

---

## Tempering Justice with Compassion: Rationales of Personal Mitigation in Sentencing

---



**Bas van Stokkom**

### **Introduction**

In his book *Crime, Punishment and Restorative Justice* Ross London argues that the expression of remorse constitutes an important instrument for restoring trust in an offender and therefore would operate to reduce the demand of punishment (2011: 176). It is a widely accepted and well-settled legal principle that remorse should be treated as a mitigating factor in sentencing (if it is proved to the sentencing court's satisfaction). But there is comparatively little sustained explanation for its rationale, in either case law or jurisprudential commentary (Proeve and Tudor, 2010: 115).

When offenders show remorse and take responsibility, what are exactly the consequences of imposing punishment? I will argue that a 'remorse discount' is not always logical; offering a non-custodial sanction-track may sometimes be more convincing.

In justifying a sentencing discount several issues obstruct a clear discussion. The grounds on which to grant a possible discount differ. In this chapter I will try to offer more coherent reasons to legitimate less severe sentences (mitigation), be it a discount or a non-custodial sanction. Now mitigating considerations of justice can be oriented at culpability, operating within the logic of just deserts. For example when an offender has mental disabilities and therefore is deemed less accountable. But I will focus on personal mitigation factors, especially offenders who *ex-post-facto* apologise and want to make

good. In considering these factors there is not always a connection with the wrongdoing, e.g. when an offender is allocated a non-custodial punishment in order to maintain his family obligations. So I will not discuss factors that mitigate gravity (harm; culpability), but only personal factors (features of the offender's personality and life circumstances).

I will try to bring more order in these factors and explicate several rationales, but I will focus on remorse. Indeed, this remorseful attitude, the 'change of heart' and the willingness to make good, is in the centre of many restorative justice theories. Although recently the debates on restorative justice have focused much attention on responsible offenders, personal mitigation is still an under-theorised aspect in punishment theory.

Many judges—and the public—do recognise the importance of personal mitigation factors, but just deserts theorists regularly object because sentencing uniformity should prevail. They tend to disqualify offender-related factors and focus on harm and culpability. For those and other reasons theories of just deserts have often been criticised (Braithwaite and Pettit, 1990). According to Michael Tonry (2011: 217) the (strong) proportionality principle has three fundamental problems. First, by giving priority to equality in suffering for 'like-situated' offenders, it often requires imposition of more severe and intrusive punishments than are required. Second, it misleadingly objectifies punishment, by allocating generic penalties and using terms as 'like-situated offenders'. Third: it ignores the problem of 'just deserts in an unjust society' (ignoring social deprivation and problems of social injustice).<sup>1</sup>

I will interpret the tendency to reject personal factors—as philosopher John Tasioulas does—as 'just deserts reductionism'. My contention is that 'special' concerns about the offender—mercy, tolerance, taking responsibility—are as important as 'regular' just deserts. The theory of Tasioulas opens up 'one-dimensional' accounts of retributive desert and allows varying values (just deserts, prevention, mercy) to compete under the aegis of the justified censure. Within this perspective mercy has a firm place in deliberation about criminal punishment. Now mercy has a 'baroque reputation' in

---

1. Also retributivists recognise that just deserts theory seems to be 'unremittingly in its zeal to expose individuals to the sufferings and indignities of legal punishment' (Lippke, 2009: 378). Lippke agrees that the use of strict retributivism tends to be pernicious. He pleads for various forms of reduction in punishment.

punishment theory, a ‘relic of a defunct political absolutism or a religious mentality’ (Tasioulas 2003: 120). Philosopher Jeffrie Murphy refers to the modern belief that mercy must be a ‘product of morally dangerous sentimentality’ (Murphy 1988: 167). Despite these views, I will point out that mercy is a structural feature in sentencing practices.

I will re-interpret Tasioulas’ theory and argue that mercy can be viewed as one aspect of a broader category of special concern and care for the offender and the persons affected (his dependants/those to whom he owes something). The several grounds for personal mitigation do have a common ethical basis: by giving attention to specific interests and needs justice can be tempered with compassion. Within this perspective we can facilitate responsibility and devise individualised sentences, giving counterweight to abstract justice orthodoxies.

The question of the sentencing discount is not peripheral, as just deserts theorists would argue. It is one of the core questions in penal justice. I believe the issue of mitigation deserves more attention in the current debate on punishment and high custody levels. Christine Piper (2007) argues that populist punitiveness has led to an inflation of calculations of seriousness at policy and sentencing levels; offenders with a criminal history are often sent to prison in case of relatively minor offences. According to Piper there seems to be a reduced acceptance of mitigation factors, which prevents the ‘cusp cases’ — lying on the community/custodial sentence boundary — from being moved down the penalty ladder. However, Jacobson and Hough (2007) found that personal mitigation plays the largest part in tipping the balance away from the imposition of a term of custody.

Like Shapland (2011) I will argue that personal mitigation should move from the margins to the centre stage of sentencing guidance. By doing so, there can be more concern for encouraging the offender to desist from crime, as well as to make reparation. If mitigation is to play a more profound role, judicial discretion needs more structure (Jacobson and Hough, 2007). On which principles is personal mitigation based? Principled distinctions need to be made between factors that relate to unusual difficult circumstances, factors that affect the offender’s suffering and factors that facilitate non-custodial sentences. Because I will focus on these mitigation rationales, the particularities of offenders are in the forefront. I will not really deal with

mediation in penal matters and its negotiated outcomes (like compensation). I will only discuss sanctions as authoritative responses by the state.

In the next section I will discuss the gap between just desert orthodoxy (and its objections against individualising punishment) and sentencing practices in which personal mitigation factors do play a large role. Consequently I will briefly explore John Tasioulas' argumentation, in which censure functions as an overarching principle of justice. His theory breaks open the hierarchy of sentencing principles, counteracts just deserts and puts repentance and mercy in the centre of attention. I will then discuss some critical issues with reference to mercy and offender-characteristics. Is mercy an intrusion into judicial sentencing as philosopher Antony Duff contends? Is it reasonable to examine the offender's soul to assess remorse and other attitudinal aspects? How does mercy relate to another leniency-rationale, the principle of greater tolerance to first offenders? I will argue that the offender's willingness to apologise and take responsibility restores trust and justifies a non-custodial sanction-track. Finally the rationales of personal mitigation are presented together and the question whether social deprivation is a mitigation-factor is dealt with.

### **Just Deserts and Personal Mitigation: Theory Versus Practice**



Some retributive thinkers are prepared to include remorse in their reasoning. Contrition and repentance can provide the grounds for genuine inner restoration: punishment aims at expiation of the wrongdoer's guilt (Garvey 1999). Jeffrie Murphy (1997) argues that repentance can repay the victim for the blow to his dignity and erases the message of inferiority that the offender *prima facie* conveys to the victim through the criminal act. But he admits that this message will not always be absorbed by the public. The public might respond cynically: 'express remorse and escape punishment'.

But many retributivists stick to the doctrine of just deserts: offenders should be punished because they deserve it. Classical retributivism is looking backwards and is only concerned with the wrongful act. Post-offence remorse, apology, or repentance cannot lessen the culpability of the act itself. Just deserts emphasises, in the name of fairness, the standardised treatment of all offenders, so that individualised concerns with repentance (or rehabilitation or reparation) are overlooked.

Andrew von Hirsch criticises the instrumental role of punishment in securing repentance, because it threatens to undermine proportionality. Restrictions on severity in order to facilitate the achievement of penitence would sacrifice proportionality (Von Hirsch 1993: 75–76; Von Hirsch and Ashworth 2005: 104–105).

