

CHAPTER ONE

PUNISHING, MORE OR LESS: EXPLORING AGGRAVATION AND MITIGATION AT SENTENCING

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This volume explores an under-researched yet fascinating domain in the field of criminal sentencing: the circumstances that may justify imposition of a harsher or more lenient sentence. At sentencing, courts must weigh a wide range of offence and offender-related factors in order to determine the severity of the sentence. Some factors influence the sentence by affecting the seriousness of the crime, others because they reflect a higher or lower level of culpability on the part of the offender. Mitigating and aggravating factors are often taken for granted by members of the public (and possibly some legal professionals) – we all have intuitions about whether factor X should result in a more lenient or a harsher sentence. Certainly, for many factors the relevance is obvious: committing an assault against someone while disparaging their ethnicity or religious beliefs obviously makes the assault more serious; there is an additional element of harm (contained in the affront to the victim's identity). Similarly, if, immediately after committing the crime the offender assists the victim, apologizes for his conduct and makes amends, this justifies a more lenient sentence. But many problematic circumstances exist.

Consider intoxication – a circumstance commonly associated with offending and which is explored by Nicola Padfield in her chapter in this volume. Should the fact that the offender was drunk at the time of the offence result in a more lenient sentence? One justification is that the offence was uncharacteristic of the offender. On this line of reasoning intoxication sustains a more general claim that the offence was 'out of character'. At the same time there is a strong counter-argument in cases in which the offender has a history of heavy drinking: he or she may be

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seen as being more culpable for failing to exercise some restraint regarding a known problem. According to this analysis intoxication should aggravate the sentence – as in the case of an offender who drinks heavily knowing that this often results in criminal assaults in pubs. Indeed, a number of guideline schemes identify intoxication as an aggravating factor.¹ Empirical research by Wilkins found that the fact that the offender was under the influence of alcohol emerged on lists of mitigating *and* aggravating factors (Wilkins 1983). As with a number of other factors, then, intoxication may aggravate or mitigate, depending upon the particular circumstances of the offence and the offender.

Intuition alone is often a poor guide to principled sentencing. Some guidance for sentencers with respect to the interpretation of this circumstance would be helpful. If the role of a particular circumstance is subject to variable interpretations, the case for guidance surely becomes unassailable. This does not mean that guidelines with respect to an ambiguous factor such as intoxication need to be heavy-handed and prescriptive – laying down that drunkenness should *never* mitigate or *always* aggravate – but it is surely possible to give some guidance as to its role at sentencing, with the intention of promoting a consistent approach.

CHAPTER OVERVIEW

I begin by noting some justifications for providing guidance for sentencers with respect to mitigation and aggravation. This is followed by a brief discussion of the guidance provided to courts in common law jurisdictions. Throughout, I illustrate the discussion with examples from various jurisdictions, although the primary focus is on the guidelines in England and Wales. After identifying some limitations on sentencing factor guidance, I offer suggestions for improving matters. The chapter concludes with a brief overview of the remainder of this volume.

JUSTIFICATIONS FOR GUIDANCE

The absence of comprehensive guidance regarding sentencing factors is regrettable, for several reasons.

¹ For example, the crime seriousness guideline issued by the Sentencing Guidelines Council (now the Sentencing Council of England and Wales) identifies ‘commission of offence while under the influence of alcohol or drugs’ as an aggravating factor indicating higher culpability. (All the English guidelines are now available at www.sentencingcouncil.org.uk.)

The power of sentencing factors to influence sentence severity

If mitigating and aggravating factors had only a minimal impact on sentencing, it might be reasonable to leave the matter to judicial discretion. However, these factors can exert a powerful influence over sentence outcomes; they may well determine whether custody is justified and necessary, or may mean a significant difference in the duration of any custodial term imposed. Research in England and Wales has demonstrated that personal mitigation still plays the largest role in tipping the balance away from the imposition of a term of custody (Hough et al. 2003: 37) while Jacobson and Hough (2007) found that in approximately one-third of the cases which they observed, judicial recognition of personal mitigation changed what would have been a custodial sentence to a community-based sanction. In the light of this it is vital that sentencers consider and apply factors in a uniform manner. The concepts of equality and fairness that underlie the criminal law require sentencers to apply mitigating and aggravating factors consistently.

