

# *MITIGATION* :

the role of personal factors in sentencing

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## Foreword

This report has its origins in an earlier piece of work by the same research team, published by the Prison Reform Trust. That work is *The Decision to Imprison*. It is concerned mainly with the factors that have led sentencers to rely increasingly on custodial sentences since 1991. It draws attention to the importance of mitigating factors, and personal mitigation in particular, in many sentencing decisions. When the researchers suggested that a second study focusing on these issues would be of value, I was very happy to lend what help I could to the enterprise.

Sentencing legislation is placing increasing weight on the future risks that offenders pose. It can be right for judges to depart from the normal principle that sentences should be proportional to the seriousness of the offence when sentencing if the offender represent an exceptional danger to the public. Current penal debate is preoccupied with difficult issues about the definition and identification of such dangerous offenders. This report reminds us that there is another side to the coin, and that justice and the public can in some cases be best served by lenience. An experienced sentencer should be in a position to identify the cases which fall in this category and sentence accordingly.

Personal mitigation can play a critical part in the sentencing process. We sentence not just the offence but the offender. If justice is to be done, we need to take account of the offender's personal situation and the factors that led to the offence, as well as the seriousness of the offence. Justice is best served by an individualised approach to sentencing in which we allow personal mitigation to play a full part. However, as the researchers argue, we need to be clearer about the principles that justify lenience just as we need to be clearer – and in our view more parsimonious – about the circumstances where we define offenders as dangerous.



Lord Woolf of Barnes  
September 2007



## Acknowledgements

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Eilidh Currie, Jasmine Chadha and Rona Epstein carried out most of the observation work for the study. Much of the empirical material presented in this report therefore derives from their attentive and highly detailed note-taking. Eilidh Currie also provided considerable assistance with the analysis of the observation findings.

A large number of people were very generous with their time. We are grateful to those who helped to get the study off the ground, providing access to our respondents: particular thanks are due to the then Lord Chief Justice, Lord Woolf, and Lord Justice Judge for supporting the study. We would also like to thank the Resident Judges in the five study areas for identifying potential respondents for us and for ensuring that we could observe cases that involved sentencing decisions.

Particular thanks are due to all those judges and recorders who gave up their time to take part in the study. All met the considerable demands we placed on them with forbearance and good humour; and we are especially grateful to them for the spirit of openness with which they approached the study.

Thanks are due to several people who helped us when we were developing the study, analysing our findings and drafting this report. In particular we would like to thank Andrew Ashworth, John Bowers, Bob Collover, Leonard Krikler, Kevin McCormac, Elaine Player and Julian Roberts.

Finally we would like to thank Geoff Dobson, Kimmatt Edgar, Juliet Lyon and others at the Prison Reform Trust. The Trust's staff were consistently constructive and supportive, but at the same time never failed to respect our independence as researchers.

Jessica Jacobson  
Mike Hough  
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## SUMMARY

This report is concerned with personal mitigation: factors which reduce the severity of a sentence, and relate to the offender rather than the offence. It involved observation of sentences passed in the Crown Court, and interviews with judges and recorders.

Key findings are:

- *Personal mitigation takes many forms, relating to: the offender's past; the offender's circumstances at the time of the offence; the offender's response to the offence and prosecution; and the offender's present and future.*
- *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.*
- *Judges cited at least some factor of personal mitigation as relevant to sentencing in almost half of the 162 cases observed in the study.*
- *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.*
- *In a just over a quarter of the 127 cases, mitigation including personal factors resulted in a shorter custodial sentence.*
- *Respondents were asked to rate the importance of different mitigating factors in three cases; they were in agreement about the importance of some forms of personal mitigation, but expressed very mixed views on others.*

The researchers conclude that the significance of mitigation in sentencing is not recognised by policy. They argue that justice is best served by an individualised approach to sentencing which allows personal mitigation to play a full part. What is needed is consistency of sentencing process – which will not necessarily result in consistency of outcomes for any given offence category. The researchers suggest that there is a need for guidance, for example from the Sentencing Guidelines Council, on the principles of personal mitigation that should – and should not – be incorporated into sentencers' decision-making.

### Background

This study examined the role of personal mitigation in sentencing in the Crown Court. The topic is important because decisions about mitigating and aggravating factors actually define the detail of any sentencing framework grounded in proportionality. It is the ways in which sentencing practice deviates from the principle that the punishment should fit the crime that constitute the interesting penological questions.

The topic is not simply of academic interest, however. Our sentencing framework has shifted its centre of gravity from just deserts to risk-based sentencing – but the



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‘rebalancing’ that this has involved could unbalance the framework. This is because all the emphasis in the new risk-based provisions is on the sentencing of high-risk cases. It is perfectly proper for politicians to decide that in the interests of public protection some categories of offender should get heavier sentences than their offence actually warrants. But if they do so, it makes both penological and fiscal sense to allow sentencers to deviate from proportionality not only in high risk cases, but in those where risks are low. Greater attention to personal mitigation could thus help contain our burgeoning prison population.

## Methods

The study involved observation of sentencing in open court and one-to-one interviews with sentencers. It was carried out across five Crown Court centres located in London, and in the South-East, Yorkshire and the Humber and West Midlands regions. We observed a total of 132 cases involving 162 defendants and 52 sentencers. In most cases we observed the prosecution’s account of the facts of the case, the plea in mitigation by the defence counsel and the passing of sentence by the judge. We conducted interviews with 40 sentencers, including each court’s resident judge. The interviews comprised a series of open-ended questions about sentencing and mitigation, followed by a short sentencing exercise in which the respondents were asked about the weight they would accord to a number of different mitigating factors attached to three different sentencing scenarios.

## Main findings on mitigation

The term ‘mitigation’ is used to refer to any aspect of a case that reduces the severity of the sentence passed. ‘Personal mitigation’ refers to factors relating to the *offender* rather than the offence. Personal mitigation takes many forms, for example relating to:

- the offender’s past (e.g. good character, productive life, deprived background) the offender’s circumstances at the time of the offence (e.g. financial pressures, psychiatric problems, intellectual limitations, immaturity)
- the response to the offence and prosecution (e.g. remorse, acts of reparation, addressing the problems that led to the crime, cooperation with the police)
- the offender’s present and future prospects (e.g. family responsibilities, supportive partner, capacity to address problems underlying the criminal behaviour).

Our observation of sentences being passed shows that personal mitigation plays an important and largely unrecognised part in the sentencing decision. Judges cited at least one factor of personal mitigation as relevant to the sentence in just under half of the 162 cases observed in the study. Personal mitigation 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 pulling the sentence back from immediate custody. In just over a quarter of the 127 cases, mitigation including personal factors resulted in a shorter custodial sentence.

The judges and recorders whom we interviewed were asked to consider three sentencing scenarios, and to rate the significance of different sorts of mitigating factors attached to each. They were in agreement about the importance of some forms of personal mitigation. For example, most said that they would attach a great deal of importance to the fact that an offender convicted of assault occasioning actual bodily harm was clinically depressed at the time of the offence; and only one would give a burglar much credit for the fact that he had had a difficult childhood.

Other factors produced inconsistent responses. Half said that they would place a lot of weight on support for the offender offered by the victim's family in a case of causing death by dangerous driving; but almost half disagreed. Most would also take considerable account of a burglar's commitment to enter a drug treatment programme, but seven out of 40 said that this should have minimal impact.

### Policy shifts and sentencers' responses

The sentencing framework introduced by the 2003 Criminal Justice Act has shifted sentencing policy some way from that embedded in the 1991 Criminal Justice Act. The formal position is that proportionality to the offence remains the guiding principle of sentencing. However, new risk-based preventative sentencing measures introduced by the recent Act could turn out to be of great importance. These include provisions relating to the sentencing of offenders who are deemed 'dangerous'. 'Dangerous' offenders can be subject to life imprisonment, extended sentences or imprisonment for public protection. The Act *requires* the court to assess an adult offender as 'dangerous' if he has committed a 'specified' violent or sexual offence and has a previous conviction for such an offence – unless the court believes it unreasonable to do so. The lists of 'specified' violent and sexual offences are extensive; hence a significant proportion of offenders are potentially encompassed by these provisions. The 2003 Criminal Justice Act also directs sentencers to treat previous convictions as aggravating factors, whereas established sentencing practice was to treat a *lack* of previous convictions as mitigation.

Recent developments in sentencing policy were discussed during interviews. Some sentencers expressed strong concerns about the curtailment of judicial discretion, for example in relation to the provisions for risk-based preventative sentencing. They tended to think that legislation would never be able to take account of the full range of circumstances of offenders coming before them, and that mandatory sentences and similar statutory provisions risked driving the humanity and justice out of sentencing.

Sentencers were asked about the relationship between risk assessment and the assessment of mitigatory factors. There was a range of responses. Some thought that the process of assessing risk and the process of assessing mitigation involve two separate sets of considerations. Others thought that the two processes run in parallel and feed each into other. Low risk can be a factor in mitigation and/or vice versa. Similarly, high risk may be associated with a lack of mitigation. Others thought that the two processes were in tension, and often yielded conflicting conclusions.

## The study's implications

There is a clear case for structuring judicial discretion as it relates to personal mitigation. The argument is persuasive that judicial discretion enables sentencers to retain the humanity in sentencing. By implication, the extensive scope for personal mitigation is something to be valued rather than discarded. However, the study has shown that there is plenty of room for idiosyncratic decisions on mitigation, and it seems wrong that judges should apply conflicting principles in their decisions about mitigation.

Our analysis has shown that there are at least four types of factor that sentencers take into account in personal mitigation:

- those that indicate reduced culpability, such as youth or mental health problems, pressing need, previous good character and exceptional disadvantage
- those that indicate limited risk of further offending - relating to remorse and attempts to make reparation, the offender's circumstances, or steps taken towards rehabilitation
- those that indicate particular sensibility to punishment, such as the strain of prosecution, the loss of reputation and standing or the fact that the offender is unusually poorly equipped to handle a prison sentence
- factors that call for clemency, such as the victim's support for the offender, family responsibilities and the 'collateral damage' that imprisonment would inflict on relatives, or the social contribution made by the offender.

It would be possible – and desirable – to articulate a set of principles that should apply to the various forms of personal mitigation. The task falls most obviously to the Sentencing Guidelines Council (SGC), supported by the Sentencing Advisory Panel. Topics on which guidance would be helpful include:

- whether and why securing or retaining employment should be regarded as a mitigating factor
- whether disadvantage and social exclusion should be regarded as mitigating factors, and whether advantage should be regarded as an aggravating factor
- whether and why family and childcare responsibilities should be treated as mitigating factors, and whether fathers should be treated differently from mothers
- whether offender 'sensibility' to particular punishments should be taken into account, by analogy to the means test applied in unit fine systems
- to what extent and in what circumstances the prospect of rehabilitation, e.g. through drug treatment, can over-ride the principle of proportionate punishment
- the scope for personal mitigation a) where there is a plea of not guilty, and b) where the offence is so serious as to make custody inevitable.

Politicians at present are much readier to promote risk-based preventative sentencing than to argue the case for personal mitigation. They tend to assume that the public have little time for judges' claims about sentencing the individual. Generally, the tone of political debate assumes a public that is fed up with 'soft' treatment of criminals.

There is certainly evidence to show that at one level, a majority of the public feel that judges are out of touch, and believe that sentences are too lenient. However, this cynicism and frustration appears to be a function of the limited and inaccurate information that people have about sentencing. When asked to ‘sentence’ specific cases, members of the public give responses which are often softer than judicial practice. In other words, polls may indicate that people want tougher sentences; when given the chance to reflect on the issues, however, they are likely to support judges’ views about the importance of individualised sentencing. If this is indeed the case, it should be possible to reach a broad consensus on the key principles underpinning personal mitigation. In order to achieve this consensus, however, there is a need for political leadership that persuades the public there is value – both moral and fiscal – in principles of penal parsimony, and that justice and toughness are not synonyms.



# 1 Introduction

## The issues

Personal mitigation – mitigating factors that relate to the background or circumstances of the offender – has been ignored by both policy and research over the last two decades. The Criminal Justice Act 1991 introduced a desert-based sentencing system which focussed the sentencing decision on the crime, rather than the offender – although it did not exclude mitigating factors such as ‘previous good character’ and other factors indicating reduced culpability. The Criminal Justice Act 2003 preserves the central principle of proportionality that underpinned the 1991 Act, but requires substantial deviation from it when the offender represents a future risk to society. Sentencers are required to assess not only the seriousness of the offence but the risk of serious harm that the offender poses. Offenders who are deemed ‘dangerous’ can be sentenced to life imprisonment, extended sentences or imprisonment for public protection. The Act also directs sentencers to treat previous convictions as aggravating factors, whereas established sentencing practice was to treat a *lack* of previous convictions as mitigation.

The new sentencing framework thus puts the spotlight on those situations when sentencers should deviate from desert principles in order to provide the public with greater protection from those who pose a risk to them. However it is silent on issues of personal mitigation – those circumstances in which the circumstances of the offender justify a sentence that is less than proportionate to the gravity of the offence. The main theme of this report is that doing justice demands attention not only to risk but also to personal mitigation. It presents the findings of a study focussed on the following questions:

- What is the role of personal mitigation in sentencing decisions made in the English criminal courts?
- What are the main components of personal mitigation?
- With respect to the role accorded to personal mitigation, how does sentencing practice relate to current sentencing policy?
- What are the implications of our findings for future policy developments?

Personal mitigation casts into sharp focus some fundamental issues about sentencing principles and judicial discretion. Is justice best served by sentencing the offence or the offender? What balance ought to be struck between the two? As we write, control of judicial decision-making is a hotly debated issue; this study is therefore timely. Surprisingly, mitigation has been an under-researched topic, despite its evident significance in the sentencing process and the contentious issues it raises (see Ashworth, 2005: 151).<sup>1</sup>

In this report, we use the term ‘mitigation’ to refer to *any* aspect of a case that reduces the severity of the sentence passed – in terms of sentence *length* or *type*. The sentencers we interviewed for our research generally used the term in this sense, although occasionally we were required to clarify the meaning when a sentencer presumed that our focus was on the plea in mitigation made by defence counsel rather than mitigating

1. Previously, the only detailed empirical study that specifically focused on the role of mitigation in the English criminal courts was that of Shapland (1981), who examined the mitigation deployed in the sentencing of 100 adult defendants in magistrates’ courts and the Crown Court. Other empirical studies of sentencing that have involved consideration of mitigation include Flood-Page and Mackie (1998) (on sentencing practice in magistrates’ courts and the Crown Court), Hedderman and Gelsthorpe (eds) (1997) (on the sentencing of female defendants by magistrates) and Parker (1989) (on the sentencing of young offenders by magistrates).

factors more broadly. 'Aggravation', conversely, refers to factors that increase the severity of a sentence. We use the term 'personal mitigation' to refer to mitigation that relates to the background or circumstances of the *offender* rather than the facts of the offence. As we shall discuss, it is a moot point precisely where the boundaries fall between offence- and offender-based factors.

For the sake of manageability, the study focussed on the sentencing of adult offenders in the Crown Court, although our research questions could equally be applied to magistrates' and youth courts. Some of the sentencers whom we interviewed for the study referred to young offenders, and a very small number of our observed cases involved under-18s dealt with by the Crown Court because of the gravity of the crimes under sentence.

## The sentencing framework

The history of sentencing over the past two decades is one of increasing curtailment of judicial discretion. Writing in 1970, Thomas described 'the growing recognition by the courts of the principle of individualization of sentence' as 'the leading tendency of judicial sentencing policy' (1970:3). This tendency has been reversed since the 1980s, as concerns emerged about sentencing disparities between cases and between areas, and about the over-use of custody. More recently, the political thrust has been to toughen up sentencing and thus to provide better protection for the public. To achieve the ends of greater consistency in sentencing and public protection, policy has sought to limit the judicial room for manoeuvre in passing sentence. At the same time, the preoccupation with controlling prison numbers has remained. The process of establishing ever-greater controls over judicial decision-making – with different and conflicting aims in view – has led to a very complex sentencing framework within which the judiciary now operate.

To set the context for our discussion of mitigation, we shall consider three aspects of the sentencing framework here. First, we discuss sources of sentencing decisions; secondly, we look at some of the relevant provisions of the Criminal Justice Act 2003; thirdly, we consider the sentencing principle of proportionality.

### Sources of sentencing decisions

The main points of reference for sentencing decisions in English law are legislation, Court of Appeal judgments, and sentencing guidelines developed by the newly-established Sentencing Guidelines Council.<sup>2</sup>

Sentencing legislation has, in Ashworth's words, largely had the role of 'providing powers and setting outer limits to their use' (2005: 32). Most offences have maximum sentences set by statute; even if this maximum is rarely, if ever, used, the statutory maximum traditionally provided a signal to sentencers about Parliament's view of the gravity of the offence. The past ten years have seen a much more interventionist approach to legislation. For example, mandatory minimum sentences were first introduced by the Crime (Sentences) Act 1997. An array of other provisions were contained in the Crime and Disorder Act 1998, the Youth Justice and Criminal Evidence Act 1999, the Proceeds of Crime Act 2002 and, most recently, the Criminal Justice Act 2003.

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2. Commentaries on sentencing decisions and legislation by academic lawyers – notably those of David Thomas in the Criminal Law Review – are described by Ashworth as an additional, if 'less formal and weaker', source of sentencing law.

As noted by Thomas (2003), the review of sentences by the Court of Appeal has been the main instrument by which the judiciary has sought to regulate itself within the relatively loose statutory framework. Court of Appeal guidance takes a variety of forms, classified by Ashworth (2005) as:

- authoritative and binding decisions by a full court, which is very rarely convened by the Lord Chief Justice to hear a particular case – usually where a conflict between two different precedents must be addressed
- guideline judgments, which set out a general approach to a certain type of offence, taking into account variations in the cases heard by the courts
- interpretation of sentencing legislation
- settled lines of decisions: that is, where a series of individual decisions, generally on a point of principle, acquire authority
- pronouncements on general sentencing policy, usually in relation to custodial sentencing for certain types of offender
- Attorney General's References: the 1998 Criminal Justice Act enabled the Attorney General to appeal sentences on the grounds of leniency, and the Court of Appeal's decisions on these are a further source of guidance
- ordinary sentence appeals, which are dealt with relatively briefly and may not give rise to detailed consideration of the key issues.

A Sentencing Advisory Panel was established by the Crime and Disorder Act 1998, to advise the Court of Appeal on guideline judgments. Under the provisions of the Criminal Justice Act 2003, the panel now gives its advice to a new Sentencing Guidelines Council (SGC) rather than the Court of Appeal. The role of the SGC, which began operating in March 2004, 'is to issue sentencing guidelines to assist all courts in England and Wales, to help encourage consistent sentencing'.<sup>3</sup>

At the time of writing, the SGC has issued final guidelines on manslaughter by reason of provocation, the reduction in sentence for a guilty plea, the new sentences of the Criminal Justice Act 2003, and the overarching principle of seriousness. A number of draft guidelines are currently under consideration, including guidelines on robbery, sexual offences and domestic violence.

### The Criminal Justice Act 2003

Part 12 of the Criminal Justice Act 2003 contains an enormously wide range of provisions on sentencing and is now the most important statute within sentencing law. It sets out, for the first time in statute, the purposes of sentencing. These are defined in section 142 (1) as:

- a) the punishment of offenders
- b) the reduction of crime (including its reduction by deterrence)
- c) the reform and rehabilitation of offenders
- d) the protection of the public
- e) the making of reparation by offenders to persons affected by their offences.

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3. As stated on the SGC website: [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk). This remit is narrow, by comparison to sentencing councils in Australia, which tend to have a more explicit 'community engagement' function. See Tonry, 2002, for a discussion of the SGC.



The Act restructures both custodial and community sentencing. A single, generic community sentence replaces the different kinds of community orders that had existed hitherto.<sup>4</sup> Under the new system, sentencers can attach one or more of a range of different conditions and requirements to the generic community order. The 2003 Act also introduced three new disposals that represent hybrids between custody and community orders. 'Custody plus' (which is not yet available to the courts - and may never be) comprises a prison sentence of up to three months followed by a licence period of at least six months, to which conditions are attached. Intermittent custody allows custody to be served on weekdays or at weekends only. Finally, a new suspended sentence (known as 'custody minus'), which is a custodial sentence suspended for a period of six months to two years, during which period community requirements can be imposed.

Sections 224 to 236 of the Act introduce 'an entirely new regime for the sentencing of offenders described as dangerous' (Ashworth, 2005: 210). There are three levels of sentence: imprisonment for life, indeterminate sentences of imprisonment for public protection, and extended sentences. The courts must impose these sentences where certain conditions of 'dangerousness' are fulfilled. Finally, section 143 of the Act directs the court to 'treat each previous conviction [of the defendant] as an aggravating factor if ... the court considers that it can reasonably be so treated'. This marks a significant change to previous practice whereby 'good character' was treated as a mitigating factor, with previous convictions resulting in a progressive loss of this mitigation. Section 143, unlike the dangerousness provisions, is not explicitly focused on risk, but at its heart is the aim of preventing further offending by recidivists (see Home Office, 2001: 13).

Most of the sentencing provisions of the Criminal Justice Act 2003 – including the dangerousness and pre-convictions provisions, the new community order and new suspended sentence – came into effect on 4 April 2005. Most, but not all, of these apply only to offences committed on or after that date. Pilots of intermittent custody started at the end of January 2004 (see Penfold et al., 2006); at the time of writing, this sentence has been abandoned.

