling these developments are changes in practice, as embodied in

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33 *In re Meunier* [1894] 2 QB 415.

34 *R v Governor of Brixton Prison; Ex parte Schtraks* [1964] AC 556 per Lord Radcliffe, 591-2.

35 Lords Evershed and Hodson in *Schtraks*, 598, 610.

36 *R v Governor of Pentonville Prison, Ex parte Cheng* [1973] AC 931 per James LJ (Divisional Court), 937, and in the House of Lords, per Lord Hodson, 942, Lord Diplock, 945, and Lord Salmon, 963. Lord Simon of Glaisdale dissented, arguing that the accrued restrictions on the political offence exemption were indefensible in the light of the words and the origins of the legislation. In *R v Pentonville Prison governor; Ex parte Budlong* [1980] 1 WLR 1110, the Divisional Court (Lord Widgery CJ, Griffiths J) cited Lord Radcliffe's test with apparent approval and then proceeded to apply Lord Reid's.

37 However in *Cheng*, where the applicant had allegedly committed a political offence against one government within the territory of another (the requesting) government, a broad test would have entitled him to rely on the political offence exemption and the fact that Lord Simon's well-argued dissent did not persuade the majority to allow the applicant's appeal suggests a continued concern to limit the scope of the exemption beyond what is justified on the basis of its apparent meaning.

38 *In re Castioni* [1891] 1 QB 149. Castioni had allegedly committed a murder in the course of an uprising against the government of the Swiss canton of Ticino.

39 There is a vast literature on this subject, much of it developing very similar arguments. See 'Extradition and the political offense exception' (1987) 81 *American Society of International Law: Proceedings of the Annual Meeting* 467; WG Young and F Erny 'The political offense exception as applicable to terrorists: judicial interpretations and legislative reform' (1987) 25 *Duquesne Law Review* 481, 496-500; JP Groarke 'Revolutionaries beware: the erosion of the political offense exception under the 1986 United States-United Kingdom Supplementary Extradition Treaty' (1988) 136 *University of Pennsylvania Law Review* 1515, 1523-6; Perry (1989), 725-30. Courts were criticised for finding that

the US-UK Supplementary Extradition Treaty of 1986, under which extradition for a wide range of political offences is permitted.[40] In that same period, the Irish Supreme Court has applied a far more restrictive test in cases involving the question of whether members of the IRA and the INLA should be extradited to the UK.[41] Gilbert has suggested that in Ireland and elsewhere in Europe, offenders are being denied political status insofar as their activities involve attempts to overthrow stable democratic regimes.[42]

In Australia, the task of defining 'political offence' is eased by the relevant legislation which eliminates the requirement that there be parties contending for control of the state.[43] To some extent, the *Extradition Act 1988* (Cth) also deals with the problem of the 'undeserving political offender' by excluding from the political offender exemption those charged with offences against a number of international conventions; those charged with serious offences against heads of state and members of their families; and those charged with the actual or attempted taking or endangering of a life of a person if so provided by regulation or if the offence constituted a collective danger to others. Castioni would still be safe. Meunier would not.

The Australian case law is inconclusive. In *Re Wilson; Ex parte Witness T*[44] the High Court considered the question of whether, in particular extradition proceedings, a witness could be compelled to give evidence, his compellability being dependent upon the alleged offences not being of a political character. The offences involved war crimes and the High Court unanimously held that there was no evidence to suggest that they could be classed as political. Barwick CJ, with whom Gibbs and Stephen JJ agreed, applied Viscount Radcliffe's test in *Schtraks*, as did Mason J. However, Jacobs J considered that Viscount Radcliffe's dicta were not necessarily applicable, having been made in a different context and Murphy J rejected what he called the test in *Schtraks'* case[45] as in some respects too broad and in some respects too narrow. There was no discussion by the majority of why Viscount Radcliffe's views were to be preferred to those of Lord Reid (or for that matter those of Lords Evershed or Hodson) and it was in any case not necessary for the Court to resolve this issue.

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members of the IRA and the INLA were eligible under the political offence exemption. Such criticisms seem misplaced. Whatever one might think of members of these and other violent organisations, it is difficult to see how one can argue that their offences are not political, unless (in the case of those charged in connection with attacks on civilians) one argues that the nexus between the crime and the target is insufficiently close to warrant the classification. The problem of giving refuge to undesirable offenders, was surely one better solved by altering the relevant legislation than by reading into the legislation exceptions for which the legislation simply did not provide.

40 Young and Erny, 513-8; Groarke, 1526-31.

41 G Gilbert 'The Irish interpretation of the political offence exemption' (1992) 41 *International and Comparative Law Quarterly* 66.

42 Gilbert, 84.

43 *Extradition Act 1988* (Cth) s 5 ('political offence' defined).

44 (1976) 135 CLR 179.

45 For the reasons already given, I consider that there is no single test in *Schtraks*.

The only subsequent Australian authority is *Prevato v Governor, Metropolitan Remand Centre*.[46] Prevato had allegedly been involved in a number of incidents in the course of a campaign by a radical organisation against selectivity in schools in the Padua area. The campaign involved arson, destruction of property, disruption, and threats to and forcible detention of teachers and other public officials. It did not involve the infliction of serious physical injury. On their face, the charges suggested that the Italian government was 'after' Prevato because of the political motivation underlying these offences. Opposing extradition, Prevato argued (inter alia) that his offences were of a political character. Wilcox J upheld his claim. The fact that the campaign may have been directed at a local rather than the national government was immaterial to whether the activities amounted to offences of a political nature. Moreover, in assessing whether the offences were political, it was not necessary that the offender should have been engaged in a campaign to change the government itself.

> [I]t is enough that there be a concerted campaign to change government policy. Not every offence committed in the course of opposition to government policy is a political offence. There must be, at least, an organized, prolonged campaign involving a number of people. The offence must be directed solely to that purpose; it must not involve the satisfaction of private ends. And the offence must be committed in the direct prosecution of that campaign; so an assault upon a political opponent in the course of the campaign may be a political offence but an assault upon a bank teller in the course of a robbery carried out to obtain funds for use in the campaign would not be.[47]

This test corresponds closely with Lord Reid's test in *Schtraks* and, but for the subsequent tendency for English judges to treat Lord Reid's and Lord Radcliffe's tests as interchangeable, one might criticise the judgement as scarcely consistent with the authority allegedly underpinning it. However whether justified by authority or not, Wilcox J's decision is clearly an eminently sensible interpretation of the legislation.

Yet, while it is a relatively broad test, it is one which imposes definite limits on those who could claim political offender status. It raises the question of whether a person could claim offender status if their campaign involved only a handful of others, if it was in its very early days, or if it involved an attempt to undermine the state by demonstrating its inability to protect its citizens.