The potential variability of application

A second justification for guidance concerns the absence of consensus; sentencers often disagree with respect to the weight and significance of various sentencing factors. Research has repeatedly demonstrated considerable variation in the judicial response to some sentencing factors. In an older Canadian study Hogarth found that ‘there was little agreement among magistrates . . . each magistrate seemed to establish his own criteria for assessing the relevance of, and the weight to attach to, different types of information’ (1971: 371). Shapland (1981) also found little consensus among barristers in England and Wales with respect to the factors deemed relevant to speeches of mitigation, while Corbett (1987) noted that ‘aggravating and mitigating value judgments were made of the same fact’ (p. 211). Most recently, Jacobson and Hough (2007: 17) report considerable variation in sentencers’ reactions to mitigating factors. It seems clear that some factors are susceptible of different interpretations – hence the need for guidance.

Guiding the ‘intuitive’ sentencer

A third justification for providing structure and guidance concerns the phenomenology of sentencing. Determining which factors should mitigate or aggravate is the element of sentencing most likely to arouse intuitive reactions to punishment. There are several dangers here. First, as noted earlier, our intuitions are not always good guides to the

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determination of a principled sentence. Second, intuitions, by definition, vary widely; one person's view of personal mitigation may be very different from another's. Even if two sentencers agree on the relevance of a particular factor, they may diverge on its relative weight, one considering it to be important enough to make a difference between community and custody, the other as being insufficient to change the appropriate sanction to this extent. For this reason, sentencers should be provided with some guidance and encouraged not just to give free rein to their intuitive responses.² In addition, lay sentencers may be overly influenced by sympathy for a particular defendant, or swayed against some kinds of offenders. There is a natural human tendency to be more lenient towards people we like, or people whom we perceive to be similar to ourselves. Social distance is inversely related to the level of tolerance we have for wrongdoing.

Promoting public confidence in sentencing

A final justification for guidance concerns the relationship between sentencing and the community. If sentencing factors are not conceptually sound and systematically applied, the public image of sentencing will suffer. Poorly understood sentencing factors can be the source of much public and media criticism of sentencers;³ when a defendant is spared custody through the application of an important mitigating factor it is important to ensure that the relevance of the factor is clear to the community – and guidelines represent a vehicle to communicate with the public. Otherwise, public misunderstanding of sentencing and criticism of sentencers will grow. Promoting public understanding of sentencing is a statutory function of many sentencing authorities. For example, the enabling legislation of the Sentencing Council of England and Wales states that the Council 'may promote awareness of matters relating to the sentencing of offenders' (s. 129(2)). Similarly, section

² It would be strange if no parallels existed between legal models of sentencing and intuitive reactions to claims for mitigation; however, there are important differences between the two spheres. State punishment invokes a separate set of considerations. For example, the purposes of sentencing identified in s. 142(1) of the Criminal Justice Act 2003 in England and Wales include deterrence and incapacitation; these objectives are not invoked in an everyday context.

³ The author of the first English sentencing text (Cox 1877) observed that 'The province of the Judge and Magistrate is so little understood by the public that complaints are sometimes made of the severity of a Judge. The writers of sensational articles in the newspapers take especial pleasure in this work. It is at once so easy to write about and so pleasant to read . . . The degree of mitigation is a question that can only be determined by such knowledge of all the facts as the Judge alone can acquire . . . but which are quite unknown to the public, to the reporters and to the commentators' (p. 19).

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100J(1)(e) of the Crimes (Sentencing Procedure) Act 1999 in New South Wales requires the Sentencing Council in that state to ‘educate the public about sentencing matters’. Many sentencing factors may strike the public at first glance as being questionable. As Roberts and Hough note in their chapter here, mitigating sentence because the offender pleaded guilty or because it was his or her first conviction may generate public anger – at least until the principle underlying these common factors is adequately explained.