### The principle of proportionality

Proportionality has long been established as the fundamental guiding principle of English sentencing law. As set out in the Halliday Report on sentencing in England and Wales, the principle is 'that the severity of punishment should not exceed a level "commensurate" with the seriousness of the offence or offences for which the offender is to be sentenced' (Home Office, 2001: paragraph 2.3). The proportionality or – as it is frequently termed – 'just deserts' principle makes fairness a fundamental objective of sentencing; hence, 'the penal sanction should fairly reflect the degree of reprehensibility (that is, the harmfulness and culpability) of the actor's conduct' (von Hirsch and Ashworth, 2005: 4).<sup>5</sup>

The White Paper that preceded the 1991 Criminal Justice Act explicitly made proportionality the basis of sentencing in the English criminal courts. It stated that:

*If the punishment is just, and in proportion to the seriousness of the offence, then the victim, the victim's family and friends, and the public will be satisfied that the law has been upheld and there will be no desire for further retaliation of private revenge (cited by Ashworth, 2005: 102).*

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4. Under the previous sentencing regime, the community sentences for adults were the Community Rehabilitation Order (formerly the Probation Order), the Community Punishment Order (involving unpaid work in the community - formerly a Community Service Order), the Community Punishment and Rehabilitation order (a combination of the above) and the Drug Treatment and Testing Order.

5. The theoretical development of the concept of proportionality has been associated particularly with the work of Andrew von Hirsch; see, in particular, his publications of 1976, 1986 and 1993.

However, the development and implementation of the 1991 Act was marked by a certain amount of confusion over its sentencing provisions, and it was modified in part by another Criminal Justice Act which was passed just two years later. The latest Criminal Justice Act 2003 marks a departure from the strict deserts approach of the 1991 Act; it nevertheless retains proportionality at the heart of sentencing by making offence seriousness the key consideration in most sentencing decisions.

The concept of offence seriousness, for the purpose of proportionate sentencing, is generally understood to encompass both the *harm* caused by the offence and the offender's *culpability*. This is expressed in Section 143(1) of the Criminal Justice Act 2003:

*In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.*

This understanding of seriousness necessitates consideration of factors that may mitigate the offence on the grounds of the offender's reduced culpability or, likewise, aggravating factors that reflect increased culpability. The Sentencing Guidelines Council guideline on 'seriousness' specifies four levels of criminal culpability: where the offender has *intention* to cause harm; is *reckless* as to causing harm; has *knowledge* about the risks of harm; or is *negligent* (SGC, 2004a: paragraph 1.7).

Despite its general commitment to proportionate sentencing, the Criminal Justice Act 2003 allows principles of public protection to trump that of proportionality in some cases. This is most marked in the stringent provisions for dangerous offenders; and its instruction that previous convictions should be treated as aggravating factors may also be in tension with the principle of proportionality.

## Methods

There were two main elements to the empirical research conducted for this study: observations of sentencing and one-to-one interviews with sentencers. Both the observations and interviews were carried out across five Crown Court centres. These were selected with advice from senior judiciary. Our criteria for selection were that they should represent a reasonable geographic spread (the courts were located in the London, South-East, Yorkshire and the Humber and West Midlands regions) and should include one court located in a small town and four larger, urban courts.

### Observations

In all five courts we observed cases that were listed for sentencing. In total, we observed a total of 132 cases involving 162 defendants and 52 sentencers. (For details of the cases, see Appendix 1 to this report.) As observers, we usually sat in court in the public gallery, from where we took detailed notes of the proceedings which we subsequently typed up and analysed.

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The sentencing hearings generally comprised the following elements:

- statement of the charge and guilty plea or verdict by the clerk of the court
- outline of the factors of the case by the prosecution, including details of the offender's previous convictions
- plea in mitigation by the defence counsel
- passing of sentence by the judge.

Very occasionally, we observed sentencing that immediately followed a guilty verdict in a trial. More frequently, the hearings followed adjournment for reports after a trial or, most commonly, a guilty plea. The length of hearings ranged from 10 minutes to two or three hours or more: this depended partly on the complexity of the case. For example, cases with more than one defendant or where one defendant faced several different charges took more time, as did those in which there was a particularly complicated set of facts associated with the offence. However hearing length was also affected by the general approach of the lawyers and judge. Legal arguments about specific issues in the case, such as the confiscation of assets, sometimes slowed proceedings considerably.

Cases were sometimes adjourned for one or two hours – for example, to allow the defence team to take instructions from their client or to consult with probation about the details of a proposed community sentence. Some judges adjourned the case to give further consideration to the sentence in their chambers. Frequently, our efforts to observe as many cases as possible were frustrated by adjournments for periods of days or weeks. These adjournments were sometimes to allow further reports or assessments to be carried out; more often, they were a consequence of problems with case preparation encountered by the police, court, probation, crown prosecution service or legal teams.

### Interviews

We conducted one-to-one interviews with 40 sentencers across all five courts, including each court's resident judge. The interviews comprised a series of open-ended questions about sentencing and mitigation, followed by a short sentencing exercise in which the respondents were asked about the weight they would accord to a number of alternative mitigating factors attached to three different sentencing scenarios. Most interviews lasted between 45 and 60 minutes.

Of our 40 respondents, 27 were full-time judges and 13 were recorders (that is, they sat in the Crown Court on a part-time basis). Four of the judges were women, as were four of the recorders. The level of experience of our respondents varied widely: the most experienced had been a full-time judge for 16 years; the least experienced was in only her third week of sitting as a recorder.

Eighteen of our respondents were among the 52 judges whom we observed passing sentence. We had the opportunity to discuss a small number of these observed cases with the judges during our interviews with them; a few of these judges also gave us the case papers to read.

## Outline of the report

Chapter Two provides an overview of the factors that determine sentencing decisions, based on an analysis of quantitative data derived from our interviews and observations. The chapter looks at the interplay between offender- and offence-related factors in sentencing decisions, and classifies the different components of aggravation and mitigation. We also examine the impact of the various kinds of mitigating factor on sentencing decisions.

In Chapter Three, we flesh out the quantitative data presented in the previous chapter with qualitative data from the interviews and observations. We look in turn at mitigation within five broad categories:

- the immediate circumstances of the offence
- the defendant's wider circumstances
- the defendant's response to the offence and prosecution
- the defendant's past
- the defendant's present and future.

Chapter Four considers subjectivity and discretion in sentencing which, we argue, are a logical concomitant of the emphasis placed by sentencers on personal mitigation. There are five key issues here. First, we look at how different kinds of aggravation and mitigation reflect different sentencing rationales. We then consider the relationship between mitigation and disadvantage. Thirdly, we discuss the implications for mitigation of the offence itself and the guilty plea. Fourthly, we look at the role of the plea in mitigation. Finally we discuss the process by which sentencing decisions are made.

Chapter Five examines the current developments in sentencing policy and considers sentencers' reactions to it. The final chapter considers the implications of our findings on personal mitigation for the development of policy in the future.



## 2 Sentencing the offender and the offence

Most sentencing decisions in the Crown Court are not based on the facts of the offence or offences alone. Rather, sentencing tends to involve close consideration of the offender as well as the offence. Many of the offender-related factors that play a part in sentencing decisions are mitigating factors (and are referred to as ‘personal mitigation’ in this report); some, however, have an aggravating affect.

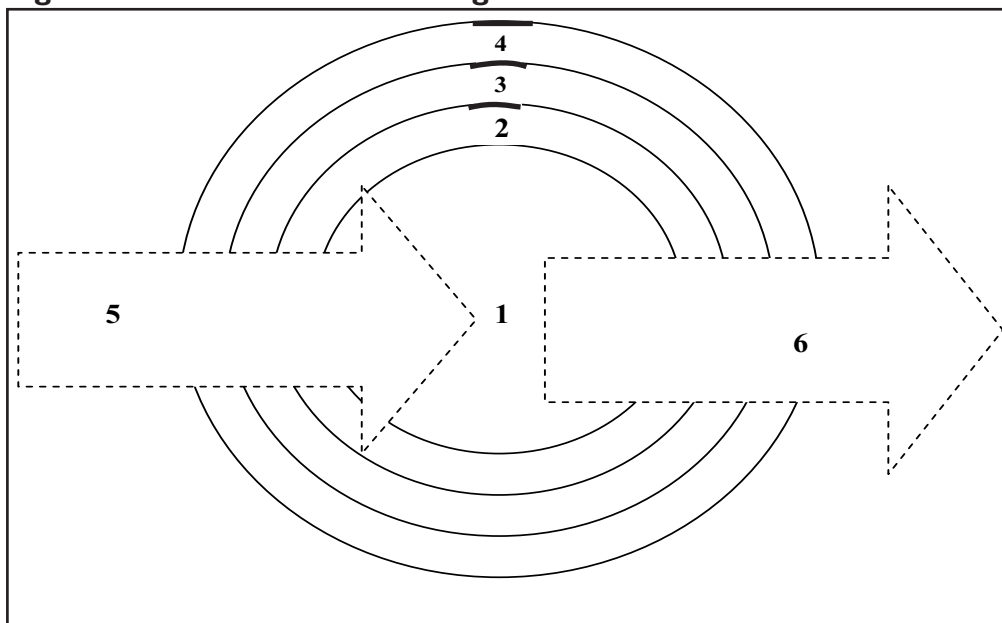
### Factors in sentencing decisions

In analysing sentencing decisions, we developed a six-fold categorisation of factors that can play a part:

1. Factors relating to the criminal act, including harm caused to any victim(s)
2. Factors relating to the immediate circumstances of the offence
3. Factors relating to the defendant’s wider circumstances at the time of the offence
4. Factors relating to the defendant’s responses to the offence and prosecution
5. Factors relating to the defendant’s past
6. Factors relating to the defendant’s present and future.<sup>6</sup>

These categories are by no means discrete: they overlap with and merge into each other. Drawing boundaries between the different sets of factors is thus a somewhat arbitrary process, but is an attempt to bring analytic clarity to a confused and complicated empirical reality. Figure 2.1 depicts the categories graphically.

**Figure 2.1: Factors in sentencing decisions**



1 = the criminal act, including harm caused 2 = immediate circumstances of offence 3 = wider circumstances at time of offence  
4 = response to & experiences of prosecution 5 = defendant’s past 6 = defendant’s present and future

6. Shapland (1981) categorized the mitigating factors cited in mitigation speeches as: reasons for the offence; descriptions of the gravity of the offence; attitudes of the offender to the offence; present personal circumstances of the offender; past personal circumstances of the offender; future personal circumstances of the offender; factors concerned with the probation service; factors concerned with court processes; and ‘others’.

Each of our six categories contains a range of potentially mitigating and potentially aggravating factors: that is, factors that can make the sentence less or more severe (although they may, in practice, have a neutral effect). Many of these factors are set out in Table 2.1; however, this list is not intended to be exhaustive. It is immediately clear from the table that, as noted by Ashworth, ‘the factors which have been recognized as mitigating sentences in England are a much more heterogeneous collection than the aggravating factors’ (2005: 160).

The factors in Category 1 can, clearly, be described as offence-related; and some of these may be incorporated in the specific charge or charges faced by the defendant. The factors in Categories 3 to 6 can be described as offender-related (although in the case of ‘supportive attitude of victim’, in Category 4, the factor relates to the victim more than the offender). Category 2 is a grey area, within which the factors are neither purely offence- nor purely offender-related. The aggravating factors in this category are often seen as contributing to an offender’s culpability, and hence to the overall seriousness of the offence. By the same token, mitigating factors in this category – and, arguably, some of the factors in Categories 3 and 5, such as youth, psychiatric problems and a history of deprivation – can be seen as reducing the offender’s culpability.

It is difficult to determine where to place factors relating to drug and alcohol misuse in our six-fold categorisation. A sentencer may regard as aggravating the fact that an offence was committed when the offender was intoxicated (Category 2): indeed, the current sentencing guideline on seriousness cites ‘commission of an offence while under the influence of alcohol or drugs’ as a factor indicating higher culpability (SGC, 2004a: 6). Historically, however, intoxication was often been regarded as mitigation on the grounds that it reduced culpability.<sup>7</sup> Where acquisitive crime is committed in order to fund a drug habit, this might be treated as a mitigating or aggravating (within Category 3), depending on whether the sentencer views this as a manifestation of diminished or increased culpability. It seems that the most crucial point considered by sentencers with respect to both alcohol and drug misuse is whether there are prospects of effective treatment of dependency. If this is deemed to be the case, the sentence may be passed with reference to the offender’s present/future (Category 6), and the prospects of treatment will mitigate in the sense that a rehabilitative rather than punitive sentence is passed. Conversely, evident lack of willingness to address a drug or alcohol problem may be an aggravating factor within the same category.

A guilty plea could be included as a mitigating factor in Table 2.1 under category 4 (response to offence and prosecution). However, because of the statutory basis of the sentence discount for a guilty plea,<sup>8</sup> we have not examined it as a mitigating factor in itself – although in Chapter Four we will look at how a guilty plea can help to bring a range of other mitigating factors into play.

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7. Walker (1999) observes that the Court of Appeal originally treated voluntary intoxication as mitigation, but by the late twentieth century tended to reject this plea.

8. See sections 144 and 174(2) of the Criminal Justice Act 2003, supported by guidance from the Sentencing Guidelines Council (SGC 2004b).

**Table 2.1: Potential aggravating and mitigating factors**

| <b>Category 1: The criminal act</b>  |   |
|--|---|
| <b>Possible aggravating factors</b>  | <b>Possible mitigating factors</b>  |
| High level of impact – e.g. in terms of harm caused to victim and/or profit gained | Low level of impact   |
| High level of violence used  | No violence/low level of violence   |
| Effectively executed/sophisticated   | Poorly executed/unsophisticated   |
| Group or gang activity   | -   |
| Played leading role in relation to others  | Played minor role in relation to others                                       |
| -  | Defendant suffered 'rough justice'  |
| <b>Category 2: Immediate circumstances of the offence</b>                          |   |
| <b>Possible aggravating factors</b>  | <b>Possible mitigating factors</b>  |
| Planned/deliberate offence   | Spontaneous offence   |
| High level of recklessness   | Low level of recklessness/unintentional                                       |
| -  | Provocation   |
| Pressured others to get involved   | Acted under pressure from others  |
| Abuse of position of trust/power   | -   |
| Deliberately targeted vulnerable victims or members of a particular social group   | -   |
| Offended when intoxicated  | -   |
| <b>Category 3: Wider circumstances at time of offence</b>                          |   |
| <b>Possible aggravating factors</b>  | <b>Possible mitigating factors</b>  |
| Motivated by greed   | Offended in response to pressing need   |
| -  | Vulnerability to the influence of others                                      |
| -  | Social/intellectual limitations   |
| Mature individual  | Youth/immaturity  |
| Offence linked to (untreatable) psychiatric problems                               | Offence linked to (treatable) psychiatric problems                            |
| -  | Under severe stress at time of offence  |
| On bail/licence at time of offence   | -   |
| Prevalence of offence in local area  |   |
| <b>Category 4: Responses to the offence and prosecution</b>                        |   |
| <b>Possible aggravating factors</b>  | <b>Possible mitigating factors</b>  |
| Failure to acknowledge offence and harm  | Remorse/acknowledgment of offence   |
| -  | Efforts at reparation   |
| Lack of co-operation/compliance  | Co-operation with authorities   |
| -  | Court processes have been stressful/ long-running                             |
| -  | Has spent time in custody (on remand)   |
| -  | Has been addressing problems since arrest                                     |
| -  | Supportive attitude of victim   |
|  | Consistency with co-defendants  |
| <b>Category 5: Defendant's past</b>  |   |
| <b>Possible aggravating factors</b>  | <b>Possible mitigating factors</b>  |
| Previous offences  | Good character; or limited previous offending                                 |
| Negative responses to previous sentences   | Positive responses to previous sentences                                      |
| -  | Has led a productive/worthwhile life  |
| -  | Disadvantaged/disrupted background  |
| -  | Traumatic life events   |
| -  | General improvement in behaviour  |
| <b>Category 6: Defendant's present and future</b>                                  |   |
| <b>Possible aggravating factors</b>  | <b>Possible mitigating factors</b>  |
| High risk of reoffending/causing harm  | Unlikely to reoffend/cause harm   |
| No motivation or capacity to address problems                                      | Can address/is addressing problems (e.g. drug, alcohol problems)              |
| Psychiatric problems cannot be treated   | Psychiatric problems are being/can be treated                                 |
| -  | Has family responsibilities   |
| -  | Has support from family/partner   |
| -  | Currently in work/training/studying or has prospects of work/training/studies |
| -  | Physical illness or disability  |
| -  | Old age   |



## The role of personal mitigation: observation findings

The empirical work for this study included observation of sentences passed on 162 defendants appearing in 132 cases. (For more details on the observed cases, see Appendix 1.) In each case, we noted the sentence passed and sentencing remarks. On the basis of the remarks, we sought to identify which, if any, of the mitigating factors expressed in the plea in mitigation, and in any reports referred to, had an impact on the sentence. It was often difficult to determine if a given factor influenced the sentence, and the extent of this influence, based on what was said in open court. Typically a judge might refer to the factors that had been considered in passing sentence – to signal to the court and any appellate bodies that the decision had been properly taken – without saying what weight, if any, had been attached to each.

The analysis of our data was hence not an entirely objective process, but involved the exercise of judgement. In a small number of the cases we were able to discuss the sentences with the judge and/or look at the case papers; in these cases, we gained much more insight into the sentencing process.

Table 2.2 shows the frequency with which the different kinds of mitigating factors appeared to impact on sentences passed, across all 162 decisions. Mitigating factors within categories 3, 4, 5 and, particularly, 6 are often important. The ‘other’ category in the table includes a small number of factors that were occasionally cited but were not, in a strict sense, related either to the offence or the offender. Because of their rarity, these factors are not considered further.

Table 2.3 shows the impact of mitigation of all kinds on the sentences passed. It includes only those cases – amounting to 127 of the 162 offenders we observed being sentenced – in which the sentencing remarks revealed whether or not mitigation had had an impact.

In 43 of the 127 cases, the judge said that the offence(s) merited custodial sentences, but mitigation had pulled the sentence back from immediate custody.<sup>9</sup> Of these cases, 35 resulted in a non-custodial sentence, five in a suspended sentence, and three had sentencing deferred. Personal mitigation (defined as mitigation falling within Categories 2 to 6 of our classification) played a major, and usually the major, part in at least 38 of these 43 non-custodial sentencing decisions. Personal mitigation was also central to the decisions to conditionally discharge one offender and to impose a fine on another. In 20 cases, mitigation appeared to have a minimal or no impact on sentence.

In a total of 61 cases, mitigation resulted in the passing of a shorter custodial sentence than would otherwise have been imposed. In 21 of these cases, the only mitigating factor cited by the judge was a guilty plea. In the remaining 40 cases, other mitigating factors – including, in at least 34 cases, personal mitigation – played a part.

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9. These 43 cases covered a wide range of offences – including Class A drugs offences, passport-related offences, and offences of possessing/making indecent images of children. In six cases, the primary offence committed by the defendant was burglary and, in another six, assault occasioning actual bodily harm. (See Table A8 in Appendix 1 for further details.)

**Table 2.2: Mitigating factors cited by sentencers (as affecting sentence)**

| Category of mitigation                                    | Type of mitigation   | No. of times cited |
|---|--|--------------------|
| Category 1:<br>The criminal act                           | Lack of seriousness/impact of offence  | 19                 |
|   | Played minor role in relation to others  | 12                 |
|   | Received 'rough justice' during criminal act                                       | 1                  |
|   | <b>Total</b>   | <b>32</b>          |
| Category 2:<br>Immediate circumstances of the offence     | Acted under pressure from/on behalf of others                                      | 4                  |
|   | Provocation/threat   | 3                  |
|   | Highly emotional/distressed  | 2                  |
|   | Lack of understanding of offence   | 1                  |
|   | Spontaneous/opportunistic offence  | 1                  |
|   | No intention to cause harm   | 1                  |
|   | Offence was 'error of judgment'  | 1                  |
| <b>Total</b>  | <b>13</b>  |                    |
| Category 3:<br>Wider circumstances at time of the offence | Youth  | 19                 |
|   | Pressing personal or family need   | 10                 |
|   | Vulnerable/immature/naïve  | 7                  |
|   | Psychiatric illness/problems   | 5                  |
|   | <b>Total</b>   | <b>41</b>          |
| Category 4:<br>Response to offence and prosecution        | Faced up to/understands criminal behaviour   | 12                 |
|   | Remorse  | 9                  |
|   | Has been addressing problems in custody/time on remand has been difficult/salutary | 9                  |
|   | Co-operation with authorities  | 6                  |
|   | Letter from deft to court  | 4                  |
|   | Court processes stressful and/or long-running                                      | 3                  |
|   | Has lost job and reputation  | 1                  |
|   | Deft represented himself well  | 1                  |
|   | <b>Total</b>   | <b>45</b>          |
| Category 5:<br>Defendant's past                           | Good character or limited/irrelevant/gap in previous offending                     | 21                 |
|   | Has led a productive/worthwhile life   | 7                  |
|   | Has shown a general improvement in behaviour                                       | 7                  |
|   | Offence uncharacteristic/'let yourself down'                                       | 5                  |
|   | Difficult/deprived background  | 3                  |
|   | Engaged well with previous community punishment                                    | 1                  |
| <b>Total</b>  | <b>44</b>  |                    |
| Category 6:<br>Defendant's present and future             | Can address/is addressing drug problems  | 14                 |
|   | Has family responsibilities  | 11                 |
|   | Unlikely to reoffend/cause harm (general point)                                    | 6                  |
|   | Prison will not benefit deft and/or the public                                     | 6                  |
|   | Supportive family/partner  | 6                  |
|   | Currently in work/training or prospects of work/training                           | 5                  |
|   | Can address/is addressing alcohol problems   | 5                  |
|   | Can or may make amends for offending behaviour                                     | 3                  |
|   | Is a capable person  | 2                  |
|   | Letters of recommendation  | 2                  |
|   | Age (older)  | 2                  |
|   | Physical illness/disability  | 1                  |
| <b>Total</b>  | <b>63</b>  |                    |
| Other:<br>Proportionality and consistency                 | Need to avoid over-long custodial sentence   | 4                  |
|   | Consistency with co-defendants   | 3                  |
|   | Has effectively spent time on curfew order (on bail)                               | 1                  |
|   | Has spent time in hospital since offence   | 1                  |
|   | High value of confiscated bike   | 1                  |
|   | Totality principle   | 1                  |
| <b>Total</b>  | <b>16</b>  |                    |

**Table 2.3: Apparent impact of mitigation on sentence**

| Impact of mitigation   | No. of sentences | % of sentences |
|--|------------------|----------------|
| Custody → non-custodial sentence   | 35               | 28%            |
| Custody → suspended custodial sentence                                     | 5                | 4%             |
| Custody → deferred sentence  | 3                | 2%             |
| Sentence unknown → conditional discharge                                   | 1                | 1%             |
| Sentence unknown → fine  | 1                | 1%             |
| Shorter custodial sentence: factors other than/additional to a guilty plea | 40               | 31%            |
| Shorter custodial sentence: reflecting guilty plea <i>only</i> .           | 21               | 17%            |
| Minimal/no impact  | 20               | 16%            |
| Hospital order because of mental illness                                   | 1                | 1%             |
| <b>Total</b>   | <b>127</b>       | <b>101%</b>    |

In short, personal mitigation was evidently a factor in just under half of all 162 cases we observed. Taking into account only those 127 cases in which the impact or non-impact of mitigation was made explicit, in almost a third personal mitigation was a key factor pulling the sentence back from immediate custody; and in just over a quarter personal mitigation contributed to the passing of a shorter custodial sentence.