A second issue involves the relevance of extradition law. It is, for instance, hard to avoid a sense that the political offender doctrine is still in part to be understood in terms of its nineteenth century origins: as an embodiment of the idea that there are oppressive states which are resisted by heroic rebels who are entitled to the protection of enlightened liberal democracies. Consistent with this is the fact that the law relating to extradition between Australian states does not recognise a political offence exemption.[48] That said, there are several countervailing arguments. First, *Prevato* does not rely on the imagery of the noble

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46 (1986) 8 FCR 358.
47 (1986) 8 FCR 358, 386.
48 See *Service and Execution of Process Act 1901* (Cth).

rebel. Second, the logic of the tendency towards the domestic implementation of international law is that the standards expected of other states are standards which Australia ought to apply to its own activities. From this it follows that if political motivation is relevant to whether offenders against the laws of other countries should be punished, it ought at least be taken into account in determining the extent to which offenders against local laws should be punished.

In the light of these considerations, it can be argued that politically motivated crime is regarded as special and as *prima facie* entitled to a favourable response. However, there are limits: while Australian courts are perhaps somewhat more generous than courts in other jurisdictions, the lingering authority of *Meunier* and the terminology of Australian legislation suggest a reluctance to afford protection to those whose political offences are directed at civilians and other targets which imperfectly symbolise the offender's grievance.

Common law presumptions in favour of traditional freedoms

A second analogical body of law consists of the Common law presumptions in favour of traditional freedoms. Courts presume that in the absence of language clearly expressing a contrary intention, legislation is to be interpreted on the basis that it is not intended to interfere with fundamental common law rights.[49] Among these rights are the rights of freedom of expression and the freedom to take part in processions. Fundamental common law rights are also recognised in other contexts. The relevant local case law is thin. While there appear to be no cases where Australian courts have applied a presumption against interference with free speech when interpreting legislation,[50] the presumption in favour of freedom of expression has been recognised in cases involving contempt law. In *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd*,[51] Jordan CJ recognised the possibility of conflict between the interests of litigants in a fair trial, and the interests of the public in access to information, and held that there were cases where the latter interest should prevail over the former.

> The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.[52]

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49 Eg *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (presumption against interference with person liberty); *Balog v ICAC* (1990) 169 CLR 625, 635-6 (given right of non-self-incrimination, a body with the coercive powers of ICAC must be presumed (prima facie) not to have power to make findings of guilt in its reports).

50 DC Pearce and RS Geddes *Statutory interpretation in Australia* 3rd ed (1988) Butterworths Sydney, does not refer to any such cases at all. Textbooks and casebooks on civil liberties also make no references to any such cases: see eg E Campbell and H Whitmore *Freedom in Australia* new ed (1973) Sydney UP Sydney; B Gaze and M Jones *Law, liberty and Australian democracy* (1990) Law Book Co Sydney; N O'Neill and R Handley *Retreat from Injusice: Human Rights Law in Australia* (1994) Federation Press Sydney.

51 (1937) 37 SR(NSW) 242.

52 (1937) 37 SR(NSW), 249.

The importance of the public's interest in communication has been reiterated in recent High Court decisions. Freedoms of speech and of the press to be curbed only to the extent necessary to prevent "a real prejudice to the administration of justice".[53] Even in criminal cases, the public interest in "freedom of information and the provision of information which the public has a legitimate interest in knowing"[54] must be balanced against the need for fair administration of justice.[55]

The presumption in favour of the right to take part in processions was affirmed by the High Court in *Melbourne Corporation v Barry*[56]. The protected right is, in one sense, a general, non-political right "for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let and hindrance"[57] upon a highway. Indeed, the judgment of Higgins J makes no reference to the political implications of the right to take part in demonstrations. However, Higgins J's judgment shows awareness of the potential for processions to arouse strong feelings,[58] and Isaacs J appears to have proceeded on the basis that the right of procession is not merely a technical piece of highway law.

> Common justice, therefore, dictates that except where the Legislature has clearly empowered a council to make its own unfettered and unregulated will at the moment the test of legality or illegality, a council having the power of 'regulating by law' should state its requirements in the by-law as explicitly as circumstances reasonably permit. Otherwise, how are individuals to attempt to conform to law without a total surrender of their right innocently and unaggressively to use the King's highway in company on occasions that frequently represent great and important national, political, social, religious or industrial movements or opinions?[59]

However, while a presumption in favour of the right to demonstrate was fatal to the regulation whose validity was at stake in *Barry*, it was not sufficient to defeat an analogous regulation made under a slightly broader empowering statute.[60] Moreover, while the common law recognises the right of processionists as highway users, it has traditionally drawn a distinction between a right of procession and the correlative absence of a right to use a highway for a static demonstration. Indeed, static demonstrations have traditionally been treated as representing a violation of the rights of highway users. To many political activists

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53 Gibbs CJ in *Victoria v Australian Building Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 56. In that case, Mason J used the somewhat different expression: 'a substantial risk of serious injustice': 98. However, in *Hinch v A-G(Vic)* (1987) 164 CLR 15, 27, he endorsed Gibbs' formulation. Stephen J, while acknowledging that there can be a conflict between these freedoms and the right to a fair trial, has argued that in general, the two reinforce each other: "It can, I think, be said that generally these two complement each other: a fair and proper administration of justice provides the only available safeguard of the citizen when freedom of speech is unlawfully denied; and it is only in an open society, where freedom of scrutiny and expression prevails, that justice is likely routinely to be fairly administered": *BLF*, 74-5.

54 *Hinch v A-G* (Vic) (1987) 164 CLR 15, 22 per Mason J.

55 Id. (In the circumstances, the latter interest prevailed).

56 (1922) 31 CLR 174.

57 *Wills J in Ex parte Lewis* (1888) 21 QBD, 197, cited by Higgins J in *Melbourne Corporation v Barry*, 206.

58 *Melbourne Corporation v Barry* (1922) 31 CLR, 207: "There is, of course, some danger to the public peace from some processions. . . ."

59 (1922) 31 CLR, 197.

60 *Paull v Munday* (1976) 50 ALJR 551.

this would seem to represent an arbitrary distinction — a moving demonstration is an exercise of fundamental common law rights; when it comes to a halt it promptly violates them. Processions involve a conflict of rights; static demonstrations, it seems, involve nothing but the violation of rights. Thus, while freedom of expression is regarded as a fundamental right, the common law tradition is to confine it narrowly. The protection accorded to free expression generally and to processions (political or otherwise) in particular does not extend to static demonstrations.[61] Indeed, judicial pronouncements do not even appear to regard static demonstrating as an interest worthy of being balanced against other competing interests.

Constitutional Protections

Recent High Court decisions have highlighted the importance of the old common law presumptions in favour of the protection of freedom of speech. The Court's controversial decision in the *Political Advertising case*[62] that there is a constitutionally protected prima facie right to freedom of political communication, reflects a perception that the system of responsible government pre-supposes the existence of such a right. 'Political' was given a broad definition, and the implied protection was interpreted as extending to both Commonwealth and state laws purporting to regulate political discourse.[63] The Court made it clear, however, that the right was not an absolute one,[64] and the majority accepted that it might be legitimate for a government to impose restrictions on "an activity or mode of communication by which ideas or information are transmitted". Decisions in such cases would involve weighing the burden imposed on free communication against the competing public interest which the restriction was designed to secure.[65] It would therefore still be open to the court to uphold the validity of the classic 'political' offences, such as offensive behaviour, trespass, indecent

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61 Cf the constitutional protection afforded speech and assembly in the US: Katz, 908.

