


Should Impact Constitute Mitigation?: Structured Discretion versus Mercy*

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 Keywords to Follow

Summary: *Sentencing guidance on the weight to be given to mitigation about the impact of punishment on an offender has differentiated between serious and less serious offending and between degrees and types of disadvantage. This article reviews current sentencing approaches and analyses the justifications for taking impact into account. In particular it notes that increased emphasis on victim impact and a recent “inflation” of seriousness decreases the likelihood that punishment impact will influence sentencing decisions. Consequently, it argues that, at a time of rising use of imprisonment, principled justifications could support more attention to impact, and that this is particularly important where offending lies on the “cusp” of a custodial sentence.*

The Court of Appeal (Criminal Division) has faced, since its inception in 1907, difficult decisions about personal mitigation when considering appeals against sentence or the calculation of the minimum term within a life sentence. As now stated in statute, nothing “prevents a court from mitigating an offender’s sentence by taking into account any such matters as, in the opinion of the court, are relevant in mitigation of sentence” when deciding on custodial, community or financial penalties.¹

Of particular difficulty are the decisions which rest on the weight to be given to information about the deleterious impact of the sentence on the offender or the offender’s family—what Shapland categorised as “future personal circumstances”.² They present particular difficulties for retributivist theory precisely because they are future orientated and because they make problematic our notions of equal punishment. Consequently, they constitute some of the special cases that are dealt

*I am extremely grateful to Susan Easton from whom I learnt a great deal in the course of writing: S. Easton and C. Piper, *Sentencing and Punishment: the Quest for Justice* (Oxford University Press, 2005). I draw on those insights in this article, though the views expressed here are mine.

¹ Criminal Justice Act 2003, s.166(1). See also Sentencing Guidance Council (“SGC”), *Overarching Principles: Seriousness* (SGC, London, 2004).

² J. Shapland, *Between Conviction and Sentence, the Process of Mitigation* (Routledge and Kegan Paul, London, 1981), at p.55. She further subdivides this category (at p.68). Her empirical research used a sample of 100 cases that revealed a total of 876 instances of mitigating factors submitted comprising 229 different factors.

with by von Hirsch and Ashworth as part of the “borderlands” of desert theory³ and they prompt discussion of concepts such as mercy and compassion which are, perhaps, more familiar to theology than penology.

Mean with mercy?⁴

The Sentencing Guidelines Council (SGC) and the Sentencing Advisory Panel (SAP) have referred to personal mitigation in their guidance and recommendations but there has been no detailed discussion so far except in relation to the discount for a guilty plea. Over the years, however, to bring some order to an area of law which may appear as chaotic as some of the lives under review, the Court of Appeal has tended to treat mitigating factors as “of little significance”.⁵ Where, as in the *Dosanjh* guideline judgment on evasion of import duty,⁶ the court is dealing with what it considers to be serious offending, judges are concerned above all not to downgrade a message about seriousness. They argue that the elements of censure and deterrence⁷ in a deserved punishment should not be reduced by allowing mitigation about the personal impact of a sentence to have an effect. The corollary is that the courts normally take impact into account only if the circumstances of the offending are relatively less serious.

Further, when accepting that the punishment will be more onerous because of personal circumstances, the courts tend to justify any reduction in sentence as an exceptional act of mercy. For example, the following statement made by Lord Lane C.J. almost two decades ago was recently endorsed by Sir Igor Judge⁸ when declining to increase the sentence on an 81-year-old sex offender:⁹ “Leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.”¹⁰

What this means is that there is no clearly-articulated penal justification for allowing such mitigation to have effect. Further, if the way in which seriousness is constructed changes with, for example, a greater weight given to persistence of offending,¹¹ then so does the likelihood that mitigation about impact will influence

³ A. von Hirsch and A. Ashworth, *Proportionate Sentencing, Exploring the Principles* (Oxford University Press, 2005), p.131.

⁴ I will argue below that “mercy”, if referring to unstructured discretion, is not the most appropriate approach here. See, A. von Hirsch and A. Ashworth, fn.3 above, at p.165; N. Walker, “The Quiddity of Mercy” (1995) 70 *Philosophy* 27.

⁵ In *Dosanjh (Barjinder)*, *The Times*, May 7, 1998; [1999] 1 Cr.App.R.(S.) 107 the headline for *The Times* report was “Mitigating factors of little significance”.

⁶ *Dosanjh*. The Sentencing Advisory Panel has since issued guidance on tobacco and alcohol smuggling (SAP 2003) which was followed in *Czyzewski* [2003] EWCA Crim 2139.

⁷ *Cunningham* (1993) 14 Cr.App.R.(S.) 444 upheld the ability of sentencers to incorporate the need for deterrence in their assessment of seriousness notwithstanding the terminology of s.2 of the Criminal Justice Act 1991. Several of the cases discussed in this article specifically refer to deterrence as a justification for not reducing a sentence.

⁸ President of the Queen’s Bench Division and a member of the Sentencing Guidelines Council since 2005.

⁹ *Attorney-General’s Reference (No.73 of 2006) (Micklefield)* [2006] EWCA Crim 2508, *The Times*, November 3, 2006.

¹⁰ *Attorney-General’s Reference (No.4 of 1989)* (1989) 90 Cr.App.R. 366.

¹¹ Criminal Justice Act 2003, s.143(2). See A. von Hirsch and J. V. Roberts, “Legislating Sentencing Principles: the Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions” [2004] Crim. L.R. 639.

sentence. In the context of what appears to be more severe sentencing practice,¹² this decreases the incidence of impact as a sentencing factor.

Reported cases and guidance have typically discussed mitigation of penalty in relation to the disadvantageous impact on the custodial experience of illness, disability, old age, or vulnerability to harm from other prisoners. In addition, the impact on innocent others,¹³ notably children, is sometimes taken into account. All provide examples of the approach outlined above.