## The role of personal mitigation: interview findings

All 40 sentencers interviewed for this study were asked the open-ended question: 'What kinds of personal mitigation most frequently influence the sentences that you pass?' Their unprompted responses to this question are summarized in Table 2.4. Categories 1 and 2 do not appear in this table because of the question's explicit emphasis on personal mitigation.

The next chapter will look in detail at respondents' comments about the role of mitigation in sentencing. Two points are worth making here, however. First, the range of factors cited by sentencers when discussing personal mitigation in the abstract are broadly consistent with the factors cited by the sentencers in our observed cases. For example, Category 6 factors (relating to the defendant's present/future) appear to have particular significance within both data-sets.

Secondly, and rather to our surprise, many of our respondents were hesitant or reluctant to generalise about the kinds of personal mitigation that influence their sentences. Their answers indicated that they had not previously considered the concept of mitigation in terms of theory or general principle. Several argued that the question was difficult to answer because 'each case is different'. One respondent said that he did not like the question, because he is always influenced by whatever mitigation there is. He is not happy to categorise mitigation: 'We're paid to listen.' Two respondents said that the answer to any such question has to be, 'it depends'.

In two cases, respondents initially said that they could not comment on which mitigating factors tend to carry weight, but went on to discuss the issue in some detail. Through mulling over the question in this way, they eventually reached the conclusion that, in the one case, 'the more you think about it, the more factors there are'; and, in the other case, 'Now I think about it, maybe mitigation does play a bigger part than I first indicated.'

**Table 2.4: Sentencer mentions of personal mitigation factors**

| Category of personal mitigation                           | Type of personal mitigation   | No. of mentions |
|---|---|-----------------|
| Category 3:<br>Wider circumstances at time of the offence | Youth   | 9               |
|   | Difficult family/social circumstances                                 | 8               |
|   | Financial pressures   | 7               |
|   | Social/intellectual limitations                                       | 4               |
|   | Psychiatric illness/problems  | 4               |
|   | Reasons for offence (general)   | 3               |
|   | Vulnerable/immature/naïve   | 2               |
|   | <b>Total</b>  | <b>37</b>       |
| Category 4:<br>Response to offence and prosecution        | Remorse (and efforts at reparation)                                   | 13              |
|   | Has been addressing problems since arrest                             | 5               |
|   | Court processes stressful and/or long-running                         | 2               |
|   | Co-operation with authorities   | 2               |
|   | Faced up to/understands criminal behaviour                            | 2               |
|   | Serious demeanour in court  | 1               |
|   | Supportive attitude of victim   | 1               |
|   | <b>Total</b>  | <b>26</b>       |
| Category 5:<br>Defendant's past                           | Good character or limited/irrelevant previous offending               | 11              |
|   | Difficult/deprived background   | 4               |
|   | Has led a productive/worthwhile life                                  | 2               |
|   | Has shown a general improvement in behaviour                          | 2               |
|   | Engaged well with previous community punishment                       | 1               |
|   |   | <b>Total</b>    |
| Category 6:<br>Defendant's present and future             | Family responsibilities   | 20              |
|   | Can address/is addressing drug problems                               | 15              |
|   | Physical illness/disability (including terminal illness)              | 13              |
|   | Currently in work/training or prospects of work/training              | 9               |
|   | Can address/ is addressing problems (general)                         | 6               |
|   | Supportive family/partner   | 5               |
|   | Age (older)   | 3               |
|   | Prison will not benefit defendant and/or the public                   | 3               |
|   | Unlikely to reoffend/cause harm (general point)                       | 2               |
|   | Non-English speaking (therefore prison would be especially difficult) | 1               |
|   |   | <b>Total</b>    |

Ashworth has made the point that when asked about their calculations, judges and magistrates 'have a tendency to retreat behind the "no two cases are the same" argument' (2005: 180). Similarly, in his report on the sentencing of young offenders by magistrates, Parker writes of how sentencers 'justify their sentencing decisions 'with the magic words, "we judge each case on its merits"' (1989: 173).<sup>10</sup> The question raised, in turn, by the 'no two cases are the same' response is whether justice would better be served by a sentencing framework within which certain overarching principles – relating to mitigation among other matters – are more clearly articulated. This is a question to which we return in the concluding chapter of this report.

## The role of personal mitigation: sentencing exercise findings

In order to explore the relative weight given to different types of specific mitigating factors, we conducted a short sentencing exercise during our interviews with sentencers. Each respondent was asked to consider three sentencing scenarios, attached to which were various alternative mitigating factors. Each factor had to be 'scored', as follows:

- A = A big impact – e.g. shift from custodial to non-custodial sentence, or halving of sentence length
- B = Some impact – e.g. some reduction in sentence length
- C = Minimal or no impact

10. With reference to the tendency of sentencers to assert that 'each case is different', Hawkins (2003) argues that decision-makers in the criminal justice system 'do not confront for practical purposes a unique world of distinctive events, problems and people. Matters are simplified and made sense of by seeking patterns, by using past experience and aligning the present with the past.' This can be described as a process of 'typification'.

**Figure 2.2: Sentencing Exercise results**

**Scenario 1: Burglary**

*Offender*  
22-year-old man; several previous shoplifting  
Early guilty plea to burglary

*Victim*  
76-year old woman  
Alone in house

| Mitigating factor  | Mitigation scores |     |    |     |    |
|--|-------------------|-----|----|-----|----|
|  | A                 | A/B | B  | B/C | C  |
| i) Physically and emotionally abusive parents. Childhood mainly in care  | 0                 | 1   | 6  | 9   | 24 |
| ii) Lives with 20-year-old girlfriend & daughter of 18 months. Shown himself to be a devoted father.                       | 1                 | 0   | 11 | 9   | 19 |
| iii) Dependent on heroin for 5 years. Now highly motivated to get treatment; started on a drug programme following arrest. | 19                | 7   | 7  | 0   | 7  |
| iv) Functionally illiterate (mother discouraged school attendance) and never had a regular job.                            | 1                 | 0   | 10 | 10  | 19 |
| v) Has had same job for 18 months. Letter of support from employer confirming prospect of promotion.                       | 6                 | 5   | 18 | 2   | 9  |

**Scenario 2: Death by dangerous driving**

*Offender*  
45-year-old woman of previous good character  
Early guilty plea to causing death by dangerous driving  
Lost control on motorway, distracted by radio

*Victim*  
Her passenger  
A personal friend

| Mitigating factor   | Mitigation scores* |     |    |     |   |
|---|--------------------|-----|----|-----|---|
|   | A                  | A/B | B  | B/C | C |
| i) Letter from victim's family saying they forgive the offender & don't want her sent to prison. Are in court to offer support to defendant | 19                 | 3   | 11 | 2   | 4 |
| ii) Defendant married with children aged 8, 10 and 13.  | 6                  | 5   | 20 | 2   | 6 |
| iii) Defendant intensely remorseful; attempted suicide.   | 11                 | 4   | 20 | 0   | 4 |

**Scenario 3: Assault occasioning actual bodily harm**

*Offender*  
35-year-old man of previous good character  
Early guilty plea to assault occasioning ABH (Sn 47)  
Dispute over change

*Victim*  
Bus driver  
Received facial cut requiring stitches & severe bruising

| Mitigating factor  | Mitigation scores |     |    |     |    |
|--|-------------------|-----|----|-----|----|
|  | A                 | A/B | B  | B/C | C  |
| i) Psychiatric report indicates severe clinical depression; offender under treatment at time of offence.   | 25                | 5   | 9  | 1   | 0  |
| ii) Defendant's family have attended all court hearings, & offer practical, financial & emotional help.  | 3                 | 1   | 12 | 3   | 21 |
| iii) Defendant has expressed profound regret. Has written to the court to stress his remorse, and has written to the victim and victim's family. | 4                 | 9   | 20 | 4   | 3  |
| iv) Defendant is a respected individual with responsible job. Stress of prosecution extremely high.  | 4                 | 4   | 14 | 6   | 12 |
| v) Offence utterly out of character: a 'moment of madness'. Under stress after break-up with girlfriend.   | 9                 | 6   | 16 | 2   | 7  |

The results for the three scenarios are presented in Figure 2.2. The large majority of our respondents regarded a custodial sentence as the most likely outcome in all three scenarios; but where they ranked mitigation as A (and even A/B) a shift from a custodial to a non-custodial sentence was possible.

Table 2.5 ranks the average mitigation ‘scores’ for each of the factors. The highest-ranking factor proved to be the severe clinical depression in the case of the assault occasioning actual bodily harm (ABH). Three of the burglary factors had the lowest rankings; this reflects a general sense among our respondents that these were unremarkable (if, in the cases of childhood abuse and illiteracy, unfortunate) factors that did not merit special treatment. (‘They’re all like that,’ said one judge with respect to the illiteracy factor, and gave it a C.) As might be predicted from the emphasis accorded to this kind of factor in our observed cases and in the interview responses, the ‘drug dependency/ treatment’ factor in the burglary scenario scored highly.

**Table 2.5: Ranking of mitigating factors – from most to least influential**

| Rank*      | Average ‘score’** | Factor                          | Scenario           |
|------------|-------------------|---------------------------------|--------------------|
| <b>1</b>   | 3.4               | Severe clinical depression      | ABH                |
| <b>=2</b>  | 2.8               | Support from victim’s family    | Death by dangerous |
| <b>=2</b>  | 2.8               | Motivated to get drug treatment | Burglary           |
| <b>4</b>   | 2.5               | Intense remorse                 | Death by dangerous |
| <b>=5</b>  | 2.2               | Profound regret                 | ABH                |
| <b>=5</b>  | 2.2               | ‘Moment of madness’             | ABH                |
| <b>7</b>   | 2.1               | Married with three children     | Death by dangerous |
| <b>8</b>   | 1.9               | Steady job                      | Burglary           |
| <b>9</b>   | 1.6               | Respected individual            | ABH                |
| <b>10</b>  | 1.1               | Support from defendant’s family | ABH                |
| <b>=11</b> | 0.9               | Partner and young child         | Burglary           |
| <b>=11</b> | 0.9               | Functionally illiterate         | Burglary           |
| <b>13</b>  | 0.6               | Abused and in care as a child   | Burglary           |

\* Ranking is produced by assigning the values to the mitigation scores as follows, A=4, A/B=3, B=2, B/C=1, C=0, and calculating the average (mean) for each factor.

Respondents were in agreement about some of the mitigating factors, and markedly inconsistent in their views on others. The factors which produced the most mixed responses are listed in Table 2.6; this list includes all factors for which both A and C were selected by at least four respondents.

**Table 2.6: Mitigating factors producing the most inconsistent responses**

| <b>No. A responses</b> | <b>No. C responses</b> | <b>Factor</b>                   | <b>Scenario</b>    |
|------------------------|------------------------|---------------------------------|--------------------|
| 19                     | 4                      | Support from victim's family    | Death by dangerous |
| 19                     | 7                      | Motivated to get drug treatment | Burglary           |
| 11                     | 4                      | Intense remorse                 | Death by dangerous |
| 9                      | 7                      | 'Moment of madness'             | ABH                |
| 6                      | 9                      | Steady job                      | Burglary           |
| 6                      | 6                      | Married with three children     | Death by dangerous |
| 4                      | 12                     | Respected individual            | ABH                |

## 3 Personal Mitigation in Practice

This chapter fleshes out the quantitative data presented in the previous chapter with qualitative data from the interviews and observations. We look in turn at mitigation within each of Categories 2 to 6; Category 1 is excluded because of the overall focus of this study on personal mitigation.

### Immediate circumstances of offence

As noted Chapter Two, mitigation that relates to the immediate circumstances of the offence falls into a grey area between offender- and offence-related mitigation. Factors within this category were not often discussed in our interviews with sentencers, as we had made clear our specific interest in personal mitigation.

#### Pressure from others

Mitigating factors relating to the immediate circumstances of the offence were cited in the sentencing remarks in some of our observed cases, but not with great frequency. The most common factor in this category (as shown in Table 2.2) was the recognition that the defendant had acted under pressure from others in committing the offence, although this pressure was not so severe as to allow a defence of duress. A typical such case was one in which a 33-year-old woman (and mother of four) received a 30-month sentence for importation of a Class A drug. In his sentencing remarks, the judge stated that the sentence would have been at least double this length had it not been for the defendant's guilty plea and the indications that she had acted under intense pressure from her potentially violent ex-boyfriend.

A similar case was described to us in interview by a judge who said that he had passed a suspended sentence, under the old provisions, for a woman with young children who had taken a wrap of heroin into prison for her boyfriend. It was clear that the boyfriend had threatened her, and that she had been 'terrified' and 'totally wrecked' by the whole experience of committing the offence and the arrest and prosecution that followed. She was, the judge said 'sobbing all the way through the proceedings'.

#### Provocation

In our observed cases, provocation – which, in the words of Ashworth, 'lies on the boundary between partial justification and partial excuse' (2005: 162) – was rarely mentioned as a significant mitigating factor. However, it was a key issue in the case of Mr Smith, as described in Box 3.1.



### **Box 3.1: Neighbour dispute**

Mr Smith, a 47-year-old white male of essentially good character, pleaded guilty to possession of a bladed article in a public place and causing fear of violence. The knife had been used to threaten a neighbour in the presence of the neighbour's children.

In his sentencing remarks, the judge commented that on first seeing the case papers he felt that custody was unavoidable; however, when he read the papers thoroughly he decided that the circumstances of the offence were such that custody was inappropriate. He passed a 12-month community order with alcohol treatment and supervision. He explained to the defendant that if he failed to comply with the conditions he would be back in court; but added, 'I rather doubt that will happen, Mr Smith. Am I right?' The defendant replied: 'You can count on it.'

In discussion with us after the case, the judge explained that Mr Smith had committed the offence after having lived next door to the complainant for three years. As was evidenced by statements from other neighbours of the complainant (including an off-duty police officer), the complainant had caused immense problems: he and his family were extremely noisy and abusive, and their house and garden were filthy and attracted rats. These problems had contributed to an alcohol problem and depression on the part of Mr Smith. Eventually, after the complainant's children had destroyed his fence and run riot in his garden, Mr Smith snapped. In a drunken state, he ran out of his house with a knife and threatened the complainant.

The key to the sentence, the judge told us, was the evidence about the background to the offence provided by the statements from others, including the police officer. Another mitigating factor was that the defendant had voluntarily sought help with his alcohol problem. This was not a case, the judge concluded, 'where society or justice would be served by the defendant going to prison'.

One of our respondents said that he is sometimes influenced, in passing sentence, by evidence of 'an immediately identifiable triggering event' behind the offence. He gave as an example a case of criminal damage he had recently sentenced. The defendant had come home to find his wife in bed with a colleague, and had proceeded to smash up the colleague's smart BMW that was parked outside. By the time the case came to court, the defendant had already paid a £3,000 repair bill, and the judge felt in a position to pass a relatively light sentence.

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## Defendant's wider circumstances

### Youth and immaturity

Within the 'wider circumstances' category, the youth of defendants emerged as the most frequently cited factor both in our observed cases and in our interviewees' responses (see Tables 2.2 and 2.4). Sentencers appear to have a relatively broad understanding of 'youth' – which extends to men and women in their early 20s. Sometimes it was the immaturity or the naivety of the defendant rather than his or her specific age that had the mitigating effect. For example, in the case described in Box 3.2, the defendant's immaturity and the evident foolishness of the offence helped to persuade the judge that a 12-month community order was the appropriate penalty for a residential burglary.

#### **Box 3.2: An unusual residential burglary**

The 20-year-old Mr Taylor was sentenced for a residential burglary. He appeared in court in an over-large suit; his mother watched anxiously from the dock.

The burglary was of a house let to students. On the night of the offence, the students were having a party, and Mr Taylor was hanging about outside. At 6 am, he chatted to one of the students who had come out for a smoke, and to some of the others through an open window. At 8 am he asked if he could join the party, and was told the occupants were going to bed. Between 8 and 10 am he climbed through the open kitchen window and stole 3 mobile phones, a computer gaming station and a purse.

The students immediately suspected him and searched the neighbourhood for him. They found him nearby, and a scuffle broke out after he handed over the stolen mobile phones. When the police arrived they arrested two of the students for assaulting Mr Taylor; the latter was arrested by another officer shortly afterwards. He admitted he had taken the property but said he had done it as a joke and intended to return it. He subsequently pleaded guilty to burglary.

The judge commented to the defence counsel, during the plea in mitigation, 'He's an idiot, isn't he?' The barrister agreed. The judge went on to pass a 12-month community order with a supervision requirement. He commented that it had been a 'very very stupid offence', and added, 'You shouldn't be in this court; I hope you won't come back to court. I don't think you will – coming to court has been a nerve-wracking experience.' He went on to stress that 'people who commit burglary of houses usually go to prison ... If you and I meet again you will go to prison so fast your feet won't touch the ground.' Mr Taylor was silent as the judge passed sentence. His mother hugged him tightly and tearfully outside the courtroom.

A judge told us in interview that most offending is done by people who are ‘stupid’ rather than established criminals, and the most stupid of all are youngsters: teenagers ‘full of testosterone and not much sense’. The day before the interview, he had sentenced a 15-year-old who had been arrested for supply of very small amounts of heroin and cocaine, following a test purchase operation. The defendant ‘could barely see over the edge of the bench’. According to the relevant guideline cases, a custodial sentence of some years would be expected for such an offence; but the defendant’s age and naivety, along with his guilty plea, frankness, and the indication that he had been bullied into the offence by his associates, persuaded the judge to pass a supervision order.<sup>11</sup>

### Need

Where defendants have acted in circumstances of obvious and desperate need, this carries weight as a mitigating factor for some sentencers. A number of our observed cases involved the use of false passports or other identity documents, and in some of these cases, the judges appeared to be swayed by accounts of desperate hardship. Two such cases are described in Box 3.3.

#### **Box 3.3: Two cases involving the use of ‘false instruments’**

##### *Case 1*

The defendant was a 26-year-old Iranian woman with a five-year-old son who had left Iran as a political refugee, following the ‘disappearance’ of her husband. She had been arrested when boarding a Eurostar train with a forged Belgian identity card – apparently in an attempt to travel back to Iran. In the plea in mitigation, the barrister stated that the purpose of her journey had been to travel to Iran to be with her mother, who was about to undergo open-heart surgery (while her son stayed in England with friends). He went on to state that he had just learnt of the mother’s death, although the defendant had not yet been told of this. At this point, the defendant began to weep hysterically; the judge ordered a short adjournment and sharply criticised the barrister for informing his client of her mother’s death in open court.

After the adjournment, the judge passed a sentence of 4 months, of which she had already served 50 days on remand. He commented that the usual sentence would have been 12 to 18 months, but he had taken into account the reason for her

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11. It is clear that the sentencing of children, as opposed to young adults, raises particular issues; as is noted in a NACRO briefing on youth crime, the sentencing process necessarily ‘involves a complex interplay between three principles: proportionality; the prevention of offending; and the welfare of the child’ (2003: 7). See also von Hirsch, 2001, for discussion of the criteria for proportionate punishment for juvenile offenders. For the most part, this report is focussed on the sentencing of adults.

### Case 2

The 30-year-old defendant, a Nigerian man, had been brought to Britain at the age of 16 to work for a Nigerian family, by whom he was badly treated. With the help of a friend he had eventually escaped the family and acquired work as a cleaner, through which he was supporting his girlfriend and seven-month-old baby. He was arrested following an attempt to open a bank account with a false Nigerian passport.

The defendant was sentenced to 14 weeks in custody, which was equivalent to the time he had already spent on remand. The judge commented that the offence was a serious one that demanded a custodial sentence; but the defendant had committed the offence in an attempt to regularise his position, and the bank had suffered no loss. Throughout the proceedings, the judge appeared well-disposed towards the defendant: he interrupted defence counsel on several occasions to ensure the record stated that the defendant had been brought to England effectively as a slave; he repeatedly commented that he understood the defendant's position; and he made sure that at an early stage the defendant understood he would not be returning to custody.

In interview, some of our respondents talked about the difference between acquisitive crime for the purpose of 'greed' and acquisitive crime that is driven by real need (this dichotomy does not appear to encompass crime committed to fund a serious drug habit). One respondent commented that when he has before him a defendant who has stolen from an employer, and the money is to make ends meet, 'despite any guidelines, I can't find it in me to send them away'. Another said that, for him, personal mitigation is significant 'if I'm persuaded that the defendant's circumstances are truly wretched – and some people have got wretched, horrible lives'.