Likewise Antony Duff endorses a strict retributivist theory: repentance does not have a punishment-reducing significance. Deserved hard treatment is considered as an integral part of repentance: punishment enables the offender to repent through undergoing the deserved punishment as a penance. Thus, the crime, not the offender is the focus of punishment. The offender is censured for the crime committed and not for his character. Nothing the offender does or feels after the crime alters the nature and seriousness of the crime committed. Besides, Duff points out that the assessment of remorse would require an intrusive interest in the offender's inner life, as will be evident later in this chapter.

The standard arguments against mercy focus on equality. Mercy violates the rational norm of treating like cases alike and thus flouts the demands of penal justice. Mercy amounts to treating identical cases differently, showing leniency to one wrongdoer yet withholding it from another. It is unfair to those who do not receive a lenient sentence and allows unequal treatment. Moreover, excusing the offender from punishment belittles the crime and the harm done. Victim and the public interpret the failure to punish to mean that the crime is not really wrong and that the offender is free to keep doing it. Therefore we should eliminate mercy from the possible range of mitigation justifications (Markel 2004).<sup>2</sup>

Retributive proportionality, as a system of uniform sentencing, necessarily shoehorns cases into crude abstract categories. But two ostensibly identical crimes can have widely different harms and consequences for their victims and other stakeholders, as offenders' families. There is no consideration of the real-life human being who committed the offence. Ensuring proportionality between the punishment and the criminal offence (if such a thing

---

2. From a different viewpoint, see Garvey (1999). Imposing too light a punishment can undermine the public's appreciation of the value of the victim, and the latter's self-esteem. It conveys the message that the criminal act was not, after all, so evil, thereby adding to the harm done to the victim.

is altogether possible; see Wright 1999), means that neither the offender's characteristics nor his past conduct may legitimately be considered in determining an appropriate sanction. It follows that a remorseful offender should not be treated differently from a contemptuous, indifferent offender. And it follows that an experienced criminal should not be punished more severely than an infrequent or first-time offender. To circumvent this kind of reasoning Von Hirsch devised a theory of greater tolerance to defend mitigation for first offenders (see below). Obviously personal factors matter after all!

Just deserts theorists want us to believe that only the wrongfulness of the act and the harm to the victim matter, thereby deliberately restricting the scope of justice. They reject differential treatment between offenders based on their history of prior offending, their demonstration of remorse and rehabilitation needs. Fortunately, sentencing practices give another picture. Judges automatically take into account the content, nature and importance of personal mitigation. Remorse often has a moderating effect on the severity of sentences.

In the US remorse, although marginal in the guidelines and in proceedings, does play a far more prominent role than often is thought. When it comes to the sentencing decision, judges seem to weight expressions of remorse and apology heavily. The perceived remorse can significantly reduce the likelihood that a jury will impose severe punishments. When discussing release decisions parole boards take remorse into account (Bibas and Bierschbach 2004).

In their overview of some common law jurisdictions Proeve and Tudor point out that the prosecutor's decisions are influenced by remorse and apology, including decisions not to charge, to accept proposed pleas and cooperation agreements, and to recommend favourable sentences (2010: 85–87). Some studies have found that offenders who deny committing serious offences receive significantly higher sentences than those who admitted guilt. Sometimes offenders who exhibited no contrition for their offence received sentences four times the length of those who were highly contrite. When offenders have an extensive prior history of alcohol use, remorse may have the opposite effect of more severe sentences: these offenders may be seen as insincere.

Jacobson and Hough (2007) examined the role of personal mitigation in sentencing in the English Crown Court. Personal mitigation takes many

forms, for example relating to the offender's past (e.g. productive life; financial pressures; psychiatric problems; etc), the response to the offence (e.g. remorse, acts of reparation, willingness to address problems that led to the crime; etc) and the offender's prospects (e.g. family responsibilities; capacity to address problems; etc.).<sup>3</sup> The authors conclude that personal mitigation plays an important part in the sentencing decision. 'It can be the decisive factor in choosing a community penalty in preference to imprisonment ... In just under a third of the 127 cases where the judge made the role of mitigation explicit, personal mitigation was a major — usually the major — factor which pulled the sentence back from immediate custody' (2007: vii).

Does the public share the judiciary's tendency to take into account personal mitigation, when the offending is serious? Research on public opinion and personal mitigation shows that the effects of personal mitigation on sentence are sometimes quite significant (Hough *et al*, 2009).

Although offence related factors dominate in assessing aggravation,<sup>4</sup> and there is less consensus among respondents in justifying mitigation, there is widespread support for taking into account these factors. The background, circumstances and individual 'story' of the offender are deemed to be critical factors that should feed into the sentencing decision. When examining mitigating factors, most respondents seem to display an attachment to individualised sentencing and are willing to take personal factors into account. 'The public tends to attach weight to personal mitigation, even if they are disinclined to regard specific factors as universally applicable' (2009: 54). There is strong public support for considering an appeal to leniency on behalf of the victim and there is a significant level of acceptance of alternative sanctions. Two thirds of the public believes a community sentence is justified (definitely or probably) in the absence of previous convictions, even in cases of a serious assault. Other important offender-related factors are: 'offender caring for children', 'offender remorse' and 'offender is young'.

---

3. Jacobson and Hough (2007: see table 2.3. at 13).

4. The authors stress that aggravating factors are offence- rather than offender-related, and are seen as more generally applicable (as a matter of principle) to sentencing decisions. Offender-related mitigating factors are by definition highly contextual and less clear. They depend heavily on personal and case characteristics which cannot be specified in advance.

In an American study Gromet and Darley (2006) found that respondents sent a majority of low-seriousness cases to restorative procedures. As crimes increase in seriousness, respondents sent a majority of cases to a mixed procedure (retributive and restorative), even though they had the option to use the traditional court system. This suggests that in case of an offence of a serious nature people are willing to allow also restorative measures. The more potential they see for the offender to be rehabilitated, the more likely they are to apply restorative measures. This is consistent with the finding that people who are most supportive of restorative measures are the ones who believe in the possibility of rehabilitating offenders. By contrast, there may be offenders who are thought of as 'un-rehabilitative', who regardless of the seriousness of crime, will not be qualified for restorative measures (Gromet and Darley 2006).

We may conclude that criminal law professionals accord much weight to personal mitigation factors, also expressions of remorse. Bibas and Bierschbach offer a convincing answer: 'In the eyes of judges, they indicate that an offender is not 'lost', that he has some self-transformative capacity that justifies (or requires) a lesser punishment.' (2004: 94). Concerning public opinion, we may conclude that people's intuitive judgments depend not only on the wrongfulness of the act, but also on their assessment of the actor's attitudes and other contextual factors, including the possible damage of the punishment to the web of people and relationships.

### **Beyond Just Deserts Reductionism: Tasioulas' Theory**

According to John Tasioulas just deserts theory tries to sideline mercy and other considerations in order to save the consistency rationale. But this primacy of consistency and predictability is misplaced. 'The long history of philosophical disputation about punishment teaches us that a cut-and-paste assembly of disparate principles is the best we can realistically hope for' (2006: 282).

Tasioulas is in favour of value pluralism within an overarching structure of communicating censure for wrongdoing. He regards the communication of justified censure (through hard treatment) as the general justifying

aim of punishment.<sup>5</sup> So punishment is not merely the communication of deserved blame. This retributive norm of just deserts is a fundamental norm, but it is not the only one. We should not allow just deserts to take up all the space of penal justification at the expense of other values as crime prevention and mercy.

Tasioulas offers a revised communicative theory, in which the formal end of condemnation encompasses many values. Desert is a fundamental, but not necessarily exhaustive, determinant of what punishment is justified. Desert may determine the just quantum of punishment only within a broad range. Even when the circumstances of the crime are fully specified it is not possible to determine the exact punishment that is proportionate to crime. Of course this indeterminacy does not render the idea of just desert vacuous. Considering fairness (treating like cases alike) and ordinal scaling remain instructive.