If we take first, the impact of old age and illness on the custodial experience,¹⁴ the guideline judgment on sentencing for firearms offences issued by the Court of Appeal in 1997¹⁵ evidences the dismissal of mitigation when several factors aggravate seriousness. The judgment also provides an example of a trend to increase, or reflect a policy increase in,¹⁶ the relative seriousness of some kinds of offending and particular aggravating factors. In this case Lord Bingham C.J. said:

“We share the view expressed by the court on earlier occasions that some of the sentences imposed for these offences in the past, sometimes by this Court, have failed to reflect the seriousness of such offences and the justifiable public concern which they arouse.”¹⁷

Where, as here, seriousness has been upgraded, any personal mitigation becomes relatively less weighty when put in the balance. This has also occurred in relation to sexual offences though the recent cases of *NR*¹⁸ and *H*¹⁹ emphasise the difficulties of making such discretionary decisions on the basis of compassion. In *NR* a 68-year-old sex offender in poor health had his sentence of 13 years reduced to 10 years, solely on the grounds of his age and ill-health, with no cases distinguished. Yet the appellant in *H*, who was aged 52 and disabled and would have particular difficulties in prison, received no reduction because of the seriousness of his abuse of his stepsons.

The overriding importance of offence gravity is also evident in decisions on the minimum term to be served in an indeterminate sentence. In *Bata*,²⁰ an application by an 80-year-old prisoner sentenced to life for murder, Jack J. decided that the

¹² See, for example, M. Davis, J-P. Takal and J. Tyrer, “Sentencing Burglars and Explaining the Differences between Jurisdictions” (2004) 44 B.J. Crim. 741 for empirical research suggesting more severe sentencing occurs in England and Wales than in Finland.

¹³ The innocent other is sometimes a spouse or family member in ill-health or disability and sometimes employees who would lose their job. There is insufficient space in the article to deal properly with these issues.

¹⁴ Because illness or disability and old age may co-exist, they are often treated together in appeal cases and the impact of each is not distinguished. For accounts of the experience of older prisoners, see A. Wahidin, *Older Women in the Criminal Justice System: Running out of Time*, (Jessica Kingsley Publishers, London, 2004); E. Crawley and R. Sparks, “Hidden Injuries? Researching the Experience of Older Men in English Prisons” (2005) 44 (4) *The Howard Journal of Criminal Justice* 345.

¹⁵ *Avis* [1998] 1 Cr.App.R. 420 (dealing also with the cases of *Avis*, *Thomas*, *Torrington*, *Marques* and *Goldsmith*).

¹⁶ For example, via increased statutory maxima for particular offences, as in this case.

¹⁷ *Tony Avis*, fn.15 above, at p.430.

¹⁸ *NR* [2005] EWCA Crim 2221.

¹⁹ *H* [2005] EWCA Crim 949; 2005 WL 1185466. See also *Hussain (Mohammed)* [2005] EWCA Crim 1866 where a deterrent sentence on a 62-year-old with angina was not reduced.

²⁰ *Bata (Setting of Minimum Term)*, *Re* [2006] EWHC 468 (QBD).

minimum term should not be reduced on account of the age and considerable ill health of Mr Bata because of the nature of the killing by a single gun shot at very close range.²¹

Prison facilities and unpleasant experiences

The illness or disability of the offender does not, therefore, on its own lead to a reduced sentence and the guideline judgment in *Bernard*²² makes clear that a medical condition that might in the future affect life expectancy does not preclude a prison sentence.²³ What cases before and after *Bernard* suggest is that what is seen as excessive impact of punishment to which the courts will respond appears, rather, to be a high risk of (earlier) death because of prison conditions and facilities.

For example, in *Stark*²⁴ and *Veiga*²⁵ the fact that Stark was suffering from AIDS and Veiga was HIV positive with chronic Hepatitis C, was seen as irrelevant to sentence. In *Green and Leatherbarrow*,²⁶ however, the court took a more sympathetic view of the impact, respectively, of sickle cell anaemia and chronic emphysema: Green was at risk of sudden death if there were no immediate access to suitable medical facilities and Leatherbarrow had severe breathing difficulties which were sometimes critical. More recently, the offender (M) was allowed a further reduction on account of his chronic ill-health and low life-expectancy.²⁷ However, *Bernard* emphasised that mercy—in terms of early release—is generally a matter for the exercise of the Home Secretary's powers.²⁸

Sentencers are also loath to take into account the fact that some prisoners are vulnerable to humiliating treatment or potentially fatal violent attacks from fellow prisoners. For example, in *Parker*,²⁹ where the appellant was segregated (under r.45, previously 43) to protect him from bullying and assaults, the court held that it was not relevant to sentencing that an offender found it exceptionally hard to adjust to prison life. Similarly, in the *Nall-Cain* case a sentence of five years imposed on Lord Brocket was upheld because “a defendant's treatment by other inmates is not generally a factor to which this court can have proper regard.”³⁰

²¹ The circumstances of the murder are worth reading in full: they concern a dispute between holders of adjacent allotments and the dumping of garden waste on the shared path.

²² *Bernard* [1997] 1 Cr.App.R.(S.) 135.

²³ For further discussion on these issues, see A. Ashworth and E. Player, “Sentencing, Equal Treatment and the Impact of Sanctions” in A. Ashworth and M. Wasik (eds), *Fundamentals of Sentencing Theory* (Clarendon Press, Oxford, 1998), at pp.256-261; N. Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (Blackstone, London, 1999), at pp.150-152.

²⁴ *Stark* [1992] Crim. L.R. 384.

²⁵ *Veiga (Jose Dionisio)* [2003] EWCA Crim 2420.

²⁶ *Green* (1992) 13 Cr.App.R.(S.) 613; *Leatherbarrow* (1992) 13 Cr.App.R.(S.) 632. See S. Dyson and G. Boswell, “Sickle Cell Anaemia and Deaths in Custody in the UK and USA” (2006) 45(1) *Howard Journal* 14 for the context of *Green*.