### Mental illness

The issue of mental illness did not emerge with great frequency either in our observed cases or in the interview responses. This is perhaps surprising, given the high rate of mental illness and among offenders and particularly among those in custody (see, for example, Rickford and Edgar, 2005). However, as we have seen in the previous chapter, the mental health factor in the sentencing exercise (in the 'ABH' scenario) was easily the highest scoring mitigation. A key concern in relation to mentally ill defendants is whether the condition can be treated. Where treatment is possible, either in the community or through a hospital order, sentencers have a wider array of sentencing options at least in theory; in practice, lack of availability of psychiatric resources often restricts what sentencers can do. 'You can't get hospital beds for love nor money', one judge complained to us.<sup>12</sup>

12. Walker (1999) discusses the mitigations associated with mentally disordered offenders.

## Responses to offence and prosecution

### Remorse and honesty

The defendant's response to the offence itself, and also to the experiences of arrest and prosecution, can be a basis of mitigation. Defence lawyers frequently draw sentencers' attention to their clients' supposed remorse. In the Sentencing Guidelines Council guideline on seriousness, remorse is one of very few factors that are specifically cited as mitigation (paragraph 1.27).<sup>13</sup> As Walker notes, 'remorse is routinely mentioned in the Magistrates' Association's Sentencing Guidelines 1997 as a possible mitigation where almost any sort of offence is concerned' (1999: 113).<sup>14</sup>

Many of our respondents stressed that they take remorse into account only when it is demonstrated: it is not enough for a respondent simply to say 'sorry'. Some sentencers place an emphasis on defendants' letters to the court (which 'remarkably few take the trouble to write', one commented); some look for efforts at reparation. A judge described a striking example of demonstrated remorse on the part of a street robber. The defendant had been arrested when he went into a police station to confess that, the day before, he had knocked over an old woman and stolen her handbag to get money for drugs. Such an offence merited three to four years' custody; however, the judge passed a drug treatment and testing order, which in time the defendant completed successfully.

In the sentencing exercise, remorse appeared in both the 'death by dangerous driving' and 'ABH' scenarios, and was predominantly scored as a middle-ranking factor. Some respondents, however, were dismissive: one comment on the dangerous driving scenario was: 'it may sound harsh, but I'd expect her to feel intense remorse'.

Some of our respondents appeared less concerned with remorse than with the wider question of whether a defendant has faced up to, and understood, what he has done. One judge stressed that what impresses him more than anything else, when it comes to mitigation, is 'manifest frankness and honesty' – which is something rarely seen in court. Another described sentencing a defendant who had been involved in 'ringing' (that is, disguising the identity of) stolen cars – an offence which normally leads to a custodial sentence of at least four months. In this case, the judge passed a non-custodial sentence because he felt the defendant, who was of good character, had 'learnt his lesson'. He had, apparently, 'got it in the neck from his wife, and thought afterwards – I have been an absolute idiot'.

From our court observations as from our interviews, we gained the impression that simple expressions of remorse do not necessarily carry weight; but what can make a difference is remorse accompanied by honesty about the criminal behaviour and the problems underlying that behaviour. In the case described in Box 3.4, for example, a critical factor was the defendant's immediate admission, on arrest, that he had a problem and needed help.

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13. The Sentencing Guidelines Council has recently issued a draft guideline on Domestic Violence (SGC 2006a) which refers to the possibility of passing a community sentence where, among other factors, 'the offender shows genuine signs of remorse'. This allusion to remorse has produced a significant amount of negative comment in the national press.

14. For a vehement argument against taking account of remorse in sentencing, see Bagaric and Amarasekara (2001).

**Box 3.4: Indecent images of children**

Mr Green, aged 32, pleaded guilty to eight counts of downloading almost 4,000 indecent still images (including images of the most serious level 5) of children and some movies. He was arrested when officers from the MPS Paedophile Unit attended his home – where he lived with his parents - with a search warrant. On opening the door to the officers he said, ‘That’s me: I’ve been looking at that stuff on the computer.’ When he was interviewed by the police later that day he said, ‘I’m glad this has come to a head. I wanted to ask for help. I know I’ve got a problem.’

In the plea in mitigation, Mr Green was described as a man of good character, who had worked hard all his life. While acknowledging that the seriousness of the offence placed it over the custodial threshold, the barrister asked the judge to give consideration to the pre-sentence report recommendation of a community sentence, and added, ‘I hope your Honour gets a sense of his genuine remorse and his recognition that he requires help.’

The judge passed two sentences: a £2,000 fine for the least serious count, and a three-year Community Rehabilitation Order (CRO), with a requirement to attend the sex offender group work programme, for the remaining counts. He explained in his sentencing remarks that the defendant’s early guilty plea and co-operation with the police brought the sentence below the custody threshold, and the CRO would deal with his evident need for help. However, he wished also to ‘send the message to the public about the seriousness of this offence’ and felt that the imposition of a fine alongside the community penalty would do so.

**Delayed or deferred sentencing**

If a considerable period of time has elapsed between the offence and sentencing, this may provide scope for certain kinds of mitigation to come into play. The delay may give the defendant the opportunity to demonstrate his remorse, or to start addressing some of the problems underlying the criminal behaviour, or even to make amends for the crime. One of our respondents described a case in which a young man was convicted of an assault causing grievous bodily harm following a fight with a pub barman. Through no fault of the defendant, the case had taken a long time to come to court and he had committed no more offences in the meantime; this supported the defence counsel’s claim that the assault had been an ‘aberration’. The defendant was sentenced to a community punishment order (unpaid work) and ordered to pay substantial compensation – which he was in a position to do thanks to his well-paid job.

We observed a case in which delayed sentencing helped bolster mitigation for a 22-year-old man convicted of careless driving, affray, and assault occasioning ABH. The defendant had a number of previous convictions, including offences of violence. The judge deemed a custodial sentence unavoidable, but limited the sentence to 10 months in total. In passing sentence, the judge observed that the defendant had changed a lot over the 16 months since he had committed the offence, and ‘it may be that you are starting to grow up’.

A sentencer can defer a sentence for up to six months expressly for the purpose of monitoring the defendant’s behaviour in the interim. While the courts have long had this power, the Criminal Justice Act 2003 enables the court to impose a wide variety of conditions on the offender during the period of deferment, and allows the offender to be recalled for sentencing, if appropriate, before the end of the period. One of our respondents argued that the new deferred sentence may encourage sentencers to pass non-custodial sentences for previously prolific offenders who have indicated that they

**Box 3.5: A deferred sentence**

Mr Hale was a 37-year-old who had entered early guilty pleas to a commercial burglary, an attempted commercial burglary, and failure to surrender to bail. The offences were committed while he was on a previous Community Rehabilitation Order. He had 71 previous offences recorded against him, including many commercial burglaries. His offending was clearly driven by his heroin dependency.

The judge said that ‘these offences are certainly worth a prison sentence, aren’t they?’ but that he would defer sentence for six months. This was to see if what Mr Hale had written in a letter to the court – namely, that he was deeply ashamed and wanted to put all the offending behind him – was ‘anything like the truth’.

Mr Hale was told that if, over the six-month period, he kept his accommodation, found work, did not commit any further offences, and responded to help offered by probation, he would not be given a custodial sentence. ‘If you make a mess of it, you go to prison. If you don’t, you won’t ... I hope you will succeed; I expect you will succeed.’

genuinely want to ‘wipe the slate clean’ – since the six-month period of deferment can be used to test this claim. This is the approach adopted in the case described in Box 3.5.

Deferred sentences also provide opportunities for reparation – as in a case we observed of a 39-year-old builder convicted of fraudulent evasion of income tax. The sentence was deferred for five months to allow the defendant to establish, by co-operating with the Inland Revenue, the precise amount of tax owed, and to start making payments.

### Time on remand

The gap between offence and sentence can gain particular significance if the defendant's time on remand is treated as, effectively, a mitigating factor. This is an entirely separate matter to the automatic process of taking time on remand into account when calculating the custodial sentence to be served. We are referring here to the tendency of some sentencers to view time on remand as an element of the sentence in its own right, which can then be supplemented with a separate, non-custodial sentence. Hence, for example, one of our respondents said that a first-time offender who has spent a few weeks on remand may have had the necessary 'first taste' of prison, and may then be suited to a community sentence. Another described this as getting 'two [sentences] for the price of one'. This combination of a short custodial sentence with a longer community order is precisely what the new sentence of 'custody plus', under the Criminal Justice Act 2003, is supposed to introduce.<sup>15</sup>

Time spent on remand may be more likely to count as mitigation if the defendant has obviously found the experience difficult, and it can thus be said to have had a 'salutary effect'. One respondent told us that in such cases, the defendant directly benefits from having been remanded in custody, because of the impact on the sentence that is ultimately passed. We observed one case in which the defendant was sentenced for residential burglary, theft (three counts), failure to surrender to bail and possession of a Class A drug. He was said to be dependent on heroin and of very low intelligence, and the thefts and burglary for which he was being sentenced had been ludicrously incompetent. He had spent 24 days on remand in Durham Prison which, according to his defence team, had been a 'horrible experience'. A particular problem was that he had been unable to understand what people around him were saying, because of his partial deafness and his unfamiliarity with their accents. In sentencing him to a 12-month community rehabilitation order, the judge commented that he hoped that his time in prison 'has taught you a lesson'.

Sometimes the fact that a defendant has been on remand helps with the public presentation of a community sentence that follows, as was the case in the sentencing of Mr Kong, described in Box 3.6. In other cases, the impact on sentence of time spent on remand is complicated. For example, one of our respondents described a case in which the defendant had used a false credit card to buy sports goods, while subject to a conditional discharge. He had a string of previous offences; he was drug dependent and mentally ill; there was little mitigation; and the pre-sentence report stated that he was not suitable for a community sentence because of his psychiatric problems. Because he had already spent the equivalent of a 12-month sentence on remand, he could have been sentenced to a 9-month custodial sentence which would have meant his immediate release. However, our respondent decided to pass a conditional discharge. The nine-month sentence would have 'left him with nothing', whereas the conditional discharge meant that he had 'something hanging over him', and could also have the continued help of the probation service which he was attending voluntarily. In cases like this, our respondent said, 'proportionality goes out the window', since the sentence did not so much reflect the seriousness of the offence as the particular situation of the offender.

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15. At the time of the fieldwork, custody plus had not yet been implemented



**Box 3.6: Time on remand**

Mr Kong was a photographer who had been struggling to establish a professional presence within the local Chinese community. In a state of extreme frustration, he one day entered a competitor's shop, threw petrol all around him, and threatened to set himself and the shop on fire. He was subsequently convicted, following a guilty plea, of threatening to destroy or damage property by fire. It was established over the course of the criminal proceedings that Mr Kong had some mental health problems and that he had referred himself for treatment.

Mr Kong was sentenced to a community rehabilitation order, and the judge stressed the importance of his continuing to receive psychiatric help in the community. The judge referred in his sentencing remarks to the period of some months that the defendant had spent on remand (he had initially been remanded because of his apparent mental instability at the time of his arrest) – saying that this meant he had been ‘punished sufficiently’.

In discussion with us after the case, the judge said he was confident that a community sentence was the appropriate disposal, but that it would have been ‘very awkward’ to pass such a sentence had Mr Kong not already spent time in custody. The fact that Mr Kong had been remanded was, said the judge, ‘my good fortune in a way’, as it allowed him to justify the community order on the grounds that the offender had already been ‘punished’.

**Offender sensibility**

Issues of ‘offender sensibility’ arise where a sentencer believes the prosecution process has caused the defendant to suffer emotionally, and that this can be treated as part of the punishment for the crime. This was not a consideration that loomed large either in our observed cases or in our discussions with sentencers, but it did arise occasionally. We saw an Asian man in his late 20s, with no previous convictions and a clean driving licence, sentenced for dangerous driving and drinking while unfit due to alcohol. His defence counsel stated that his client very rarely drank alcohol, and the offence occurred after he had been celebrating the granting of UK residency to his Moroccan wife. In passing a community order, the judge commented, ‘I hope that listening to the Crown describe the offence is a punishment in itself and that the reminder is enough to stop you doing it again.’ One of our respondents described, as a general example of the role of mitigation in sentencing, those cases in which there is a first-time offender who ‘has been in hell’ waiting to be sentenced, and for whom this has been as much as a punishment as six months in prison would be.

A related issue is the loss of a defendant's reputation, or what Walker refers to as the ‘stigmatising consequences of a conviction, which may affect the offender's social and even

familial relations as well as his career' (1999: 132). As we have seen, the 'respected individual' factor in our sentencing exercise (ABH scenario) did not score highly, although sentencers' views on the relevance of this factor were mixed. One of our observed cases involved a 45-year-old defendant who had stolen a large number of cheques, credit cards and other items from the post, while working for Royal Mail. He was given a 12-month community order with various conditions, with the judge commenting that he had escaped custody 'by the narrowest margins' on account of his having already lost his job and his reputation.

### Support from victim

An interesting form of mitigation - which does not fit neatly within any of our categories but is perhaps best included under the heading 'responses to offence and prosecution' - is support from the victim or the victim's family. This may arise most frequently in domestic violence cases, where the victim of the violence asserts that she 'forgives' the offender and wishes their relationship to continue. The Sentencing Guidelines Council draft guideline on domestic violence considers the wishes of the victim as a factor that can influence sentence and concludes that 'there may be circumstances in which the court can properly mitigate a sentence to give effect to the expressed wish of the victim that the relationship be permitted to continue', if the court is satisfied that this wish is genuine and that the victim will not be exposed to a high risk of further violence (SGC 2006a: 7).

One can hardly over-estimate the difficulty of assessing the genuineness of a domestic violence victim's plea for lenient treatment of her abuser; nor is it a straightforward matter to balance attention to the victim's wishes against the wider principle that sentences should reflect offence seriousness. In two of our observed cases, the sentencers grappled with these issues and decided to give weight to the victim-related mitigation. In the one case, the judge stated that he had taken into account, in passing a community sentence, the resumption of the relationship between the victim and the defendant - about which he had questioned the victim in court - and the fact that they were now expecting their first child. In the other case, the judge passed a suspended sentence for offences of affray, common assault (two counts) and possession of an offensive weapon and possession of a bladed article in a public place. He had been given a letter from the victim in which she stated 'I love this man from the bottom of my heart', and letters from two of her young children, which said that they wanted the defendant back home so that he could go to their school plays, read them stories and give them 'cuddalls'. The judge stated that he was suspending the sentence because of the impact a custodial sentence would have on the family, and because of the defendant's 'frankness' with the court along with his early guilty plea.

Our sentencing exercise included a scenario in which a different kind of victim-related mitigation was put forward. This was the death by dangerous driving scenario, with the potential mitigation being the letter from the victim's family stating that they forgave the defendant and did not want her sent to prison. The views of the sentencers on this matter were highly mixed: examples of the comments made are provided in Box 3.7.

**Box 3.7: Relevance of bereaved family's support for defendant in death by dangerous driving case: respondents' views**

- The mitigation should score A [high impact] because the victims are 'making a declaration against their perceived interest'. One expects a letter from the victim demanding punishment.
- 'Unlike a lot of judges, I attach real importance to what the victim or victim's family want. In some ways, the victims are the most important people.'
- Guideline cases allow you to reflect victim's wishes.
- Generally they say that sentencers should not take victims' wishes into account, but 'I think there's a guideline case that says in this kind of case you can'.
- Sentencers are 'not supposed to taken notice of what the family says – but I can't do that'.
- One is not supposed to take victims into account, 'but I personally would'.
- This mitigation is important 'in a discreet way' – you must not sentence according to what the victim wants, but this makes it easier not to send her to prison.
- The relevant guideline says the victim's wishes are not to be taken into account.
- 'The law's quite clear' that the defendant should not get a lesser sentence because that is what the family want.
- The mitigation should score C [minimal/no impact] because 'you're sentencing as a societal exercise' – not on behalf of the victim.

The range of perceptions among the sentencers of the legal standing of victim-related mitigation reflects the ambiguity of the relevant legal guidance. In 2001, when 'victim personal statements' were introduced across England and Wales, the Lord Chief Justice specified that the courts should take into account, in passing sentence, the consequences of an offence for the victim but should not consider the opinions of the victim or victim's family as to the appropriate sentence. The Court of Appeal has likewise followed the principle that sentences should not be based on the views of victims or victims' relatives, but in certain cases has stated that a sentence can be reduced when it would otherwise add to the grief of the victim's

family. Hence, 'while perhaps dancing around the issue the courts have, in spite of the principle of no involvement, allowed the forgiveness of the victim to have an effect on the sentencing of the offender' (Currie, 2005: 21).

## Defendant's past

### Good character

Our interview and observation data suggest that the practice of treating good character as mitigation (which is progressively lost as the number of previous convictions rises) continues in the Crown Court, despite the 2003 Criminal Justice Act's instruction to treat relevant previous convictions as aggravating factors. It is clear that the severity of a sentence tends to be reduced if an offender has no previous convictions at all, or – to a lesser extent – if he has few or no *relevant* previous convictions, or if he has not offended in recent years.

Some of our respondents talked about the offender whose offence can be treated as essentially a blip in an otherwise relatively blameless life. One judge gave the hypothetical example of a man who has never offended before, has always worked, and went out drinking with friends one night and got into a fight. Such a man would be 'terrified' of going to prison and a prison sentence would be counter-productive: it would be 'an expensive, brutalizing experience'. In such a case, the judge would probably impose a very large fine, although he is aware that in so doing he would be 'sailing close to the wind', as the Lord Chief Justice has stressed the need to be tough on alcohol-related violence, and the public want 'drunken yobs' in prison.

A different kind of case in which a first-time offender was treated with relative leniency was that of a 38-year-old Senegalese man convicted of theft involving breach of trust. He had taken nearly £5,000 from the bureau de change at which he worked, to give to someone who claimed he had a machine that turned £20 into £50 notes. The judge hearing the case passed a nine-month suspended sentence, and explained that he had initially thought a short custodial sentence was unavoidable, but had been persuaded of the 'exceptional circumstances' of this offence. It was, he felt, an isolated incident, given that the defendant was a man of good character, with a good employment record, of whom 'a large number of people have spoken well'. He gave credit also for the fact that it was the defendant who had alerted his employer to his own misdeed.

A defendant's 'positive good character' – that is, not simply his lack of previous offending, but the productive life he has led – is sometimes rewarded by the sentencer. One respondent told us that a defendant who has contributed to society, for example by having 'fought for his country', is 'in a different league' to other defendants. We observed a case in which a 48-year-old woman was sentenced for 18 counts of obtaining money transfer (amounting to a total of £11,000) by deception. Her sentence of a 240-hour community punishment order was described by the judge as 'extraordinarily lenient', but he justified it as follows:

*You don't just have no previous convictions but you have positive good character. You have brought up a family in sometimes adverse conditions and you have a good employment record. You have shown genuine remorse and a deep sense of shame. You committed these offences in emotional circumstances and the losses have been made up in their entirety ... You ought to go to prison. However, the circumstances of the offence, of your life and your subsequent behaviour lead me to believe that prison would cause more harm to you than it would cause good to the public.*

### Deprivation and disadvantage

Pleas in mitigation often make much of past traumas, abuse or general disadvantage suffered by defendants, but such factors do not appear to carry a great deal of weight for sentencers. In some of our observed cases, these factors were mentioned in the sentencing remarks, but in such cases it appeared that the judges were acknowledging the issues raised by the defence counsel in the plea rather than giving credit for them.

In interview, some of our respondents talked of giving credit to defendants who have to some extent overcome adversity. For example, one judge commented that as a sentencer you usually deal with people who are, because of their disadvantaged backgrounds, 'totally feckless', and therefore it is impressive if you see someone from a 'terrible background' who has managed to achieve something. Another respondent described a case in which a young man was convicted after trial of possession of an offensive weapon (a machete) with intent – for which she sentenced him to a non-custodial penalty, despite the seriousness of the offence. The defendant had grown up on a very rough estate, on which there were powerful influences leading towards unemployment and crime; but he was undertaking an electrician's apprenticeship and was also involved in training young footballers, for which he travelled across London twice a week. He therefore, in the words of our respondent, 'had every chance of escaping that predicted outcome [of unemployment and crime]', and a custodial sentence 'risked ruining that chance of escape – ruining his life chances'.

Some respondents indicated that they view early deprivation as relevant when the defendant's background was exceptionally deprived. It can also be more relevant when defendants are in their teens or early twenties, as these young people have had little opportunity to overcome their problematic backgrounds. One judge described a case he had sentenced the day before our interview, involving a 17-year-old convicted of theft and robbery from an off-licence. The defendant was from a very difficult background, and had been caring for his sick mother for some time; the offence appeared to be 'a cry for help'. The judge commented, 'I probably should have sent him down, but I couldn't possibly ... looking at the whites of his eyes.'

As has already been noted, in our sentencing exercise the factors relating to the burglar's disadvantaged background received low mitigation scores, with many of our respondents observing that such factors are quite typical: it's 'what they're all like', one said. Indeed, the 'abused and in care as a child' factor received the lowest average score of all the items in the exercise. One judge commented that mitigation relating to difficult childhoods 'is thrown at us time after time'; he went on to say that he is 'prejudiced' against such mitigation, as he himself was from a disadvantaged background. (One can safely assume, however, that not many judges share his experience of early deprivation.) The relationship between mitigation and disadvantage is a subject to which we return in the next chapter.

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## Defendant's present and future

### Tackling drug dependency and other problems

From both our observations and our interviews we have concluded that mitigating issues relating to the defendant's present and future tend to play the greatest part in sentencing decisions. This general mitigation category encompasses a wide range of issues, of which the defendant's capacity to address drug problems, especially where acquisitive crime is linked to drug dependency, is perhaps the most significant.

