



The pain and purpose of punishment: A subjective perspective

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Abstract

Punishment is one of the purposes of sentencing and may additionally serve instrumental functions, primarily the reduction of crime. However, the current sentencing framework rests on a flawed understanding of the experience and severity of sentences. Punishment can be experienced in a variety of ways and the severity of a sentence depends on individual circumstances and vulnerabilities; subjective severity is also inextricably linked to inequality in society. Sentencing guidelines have been introduced with the aim of achieving consistency in sentences, with more severe punishment for more serious offences. However, it is necessary to move away from the idea that we can objectively rank severity of punishment and give more consideration to what it is supposed to achieve. Regarding imprisonment, it currently fails to communicate to prisoners what it is for and neither does it appear to achieve rehabilitation or deterrence. Yet, the legitimacy of the Criminal Justice System rests on perceptions of fairness, not only of victims and the public, but also of those subjected to punishment. A 'just' criminal justice system should therefore consider subjective experiences in sentencing and the implementation of sentences. This paper advocates a commitment to communicative punishment, with offenders as active participants in the process of shaping their punishment.

Introduction

[I]nsofar as our existing penal institutions and practices are not just imperfect ..., but radically unjust, oppressive, or morally corrupt ..., they put all of us in a morally problematic position. For criminal punishment is imposed in our name, by courts that claim to be acting on our collective behalf ... We are therefore all complicit in these practices, and in the injustices and the oppression that they perpetrate. (Duff, 2003a: 304)

Punishment is a problematic concept, because it can be understood and defined in multiple ways. Punishment may be considered synonymous with sentence or legal sanction; a state-imposed response to a crime. However, in the Criminal Justice Act (CJA) 2003 it is regarded as one of the *purposes* of a sentence, hinting at its retributive value. Rather than a purpose in itself, punishment may also be considered instrumental in achieving other aims, such as reducing crime through deterrence and rehabilitation. The CJA 2003 is an amalgam of retributive and utilitarian justifications of punishment. Section 142(1) of the CJA 2003 states that a court 'must have regard to the following purposes of sentencing':

- (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, and
- (e) the making of reparation by offenders to persons affected by their offences.

What constitutes 'punishment' under point (a), however, is not specified. There are a variety of normative theories that argue the merits of different approaches of what punishment ought to be and ought to achieve. These theories are important to consider for sentencing policy, but it is equally important to know to what extent they translate into practice. The CJA 2003 does not consider that the subjective experience of punishment has an impact on the extent to which any of its purposes of sentencing can be realised. This paper discusses a subjective understanding of punishment and its implications. First, it problematizes the principle of proportionality that is central to retributive theory; theoretical assumptions about the ranking of punishments on the basis of severity are flawed, and offenders may experience the same (objective) punishment very differently. Secondly, there is no consensus about the meaning and function of punishment among offenders (the focus in this paper is on prisoners). In order to reshape penal policy, then, one needs to consider what punishment is and what it should achieve, but also how this can be effectively translated in practice and

communicated to offenders. It is proposed that the subjective experience and impact of punishment can best be taken into account through a process of 'negotiated sentencing', in line with Duff's theory of communicative punishment (Duff, 2001: 160).

In this paper, I will bring together the literature on the subjective experience of punishment and illustrate some points further with quotes from my own research on the pains and gains of imprisonment with prisoners. For this research, I carried out semi-structured interviews with 15 female and 15 male prisoners serving determinate sentences between 6 months and 6 years; 11 were imprisoned for the first time. The participants were within months of release, and the interviews mostly focused on their prison experience and expectations for the future (see also Van Ginneken, 2014, 2015).

Severity and proportionality

In their contribution to the *What Is Justice?* working paper series, Deering and Smith (2014) advocate a revised version of retribution as a justification for punishment. They define punishment as the state's imposition of any type of sanction on an individual for an act that has violated criminal law. In addition to a proportionate sentence to restore the status of the victim, Deering and Smith (2014) also advocate a commitment to social justice and desistance by building offenders' socio-economic capital. This proposal challenges the traditional notion that retributive sentencing is backward-looking and only concerned with an appropriate response to the crime committed, rather than with influencing the offender's future behaviour. The authors importantly emphasise that retribution should not be equated with vengeance, and that any type of court sentence or out-of-court sanction is able to serve a retributive function. While proportionality is a sound principle in theory, the section below discusses the challenges posed by consideration of subjective severity of sentences.

