

OFFENDER AGENCY AT SENTENCING

Exploring the grounds and scope for engaging
offenders in the determination of punishment



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Abstract

Punishment is a grave intrusion into individual liberty, yet in most liberal criminal justice systems, including England and Wales, those punished are rarely directly engaged in determining their sentence. The thesis challenges this status quo and asks on what grounds and to what extent offenders should exercise agency at sentencing, and to what extent offenders can exercise agency in current English sentencing practice. First, it examines possible theoretical arguments for offender agency on a state-centred account of sentencing. It does so in respect of several theories of punishment: communicative variations of desert theory, a forgiveness-based theory of punishment, and therapeutic jurisprudence. Secondly, the thesis develops a normative framework for offender agency. It argues that there may be good justifications for allowing offenders to exercise agency at sentencing, to be more respectful of the offender as a responsible moral agent and to foster rehabilitation. It explores conceptually what an ‘agentic’ sentencing system might entail and argues it should be based on the paradigm of a dialogue between the judge and offender. The offender’s agency should be non-dispositive and in principle should have no guaranteed determinative influence on the sentence. However, the offender’s input may alter the disposition, insofar as it is aligned with the public interest. It explores other constraints on offender agency to preserve the state’s fundamental role in sentencing. The proposed model embodies a different conception of sentencing as a decision-making process to be done *with* offenders, rather than *to* offenders. The thesis examines objections that could be levelled against an agentic sentencing model. Finally, the thesis undertakes a doctrinal enquiry into instances of offender agency in current English sentencing practice. It concludes that, while current sentencing practice does not respect offender agency in a principled manner, there is both value in and scope for allowing offenders to exercise agency in a state-centred sentencing system.

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ADHD	Attention Deficit Hyperactivity Disorder
BAME	Black, Asian and Minority Ethnic
CAA 1968	Criminal Appeal Act 1968
CJA	Criminal Justice Act (1948, 1972, 1988, 1991, 2003)
CM/Rec (2014) 4 on EM	Council of Europe, Recommendation CM/Rec (2014) 4 on Electronic Monitoring, adopted by the Committee of Ministers on 19 February 2014
CPD	Criminal Practice Direction
CPS	Crown Prosecution Service
C(S)A 1997	Crime (Sentences) Act 1997
DTTO	Drug Treatment and Testing Order
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ERCSM	Council of Europe, Recommendation CM/Rec (2017) 3 on the European Rules on Community Sanctions and Measures, adopted by the Committee of Ministers on 22 March 2017
ICCPR	International Covenant on Civil and Political Rights
OASys	Offender Assessment System
PSC	Problem-solving Court
PSR	Pre-sentence Report
R (92) 16 on ERCSM	Council of Europe, Recommendation No R (92) 16 on the European Rules on Community Sanctions and Measures, adopted by the Committee of Ministers on 19 October 1992
RJ	Restorative Justice
SCA 1981	Senior Courts Act 1981
TJ	Therapeutic Jurisprudence
Victims' Code	Code of Practice for Victims of Crime
VPS	Victim Personal Statement

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*'No, no!' said the Queen. 'Sentence first — verdict afterwards.'
'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!'
'Hold your tongue!' said the Queen, turning purple.
'I won't!' said Alice.
'Off with her head!' the Queen shouted at the top of her voice. Nobody moved.¹*

INTRODUCTION

Limited offender agency at sentencing

The excerpt from *Alice's Adventures in Wonderland*, written by Oxford-based author Lewis Carroll,² depicts a defendant who has no voice and whose agency is denied. Punishment is a grave intrusion into individual liberty, yet in most liberal criminal justice systems, including England and Wales, those punished are rarely directly engaged in determining their sentence. Consequently, the offender's agency in respect of sentence – that is the offender's capacity to exercise choice and play an active part in the sentencing process – is limited.

In adversarial systems, the criminal trial is easily completed without any contribution from the defendant.³ Rather than being an active agent, defendants/offenders play a passive role in English criminal trials, especially at sentencing.⁴ Hudson suggests:

Where the victim may well feel excluded *from* the proceedings, the offender is excluded *by* the proceedings. He will be talked about through the reports of probation officers or other professionals; he may be placed at the scene of the

¹ L Carroll, *Alice's Adventures in Wonderland* (Macmillan and Co 1865).

² MN Cohen, 'Dodgson, Charles Lutwidge [pseud. Lewis Carroll]' in B Harrison, L Goldman and D Cannadine (eds), *Oxford Dictionary of National Biography* (Oxford University Press 2004).

³ F Pakes, *Comparative Criminal Justice* (4th edn, Routledge 2019), 121.