But Tasioulas' formal theory of communicative censure does not equate justified punishment with deserved punishment. There are other considerations. So mercy can have a bearing on justified punishment independently of any impact on judgments of desert. Also preventative considerations can play a role in determining the amount and type of punishment to be inflicted in particular cases.

When discussing which amount of punishment is justified, there is a conflict between reasons of desert to punish and reasons of mercy to show leniency. There may be 'an unavoidable sense of excess in insisting on the full infliction of the deserved hard treatment' (Tasioulas 2006: 318). A decent concern for the offender's welfare can justify us in tempering the punishment deserved. So Tasioulas argues that it is perfectly legitimate to widen one's field of vision beyond the wrongful act — to take account of the nature of the agent and his broader circumstances.

Repentance is a central consideration within the communicative enterprise aimed at conveying justified censure for wrong-doing (and resists being

---

5. Within retributive theories hard treatment is supposed to communicate justified censure for the offender's wrongdoing. I think 'hard treatment' is a fallacious term because it suggests that sanctions should be threatening and that moral learning (facing-up to what you have done) is not important (Van Stokkom 2005). I prefer 'burdening'. As I will argue later on, we may conceive two sanction-tracks that both involve burdens, one disciplining, the other restoring.

subsumed under the norm of retributive desert). Repentance is the experience of the burdens of guilt, ‘burdens that can dominate a person’s mental horizon, sapping their capacity to engage with what ordinarily gives life its value’ (Tasioulas 2007: 493). By repenting the offender re-integrates himself with the moral values and works towards healing the rift with the community by the work of apology, reparation and moral regeneration. It is the intrinsically correct response by the wrongdoer, a righting of one’s wrongdoing, not just a change for the better in its aftermath.

Tasioulas contends that ‘antecedent repentance’, manifested prior to the infliction of punishment, figures as a *pro tanto* ground for mercy to the offender, a reason, for inflicting a more lenient punishment (Tasioulas 2006: 316–321). On the other hand, punishment could help spark in the offender the remorseful recognition of his wrongdoing that leads him to undergo his punishment as a penance (Tasioulas 2007: 496). But a consistent proponent of punishment as repentance should reject all forms of punishment that inhibit the willingness to reconsider one’s wrongdoing. Custody but also ‘shaming’ punishments, in terms of Tasioulas, are ‘deficient both as a penance and as a means for encouraging repentance’ (2007: 496). ‘Subjection to the scornful gaze of others ... is more likely to inhibit, rather than facilitate, the offender’s development of a penitent understanding of his deed’ (2007: 497). For that reason sentencing authorities should select forms of punishment which are judged more likely to foster the offender’s repentance. The sentencing authority should select ‘among equally deserved punishments, that which would be more effective in inducing a penitent state’ (2007 *idem*). In this way Tasioulas is more realistic than other expiation theorists.<sup>6</sup>

Tasioulas criticises the notion of repentance as self-inflicted punishment. In this view (Murphy 1997; Nozick 1981) it may be obligatory to show leniency to the repentant offender, because we can take the exhibited repentance as a form of suffering. This can in turn be seen as punishment he has already undergone. This argument suffers from two difficulties: first it lacks an

---

6. Retributivists like Duff who set a premium on expiation tend to take no account of the adverse effects of regular imprisonment (and seem unaware of labelling theory). Most convicts develop a hardened attitude, as Nietzsche emphasised. Punishment intensifies the feeling of alienation and strengthens resistance. In effect, it is the practice of punishment itself which hinders the development of a sense of guilt (Van Stokkom 2005).

imposed burden, and secondly it lacks a public meaning accessible to the victim and the wider community (2007: 504, 505).

Tasioulas' theory of communication enables us to view repentance as a ground for mercy. Mercy is responsive to the plight of the wrongdoer and 'embraces reasons for leniency that arise out of a charitable concern with the well-being of the offender' (2006: 312).<sup>7</sup>

Merciful acts are not discretionary or 'gift-like' as is often assumed, nor is mercy distinguished from justice by its 'particularity'. Tasioulas (2007) masterfully shows why these 'dogmas' are implausible and explains why judges have an obligation to grant mercy to offenders in appropriate cases.<sup>8</sup> Of course this obligation possibly conflicts with the obligation to impose the deserved punishment. Tasioulas adds that the interest of the offender alone is not sufficient to create a duty to grant mercy. 'Mercy is a great common good, one that makes our communal life more humane' (2003: 128).

Mercy offers reasons for the suspension or reduction of a penalty. What sorts of facts provide grounds for mercy and wherein lies their normative significance? Tasioulas (2003) addresses four.

1. The offender's history and upbringing; the formidable obstacles he may have encountered to forming a decent and law-abiding character.
2. Cases that pose unusually severe obstacles to law-abiding behaviour (for example, the plight of a battered woman).
3. Offenders who suffered a grave misfortune which will be cruelly exacerbated by the infliction in full measure of his just deserts (e.g. losing your child as a result of drink-driving).
4. Offender repented his wrong-doing.

The general idea behind these grounds is that the imposition of the sentence warranted by the retributive norm is an excessive hardship. Their salience consists in their bearing on a humanitarian concern, one that looks

---

7. Compare Bibas 2007: mercy does not obliterate the need to punish. But although the offender deserves punishment, mercy may lessen the deserved punishment (see also Bibas and Bierschbach 2004).

8. The offender cannot earn mercy and has no subsequent right to mercy. At most offenders might have a right to present a case for mercy (Bibas 2007).

to the impact of a proposed punishment on the offender's well-being in the light of their prior moral conduct, life history and the broader context of their wrongdoing (2003: 119). It is harsh and, at the limit, cruel in such cases to communicate the full extent of censure that would have been warranted.

### **Personal Factors and Leniency: Criticism and Contra-criticism**

Tasioulas' hybrid theory allows taking into account remorse and other personal factors in sentencing decisions. That is an attractive starting point because in practice sentencers have to select and combine varying and sometimes conflicting punishment considerations. However, and not surprisingly, his theory, and many other accounts of sentencing leniency, have induced a lot of criticism. I will deal with two issues: the intrusion of mercy in judicial sentencing, and the examination of the offender's soul. Consequently I will argue that mercy is but one of the leniency rationales. Condoning a 'lapse' of an offender without prior convictions is another. Andrew von Hirsch recognises the importance of this justification of personal mitigation and tries to integrate this rationale in his model of retributive desert.

#### **The intrusion of mercy**

Could mercy play a proper role in the criminal justice system? Duff's answer is clear: mercy 'intrudes' into the criminal process. Punishment must aspire to be a process of communication from the offender to those he wronged. The communicative aim of punishment is to bring the offender to face up, to focus on the wrong he has done, as something he should repent. By contrast, mercy focuses on what the offender himself has suffered. It cannot communicate an appropriate message to the victims.

Moreover, the sentencer has no reason to mitigate the punishment, since whilst repentance motivates to undertake reparative action, it cannot affect the wrongdoing. The repentant offender deserves no less severe a punishment than the unrepentant offender. There is no reason to mitigate. Duff concludes: 'The claims of mercy conflict irremediably with the demands of justice' (2007: 387).<sup>9</sup>

---

9. Duff (1993) stresses that (later occurring) repentance does not make the crime less serious. The same is true for the defiant criminal: defiance does not make the crime worse.

However, Duff argues, sometimes the sentencer should have her eyes open for the offender's suffering. When the depth and intensity of an offender's repentance is obvious, a sentencer, as human person, might reasonably be moved to leniency. But still mercy cannot operate within the perspective of criminal punishment; it is not a virtue of sentencers but rather a virtue of human beings. In other words: as persons, sentencers can and should feel sympathy and compassion, but these feelings are irrelevant to the performance of their role as sentencers.