62 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; see too *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

63 A majority of the Court (Mason CJ, Deane, Gaudron and Toohey JJ) was of the view that the implied protection for freedom of political expression restricted the Commonwealth and States alike, at least insofar as the expression related to matters which might conceivably have some link with Commonwealth politics. This conclusion was technically obiter (given that it was unnecessary for the Court to resolve this issue). In *Theophanous v Herald & Weekly Times* (unreported, 12 October, 1994), the Court ruled that state libel laws were invalid insofar as they infringed the implied freedom. In *Stephens v Western Australian News papers Ltd* (unreported, 12 October 1994), the Court recognised that there could be matters of exclusively State concern (in that case, allegations in relation to an overseas trip by six state parliamentarians) which would lie outside such protections as the Commonwealth Constitution might afford, but which would be caught by implied protections arising by virtue of analogous provisions in State Constitutions.

64 Mason CJ in *Political Advertising*, 142-4; Deane and Toohey JJ, 169; Gaudron J, 217-8. Mason CJ and Deane, Toohey and Gaudron JJ all considered that it would be extremely difficult to justify a law which directly limited freedom of political discourse. See too McHugh J, 234-5 who considered that laws limiting communication during an election could be upheld only 'on grounds of compelling justification': 235).

65 There is no express discussion of this issue but see Mason CJ, 142; Deane and Toohey JJ, 169; Gaudron J, 217.

language, and resist arrest.[66] It would also be open to the court to rule that it was still within the powers of the states to enforce these laws in the context of political activity. However, the logic of the balancing exercise is such that a future High Court might rule that there were some forms of protest which it was no longer within the Commonwealth's or the States' power to prohibit.

The decision in *Theophanous v Herald & Weekly Times*[67] seems to provide a slightly firmer basis for arguing that insofar as the traditional criminal law restricts political expression, it may (in some circumstances) fall foul of the implied constitutional guarantee. In that case, the question for the court was whether the implied guarantee overrode the law of defamation insofar as it related to statements made in the course of political discourse. The Plaintiff had argued that the implied guarantee was to be read in the light of the common law and criminal law in force at the time of the Constitution, and that those who had framed the Constitution had presumably not considered that such laws were inconsistent with the requirements of representative democracy. If successful, this argument would have foreclosed challenges to the constitutionality of the traditional public order offences.[68] In rejecting this argument, however, the majority[69] has left open the possibility of such challenges. While it would, of course, still be open to the court to use the balancing argument to uphold all or most 'anti-protest' laws, and their enforcement[70] in political cases, the *Theophanous* decision will make legal challenges to such laws slightly easier.

If political communication is essential for representative government, it would seem to follow that even where communication takes a non-protected form, it is entitled to be treated as more acceptable than analogous behaviour which lacks a political communicative component. While the *Political Advertising case* was decided in the context of a ban on political advertising in the period leading up to an election, at least four justices regarded the right to free speech as an ongoing one, and this view was reaffirmed by the majority in *Theophanous*.

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66 Particularly suggestive in this respect was Gaudron J's statement that: "As the implied freedom is one that depends substantially on the general law, its limits are also marked out by the general law. Thus, in general terms, the laws which have developed to regulate speech, including the laws with respect to defamation, sedition, blasphemy, obscenity and offensive language will indicate the kind of regulation that is consistent with the freedom of political discourse".

67 Unreported, 12 October 1994. The case re-emphasises the broad scope to be given to "political" (see Mason CJ, Toohey and Gaudron JJ, 6-8), although it recognises that there are categories of communication which do not qualify for the implied protection: some comments by television entertainers and (Philip Morris beware?) "commercial speech" (Mason CJ, Toohey and Gaudron JJ at 7, 8).

68 Trespass laws, however, would not have been protected under this argument — and trespass laws have become among the most widely used of anti-protest laws.

69 Which included Gaudron J, notwithstanding her previously quoted statement in *Political Advertising*.

70 Particularly vulnerable would be the use and attempted use of bail conditions as a means of discouraging further demonstrating (for examples of which, see Zdenkowski, 162-6). Even prior to *Political Advertising* the law's unease about 'prior restraint' of communication was evidenced by Equity's refusal to allow injunctions to restrain imminent libels: RP Meagher, WMC Gummow and JRF Lehane *Equity, doctrines and remedies* (1993) 4th edition, Butterworths Sydney, 550, and see Zdenkowski, 167-8 for an example of a refusal of an injunction to restrain further demonstrating.

Discrimination law

Discrimination on the grounds of political belief is contrary to the International Covenant on Civil and Political Rights (ICCPR) (Art 26). In Victoria, Queensland, Western Australia and the ACT, local legislation forbids discrimination on the grounds of political beliefs and activities.[71] However, Commonwealth legislation does not forbid such discrimination, although it does empower the Human Rights Commission to conciliate in cases where people have been disadvantaged through political discrimination.

Tribunals, boards and courts have had to interpret when activity is to be classed as political. Courts have interpreted 'political' as applying to beliefs or activities bearing on government[72] but have been reluctant to extend the term to apply to activities which take place within a framework laid down by law (and, it seems, policy) when the beliefs or activities do not treat that framework as problematic. Anarchists and terrorists would, it seems, be able to argue that their beliefs were political.

However, there are several respects in which the analogical use of discrimination law is restricted. First, there is no protection of people from political discrimination in New South Wales, South Australia, Tasmania, or the Northern Territory. The analogical utility of other States' discrimination law in these states is obviously correspondingly limited. Second, even when political discrimination is proscribed, it is only one of a number of forms of impermissible discrimination. These include discrimination on the grounds of criteria over which a person has no control (age, race and sex), and discrimination on the grounds of matters which are arguably far more within the person's control (such as religion).[73] One objection to analogical reasoning based on discrimination law might be that such laws reflect not the desirability of protecting political expression per se, so much as a perception on the part of legislators that political views (like sex, race, ethnicity and religion) are particularly likely to evoke unfairly discriminatory treatment[74] and therefore particularly such as to require compensatory legislation. Yet while there is probably some merit in this argument, it does not destroy the analogical utility of discrimination laws. There are, after all, beliefs and attitudes which may well evoke discriminatory treatment, but which are not regarded as worthy of protection.[75] Discrimination on the

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71 Victoria: *Equal Opportunity Act 1984* ss 21-33 (the prohibition is on discrimination on the grounds of the private life of a person, private life being defined to mean holding or not holding a political or religious belief or view, or engaging in or refusing or failing to engage in any religious or political activities: s 4); Western Australia: *Equal Opportunity Act 1984*, Part IV (no discrimination on the ground of a person's religious or political conviction); Queensland: *Anti-Discrimination Act 1991* ss 7(1)(j) (no discrimination on the grounds of political belief or activity).

72 *Nestle Australia Ltd v Equal Opportunity Board* [1990] VR 805 (Vincent J); *CPS Management v Equal Opportunity Board* [1991] 2 VR 107 (Marks J).