²⁷ *Attorney-General's Reference (No.7 of 2005)* [2005] EWCA Crim 56. Because the aggravating factors were deemed more serious by the Court of Appeal than by the trial judge the five-year sentence was not reduced.

²⁸ Then under Criminal Justice Act 1991, s.36, now Criminal Justice Act 2003, s.248: one of the few remaining powers of the Home Secretary. See also, Walker (1999), fn.23 above, at pp.212-220 for a discussion of the prerogative of mercy.

²⁹ *Parker* [1996] Crim. L.R. 445. He had been given a sentence of 18 months for a robbery where the victim was a 16-year-old girl in the street.

³⁰ *Nall-Cain (Charles)* [1998] 2 Cr.App.R.(S.) 145 at 150, *per* Rose L.J. In this case the prisoner had been assaulted and threatened and was, in the event, moved for his own

Perhaps the most vulnerable prisoners are those who are most vilified not only by the public but also by other prisoners, notably sex offenders who commit offences against children and who will spend much of their sentence under r.45. In the late 1970s *Holmes*,³¹ a rapist, was given a reduced sentence on this ground but the general approach to vulnerable prisoners is now applied to such offenders.³² Interestingly, this approach is not in line with a recent decision on whether or not to grant bail where W's "unpleasant experiences in custody" constituted a material consideration in the grant of bail.³³

It would also appear that "mercy" should be dealt out only if, as in equity, the claimant has clean hands.³⁴ If the court concludes that the mitigation has been used before or a disability has been used to avoid detection the courts are reluctant to reduce the sentence and may consider the circumstances to be an aggravating factor. For example, *Kesler*³⁵ concerned a third Class A drugs offence where the minimum sentence is seven years.³⁶ K was given seven and a half years but had received relatively lenient sentences for his first two Class A convictions. The court found the offending too serious to take account of the mitigation and went on to say:

"[I]t is plain that he has been using his health as a means of obtaining sympathy and of deception and he has already gained from his previous sentences such benefit as could possibly be accorded to him for those matters."³⁷

In recent years the courts have, however, been readier to take account of the impact on female prisoners of the current difficulties of the Prison Service in accommodating them.³⁸ *Mills*,³⁹ for example seems to allow as mitigation the fact that, if the offender is a mother, she may be allocated to a prison far from her home and children and so the impact of loss is greater because of the sparsity of visits. Furthermore, perhaps as a reflection of the publicity generated by fathers' groups in relation to contact with their children on divorce, there is also pressure for better

protection seven times in his two and a half years in prison. See, *Call me Charlie: the Autobiography of Lord Brocket* (Simon and Schuster, 2004).

³¹ *Holmes* [1979] Cr.App.R.(S.) 233.

³² This is in line with the outcome of *R. (on the application of G) v Home Secretary* [2005] EWHC 2340 (Admin). The prisoner (G) committed further offences after release from a sentence served in a Protected Witness Unit ("PWU"). On return to prison he was initially detained in a PWU but later transferred, as a category A prisoner, to a self-contained unit at HMP Belmarsh. By judicial review G challenged both the regime and the categorisation and sought a declaration that the conditions constituted a breach of Art.2 of the ECHR. All claims failed.

³³ *R. (on the application of AW) v Kingston-Upon-Thames Crown Court* [2005] EWHC 703: this was an application—by a prisoner who previously suffered a serious sexual assault while in custody and was still considered vulnerable—for judicial review of a decision to refuse bail.

³⁴ *Stark*, fn.24 above, had continued to obtain heroin for supply after previous leniency and this was also noted by the Court of Appeal.

³⁵ *Kesler (Anthony John)* [2005] EWCA Crim 939.

³⁶ Under the Powers of Criminal Courts (Sentencing) Act 2000 s.110.

³⁷ At [14], *per* Ouseley J. At [8] it had also been noted that "He used to give the impression of innocent behaviour by going out with his dog to collect the drugs, and because of his disability had a stick, but it was hollowed out so that he could keep his drugs in it."

³⁸ The court in *Witten (Sarah Jane)* [2002] EWCA Crim 2628 had done so: see later discussion.

³⁹ *Mills* [2002] EWCA Crim 26.

contact between male prisoners and their children, because of distress to fathers as well as children.⁴⁰

The young offender

One category of offenders—children and young people over the age of 10 years and below the age of 18—might be seen as a category which is already the subject of generic mitigation. Notions of reduced culpability and loss of “developmental time” justify reduced penalties for minors,⁴¹ as does acknowledgement that for young prisoners time may pass more slowly.⁴² These justifications for lower levels of proportionate sentencing⁴³ are important, given that, since the Criminal Justice Act 1991, the same “just deserts” criteria have applied to adults and minors.

Arguably, however, it is the continuing applicability of s.44 of the Children and Young Persons Act 1933 that ensures the consideration of such arguments. That section imposes a duty on the youth and criminal courts to “have regard to the welfare of minors” when dealing with their trial and sentence. It is a weak principle, unlike the welfare principle operating in the family courts,⁴⁴ and exists alongside the more recently imposed aim for the youth justice system of preventing offending.⁴⁵ Nevertheless, as the high profile appeals of Jon Venables and Robert Thompson proved, it can be an influential principle: it ensured that the child’s welfare and progress must be periodically reviewed when determining the minimum period to be served in detention.⁴⁶

On the other hand, there are indications that, even for young people, the policy preoccupations with dangerous offenders are taking precedence. As *Youth Justice—the Next Steps* noted:

“The most serious offences are no less damaging to victims and the community, and the most dangerous offenders are no less of a threat, because they involve under-18-year-olds.”⁴⁷

The new protective custodial sentences in ss.226 and 228 of the Criminal Justice Act are mandatory if the conditions are met.⁴⁸

Recent cases would also suggest that courts consider “youth”, as with other impact mitigation, of little significance if the offending is very serious. For example, the facts of a recent case involving offenders aged 17 and 19 led the court to state

⁴⁰ See, for example, S. Watson and S. Rice (with prisoners at HMP Wolds), *Daddy’s Working Away* (Care for the Family, London, 2004).