So Duff tries to sustain the claim that mercy is only discretionary. By contrast, Tasioulas tries to convince us that mercy can and should be obligatory. Only a duty to grant mercy could possess normative force needed to justify deviation from the judge's duty to implement justice. He defends a legal duty for judges to show mercy in sentencing when undefeated grounds for it obtain (2003: 129). This duty to grant mercy concerns a subclass of (unusual) cases in which offenders find themselves in miserable circumstances. This means that judges are not required to show mercy in cases where no grounds for it obtain. There is no potential overburdening of punishers.<sup>10</sup>

Tasioulas recognises that procedural fairness will be violated. But 'it may be judged worth the cost of introducing an element of inconstancy into the penal system if it is thereby rendered more humane' (2003: 130). Seen from this perspective, mercy should properly play a role in the criminal process. Protecting human worth should be part of the criminal justice institution. For example, it cannot tolerate verdicts that amass public suffering upon grave private suffering.

Another relevant point in Duff's reply to Tasioulas is that liberal law involves abstraction. Therefore sentencers should not allow the assessment of changes within the conduct of the offender and the examination of other concrete particularities of the individual offender and the social context from which his offence emerged. Duff recognises that abstraction involves

---

10. Proeve and Tudor (2010) distinguish a strong version (remorse must always be a mitigating factor; eliminate discretion) from a weak version (remorse may be treated as a mitigating factor: large degree of discretion). They opt for a middle ground position: remorse should be a mitigating factor in a limited range of cases. A failure to consider personal mitigating factors requires explanation (in a fully articulated set of reasons for sentence). This preserves judicial discretion, but within certain constraints. This middle ground version both reflects settled law and practice and seems to be the more plausible approach.

a source of individual injustice. And he also recognises that individualised particularities constantly irrupt into the law, thus destroying its pretensions to rational coherence. But still, he prefers the law's abstract reasoning. He seems to accept that this view brings along an impoverished discourse of censuring that eliminates the articulation of human circumstances, including the ways how the offender has processed guilt and accounts for the harm done. The abstract censure he pleads for contains messages without many opportunities to internalise moral norms. Remarkably, this contrasts Duff's plea for two-way communication. Viewed from that angle one might expect that the censure is not only about crime categories and punishment measures, but also made to a particular human being who has to face up to what he has done (see Van Stokkom 2007).<sup>11</sup>

### **Examining the offender's soul**

Duff stresses that the criminal law has to respect its citizens' privacy. A liberal system of criminal law should not allow an inquiry into the defendant's life and character. Judges should only attend to those factors that the law defines as directly relevant to guilt (2007: 376).

Von Hirsch expresses similar arguments: the liberal state may impose a penalty on the offender as a means of moral censure, but it may not require any attitudinal response to that censure because, if it did, the personal autonomy of the subject would be violated. Requiring or even encouraging defendants to apologise for their conduct would extend the reach of authority of the state beyond its legitimate function of controlling harmful behaviour and would become intrusive into a person's autonomy (Von Hirsch 1993: 82, 84).

Encouraging offenders to acknowledge and repudiate their crimes is seen by many liberals as an invasion of conscience. Generally liberals have trouble with what they call 'penetrating the criminal's soul' (Markel 2004). The

---

11. It seems that many desert theorists inconsistently switch between abstract and concrete ways of reasoning. On the one hand they devise objective measures of penal deservedness. But on the other hand they focus at individual blameworthiness and its particularised judgments about moral responsibility (self-defence, knowing, mental illness, duress, etc.). If punishment is principally related to blaming, Tonry says, it is relevant 'whether the offender was mentally impaired, socially disadvantaged, a reluctant participant, or moved by human motives' (Tonry 2011: 229).

examination of the offender's character is deemed tricky and could undermine individual autonomy. Indeed, 'character' is a tricky question. Punishing character, Nigel Walker says, is 'to engage in moral book-keeping, using previous records as an index of total moral worth' (cited in Bagaric 2000).

There are good reasons to limit the scope of the criminal law to the conduct of the offender rather than to his thoughts and beliefs. As Tasioulas says (2007: 487) we should not embrace a 'character' version of retribution (see Murphy 1997) which would require that the state delves into the privacy of its citizens to make an exhaustive accounting of features of our lives that form part of our moral characters. This means that sentencers should focus on the outer features of attitudes, as apologising, rather than the inner moral state of the offender.<sup>12</sup>

How to justify attitudinal considerations? London (2011: 200) offers two important reasons. First, demonstrations of attitudinal change, including apology and the expression of remorse, are never required. Evaluation of attitudes may be made, including the offender's personality, but only if the offender agrees. For example, he may refuse to answer any questions that may be incriminating, but also waive the rights against self-incrimination when it appears in his best interest to do so. So offenders may apologise voluntarily if they believe it is in their interest to do so. In sum, what is morally objectionable is not the assessment of specific attitudes, but the possibility that the state will coerce an individual into adopting an attitude that contradicts his values and beliefs.

Second, liberal criminal sentencing does not bar considerations of an offender's attitudes. Personal factors are relevant in devising adequate sanctions (London 2011: 200). To assess which type of punishment is suitable, and to assess the offender's amenability to rehabilitation we require information

---

12. Often liberals resort to cheap rhetoric. For example, Lippke (2008) portrays state officials as inquisition fanatics, intruding the rights of offenders. In the words of Tudor: 'he paints the picture of untrustworthy legal officials probing the moral souls of hapless offenders who languish in their grip for indeterminate periods.' (Tudor 2008: 271). In reality much of the so-called 'intrusive' monitoring is already in place in the form of parole boards and with good reasons: checking improvements in self-reform, work-attitudes, responsible conduct, etc. There is little disturbing in this: it is routine for parole boards and sentencing courts to assess offenders' self-perceptions, attitudes, behavioural patterns, etc.

about his degree of self-control, his empathy to the victim, his willingness to undergo rehabilitation, and many other subjective factors.<sup>13</sup>

In other words, the judge has to take into account offender attitudes, just as she takes the social circumstances of offenders and their families into account. If you adhere to the principle that the offender 'has to learn a lesson' it is good to know if he has learning disadvantages or lacks self-control. Moreover: suppose the judge does not take into account the offender's motives, attitudes and social situation. This would stimulate the offender to cope with the imposed sanction in cynical and indifferent ways and to make no effort to respond positively.

Another argument that is often raised is that taking account of remorse would reward those offenders who succeed in displaying the appropriate sentiments. Concerning the problem that many offenders portray themselves as less blameworthy than they are, there is an adequate reply: we can trust judges to discern sincerity and honesty. Besides, other moral states such as the credibility of witnesses are also not easy to verify. The assessment of these states always brings along practical fact-finding problems (Bibas and Bierschbach 2004: 142).<sup>14</sup>

Of course we need to protect offenders against close supervision of their moral selves. We should respect the moral autonomy and dignity of persons. But, as philosopher Steven Tudor says, it is precisely this respect that requires us to pay attention to the moral attitudes of wrongdoers. 'To ignore a person's remorse can be to shun a fundamentally important aspect of his moral self, and can manifest a fundamental disrespect' (Tudor 2008: 271–272). Basic respect may sometimes not allow the probing of conduct, but respect may also require recognition of human needs.

---

13. Of course the determination of appropriate punishment is also presumed to serve the purpose of preventing future crime. Inquiring the offender's history of offending and his beliefs as to the wrongfulness of his actions is justified because it has a significant bearing on the assessment of the risk he poses to society.

14. When it comes to assessing remorse and its genuine expressions, research shows that judges are led by four sorts of indicators: co-operative (providing information etc), reparative (restitution to the victim), reformative (change his behaviour) and self-punitive (imposing a burden on himself) (Proeve and Tudor 2010: 96, 97).

## Tolerance

Tasioulas suggests that when we take notice of the plight of offenders, automatically mercy is involved. I think he tends to overstretch the domain of mercy. We need a more refined approach of rationales involved when concern for offenders is at stake, including tolerance for incidental ‘lapses’, taking responsibility and prevention of harm.