In interviews and the sentencing exercise, most of our respondents asserted their commitment to using drug treatment disposals when they are advised to do so by the assessments. They are, of course, aware that prospects of success in any given case tend to be far from certain, and hence the passing of a community order with drug rehabilitation requirement<sup>16</sup> is often viewed as a matter of 'taking a chance' on a possibly deserving defendant. A similar stance is taken with respect to some defendants with other kinds of problems – ranging from alcoholism to treatable mental health problems - for which help in the community is available. Sentencers sometimes feel that they must choose between, on the one hand, a prison sentence that will 'punish' the offender but is unlikely to address and may even entrench offending behaviour and, on the other hand, a rehabilitative sentence that may benefit the defendant and thereby, ultimately, the general public. This applied, for example, in the observed case of Halliday, described in Box 3.8, in which the judge concluded that prison 'won't help matters'.

### Family responsibilities

Many of the sentencers we interviewed and those we observed seemed to pay particular attention to the issue of family responsibilities when weighing up mitigation. Their concern here was largely the impact of a possible custodial sentence on the defendant's family. Another consideration was, on occasion, that the defendant's care for his family demonstrated certain positive personal qualities and possibly militated against further offending. Some of our respondents, however, stressed that they treat family responsibilities as mitigation only when these are exceptional. As an example, one judge cited the 'desperate home circumstances' of a woman who had stolen £20,000 over four months from the accountant she worked for as a secretary. The offence involved a 'gross breach of trust', but prison would have been 'a devastating blow for the family' – given that the defendant had weekend care of her husband's two children, one of whom had severe cerebral palsy. She also had a 15-year-old daughter who sat in court, crying.

In the absence of exceptional circumstances, some respondents said, family matters may not count for much. A judge told us that he is rarely touched by mitigating features concerning the family: his view is that the family are the defendant's problem, not the judge's. He added: 'And don't tell me there's a child in your belly, when you've got pregnant after your arrest.' The numbers who 'plead the belly', he said, are 'remarkable'. In contrast, others we spoke to were inclined to take children into account in all circumstances. Some said that this tends to be an issue with respect to female rather than male defendants; others were at pains to point out that men may have family responsibilities just as much as women.<sup>17</sup> In the

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16. Formerly a Drug Treatment and Testing Order

### **Box 3.8: A case of domestic violence**

Mr Halliday, a man in his mid-30s, was convicted after trial of two offences of common assault (on his ex-wife and her child) and an offence of assault occasioning actual bodily harm (on his ex-wife's friend). The assaults occurred during a drunken dispute with his wife and her friend over the defendant's access to his child – who was not the child who was assaulted. The defendant was found not guilty of threatening to kill his ex-wife.

The defendant had several previous convictions, for assault on a police officer, racially aggravated criminal damage, and drunk and disorderly behaviour, among other matters.

Mr Halliday's defence counsel described his 'distressing' family situation, arising from the fact that he had not been able to see his child for over a year, despite being 'desperate to maintain a relationship with him'. She spoke of the damaging influence of alcohol on his behaviour, but said that he was not alcohol dependent.

The judge passed a two-year community order, with conditions of supervision by probation and attendance of a 24-week domestic violence programme. He also ordered costs of £500 to be paid. In his sentencing remarks he commented that 'the circumstances of these offences is a disgraceful state of affairs ... You have a history of violence with women and your problems of drink and anger need to be addressed.' He concluded: 'You should go to prison for this, but in these circumstances it won't help matters.'

sentencing exercise, the young male burglar received a low average score for the mitigation of 'partner and young child', compared to a middling score for the 'husband and three children' mitigation in the death by dangerous driving scenario, in which the defendant was a 45-year-old woman.

Three (male) respondents told us that they tend to sentence women more lightly than men not only because they have family responsibilities. One of these three spoke of having to 'fight a reverse prejudice of being over-kind to women'; another cited 'being a woman' as a mitigating factor, taking into account 'personal hardships and hardships to their families'; the third said that 'like all biased white middle class men, I don't like sending women to prison'. He went on to explain that research shows women tend to find prison more difficult than men do, because they resist regimentation – being more 'sensible' and 'individualistic'.<sup>18</sup>

In a significant number of our observed cases, the defendants' family responsibilities of various kinds appeared to influence the sentencing outcomes. One such case was that of Mr Allan who cared for his disabled sister, as described in Box 3.9.

17. In their study of the sentencing of female offenders by magistrates, Gelsthorpe and Loucks (1997) found that female defendants were more likely than male to have their sentences mitigated by their responsibility for dependants, primarily children.

18. At a national level, the sentencing of female defendants has, however, become more severe over recent years. While the adult male prison population increased by 50% between 1991 and 2001, the adult female prison population rose by 143% (Hough et al, 2003) – a rate of increase that is not entirely explained by numbers appearing before the courts or seriousness of offending.

**Box 3.9: A defendant's care for his sister**

Mr Allan, an 18-year-old, appeared in court to be sentenced for an offence of assault occasioning actual bodily harm. For no reason that could be discerned, Mr Allan had punched in the face an acquaintance with whom he had spent an evening drinking. He went on to hit him in the face with a glass that broke, and to kick him when he fell on the floor. While he didn't suffer serious injuries, the victim later told the police that cuts he received to his face were of particular concern to him because he was a professional magician and his looks were therefore important to him.

When arrested six weeks after the offence, Mr Allan said he could remember nothing of the evening from the time he went to the pub. He pleaded guilty to the offence.

The judge told Mr Allan that 'young men who smash glasses into people's faces go to prison, and sometimes for a long time'. He said that he had no alternative other than to pass a custodial sentence. However, he had the power to suspend the sentence, and this he did: taking into account the defendant's age, the 'worthwhile life' that he was leading, and the care he gave to his sister. This care had been described in some detail by Mr Allan's defence counsel, who explained that the sister had been seriously brain-damaged after an accident. Mr Allan was said to have a very special relationship with his sister – having the capacity to communicate with her in a particular kind of language, and to calm her down when she was aggressive and depressed. The offence had occurred on the day of his sister's 21st birthday. Mr Allan's mother was in court, prepared to speak of the 'invaluable help' that her son provided, but the judge felt no need to call her.

As the suspended sentence was passed under the provisions of the Criminal Justice Act 2003, the judge imposed conditions: a 100-hour unpaid work requirement and an electronic curfew for 4 months. In conversation after the case, the judge told us that had he not been able to impose these conditions it would have been harder to pass the suspended sentence; however, he might have made a claim of 'exceptional circumstances' because of the defendant's care for his sister.

**Family support**

In some circumstances, the existence of family support as well as family responsibilities can act as mitigation. While some of our respondents clearly viewed family support as unimportant, others placed a particular emphasis on it. For example, one judge said that this is a particularly important factor in cases involving young Asian defendants because



of the 'strong culture of family' among Asians. If an Asian's family are not in court, he said, this suggests that there has been estrangement; but if, in contrast, the family are there, perhaps armed with a letter expressing their willingness to have the defendant back in the family, this indicates that the defendant has strong support which may reduce the risk of further offending. Another judge also referred to the ethnicity of defendants in discussing family support. He said that many young black defendants are unlikely to have grown up with both parents; and hence it makes a strong impression if he sees both parents sitting in court, perhaps also with a grandmother, all saying 'we support you'. This respondent also said that takes note when a young defendant with a 'feckless' past has recently got together with a 'good girl' who has not been in trouble before, is sitting in the public gallery, and has said – according to the pre-sentence report – that she will leave the defendant if he goes burgling again.

In the sentencing exercise, the existence of family support in the ABH scenario did not score highly. Comments made by the respondents about this potential mitigating factor included, 'He's lucky to have that, but it's not going to make any difference'; and, 'It happens all the time – family always gather around when somebody's in trouble.' The latter comment can be contrasted with that of another judge, who said that 'one of the most heartbreaking things' is to see a 17-year-old in court in serious trouble, with no one there to support him.

Family support played a part in a small number of sentencing decisions that we observed. This was sometimes a matter of the family's capacity and willingness to provide direct, practical assistance to the defendant. For example, in the case of a heroin-dependent burglar and thief of low intelligence (discussed above with reference to his unhappy period on remand in Durham prison), the judge was told that the defendant's two sisters had agreed that he could live between them – staying with one on weekdays, and the other at weekends. In sentencing him to a 12-month community rehabilitation order, the judge commented, 'Your sisters have been very good to you, and I hope they will continue to be good to you.' He went on to say that the aim of the order was to enable 'the probation officer [to] help your sisters to guide you on to the straight and narrow.' In other cases, family support could make little difference to the outcome. A tearful mother of a 21-year-old dealer of Class A drugs gave what was described by the judge as a 'moving address', in which she took some of the blame for her son's behaviour, said that she would 'do my best to make sure that he will never get involved in this again', and that she was 'pleading with you to try and understand what's happened'. The judge said that he was 'taking into account' what the mother had said, but could not pass less than a four-year custodial sentence.

### Physical illness

In interview, several of our respondents mentioned chronic physical illness or disability as factors which can impact a sentence, on the grounds that the defendant might find custody (and indeed a work requirement attached to a community sentence) considerably more difficult than would otherwise be the case. Such issues did not arise, however, in our observed cases.

Some respondents commented that a reduced life expectancy or relative old age will also be taken into account in considering a custodial sentence, but that this can raise difficult questions. As one judge asked rhetorically, how should one sentence a 70-year-old sex offender? In fact, we observed the case of a 72-year-old man who was convicted of a sexual assault on a young woman. In this case, the judge appeared to pay little attention to the defence counsel's plea in mitigation – which focussed on, among other matters, the fact that the offence had occurred the day after the funeral of his wife of 39 years – and was more concerned with the risks indicated by his previous pattern of offending. He sentenced him to imprisonment for public protection under the provisions of the Criminal Justice Act 2003, but set the minimum term to be served in prison as 12 months, of which he had already served a substantial portion on remand.

### Employment

From both the interviews and the observations, there was some evidence that a defendant's steady job, or involvement in studies or vocational training, can be a mitigating factor. A judge commented that for him a good work record is 'very influential', as he would be loathe to damage a defendant's long-term economic prospects by sending him to prison. Furthermore, by holding down a job a defendant demonstrates that he is a reasonably responsible, organised person - unlike most who appear in court – and possibly less likely to offend again. Some respondents, however, cautioned against taking any notice of the typical claim by a defendant that 'my girlfriend's father has given me a job in his builder's yard, starting Monday'.

We observed an interesting case that involved a 23-year-old convicted of affray (following a late guilty plea) alongside two co-defendants. His defence counsel told the court that his life-long ambition had been to join the Marines; and he was in the process of completing his entry at the time of the offence. If he was to receive a custodial sentence, this ambition would be thwarted. The judge stressed that the offence deserved custody but passed a community sentence – stating that a custodial sentence would prevent him 'taking a course in your life that could do all of us some good'. Having passed a non-custodial sentence on this defendant, the judge was then bound, for the sake of consistency, to pass similar sentences on the two co-defendants.

The results of our sentencing exercise suggest that it can backfire on the defendant if his promising work record is offered as mitigation. In the burglary scenario, one of the potential mitigating factors was that the defendant had held down the same job for 18 months. This produced divergent views among the respondents, with six scoring it as a 'high impact' factor while nine scored it as 'minimal/no impact'. Among the latter group, some suggested that a defendant in a steady job is more culpable, as there can be little reason or excuse for his commission of acquisitive crime. Those who scored the employment factor highly, in contrast, spoke of the promise for the future that the work record holds out. As one commented, 'There are a lot of criminals who haven't held down a job for 18 minutes let alone 18 months.'



## 4 Sentencing as a subjective process

The importance of personal mitigation or, more broadly, offender-related factors in sentencing makes it inevitable that sentencers exercise a considerable degree of discretion, within the parameters set by legislation and sentencing guidelines. Sentencing, in other words, involves responding to the characteristics, circumstances and life history of the individual, which potentially brings into play any number of variables to be weighed up by the sentencer. Inconsistencies in both process and outcomes are an unavoidable result.

This chapter considers various aspects of subjectivity and discretion in sentencing. First, we look at how different kinds of aggravation and mitigation reflect different sentencing rationales. We move on to consider the relationship between mitigation and disadvantage. Thirdly, we discuss the implications for mitigation of the offence itself and the guilty plea. Fourthly, we look at the role of the plea in mitigation, and then conclude the chapter with a discussion of the process by which sentencing decisions are made.

### Aggravation, mitigation and sentencing rationales

Few of our respondents made explicit the connections between particular sentencing rationales and particular forms of mitigation. However, in according significance to certain aggravating or mitigating factors, sentencers are (implicitly) prioritising certain sentencing rationales over others. In simple terms, rehabilitative sentencing brings offender-related factors to the fore, while just deserts sentencing encourages a focus on offence-related factors (cf Engen et al., 2003: 109).<sup>19</sup> In practice, it is more complex than this – not just because there are other sentencing rationales besides deserts and rehabilitation, but also because the concept of offender *culpability* is central to considerations of offence seriousness (and hence desert), and this is an elastic concept which potentially encompasses a range of personal mitigating and aggravating factors.

Nevertheless, it is clear that the aggravating and mitigating factors most relevant to the **just deserts** approach are those relating to the criminal act and the immediate circumstances of the act (i.e. factors in categories 1 and 2 of our Table 2.1 classification). Reduced culpability may also be associated with some mitigating factors relating to the wider circumstances of the offence, such as youth, immaturity, emotional stress and need (category 3).

Factors relating to the defendant's past (category 5) may also be viewed as either diminishing or increasing culpability. For example, a disadvantaged background may occasionally be treated as a mitigating factor on the grounds of reduced culpability. More significantly, desert theorists such as von Hirsch (1986) have tended to argue that an offender who has few or no previous convictions is less culpable than a persistent offender, because an initial offence may simply be a 'lapse', reflecting normal 'human frailty'. As expressed by a former Lord Chief Justice, 'A single transgression gives room

19. In the words of Thomas, the 'primary decision' to be made by the sentencer is over 'which of the two conflicting objectives [of sentencing] will be pursued' – namely, the objective of retribution and general deterrence, which necessitates correlating sentence severity to the seriousness of the offence, or the objective of meeting the offender's needs, in which case the sentence is shaped by the court's understanding of those needs (1970: 4).

to hope that the transgressor may learn his lesson; persistence in wrongdoing shows that he has not learned it' (Bingham, 1997: 10). This underlies the practice of treating good character as mitigation. It has been argued by some desert theorists that the replacement of the principle of 'progressive loss of mitigation' for good character with cumulative sentencing for persistent offenders – as seemingly permitted by the 2003 Criminal Justice Act's instruction to treat previous convictions as aggravating factors - is fundamentally incompatible with proportionality. As noted above, however, it appears that this shift in policy is not yet reflected in current practice in the Crown Court.

As, in a sense, an aspect of the proportionality rationale, some mitigation relating to the defendant's responses to the offence and prosecution (category 4) and the defendant's present and future (category 6) is about **avoiding disproportionate punishment**. This applies when a sentencer reduces the severity of a sentence because the stress of delayed or long-running prosecution or time spent on remand is deemed a punishment in itself. Another example of this is when the sentencer opts for a non-custodial sentence on the grounds that custody would cause particular hardships for an offender in ill health, or would result in the offender losing his home or employment. For elderly defendants, custodial sentences may be reduced on the grounds of additional hardship or 'because any such sentence deprives them of a large fraction of their expectation of life' (Walker, 1999: 152). A different kind of avoidance of disproportionality is when a sentence is made more lenient so as to reduce the suffering of the defendant's family members: this is, in the words of one of our respondents, a matter of reducing 'the impact on the innocent of the sentence'. Ashworth notes an 'absence of clear principle' with respect to this kind of mitigation, which, as a result, means that the 'language of "showing mercy" is often used (2005: 177). Indeed, one of our respondents described as 'showing mercy' his decision to pass an unexpectedly short custodial sentence on a prolific burglar whose long-term partner was clearly in the late stages of terminal cancer.

Many of the potential aggravating factors listed in Table 2.1 - especially those relating to the defendant's responses to the offence, his past, and his present and future (categories 4, 5 and 6) - may be thought to indicate a high risk of reoffending. For example, the offender who shows no remorse for his offence, has offended many times before, or is failing to address the problems underlying his offending behaviour, may be deemed likely to reoffend. Where such an assessment results in the passing of a custodial sentence, this reflects a **protective** or **incapacitative** sentencing rationale. The objective of **individual deterrence** may also play a key part in such sentencing decisions. **General deterrence** as a sentencing rationale is less obviously linked to specific aggravating and mitigating factors, other than in cases – which we did not come across – where the local prevalence of a crime is treated as an aggravating factor. Otherwise, general deterrence tends to be a thread that runs through many sentencing decisions, possibly reducing the effects of mitigation.

The converse of sentencing for purposes of incapacitation and/or individual deterrence is when mitigation focussing on good character, remorse, understanding of the offence and so on (categories 4 and 5) points to a low risk of re-offending and diminishes the severity of the sentence on this account. In this context, **parsimony** is a kind of principle of sentencing to which sentencers may adhere, on the grounds that sentencers

are obliged to pass the minimum sentence justified by the seriousness of the offence. More positively, if the defendant's remorse is accompanied by an apparent capacity to tackle his personal problems (category 6 mitigation – relating to the defendant's present and future), this may result in a community-based sentence focussed on treatment, in accordance with the principle of **rehabilitative** sentencing. Other positive attributes of the defendant's current circumstances – for example employment, family support, family responsibilities – may also mitigate for the same reason: that is, they enhance the prospects of reform or, more generally, make reoffending less likely and thereby reduce the need for incapacitative or (individual) deterrent sentencing.

Linked to this latter point is what can be termed, as by Ashworth (2005: 173), the **social accounting** rationale of sentencing. This is not always accepted as a key sentencing aim (for example, it is not cited in the Criminal Justice Act 2003) but does appear to play a part in the reasoning of some sentencers. The assumption here is that the defendant who has in the past made a valuable contribution to society should be rewarded for so doing when he is sentenced – or, as expressed by Walker, 'deserts can be reduced by meritorious conduct' (1999: 111). One of our respondents discussed the mitigating effect of family responsibilities, particularly responsibilities for sick relatives, in these terms. He said that someone who looks after vulnerable dependents could be said to be doing work for the community, and this should be taken into account in sentencing such a person, since 'we're all indebted to those who look after others ... Someone has to do it.' Another respondent described reducing the sentence of a defendant who had, in the past, saved someone's life.

Some mitigation within categories 4 (responses to the offence and prosecution) and 6 (defendant's present and future) is linked to the aim of **reparation**: that is, where the defendant can make amends in some way for his offending. This was not prominent among the issues that emerged in our interviews and observations. However, it occasionally came to light in our observed cases: for example, as an element in the decision to defer the sentence of a tax evader to enable him, among other matters, to start repaying the tax that he owed. Reparation is often a consideration when community orders involving unpaid work are passed. A few respondents referred to the payment of compensation (either voluntarily or through a court order) as a means by which an offender might help to redress the harm he has caused, and even – if it was a one-off offence – stay out of prison.

Certain forms of mitigation reflect the aim of assisting the **functioning of the criminal justice system**. This is the rationale for the guilty plea discount (which we are not examining here as mitigation, because of its statutory basis), although a related concern here is that the avoidance of a trial can be beneficial for victims and witnesses who are spared the ordeal of giving evidence in court. This rationale applies also in cases in which the defendant provides evidence that assists the prosecution of others or, more generally, in which the defendant has been particularly co-operative with the authorities with respect to his own case.

## Mitigation and disadvantage

What is the relationship between mitigation and disadvantage? The evidence from our research is that there are manifold contradictions in this relationship.

### Disadvantage and reduced culpability?

Some theorists have argued that disadvantage, particularly in the form of early deprivation, should mitigate. This argument is usually made from a just deserts perspective; the assumption it is based on is that a seriously disadvantaged defendant is not as culpable as others. As Odudu has suggested, for example, 'The moral blameworthiness of the deprived is different because the choices the deprived face and what motivates their action is different' (2003: 418).<sup>23</sup> Von Hirsch, however, is hesitant about the extension of the principle of proportionality to take account of reduced culpability resulting from deprivation. His view is that 'a sentencing scheme, on any theory, scarcely can compensate for the effects of wider social ills'; nevertheless, proportionality 'permits this issue of social deprivation to be raised'. His conclusion on this point is that:

*If, on the one hand, deprived persons (or some of them) might arguably be entitled to something less than the full measure of the prescribed punishment, but if, on the other, granting such special mitigated treatment is likely to encounter serious theoretical or practical obstacles, one possible solution remains: to keep such matters in mind, when setting a [sentencing] scale's anchoring points (1993: 108).*<sup>24</sup>

Whatever the academic arguments for and against disadvantage as mitigation, defence advocates routinely assume that sentencers are swayed by accounts of their clients' social deprivation. Many of the pleas in mitigation that we heard in court made much of the misfortunes experienced by the defendants, particularly as children: numerous unhappy stories were told of child neglect and abuse, family breakdown and bereavement. Whether these accounts were claims of reduced culpability, or simply attempts to engage the sympathy of the judge, was rarely made clear by defence counsel.

As has been noted above, for their part sentencers appear to be somewhat immune to accounts of disadvantage – other than when the circumstances are truly exceptional, or the defendant is very young, or the defendant has evidently strived to overcome the adversity he has faced. There is a simple reason for this: the vast majority of defendants are disadvantaged in one way or another (and often in many ways), which effectively rules out special treatment on these grounds. As one respondent dismissively put it: 'There is a sob story in everyone.' A related point is that while a great many defendants are seriously disadvantaged, many are also highly inadequate individuals leading chaotic lives. As one judge commented, defendants are usually 'completely disorganised. There are the real crooks, but the vast majority are just hopeless.' They are people 'who cannot cope with life and manifest that by committing stupid offences.' This kind of inadequacy is very often rooted in early deprivation, as made clear by another judge who said, 'Some people simply can't – can't cope with past [traumatic] events ... and it's a component of their approach

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23. See also, among others, Hudson (1995).