⁴ J Doak and L Taylor, 'Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing' (2013) 64 Northern Ireland Legal Quarterly 25, 35; A Kirby, J Jacobson and G Hunter, *Effective Participation or Passive Acceptance: How Can Defendants Participate More Effectively in the Court Process?* (Howard League for Penal Reform, What is Justice? Working Papers 9/2014, 2014).

crime by police and other witnesses; he may be described as a nuisance, a menace, a danger to society by judges and magistrates.⁵

One instance where defendants can relay their side of the story to the court is when they⁶ give evidence at trial.⁷ Yet, not all defendants have this opportunity, since the majority attend court only for sentencing.⁸ In England and Wales offenders rarely speak for themselves at the sentencing hearing.⁹ Traditionally, a judge does not communicate directly with an offender who has legal representation, except in limited circumstances such as the entering of a plea or the delivery of sentence.¹⁰ Even at the delivery of sentence the communication may be limited to instructing the offender to stand, and if a custodial sentence is imposed, the judge will typically say ‘Take him down!’ after which the offender will be taken directly to his cell.¹¹ On the rare occasion when offenders are offered the opportunity to speak, most may remain silent, not knowing what they are allowed or expected to say, and will have turned speechless or incoherent.¹²

In many countries, court architecture may impede direct interaction between the bench and the defendant/offender. Courtrooms are designed so that there is maximum distance between the judge and defendant/offender.¹³ While during the contested trial the defendant leaves the dock and enters the witness box to give evidence, during a sentence hearing he

⁵ B Hudson, ‘Victims and Offenders’ in A von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart 2003), 179.

⁶ The thesis aims to use gender neutral nouns as much as possible through the use of the plural form. Where this is not possible, the pronoun ‘he’ is used as an arbitrary simplification device and refers to people of all genders.

⁷ Kirby, Jacobson and Hunter (n 4), 9.

⁸ Ibid, 4-5, 9.

⁹ Doak and Taylor (n 4), 35-36.

¹⁰ M King, ‘The Therapeutic Dimension of Judging: the Example of Sentencing’ (2006) 16 *Journal of Judicial Administration* 92, 94. While King is a magistrate in Australia, his observations about the Australian criminal process are also relevant for English criminal practice.

¹¹ Kirby, Jacobson and Hunter (n 4), 5.

¹² Hudson (n 5), 179-180.

¹³ Ibid, 179-180.

remains in the dock throughout.¹⁴ By positioning the defendant in the dock, he is physically far removed from the conversation between the judge, prosecution, and defence lawyer.¹⁵

There is evidence to suggest that some offenders wish to be more actively engaged in the criminal process, as the following account of an offender who appeared at both the magistrates' and Crown courts illustrates:

The moment you're sentenced you're taken straight away, and that's the one thing I've never liked about a court. 'You're done now go away. You've just ruined your life, we don't care. Off you go.' That's a bit inhumane the way it happens. For a judge to send you to prison, I would expect someone to try and give someone some advice ... Take a few minutes out and speak to the guy, say 'You're too old for it now. You need to sort your life out.' Don't just brush people off.¹⁶

While offender agency at sentencing is limited, it is not entirely absent either. Socio-legal research indicates that the formality of justice in the magistrates' courts and the technical nature of proceedings tends to hinder defendants' ability to participate in the proceedings.¹⁷ However, there is also some evidence that magistrates' courts may provide more opportunity for magistrates to interact directly with those who appear before them.¹⁸ At least as the focal point for justice in the community, magistrates' courts are the most appropriate forum to adopt a more engaged approach to sentencing.¹⁹

¹⁴ Kirby, Jacobson and Hunter (n 4), 5.

¹⁵ JUSTICE, *In the Dock: Reassessing the Use of the Dock in Criminal Trials* (JUSTICE 2015), 12-13; Pakes (n 3), 113, 121.

¹⁶ Kirby, Jacobson and Hunter (n 4), 10.

¹⁷ P Carlen, *Magistrates' Justice* (Martin Robertson 1976); P Carlen, 'The Staging of Magistrates' Justice' (1976) 16 *British Journal of Criminology* 48.

¹⁸ In Australia see e.g. S Roach Anleu and K Mack, 'Magistrates, Magistrates Courts and Social Change' (2007) 29 *Law and Policy* 183; K Mack and S Roach Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices' (2011) 37 *Monash University Law Review* 187.

¹⁹ In a 2009 Green Paper, the UK government set out its intention to introduce problem-solving approaches in magistrates' courts, including that the judiciary can speak directly with the offender about why they committed the crime, problems underlying offending behaviour, and discuss sentencing options. (Cabinet Office, *Engaging Communities in Criminal Justice* (Green Paper, Cm 7583, 2009), 27; see further Chapter 4). Almost all cases start in the magistrates' court, and 90 per cent are completed there ('Magistrates' Court' (*Courts and Tribunals*

Furthermore, the offender can communicate indirectly with the court about his sentence. For instance, the offender can convey certain information via the probation officer through the pre-sentence report. Most commonly, the offender's agency is conveyed through his defence lawyer. An obvious instance of indirect offender agency is the defence plea in mitigation. There are also aspects of sentencing that seemingly allow the offender to have a degree of influence on the disposition. For example, particular community order requirements can only be imposed if the offender consents or indicates his willingness to comply with them.²⁰ The option to enter into a guilty plea, which can result in a sentence discount of up to a third,²¹ at least in theory allows the offender to exercise a degree of agency in respect of sentence. However, it is questionable whether these are the optimal ways to engage offenders in the sentencing process.