Like Duff, Von Hirsch would also reject mercy as a ground for leniency, calling it a subjective feeling that misses references to offender-interests. But remarkably, he defends a first offender discount, exactly on the basis of sympathy feelings. We should sympathise with ‘human frailty’.

Von Hirsch (2001) develops a ‘principle of greater tolerance’ in the application of penal censure to juveniles and first offenders. Adolescence is a time of testing limits and making mistakes, including those that harm others. A milder punishment convention for juveniles would preserve the young person’s opportunities and prospects. In certain situations, Von Hirsch argues, ‘we should entertain a certain degree of sympathy for the predicament of those punished—and hence utilize more forgiving standards of blame’ (2001: 231). Even an ordinarily well-behaved person can have his moral inhibitions fail in a moment of wilfulness or weakness. ‘Such a lapse reflects a kind of human frailty for which some sympathy would be shown’ (*idem*). Recognising fallibility—the human susceptibility to lapse—calls for a limited tolerance of failure, expressed through some diminution of the initial penal response.<sup>15</sup>

In other words, the reduced response for the first offender serves to accord some respect for the fact that the person’s inhibitions functioned before, and to show some sympathy for the all-too-human weakness that can lead to a lapse. Such a loss of self-discipline is the kind of human frailty for which some understanding should be shown (Von Hirsch 1998: 194).<sup>16</sup>

Thus, the offender should get less when first convicted, but the discount should progressively be reduced thereafter. The repeated offence can less and less plausibly be characterised as a lapse, an aberrant failure of moral

15. I think the lapse-discount can be viewed as a ‘condoning rationale’ based on moral credibility (recognition and approval of the attributed moral quality to be trusted, to be worthy of confidence).

16. This comes very close to Tasioulas’ arguments. He points out that mercy makes a concession to human frailty in many cases, to the failure of basically decent people to exercise the rational self-discipline in difficult conditions.

inhibition. We should give up the discount after a number of repetitions because the offender has chosen to disregard the disapproval visited on him, thus not responding to the requisite effort at self-restraint (Von Hirsch 1998: 193).<sup>17</sup>

The lapse discount, Von Hirsch goes on, reflects not only sympathy, but it is also granted on the assumption that humans are capable of something worthy of respect—namely, paying attention to others' censure. In viewing the offender as a moral agent, we assume him capable to attend to the disapproval visited on him, and thus give him a second chance. The assumption is that the offender takes the condemnation of his acts seriously. What is hoped for is that the offender not merely desists in the future, but desists because he shares the recognition of the wrongfulness of the act.

I think this argumentation is important: believing in the moral capabilities and trustworthiness of the offender. We trust him to take the lesson to heart. It is based on the assumption of taking notice: bear in mind, consider and process the censure. Mercy seems to lack this agency aspect: suffering or vulnerable offenders are not really morally approachable. They are more likely to be concerned with their own pain than with the harm they have caused to others.

### **Facilitating Responsibility**

In this section I will concentrate on other grounds for personal mitigation which are more related to future interests. A case in which leniency might be warranted is the defendant's effort for the advancement of an important social good (e.g. giving employment) or a socially valuable invention (e.g. the discovery of a cure for cancer). Custody would threaten to thwart these valuable contributions. This consequentialist rationale is especially relevant when considering the adverse effects of prison. For example, many judges show leniency to offenders because the just penalty would entail harm to innocent dependants. It is the sentencer's duty to prevent this. Preventative approaches are much more open to post-offence factors that may play a role in determining the effectiveness of the sentence.

---

17. Von Hirsch points to other relevant questions. Does the lapse-discount apply to any criminal conduct, however grave? Does the most heinous conduct fall outside the scope of human fallibility?

But in this section I will discuss another future-focused rationale: the offender's intended efforts to 'make good' and to change his conduct. These efforts may very well have preventative effects, but the rationale is not instrumental and is based upon remorse and its inducement to take responsibility (to repair or to rehabilitate). The offender recognises the wrongfulness of his conduct.

A complicating factor is that remorse can have two different mitigation justifications.

Remorse considered as grave suffering, accompanied with inner turmoil and consuming torments, may induce mercy and take the form of 'a less severe sentence'. But remorse considered as a concern to relieve the victim's suffering and a promise to change yourself, does not have the logic of counterbalancing an excess of public punishment. Thus, remorse can invoke mercy (avoiding an excess of suffering) but it may also be matched with self-committed efforts to repair/self-reform. Importantly, in the context of restorative justice remorse is valuable not because it is painful, but because it reinforces the victim's worth and promotes the offender's moral reform.

What justifies mitigation in the case of the offender's remorse and apology? Proeve and Tudor (2010) argue that remorse implies the recognition that the offender is worthy of social respect. He is listening to his conscience. By taking account of a morally appropriate response to a reproach, you are acknowledging the wrongdoer's efforts. Therefore the reproach can be modulated.

I think we should extend this reasoning: we can trust the responsible offender (Van Stokkom 2005; London 2011). As stated, remorse indicates that the offender is connected with the values which the law is appealing to. He is morally approachable. Genuine remorse points at a positive moral disposition, a commitment to comply, an indication that trust can be renewed. The willingness to repair the harm done not only indicates that the offender acknowledges that he committed a wrong, but also that he will respect other person's rights in the future. By contrast, if an offender says 'when I am free I will steal again', he cannot be trusted. Threatening to continue criminal behaviour is a promise to harm other persons in the future and implies a breach of trust.

Remorseful offenders do change the claims between the involved parties: offender, victim and state. If the offender admits guilt and is willing

to repair the harm, there is no conflict between offender and the state, at least in the sense of a ‘clash of opinions’.<sup>18</sup> What the preventive punisher wants is there: a commitment to avoid future victimisation. And what the retributive punisher aims at is also fulfilled: the offender has called himself to order and subscribes the legal norms. If there is no such conflict between the offender and the state, one can argue that the offender may become the co-author of his sanction-plan and that the interests of the victims involved can be dealt with. The victim comes in and is allowed to have a say in determining the plan.

Does remorse — as willingness to repair/self-reform — imply a reduction of the sentencing amount? I think allocating a less severe kind of sentence is more appropriate. Let’s first discuss some arguments in favour of reduction. A radical version of remitting / reduction of sentencing is the redundancy rationale. In this account the offender has done (at least part of) what the sentence would have done. The offender has ‘pre-empted’ the sentence. Redundancy fits the consequentialist rationale of Bentham: the remorseful person is less likely to reoffend in the longer term.<sup>19</sup> But as stated before, it is a misdescription to say that the remorseful person is already punishing himself. Punishment is imposed from without. Self-punishment cannot simply be a substitute for the censure by the judge (Proeve and Tudor, 2010).

Jeffrie Murphy (2011) claims that repentance is a relevant ground for a reduction in criminal sentence. In his view repentance is a direct repudiation of the message of contempt carried by the criminal wrong. Withdrawing the contemptuous message, he argues, lessens the harm and wrong in significant ways. I think this is correct in respect with spontaneous remorse right after the offence (before the offender is arrested by the police). The offender is less culpable. But in cases of later occurring remorse Murphy’s argumentation does not convince. It is not obvious that in such situations apologising words would in itself lessen harm and wrong. Admittedly the offender shows a zeal to ‘elevate’ the status of the victim, but he should combine his remorse with real efforts.

---

18. In terms of violation of legal norms there is of course a conflict.

19. There is much empirical support for this proposition. For an overview see Proeve and Tudor (2010: 120–121).

Ross London argues in a similar way as Murphy and claims that trust should lead to reduction of sentencing terms. ‘Intuitively we demand less punishment for those who strive to restore trust by every means within their power. We feel they simply do not need to be punished further’ (2011: 121).<sup>20</sup> But I think the severity of punishment cannot be reduced by the demonstration of indices of trust. Trust cannot and should not be rewarded with a punishment discount. It is an everyday obligation of citizens to behave trustworthily.