⁴¹ See the discussion in A. von Hirsch, “Proportionate Sentences for Juveniles: How Different than for Adults?” (2001) 3 *Punishment and Society* 221.

⁴² See recent research: N. Cope, “‘It’s no Time or High Time’: Young Offenders’ Experience of Time and Drug Use in Prison” (2003) 42 *Howard Journal* 33.

⁴³ Strictly speaking, we should not refer to the “sentencing” of minors in the youth court which. Instead, the court makes an order upon a finding of guilt (Children and Young Persons Act 1933, s.59).

⁴⁴ Children Act 1989, s.1 which establishes that the child’s welfare is paramount in relation to decisions concerning their upbringing.

⁴⁵ Crime and Disorder Act 1998, s.37(1).

⁴⁶ *Thompson (Tariff Recommendation)*, Re [2001] 1 All E.R. 737 (for the background see also *V and T v United Kingdom* (2000) 30 E.H.R.R. 121).

⁴⁷ Home Office, London, 2003.

⁴⁸ See Easton and Piper, fn.1 above, at pp.255–256.

that, for such types of offending, a custodial sentence must be imposed “save in the most exceptional cases, such exceptions arising, for example, by reasons of extreme youth.”⁴⁹ Being “young” was insufficient. No distinction was made between the two offenders on grounds of age and it was other forms of mitigation that influenced the court’s decision in their favour. Similarly, in a case involving a series of offences with very serious aggravating factors, the mental age of 10-and-a-half of one 18-year-old was not considered relevant.⁵⁰

What the practice with young offenders would suggest is that clear law and guidance is necessary to ensure that a particular factor, in this case age, is routinely be taken into account where it applies. It also suggests that policy priorities in regard to both seriousness and dangerousness can reduce the effect of such generic mitigation to negligible proportions.

Innocent others

The issue of prisoners’ children has also recently gained a higher profile both in the media and in academic research.⁵¹ Here, where the focus is punishment impact on innocent others, the appellate court has taken a relatively stringent approach,⁵² notwithstanding the message in *Mills*⁵³ that courts should where possible take into account whether the offender is a primary carer for a child. This approach is exemplified by a recent series of cases involving women who took Class A drugs into prison for the person they were visiting. Jeanne Batte, for whom the Appeal Court substituted a two-year sentence with immediate suspension was clearly told by Buxton L.J.:

“We consider that this is a wholly exceptional case . . . we wish to emphasise strongly that this is the type of offence where circumstances that may otherwise count in mitigation . . . do not normally play a role.”⁵⁴

The exceptional circumstances that gained the “act of mercy” requested by her lawyer included severe depression with a risk of a suicide attempt, care for a disabled brother of 69 (she was 60), the death of one child and the severe illness of two others. Here the impact on the mother as well as the children was taken into account.

Sarah Witten⁵⁵ also had her sentence reduced (from three and a half years to two years) because of the impact on her three children aged six, five and three. Carmen

⁴⁹ *Attorney-General’s Reference (Nos 21 and 22 of 2004)* [2004] EWCA Crim 3048.

⁵⁰ *Attorney General’s Reference (Nos 39, 40 and 41 of 2005)* [2005] EWCA Crim 1961: “Their youth and low intelligence of the second offender, provide no explanation and only modest mitigation” (at [26], *per* Holland J.).

⁵¹ See, for example, B. Brooks-Gordon and A. Bainham, “Prisoners’ Families and the Regulation of Contact” (2004) 26 *Journal of Social Welfare and Family Law* 263; H. Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan, Cullompton, 2006); H. Codd, “Prisoners’ Families: Issues in Law and Policy” (2004) 55 *Amicus Curiae* 2; S. Salmon, “Children with a Prisoner in the Family” (2004) *Childright* 203 at pp.18-20

⁵² For a review of wider legal issues regarding mothers in custody, see V. Munro, “The Emerging Rights of Imprisoned Mothers and their Children” (2002) 14 *Child and Family Law Quarterly* 303.

⁵³ [2002] EWCA Crim 26.

⁵⁴ *Batte (Jeanne)* [1999] 2 Cr.App.R.(S.) 223 at 225.

⁵⁵ *Witten*, fn.38 above.

Mackenzie had only one child but her husband had a life-threatening illness and on these grounds her sentence was reduced from nine months to two months.⁵⁶ In *Babington*,⁵⁷ however, no reduction was given: the court distinguished *Witten* because Angela Babington's children were older, had all been in care and only one of her children was living with her at the time of sentence.

In the recent case of *Ingram*,⁵⁸ where the court reduced the sentence on a father from six years to five years, the effect on the children was also enhanced by the effect on a business and the indirect effect on the children's security of the failure of the business.⁵⁹

Such relatively minor reductions, however, can hardly significantly lessen the detriment to the children and justifying anything more would be difficult in the current climate. A higher priority is currently given to the impact of offending on the victim and their family, evident, for example, in the piloting of oral family-impact statements to court.⁶⁰ This also increases the level of seriousness of the offending, a trend not countered by the clear priority of the Rebalancing Sentencing Unit at the Home Office to "encourage tough and rigorous sentences".⁶¹

Sentencing courts now also take a tougher line when considering a recommendation for deportation. In *Nazari* in 1980 Lawton L.J. stated that "This court and all other courts would have no wish to break up families or impose hardship on innocent people"⁶² and that it was proper for a court to consider the impact of deportation on persons not before the court. However, by the time of the recent case of *Carmona*⁶³ the court had transferred responsibility for assessing such impact to the Asylum and Immigration Tribunal when the sentence has expired. The court stated that, in the light of the Human Rights Act 1998 and the full range of relevant Art.8 issues to be addressed, it is now unnecessary and undesirable for a judge to assess the effect on innocent family members.⁶⁴

Justifying current policy

Where the effect of personal circumstances on punishment impact is taken into account, as we have seen, there is virtually no explanation in terms of penal principles. There is some structure to the exercise of discretion, as the above review of cases reveals, but it often lacks detail and authority. The impact of punishment is subsumed in the judicial exercise of discretion in relation to personal circumstances

⁵⁶ *McKenzie* [2004] EWCA Crim 38. For a brief commentary see N. Stone (2004) 51 *Probation Journal* 183.