In sum, sentencers only rarely engage offenders directly in the process of deciding the type and quantum of the sentence that would be appropriate in their case. Sentencing is characterised by a 'top down' approach, in which the offender is considered the passive recipient of the punishment that the court authoritatively imposes.²² The extent to which the offender can exercise agency in respect of sentence is limited.

The idea that offenders should exercise agency at sentencing may be met with disbelief and resistance. Some may object that there are no good reasons to allow offenders to exercise agency at sentencing, or indeed that there are strong arguments against it. Initially, punishment and offender agency may appear contradictory concepts. To suggest that offenders should be

Judiciary) <<https://www.judiciary.uk/you-and-the-judiciary/going-to-court/magistrates-court/>> accessed 10 March 2019).

²⁰ Criminal Justice Act 2003 (CJA 2003), ss 207(1), 207(3)(c), 209(2)(d), 215(2).

²¹ Ibid, s 144; Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2017).

²² RA Duff, 'Punishment, Retribution and Communication' in A von Hirsch, A Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009), 133.

allowed to exercise agency in respect of sentence could be seen as privatising punishment and undermining the court's authority. Such a response arises from the understanding that punishment is precisely the consequence of, or response to, the offender's wrongdoing and that it constitutes the coercive power of the state over the individual. If so, it may be thought that offenders cannot exercise agency within the coercive constraints of the criminal justice system. The thesis argues, however, that the tension between the fundamental role of the state in respect of punishment and offender agency is not insoluble, provided constraints are put in place.

Allowing offenders to exercise agency at sentencing may be viewed by the public as being soft on offenders and letting them dictate the terms of their own punishment. Offenders are not the most obvious category for public sympathy. They are individuals who 'have done wrong to others; they have harmed them financially, emotionally, physically and/or reduced their life chances in other ways many will never know.'²³ It is intuitively much easier to sympathise with those who have suffered the harm and make the case for victim participation. Additionally, since the offender is the person who will suffer the punishment, he is likely to have an excessive interest and emotional involvement in the case.²⁴ The concern might be that offenders cannot be trusted and that, given the opportunity to exercise agency in respect of sentence, they will only try to minimise their role in the offence and get the most lenient sentence possible. This view suggests offenders should not have a say in the determination of sentence.

Another objection may be that, even if there are theoretical arguments in favour of allowing offenders to exercise agency, it would not be practically feasible. In the current system, there are good reasons why offender agency is mostly transmitted through their legal

²³ J Peay and E Player, 'Pleading Guilty: Why Vulnerability Matters' (2018) 81 *Modern Law Review* 929, 939-940.

²⁴ S Trechsel and S Summers, *Human Rights in Criminal Proceedings* (Oxford University Press 2005), 245-246.

counsel. The language used in courtrooms is often very formal and characterised by legal jargon, far removed from everyday language.²⁵ Sentencing is a complex and technical process, structured by statutes, case law, and sentencing guidelines,²⁶ which can seem incomprehensible to the layperson. A lack of understanding of courtroom formalities and customs, combined with an insufficient knowledge of substantive and procedural law, puts the offender at a disadvantage in the absence of legal representation. From that perspective, it makes sense to keep the criminal process in the hands of experts.²⁷ But while legal representation is vital in the current system, it often results in making offenders more removed and less visible in the proceedings, especially if the judge only engages with the defence lawyer and not with the offender himself.²⁸ The formality of the courtroom, as well as the complex procedures, technical and archaic language can have the unintended effect of silencing offenders.²⁹ It is a paradox that the person who is supposedly at the centre of the criminal process – by virtue of having committed the offence, being called to answer, and having to suffer the punishment in case of conviction – is simultaneously at the periphery of the proceedings.³⁰ Yet that is how current sentencing is structured.

Other counterarguments and objections to offender agency at sentencing are conceivable. Throughout the thesis, as the possible grounds for allowing offenders to exercise agency and the principles and limitations of a sentencing system that facilitates offender agency become clear, some of these doubts and prejudices will be addressed and where possible

²⁵ J Shapland, *Between Conviction and Sentence: the Process of Mitigation* (Routledge & Kegan Paul 1981), 87-88.

²⁶ A Ashworth, *Sentencing and Criminal Justice* (6th edn, Cambridge University Press 2015), 19-42.

²⁷ King (n 10), 94.

²⁸ R Hunter, S Roach Anleu and K Mack, 'Judging in Lower Courts: Conventional, Procedural, Therapeutic and Feminist Approaches' (2016) 12 *International Journal of Law in Context* 337, 341.

²⁹ Kirby, Jacobson and Hunter (n 4), 9.