The principle of proportionality refers to the idea that the severity of the punishment should reflect the harm done or risked and the offender's culpability. A retributivist may offer various justifications for punishment, namely that wrongdoers deserve to be punished (i.e. just deserts), to cancel out the unfair disadvantage gained by offenders over law-abiding citizens, or the expression of disapproval of illegal conduct (i.e. censure; Von Hirsch, 1993). It follows from retributivism that crimes and punishment can be ranked according to their seriousness and severity, respectively. Studies have found consensus among the public regarding the ranking of offences and sentences according to their relative seriousness and severity (Harlow et al., 1995; Stylianou, 2003). In these ranking exercises imprisonment is rated as most severe, while probation is regarded as comparatively light. Members of the public seem to favour retributivist principles in sentencing exercises, even though they also pay lip service to utilitarian goals such as rehabilitation (Carlsmith, 2006; Roberts and Gebotys, 1989).

Members of the public would normally rank the severity of sentences on the basis of expectations, rather than experiences. In other words: most people's conceptions of

what punishment is like are based on what they imagine it to be, partly informed by portrayals in the media and popular culture. Similarly, various prisoners in my study on *the pains and gains of imprisonment* mentioned that their experience of first-time imprisonment was very different from what they had expected on the basis of media representations of imprisonment.

Esther¹: Can you tell me a bit about what life is like in this prison?

Adena: Ehm [laughs] it's alright, but I thought it was gonna be a lot harsher, to be fair. 'Cause when you see like on the telly, you see all these prisons on the telly and you think they're gonna be really bad, but it's not really that bad really.

Vicky: It's not been as bad as I thought it was gonna be, you know; sometimes you see jail on telly and you think-, and it's nothing like it is when you actually come.

Sexton (2015) described the difference between punishment expectations and experience as punishment salience. If the expectations are harsher than the actual experience, there is a negative punishment gap, whereas a positive punishment gap exists when the experience is harsher than the expectation. I would argue, however, that the incongruity between expectation and experience may also be interpreted as a shift in meaning: punishment manifests itself in a different way than expected. This does not necessarily imply that it is more or less severe, but simply different in nature. For example, Dave's² prison experience of tedium and routine (Sexton, 2015: 130) may still be quite painful, albeit not in a violent way – which he initially expected.

The discrepancy between expectation and experience may also explain why offenders judge the (comparative) severity of probation and prison sentences differently from the general public. When prisoners are asked to compare the severity of punishments, they regard (intensive) probation supervision of a certain length as equally or more severe than imprisonment (Petersilia and Deschenes, 1994; Wood and Grasmick, 1999). This was echoed by some of the participants in my study.

Katie: People dread probation orders a lot more than they dread jail.

Esther: Yeah? Why?

Katie: Definitely, because probation's taking a day out of your life. You just do your jail, it's over with. You go back to your life, do you know what I mean?

¹ 'Esther' is the author of this paper but all other names used are pseudonyms.

² 'Dave' is a participant in Sexton's (2015) research.

You have no choice but to do your jail. You get sent to jail, that's it. But when you're out there, probation is a choice. DTTO is, as you know, a Drug Treatment and Testing Order. As criminals call it, it's a 'Don't Take The Order'. That's what it's known as. If that's what you're offered in court and they say, 'right, we're offering you a DTTO', it's a Don't Take The Order, wanna go to jail.

Natasha: I wouldn't do community service, I'd rather have gone to jail.

The pains of imprisonment have traditionally been understood as pains resulting from deprivations, in particular the deprivation of liberty (Sykes, 1958). While this is still relevant and very acute for many sentenced offenders, those who receive sentences that require a higher degree of self-government experience what may be described as the pains of freedom (Shammas, 2014) or the pains of probation (Durnescu, 2011). Self-government can also be experienced as painful in a prison environment, for example in relation to navigating the system (Crewe, 2011). Prisoners had different preferences in relation to the security level or public/private management of prisons, which was related to the level of freedom and enforcement of rules.

Tyrone: It's good to have rules. In this private jail, you can break the rules and nothing really happens. In a HMP, in a government-run jail, you break the rules there then you are getting done for it. That's a proper jail, proper officers working there.