Offenders who demonstrate a trustworthy attitude do not deserve a sentencing discount, but a non-custodial sanction. In that way courts can promote the development of responsible behaviours in offenders. Ideally these sanctions confer a positive meaning to the burden that is imposed upon the offender, oriented at self-reform and reparation. By contrast, custody tends to interrupt ordinary ‘good behaviour’ routines and social obligations. Custody is disempowering; it is an ineffective method of communicating normative standards to offenders or eliciting compliance with those standards. Offenders would have relatively little incentive to accept a reparation package, if they necessarily had to suffer ‘hard treatment’ in terms of a dull prison regime.

To be clear, there is a difference between the willingness to make good and the actual accomplishment of reparative tasks. Fulfilling the obligations that were agreed to in a restorative proceeding (e.g. carrying out tasks in order to compensate the victim), may go hand in hand with remittal / reduced punishment.<sup>21</sup>

### **Rationales of Personal Mitigation**

I have discussed several grounds for personal mitigation: mercy, tolerance, prevention and responsibility. They are part of the judge’s duty to show

20. London’s theory contains a related implausible argument. He states that those offenders who manifest no signs of trustworthiness must correspondingly be punished more severely (2011: 295). But remaining untrustworthy (or unrepentant or unresponsive) is not a good reason to impose aggravated sentences (see Proeve and Tudor 2010: Chapter 7). It is a good reason, I think, to impose a disciplining sanction track.

21. In reality full restitution of considerable harm appears seldom and is difficult to achieve. English restorative schemes do not show so much direct gifts (except those embodied in apologies), nor restitution, but very considerable expression of potential self-reform. Offenders take responsibility to change themselves to make the victim and society feel better (Shapland, 2006: 518).

sensitivity and concern for offenders and those affected by his wrongdoing, focusing on their specific needs. In the scheme below the four rationales are presented in terms of the judge's object and core legitimation, characteristics of offenders and their life circumstances.

### **A. Sentencing reduction**

**1. Mercy.** Counterbalance an excess of suffering or misfortune.

Extreme vulnerability of the offender / miserable plight (illness / old age / loss or severe illness of beloved / long term separation from beloved); battered woman; consuming pains of remorse) (possibly: formidable obstacles to compliance in case of socially deprived offenders).

**2. Tolerance.** Condone a lapse.

Offence 'out of character': assumption of predominant compliance or good reputation in case of first offenders; long time elapsed since offender's last previous offence.

### **B. Non-custody sanction-track**

**3. Active responsibility.** Facilitate (planned) efforts to make good / self-reform.

Trustworthy offenders taking responsibility.

**4. Prevention.** Avoid harm to the offender and the offender's dependants.

Young offenders. Petty repeat offenders. Offenders maintaining a family/bringing-up children.

These four types of personal mitigation are outside the logic of reduced culpability. All four are grounded in concern for the well-being of the offender and those affected, tempering the claims of just deserts. As stated, the first two could lead to reduced sentencing measures. Both are based on a 'unduly harsh' logic. Three and four are more future focussed and justify sanction-tracks that facilitate responsible behaviour and/or lessen the destructive impact of penal sanctions. The rationales can be combined, for instance a sentence discount for a lapse and facilitating efforts to make good.

The judge has a legal duty to take into account personal mitigation factors when undefeated grounds for it obtain. If the judge would set aside the mentioned rationales he could compromise interests, not only the offender's interests but also those of the victims and the offender's dependants. If mercy is bypassed the inflicted 'punitive-extra' could lead to relentless and even cruel forms of harm. Not incorporating the plight of a battered woman in sentencing considerations would be more than unreasonable. In case of the responsible offender: not honouring his attitudinal change would mean that he is fundamentally discredited (a cause to be distrusted and disbelieved). Maybe Tonry's term 'malign neglect' is a better qualification: a wilful lack of care and attention. Excluding offender-responsibility as a factor to determine which sanction track is appropriate may have many adverse effects. Suppose a responsible offender is informed that he is not allowed to escape a disempowering sanction-track. Then it would be far more difficult to discuss with him in constructive ways which reparation might be offered or in which ways he might rehabilitate/change his life.

The fourth rationale in particular aims to protect the interests of the offender and the offender's dependants: prevent damage to their life prospects. Possibly the attitudes of the offender himself remain unchanged. So our concern to the offender is mainly consequentialist: it relates to the less injurious consequences of a non-custodial sentence.

Of course there are more classes of mitigating factors and there are certainly many more reasons for sentencing mitigation. For example the case of an offender who has already been punished independently of formal legal procedures (e.g. through vigilantes or social ostracism). A complicating factor is the class of cases honouring the wishes of victims, which are often idiosyncratic and difficult to order / rationalise.<sup>22</sup>

Particular circumstances are often subject to variable interpretations which create the possibility of discrimination and inconsistency. Therefore discretion should be exercised for reasons, without partiality, that is, in rule-following

---

22. It is good to realise that leniency in sentencing need not possess moral value. Some mitigation factors are merely prompted by expediency as rewarding offenders for cooperation (pleading guilty; giving evidence against another defendant). Mitigation may also be justified by reducing the escalating costs of the penal system. Acts of leniency may even be grossly unjust, as in cases in which mild sentences are motivated by class prejudice (Tasioulas 2007: 501).

ways (Walker 1995; Roberts 2011). Some reasons are capable of being made the subject of rules, although not all acts of leniency can be satisfactorily determined by rules. Rules ‘constrain’ and we may argue that rule-following is not necessarily ‘being just’. Not all rules fall within the definition of just deserts. So under the rationale of mercy we have to treat like cases alike, as much as retributive desert does, although the criteria of relevant similarity are different. From the perspective of compassion for the offender’s suffering, it treats like cases alike (Duff 2007).<sup>23</sup>

Accounting personal mitigation factors involves many practical problems of implementation. For instance, judgments of proportionality across punishment-modes and tracks are harder to make. But at the same time it seems to be possible to make publicly clear that a lighter sentence does not imply a less serious crime (Duff 2007: 385).<sup>24</sup>

In the case of serious and abhorrent crimes apologising words will often fail, no matter how honestly and eagerly expressed. Repentance and the urge to repair are outweighed by a shocked sense of justice. For that reason imprisonment will often have (temporary) priority. The offender is not yet conferred the status of ‘co-director of his own sanction’. First, the retributive emotions must erode before we can grant him a dialogue on the subsequent modelling of his punishment. In other words, some crimes are so serious that the willingness to repair is not sufficient and an incapacitating punishment-track seems to be indicated.

Remorseful offenders do not have a right to a restorative sanction-track. They have to convince us that trust is justified. An initially cooperative

- 
23. Often the categories of just deserts are stretched to achieve the desired result of a less severe punishment (accountability; excuse; etc). Consider the battered woman who kills her partner in a burst of anger. The woman may be assessed as having a mental illness that renders her not fully accountable for her actions. Or she was provoked and acted out of self-defence thus she retained her rational competence. However, I agree with Tasioulas (2003) that she is primarily a case for mercy on the grounds that her hopeless situation properly elicits our compassion.
24. Tonry (2011) argues that judges should impose the least severe sentence (applying the principle of parsimony). Proportionality only has the role of setting upper limits to punishment. This way of thinking introduces robust departures from parity requirements. According to Von Hirsch and Ashworth this means a sacrifice of equality. In their view parity is an important requirement of fairness, not just a marginal constraint (2005: 161). I agree, but not with their conclusion that this justifies only modest deviations. Serious deviations should be allowed (and are widely applied in sentencing practices: conditional sentences, acquittal, accord, etc).

convict who agreed with a reparation-plan but fulfils no obligation at all, forfeits our trust. Conversely, the sentencing authorities cannot impose a restorative sanction-track to an unrepentant or recalcitrant offender. Many offenders seem to be ‘tigers’: not responsive to moral considerations or capable of governing their conduct (Von Hirsch 1993). Their punishment takes place in a hostile context that will probably ‘harden’ them. But as soon as they want to take responsibility they should be allowed to change to more constructive sanction-tracks. For that reason it should be possible to invert a disempowering sanction to a constructive one. This means that, during the term of a sentence, offenders—conditional upon their behaviour—could be referred to other tracks.