³⁰ *Ibid*, 10-11.

rebutted. For now, suffice it to state that, despite possible objections, offender agency at sentencing merits further consideration for two reasons. While Chapter 1 identifies in detail the gap in the literature this thesis seeks to fill, a short account of these two reasons is provided here. First, the concept of agency has been developed and theorised in various stages of the criminal justice process. Individual autonomous agency is one of the fundamental notions in the justification of criminal law as it is the basis for criminal responsibility.³¹ Respect for the offender as a responsible moral agent is not only one of the underlying premises of punishment in desert theory,³² but also in communicative theories that combine retributive and consequentialist elements in the justification of punishment,³³ and in Lacey and Pickard's theory of punishing with forgiveness.³⁴ Furthermore, defendants' rights of participation and exercise of agency in earlier phases of the criminal process, such as the crime investigation, evidence gathering, plea bargaining, and the contested criminal trial, have been the subject of academic study.³⁵ In the implementation of the sentence and thereafter, agency is often

³¹ See e.g. RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Blackwell 1990); A Ashworth and J Horder, *Principles of Criminal Law* (7th edn, Oxford University Press 2013), 23-24; N Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press 2016), 27-33.

³² See e.g. A von Hirsch, *Doing Justice: the Choice of Punishments* (report of the Committee for the Study of Incarceration) (Hill and Wang 1976). See also J Deigh, *The Sources of Moral Agency: Essays in Moral Psychology and Freudian Theory* (Cambridge University Press 1996), 18; A Brudner, *Punishment and Freedom: a Liberal Theory of Penal Justice* (Oxford University Press 2009), ch 1.

³³ See e.g. A von Hirsch, *Censure and Sanctions* (Clarendon Press 1993); RA Duff, *Punishment, Communication, and Community* (Oxford University Press 2001); C Bennett, *The Apology Ritual: a Philosophical Theory of Punishment* (Cambridge University Press 2008).

³⁴ N Lacey and H Pickard, 'From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm' (2013) 33 *Oxford Journal of Legal Studies* 1; N Lacey and H Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 *Oxford Journal of Legal Studies* 665.

³⁵ See e.g. M Chiavario, 'La Justice Négociée: Une Problématique à Construire' (1993) 15 *Archives de Politique Criminelle* 27; F Tulkens, 'Negotiated Justice' in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002); MD Dubber, 'The Criminal Trial and the Legitimation of Punishment' in RA Duff and others (eds), *The Trial on Trial: Truth and Due Process*, vol 1 (Hart 2004), 85-86, 92-96; A Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2015); A Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' [2018] *International Journal of Evidence and Proof* 1.

understood in the context of responsibilisation.³⁶ The offender's agency in the implementation of his sentence is also central on a responsive censure-based account,³⁷ and the importance of active involvement by the offender is emphasised in the desistance literature,³⁸ in the 'new rehabilitation' literature,³⁹ and (at least in theory) in therapeutic jurisprudence.⁴⁰ By contrast, the concept of agency at sentencing is understudied and under-theorised. There seems to be a

³⁶ See e.g. D Garland, 'Probation and the Reconfiguration of Crime Control' in R Burnett (ed), *The Probation Service: Responding to Change (Proceedings of the Probation Studies Unit First Colloquium)* (University of Oxford Centre for Criminological Research 1997); D Garland, "Governmentality" and the Problem of Crime: Foucault, Criminology, Sociology' (1997) 1 *Theoretical Criminology* 173; N Rose, 'Government and Control' (2000) 40 *British Journal of Criminology* 321; GC Gray, 'The Responsibilization Strategy of Health and Safety: Neo-liberalism and the Reconfiguration of Individual Responsibility for Risk' (2009) 49 *British Journal of Criminology* 326; P O'Malley, 'Responsibilization' in A Wakefield and J Fleming (eds), *The Sage Dictionary of Policing* (Sage 2009); J Phoenix and L Kelly, "You Have to do it for Yourself": Responsibilization in Youth Justice and Young People's Situated Knowledge of Youth Justice Practice' (2013) 53 *British Journal of Criminology* 419; A Gradin Franzén, 'Responsibilization and Discipline: Subject Positioning at a Youth Detention Home' (2015) 44 *Journal of Contemporary Ethnography* 251.

³⁷ N Dagan and JV Roberts, 'Retributivism, Penal Censure, and Life Imprisonment without Parole' (2019) 38 *Criminal Justice Ethics* 1; JV Roberts and N Dagan, 'The Evolution of Retributive Punishment: From Static Desert to Responsive Penal Censure' in A du Bois-Pedain and A Bottoms (eds), *Penal Censure: Engagements within and Beyond Desert Theory* (Hart 2019).