CONCEPTUAL FRAMEWORKS

Despite the importance of sentencing factors, as Ashworth notes, ‘The concepts of aggravation and mitigation have tended to attract little close examination or theoretical discussion’ (2010: 156; see also Walker, 1999). Classifications of sentencing factors have been proposed. For example, the Victorian Sentencing Committee identified five categories of mitigating factors (1988: 258). More recently, Jacobson and Hough have proposed a framework of categories for factors relating to personal mitigation (2007; see also their contribution to this volume). Guideline schemes do not always reflect a coherent conceptual foundation, and more structure for sentencers may be desirable.

STRUCTURING DISCRETION AT SENTENCING

Sentencers in England and Wales, the United States and a number of other jurisdictions receive guidance on a wide range of issues relating to the determination of sentence. However, even the most detailed and prescriptive guidelines will fail to ensure consistency of approach in sentencing unless adequate direction is also provided with respect to sentencing factors, both mitigating and aggravating. At present, guidance regarding sentencing factors tends to be modest. Guideline schemes around the world generally adopt a *laissez-faire* approach to the use of sentencing factors. Even in the relatively restrictive US-based systems which restrict judicial discretion, guidance regarding the application of other factors is quite limited. This state of affairs may reflect the view that consideration of mitigation and aggravation is more properly left to the exercise of judicial discretion, with only minimal direction from the legislature, the guidelines authority or the Court of Appeal. Consistent with this perspective a number of scholars – including some

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contributors to this volume – are of the view that additional guidance regarding mitigating or aggravating factors is unhelpful or unwise.

As will be seen, there is considerable variation across the common law world with respect to the degree and nature of guidance regarding sentencing factors.

SOURCES OF GUIDANCE

The legislature: statutory sentencing factors

Legislatures affect sentencing factors in the first instance by creating the judicial discretion to consider mitigation at sentencing. For example, section 166 of the Criminal Justice Act 2003 states that: ‘Nothing in [provisions relating to the determination of sentence] . . . 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’. Section 718.2a of the Criminal Code of Canada is more affirmative, directing courts that ‘A sentence should be increased or reduced to account for any *relevant* aggravating or mitigating circumstances relating to the offence or the offender’ (emphasis added).

The second way in which legislatures affect the application of sentencing factors is through codification of specific factors. Almost all⁴ common law jurisdictions have placed certain mitigating and aggravating factors on a statutory footing. According to some statutes, judges are directed to consider these factors when determining the seriousness of the offence. Thus, sections 2 and 3 of Chapter 29 of the Swedish Criminal Code 1988 specify a number of factors that enhance or diminish the penal value of the crime. In addition, section 5 of the chapter specifies eight additional mitigating circumstances that a court shall consider ‘to a reasonable extent’. These include factors such as whether the punishment would have a disproportionate effect on the offender due to advanced age or ill health.

In most jurisdictions the number of codified factors is generally small: in Finland the principal sentencing statute specifies only five factors which increase the severity of the punishment, while the Canadian Criminal Code lists only a handful of aggravating factors and no mitigating factors. The absence of mitigating factors in the Canadian sentencing regime reflects a trend found elsewhere to provide more guidance

⁴ Tasmania is an exception: its sentencing legislation does not identify any factors.

with respect to aggravation than mitigation.⁵ In England and Wales, five sentencing factors have been placed on a statutory footing. The Criminal Justice Act 2003 provides no indication regarding the relative weight of the factors, their potential to move a case over the custody threshold, or whether they are more important than other sentencing factors emerging from the case law. The statute thus provides only limited guidance to sentencers regarding the sources of aggravation and mitigation. This reflects the existence of the sentencing guidelines issued by the Sentencing Council and which presumably are designed to supplement and interpret the statutory framework.⁶