73 I will forbear from attempting to classify discrimination on the grounds of sexual preference.

74 See eg Vincent J in *Nestle Australia v EOB*, 818.

75 And indeed one of the purposes of the Victorian legislation was to provide 'a legislative statement and protection of fundamental rights of belief and expression', per Vincent J in *Nestle*, 817, quoting the Minister's second reading speech.

grounds of a person's aesthetic preferences, attitudes to the fast life, and beliefs about locus of control is, as far as the law is concerned, perfectly legitimate.

The fact that political beliefs are protected in a way that most other beliefs are not suggests that they are regarded not only as perhaps more likely to evoke discrimination, but that they are also regarded as more worthy of protection. They are not unique in this respect: the analogical use of discrimination law in the context of political offending also suggests that religiously (or anti-religiously) motivated offenders should be treated more leniently.

Other analogies

Respect for political views appears in other areas of law. Asylum law suggests conclusions similar to those which flow from extradition law. Refugee law provides an analogy which represents a cross between extradition law and discrimination law. Under refugee law, people are entitled to refugee status if they face persecution on the grounds, inter alia, of political beliefs.[76] This entitlement persists, notwithstanding that the applicant may have been involved in criminal activity. However, as with discrimination law, the analogical utility of this principle is restricted. The existence of the protections may in part reflect not so much a concern to grant a privileged stratus to political activists as the fact that political activists are, in many countries, particularly likely to be persecuted.

Political motivation as an aggravating circumstance

There is a limited amount of legal material which suggests that in certain circumstances political motivation may exacerbate an offence. While the classic examples of such material are relatively archaic, their general irrelevance to contemporary Australia is arguably a reflection of the extremely domesticated nature of most forms of political protest.

Under Commonwealth law, there exist a variety of laws the effect of which is to attach particularly severe consequences to certain forms of political behaviour. The most extreme example is treason, which carried the death penalty until the abolition of capital punishment for Federal crimes in 1973.[77] More important, for the purposes of this paper is the much more recently created offence of treachery.[78] This offence is constituted, inter alia, by acting with intent (a) to overthrow the Constitution of the Commonwealth by revolution or sabotage, or (b) to overthrow by force or violence the established government of the Commonwealth, a State or a

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76 In Australia this follows from the combined effects of the *Migration Act 1958* (Cth) ss 5 and 36, and the *Convention Relating to the Status of Refugees*, Article I A(2) and the *Protocol Relating to the Status of Refugees*, Art I A(2).

77 *Crimes Act 1914* (Cth) s 24. It should be noted, however, that while treason will normally be political in the sense that it will have political implications, the offence also encompasses what could be non-politically motivated offences.

78 *Crimes Act 1914* (Cth) s 24AA.

'proclaimed country'. It carries a life sentence.[79] A third relevant set of offences are those which punish sedition.[80] A fourth example is constituted by the offence of interfering with political liberty.[81] State law includes many similar offences. Treason is an offence under the laws of all states except Western Australia.[82] Sedition is a common law offence in New South Wales, South Australia and Victoria, and a statutory offence in the code states.[83] In the code states, it is also an offence under the codes to interfere with the free exercise of power by the Governor, a Minister, a member of the Executive Council or a Member of Parliament.[84] In Queensland, it is a serious offence to make demands with menaces on the Executive.[85]

Prosecutions for these offences are extremely rare, even when it is apparent that the offences in question have been committed.[86] Moreover, in one sense, it can be argued that these offences are irrelevant to the sentencing of those who have been charged with other less serious offences. While sentencers may not sentence a person on the basis that they have committed an offence with which they have not been charged, they must nonetheless make decisions with respect to the seriousness of those charges on which a defendant has been convicted and where the Crimes Act offences suggest that there are circumstances in which the political intent underlying those offences may be an aggravating rather than a mitigating circumstance.

The relevance of political motivation

The more the offence involves political communication, the more leniently it should be treated

This conclusion follows from the value now placed by the law on freedom of political communication. The fact that there is an offence at all obviously

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79 s 24AA(3).

80 See in particular s 24A(f) which defines as a seditious purpose, an intention to 'excite Her Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth'.

81 *Crimes Act (Cth) 1914* s 28: 'Any person who, by violence or by threats or intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person, of any political right or duty, shall be guilty of an offence'.

82 *Criminal Code* s 37 (Qld); *Criminal Code* s 56 (Tas); *Crimes Act 1958* s 9A (Vic). In NSW and SA, relevant imperial legislation remains in force, but only insofar as it relates to the monarch: *Crimes Act 1900* s 11 (NSW); *Criminal Law Consolidation Act 1935* s 6 (SA);

83 Queensland and Western Australia: ss 44-45; Tasmania: ss 66-67.

84 Queensland and Western Australia: ss 54-55; Tasmania: ss 69-70.

85 *Criminal Code* s 54A. The maximum penalty is 14 years or life imprisonment depending on the nature of the threat. There is no analogous provision for those who seek to coerce the legislature.

86 There have, in the last fifty years, been three prosecutions for sedition, notably the two prosecutions of Communist leaders in the late 1940s, and less notably, a prosecution arising out of a call for revolution in Papua: Campbell and Whitmore, 328. There have, to my knowledge been no prosecutions for any of the other offences. There were no prosecutions for sedition during the protests of the 1960s and 1970s, notwithstanding that some of these protests were clearly such, and organised in such a way, that their organisers could be said to have been attempting to excite her Majesty's subjects to act illegally in order to secure the alteration of matters established by Commonwealth laws.

indicates that the relevant behaviour's political communicative element has not been sufficient to ensure that the behaviour has qualified for constitutional or common law presumptive protection, but so long as there is a communicative element, the common law and constitutional analogies would suggest that some respect must be afforded the behaviour in question.

The respect to be afforded the behaviour in question will depend on the degree to which it possesses a political communicative element. To some extent, a court's assessment of this will reflect the case the defendant can make for the proposition that the behaviour in question was intended to communicate a particular political message. However, this in turn will depend on the degree to which that case is likely to be taken seriously by the court.

Claims that offences were communicative[87] are likely to be believed when there is evidence to support this claim and when the offence takes a form which is consistent with the claim. Direct evidence to support the claim may come from several sources. One will be the police description of the offence, including references to statements by offenders of their reasons for having offended. A second will come from statements by defendants about their reasons for having offended. A third form of evidence could involve references to the way in which the offence was portrayed by the media.

Whether courts will find that the defendant's act was motivated by a desire to communicate a particular message will depend on a number of variables. First, the more the defendant accepts responsibility for the act, the more likely it is to be interpreted as communicative. Where the offender denies the act (as, for example, may be the case where there is a dispute about who hit whom in the course of a demonstration), the offender will be hard-pressed to argue that the act was done with a particular motive, given that the essence of the defence was that there was no such act. Where, on the other hand, the defendant admits to having engaged in the act, it will be easier to explain the reasons for doing so. Moreover, where the circumstances of the act were such that there was a high probability of arrest, and where the act has no obvious intrinsic satisfactions, a claim that it was intended as a form of communication is likely to be persuasive.[88]

Second, the closer the link between the act and the message, the greater the likelihood that the act will be recognised as communicative. The link may be constituted by the fact that the offence has been against a law whose rightness the offender wishes to put in issue; more usually, a close nexus between the act and the message will be evidenced by the surrounding circumstances.[89]

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87 Rather than repeatedly using clumsy terms such as 'politically communicative', I shall sometimes simply use words such as 'communicative' or 'communicate' as synonyms. The unqualified words should be read accordingly.