³⁸ See e.g. S Farrall and B Bowling, 'Structuration, Human Development and Desistance from Crime' (1999) 39 *British Journal of Criminology* 253; S Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (American Psychological Association 2001); A Bottoms and others, 'Towards Desistance: Theoretical Underpinnings for an Empirical Study' (2004) 43 *Howard Journal of Criminal Justice* 368; D Gadd and S Farrall, 'Criminal Careers, Desistance and Subjectivity: Interpreting Men's Narratives of Change' (2004) 8 *Theoretical Criminology* 123; F McNeill, 'A Desistance Paradigm for Offender Management' (2006) 6 *Criminology and Criminal Justice* 39; S Farrall, A Bottoms and J Shapland, 'Social Structures and Desistance from Crime' (2010) 7 *European Journal of Criminology* 546; L Kazemian and S Maruna, 'Desistance from Crime' in M D Krohn, A J Lizotte and G P Hall (eds), *Handbook on Crime and Deviance* (Springer Science & Business Media 2010); J Shapland and A Bottoms, 'Reflections on Social Values, Offending and Desistance Among Young Adult Recidivists' (2011) 13 *Punishment and Society* 256; S King, 'Transformative Agency and Desistance From Crime' (2012) 13 *Criminology and Criminal Justice* 317; D Healy, 'Changing Fate? Agency and the Desistance Process' (2013) 17 *Theoretical Criminology* 557; S Farrall and others, *Criminal Careers in Transition: The Social Context of Desistance from Crime* (Oxford University Press 2014); J Shapland and A Bottoms, 'Desistance from Crime and Implications for Offender Rehabilitation' in A Liebling, S Maruna and L McAra (eds), *The Oxford Handbook of Criminology* (6th edn, Oxford University Press 2017).

³⁹ See e.g. FT Cullen and KE Gilbert, *Reaffirming Rehabilitation* (Anderson 1982); E Rotman, *Beyond Punishment: A New View of the Rehabilitation of Criminal Offenders* (Greenwood Press 1990); FT Cullen and P Gendreau, 'From Nothing Works to What Works: Changing Professional Ideology in the 21st Century' (2001) 81 *The Prison Journal* 3; S Lewis, 'Rehabilitation: Headline or Footnote in the New Penal Policy?' (2005) 52 *Probation Journal* 119; G Robinson, 'Late-Modern Rehabilitation: The Evolution of a Penal Strategy' (2008) 10 *Punishment and Society* 429.

⁴⁰ See e.g. DB Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence' (1992) 40 *Cleveland State Law Review* 517, 518; DB Wexler, 'New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship' (1993) 10 *New York Law School Journal of Human Rights* 759, 762; DB Wexler and BJ Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press 1996), xvii; J Nolan, *Reinventing Justice: the American Drug Court Movement* (Princeton University Press 2001), 186-187; BJ Winick and DB Wexler, 'Drug Treatment Court: Therapeutic Jurisprudence Applied' (2002) 18 *Touro Law Review* 479, 484.

disjuncture between the emphasis on agency in the commission of crime, in the investigation and adjudication stage, and implementation of the sentence on the one hand, and the comparative lack of focus on offender agency at sentencing on the other.

Secondly, while in the last half century there has been increased scholarly attention to and advocacy of victim participation at sentencing,⁴¹ the role of the offender is not frequently noted or analysed. While it should not be assumed that if one stakeholder is given a voice another must too, the extent to which the offender should be engaged at sentencing at least merits consideration. The thesis addresses this double gap in the literature, by focusing on agency at a specific stage in the criminal justice process, namely sentencing, and a particular actor, the offender.

Research questions, aims, and methodology

The thesis addresses two research questions. Parts I and II ask, ‘On what grounds and to what extent should offenders exercise agency in the process of determining their sentence?’ Part III asks, ‘To what extent can offenders exercise agency in current English sentencing practice?’

⁴¹ See e.g. A Ashworth, ‘Some Doubts about Restorative Justice’ (1993) 4 Criminal Law Forum 277; M Cavadino and J Dignan, ‘Reparation, Retribution and Rights’ in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd edn, Hart 1998); A Crawford and J Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000); A Sanders and others, ‘Victim Impact Statements: Don't work, Can't work’ [2001] Criminal Law Review 447; I Edwards, ‘The Place of Victim Preferences in the Sentencing of "Their Offender"' [2002] Criminal Law Review 689; E Erez, ‘Integrating Restorative Justice Principles in Adversarial Proceedings through Victim Impact Statements’ in E Cape (ed), *Reconcilable Rights: Analysing the Tension between Victims and Defendants* (Legal Action Group 2004); L Zedner, *Criminal Justice* (Oxford University Press 2004), 143-146; J Chalmers, P Duff and F Leverick, ‘Victim Impact Statements: Can Work, Do Work (For Those who Bother to Make Them)’ [2007] Criminal Law Review 360; JV Roberts, ‘Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole’ (2009) 38 Crime and Justice: A Review of Research 347; A Bottoms and JV Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan 2010); E Erez and JV Roberts, ‘Victim Participation in the Criminal Justice Process: Normative Dilemmas and Practical Responses’ in SG Shoham, P Knepper and M Kett (eds), *International Handbook of Criminology* (CRC Press 2010); K Katz, ‘Opposing Scales of Justice: Victims' Voices in the Sentencing Process’ (2010) 14 Canadian Criminal Law Review 181; Ashworth, *Sentencing and Criminal Justice* (n 26), 438-444; N Lacey and H Pickard, ‘A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame’ (2019) 27 Journal of Political Philosophy 229.