⁵⁷ *Babington (Angela Dawn)* [2005] EWCA Crim 866.

⁵⁸ *Ingram* [2004] EWCA Crim 187.

⁵⁹ The case report is more concerned with reviewing the mitigation concerning the effect on the business and employees than the children.

⁶⁰ See Department for Constitutional Affairs, *Your Choice to Have a Voice in Court* (Office for Criminal Justice Reform, London, 2006).

⁶¹ See, www.homeoffice.gov.uk/about-us/organisation/directorate-search/noms/olsp/rebalancing-sentencing/. However, its other main aim to encourage sentencing guidance which makes "cost effective use of capacity" could encompass reduced sentences to achieve equal impact.

⁶² *Nazari* [1980] 1 W.L.R. 1366 at 1374. This guideline judgment dealt with four appeals.

⁶³ *Carmona (Nelson)* [2006] EWCA Crim 508.

⁶⁴ Further, the court decided that a recommendation for deportation could be made by the sentencing judge notwithstanding the relatively lenient sentence of 15 months' imprisonment that was imposed.

and, where explicitly justified by defence counsel or judge, the reference is to mercy. Such discretion is also exercised sparsely and only when the offending is not serious or the sorrows and sensibilities are multiple and grave. Further the judicial message is that the discretion to exercise mercy should preferably operate elsewhere. Rarely then do those circumstances of the offender which will affect punishment impact become a required variable in the calculation of punishment.

There are several compelling arguments to support this very cautious approach to impact mitigation. A reduced sentence might indeed not provide the censure that is at the heart of modern retributivism⁶⁵ or the denunciation that the public requires and it might lessen the deterrent effect if offenders believe that they can offend with impunity. There is also the popular “you should have thought of this before” argument in relation to offenders on whom punishment would impact particularly harshly.⁶⁶ Further, media reports would suggest that the public want to “see” equality of treatment for offences which are of similar gravity and believe injustice has been done if an outcome “looks” too lenient or too severe in comparison to known cases.

Perhaps the best example of public misunderstandings and mistrust about the principle of equal impact is the outcry that resulted from the introduction of unit fines in 1992.⁶⁷ Although the impact of a fine on the offender’s financial resources had long been taken into account,⁶⁸ the new provisions were repealed almost as soon as they were implemented.⁶⁹ Unit or day fines—whereby all fines were calculated as the product of a level of seriousness with a unit of financial assessment based on the offender’s disposable salary—are again being promoted,⁷⁰ although enforcement of payment is currently given a higher priority in government policy.⁷¹ Further, Moore’s research suggests magistrates are loath to reduce fines low enough to reflect adequately a lack of financial resources⁷²: giving a strong message of censure is deemed more important.

It is, of course, even more difficult to strive for equal impact of custodial sentences than fines particularly because of the relative uncertainty of information about either the punishment or the offender though Ashworth and Player argue that the differences could be accommodated.⁷³ Given these problems, can assessing and taking more account of punishment impact be justified?

⁶⁵ See, for example, A. von Hirsch, *Censure and Sanctions*, (Clarendon Press, Oxford, 1993).

⁶⁶ The appellant in *McKenzie* was told she had “brought it upon herself”: see fn.56 above. This is also a common response amongst the students on our Sentencing and Punishment module.

⁶⁷ Criminal Justice Act 1991, s.18.

⁶⁸ Although the power to raise as well as lower the level has been possible only since the Criminal Justice Act 1993. The exception is fixed penalties: see Easton and Piper (2005), fn.1 above, at p.230.

⁶⁹ By s.65 of the Criminal Justice Act 1993 inserting a new s.18 in the Criminal Justice Act 1991.

⁷⁰ See the Carter Report, *Managing Offenders, Reducing Crime: a New Approach*. (Home Office, London, 2003), at p.27.

⁷¹ A new National Enforcement Service is planned from April 2007. See also, Home Office, *Fine Enforcement in Magistrates’ Courts* (Home Office, London, 2002).

⁷² R. Moore, “Executing Warrants against Fine Defaulters: the Continuing Search for Effectiveness and Efficiency” [2003] Crim. L.R. 595; Easton and Piper (2005), fn.1 above, at pp.228-229.

⁷³ Ashworth and Player (1998), fn.23 above, at pp.258-260.

Justifying more emphasis on impact

In the cases reviewed above, the judicial imperative was not to dilute the messages that flow from a punishment which is strictly commensurate to seriousness. The dominant sentencing principles for “normal” offenders—those not deemed to be dangerous⁷⁴—still appear to be proportionality and “just deserts” and in theory retributivist principles could justify taking impact of sentence into account. The argument would be that, if the proportionality and deservedness of punishment is what justifies its imposition, it is unjust if the experience of punishment is disproportionate to the seriousness of the offending.

”In subjective terms . . . two years’ imprisonment in a single setting will have very different meanings to different offenders who have committed the same crime. Two years’ imprisonment in a maximum security prison may be a rite of passage for a Los Angeles gang member. For an attractive, effeminate twenty-year old, it may mean the terror of repeated sexual victimization. . . . For an unhealthy seventy-five-year old, it may mean a death sentence.”⁷⁵

The aim of just deserts sentencing could be to impose a proportionate amount of punishment impact for a particular amount of seriousness. As reported cases reveal, certain categories of “disadvantage” have led to sentence reductions. If reductions were justified, not on the compassionate exercise of discretion, but on the ground that the custodial experience will be physically or psychologically more onerous, quantity is, in effect, traded for (bad) quality.