88 Rawls, 366-7; Singer, 82.

89 This is recognised by demonstration organisers who characteristically stage their demonstrations on an occasion or at a place and/or time which symbolises their grievances. This proposition receives a kind of recognition in the distinction between direct and indirect disobedience, the former being

Third, the interpretation placed on the offence is likely to be a function of the degree to which it is characterised by features which are inconsistent with alternative interpretations. This proposition overlaps with the previous two propositions, but requires attention to strategies that may be used to highlight the communicative as opposed to the coercive element to political crime. It may help explain why violence is often not a particularly effective communicative tool: it is too easily represented by its opponents as pathological, such representations succeeding because violence arouses particular kinds of imagery in a way that trespass, for example, does not. Fourth, the likelihood of an offence being treated as communicative will be a function of the degree to which the behaviour in question has become institutionalised. Where there is a tradition of engaging in certain types of offences in order to communicate political messages, these offences are far more likely to be recognised as communicative than will be the case where no such tradition exists. This last consideration, however, highlights a paradox. If political crime becomes institutionalised, it is in danger of ceasing to become newsworthy.[90] As a result, communication may require innovative offending. The degree to which this is so will be reduced by the paradox that, being bureaucratic organisations, media are apt to define newsworthiness in a manner which means that the routine can often be newsworthy. Moreover, political offenders who depart from ritualised offences may find that media coverage of their offences is such that their message gets lost. However, there are obvious rewards to be gained from unusual[91] and even violent offences. For this reason, they will take place. The offender may find it harder to claim that the acts are communicative, but the task is unlikely to be an impossible one, especially where the offence bears some of the indicia of a communicative offence.[92] Finally, the communicative efficacy of an act is likely to decline as the non-political elements of the act become increasingly controversial. Where the act arouses disapproval, there is a likelihood that the debate aroused by the act will focus on means rather than ends so that while the act may achieve a high level of publicity, its political communicative element may well be drowned out by the degree to which it provokes debate about the need for law and order.[93] For these reasons,

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regarded as a more justifiable (or even the only justifiable) form of protest: see eg *US v Shoon* discussed in Cavallaro, 365-6. Generally, see Fortas, 63; Greenawalt in Bedau (1990), 181-3 who, however, does not see directness as mandatory.

90 This concern is expressed by SR Schlesinger, 955: "As citizens become increasingly inured to and perhaps even bored or angered by the tactics of civil disobedience, acts of civil disobedience will lose their educational or shock value, citizens will no longer be moved to an examination of the justice of the protester's cause, and protesters will have to resort to increasingly coercive methods simply to get attention".

91 See eg Greenpeace's action in blocking discharge outlets in order to draw attention to the fact that its target was polluting Botany Bay: Zdenkowski, 150, 152. There, unusually, the 'offences' had the effect of stimulating the prosecution of their target.

92 It is for example instructive, to note the publicity generated for the Kampuchean refugees' cause by David Kang's alleged assault on Prince Charles: see eg *The Age* 27 January 1994, 2 (Kang's letter to the Prince); 28 January 1994 (Magistrate's sympathetic comments on refugees); 28 January 1994; 29 January 1994; 31 January 1994 (sympathetic letters); and even the editorial on 29 January 1994 which, while on balance unsympathetic to Kang, canvassed the issues involved in the refugee debate.

political motivation will tend to be more strongly mitigating in the case of non-violent offences.

The more coercive the offence, the more harshly it should be treated

This conclusion is harder to sustain. The extradition analogy, for example, suggests that political offenders may be exempt from extradition notwithstanding that their crimes are coercive in the sense that they were oriented towards forcing a government to make concessions, or even if they were oriented towards achieving the forcible overthrow of a government. However, the reality seems to be that even in the context of extradition law, tolerance for political crime tends to decrease to the degree to which it involves attempts to force liberal democratic governments to follow the offenders' policies, although *Prevato* can be cited as an example of legal tolerance of an attempt to coerce a liberal democratic government.

In contrast, the logic of the privileging of political communications is that coercive political activities tend to be relatively unacceptable, except insofar as the coercion involves a threat to vote against a parliamentary candidate unless that candidate pursues policies more to the voter's liking. Where political crime simply communicates a threat that support for a cause is so strong that it would be electorally unwise to disregard it, this can be seen as a mitigating circumstance. Where the threat involves non-electoral sanctions (physical injury, harassment, etc) or where the threat of loss of electoral support is a result of intimidation of the electorate, the threat is arguably an aggravating circumstance. This conclusion seems to follow from the High Court's grounding of the Constitutional protection of political expression in Australia's system of representative and responsible government. Just as the integrity of parliamentary democracy could be threatened by corruption,[94] so it would be threatened by illegitimate attempts to coerce parliamentarians. From this, it would follow that these attempts to coerce parliamentarians are to be treated as bad not only in themselves, but also as representing a challenge to a fundamental feature of the Constitution. Subject to an argument to be developed below, this suggests that where political crime is

93 The David Kang case also illustrates this. His defence lawyer's claim (*The Age* 28 January 1994 6) that Kang's actions were "nothing more than a media stunt" might diminish Kang's alleged wrongdoing, but it also reduces what might be a serious political action to something not much more serious than a piece of thoughtless irresponsibility. (The more detailed exposition of Kang's motives was buried by the graphic, dismissive and headlined phrase). Coverage of Kang's alleged mental state (*The Age* 28 January 1994 1, 6; 5 February 1994) carries with it the possibility of the psychopathologisation of Kang's behaviour. On this possibility, see too: Dixon-Jenkins, 379 per Starke J: "I think the argument [a necessity defence] has only to be stated in that way to expose its irrationality because in my opinion it is an irrational argument, and were it not for strong evidence as to the applicant's sanity, I would have said to the point of insanity".

94 Among the arguments raised by the Commonwealth in the *Political Advertising* case had been that the expense associated with paying for television advertisements encouraged corruption. The majority accepted that if this were indeed the case, it could be grounds for seeking to control political advertising. However, the contention was rejected on the grounds that the form of control was inappropriate given the evil to be avoided, and on the grounds that there were other less draconian ways of controlling corruption.

intended to coerce governments, its political nature might well constitute an aggravating circumstance.