The thesis aims to make a contribution to the fields of sentencing, penal theory, and criminal justice in three ways. First, the thesis aims to undertake a legal theoretical enquiry into possible arguments for respecting the offender's agency at sentencing (Part I). Secondly, it aims to develop a normative framework for offender agency at sentencing. It aims to explore conceptually and normatively what a sentencing system that is built more consistently around offender agency might look like. The thesis sets out the defining lines of an 'agentic' sentencing model, what the normative objections and limitations may be, and whether and how these can be accommodated (Part II). Thirdly, the thesis aims to analyse to what extent offenders can exercise agency in current sentencing practice in England and Wales. To that end, the thesis carries out a doctrinal analysis, focusing on statutes, case law, and legal doctrine pertaining to the relevant aspects of sentencing in the English criminal justice system. It assesses current sentencing practice by the normative standards developed earlier in the thesis (Part III).

Structure and argument

The thesis consists of eight chapters, bookended by an introduction and conclusion, and is divided into three parts. Chapter 1 is a precursor to the rest of the thesis. It defines the notion of agency as it is used in the thesis and subsequently explores the relevance of agency in criminal justice and identifies the gap the thesis seeks to fill.

Part I: Arguments for offender agency at sentencing

To address the questions of on what grounds and to what extent offenders should exercise agency at sentencing, an essential first step is to consider the role of the state at sentencing and in the institution of punishment. The state's role has implications for the role of the offender and for the constraints that should operate if a sentencing model that facilitates offender agency were developed. This is addressed in Chapter 2. Advocates for victim agency, and to a lesser

extent offender agency, have focussed so far on agency outside the courtroom and with limited or no state involvement, particularly in restorative justice (RJ).⁴² By contrast, the thesis does not argue that the state should be less involved in the determination of the sentence. The argument is of a different kind: there is scope for altering the manner in which the main actors in the criminal process, particularly the state and offender, interact in determining the sentence, and value in setting the parameters for such interaction in a way that preserves the role of the state and facilitates the offender's agency.

Offender agency raises questions concerning the concept, justifications, and aims of punishment. Crucially, the justifications and scope for offender agency at sentencing will depend on the theory of punishment, or broader theory of criminal justice, one adopts. Chapter 3 explores arguments for offender agency in expressive and communicative censure-based theories of punishment.⁴³ It then compares and contrasts some of the arguments derived from censure-based theories of punishment with the counterview offered by Lacey and Pickard, who question the role of censure and argue we would do better to punish with forgiveness.⁴⁴ Chapter 4 focusses on a more consequentialist theory concerned with desistance and rehabilitation,

⁴² See e.g. H Strang and J Braithwaite (eds), *Restorative Justice: Philosophy to Practice* (Ashgate 2000); L Walgrave (ed), *Restorative Justice and the Law* (Willan 2002); A von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart 2003); J Dignan, *Understanding Victims and Restorative Justice* (Open University Press 2005); D Sullivan and L Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2006); T Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy* (Criminal Justice Press 2007); C Cunneen and C Hoyle, *Debating Restorative Justice* (Hart 2010); J Shapland, G Robinson and A Sorsby, *Restorative Justice in Practice: Evaluating what Works for Victims and Offenders* (Routledge 2011); G Johnstone, *Restorative Justice: Ideas, Values, Debates* (2nd edn, Routledge 2011); M Rossner, 'Restorative Justice in the Twenty-First Century: Making Emotions Mainstream' in A Liebling, S Maruna and L McAra (eds), *The Oxford Handbook of Criminology* (6th edn, Oxford University Press 2017).

⁴³ See e.g. RA Duff, *Trials and Punishment* (Cambridge University Press 1986); Duff, *Punishment, Communication, and Community* (n 33); RA Duff, 'Penance, Punishment, and the Limits of Community' (2003) 5 *Punishment and Society* 295; Duff, 'Punishment, Retribution and Communication' (n 22); von Hirsch, *Censure and Sanctions* (n 33); A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005); Bennett (n 33); C Bennett, 'Expressive Punishment and Political Authority' (2011) 8 *Ohio State Journal of Criminal Law* 285; C Bennett, 'Punishment as an Apology Ritual' in C Flanders and Z Hoskins (eds), *The New Philosophy of Criminal Law* (Rowman & Littlefield 2015).

⁴⁴ Lacey and Pickard, 'From the Consulting Room' (n 34); Lacey and Pickard, 'To Blame or to Forgive?' (n 34).

namely therapeutic jurisprudence.⁴⁵ None of these constitute theories of offender agency, and yet their foundations are such that arguments for offender agency can be derived from them. Their pluralistic nature makes them uniquely suited as theoretical bases for offender agency. Even though the arguments for offender agency come from different perspectives and are derived from dissimilar accounts of criminal justice and punishment, closer analysis reveals that they are based on similar values and that these accounts are complementary and to some extent overlapping.

Part II: A normative framework for offender agency at sentencing

The second part of the thesis develops a normative framework for offender agency at sentencing. Drawing on the arguments explored in Part I, Chapter 5 starts by setting out the justifications for respecting the offender's agency at sentencing, thus addressing the question 'On what grounds should offenders exercise agency at sentencing?' First, the ethical justification is that there is inherent value in facilitating the offender's agency at sentencing by allowing him to participate in the sentencing discussion: doing so is more respectful of the offender as a moral agent and may allow him to take responsibility for his offence and sentence. Secondly, there is a consequentialist justification for allowing the offender express what their sentence should involve, namely that doing so might increase the possibility of achieving reparation, rehabilitation, and desistance.