24. Likewise, von Hirsch and Ashworth conclude that social deprivation should not be treated as reducing culpability, but a case can be made for mitigation on compassionate grounds, taking into account the deprived offender's 'diminished incentives for compliance' and the fact that 'these diminished incentives reflect a societal failure' (2005: 66).

to life, and therefore their [lack of] ability to cope with pressure and resist temptations and all the other factors that lead to offending.’

### Advantage, mitigation and aggravation

While disadvantage often fails to mitigate (notwithstanding the apparent belief to the contrary of defence advocates), it appears that *advantage*, in some circumstances, can mitigate. More specifically, as has been noted in the preceding chapter, a defendant’s employment or family support are sometimes treated by sentencers as mitigating factors. When this occurs, the rationale is nothing to do with culpability. Rather, the mitigation is based on assumptions about the defendant’s low risk of reoffending or prospects for reform, or (emphasising the need for proportionate punishment) the sense that he has more to lose than other defendants, and will therefore suffer more if a custodial sentence is passed.

When culpability is brought into the equation, the advantages enjoyed by a defendant can, conversely, be treated as aggravating factors. As some of our respondents suggested, for example, an employed defendant ‘should know better’ and therefore is more culpable when he commits a crime. However, the notion that advantaged defendants should in practice receive more severe punishment than others is unlikely to carry much favour – both because it could lead to accusations of discrimination and disproportionate punishment, and because it would undermine rehabilitative concerns. In short, consideration of the impact of advantage/disadvantage on sentencing brings to light various dilemmas that merit further attention by policy-makers and practitioners.

One of our respondents, an experienced judge, described a case that provides an appropriate conclusion to this discussion. It involved a 21-year-old who had set up a company to organise charitable events, in relation to which he was convicted for fraudulent trading. The young man was from a ‘good family’, and had had a public school education. He had many references asserting that he was a very good boy who had never been in trouble before. In passing sentence, the judge was struck by the fact that this young man was quite unlike the usual people who stood before him: he was someone who had enjoyed all kinds of advantages, but had not used them. With this in mind, the judge passed a sentence of eight months’ custody. The custodial sentence was successfully appealed; in its place, the Court of Appeal imposed a community sentence. In describing the case to us, the judge commented that all this had happened a couple of years ago, but the Appeal Court’s decision ‘still rankles’.

## The offence and guilty plea

### Offence seriousness and mitigation

We have shown that in passing sentence, a sentencer may consider a range of offender-related factors, and makes an implicit choice between different sentencing rationales. The context for these decisions is set by the level of seriousness of the offence being dealt with. Many of our respondents stressed that personal mitigation is much more of a consideration when the offence is not very serious, and hence the decision to be made is



about the kind of sentence to be passed, rather than the length of a custodial sentence. This is not to deny, however, that personal mitigation can and frequently does impact sentence length – as indeed we found to be the case in many of our observed cases.

There are two elements to the apparently common-sense assumption that the more serious an offence is, the less personal mitigation matters. First, it is clear that some mitigating considerations – for example, the desire to avoid disrupting the defendant's employment or family life, or his motivation to undertake drug treatment – only apply if the decision is about sentence type, and particularly custody versus non-custody, rather than sentence length.

Secondly, it appears that some offences are viewed as so serious that the associated personal mitigation is deemed irrelevant – or a very minor concern next to the much greater issue of the crime that has been committed. In the words of Henham, writing specifically about the mitigation of good character, 'It is evident that, where serious offences are concerned, the gravity of the offence is merely regarded as an aggravating factor which automatically extinguishes mitigation to the point where the sentence reflects the ceiling for that offence' (1997: 268). One of our respondents made this kind of point. He was a judge who had recently sentenced a group of young boys who had stabbed someone and broke his jaw. They had pleaded not guilty, and there had been a six-week trial. The defendants had previous good character, and 'stacks of testimonials'; their parents clearly considered them 'gentle, loving church-going boys'. However, the judge commented that 'when you see them strutting their stuff on CCTV' and consider what they have done, the fact that they go to church and are nice to their younger brothers and sisters does not count for anything, and should not have an impact on sentence.

Looking at the inverse relationship between the significance of personal mitigation and the seriousness of the offence, one might question the fairness of, essentially, 'rewarding' certain forms of mitigation if the offence is of relatively low seriousness, but discounting that same mitigation if the offence is more serious. A related issue is that the significance of some aspects of personal mitigation may diminish as offenders become more persistent. Evidence of remorse, for example, inevitably carries much more weight for a first-time offender than for a recidivist.

### Guilty pleas and mitigation

The defendant's guilty or not guilty plea also shapes the context within which mitigation is considered by the sentencer. Usually – as our respondents pointed out – personal mitigation plays a greater role if the defendant pleads guilty. This is because many of the important mitigating factors, such as remorse, and a willingness to address the problems underlying the criminal behaviour, cannot logically proceed from a plea of not guilty. One judge commented in interview (adding that this was something he had not thought about before), that the defendant who pleads guilty not only can claim remorse, but also 'engages the court's sympathy much more readily'. Given that the discount in sentence for a guilty plea is to be calculated after any relevant mitigating factors have been taken into account,<sup>25</sup> this effectively means that the plea permits a double discount on the sentence – the fairness of which can perhaps be questioned. Some theorists, it should be noted, have argued that the guilty plea discount in itself is problematic, given that it 'provides a powerful incentive

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<sup>25</sup> See the sentencing guideline on reduction in sentences for guilty pleas, paragraph 2.3 (SGC, 2004b).

to innocent persons to plead guilty' and significantly increases the sentence to be served by a defendant who is wrongly convicted after a trial (Tonry, 2002: 97).<sup>26</sup>

The plea of guilty may be on a basis of plea, agreed with the prosecution, that differs markedly from the original charge and thereby not only minimises the seriousness of the offence but also offers further scope for personal mitigation. (Although the basis of plea can be challenged by a judge who subsequently hears the case, leading to a Newton Hearing, this is not often done.) For example, we observed a domestic violence case in which mitigation concerning the defendant's reconciliation with his partner – of which the sentencer evidently took account - would have been more difficult to sustain had the defendant been convicted of the original, more serious charges. One of our respondents voiced his frustration with the fact that a dishonest defendant, who pleads guilty to the minimum that the prosecution will accept, will be sentenced on that basis and thus rewarded for his dishonesty. In contrast, an honest defendant who admits to the court all he has done, in an effort to 'wipe the slate clean', is likely to receive a harsher sentence.

## The plea in mitigation

The defence counsel's plea in mitigation – which is often built around issues highlighted by the pre-sentence report - is usually at the heart of a sentencing hearing. According to our respondents the plea in mitigation can, if done effectively, make a difference to the sentence that is passed. We asked our respondents for their views on what makes a good plea in mitigation; in reply, the qualities that were emphasised were realism, creativity and structure (see Box 4.1).<sup>27</sup>

While observing that some pleas are very well done indeed, and have real effect, many of our respondents were disparaging about most of the pleas they hear. 'Poor quality advocates doing poorly paid work' was the description offered by one. Our respondents complained that many pleas are too long, filled with irrelevant material, and poorly structured (complaints that our observations of sentencing did little to refute). For example, one judge talked about young barristers who 'stand up and blather away'; another spoke of those who 'regurgitate ... the plea of guilty, the sick grandmother, the dead parrot' and so on. These advocates, he said, have a standard list of items (dead father, sick mother etc) from which they select the ones to use on any given occasion. Another respondent, similarly, talked of mitigation as a 'mantra' repeated with little thought in case after case. Two used the phrase 'scatter-gun approach' to describe the tendency of barristers simply to hold forth on any and every issue that might conceivably have a bearing on the sentence.

A particularly vociferous judge complained of pleas that 'go on far too long ... [and] end up enraging you rather than helping you'. Typically, he said, the advocate asks him if he has read the pre-sentence report; he says that he has; and then the advocate 'insists on reading it out anyway ... He'll bang on for 20 minutes about all the children [the defendant has] fathered', and in the end the plea has the 'opposite effect to what was intended'. In a similar vein, another respondent said, telling the judge about the defendant's

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26. Tonry also notes that sentencing disparities affecting Afro-Caribbean defendants can be exacerbated by sentence discounts since, as research by Roger Hood has found, Afro-Caribbean defendants are less likely than others to plead guilty. See also Darbyshire (2000) for a vehement critique of guilty plea discounts. Note also that at the time of writing, the Sentencing Guidelines Council is consulting on the revision of its guideline on the guilty plea discount (see SGC 2006c), following concerns that have been raised about various aspects of the initial guidance.

27. A study of Crown Court sentencing in Oxford in 1980/81 found similar views of pleas in mitigation among judges. Good pleas were said to involve 'realism ... , ready support for factual assertions ... , and sound knowledge of the purpose and availability of the various disposals'. Poor pleas were described as ill-prepared and repetitive (Ashworth et al, 1984: 43).

### **Box 4.1: What are the attributes of a good plea in mitigation?**

#### **Realistic and informed**

- Realism is about acknowledging and dealing with the bad features of the case straight away, before moving on to the other aspects.
- A good plea should be understated, should acknowledge the downsides of a case, and then ‘marshal in a logical and coherent way’ the positive issues.
- Realism is also about providing ‘the hooks on which to hang a sentence’ that is considerably more lenient than one would have thought, by providing a ‘realistic, intellectual framework to justify the sentence’
- The good advocates are those who ‘give you pause for thought, lead you by the hand and persuade you that you don’t have to send him to prison, and that it would be wrong to do so: not for emotional but for intellectual reasons’.

#### **Creative**

- A good plea ‘draws your attention to matters you have not previously considered, or lays appropriate emphasis on matters that you have not thought important’.
- Good pleas are those that ‘really go for it’: there is a ‘real art’ in persuading someone to do something that is more lenient than he would otherwise do.
- Under the pressure of a long court list, ‘skilful mitigation makes the task of identifying those unusual features or novel features [of a case] that much easier’. This is a matter of ‘giving some life to the sort of formulaic mitigation that most practitioners can do in their sleep’.
- If mitigation is to have an impact, it needs to contain something ‘slightly out of the ordinary [that] sounds genuine’, and to engage the interest of the judge.

#### **Structured**

- A good advocate will ‘enumerate *in a logical order*’ the main points of the case, without adopting a ‘hectoring manner’.
- A good plea is ‘relevant , concise, well-informed and realistic.’
- A good plea has ‘tercity, lack of repetition, clarity and relevance to the nature of the offence’.
- A good plea is organised, succinct, in bullet points. Attractive presentation counts, and there is no need for ‘hours of oratory.’

28. The standard fees for a single sentencing hearing are: £60 for a junior barrister acting alone, £102 for a leading advocate other than a Queen’s Counsel, and £150 for a Queen’s Counsel (information provided by Bar Council).

grandmother's sick cat is not going to help: it may simply annoy the judge because he has to listen to 'this rubbish'. According to another respondent, 'the worse advocate you are, the longer it gets': whereas some advocates say that they have six points to make and then run through each in turn, 'others make the same six points over the next half an hour, hidden behind a massive verbiage – and then you have the job of digging them out.' We observed a case during which the judge interrupted the defence advocate in the middle of his plea with the command: 'Stop rabbiting on.'

Our respondents offered a variety of reasons for the generally poor quality of pleas in mitigation. Underlying many of these reasons seems to be the low priority accorded to sentencing hearings by court staff and the legal profession – despite the fact that for the defendant, the moment of sentencing is often the most critical point in the prosecution process. The failure to prioritise sentencing is reflected, for example, in the poor pay for doing pleas in mitigation,<sup>28</sup> which in turn means that this task often falls to relatively junior advocates. Problems with the scheduling of sentencing hearing often result in the last-minute assignment of advocates to cases, which can mean that the barrister does not meet the client before they both come to court on the day of the hearing. Even when an adjourned sentencing hearing is held following a trial, the defence advocate is frequently new to the case, if the barrister who originally represented the defendant is by then occupied with other cases.

The sheer workload of the courts, and associated poor organisation and preparation of case files, can also hinder effective advocacy. One of our respondents described (doubtless with some exaggeration) his experiences of working as a criminal barrister prior to his appointment as a judge. Typically, he said, he might arrive in court in the morning with six pleas to do; all the defendants would turn up at 10 o'clock with mothers, girlfriends and letters of reference; his cases would be scheduled one after the other from 10.30 – and the judge would not look kindly upon a request for more time. He would hence be left to 'cut some corners' in his attempts to construct pleas in mitigation that 'sounded half decent'. The judge's perspective on such a situation was offered by another respondent, who described the barrister who 'takes the tape off [the file] as you come into court' and prepares simply to 'trot out a few platitudes'. More generally, some of our respondents talked about the failure of practitioners to recognise that the effective delivery of a plea in mitigation is an 'art', which must be learned through observation and practise, and demands thoughtfulness and attention to detail.

A few of our respondents told us that they try to avoid being swayed too much by the effectiveness of the plea: 'I think judges ought to remind themselves constantly to sentence the offence and the offender and not the [plea in] mitigation.' One respondent described a case in which he sentenced a young Russian woman who had acquired various loans through bogus mortgage applications. Thanks to the wealth of her new husband, she was represented in court by an 'eminent silk' who delivered a 'glorious plea ... a fabulous celebration of the Queen's English'. On considering the plea, however, the judge decided that 'whilst it was beautiful, in the end ... it was a triumph of style over substance ... and [didn't] make a scrap of difference'. He thus passed the sentence of 15 months' custody that he originally had in mind. Another respondent said that judges are on their guard for incompetent advocates, and are experienced enough to identify the key points of

mitigation even if these are poorly presented. In fact, he said, a badly done plea can work to the defendant's advantage, because you feel that 'he hasn't had a fair crack of the whip ... so you end up doing the mitigation for him.'

While many of our respondents were strong critics of the quality of pleas in mitigation, they spoke more positively about the pre-sentence reports they see. Reflecting a finding of our previous research on sentencing (Hough et al, 2003), most of the sentencers were agreed that the quality of pre-sentence reports has improved greatly over recent years, and that the large majority of reports provide genuine assistance with sentencing decisions. Views on the new, more structured format of the reports were mixed, however: while some respondents asserted that the format helps them to pick out key points quickly, others complained that it is too rigid and tends to make the reports long-winded.

## 'What one person thinks about another'

### The process of decision-making

One respondent, a female judge, talked in vivid terms about the process of making a sentencing decision:

*When the offender comes into court, and you have that first long hard look at him, you can see so much in that first split second. That direct relationship between the Bench and the dock – you can see, are you looking at a fool? Are you looking at someone who doesn't give – anything? Are you looking at someone who's just been knocked about from day one? You can tell a lot.*

She went on to say that sentencing can be 'terrifying, because it's a very subjective exercise – there are all these objective parameters put in place, but in the end it's down to what one person thinks about another'.

This intuitive, subjective dimension of sentencing was stressed by a number of our respondents – such as the one who said that sentencing is about a 'personal and sometimes emotional response to a particular set of circumstances'. In speaking in these terms, the respondents sometimes made the point that sentencing – like advocacy, it seems - is 'an art, not a science'. (Ashworth [2005: 49] notes the general tendency of the judiciary to describe sentencing in this way.)

Indeed, if subjective factors such as a defendant's remorse and his motivation to address his problems are potentially carry significant weight as mitigation, it is inevitable that sentencing becomes partly a matter of what our respondents referred to as 'experience and feeling' or 'gut feeling rather than careful calculation'. One judge told us that 'if you see a fully grown man in the dock crying' this can be seen as a clue that he will not offend again in the future. Another of our respondents commented, 'I know there are actors in the dock as much as on stage ... but it's easy to under-estimate the importance of the face-to-face contact you have with the offender – particularly if you take the trouble to

make eye contact'. Like several of our other respondents, this judge acknowledged the difficulty of making assessments of character and motivation for the purpose of sentencing. He added, however, that he while he might be 'conned' by a defendant pretending to be remorseful, 'I'd rather make that mistake than find a [genuinely] repentant, reformed offender and reject his pleas ...'

Notwithstanding the general emphasis on subjective, intuitive decision-making, a number of our respondents (particularly, but not only, recorders and less experienced judges) also stressed that they personally favour a structured approach to sentencing, which they distinguished from the more quickfire or instinctive approach of others. By far the most striking example of this was the judge who described sentencing as 'a cold, intellectual analysis of the relevant criteria'. She described how she always makes note on the relevant guideline cases before sentencing, and will adjourn a case if necessary to allow her to review all the applicable legal arguments. She said that she sometimes asks counsel to talk through the factors, as reflected in case law, if required – which can be a 'very painful process'.<sup>29</sup> A newly appointed recorder spoke of how she had developed her own 'template' to guide her through each sentencing decision, although more experienced judges (especially those, unlike her, from criminal law backgrounds) have told her that when it comes to sentencing 'you just do it'. She thinks that her approach not only reflects her lack of experience, but also the fact that sentencers receive more training today than they did in the past, and this training tends to emphasise structured decision-making.

Another recorder said that she takes longer than most sentencers to make a decision because she always looks up the relevant legal guidelines and provisions, thinks about the issues carefully, and drafts her sentencing remarks in advance. She has sometimes felt under pressure from Counsel who complain that she is too slow, but she refuses to sentence 'off the cuff' because it is a complex process which demands time. The judge who described sentencing as a matter of 'what one person thinks about another' also spoke about the need to deal in a structured way with the wide range of factors that come into any sentencing decision. Otherwise, she said, 'It all just swims about in my head'. Hence before going into court she always notes the aggravating and mitigating factors of a case, and the potential sentence. Another judge said that if he is passing sentence after a trial he always likes to allow time for the 'dust to settle' so that he can approach the decision afresh, 'remote from the battle as to guilt'. He added that, nevertheless, 'I don't detract from some people who have the ability to sentence as if from a machine gun'.

A few of our respondents talked about how helpful it can be to talk informally about sentencing options with other judges. One judge commented, 'I make no bones about bouncing ideas off other people; and people stick their heads round the door and say – what do you think about this?' A recorder described to us a case in which she had passed a custodial sentence but had given serious consideration to a community order. She had felt very uncertain about her decision, but was much happier after discussing it with her colleagues over lunch, as all had agreed with the decision to impose custody, and most had in fact favoured a longer sentence than the one she had passed.

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29. Of all our 40 respondents, this was the only one who would not score the mitigating factors in the scenario on death by dangerous driving in our sentencing exercise - saying that she did not wish to provide answers without looking up the relevant guidance.

30. In all the courts in which we carried out our research, sentencing was often but not exclusively listed for Fridays, and even on Fridays sentencing cases tended to be intermingled with other kinds of hearings.

### Sentencing workloads

We asked our respondents about the number of cases they feel comfortable dealing with on a 'sentencing day': that is, a day on which they have a list containing several sentencing hearings.<sup>30</sup> This question produced a wide range of replies: from those who said that they are happy to deal with up to three cases in a day, to those who said they are comfortable with a maximum of 15 to 16. These answers further illustrate the difference between the fast sentencers and those for whom the process is much slower and more painstaking – although they also partly reflect differences in court workloads. Several sentencers talked of having days when they are faced with too many cases - with the figure for 'too many' ranging from over three to over 20. Some pointed out that this is problematic not just because they have insufficient time to give proper consideration to each case, but also because, as one said, it does not allow justice 'to be seen to be done as well as done'. The recorder who made the last remark told us that, as a barrister, he has been in court on days when there has been a 'stacked list' being dealt with by a 'harassed, irritable judge'. It is most undesirable if, for example, the parent of a defendant is in court to see 'the barristers rattling through [the case] and the judge cheesed off'.

Several respondents stressed that the number of cases they can manage comfortably depends on whether they get the papers the night before, allowing time for preparation or – as happens far too often – the papers arrive on the day of the case. Some also pointed out that the length of time needed for sentencing depends on the complexity of any given case, with, for example, cases in which there are several defendants taking much longer than 'single-handers'.

The point was also made to us that on any day a proportion of cases listed for sentencing are likely to be ineffective. Our own observations certainly confirmed this: the process of sentencing was characterised by a kind of rolling chaos, whereby cases were frequently adjourned for a wide variety of reasons. These reasons included the failure of defendants, their lawyers or other parties to appear in court; documentation – such as psychiatric or other reports – going missing or not being provided on time; and the emergence of inconsistencies in information contained in case papers. It was not unusual, for example, for the judge, defence and prosecution all to find themselves holding differing versions of a defendant's antecedents. Sometimes the most basic information – for example, a defendant's name and date of birth - had not been verified prior to a sentencing hearing, and the case would have to be adjourned so this could be carried out.

### The role of the defendant

The extent to which a sentencer seeks to engage directly with the defendant varies from case to case and from sentencer to sentencer. Some, but by no means all, of our respondents talked to us about this aspect of sentencing. One judge said that when he passes any community order he likes to reserve breaches to himself, as he finds it useful to be useful to 'eyeball an offender' and tell him that he does not want to see him again. As this respondent made clear, some sentences allow the judge to build a kind of relationship with the defendant. He enjoys conducting reviews of drug treatment and testing orders, he said, as these offer a rare opportunity to observe what happens after the sentence is passed.<sup>31</sup> He has had a few 'star pupils', and finds it rewarding to see how they are doing.

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31. Our earlier study of sentencing found that sentencers were generally enthusiastic about the review process that was part of drug treatment and testing orders. Some sentencers in the study suggested extending the review, as a form of sentencer-defendant contract, to other sentences (Hough et al, 2003).