Viewed from the perspective of trust and responsibility, a dual track system seems a convincing model. In principle (under the system described), judges have the duty to convey a referral order to responsible offenders—also in serious cases. This should still be the case when victims are not willing to participate in a restorative procedure, or in case of absent or abstract victims.

### **Is social deprivation a mitigating factor?**<sup>25</sup>

An extensive group of offenders has experienced a tragically disadvantageous upbringing. Some of them will have significant cognitive and emotional disabilities (lack of understanding of other persons’ basic interests; deficient command of impulses). This may justify reduced culpability and the imposition of treatment or assistance.

In his study *Malign Neglect* (1996) Michael Tonry re-introduces an individualised approach to sentencing in order to humanise the decision-making process. A system of punishment based on ‘social culpability’ would take account of all the particulars of an offender’s life. He aims to reverse the American trend to impose long punishments on disadvantaged groups (especially young black males), based on a system of rigid guidelines. This system ‘generally forbids judges to mitigate sentences to take account of the offender’s background and personal circumstances’ (Tonry 1996: 127).

Tonry argues that judges should consider an offender’s exposure to social adversity in mitigating sentencing. Those whose chances of life have been

---

25. Social deprivation is an issue far too complex to discuss in this text. I only will present some preliminary considerations.

diminished by forces beyond their control are less blameworthy for their resulting misconduct than those who suffered no such disadvantages. Many face an overwhelming temptation or undergo great pressure to commit crime. Tonry assumes that it is not morally wrong to sympathise with those who gave in to those pressures and help them resist temptation next time.<sup>26</sup>

Although having a 'deprived background' does not seem to be a sufficient reason, there are many areas in which the judge could exercise mercy. Candidates for merciful treatment are (Misner 2000):

- non-violent crimes that have not invoked strong emotional responses by society;
- criminal conduct that is questionable in terms of moral culpability (e.g. begging; using drugs);
- criminal conduct that did not cause injury;
- criminal conduct that did not create particularised victims;
- criminal conduct that actually disadvantaged the offender over the long haul.

So there are good reasons for sentencing reduction. But is mitigation feasible? There are many obstacles. The population might think that a large number of indigent but criminally active offenders are 'getting away' with reduced punishment (Von Hirsch and Ashworth 2005). Mitigation could give the message that disadvantaged offenders are to a lesser extent responsible. Obviously they do not have the duty to be responsive to moral norms. In this way they are persistently excused (London 2011: 252). So it is not

---

26. For similar arguments see retributivist thinkers such as Lippke (2009) and Von Hirsch and Ashworth (2005). Lippke points out that severe social deprivation tends to undermine the capacity to behave in responsible ways. Although socially deprived offenders are more or less blameworthy, some sentencing reduction seems in order. The criminal justice system, Lippke says, is 'rightly perceived as weighting more heavily upon them than upon equally ill-deserving others, thus earning their distrust if not contempt' (2009: 386). Von Hirsch and Ashworth argue that in a severely deprived social environment the social incentives to compliance are reduced. If social supports for law-abidingness are lacking, the deprived offender is in a more troubled situation, 'one in which the temptations to offend become harder to resist' (2005: 68). This predicament, the authors argue, warrants a degree of compassion and could in theory justify a sentencing reduction.

always wise to sympathise with ‘overwhelming temptation’ and ‘great pressure’ to commit crime.

Ross London believes that restorative sanction-tracks will offer more prospects. I agree, but an important question is: to what extent is the willingness to self-reform and ‘making good’ dependent on social class? London contends that an attitude of defiance is as prevalent among privileged offenders as it is in underprivileged offenders. Both groups are receptive to social controls. But still we may assume that the verbal capabilities to empathise and take responsibility seem to be distributed unevenly among social classes. For example, middle class offenders seem to have fewer difficulties with the language of peace-making and apologising in mediation settings (Presser and Hamilton 2006).

Many socially deprived repeat offenders are not prepared to face up to what they have done. I think the rationale of prevention of harm by keeping non-dangerous repeat offenders with naïve and chaotic lifestyles out of custody is still relevant. Behavioural orders and removal to sanction regimes with much supervision and social support might be indicated.

## Conclusions

Does focusing on specific needs and human characteristics introduce inequality? Some judges are quick to grant mercy. Some offenders and some victims are more eloquent and attractive than others, which also may stimulate or discourage mercy. As Bibas (2007) says, all these concerns are legitimate but far from fatal. Discrimination, arbitrariness, and variations in temperament, eloquence, and attractiveness are endemic problems in criminal justice. Bringing them into the open can help reasoned deliberation and public scrutiny. The option to have more rules and less discretion is understandable, and to an extent discretion can be channelled effectively. Therefore we could try to bring more structure to personal mitigation decisions.

Treating like cases alike is a value, but not the only one (Bibas, 2007: 347). Equality should not trump other relevant values, thereby sacrificing individualisation. Doing justice demands a balance of competing values, and taking into account mercy, tolerance, and responsibility keeps justice from being inexorable and rigid. Doing justice involves more rationales than only just deserts. Penal law should also protect the human worth of offenders

and all those they affected. Crime has a human face and there is no need to suppress it by employing tight sentencing guidelines.

Jacobson and Hough (2007) contend that greater attention to personal mitigation could help contain the burgeoning prison population. If sentencers are allowed to deviate from proportionality in high risk cases (imposing long-term preventative sentences to dangerous offenders) they should also have the possibility to do so in cases where the risks are low. The authors add that the significance of mitigation in sentencing is not recognised by policymakers. They are much readier to promote long-term preventative sentencing and tend to assume that the public is fed up with 'soft' treatment of criminals.

Punitive preferences are booming in a populist drama-democracy and probably will be booming, in spite of dropping crime figures. The philosophy of just deserts cannot defend itself against this long-term trend of rising demands for severe punishments. In America, the introduction of sentencing guidelines did nothing to undo the trend of meting out disproportionate sentences to young black males. An appropriate answer to penal populism and distorted offender images is individualisation: putting the offender back into sentencing.

Just deserts theory fails to take account of differences in personal circumstances and individual effects of punishment. I believe this rejection of offender specific factors has contributed to the growth of unreasonable and unjust sentencing systems that in many ways discourage initiatives to desistance and reparation. An important fact is that the public supports personal mitigation factors (Hough *et al*, 2009; Lovegrove 2011). Robinson's research (2012) shows that laypersons support mitigation of punishment when offenders show true remorse or when punishment would render a hardship on the offender's family. The author points out that strict proportionality deviates from the community's shared intuitions of justice; the moral credibility of the criminal law could be undermined if mercy is not exercised.

As Tasioulas has exemplified we should go beyond just deserts reductionism. There are competing moral imperatives that justify sanctions. Doing justice presupposes that proportionality constraints (standard cases and punishments) are loosened and that judges take account of the variety of offender

circumstances, offence contexts, and punishment dimensions (Tonry, 2011: 235).