⁴⁵ See e.g. DB Wexler (ed), *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press 1990); DB Wexler and BJ Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press 1991); Wexler and Winick, *Law in a Therapeutic Key* (n 40); DB Wexler, 'How the Law Can Use What Works: A Therapeutic Jurisprudence Look at Recent Research on Rehabilitation' (1997) 13 *Behavioural Sciences and the Law* 365; BJ Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy, and Law* 184; J McGuire, 'Can the Criminal Law Ever be Therapeutic?' (2000) 18 *Behavioural Sciences and the Law* 413; DB Wexler, 'Robes and Rehabilitation: How Judges Can Help Offenders 'Make Good'' (2001) 38 *Court Review* 18; BJ Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055; King (n 10); M King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?' (2007) 32 *Alternative Law Journal* 91; M King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096.

Chapter 5 then explores the procedural implications of these theoretical justifications for offender agency at sentencing, addressing the question ‘To what extent should offenders exercise agency at sentencing?’ It develops a model that is built more consistently around offender agency, which shall be termed the ‘agentic’ sentencing model. It argues that such a model should be based on the paradigm of a dialogue between the judge and the offender, in which the offender’s agency is in principle non-dispositive, though the offender’s viewpoint may influence the disposition insofar as it is aligned with the public interest. By contrast, the paradigm of negotiated sentencing, in which the offender’s agency is dispositive, should be rejected. While it may be questioned whether offender agency is compatible with the role of the state and fundamental criminal justice principles, the chapter suggests that they are reconcilable provided constraints are placed on the exercise of offender agency. The chapter further explores whether it is defensible and feasible that the offender communicates directly with the judge, and considers what the role of the defence lawyer should be. Finally, Chapter 5 indicates that agentic sentencing may have implications for the role of the victim, but explains why this is beyond the scope of the thesis.

Chapter 6 explores possible objections to an agentic sentencing model. It argues that the issue of an offender’s unwillingness to exercise agency can be accommodated. As non-dispositive agency is a key principle of the proposed model, the chapter explores a range of risks related to this principle, including that it may lead to dissatisfaction if the offender’s viewpoint is not taken into account, or that facilitating the offender’s agency could become tokenistic. Another issue is that offenders may seize the opportunity of a sentencing dialogue to maximise their self-interest and try to receive the most lenient sentence possible. Alternatively, an offender may say something to his own detriment, resulting in a more severe sentence. Since the majority of offenders have a complex and problematic background, which may contribute to their possible inability to engage in a rational dialogue about their sentence,

the chapter explores to what extent offenders are competent to converse with the judge, and how agentic sentencing might exacerbate existing societal inequities. The chapter examines why these are valid concerns and how they can possibly be accommodated. It concludes that despite the jurisprudential justifications for offender agency, and while some objections to agentic sentencing can be rebutted, agentic sentencing also presents certain complexities which are less easily accommodated. Nonetheless, none of these objections are such that they undermine the validity of an agentic sentencing model altogether.

Part III: Offender agency in current sentencing practice

Part III examines offender agency in current sentencing practice in England and Wales and assesses the status quo by the normative standards set out in Part II. Part III carries out a doctrinal analysis, exploring six instances in the criminal process that may allow offenders to exercise agency in respect of sentence, as enshrined in statutes and case law, and as interpreted in legal doctrine. Chapter 7 explores pre-sentence reports, the defence speech in mitigation, the *Newton* hearing, and the right to appeal against sentence. The thesis conceptualises these as ‘procedural forms of offender agency’ as they are principally underpinned by the commitment to uphold the offender’s fair trials rights and ensuring procedural fairness in respect of sentence. They are non-dispositive, since they generally do not allow the offender to have a direct influence on the outcome of the proceedings.

Chapter 8 is devoted to the sentence discount for guilty plea and sentences that require the offender’s consent. It argues that these are dispositive forms of offender agency in the sense that they allow the offender to have direct and determinative influence on the sentencing decision to a certain degree. Across Chapter 7 and 8, the thesis explores the main features of these instances of offender agency, their rationale, and to what extent they are desirable vehicles for offender agency. Part III argues that, while the aforementioned instances do allow

offenders to exercise agency to a certain extent, they remain imperfect vehicles for offender agency. Overall, current sentencing practice is not motivated by a principled commitment to respecting the offender's agency at sentencing, as the agentic sentencing model developed in this thesis would require.