Esther: What was the most difficult prison to be in?

Lance: Blundeston, was a C-cat, just a fence. I thought that was the hardest one. I'm used to having walls and getting told what to do. You go to a C-cat and your door is never locked or nothing. That was probably the hardest one I've ever done.

With less behavioural restrictions there is more room to make mistakes, more ambivalence about the road to progress in the system and greater individual responsibility. While the shape of punishment may be different (and perhaps less explicit), it is still burdensome. Thus, to conceive of severity simply in terms of sentence length or behavioural restrictions is a misrepresentation of what people experience as punishment.

The measurement of relative penal severity is further complicated by individual differences: preferences of one sentence over another vary from person to person. Research with US participants shows that black and male offenders tend to consider alternative sanctions as more severe than their white and female counterparts, respectively (Wood and May, 2003; Crouch, 1993; Wood and Grasmick, 1999). One may reasonably assume that depriving life circumstances make it more difficult to

engage with probation requirements, while imprisonment is harder to endure for those with a greater stake in conformity. The experience of punishment, then, is inevitably tied up with inequality in society. The pains of a sentence are enhanced by the potential losses one faces as a result. Women may prefer alternative sanctions because they are more likely to be primary caregivers than men; imprisonment raises concerns about care and custody of children. In contrast, offenders with particularly chaotic lifestyles (closely linked to inequality) may find it nearly impossible to comply with the requirements of community orders and prefer the temporary respite of a prison sentence. For these reasons the commitment to social justice, advocated by Deering and Smith (2014) is appealing. It recognises that many offenders are at a disadvantaged position in society and punishment itself does little to address this, and only further exacerbates the situation. Individual differences in the experience of punishment mean that equal treatment does not achieve equal impact.

Max: It'd been harder for them to have released me instead of locking me up. It'd be harder for me out there than it is in here. It's easy in here. Out there, I gotta live everyday life. It's a lot harder out there. ... It's more punishment, really, outside there back then than it was in jail.

Nonetheless, Max also recognised that a community penalty – while difficult – was a better punishment for him. He spoke with respect of a judge who used his discretion to impose a community penalty rather than prison sentence.

Max: I remember a judge saying one time, he goes 'prison ain't an issue for you [Max]'; he goes 'I'm releasing you. Because I know you're gonna find it hard.'

This anecdote suggests some judicial recognition of subjective severity. It also illustrates the multi-faceted nature of subjective experience: a person may consider a particular sentence hard, but nevertheless fair and helpful. The section below addresses offenders' perceptions of the purposes of punishment.

So far I have established that individual differences in the experience of punishment mean that equal treatment does not achieve equal impact; this makes it difficult to agree on a measure of sentence severity that would ensure proportionality. The above section further showed that the assumptions about severity of sentences underlying current sentencing guidelines are flawed; imprisonment is not necessarily more burdensome than alternative sanctions, but it is more marginalising. All punishment is painful, but we need to challenge ingrained ideas about what causes pain and how this is experienced. Retribution can be achieved without resorting to unnecessarily long prison sentences or harsh conditions, but it may be an illusion to conceive of proportionality as a guiding principle.

Perceptions of purposes of punishment

As was stated above, a court needs to have regard for other purposes of sentencing than punishment (or retribution), including reduction of crime, reform of offenders, protection of the public and reparation (s. 142(1) in the Criminal Justice Act, 2003). Punishment is thus not only considered an end in itself, but also a means to an end. With such a mixed bag of (potentially conflicting) sentencing aims it is difficult to evaluate to what extent a sentence is effective. There is a growing recognition that purposes and theories of punishment do not match up with practices and experiences of punishment. Before addressing imprisonment's ability to deter and reform offenders, it is worth considering whether it achieves to communicate why an offender is punished.