Retributivist principles could also justify taking account of collateral consequences to innocent children and others on the basis that punishment of the innocent can never be condoned: only the offender should be punished, not his family. However, it would be difficult in practice to do this without imposing a disproportionately lenient sentence on the offender that might not be justifiable in relation to impact on the offender. The focus should, then, be on developing acknowledged sentencing principles in relation to the impact of personal factors on the offender’s experience of punishment. Education of the public in regard to new principles would be necessary to avoid a repeat of the public hostility to the apparent inequity of sentences which resulted from the introduction of unit fines.

Further, in line with the retributivist focus on desert as part of an objective standard of punishment which has no room for the subjectivity of discretion, these principles must constitute a structured sentencing framework which deals with the weight to be given to impact factors. If mercy, as compassion, is distinguished from justice and rule following—and this begs an enormous question and a mountain of academic answers⁷⁶—then the merciful exercise of discretion is not an acceptable mechanism for taking account of punishment impact. Sentencing reductions which cannot be justified by reference to penal theory might be appropriate if, as a public policy issue, it is deemed appropriate that the courts take into account factors

⁷⁴ Those requiring orders under ss.224-229 of the Criminal Justice Act 2003.

⁷⁵ M. Tonry, *Sentencing Matters*. (Oxford University Press, 1996), at p.19.

⁷⁶ See, for example, Walker (1995), fn.4 above, who reviews the approaches of seminal writers on the subject and then classifies into 21 categories the reasons sometimes given for exercising mercy. He further classifies these into three groups by their relationship with rule following and “justice”.

which do not directly concern impact on the offender, or factors which relate to the conviction itself or “natural justice”.⁷⁷ If the issue is simply the welfare of the child then “mercy” could also be routinely exercised as a policy decision imposed on the courts via guidance. However, where the offender’s separation from their children (possibly permanently as a result of imprisonment)⁷⁸ imposes extra suffering on the offender during punishment then that should be part of the calculation of proportionate impact. That suffering is well documented and could be routinely so calculated.

However, classical retributivists might not support even this narrower focus because their philosophy depends on a particular view of human beings. For Kant the model of the individual is of a rational agent who deserves the full punishment and could be expected to take impact of punishment into account when choosing whether or not to offend.⁷⁹ A sentencing focus on proportionality of impact, however, does not necessarily undermine Kant’s emphasis on the free will of the offender or Hegel’s “right” to punishment⁸⁰: the state is simply ensuring that a just and proportionate punishment is provided. Further, desert theory could more easily incorporate this focus if it were justified as principled mitigation of impact across specified classes of offenders, thus reducing the risk of undue variation of sentences.⁸¹

If retributivist principles could justify a principled application of impact factors then there are also well-rehearsed utilitarian arguments for so doing and, arguably, the Criminal Justice Act 2003 has put more emphasis on utilitarian thinking.⁸² For the utilitarian the assessment of what Bentham referred to as “the several circumstances influencing sensibility”,⁸³ and the calculation of punishment “pain”, is done to make judgments about the effectiveness of punishment via rehabilitation, deterrence or containment. However, the utilitarian is also frugal: the amount of punishment should be the least possible and the most cost-effective for the purpose.

⁷⁷ The approach of the courts to other personal mitigation is very similar to impact cases. For example, in *Robinson* the court decided on a custodial sentence because of the breach of trust involved and the personal mitigation did not amount to “exceptional circumstances” such that a suspended sentence could be justified (under the Criminal Justice Act 1991). The personal circumstances of the postmistress included bankruptcy (because of a large loan and subsequent drop in property values) and the fact that her husband had lost his employment and was in hospital. See *Robinson* [1993] Crim. L.R. 404.

⁷⁸ The living arrangements of about 8,000 children each year are affected by their mother’s imprisonment and about 8% of children who were living with their mother before her imprisonment are taken into local authority care. See, www.womeninprison.org.uk/index.php?option=com_content&task=view&id=35&Itemid=44.

⁷⁹ “Autonomy, then, is the basis of the dignity of human and every rational endeavour”: Immanuel Kant, *Fundamental Principles of the Metaphysics of Ethics* (1785), trans. T. K. Abbott (Longmans, London, 1969), at p.65.

⁸⁰ G. W. Hegel, *Hegel’s Philosophy of Right* (1832), trans. T. M. Knox, (Clarendon Press, Oxford, 1952).

⁸¹ I am grateful to an anonymous referee for suggesting this point.

⁸² Koffman, for example, argues that proportionality has declined in importance since the Criminal Justice Act 1991 and its status has been further confused by the 2003 Act. See, L. Koffman, “The Rise and Fall of Proportionality: the Failure of the Criminal Justice Act 1991” [2006] Crim. L.R. 282.

⁸³ Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (1789), ed. J. L. Burns and H. L. A. Hart (Clarendon Press, Oxford, 1996), at p.169.

This raises the issue of sentence feasibility⁸⁴: is it likely, given the personal circumstances of the offender that they will be able to undertake the proposed sentence effectively? If not, this would justify reducing the use and amount of imprisonment, or not imposing particular community penalties, when, for example, the very old or very ill, or those with too many care-giving commitments are not capable of responding to rehabilitation programmes or are not in a position to re-offend. For example, although it has long been government policy to divert the mentally ill from prosecution and prison, in practice the prison population has a disproportionate number of people with a mental disorder.⁸⁵ Carlen has queried whether it is realistic “to expect emotionally and mentally damaged recidivist clients” to undertake an effective punishment.⁸⁶ Further, the effectiveness of custody also appears to be influenced by the ability to maintain family ties: prisoners who do so are six times less likely to re-offend.⁸⁷