Some other respondents also talked about cases in which they have monitored and supported genuine progress on the part of the defendant. For example, a judge described sentencing a 16-year-old, from an ‘appalling family background’ who had committed a nasty distraction burglary with an older offender. The judge passed a supervision order, with a requirement to report to the court on the monthly basis; and with one blip, the young offender has since had ‘glowing reports’. With this boy as with other youngsters who appear in court, this judge told us, he tries to build up a rapport – and this is possible even in a court setting this is possible if one employs simple tactics such as the use of first names.<sup>32</sup> Another judge talked of a case in which he passed a drug treatment and testing order on a husband and wife who were, he felt, ‘worth taking a gamble on’. He has been pleased to see both of them getting themselves into a position to take up employment and to have their six children returned to their care by social services.

Through our court observations, we noted that whereas a majority of judges were inclined to use their sentencing remarks to make a general pronouncement to the court about the offence, offender and sentence passed, others took the opportunity – as far as possible – to speak directly to the defendant at a more personal level. The latter might involve confirming with the defendant that he fully understood the sentence and any conditions attached to it, or expressing some hopes or expectations with regard to the defendant’s future conduct. In Box 4.2, we cite two sets of sentencing remarks which illustrate the difference between, in the first case, comments addressed to the court and, in the second case, attempted engagement with the defendant (admittedly more feasible when – as is the case here – a community sentence is being passed).

In many cases we observed, it was as if the defendant, rather than being the focus of the what was going on, was in fact the least important character – almost incidental to the proceedings. Not infrequently, the judge and counsel discussed at length technical matters of law which were difficult for us to follow, as reasonably informed observers – let alone the defendant.<sup>33</sup> In a sizeable minority of the cases, non-English-speaking defendants were assisted by whispering translators who sat in the dock beside them; we wondered how much these defendants understood, even with the help of skilled translation, of what was being said about and to them in the highly formal, and probably very alien, setting of the Crown Court.

Just how confusing a sentencing hearing can be for the defendant and indeed his family was illustrated by a case in which a 19-year-old British Asian man received a total of twelve months’ custody for various offences of violence and criminal damage. As his sari-clad mother sobbed loudly in the public gallery, and angrily waved away approaches by the probation officer and solicitors, her other son stood next to her awkwardly and asked one of the lawyers: ‘How much did my brother get?’

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32. Kupchik writes of the interaction between judges and adolescent offenders in a criminal court in the USA, and of how judges use ‘admonishing language as a ... strategy for simultaneously communicating defendants’ responsibility and youthfulness during sentencing’ (2004: 168).

33. Fielding, writing of trials of violent offences, notes that the defendants sometimes appear to be ‘spectators at their own trial, with professionals representing their interests, a passive role that is also fed by the premise many defendants adopt that, as addicts (of alcohol, drugs, bad temper or incompetent personal relationships) they “cannot help themselves” (2006: 11). While defendants, and other lay participants in court cases, may find many aspects of the legal proceedings difficult to understand, professionals tend to maintain the ‘strong belief ... that procedural formality exerts a calming influence, orderly proceedings being a good that is valued more highly than comprehensibility to ordinary folk’ (2006: 28).



**Box 4.2: Sentencing remarks**

***Case of importation of class A drugs: three defendants aged 18, 20 & 21***

‘Drug trafficking into the UK is on the increase and more and more flights are bringing class A drugs. These quantities of drugs are mixed and sold on the streets, making a huge profit. Our young people, and our older people, are corrupted and degraded by these drugs and death sometimes ensues. Your personal circumstances can never outweigh my public duty to deter drug traffickers. ... I take into account that you all accept your role in this offence, that you pleaded guilty and that you have faced up to the reality of the offence. ... Earlier the US Supreme Court gave an important decision. Although this decision only applies to under 18s I think that you are all young in maturity. This decision said that as every parent knows, and as sociological studies have shown, a lack of maturity in young people results in impetuous and ill-conceived actions and decisions. Such young people are more vulnerable to outside pressures as their characters are not yet well-formed I’m going to take this into account, even though I shouldn’t. This sentence is less than it would have been if you were fully matured adults.’

***Case of burglary: 18-year-old male defendant***

Judge: Oh dear. We’ve met before, and you’re not looking good ... You cry out for help. You have got a lot of problems. The only good thing is, you haven’t committed any further offences. I propose to pass a two-year community rehabilitation order. Would you accept this?

Defendant: Yes, your honour.

Judge: [Outlines the conditions of the order.] Do you understand?

Defendant: Yes, your honour.

Judge: I would like to keep you under review. [Explains that he would like to receive a written report after one month and quarterly reports thereafter, and that he will only see the defendant if there is a problem.] If you fail, and you may, you need to be brought back to me to be re-sentenced. You understand?

Defendant: Yes, your honour.

Judge: And it’s very annoying to be kept waiting when you’re a judge ... Don’t be late again ... You’ve been very much helped by the submissions of your defence counsel.

Defendant: Thank you.

## 5 The policy context

So far, this report has described how sentencers go about the task of passing sentence, and in particular how they take account of personal mitigation. Judicial decision-making does not take place in a vacuum, of course. Sentencers operate within a sentencing framework established by statute and within a policy framework developed by democratically elected politicians. This chapter will first consider how the policy context has shifted, and will then examine sentencers' reactions to these changes.

### Policy shifts

Policy on sentencing over the past twenty years has contained contradictory elements. In particular, one strand of sentencing policy has pushed towards offence-focussed sentencing in the quest for consistency and rigour in sentencing. At the same time, other policy developments have pushed in the opposite direction: that is, towards a focus on the offender, primarily with the aim of reducing the risks of repeat offending.

#### Risk-based sentencing versus 'just deserts'

The Criminal Justice Act 1991 explicitly made proportionality or just deserts the primary sentencing rationale – although proportionality has a long history 'as a fundamental rationale of the English retributive based sentencing system' (Henham 2000: 240). Desert principles, especially as encapsulated in the 1991 Act, meant that the offence was the focus of the sentencing decision: punishment must reflect *offence seriousness*. The Act allowed sentencers to take account of the culpability of the offender, but in quite a circumscribed way – for example by providing a discount for previous good character. In practice, sentencers never really adjusted their practice to reflect the strict deserts philosophy embedded in the 1991 Act, and continued to pursue individualised approaches to sentencing in which offender characteristics, including factors that could serve as personal mitigation, were taken into account. In other words, personal mitigation continued to play an important part in sentencing – even if policy discourse assumed that the work of sentencers focussed largely on the offence.

The policy position has clearly moved some distance from that embedded in the 1991 Act.<sup>34</sup> The formal position is that proportionality to the offence remains the guiding principle of sentencing. For the majority of cases sentenced by the court, the 2003 Act leaves the principle of proportionality in place, by making it clear that offence seriousness should be the overriding consideration in passing sentence.

However, various provisions introduced by the Act allow considerable scope for departure from proportionality. As has already been noted, section 143 of the Act directs sentencers to treat each previous conviction of an offender as an aggravating factor (where the court feels this can 'reasonably' be done). This appears to permit a cumulative

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34. There was a political retreat from the philosophy of the 1991 Act within six months of its implementation followed by amendments in the 2003 Criminal Justice Act that were technically minor but nevertheless important in symbolizing a movement away from deserts sentencing.

approach to the sentencing of repeat offences, under which each subsequent offence would attract an increasingly severe sentence. This is best understood as a means of encouraging sentencers to take account of previous convictions as an indicator of the risk of further offending, and requiring them to adjust sentences upwards accordingly.

Potentially more significant than the section 143 provisions are those contained in sections 224-236 which relate to the sentencing of offenders who are deemed 'dangerous'. Under these provisions, 'dangerous' offenders can be subject to life imprisonment, extended sentences or imprisonment for public protection.<sup>35</sup> Section 229 of the Act requires the court to assess an adult offender as 'dangerous' if he has committed a 'specified' violent or sexual offence and has a previous conviction for such an offence – unless the court believes it unreasonable to do so. The lists of 'specified' violent and sexual offences are extensive; the former include, for example, the offences of affray and assault occasioning actual bodily harm. Hence a significant proportion of offenders are potentially encompassed by the dangerousness provisions.

In short, therefore, sentencing policy has made the offender rather than simply the offence increasingly central to sentencing decisions, in the sense that the future risks posed by the offender have become a key consideration. This is also reflected in the increasing emphasis on explicit 'risk assessment' – generally undertaken through use of the OASys tool<sup>36</sup> – in the production of pre-sentence reports by probation officers. How far and how rapidly sentencing practice will actually move down this road is hard to judge. As we have seen, practice never fully embraced the strict deserts approach in the 1991 Criminal Justice Act, and there may be similar inertia in the system in relation to the 2003 legislation. However, at the time of writing, sentencing was one of the dominant news topics. Politicians and the media have conspired to convince the public that judges are engaged in a downward spiral of ever-increasingly leniency. Newspapers were running campaigns to sack 'lenient' judges (e.g. the *Sun*, 12 June 2006). Our prediction is that as politicians press for a 'rebalancing' of the judicial system 'in favour of the victims', sentencers will respond by passing sentences based on future risk rather than desert, and that as a result sentences will become still more severe.

### A continued emphasis on rehabilitation

It would be wrong to suggest that sentencing provisions of the 2003 Act were concerned with the management of risk exclusively through the use of imprisonment. Whilst the new preventative sentences are an important development, the Act continues to attach great weight to the rehabilitation of offenders. It identifies 'reform and rehabilitation of offenders' as one of the purposes of sentencing, and adds to and rationalises the already extensive range of community penalties designed with rehabilitation in mind.

Sentencers can now use the generic community order to tailor-make rehabilitative sentences to suit the needs of individual offenders. According to the legislation, offence seriousness must be the primary consideration in determining whether an offender should be sentenced to a community order – as applies equally to the decision whether or not to impose custody. However, the policy emphasis on rehabilitation allows sentencers to trump proportionality with rehabilitative considerations in some kinds of

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35. An extended sentence is a different version of the extended sentence permitted under the Powers of Criminal Courts (Sentencing) Act 2000. The new sentence comprises a minimum one-year custody, from which the offender may be released at the half-way point on direction from the Parole Board, followed by an extended license period of up to five years (for violent offences) or eight years (for sexual offences). Imprisonment for public protection is an indeterminate sentence, for which the judge will set a minimum custodial term. The offender can be released only when the Parole Board is satisfied that he no longer poses a risk to the public. He will then be placed on licence for the rest of his life, unless the Parole Board determines that the licence can be revoked.

36. The Offender Assessment System, is the standardized, electronic process by which offenders are assessed in terms of their likelihood of re-offending, the risk they pose to themselves and others, and their practical, social and psychological needs.

sentencing decisions. This applies particularly in cases of relatively serious acquisitive crime linked to problem drug use, when drug treatment holds out some possibility of success. In such cases, 'the crucial questions for the sentencer concern the perceived needs of the offender, not the gravity of the offence committed' (Ashworth, 2005: 82).

The Criminal Justice Act 2003 introduced the new sentence of 'custody plus', originally to be implemented in late 2006 but now deferred. The new sentence will replace all custodial sentences of under 12 months. It is designed to give offenders a short taste of custody (not exceeding three months), and a much longer period of probation supervision in the community.<sup>37</sup> The intention is to fill an important gap in rehabilitative options: at present, those who are sent to prison for less than a year have very limited access to rehabilitative programmes in prison, and no access to them at all on their release.

### Sentencing policy and the role of mitigation

The above discussion demonstrates that the 2003 legislation encourages offender-focused or individualised sentencing, but within a framework of risk prevention. In other words, the weight given to personal factors that reflect increased risk is heavy; by contrast, personal mitigation is treated in policy almost as an afterthought. This is despite the direct relevance of many factors of personal mitigation to decisions on rehabilitative sentences aimed at reducing reoffending.

Sections 142 to 165 of the Criminal Justice Act 2003 contain lengthy discussions on offence seriousness, restrictions on sentences, procedural requirements and so on; these are followed, in section 166, by the brief observation that nothing in preceding sections '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'. The Sentencing Guidelines Council guideline on 'Seriousness' cites this instruction on mitigation, but scarcely elaborates it with the following statement:

*When the court has formed an initial assessment of the seriousness of the offence, then it should consider any offender mitigation. The issue of remorse should be taken into account at this point along with other mitigating features such as admissions to the police in interview (SGC, 2004a: paragraph 1.27).*

The guideline contains no further discussion of personal mitigation. The guidelines on specific offences that have been issued to date also pay little or no attention to the subject.

In several other jurisdictions that emphasise proportionality in sentencing, relevant legislation places certain personal aggravating and mitigating factors on a statutory footing. The Swedish penal code, for example, states that in passing sentence the court shall consider, in addition to the 'penal value of the crime', various factors including whether the accused has attempted to remedy or limit the harm caused by the crime, is likely to be dismissed from employment as a result of the crime, or 'as a consequence of advanced age or ill health would suffer unreasonable hardship by a punishment imposed in accordance with the penal value of the crime'. The New Zealand Sentencing Act of

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37. The Sentencing Guidelines Council has recently issued draft guidance on custody plus (SGC, 2006b).

2002 establishes a range of purposes of sentencing followed by a series of aggravating and mitigating factors. The latter, which are required considerations to the extent that they are applicable to the case, are largely focussed on reduced culpability and include considerations of the defendant's age, the victim's conduct, any 'diminished intellectual capacity or understanding' on the part of the defendant, and remorse. The Statutes of Canada 1995, in contrast, specify that 'a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances', but goes on to identify a small number of aggravating factors only. (See Appendix 2 for details of these and related statutory provisions, and particularly the specified mitigating factors.)

## Sentencers' responses to policy developments

Fieldwork for this study was carried out at a time of marked tension between politicians and the judiciary. The former tended to see the latter as in the grip of a culture of civil liberties that favoured the offender at the expense of the victim, whilst the latter saw the former as placing short-term pragmatism above the rule of law. These tensions provided an important backdrop to our respondents' views on recent policy developments. Respondents regularly expressed concerns about the way that sentencing policy was developing. Key issues were: what they perceive to be political 'interference' in sentencing; unease about the policy emphasis on risk assessment and offender dangerousness; and frustration with the volume and speed of legislative change.

### Resistance to 'interference' in sentencing

Many of our respondents voiced their dismay with the reduction of judicial discretion in sentencing, especially through the introduction of minimum mandatory sentences. Such developments, they argued, deny the sentencer the capacity to dispense genuine justice: 'the more judges' hands are tied,' one said, 'the less justice there is'.

The focus of these complaints was the notion that only by responding to offenders as individuals can sentencers pass the appropriate sentences. Two judges (from different courts) used almost identical turns of phrase to stress the need for 'humanity' in sentencing. One commented that judges are encouraged to sentence by following a 'kind of mathematical model' in the search for consistency, but if sentencing takes this approach 'you take out of the process any kind of humanity'. The other complained that sentencing policy encourages sentencers to act as 'robots' and that it 'should be more to do with educating the bench than tying our hands too much'. He added: 'If you take away discretion completely, then you end up taking the humanity out of sentencing.' Similarly, another respondent commented, 'It would be very sad if everything was so prescribed, there was no room for the judge to respond as a human being to the case in front of him.'

One of the more vociferous critics of current policy was a judge who said: 'We all resent the ever, ever-encroaching bounds on our discretion in sentencing... We are the people looking so effing silly in court when we can't sentence properly because some civil

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38. Hawkins (2003) observes, with respect to the criminal justice system generally, that those working within the system frequently fail to apply the 'rules' in the ways expected by those who formulated them. 'Instead, bargaining is prevalent. Rules are valuable when their enforcement is suspended for they are an important resource that can be surrendered by rule-users in pursuit of some broader goal of social order or the public interest.'

servant ... has second-guessed us.' This judge added that he does not see any point railing against the legislation, since 'I've never had any difficulty in circumventing any provisions'. Others also told us that they manage to get around the laws they do not like: 'I have to cheat, pretend I'm being tough, wheedle my way around the statutory requirements,' said one. Another said that he is able to ignore mandatory sentences by deciding on the sentence he wishes to pass, and then doing 'arithmetic in reverse' so that he can claim to have reached the decision by factoring in all the necessary elements.<sup>38</sup> One of our respondents took a more resigned approach: he commented that the prescription of sentencing by the legislature is negative because it does not allow 'degrees of culpability' to be reflected; but it is his job to reflect the legislation that has been passed, and he simply has to go along with it.

It is tempting to dismiss these complaints as the self-interested response of a beleaguered professional group: judicial discretion has long been fettered by statute, and there have always been complaints at any legislation that chips away at this discretion. On the other hand, throughout fieldwork we were consistently struck by the judges' tendency to describe cases as a complex narratives in which the offender's background and the circumstances surrounding the offence seemed almost as important as the precise details of the offences on the charge-sheet. We were left with a strong sense that sentencers genuinely needed appropriate discretion to allow them to do justice to the complexity – and indeed, the sheer quirkiness – of cases coming before them, even if the price that has to be paid for this discretion is a degree of sentencing disparity.

#### Concerns about risk-based sentencing

Our respondents did not have a uniform view on the current shift towards risk-based sentencing. Some stressed that risk should always be a focus of sentencing decisions, because the protection of the public is the soundest of reasons for sending someone to prison. Others, however, expressed their concerns about what one described as 'sentencing for the future – prospective sentencing'. A judge pointed out that although risk is a necessary part of the 'general equation' of sentencing decisions, it has to be recognised that sooner or later the defendant will come out of custody and the risk will emerge again. Another criticised the preoccupation with risk of *physical harm*, which he feels is unbalanced; as a result, he said, he pays 'virtually no attention' to risk assessments in pre-sentence reports.

Some of our respondents also criticised the tools used by the probation service to measure risk (predominantly OASys) for their rigidity and what one called the 'pseudo-science' associated with the process. Another described risk assessment as a process by which 'pre-existing objective criteria' are used and 'you feed the particulars of the case ... through the mincing machine' to come out with an answer. A judge argued that it should be the job of the sentencer, not the probation officer, to assess risk. There are, of course, respectable answers to these points – that risk assessment tools represent only the starting point in judging risks, that the job of probation officers is only to advise sentencers, who bear the responsibility for decisions about risk. The fact remains, however, that there was only limited judicial confidence in the technologies designed to support risk-based sentencing.

There was also concern about the dangerousness provisions of the Criminal Justice Act 2003 and, in particular, the presumption of dangerousness (unless this is ‘unreasonable’) for adult offenders who have previously been convicted of a relevant offence. There were complaints that the list of ‘specified’ violent or sexual offences is so long that it will pull a vast number of offenders into the net – meaning that judges will constantly have to ‘jump through hoops’ in addressing the issue of dangerousness. A more serious concern is that the number of offenders getting very long sentences will increase dramatically. This, one judge said, is the inevitable result of the failure of policy-makers to recognise that ‘offenders are a risk and you can’t insure against future breakdown’. Another respondent complained that the presumption of dangerousness will mean all kinds of offenders will be classed as dangerous when they are not. ‘We know the difference between someone who’s an idiot and someone who’s dangerous,’ he said. ‘We don’t want to start classifying people who are inadequate as dangerous.’

### The relationship between risk assessment and mitigation

As noted above, risk assessment is now central to the preparation of pre-sentence reports by probation officers. One might expect this, and the growing emphasis on risk within sentencing policy generally, would cause a shift in sentencers’ understanding of mitigation – such that mitigation becomes increasingly viewed in terms of reduced risk.

In order to assess whether such a shift is taking place, we asked all our respondents how they viewed the relationship between the processes of risk assessment and assessing mitigation. In most cases, their replies made it clear that they had not given thought to this relationship; many found the question difficult to answer and some did not give a direct response. The views that were expressed were extremely varied; the range of opinions are set out in Box 5.1. It is clear that while some sentencers are inclined to make risk factors central to their considerations of mitigation, others are more aware of the inherent tensions between risk-based and other factors in sentencing decisions.

**Box 5.1: Differing views on the relationship between assessing risk and assessing mitigation**

1. There is no obvious relationship between the process of assessing risk and the process of assessing mitigation: these involve two separate sets of considerations.
2. The two processes run in parallel and feed each into other. Low risk can be a factor in mitigation and/or vice versa. Similarly, high risk may be associated with a lack of mitigation.
3. The two processes often contradict each other. An assessment of high risk of re-offending necessarily undermines any mitigation.
4. The two processes often contradict each other. Strong mitigation can undermine an assessment of high risk.

### Too many changes?

The present government enacted a great deal of sentencing legislation prior to the 2003 Criminal Justice Act. However, the 2003 Act is unprecedented amongst criminal justice legislation in its breadth. Those provisions that relate to sentencing include:

- statement of the purposes of sentencing
- a new structure for community penalties (the Community Order)
- a new form of suspended sentence (Custody Minus)
- a new form of short prison sentence (Custody Plus)
- intermittent custody
- a new approach to previous convictions
- new sentences for dangerous offenders
- new arrangements for life sentences
- an overhaul of the arrangements for parole and discretionary release.

Several of our respondents complained bitterly about the level and pace of legislative change. One judge described how barristers and sentencers alike are 'all grappling with this new legislation'. Another said that the piecemeal introduction of the new provisions is 'idiotic'. He added, 'I'd love to sit down with some of the Parliamentarians and say: you try to make sense of this.' Another, similarly, described the introduction of so many complex changes as 'lunatic', and said that the Criminal Justice Act contains a 'labyrinth' of sentencing legislation.

Running through much of what was said about policy change was a wider frustration with the perceived failure of legislators to understand what sentencing is all about. A judge who described the Criminal Justice Act as 'law on the hoof' said that policy makers have no desire to consult; and even if they did consult, the last people they would speak to would be judges, because judges are supposedly 'out of touch'. Another judge spoke about the lack of knowledge within the Home Office of how judges work and of what goes on in court. A great deal of what is contained in the current Act, he said, is 'utterly misconceived' and 'politically motivated'. He also complained about the lack of consultation with judges.