Punishment as moral communication

Antony Duff (2001) formulated a normative theory of communicative punishment, which regards punishment (or hard treatment) as a form of two-way communication: it sends a message to offenders that they have done wrong, and it also constitutes an apology from the offender to the victim and community. While the hard treatment is an expression of an apology, it does not require that the offender is actually remorseful. Nonetheless, punishment potentially has the ability to effect repentance, positive behavioural change and reconciliation – although its effectiveness should not be judged on this basis. Finally, it is important to note that Duff sees little place for prison in society and accords a much greater role for community penalties in realising his theory of communicative punishment. Rex (2005) found considerable support among stakeholders (including magistrates, probation staff, offenders and victims) for the use of community penalties as communicative punishment, although practice was still a long way removed from the ideal model. Imprisonment, Duff (2003b) argues, sends a message of exclusion that should be reserved for only 'the most serious community-destroying crimes' (p. 398). Community penalties are still burdensome and unwelcome, but are more effective than imprisonment (and fines) at persuading offenders of the wrongfulness of their crimes and the need for moral reform. Duff (2003a) recognises that current penal practice is far-removed from his normative account of punishment: 'it offers not a justification for current practice, but an ideal standard against which actual practice can be judged – and be shown, no doubt, to be seriously wanting' (p. 304).

Indeed, according to Schinkel (2014), long-term prisoners are unlikely to perceive their punishment as a form of moral communication. Instead, moral communication in the courtroom is overshadowed by the emotional impact of receiving a (severe) sentence. The adversarial court process is also likely to direct the focus to achieving the desired outcome, resulting in manipulation of the process by all actors involved. Consequently, less attention is paid to the function of moral communication. Moral reflection in prison is trumped by the need to adapt in order to cope. While cognitive behavioural programmes address moral questions, prisoners may only engage with them on a superficial level to demonstrate compliance and move forward in the system. This is an example where different aims, such as reduction in crime and moral communication, are combined

without proper consideration of their compatibility in practice. Moral communication may be achieved more successfully if it is encouraged outside of a rewards framework; the same may be true of real rehabilitative change.

Punishment for rehabilitation

The dominant rhetoric among prisoners I interviewed was that ‘you don’t get rehabilitated in prison’ [James]. Some prisoners even emphasised that imprisonment achieves the opposite of rehabilitation and actually makes it more likely that people will reoffend, which is to some extent supported by sophisticated analyses of reoffending data (Bales and Piquero, 2012; Jonson, 2010; Nagin et al., 2009; Nieuwbeerta et al., 2009).

Max: Some people come in jail not a good criminal and go out one of the best criminals you’ll ever find. You do in this jail. It’s the way it works.

Lance: This [prison] doesn’t rehabilitate; it just makes you angry, makes you upset, resentful.

According to defiance theory (Sherman, 1993), individuals who experience a sanction as unfair and stigmatising are more likely to react with shame and rage, which increases the chances of reoffending. Robinson and McNeill (2008) similarly argue that ‘when initial or primary non-compliant behaviour is met with a response which is perceived as unjust, secondary non-compliance may follow’ (p. 444). For a sentence to achieve rehabilitative change, then, it needs to be recognised as fair and as serving its purpose by offenders. Currently, interventions aimed at rehabilitation is something done to people, rather than with them. The literature on desistance and strengths-based approaches offers insight in how to shape this in practice (McNeill, 2006). Weaver (2009) further argues that communicative punishment would support the desistance process. In practice, this would entail a more active role for the offender in shaping his or her punishment, so that it becomes more meaningful and legitimate on an individual level.

Another obstacle in the path of punishment for the purpose of rehabilitation is socio-structural in nature. While the vast majority of prisoners express a wish to stay away from crime and out of prison after release, they are often anxious of the difficulties they expect to encounter in attempts to desist from crime. The struggles associated with reintegration are well-documented, and arguably related to the problem that many ex-prisoners were not integrated in communities in the first place (e.g. Gelsthorpe et al., 2007; Petersilia, 2003). Even when immediate needs are taken care of, the contrast between life in prison and outside can create adjustment problems:

Tyrone: You basically gotta get your head back into being out, if you know what I mean. Being able to do what you wanna do and open a door when you want and go to the shop. ‘Cause here [in prison] you have to rely on

everyone else; all the officers they do everything for you, like they cook your food and they get your canteen and stuff like that. You don't pay no rent or electric and stuff like that, it's just doing all them things again that you take for granted in here, that's the hard bit when you get out of jail, 'cause you don't really know what to do.