We could strive for a multi-track sanction-system. When defendants—also of serious crimes—are willing to take up responsibility, they may be eligible to a restorative sanction-track. Disciplining sanctions (which are inevitably disempowering) might be reserved for defendants who keep responsibility at bay. As argued, the trustworthiness of the offender is decisive in assessing which sanction-track could be followed. The availability of restorative and disciplining tracks—or a mix of measures—could result in a decreased reliance on the prison system for handling offenders. These arguments fit in with the ideas of David Cornwell, Jim Dignan, Daniel Van Ness, Catherine Hoyle and many others who advocate a sanction-system in which restorative justice has its proper place. They share the view that in this system retribution is a necessity, but at the same time its application should be restricted.

Many protagonists view restorative justice as incompatible with retribution. This is still a grave impediment to accommodate restorative schemes in the mainstream of criminal justice practices. I agree with London that—at least for serious crimes—punishment is needed to underscore the public denunciation of the crime (London, 2011: 185). Of course, imposing punitive sanctions can be undesirable for many reasons. Serving one's time in prison obstructs moral education: understand and account for wrongdoing. Offender and society interests are damaged, like the preservation of social networks, caring for children, finishing school, etc. Therefore we should take—under the umbrella of the justified censure—personal attitudes and circumstances into account, consider the needs of those concerned, and protect human worth.

## References

- Bagaric, M. (2000), 'Double Punishment and Punishing Character: The Unfairness of Prior Convictions', *Criminal Justice Ethics*, 19, 1, 10–28.
- Bibas, S. (2007), 'Forgiveness in Criminal Procedure', *Ohio State Journal of Criminal Law*, Vol.4., 329–348.
- Bibas, S. and Bierschbach, R.A. (2004), 'Integrating Remorse and Apology into Criminal Procedure', *Yale Law Journal*, 114, 85–148.

- Braithwaite, J. and Pettit, P. (1990). *Not Just Deserts*, Oxford: Oxford University Press.
- Duff, R. A. (1993), 'Choice, Character, and Criminal Liability', *Law and Philosophy*, 12, 345–383.
- Duff, R. A. (2001), *Punishment, Communication, and Community*, Oxford: Oxford University Press.
- Duff, R. A. (2007), 'The Intrusion of Mercy', *Ohio State Journal of Criminal Law*, Vol.4, 361–387.
- Garvey, S. P. (1999), 'Punishment as Atonement', *UCLA Law Review*, 1804–29.
- Gromet, D. M. and Darley, J.M. (2006), 'Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures', *Social Justice Research*, 19, 395–432.
- Hough, M., Roberts, J. V. and Jacobson, J. (2009), *Public Attitudes to the Principles of Sentencing*, Sentencing Advisory Panel, Research Report -6, London.
- Jacobson J. and Hough, M. (2007), *Mitigation: The Role of Personal Factors in Sentencing*, Prison Reform Trust.
- Lippke, R. L. (2008), 'Response to Tudor: Remorse-based Sentence rDuctions in Theory and Practice', *Criminal Law and Philosophy* 2: 259–268.
- Lippke, R. L. (2009), 'Retributive Parsimony', *Res Publica* 15: 377–395.
- London, R. (2011), *Crime, Punishment, and Restorative Justice. From the Margins to the Mainstream*, Boulder/London: First Forum Press.
- Lovegrove, A. (2011), 'Putting the Offender Back into Sentencing: An Empirical Study of the Public's Understanding of Personal Mitigation', *Criminology & Criminal Justice*, 11 (1): 37–57.
- Markel, D. (2004), 'Against Mercy', *Minnesota Law Review* 88, 1421–80, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=392880](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=392880).
- Misner, R. L. (2000), 'A Strategy for Mercy', *William and Mary Law Review*, 41 (4): 1303–1400.
- Murphy, J. G. (1988), 'Mercy and Legal Justice' in: J. Murphy and J. Hampton, *Forgiveness and Mercy*, Cambridge: Cambridge University Press, 162–186.
- Murphy, J. G. (1997), 'Repentance, Punishment and Mercy', in Amitai Etzioni and David Carney (eds.), *Repentance: a Comparative Perspective*, Lanham Maryland: Rowman and Littlefield, 143–170.

- Murphy, J. G. (2011), 'Repentance, Mercy, and Communicative Punishment', in R. Cruft, M. H. Kramer and M. R. Reiff (eds.), *Crime, Punishment, and Responsibility*, Oxford: Oxford University Press, 27–36.
- Nozick, R. (1981), *Philosophical Explanations*, Oxford: Oxford University Press.
- Piper, C. (2007), 'Should Impact Constitute Mitigation? Structured Discretion Versus Mercy', *Criminal Law Review*, 141–155.
- Presser, L. and Hamilton, C.A. (2006), 'The Micropolitics of Victim-offender mediation', *Sociological Inquiry*, 76 (3): 316–342.
- Proeve, M. and Tudor, S. (2010), *Remorse. Psychological and Jurisprudential Perspectives*, Farnham: Ashgate.
- Roberts, J., Hough, M. and Ashworth, A. (2011), 'Personal Mitigation, Public Opinion and Sentencing Guidelines in England and Wales', *Criminal Law Review*, 7, 524–530.
- Robinson, P. H. (2012), 'Mercy, Crime Control, and Moral Credibility', in A. Sarat (ed.), *Merciful Judgments and Contemporary Society. Legal Problems, Legal Possibilities*, Cambridge and New York: Cambridge University Press, 99–123.
- Shapland, J. (2011), 'Personal Mitigation and Assumptions about Offending and Desistance', in: J. V. Roberts (ed.), *Mitigation and Aggravation at Sentencing*, Cambridge: Cambridge University Press, 60–80.
- Shapland, J. et al. (2006), 'Situating Restorative Justice Within Criminal Justice', *Theoretical Criminology*, Vol.10 (4): 505–532.
- Tasioulas, J. (2003), 'Mercy', *Proceedings of the Aristotelian Society* CIII, 101–132.
- Tasioulas, J. (2006), 'Punishment and Repentance', *Philosophy* 8, 279–322.
- Tasioulas, J. (2007), 'Repentance and the Liberal State', *Ohio State Journal of Criminal Law*, Vol.4, 487–521.
- Tonry, M. (1996), *Malign Neglect. Race, Crime and Punishment in America*, New York: Oxford University Press.
- Tonry, M. (1994), 'Proportionality, Parsimony, and Interchangeability of Punishments', reprinted in M. Tonry (ed), *Why Punish? How Much? A Reader on Punishment*, Oxford: Oxford University Press, 2011.
- Tudor, S. (2008), 'Remorse, Reform and the Real World: Reply to Lippke', *Criminal Law and Philosophy* 2: 269–272.

- Van Stokkom, B. (2005), 'Does Punishment Need Hard Treatment? A Reply to Duff', in E. Claes, R. Foqué and T. Peters (eds), *Punishment, Restorative Justice and the Morality of Law*, Antwerp—Oxford, Intersentia, 165–178.
- Van Stokkom, B. (2007), 'The Expressive Function of Restorative Punishment. A Public Interest Perspective', in M. Bošnjak, J. Deklerck, C. Pelikan, B. van Stokkom and M. Wright (eds), *Images of Restorative Justice*, Frankfurt: Verlag für Polizeiwissenschaft, 151–167.
- Von Hirsch, A. (1993), *Censure & Sanctions*, Oxford: Clarendon Press.
- Von Hirsch, A. (1998), 'Desert and Previous Convictions', in A. von Hirsch and A. Ashworth (eds.), *Principled Sentencing. Readings on Theory and Policy*, Oxford: Hart, 191–197.
- Von Hirsch, A. (2001), 'Proportionate Sentences for Juveniles. How different than for Adults?', *Punishment and Society*, 3 (2): 221–236.
- Von Hirsch, A. and Ashworth, A. (2005), *Proportional Sentencing: Exploring the Principles*, Oxford: Oxford University Press.
- Walker, N. (1995), 'The Quiddity of Mercy', *Philosophy* 70, 27–37.
- Wright, M. (1999), *Restoring Respect for Justice*, Sherfield on Loddon, UK: Water-side Press.