This conclusion is further strengthened by the Commonwealth *Crimes Act* and by state analogies. Moreover, while the impropriety of coercive political crime has rarely been discussed in the context of specific sentencing situations,[95] cases involving an element of political coercion seem to be those very cases where the political element in the offence seems to have been regarded as aggravating.[96]

The operation of this principle will, of course, depend on how the Court makes decisions about the coerciveness or otherwise of a given political offence. In part it will rely on statements by offenders, although these may be difficult to interpret. Claims that an offence was communicative may be hard to credit, but claims that it was coercive may smack of bravado.[97] The interpretation of the defendant's motives will therefore also depend on the degree to which their behaviour is apparently best explained in terms of an intent to coerce. Insofar as it increases the costs to a government of pursuing a given policy, a political offence may well be treated as coercive. This will also be the case where the offence involves costs to private individuals who might otherwise be inclined to support or implement a government policy. Interpretations will also be a function of political traditions. Offences are far less likely to be interpreted as coercive when there exists a tradition of reliance on such offences as a means of communication. Conversely, where there is no tradition of communicative offences, there is a greater likelihood that even communicative offences will be interpreted as coercive.

The more the offence is an offence by a member of a politically powerless group, the more leniently it should be treated

This proposition is more persuasive as a moral proposition than as a legal one. It underlies most attempts to provide justifications for civil disobedience[98] and even political violence. However, it should be regarded with a degree of caution, and in any case, it is not easily reconciled with traditional legal approaches to sentencing.

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95 However, some guidance is provided by *Rouse*, quite possibly Australia's worst political offence, albeit one involving corruption rather than coercion. An assessment of the degree to which the political element of the offence aggravated matters is complicated by the fact that the arguably lenient sentence (3 years imprisonment) reflected a sizeable number of mitigating personal circumstances.

96 See *Dixon-Jenkins; Anderson and others.*

97 Necessity defences pose particular problems for defendants. If a defendant claims that a government is pursuing an evil policy, that the protest was intended to bring the policy to an end, and that conventional politics could not achieve that end, it is hard to maintain that the means whereby the protest was going to succeed was other than by coercion. However, necessity defendants are sentenced only because their defence has failed and one reason why necessity defences fail is that they are predicated on the usually dubious claim that communication will suffice to produce a change of heart.

98 See eg M Walzer "Civil disobedience and resistance" (1968) 15 *Dissent* 13; Zinn, 53-68; Pech in Bedau (1969), 264-5; LJ Macfarlane *Political disobedience* (1971) Macmillan London, 55; Singer, Part III.

A major problem with the powerlessness justification is that 'powerlessness' (like 'power') is a term which is difficult to define, and difficult to measure — if indeed, it is meaningful to seek to measure it. The problems of definition are evidenced by the fact that the term is used in a number of quite different ways by political scientists, some of whom seek to differentiate it from related ideas such as authority, influence and coercion, while others treat these concepts as forms of power (and their absence as forms of powerlessness). Other questions also arise: is an ingredient in the possession of power the intention to use it? Has one exercised power if one has successfully achieved an outcome, that outcome not being in one's 'true' interests (whatever these might be)?[99]

These problems are to some extent attributable to the things people want to do with the term 'power'. For some, it is a building block in a theory, and the criterion for a good definition is the degree to which it yields a theoretically useful construct. For empiricists, power is ideally something measurable: empiricists will therefore favour definitions which avoid such hard-to-measure variables as 'true consciousness'.[100] For the politically committed, it is something whose definition is integrally tied up with the evaluation of particular social arrangements. In particular, because the ideal of democracy carries with it the idea that power should be relatively evenly distributed, those favourably disposed towards our political institutions will be attracted to definitions of power which lay the basis for claims that power is relatively evenly distributed. Critics, on the other hand, will favour definitions according to which there are vast disparities in power.

For the purposes of the proposition — that the more the offence is an offence by a politically powerless group, the more leniently it should be treated — I would argue that the power of a group of supporters of a given objective is a function of four variables: how many of them there are; how committed they are; the aggregate political resources they possess; and the ease with which they can be persuaded to devote these to the achievement of their objective.[101] It follows that some groups will be unsuccessful simply because the objective is one with little popular appeal, or less appeal than its alternatives. Insofar as this is the case, the group can scarcely claim that its failure to get what it wants reflects the imperfections of a formal democracy - indeed, insofar as the system is evaluated according to the degree to which it achieves even distribution of political power, this is what should happen. However, failure may also reflect the fact that those committed to alternative objectives have access to greater political resources or are able to mobilise resources more easily The unemployed, to take a trivial example, are less able to contribute to campaign funds, less able to employ research staff,

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99 For a good discussion of these issues, see D Wrong *Power: its forms, bases and uses* (1979) Blackwell Oxford, ch 1.

100 However, a Graduate School contemporary argued persuasively that such items in the biennial US election surveys as "people like me have a great deal of influence on the federal government" could, insofar as they elicited 'yes' answers, be taken as good measures of false consciousness.

101 These contentions scarcely need documenting, but they are well discussed by Wrong, *supra* n 87 chs 6, 7.

and less able to pay for TV advertising on behalf of those willing to take up their cause. Moreover, even where those committed to the achievement of a given objective are relatively well endowed with political resources, it may be harder for them than for those committed to alternatives to mobilise those resources for political action. Mancur Olson, in what is arguably still the classic analysis of this phenomenon,[102] points out that where commitment is widely shared, those committed may be extremely reluctant to make contributions to the achievement of the objective. If selfish, they are likely to reason that they will enjoy the outcome whether or not they make a contribution. If altruistic, they may reason that it does not make sense to contribute because, given the number of selfish supporters, the resources contributed will be insufficient to ensure success. Even the selfish might be quite happy to contribute if they thought that everyone else would. However, in the absence of coercion, this is not readily achieved. Thus, those who like clean air (most of us) will rarely contribute to campaigns in support of environmentalists. However, corporations whose economic viability might be bound up with continued pollution will be well-placed to mobilise their share-holders' (and possibly even their workers') resources for efforts to resist clean air campaigns.

Insofar as a group's failure to achieve its objectives is a reflection of its members' relative paucity of resources, or the relative problems of mobilising its members, it can relevantly be described as powerlessness. Insofar as it is unsuccessful, its lack of success in such circumstances can usefully be seen as representing the failure of formal democratic institutions. In such cases, resort to political crime may be partly excusable even where the crime is coercive rather than communicative.

This analysis will not satisfy the more radical critics of formal democratic regimes who argue that it treats objectives as non-problematic rather than as themselves possibly reflective of differential social power. This, however, does not matter. Since I have some doubts as to whether even my less radical analysis yields a legally acceptable criterion for sentencing, I have no doubt that a more radical analysis could not. It is also open to criticism on the grounds that it assumes that there are such things as 'political resources' whose existence can be explored other than by examining the degree to which the group gets its way. While there may be good epistemological reasons for doubting whether one can ever be confident that access or otherwise to particular resources can be treated as indicative of group power, there seems to be a rough consensus among theorists of power that there are certain resources which can usefully be treated as bases for power.[103]

The question remains whether even this analysis could be accepted by sentencers. One matter which may well concern the sentencer is that, as far as the proposition is concerned, the relevant variable is the group rather than the individual. This might be seen as giving rise to problems when relatively

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102 M Olson *The logic of collective action* (1971) revised ed Harvard UP Cambridge Mass.
103 Again, see Wrong, ch 6.

powerful individuals engage in political crime on behalf of a group whose members typically lack political resources. On one hand one might argue that the 'powerful offender' has no excuse: only those lacking in conventional political resources are justified in resorting to extra-legal strategies. Conversely, however, one might argue that there are many cases where the task of mobilisation will be assisted when a politically powerful individual engages in a political offence. The example may inspire other less powerful individuals to engage in political disobedience, thereby contributing to a state of affairs which reduces a political imbalance that would otherwise exist. Insofar as this is the case, there is a reasonable argument to be made for the proposition that political crime by politically powerful offenders may be tolerable.