The Court of Appeal

Until the advent of sentencing councils and commissions to disseminate guidelines, the appellate courts have been the traditional source of guidance at sentencing. Evaluating the adequacy of appellate guidance regarding mitigating and aggravating circumstances is beyond the scope of this chapter. However, numerous academic commentators and commissions have identified the limitations on appellate guidance in general and the area of mitigation and aggravation in particular. Most sentence appeals address a specific point of law or provide a test for whether the sentence imposed was ‘manifestly unfit’. Guideline judgments in which the court sets out the mitigating and aggravating factors relevant to the offence are relatively rare. Walker, for example, described the degree of guidance from the English Court of Appeal in the following way: ‘What emerges is the unsystematic approach of the Court of Appeal, resulting in contradictory decisions and special pleading.’ (1985: 43). Elsewhere, the Canadian Sentencing Commission (1987) noted that ‘Research undertaken by the Commission has shown that a significant number of judgments just enumerate factors without specifying whether they are considered to be aggravating or mitigating’ (p. 321). More recently, however, the Court of Appeal in England and Wales has provided

⁵ The explanation for this asymmetry is unclear; it may reflect greater consensus around aggravating factors. For example, if one agrees that hate motivation is an aggravator, it surely operates across all offences and offenders. There may be less agreement about the relevance and weight of different mitigators, in which case it is hard to be more prescriptive.

⁶ Other jurisdictions provide more comprehensive lists of statutory factors. Thus the Crimes (Sentencing Procedure) Act 1999 in New South Wales identifies twenty-one aggravating and sixteen mitigating factors. S. 9 of the Sentencing Act 2002 in New Zealand notes ten aggravating, seven mitigating and one statutorily excluded sentencing factor (see the chapter by Young and King in this volume).

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detailed guidance for sentencers.⁷ The primary source of comprehensive guidance is the guidelines authority.

Sentencing guidelines

The first challenge for any guidelines authority is to resolve the question of justification or relevance: On what basis is factor X a legitimate consideration which may aggravate or mitigate sentence? One response is to define relevance in terms of the statutory purposes of sentencing or the principal components of a proportionate sentence, namely harm and culpability. If factor X enhances culpability or signifies greater harm, then it should be considered at sentencing. This approach may be too restrictive; it is easy to conceive of factors which are unrelated to harm or culpability.

Two examples are the discount offered to offenders who plead guilty and who assist the state in its prosecution of other offenders. The justification for reducing sentences on these grounds lies outside any sentencing rationale and is located in the wider objective of constraining the costs of justice, enhancing the crime control function of the criminal justice system and sparing victims and witnesses from having to testify. On occasion the principles of sentencing, then, give way to broader goals. In these examples the role of a guidelines authority is no less clear, however. Courts need guidance on the magnitude of the discount, its relevance to variables such as the timing of the plea, the complexity of the case and other variables. This guidance is provided in some jurisdictions (see, e.g., the guideline issued by the English Sentencing Council, discussed below). The picture becomes even more complicated when we enter the zone of personal mitigation. A myriad of factors is taken into account here, many of which are hard or impossible to justify on a sound retributive principle or utilitarian basis.

The United States

Under most US sentencing guideline schemes the role of mitigating and aggravating factors is generally to justify the imposition of a sentence that is outside the range prescribed by the guidelines, or to move the case from the normal range up to an aggravated or down to a mitigated range.⁸ For example, the Utah guidelines manual notes that ‘There are

⁷ See, e.g., *R v. Saw*, which sets out factors for the offence of domestic burglary.