Prison is a controlling, structured environment and it imposes routine on prisoners' lives. This stands in stark contrast to what ex-prisoners face after release. Prison may thus achieve the opposite of rehabilitation (i.e. learned helplessness) if prisoners become dependent on institutional routines (Haney, 2002). Nevertheless, some individuals I interviewed perceived certain courses and support in prison as beneficial; particularly counselling and supportive prison officers. They used their prison sentence as an opportunity for self-improvement (see Van Ginneken, 2014). Yet, the finding that some participants in my study perceived imprisonment as the first time they received help for their problems is indicative of failure of the welfare system and missed opportunities for crime prevention. Many of the problems that contribute to offending should be addressed by social policy rather than penal policy; it needs to be recognised that penal policy alone is unlikely to achieve great changes in offending rates.

Punishment for deterrence

Similar arguments can be offered to explain why deterrence is not an effective penal strategy. Indeed, few prisoners I interviewed regarded their prison sentence as a deterrent for future offending. Nonetheless, there was some support for the idea that prisons should be more punitive to increase their deterrent effects.

Esther: How should [prison] be different?

Audrey: There needs to be something that prevents people from coming back. It's too easy to go out and come back. There's no -, there should be an element of fear there, like, you don't wanna go to prison, because you know-, Think to yourself 'oh my God, it's a bad place, you know, [worst that can happen]', it's not like that in here.

According to Audrey, prisons should be tougher to promote deterrence. However, research suggests that more depriving prison environments may achieve the opposite of deterrence and increase recidivism instead (Gaes and Camp, 2009; Listwan et al., 2013). Perhaps the collateral effects of imprisonment have more of a deterrent effect than the prison experience itself.

Esther: Do you think there are any effects that prison has had on your life?

Gerald: Yeah, stop me reoffending.

Gerald experienced imprisonment as a deterrent, mainly because of the harm it did to his family: 'It makes you realise what you're doing to them'. However, Gerald was in prison for the fourth time, so there had been no apparent deterrent impact of previous sentences. Other examples of collateral effects are separation from family, expected stigma and diminished employment opportunities. According to Windzio (2006), social deprivation during imprisonment can have a deterrent effect; greater reported pains of separation from friends and family during imprisonment was associated with lower recidivism rate. It is likely that this also tells us something about people's quality of life outside of prison and their stake in conformity. Therefore, whether imprisonment has a deterrent effect may depend on the quality of life pre- and post-imprisonment, such that a greater quality of life outside prison increases the deterrent effect of imprisonment. Again, one should consider the implications for social policy here.

The discrepancy between the multiple purposes of punishment and practice illustrated above has implications for the efficacy of the system, but also for its legitimacy and the extent to which it achieves justice. This is important from the perspective of public confidence and victims, as well as in relation to the offender's perception of fairness. Legitimacy is likely to encourage compliance, both with the law more generally, but also in a correctional setting more specifically (Tyler, 1990; Sherman, 1993; Reisig and Mesko, 2009; Sparks and Bottoms, 2005). While penal policy (as outlined in the applicable legal framework, the CJA 2003) currently expresses a commitment to a wide range of aims of punishment, it achieves none, apart from punishment for the sake of punishment (but on a subjective level it violates the principle of proportionality). As was discussed, however, most offenders do not morally engage with a prison sentence, so imprisonment in its current form also serves no communicative function of punishment.

Better punishment

A better penal policy requires an outspoken commitment to a particular penal philosophy, which can then shape penal practice. While the implementation of sentences is currently largely guided by a market philosophy in England and Wales, sentencing itself can still be shaped by normative ideas about what is just. Of course, the implementation of sentences should be closely linked to this as well. The problem with the current sentencing framework and reliance on imprisonment are not only the human costs, but also the implied idea that severity of punishment can be objectively measured (and increased, by imposing longer prison sentences). Instead, it needs to be accepted that all punishment is painful, but is experienced differently depending on individual vulnerabilities and personal circumstances. Imprisonment is not necessarily more painful than alternative options, which means that alternative sanctions can also serve the retributive purpose of punishment for more serious offences. Furthermore, community penalties are considered more suitable for communicative purposes (as outlined in Duff's normative theory and supported by stakeholders (Rex, 2005) and for supporting desistance (Weaver, 2009). The subjective experience of punishment should be taken into account in the formulation and implementation of a penal policy, with due

recognition of different manifestations of pain and the potential impact this has on perceived fairness and the process of desistance.