A second problem is that if allowance is to be made for group powerlessness, this requires some inquiry into the circumstances surrounding political offenders' inability to get their way. It will not always be easy to know whether a group's failure is due to lack of committed numbers or whether it is due to its members' lack of resources and its inability to mobilise members' resources. Can one simply assume, as do many defenders of political offenders, that political offenders are people whose inability to get their way is attributable to lack of resources or to organisational weakness rather than to lack of numbers? In the case of the classic civil disobedient who runs a high risk of punishment, the answer is arguably 'yes'. Where political activity carries with it a considerable price, it is unlikely that people will pay that price so long as they can achieve the same result more cheaply.[104] It follows, therefore, that those who are relatively well-endowed with political resources will tend to use these rather than civil disobedience as a means of achieving their objectives. As a form of communicative politics, civil disobedience is not particularly efficient. While it is often justified in terms of the failure of the media to give due coverage to the relevant cause, its communicative efficacy will be dependent upon those very media. Given the definite likelihood that the dissidents' message will get lost, political activists could normally be expected to resort to disobedience only when more orthodox forms of communication appeared not to be open. These arguments become more tenuous as the risks of political crime decline and as the coercive element increases. Where risks are slight, disobedience may become less costly than alternative forms of politics (except among those who are extremely rich in political resources). Moreover, as a form of coercive politics, political crime may sometimes be far more effective than conventional politics. Direct action can sometimes work, notwithstanding that the relevant cause is relatively unpopular. Given these considerations, it cannot necessarily be assumed that political crime is the politics of the powerless. If allowance is to be made for a group's access to political resources, courts will have to make assessments of particular defendants' groups' access to political resources.

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104 The position is complicated by the distinct possibility that political crime will bring private rewards. These rewards include pride, respect from fellow dissidents, and political influence within a group.

The other difficulty with this argument is that it raises the question: is there a legal foundation for transforming these normative arguments into legal arguments? Can courts reasonably be expected to proceed on the basis that political crime is a reflection of the imperfect operation of Australia's liberal democratic institutions?[105] Historically, the answer would arguably have been 'no'. Australian political institutions were legally constituted in a manner explicable only in terms of a concern that political power be unevenly distributed. The property franchise for upper houses, and gerrymandered electoral systems could be taken to imply that there was, if anything a weak legal presumption against the equal distribution of political power. The general democratisation of the Australian electoral system means that this kind of argument is no longer tenable. However, is it reasonable to argue that courts should base decisions on assumptions which are at variance with the legitimacy of the political system of which they are part?

In *O'Shanassy*, Blackburn J emphatically rejected the argument that the legal system could usefully be seen as reflecting the interests of a governing class.[106] It is doubtful whether he would have accepted even the more moderate analysis presented here. Nor are there grounds for believing that judicial thinking has changed much over the years since his decision.

One might point to the fact that members of the High Court have been willing to accept propositions which arguably cast some doubts on the legitimacy of Australian institutions. We find subdued echoes of this in the *Political Advertising case*. The frankest recognition comes from Brennan J's dissenting judgment, in which his Honour goes behind of the formal curtain and examines some of the practicalities of political advertising, noting that the removal of a legal ban on political advertising may be not to increase general access to the means of communication but rather to ensure that the wealthy would have greater access to the means of manipulation. This approach did not commend itself to the majority, nor to his fellow dissenter, Dawson J. The remaining justices did not so much reject his Honour's analysis as implicitly treat it as insufficiently compelling to justify prohibitions of the kind set out in the relevant legislation. Mason CJ was, for the sake of argument "prepared to accept that the need to raise substantial funds in order to conduct a campaign for election to political office does generate a risk of corruption and undue influence, that in such a campaign the rich have an advantage over the poor and that brief political advertisements may 'trivialize' political debate."[107] He also considered that it was not an adequate justification of the political advertising ban that people continued to have access to news outlets and talkback: this being dependent on "the powerful

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Political offenders who are also engaged in ongoing conventional campaigns may even welcome imprisonment as a period of respite from incessant demands on their time.

105 There would, it seems, be major problems in using this argument in the US where many 'necessity' defences have failed on the grounds that existing political procedures represented an adequate alternative means of avoiding the relevant evil: Cavallaro, 359-60, 366.

106 (1978) 21 ACTR 9 at 15.

107 *Political Advertising* (1992) 177 CLR 106 at 144-5.

interests which control and conduct the electronic media'.[108] McHugh J also expressed scepticism as to the degree to which the media can be trusted to contribute, unpaid, to the presentation of all sides in political debates.[109]

Mabo[110] can, in one sense, be seen as indicative of the High Court's willingness to make findings notwithstanding that they cast doubts on the legitimacy of the European occupation of Australia and on the current allocation of property rights with respect to land. It is no doubt this that helps explain why the decision has been so controversial.[111] However *Political Advertising* suggests a judicial reluctance to look behind legal forms. While the Court noted that the relevant legislation was not such as to achieve its rationale — the creation of a level political playing field — it did not consider the question of whether this objective was better achieved by the legislation than by the status quo ante. In valuing freedom to purchase the right to communicate over equality of influence, the Court seems to have been concerned with the forms rather than the realities of representative democracy. The business of the law is implicitly the protection of political rights from government interference rather than the achievement of greater political equality through restrictions on the use of private power, or the regulation of such government activity as creates that private power.

In view of this, it is unlikely that lack of political resources would be regarded as of relevance to sentence, except perhaps insofar as defendants who lack access to the means of communication might be able to rely on their lack of resources as a mitigating circumstance. Where, however, the offence is compensatorily coercive, legal analogies provide no grounds for claims that this is grounds for mitigation.

The merits of the defendant's cause are of little relevance to sentence.