Even Bentham admitted that it would be impracticable to put fully into operation the aim of producing for every offender a proportionate amount of “pain” in a sentence, but there is a strong utilitarian argument for focusing on impact in relation to particular categories of offenders. In particular the differential impact of the custodial experience has been the focus of recent research in relation to ethnicity,⁸⁸ gender⁸⁹ and the mentally ill.⁹⁰ The difficulty here is that of distinguishing between group sensibilities and group disadvantages. The former refers to those individual circumstances that affect impact of punishment but which can be generalised across groups such as the young, the old, the ill, primary carers and the very vulnerable. The latter refers to those factors which “pre-dispose” to offending or being apprehended and so undermine the idea of equal impact of punishment across known offenders. For example, the latest review by Harper and Chitty of the impact of corrections on re-offending notes that data from the recent Offender Assessment System (“OASys”) suggests that offenders have on average four problems, including accommodation, unemployment or substance misuse, which contribute to their committing a crime.⁹¹

So here we come to the problem that is often used as an argument for not starting down the “slippery slope” of taking impact into account: where do you

⁸⁴ P. Carlen, “Crime, Inequality and Sentencing” in P. Carlen and D. Cook (eds), *Paying for Crime* (Open University Press, Milton Keynes, 1989); B. Hudson, “Mitigation for Socially Deprived Offenders” in A. von Hirsch and A. Ashworth (eds), *Principled Sentencing, Readings in Theory and Practice* (Hart Publishing, Oxford, 1998).

⁸⁵ A recent report was highly critical of the use of prisons to warehouse the mentally ill, instead of diverting them from prison. See, *Troubled Inside: Responding to the Mental Health Needs of Men in Prison* (Prison Reform Trust/King’s Fund, London, 2005).

⁸⁶ Carlen (1989), fn.84 above, at p.22

⁸⁷ Social Exclusion Unit, *Reducing Re-offending by Ex-prisoners* (Social Exclusion Task Force, London, 2002).

⁸⁸ See the references and discussion in Easton and Piper, fn.1 above, at pp.235-240 and pp.357-363.

⁸⁹ See, for example, Fawcett Society, *Understanding your Duty, Report on the Gender Equality Duty and Criminal Justice System*, (Fawcett Society, London, 2006).

⁹⁰ See fn.85 above. There has also been pressure for changes in the Sentencing Guidelines in relation to drug couriers though the issues are not solely related to impact of punishment; see, Esmee Fairbairn Foundation, *Rethinking Crime and Punishment*, Executive Summary (Esmee Fairbairn Foundation, London, 2004), at p.9.

⁹¹ G. Harper and C. Chitty (eds), *The Impact of Corrections on Re-offending: a Review of “What Works”* (3rd edn, Home Office Research Study 291 (HORDSD), London, 2005).

stop? If we allow personal mitigation on sentence impact to be taken into account, why not those issues relating to structural factors and social deprivation? The division between the two categories is in any case not clear: structural factors also impact on health and on family formation, for example. Von Hirsch and Ashworth argue that taking account of some aspects of structural disadvantage might be justified as reduced culpability, or societal failure, but otherwise requires notions of compassion. Their conclusion that better responses to the effects of social deprivation lie in lower penalty levels generally and in changes elsewhere in the criminal justice system is compelling.⁹² Perhaps even more importantly, effective responses lie in social policy change.

Mitigation and custody rates

The issue of impact of punishment is clearly a very complex one. It is also an issue that deserves a higher profile in current policy debate for pragmatic reasons at a time of rising custody levels. Populist punitiveness has led to an inflation of calculations of seriousness at policy and sentencing levels with, as we have noted in reported cases, a consequently reduced acceptance of mitigation about punishment impact. Yet we also now have more research evidence that mitigation is important on the “in/out” line: in those “cusp cases” where the seriousness of the offending lies on the community/custodial sentence boundary. In England and Wales continuing research by Hough, Jacobson and Millie about the use and implications of personal mitigation suggests that issues relating to the offender’s circumstances are very important in justifying the imposition of a non-custodial sentence.⁹³ Conversely, this research, and that of Tombs in Scotland,⁹⁴ showed that the criminal history of the offender was much more influential in justifying the imposition of custody. Particularly in the lower courts, sentencers “claimed to know when ‘enough was enough’, when ‘the time had just come’ for a prison sentence”⁹⁵ with the result that a relatively minor offence could lead to custody as a “last resort”.⁹⁶ To move more “cusp cases” down the penalty ladder would require a challenge to these assumptions of the “need” for custody and also a greater awareness of personal mitigation and its impact.

A recent case would also suggest that the lower courts may well be placing more emphasis on harm to the victim and on giving a tougher message than guidance from the higher courts—or justice—warrant. In *AP*⁹⁷ the appellant (when aged 16 and about 22) had indecently assaulted his cousin (when aged 7 and 13 or 14). The trial judge explained that, notwithstanding the personal circumstances of AP, “I have to consider . . . the victim and to demonstrate that the court does not tolerate this sort of behaviour.”⁹⁸ On appeal, Mance L.J. felt that more weight could be

⁹² Von Hirsch and Ashworth, fn.4 above, at pp.63-74.

⁹³ M. Hough, J. Jacobson and A. Millie, *The Decision to Imprison: Sentencing and the Prison Population* (Prison Reform Trust, London, 2003).

⁹⁴ J. Tombs, *A Unique Punishment: Sentencing and the Prison Population in Scotland*. Edinburgh (Scottish Consortium on Crime and Criminal Justice, 2004)

⁹⁵ J. Tombs and E. Jagger, “Denying Responsibility, Sentencers’ Accounts of their Decision to Imprison” (2006) 46 B.J. Crim. 803.

⁹⁶ Hough *et al.* (2003), fn.93 above.

⁹⁷ *AP* [2005] EWCA Crim 425.

