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## MITIGATION AND AGGRAVATION AT SENTENCING

This innovative volume explores a fundamental issue in the field of sentencing: the factors which make a sentence more or less severe. All sentencing systems allow courts discretion to consider mitigating and aggravating factors, and many legislatures have placed a number of such factors on a statutory footing. Yet many questions remain regarding the theory and practice of mitigation and aggravation. Drawing on legal and sociological perspectives and examining mitigation and aggravation in various jurisdictions, the essays provide practical illustrations of specific factors as well as theoretical justifications. After the foreword by Andreas von Hirsch, a number of contributors address broad conceptual issues raised at sentencing. These contributions are followed by several empirical chapters, including an exploration of personal mitigation in English courts. The authors are leading scholars from a range of common law jurisdictions including England and Wales, the United States, Canada, Australia, New Zealand and South Africa.

JULIAN V. ROBERTS is a professor of criminology in the Faculty of Law, University of Oxford, and a member of the Sentencing Council of England and Wales. He is editor-in-chief of the *European Journal of Criminology* and associate editor of the *Canadian Journal of Criminology and Criminal Justice*.

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## FOREWORD

Explicit guidance for sentencing decisions, and an explicit rationale to guide them, has been a notable feature of sentence-reform efforts over recent decades. In England and Wales a system of sentencing guidelines is in place, based on statutory standards and guidelines provided by the Sentencing Council. Meanwhile, an extensive literature on sentencing theory has developed – for example, that based on notions of desert and proportionate sanctions, or on notions of ‘limiting retributivism’ (von Hirsch and Ashworth 2005: ch. 9 and appendix 2).

Yet, curiously, little attention has been paid to aggravating and mitigating circumstances affecting the sentence. The first systematic effort at sentencing guidance in England and Wales, the Criminal Justice Act 1991, established a system of statutory guiding principles; these norms were aimed at helping to establish gradations of sentence for various crimes, based chiefly on offence-seriousness. However, the legislation omitted any guidance on aggravating or mitigating circumstances affecting sentence. It was only a decade and a half later, in 2004, that the Sentencing Guidelines Council (since replaced by the Sentencing Council of England and Wales) adopted a list of aggravating and mitigating factors. Sentencing theorists and scholars have, if anything, been still more neglectful of the subject; this is the first major book devoted to the topic.

Yet aggravation and mitigation are matters of great importance in the determination of sentence. Such factors may substantially affect the severity of the sentence and raise complex ethical and practical questions.

Consider the mitigating factor of provocation by the victim, and a simple case. A young woman lives with a partner who regularly abuses her. After numerous incidents of mistreatment, her partner returns from the pub one evening under the influence of alcohol, again beats her badly, and then falls into a drunken semi-stupor. While he is in that state, she goes into the kitchen, finds a heavy skillet, and smashes it into his face. He suffers a fractured nose, jaw and cheekbones, extensive lacerations and severe trauma, and must be hospitalized. She is charged

## FOREWORD

with aggravated assault, is duly convicted and appears for sentencing. Should her sentence be mitigated, on grounds of severe provocation on his part?

It would seem that it should be. The seriousness of her offence depends on its harmfulness and culpability. The harm is unaffected by the victim's provoking conduct, but her culpability should be reduced in recognition of her victim's gross misconduct towards her, even as a matter of common-sense moral judgement. How, then, should this case be handled?

Sweden's statutory sentencing guidelines, in effect since 1989, address such questions.<sup>1</sup> That scheme provides guidance on the grading and severity of ordinarily applicable sentences. It also includes an explicit catalogue of circumstances of aggravation and of mitigation. One of the listed mitigating factors is provocation: that the crime was committed in virtue of the victim's 'obviously [injurious or] offensive' behaviour towards the defendant. Under that standard, the defendant in the hypothetical case would qualify as having been provoked by the victim's gross misconduct towards her, and the sentence would be reduced substantially.

Addressing mitigating and aggravating factors explicitly in this fashion will evoke a series of important further questions. One is that of the sentencing rationale. Consider, again, the mitigating factor of provocation. The traditional English common-law account of provocation (which concerns only homicide cases and their statutory classification) utilizes a theory of impaired volition: whether the defendant's capacity for self-control was affected by the victim's misconduct.<sup>2</sup> Several authors, including Arie Freiberg and Felicity Stewart in the present volume, point out that provocation does not necessarily involve diminished volition, and favour a culpability-based account instead.<sup>3</sup>

A second set of interesting questions relates to the criteria for applying the stated norms of aggravation or mitigation. If provocation as a mitigating factor is based on the victim's wrongful conduct towards the defendant, how heinous must the provoking conduct be? Must serious violence be involved (as in the just-cited hypothetical case)?

<sup>1</sup> Swedish Criminal Code, ch. 29 §3(1).

<sup>2</sup> See, e.g., Horder (1992). However, the common-law doctrine combines this subjective loss-of-self-control standard with a further (and very different) element of culpability: that the loss of self-control was 'reasonable' in the circumstances. For a critique of this approach, see Narayan and von Hirsch (1996).

<sup>3</sup> For an account of why provocation is a matter of culpability, see Narayan and von Hirsch (1996).

Lesser forms of violence? Gravely insulting conduct? Infringement of domestic obligations (e.g. marital infidelity)? My inclination would be that only serious misconduct by the victim should count, but how serious this needs to be should be clarified.

Making aggravation/mitigation explicit and examining their rationale can have a third function: helping to decide whether a given factor is worth introducing or retaining at all. Consider the traditional 'equity factor' in English judicial practice of reducing sentence on account of a defendant's 'social contributions' – for example, his assistance to public charities, or his good military record. Such an approach presupposes a 'social accounting' conception that treats criminal punishment as concerned with the defendant's general worthiness or unworthiness. I am sceptical that the criminal sanction should have this function – and whether it would be consistent with notions of personal liberty and fair accountability for criminal conduct (see discussion in von Hirsch and Ashworth (2005), appendix 1). But this, again, is a matter that needs further debate.

It has been suggested, however, that aggravation and mitigation are subjects not well suited to being addressed through sentencing guidelines; and that these matters are best left to the discretion of individual judges. One argument is that aggravation/mitigation should take greater account of rehabilitative factors (or of 'personal mitigation') than desert-orientated guidelines permit – so that these subjects should be exempt from the guidelines. But if that assumption is correct – that aggravation/mitigation should focus on rehabilitation or personal mitigation more – then why cannot this concern be dealt with through explicit standards on the subject? Why not, in other words, have desert-orientated guidelines for the normally applicable sentence, and aggravation/mitigation standards with a somewhat differing emphasis? The rationale for this shift in emphasis would need to be explained. But taking this approach would at least help to ensure greater consistency among the sentencing decisions of judges than were matters of aggravation and mitigation simply left to individual decision-makers' discretion.

Another claim is that matters of aggravation and mitigation are too complex and elusive to be addressed in sentencing guidelines, and should be left to judges' discretion; that they are of 'infinite' variety. The argument puzzles me. Were it valid, then how could even individual judges deal with such matters? After all, none of us (whether judges or academic penologists) seem to possess the skills of mathematicians and cosmologists in dealing with trans-finite quanta.

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## FOREWORD

An inquiry into aggravation and mitigation, their rationale, criteria and application, is long overdue. This important volume does great service in examining this area and opening it for discussion.

Andreas von Hirsch

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