In one sense this contention runs counter to most of the literature on the justifiability of political disobedience. Its rationale lies in the fact that what is at issue here is not the correctness of political disobedience, but the question of its relevance to sentencing — an activity which involves courts acting within legal parameters. Taking account of the merits of the defendant's cause would involve making decisions about the merits. There are several reasons why courts will and should be disinclined to do this. The first is that there are judicially accepted limits to judicial intervention in the policy-making process. While there is a difference between the making and the evaluation of policy, the legal and practical constraints on judicial policy-making are likely to, and ought normally to discourage judicial policy evaluation. The logic of separation of powers is that courts should not lightly intervene in policy making. The practicalities of policy-making are such that in many ways courts are relatively ill-equipped to engage in

108 (1992) 177 CLR 106 at 146.
109 (1992) 177 CLR 106 at 237.
110 *Mabo v State of Queensland* (1992) 175 CLR 1, and see esp the judgment of Deane and Gaudron JJ.
111 One might argue, however, (as, eg Zinn, 18 does) that recognition of the claims of the relatively powerless can contribute to the legitimacy of professedly democratic institutions.

the process. Moreover, judicial policy making carries with it costs, including the time taken by arguments, and the possible loss of legitimacy that could flow from involvement in political conflict. None of these considerations is conclusive, and courts and judges cannot and do not avoid a degree of involvement in the policy making process. However, this is characteristically legitimated in terms of the resolution of a matter according to criteria which include legal criteria. Judicial ventures into the review of policy-making characteristically involve evaluation of the legality of the procedures used to formulate those policies rather than evaluation of the policies *per se*. Moreover, even when judges are granted the power to review policy on the merits,[112] they are extremely wary of imposing their policies in preference to ministerial policies.[113]

There is a further reason why courts are unlikely to venture into the area of policy evaluation, and that lies in the desirability of achieving a reasonable degree of consistency across judicial decision-makers. Given that there is often considerable public controversy about the causes espoused by political offenders, one would expect that there would be considerable variation across sentencers in their attitudes to any particular cause. It would do nothing for the reputation of the judiciary that some anti-abortion demonstrators should have their cases dismissed on the grounds that abortion amounts to murder, while others are sent to prison on the grounds that control of one's body is a fundamental human right. For these reasons, it is submitted, sentencers should, in general, not base their sentences on the merits of the offender's cause.

There might, however, be two exceptions to this general proposition. First, it may be appropriate for the courts to ask how far a reasonable judge would be swayed by the arguments advanced by defendants in the course of the trial. The concern would be not with the merits of the cause but with the merits of its defence. This would be consistent with the value placed on communication. While it could require considerable mental gymnastics, this should not be beyond the capacity of a competent judicial officer.[114] Second, there are arguably some fundamental legal values in terms of which particular causes can be evaluated.

The relevance of political motivation becomes questionable when the behaviour in question has the potential to encourage disorder.

When politically motivated crime threatens to produce increased disorder, the case for treating politically motivated crime sympathetically may well become more questionable. This was a rationale for the decision in *Dixon-Jenkins*. It also underlies most criticism of claims that there exists a right to engage in civil disobedience.

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112 As, for example, when they sit on the Administrative Appeals Tribunal.

113 Re *Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 per Brennan J.

114 It is a task which many academics must and do perform when assessing essays which advance political positions with which the assessor disagrees.

There are at least two problems posed by the proposition. The first is whether, in any given case, political crime is likely to encourage disorder. In 1990s Australia, there can be little doubt that the answer must normally be that it does not. Political disobedience takes place, but there is no evidence to suggest that it is becoming more widespread or more militant over time. The question is: can one assume that this will always be the case? Most moderate defenders of civil disobedience seem to contend that civil disobedience is unlikely to get out of hand: the sanctions that are imposed on offenders will deter imitation.[115] However, the impact of such arguments is sometimes weakened by a parallel line of argument to the effect that one of the desirable things about civil disobedience is that it is likely to stimulate imitative unrest from hitherto inactive, disadvantaged groups.[116] Moreover, users of political disobedience may lend credence to fears of disorder by hinting that failure to recognise the justice of their demands may lead to resort to uncivil disobedience.[117] And, whatever the effects of sanctions, in eras where aggrieved groups have moved rapidly from civil disobedience to violence, it is understandable that there will be those who believe that any form of political crime carries with it the prospect of disorder.

With hindsight, one can often conclude that fears of disorder have been grossly exaggerated. Just as disorder can apparently escalate, so has it tended even more mysteriously to de-escalate.[118] However, unless the climate is right, or unless politically motivated offenders can convince a court that their behaviour is unlikely to be imitated, courts may well take account of the possibility that their behaviour will stimulate increased disorder absent an appropriate judicial response.

That most weaselish of weasel words, 'appropriate', has been used deliberately. The control of political crime may be accomplished in two rather different ways: by reducing the degree to which people see the need to engage in it, and by increasing the costs associated with it. Tolerance of political crime encourage offenders to maintain faith in conventional political institutions, but it may also raise expectations which if unfulfilled may produce increased disillusionment. It may also suggest to other discontents that political crime may prove a useful strategy. Punitive sentencing policies may alienate dissidents and their sympathisers, but it may also discourage the cowardly and the cautious from

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115 In addition, one might add that a major constraint on political disobedience is that there will usually be non-legal costs associated with political disobedience: these include time, boredom etc. Those very problems which make considerations which make it difficult to mobilise people for licit collective politics will normally make it difficult to mobilise them for illicit politics.

116 Eg Pech in Bedau (1969), 266-8. Whether Pech's analysis is of disobedience or civil disobedience could be a matter of dispute, but this is largely immaterial in the context of the question of an assessment of the fears to which civil disobedience can give rise.

117 See Waldman in Bedau (1969), 114.

118 The normal social science explanation for disorder is injustice. However, if that is the case, how does one explain the decline in political disorder since the late 1960s? Not in terms of increased justice. A more promising explanation involves taking account of expectations (which may rise when grievances are being attended to, actually producing more discontent), and politicisation (which may reflect the degree to which politics appears a promising avenue for achieving objectives — as compared with such alternatives as conventional individual striving, crime, drug use etc).

embarking too readily on a career of political crime. It will often be hard to know what policy will best achieve order, but both the accepting and the punitive policies appear to suggest one common policy: maintaining a strong relationship between the seriousness of the infraction (judged other than in terms of its capacity to encourage disorder) and the penalties imposed. This will minimise the danger that loyal oppositionists will become disloyal, and it will also involve respect for the principles of marginal deterrence.[119] It is also likely to maximise the authority of the law in the eyes of the general public.

Conclusions

The propositions outlined above tend to be reflected in the small number of relevant reported cases. *O'Shanassy* would score a weak positive on communication, a negative on coercion, a positive on powerlessness, and a weak positive on deterrence (the offence was of its nature readily detected). *Dixon-Jenkins* would score a weak positive on communication, a strong negative on coercion (especially since he was attempting to affect his victims' exercise of their rights of free speech), at best a weak positive on powerlessness, and a negative on general deterrence. *Rouse* would be negative on communication, negative on coercion, negative on powerlessness, and negative to neutral on deterrence. *Anderson* (but for the fact that he was not the Hilton bomber) would have scored strongly negative on communication, weakly negative on coercion (since it was not clear who was being coerced to do what); questionably on power; and negatively on deterrence.

However, what these cases also point to is the fact that while it is possible to set out some general propositions relating to political sentencing, a major problem is how courts are to determine those facts on which their sentences are to depend. Giving body to the law will be judicial assumptions about the nature of political crime and political offenders, and these are likely to reflect the interpretations placed on such images of political offenders as presented from time to time by the very media whose inadequacies are among the matters which explain why people resort to political crime in the first place. The task of the political offender may therefore be not simply the difficult task of communicating a political message; it will also be the task of presenting messages about political offending.

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119 For these reasons, I cannot understand why draft card burning was treated as such a serious crime in the US. The penalties imposed by Australian legislation for the analogous offences seem to have been far more appropriate (assuming always that the best way of dealing with the 'offence' was not simply to require a replacement fee for those who had lost/destroyed their card).