⁹⁸ *AP*, Westlaw transcript at 9.

given to the fact that the appellant had severe learning and speech difficulties, had a history of being bullied and intimidated at school, had been socially isolated as an adolescent and had twice attempted suicide. He also felt that a further period in prison would be “a tragic situation for the family” and consequently a community rehabilitation order was substituted.⁹⁹ In *Mills* too the sentencing judge had clearly considered that there was no alternative to a sentence of imprisonment but Woolf L.C.J. argued that other factors, including impact factors, could be taken into account to justify a different sentence.¹

Conclusions

If one believes that “a sentencing system should strive to avoid its punishment having an unequal impact on different offenders or groups of offenders”² and should strive to provide fair treatment then, as Ashworth and Player point out, there are two particular problems: the variable content of a single sentence of imprisonment and a varying reaction of offenders to similar punishments.³ The two issues are related but this article has concentrated on the second issue; the first issue requires revisiting the equality/difference debate in relation to age, gender and race issues in prison regimes but is otherwise a question for policy and resource allocation.⁴

To achieve the necessary shifts in thinking about the relationship between seriousness and mitigation to allow more consideration of sentence impact, sentencing discretion needs more structure, not less. Further, whatever the merits of restorative justice, the argument of its proponents that: “Diversity and flexibility are crucial in dealing with individual circumstances. There is no definitive model and ‘one size’ is never likely to fit all”⁵ is a problematic one in the sentencing context. Principled distinctions need to be made between those factors which affect directly the pains and proportionality of imprisonment and those which must be dealt with as issues separate from sentencing. Indiscriminate use of mitigation will discriminate unfairly and, as Wasik notes, “The problem is all the more acute when it makes the difference between custody and not custody.”⁶

What should not occur is a greater use of compassion as a purely discretionary exercise: the approach of the court in *Bernard*⁷ is, as von Hirsch and Ashworth have argued, “plainly objectionable” in its endorsement of reduced sentences as “an act of mercy”.⁸

⁹⁹ *AP*, Westlaw transcript at 10.

¹ *Mills* [2002] EWCA Crim 26; [2002] 2 Cr.App.R.(S.) 52 at 232-233, [12] and [15]-[17].

² Ashworth and Player (1998), fn.23 above, at p.253.

³ Ashworth and Player (1998), fn.23 above, at p.254.

⁴ For a discussion of minimum standards, security classification and regime activities, see Ashworth and Player, fn.23 above, at pp.261-269.

⁵ S. Ticknell and K. Akester, *Restorative Justice, the Way Ahead* (JUSTICE, London, 2004), at p.102.

⁶ M. Wasik, “Going Round in Circles? Reflection on Fifty Years of Change in Sentencing” [2004] Crim. L.R. 253 at p.265.

⁷ [1997] 1 Cr.App.R.(S.) 135.

⁸ von Hirsch and Ashworth (2005), fn.4 above, at p.169, referring also to R. Harrison, “The Equality of Mercy” in H. Gross and R. Harrison (eds), *Jurisprudence: Cambridge Essays* (Clarendon Press, Oxford, 1992). See also, Walker (1999), fn.23 above, at p.213. Eisenberg

My preference would be for retributivist principles to be applied to impact factors as a matter of principle not mercy or compassion. If the conditions of custody are ignored then a sentence—as experienced—may well be disproportionate in reference to penal theory and human rights jurisprudence.⁹ Similar arguments can also be made in relation to the inability to pay a financial penalty or comply with the terms of a community order. Such principles could be supplemented by utilitarian reasoning in the type of compromise that is typical of English sentencing practice.¹⁰

What should also not be forgotten is that practicalities are often determinative of outcome. As two Circuit judges noted in 1987, “It is difficult to exaggerate the importance of proper preparation of the mitigation by defence solicitor or counsel”¹¹ and “the significant difference to their client’s future” they can make.¹² Yet Shapland found “a very great disparity over what mitigating factors were put forward”: some barristers did not ask the relevant questions to elicit the information, whilst others did not adequately “sift” the information to find it.¹³

Nevertheless, fundamental issues arising from the knowledge that structural factors predispose some people to offending cannot be dealt with in sentencing. Duff’s comment that “the preconditions of just punishment are not met within our political societies, and are not likely to be met within the near future”¹⁴ is a valid one, but those pre-conditions are an issue for policy elsewhere; sentencing is not the place. The even wider issue about the distribution and impact of punishment is also beyond the scope of the sentencing courts: because only a small proportion of offenders are detected, arrested, prosecuted and sentenced there is no punishment impact on the 97 per cent of offenders who do not proceed to sentence.¹⁵

As Hirsch and Ashworth argue, the issue should not be debated as an “all-or-nothing” issue. Given the ever-increasing levels of custodial sentencing, the pragmatic reasons for taking more account of impact mitigation are important. Where it can be justified on principle, there is a strong case for encouraging sentencing courts to take mitigation into account. This article has argued that this can be done more extensively and universally in relation to punishment impact. Perhaps this is as far as the sentencing courts can go in seeking to do justice even if it leaves a feeling of injustice that for some it is easier to manage life, and that the equal application of the criminal law has unequal impact.

and Garvey argue, however, that “A single act can be both just and merciful” (T. Eisenberg and S. Garvey, “The Merciful Capital Juror” (2004) 21 *Ohio State Journal of Criminal Law* 165 at fn.5 on p.168).

⁹ See van D. van Zyl Smit and A. Ashworth, “Disproportionate Sentences and Human Rights Violations” (2004) 67 *M.L.R.* 541.

¹⁰ Swedish law provides an example of criteria for taking account of “equity mitigation” though the criteria are wider than impact issues: see, for example, von Hirsch and Ashworth (2005), fn.4 above, at pp.165-167.

¹¹ E. Stockdale and K. Devlin, *Stockdale and Devlin on Sentencing* (Waterlow Publishers, London, 1987), at p.91.

¹² Stockdale and Devlin, fn.110 above, at p.94.

¹³ Shapland (1981), fn.3 above, especially at p.119.

¹⁴ R. Duff, “Probation, Punishment and Restorative justice: Should Altruism be Engaged in Punishment?” (2003) 42 *Howard Journal* 181 at p.192.

¹⁵ See N. Lacey, “Punishment and Community” in A. von Hirsch and A. Ashworth, *Principled Sentencing, Readings on Theory and Policy* (Hart Publishing, Oxford, 1998), pp.394-408 at p.404. See also D. Cook, *Criminal and Social Justice* (Sage, London, 2006).