## 6 Policy implications

We saw in the last chapter how sentencing policy – as distinct from practice – shifted in the early 1990s towards a fairly narrowly construed deserts-based approach which attached only limited weight to features of the offender. Since then there has been a progressively more visible shift in the opposite policy direction, whereby the risks of future crime, as reflected in particular by the pattern of previous convictions, guide sentencing. We have suggested that sentencing practice never fully adopted the deserts logic of the 1991 Criminal Justice Act, nor has it embraced risk-based sentencing to the extent that 2003 Criminal Justice Act allows or requires.

Over this period Crown Court sentencers have continued to pursue an individualised approach to sentencing which places considerable importance on personal factors that aggravate, and on those that mitigate. Our study has documented the largely unrecognised importance that Crown Court sentencers attach to personal mitigation. Aspects of the offender's circumstances, as distinct from the offence, can draw the sentence back from custody to a community penalty; they can also reduce the length of prison sentences. This final chapter considers the policy implications of our findings on personal mitigation. We address three sets of issues:

- Why is personal mitigation important?
- How should discretion be structured in relation to personal mitigation?
- How should personal mitigation be explained to the public?

### Why is personal mitigation important?

The reader may reasonably ask us why this study has focussed in such detail on the specific issue of personal mitigation. We can offer two sorts of answer. The first is an academic one: decisions about mitigating and aggravating factors actually define the detail of any sentencing framework grounded in proportionality. It is the ways in which sentencing practice deviates from the principle that the punishment should fit the crime that constitute the interesting penological questions. By examining personal mitigation we cast a spotlight on the ways that sentencers deal with questions about the limits of culpability, the scope for clemency and so on. A descriptive account of the role of mitigation then poses a set of normative questions about the acceptability of current sentencing practice.

The second answer is an overtly political one. Our sentencing framework has shifted its centre of gravity from just deserts to risk-based sentencing – but the 'rebalancing' that this has involved could unbalance the framework. This is because all the emphasis in the new risk-based provisions is on the sentencing of high-risk cases. It is perfectly proper for politicians to decide that in the interests of public protection some categories of offender

should get heavier sentences than their offence actually warrants. But if they do so, it makes both penological and fiscal sense to allow sentencers to deviate from proportionality not only in high risk cases, but in those where risks are low. Greater attention to personal mitigation could thus help to contain our burgeoning prison population.

## How should discretion be structured in relation to mitigation?

Regardless of whether one might advocate a greater role for mitigation in the sentencing process, there is a case for structuring judicial discretion as it relates to personal mitigation. In the previous chapter we expressed some sympathy with the view that judicial discretion enabled sentencers to retain the humanity in sentencing. By implication, the extensive scope for personal mitigation is something to be valued rather than discarded. However, the study has shown that there is plenty of room for idiosyncratic decisions on mitigation.

It strikes us as wrong that judges should apply conflicting *principles* in their decisions about mitigation. For example, we have seen that, with exceptions, our respondents generally paid limited attention to early deprivation and abuse as mitigating factors. This was often on the grounds that childhood deprivation represented not the exception but the rule in cases coming before them. This is a reasonable argument – but does it carry the implication that offenders with more privileged backgrounds should be given tougher penalties? This is an issue of principle that relates to conceptions of culpability. One ‘social realist’ school of thought is that life opportunities are quite largely shaped by one’s social, economic and cultural background; the opposing position is that more is gained than lost in a justice system that treats everyone as equal before the law.

Our analysis has shown that there are at least four types of factor that sentencers take into account in personal mitigation:

- those that indicate reduced culpability, such as youth or mental health problems, pressing need, previous good character and exceptional disadvantage (largely categories 3 and 4 in Table 2.4)
- those that indicate limited risk of further offending - relating to remorse and attempts to make reparation, the offender’s background and circumstances, or steps taken towards rehabilitation (categories 4, 5 & 6)
- those that indicate particular sensibility to punishment, such as the strain of prosecution, the loss of reputation and standing or the fact that the offender is unusually poorly equipped to handle a prison sentence (categories 4 and 6)
- factors that call for clemency, such as the victim’s support for the offender, family responsibilities and the ‘collateral damage’ that imprisonment would inflict on relatives, or the social contribution made by the offender (categories 4 and 6).

It would be possible – and desirable – to articulate a set of principles that should apply to each of these four forms of personal mitigation. We can agree that, other things being equal, sentencers should pass sentences that fit the crime. What is needed is a greater degree of agreement about the circumstances in which ‘other things aren’t equal’ to the extent that deviation from the overarching principle of proportionality can be justified.

At the same time, it would be critically important to clarify the role of proportionality in setting the upper limits to sentences. While justice may be served in permitting certain kinds of personal factors, in certain circumstances, to mitigate sentence, it is hard to make a convincing case for construing the absence of these factors as aggravating factors – other than in cases where the foremost consideration must be the level of risk to the public. In other words, a continued commitment to proportionality as a limiting principle should preclude unintended punitive consequences for offenders whose personal circumstances do not trigger mitigation.

If there is a need for guidance on personal mitigation, the task falls most obviously to the Sentencing Guidelines Council (SGC), supported by the Sentencing Advisory Panel. As noted above, SGC guidance to date on mitigation has been limited to date. It would be an impossible task to issue comprehensive guidance that was tailored for specific cases. However, it would be possible to set out some principles of mitigation. The findings presented in Chapter 4 suggest that topics on which guidance would be helpful include:

- whether and why securing or retaining employment should be regarded as a mitigating factor
- whether disadvantage and social exclusion should be regarded as mitigating factors, and whether advantage should be regarded as an aggravating factor
- whether and why family and childcare responsibilities should be treated as mitigating factors, and whether fathers should be treated differently from mothers
- whether offender ‘sensibility’ to particular punishments should be taken into account, by analogy to the means test applied in unit fine systems
- to what extent and in what circumstances the possibility of rehabilitation, e.g. through drug treatment, can over-ride the principle of proportionate punishment
- the scope for personal mitigation a) where there is a plea of not guilty, and b) where the offence is so serious as to make custody inevitable.

The complexity of the task of developing guidelines on mitigation should not be underestimated. If they were to be effective, the guidelines would have to combine sufficient flexibility allow for the infinite variation in the detail of individual cases with sufficient rigour to promote consistent application. In drawing up any such guidelines, it could be helpful to look at how factors of personal mitigation have been identified within the sentencing frameworks of other jurisdictions, including those where specific factors have been given a statutory footing (some examples of which are provided in Appendix 2).

Another consideration in the development of guidelines is how the sentencers themselves are likely to respond. As we have noted above, our respondents included those who followed all relevant directions and guidance closely and carefully in passing sentence, and those who, in contrast, sentenced quickly and intuitively. A few in the latter category also made explicit their willingness to 'cheat' with regard to statutory requirements. It is, clearly, a possibility that guidelines on mitigation would be largely disregarded by the more intuitive sentencers, or would be interpreted as simply extending their discretion. This again points to the importance of balancing flexibility with rigour, and ensuring that the guidance is developed within the broad parameters of proportionate sentencing.

## How should mitigation be explained to the public?

Politicians may be much readier to promote risk-based preventative sentencing than to argue the case for personal mitigation. They tend to assume that the public have little time for judges' claims about sentencing the individual. Generally, the tone of political debate assumes a public that is fed up with 'soft' treatment of criminals. In the words of the White Paper, *Justice for All*, 'The public are sick and tired of a sentencing system that does not make sense. They read about dangerous, violent, sexual and other serious offenders who get off lightly, or are not in prison long enough or for the length of their sentence' (Home Office 2002: para 5.2). The Prime Minister has represented the justice process as one that 'puts protection of the accused in all circumstances above and before that of protecting the public', and one in which 'we are fighting 21st century crime with 19th century methods' (Blair, 2006).

Elsewhere (Roberts and Hough, 2002, 2005; Roberts et al., 2003) we have described how at one level, a majority of the public feel that judges are out of touch, and believe that sentences are too lenient. However this cynicism and frustration appears to be a function of the limited and inaccurate information that people have about sentencing, which in turn derive from media reporting. When asked to 'sentence' specific cases, people give responses which on balance are often softer than judicial practice. No research has been conducted in Britain on public attitudes towards mitigation; if it were, we think it would show that support for many of the mitigatory principles described in this study – provided, that is, that people were asked about specific cases, described in adequate detail. On the surface, members of the public call for tougher sentences; when given a chance to reflect on particular cases, they are likely to side with judges' concerns about 'taking the humanity out of sentencing'. In other words, we would expect judges' views about the importance of individualised sentencing to have latent support from the wider public.

Current political rhetoric tends to address the widespread frustration with soft sentencing, but not the more considered views that people express when given the time and information they need to reach judgements. As Ashworth (2005:389) puts it, 'The Home Office has taken few measures to deal with this phenomenon of ignorance and latent support, and seems more concerned about the popular press and its probable

reactions.’ Successive Home Secretaries and the Prime Minister have signalled very clearly to the public that the justice system is in a state of crisis. It is hardly surprising, therefore, that the public should take these signals at face value.

One can envisage a different political orientation towards criminal justice that did not ignore the various problems facing the system but nevertheless recognised that:

- the courts have greatly toughened up their sentencing practice since 1991 (Hough et al., 2003)
- the use of imprisonment is, with exceptions, a rather poor investment as a method of controlling crime.

What is needed is some political leadership that persuades the public there is value – both moral and fiscal – in principles of penal parsimony, and that justice and toughness are not synonyms.

Our research has focussed on one aspect of sentencing policy and practice: namely, the role of personal mitigation in sentencing. We have proposed that the principles that underpin mitigation should be articulated much more clearly. In order to achieve some degree of consensus on these principles, there needs to be open and thoughtful public and political debate on the relevant issues – something that is unlikely in the current climate. This again points to the need for political leadership and a fundamental shift in the ways in which issues of crime and punishment are presented to the public.

## Looking ahead

Taking the above into account, how should debate and policy on sentencing proceed from here? Our study offers a number of key lessons. Politicians need to accept that:

- Sentencing is often about balancing offender and offence-related factors – and *should be*, not only in the eyes of the judiciary, but also the wider public. If justice is to be achieved, sentencing must be individualised, and mitigation is a central element of the sentencing process.
- There are tensions and even direct contradictions between different sentencing principles and aims, as taken forward in policy. Sentencing is a ‘messy’ process, that has to balance sometimes irreconcilable objectives. Proportionality can remain the primary rationale that determines the overall framework of sentencing, but may be contradicted by other rationales deployed in individual decisions.
- Judicial discretion is a prerequisite for justice. Sentencers have to have some flexibility in assessing the individual factors in any given sentence, and in negotiating between the conflicting principles of sentencing.

- This does not mean that wide disparities are inevitable. Discretion can and should be structured; and many sentencers welcome the idea of structured sentencing.
- Sentencing disparity is best tackled by establishing agreed principles that can then be applied to specific cases. Legislative straightjackets that require mandatory sentences for particular categories of offence and offender will produce only the appearance of consistency of outcome; what is needed is consistency of approach.
- The risks presented by potentially dangerous offenders can be reduced but they can only be eliminated at a high cost to justice.
- There has to be more honesty in political and public debate about sentencing, and less reference to the need to protect 'us' the law-abiding majority from 'them' the criminals.

This last point is well-expressed by von Hirsch (1993 p. 5):

*A sanctioning system should not be seen as one which 'we' devise to prevent 'them' from offending. Rather, it should be one which free citizens could devise to regulate their own conduct. Persons should be assumed to be both susceptible (at least under some circumstances) to the temptation to offend, and capable of understanding the moral judgements which the criminal sanction conveys. A sanctioning system, in a democratic society, should be of the kind which such persons could accept, as a way of assisting them to resist their own temptations, in a manner that respects their capacity for choice.*

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# Appendix 1:

## DETAILS OF OBSERVED CASES

**Table A1: Cases included in analysis**

| Court        | Defendants | Cases      | Sentencers |
|--------------|------------|------------|------------|
| A            | 25         | 19         | 9          |
| B            | 16         | 14         | 5          |
| C            | 60         | 48         | 17         |
| D            | 25         | 21         | 4          |
| E            | 36         | 30         | 17         |
| <b>TOTAL</b> | <b>162</b> | <b>132</b> | <b>52</b>  |

**Table A2: Gender of defendants**

|        |     |
|--------|-----|
| Male   | 140 |
| Female | 22  |

**Table A3: Ages of defendants**

|        |    |
|--------|----|
| 15     | 1  |
| 17     | 5  |
| 18-20  | 21 |
| 21-25  | 40 |
| 26-30  | 20 |
| 31-35  | 22 |
| 36-40  | 28 |
| 41-50  | 19 |
| 51-60  | 3  |
| 72     | 1  |
| Unkown | 2  |

**Table A4: Ethnicity and nationality of defendants**

|   |    |
|---|----|
| White British                           | 82 |
| Black British                           | 23 |
| Asian British                           | 9  |
| Mixed British                           | 7  |
| Other British                           | 1  |
| Non-British – east European             | 7  |
| Non-British – other European            | 4  |
| Non-British – black Caribbean           | 1  |
| Non-British – black African             | 10 |
| Non-British – N. African/Middle-Eastern | 10 |
| Non-British – South Asian               | 3  |
| Non-British – other                     | 2  |
| Disputed                                | 2  |
| Unknown                                 | 1  |

**Table A5: Primary offence committed by defendants**

| Offence category                             | Offence                                  | Number    |
|--|--|-----------|
| Offences of dishonesty                       | Theft, handling and conspiracy to steal  | 25        |
|  | Burglary                                 | 24        |
|  | Fraud/deception                          | 12        |
|  | Passport-related offences                | 10        |
|  | Robbery                                  | 6         |
|  | Money-laundering                         | 3         |
|  | <b>Total</b>                             | <b>80</b> |
| Drugs offences                               | Drugs offences – Class A                 | 26        |
|  | Drugs offences – Class C                 | 2         |
|  | <b>Total</b>                             | <b>28</b> |
| Public order and damage to property offences | Affray                                   | 11        |
|  | Firearms and offensive weapons           | 5         |
|  | Criminal damage                          | 2         |
|  | Arson/threat to destroy property by fire | 2         |
|  | <b>Total</b>                             | <b>20</b> |
| Offences against the person                  | Assault occasioning ABH                  | 12        |
|  | Unlawful wounding/inflicting GBH (Sn 20) | 4         |
|  | Wounding/causing GBH with intent (Sn 18) | 2         |
|  | <b>Total</b>                             | <b>18</b> |
| Sexual offences and child abuse              | Sexual assault                           | 3         |
|  | Sexual assault on a child                | 1         |
|  | Indecent images of children              | 3         |
|  | <b>Total</b>                             | <b>7</b>  |
| Driving offences                             |  | <b>4</b>  |
| Other  |  | <b>5</b>  |

**Table A6: Pleas**

|            |     |
|------------|-----|
| Guilty     | 146 |
| Not guilty | 13  |
| Not known  | 3   |

**Table A7: Sentences passed**

|  |    |
|--|----|
| Deferred   | 3  |
| Conditional discharge                            | 1  |
| Fine (or 7 days' custody offered as alternative) | 1  |
| Community sentence (exc drug treatment)          | 40 |
| DTTO/community order with drug treatment         | 12 |
| Suspended custodial                              | 5  |
| Detention & Training Order                       | 6  |
| Custody under 12 months                          | 15 |
| Custody 12-23 months                             | 29 |
| Custody 24-35 months                             | 17 |
| Custody 36-47 months                             | 15 |
| Custody 4 years +                                | 17 |
| Hospital order (Sn 37)                           | 1  |

**Table A8: Primary offence, where mitigation pulled sentence back from immediate custody**

| <b>Offence category</b>                      | <b>Offence</b>                           | <b>Number</b> |
|--|--|---------------|
| Offences of dishonesty                       | Theft, handling and conspiracy to steal  | 4             |
|  | Burglary                                 | 6             |
|  | Fraud/deception                          | 2             |
|  | Passport-related offences                | 3             |
|  | Robbery                                  | 0             |
|  | Money-laundering                         | 0             |
| Drugs offences                               | Drugs offences – Class A                 | 5             |
|  | Drugs offences – Class C                 | 1             |
| Public order and damage to property offences | Affray                                   | 4             |
|  | Firearms and offensive weapons           | 3             |
|  | Criminal damage                          | 0             |
|  | Arson/threat to destroy property by fire | 1             |
| Offences against the person                  | Assault occasioning ABH                  | 6             |
|  | Unlawful wounding/inflicting GBH (Sn 30) | 1             |
|  | Wounding/causing GBH with intent (Sn18)  | 0             |
| Sexual offences and child abuse              | Sexual assault                           | 1             |
|  | Sexual assault on a child                | 0             |
|  | Indecent images of children              | 2             |
| Driving offences                             |  | 4             |
| Other  |  | 0             |
| <b>Total</b>                                 |  | <b>43</b>     |



## Appendix 2:

### SENTENCING STATUTES IN OTHER JURISDICTIONS

This appendix contains extracts from sentencing statutes of some other jurisdictions – namely Sweden, New Zealand, Canada and New South Wales, Australia. These are jurisdictions which broadly emphasise proportionality in sentencing; the statutes cited here deal specifically with aggravating and mitigating factors.

#### Sweden

Penal Code, Chapter 29, Section 1

Punishments shall, with due regard to the need for consistency in sentencing, be determined within the scale of punishments according to the penal value of the crime or crimes taken.

In assessing the penal value, special consideration shall be given to the damage occasioned by the criminal act, to what the accused realised or should have realised about this, and to the intentions or motives he may have had. ...

#### Section 3

In assessing penal value, the following mitigating circumstances shall be given special consideration in addition to what is prescribed elsewhere, if, in a particular case:

1. the crime was occasioned by the grossly offensive behaviour of some other person
2. the accused, in consequence of a mental disturbance or emotional excitement, or for some other cause, had a markedly diminished capacity to control his action
3. the actions of the accused were connected with his manifestly deficient development, experience or capacity of judgement
4. the crime was occasioned by strong human compassion ...

#### Section 4

In determining the appropriate punishment, the court shall, besides the penal value of the crime, give reasonable consideration to:

1. whether the accused has suffered severe bodily harm as a result of the crime
2. whether the accused to the best of his ability has attempted to prevent, remedy or limit the harmful consequence of the crime
3. whether the accused gave himself up
4. whether the accused would suffer harm through expulsion by reason of the crime from the Realm
5. whether the accused, as a result of the crime, has suffered, or there is good reason to suppose that he will suffer, dismissal from, or termination of, employment, or will encounter any other obstacle or special difficulty in the pursuit of his occupation or business
6. whether the accused, in consequence of advanced age or ill health, would suffer unreasonable hardship by a punishment imposed in accordance with the penal value of the crime,
7. whether, having regard to the nature of the crime, an unusually long time has elapsed since its commission ...



## New Zealand

### Sentencing Act 2002, Part 1, Section 7 (1)

The purposes for which a court may sentence or otherwise deal with an offender are –

- a) to hold the offender accountable for harm done to the victim and the community by the offending
- b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm
- c) to provide for the interests of the victim of the offence
- d) to provide reparation for harm done by offending
- e) to denounce the conduct in which the offender was involved
- f) to deter the offender or other persons from committing the same or a similar offence; or
- g) to protect the community from the offender
- h) to assist in the offender's rehabilitation and reintegration
- i) a combination of 2 or more of the purposes in paragraphs a) to h). ...

### Section 9 (2)

In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

- a) the age of the offender
- b) whether and when the offender pleaded guilty
- c) the conduct of the victim
- d) that there was a limited involvement in the offence on the offender's part
- e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding
- f) any remorse shown by the offender ...
- g) any evidence of the offender's good character. ...

## Canada

### Statutes of Canada, 1995, Chapter 22 (Bill C-41), Section 718

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- a) to denounce unlawful conduct
- b) to deter the offender and other persons from committing offences
- c) to separate offenders from society, where necessary
- d) to assist in rehabilitating offenders
- e) to provide reparations for harm done to victims or to the community
- f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

### 718.1

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

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## 718.2

A court that imposes a sentence shall also take into consideration the following principles:

- a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing
  - (i) evidence that the offence was motivated by bias, prejudice or hate on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or other similar factor
  - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,
  - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances ...

### Report of the Canadian Sentencing Commission on Sentencing Reform (1987)

This report (p. 320) listed a series of aggravating and mitigating factors which it recommended for consideration as 'primary grounds to justify departures' from the proposed sentencing guidelines. The suggested mitigating factors were:

1. Absence of previous convictions
2. Evidence of physical or mental impairment of offender
3. The offender was young or elderly
4. Evidence that the offender was under duress
5. Evidence of provocation by the victim
6. Evidence that restitution or compensation was made by the offender
7. Evidence that the offender played a relatively minor role in the offence.

### New South Wales, Australia

#### Crimes (Sentencing Procedure) Act 1999, Section 3A

The purposes for which a court may impose a sentence on an offender are as follows:

- a) to ensure that the offender is adequately punished for the offence
- b) to prevent crime by deterring the offender and other persons from committing similar offences
- c) to protect the community from the offender
- d) to promote the rehabilitation of the offender
- e) to make the offender accountable for his or her actions
- f) to denounce the conduct of the offender
- g) to recognise the harm done to the victim of the crime and the community.

### Section 21A(3)

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- a) the injury, emotional harm, loss or damage caused by the offence was not substantial
  - b) the offence was not part of a planned or organised criminal activity
  - c) the offender was provoked by the victim
  - d) the offender was acting under duress
-

- e) the offender does not have any record (or any significant record) of previous convictions
- f) the offender was a person of good character
- g) the offender is unlikely to re-offend
- h) the offender has good prospects of rehabilitation, whether by reason of the offender's age
- i) the offender has shown remorse for the offence by making reparation for any injury, loss or damage or in any other manner
- j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability
- k) a plea of guilty by the offender ...
- l) the degree of pre-trial disclosure by the defence.