The difficult question is of course how subjective experiences should be incorporated into sentencing. It has been previously suggested that the expected subjective severity of a sentence can be considered within the sentencing range specified in sentencing guidelines (Ashworth, 2011; Raaijmakers et al., 2014), which would recognise individual differences while preserving boundaries of ordinal proportionality. In practice, judges may already use their discretion to this effect. As it is, however, the sentencing ranges are based on false notions of sentence severity, as demonstrated in this paper and the objective, linear ranking of sentences needs to be abandoned to account for subjective severity. This could be realised through a process of 'negotiated sentencing' (Duff, 2001: 160), in which a discussion among relevant stakeholders (including offender, victim and – as Duff envisaged – probation officer) would ideally lead to a consensus about an appropriate sentence. The court would retain the power to approve or decide the ultimate sentence. In practice then, the court should consider (a) arguments from the defendant regarding the potential positive or negative impact of a particular sentence; (b) how the expected subjective experience of different sentences will foreseeably impact on the fulfilment of the sentencing purposes outlined in the CJA 2003 (if retained in this form); and (c) views from the victim(s) and/or community about suitable reparation of harm.

In addition to the constraints that Duff (2001) suggests should be placed on sentencing to ensure overall fairness and avoid unnecessarily intrusive or harsh sentences, sentencing should be guided by a principle of minimum harm: the appropriate sentence would be one which is expected to achieve the desired purpose (with consideration of subjective severity and the seriousness of the offence) and inflicts the least possible harm in terms of social exclusion and anticipated effects on psychological well-being. Within such a framework it would, for example, not be justified to impose lengthy prison sentences for relatively minor offences, even if the offender so desired. At the same time, the state should commit to actively reducing inequality and providing opportunities for offenders to increase their stake in conformity (as advocated by Deering & Smith, 2014). A dialogue about the appropriate sentence also gives the opportunity to have a dialogue with offenders when their reported subjective experiences and opinions are difficult to reconcile with empirical evidence or normative theories of punishment.

This approach would turn sentencing into a more individualised exercise, which has implications for legitimacy and fairness. Research suggests that perceptions of fairness about criminal processing outcomes may be strongly influenced by the process by which an outcome is reached; specifically, offenders who were able to have an impact on their sentence through plea bargaining perceived their sentence as fairer than offenders who went to trial (Landis & Goodstein, 1986). Similarly, restorative justice conferences – with an active role for victims – are associated with high victim

satisfaction (Latimer et al., 2005; Strang et al., 2006). These findings cannot simply be generalised to a process of negotiated sentencing, so it would be necessary to pilot the approach in order to identify potential problems.

The implication of the above discussion is that sentencing should be guided more by empirical findings which suggest that a just punishment can be achieved without resorting to long prison sentences and especially harsh conditions. Regarding the implementation of sentences, more attention should be paid to effectively communicating the aims of punishment to offenders. The notion that community penalties are more meaningful than prison sentences is reflected in the theoretical and empirical literature. Imprisonment is often more about survival than anything else. However, even though imprisonment will always remain painful and ostracising, it may be reshaped to constitute 'better' punishment. For example, we may look to Nordic countries for a more humane prison system that potentially equips prisoners with better skills for life outside and also benefits from highly trained staff. However, to assume that such an experience is less painful or would automatically be perceived as legitimate is a mistake (Mathiesen, 2012; Johnsen and Granheim, 2012; Shamma, 2014). We may not even have to look over our borders for examples of better practice; some lessons may be learned from therapeutic prisons, which take a rehabilitative approach and where prisoners are considered residents of a community (Stevens, 2013). However, the rehabilitative model may not be suited as a primary penal philosophy for shaping sentencing (see Von Hirsch and Roberts, 2009, for important criticisms). Instead, the philosophy of communicative punishment appears better suited for the purpose of making punishment meaningful, while also promoting desistance. It would be able to accommodate individual differences in the subjective experience of punishment by making offenders active participants in their punishment, rather than merely passive recipients. Finally, as Weaver (2009) further advocates, involvement of and communication with the wider community would increase public legitimacy of penal practice.

It needs to be acknowledged that the proposed approach remains an uneasy (albeit improved) compromise given the presumption that inequality contributes to offending; indeed, one may question whether punishment can ever be considered equal or fair in an unequal society. Whether negotiated sentencing would create greater disparities in sentencing remains to be seen; arguably, at least, conscious attention to individual differences would create greater equality in impact and experienced severity.

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