⁸ In the landmark decision in *United States v. Booker*, the US Supreme Court held that the federal sentencing guidelines are merely advisory rather than bindingly presumptive in nature. Mitigating circumstances therefore may be reasonably described as mitigating factors rather than ‘departures’ in the stricter sense of the pre-*Booker* era (see also the discussion in the chapter by Will Berry in this volume).

occasionally circumstances that compel deviation from the guidelines' (Utah Sentencing Commission 2010: 12). Directions are provided to courts with respect to the consideration of the sources of mitigation and aggravation. A non-exhaustive list of factors is provided, and courts are directed that 'in considering all aggravating and mitigating factors in a particular case, the number of each should not merely be added up or otherwise mechanically applied in the balancing process. Rather, the totality of the mitigating factors should be compared against the totality of the aggravating factors' (p. 12). Elsewhere, aggravation and mitigation create separate guideline ranges. For example, the sentencing guidelines in North Carolina provide sentencers with three sentence ranges: presumptive, aggravated and mitigated (North Carolina Sentencing and Policy Advisory Commission 2007).

Sentencing Council of England and Wales

The first definitive English guideline was issued in 1999, and many offence-specific guidelines have since appeared (see Ashworth and Wasik 2010 for a review). The English guidelines provide sentence ranges for categories of seriousness – most offences are divided into three levels. Each guideline also contains a non-exhaustive list of relevant mitigating and aggravating factors. In addition, the previous Sentencing Council issued a guideline for the determination of offence seriousness which is applicable to all offences. In that guideline the Council provides two lists containing a total of thirty-one generic aggravating factors that arise from a higher level of culpability or a greater degree of harm (or sometimes both conditions). These are described as being the most important aggravating circumstances with application across many offence categories. The lists are non-exhaustive. They include both statutory and non-statutory factors but make no commentary on the relative importance of the two. They are then followed by four factors that indicate when an offender's culpability is unusually low or that the harm is less than usually serious.

There is an imbalance in the lists reflecting the asymmetry to which reference has already been made: thirty-one factors are identified that enhance sentence severity, while only four factors are noted which may reduce the level of culpability or harm. Similarly the domestic violence guideline identifies seven aggravating but only two mitigating factors. The sexual offences guideline is also asymmetrical; there are 189 citations to aggravating factors, yet only 45 in mitigation (the same factors are cited across offences). For sixteen common offences in the

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Magistrates' Courts Sentencing Guidelines only a single mitigating factor or none are specified. One danger is that this asymmetry will concentrate sentencers' attention on aggravation rather than mitigation. The asymmetry is curious, since research suggests that the need for guidance is less pressing with respect to aggravating factors. For example, Wilkins (1983) found a high degree of consensus regarding aggravating factors but much less consensus with respect to mitigating factors.

Guilty plea discount

With respect to one important sentencing factor – the guilty plea – the Sentencing Guidelines Council (now the Sentencing Council) has provided clear and detailed advice.⁹ The Council's definitive guideline makes it clear that the reduction for a guilty plea 'derives from the need for the effective administration of justice and not as an aspect of mitigation' (Sentencing Guidelines Council 2007: 4). The definitive guideline published in July 2007 specifies the range of the reduction in sentence as well as the circumstances that justify different levels of reduction. This level of guidance reflects the importance of this factor in terms of sentencing and the administration of justice. With respect to other aggravating and mitigating factors, however, guidance is less comprehensive or precise.

Providing enhanced guidance

In all the guideline schemes a number of elements are missing, or require greater elucidation. At this point, some sentencers (and sentencing scholars) may roll their eyes and think, 'Here comes another exercise in box ticking!' Yet it is surely possible to provide structure and guidance without unduly limiting a court's discretion to craft an appropriate disposition. What other elements might a guidelines authority reasonably provide to sentencers? In my view, a number of issues need to be addressed.

The rationale for mitigating or aggravating sentence

First, it would be useful for a guidelines authority to articulate the rationale for considering specific mitigating and aggravating factors. This is not simply an academic exercise; awareness of the justification

⁹ Not once, but twice. A definitive guideline was issued by the former Council (the SGC) in 2004. After further study and consultation this was revisited by the SGC and a second definitive guideline issued in 2007. Curiously, less than two years later, in 2009, the Coroners and Justice Act created a statutory obligation on the new Sentencing Council to issue a guideline on the discount for a guilty plea. Were the legislative drafters unaware of the existence of the definitive guideline?