Scope

State-centred theories of punishment

The enquiry into arguments and scope for offender agency is restricted to state-centred theories of punishment and criminal justice. The thesis argues that the state should maintain its fundamental role in the adjudication of crime, the determination of sentences, and their enforcement. This contrasts with how historically, especially in RJ theory, advocacy for agency of the stakeholders in criminal justice has mostly led to the conclusion that agency is best affirmed outside the courtroom.⁴⁶ One of the main aims of RJ movements is to replace forms of state justice with responses to crime in which the stakeholders – the victim, offender, and community – take charge of the resolution of the 'conflict'.⁴⁷ RJ might appear an obvious theoretical basis for offender agency at sentencing, since it focuses on the role of the stakeholders, albeit primarily on the victim. Nonetheless, RJ is rejected as a normative basis for offender agency, as it is in tension with state-centred punishment. Instead, the thesis considers the implications of offender agency in the courtroom itself. The scope of the enquiry is limited to expressive and communicative variations of desert theory, which are compared with and contrasted to punishment with forgiveness in Chapter 3; therapeutic jurisprudence is discussed in Chapter 4. The thesis does not undertake an exhaustive analysis of the scope for

⁴⁶ See n 42.

⁴⁷ N Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1.

offender agency in other theories of punishment, such as deterrence, incapacitation, and pure retributivist theories, as the focus is on those theories of punishment most compatible with engaging the offender in a state-centred sentencing process.

Since state power has the potential to be abused, limits on legal punishment are necessary to uphold justice. Chapter 4 will examine how therapeutic principles have been applied in practice to demonstrate that without proper constraints the practice of punishment can quickly become highly intrusive and coercive under the guise of respecting the offender's agency. One of desert theory's central claims is that it sets limits on punishment by adhering to the principle of proportionality, according to which the severity of punishment must be determined by reference to the seriousness of the offence.⁴⁸ Lacey and Pickard have argued, however, that the requirement of proportionality in itself cannot generate robust limits. They claim that, for proportionality to limit power, political, social, and cultural institutions and broader social arrangements are needed that can stabilise and implement substantive criteria of fittingness or equivalence of punishment.⁴⁹ There is considerable merit to this argument; there is no non-arbitrary way to determine maximum and minimum sentences to anchor the system of penalties (cardinal proportionality) purely on the basis of the idea of proportionality.⁵⁰

There is a role for desert in a liberal theory of punishment, but its scope needs to be restricted. While the basic principle of proportionality alone cannot establish substantive limits on punishment, for the purpose of undertaking a conceptual and normative enquiry into the

⁴⁸ See e.g. A von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55; von Hirsch, *Censure and Sanctions* (n 33); J Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Kluwer Academic Publishers 2004); von Hirsch and Ashworth (n 43); A Ashworth, 'Desert' in A von Hirsch, A Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009); A von Hirsch, 'Proportionate Sentences: a Desert Perspective' in A von Hirsch, A Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009).

⁴⁹ N Lacey and H Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78 *Modern Law Review* 216.

⁵⁰ See e.g. E Pincoffs, 'Are Questions of Desert Decidable?' in JB Cederblom and W Blizek (eds), *Justice and Punishment* (Ballinger 1977).

grounds and scope for offender agency at sentencing, proportionality can still play a role as a conceptual ideal. From this perspective, ‘limiting retributivism’ may well be the best means by which to place limits on state intervention that might otherwise be unduly intrusive into offenders’ lives. The theories most compatible with offender agency at sentencing will be considered within an overarching framework of limiting retributivism, as first developed by Morris,⁵¹ and further refined by Frase and Tonry.⁵² At its core, limiting retributivism entails that desert is only a limiting and not a defining sentencing principle. It advocates the development of a range of ‘not undeserved’ penalties. The upper and lower limits of the range are set by a principle of broad proportionality. Within the range of ‘not undeserved’ penalties, other traditional sentencing purposes can play a role.⁵³ While limiting retributivism has its shortcomings and is open to criticism,⁵⁴ its appeal lies in the accommodation, within the limits of proportionality, of other, more consequentialist aims of punishment.

⁵¹ N Morris, ‘Penal Sanctions and Human Rights’ in N Morris and C Howard (eds), *Studies in Criminal Law* (Clarendon Press 1964); N Morris, *The Future of Imprisonment* (University of Chicago Press 1974); N Morris, ‘Towards Principled Sentencing’ (1977) 37 Maryland Law Review 267; N Morris, *Madness and the Criminal Law* (University of Chicago Press 1982); N Morris and M Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford University Press 1990); N Morris, ‘Desert as a Limiting Principle’ in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (Northeastern University Press 1992); N Morris, ‘The Honest Politician’s Guide to Sentencing Reform’ in B Forst (ed), *The Socio-Economics of Crime and Justice* (ME Sharpe 1993).

⁵² M Tonry, ‘Proportionality, Parsimony, and Interchangeability of Punishments’ in RA Duff and others (eds), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (Manchester University Press in association with the Fulbright Commission, London 1994); M Tonry, ‘Interchangeability, Desert Limits and Equivalence of Function’ in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd edn, Hart 1998); RS Frase, ‘Sentencing Principles in Theory and Practice’ in M Tonry (ed), *Crime and Justice: A Review of Research*, vol 22 (Chicago University Press 1997); RS Frase, ‘Limiting Retributivism’ in M Tonry (ed), *The Future of Imprisonment* (University of Chicago Press 2004); RS Frase, ‘Norval Morris’s Contributions to Sentencing Structures, Theory, and Practice’ (2009) 21 Federal Sentencing Reporter 254; RS Frase, ‘Limiting Retributivism’ in A von Hirsch, A Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009); RS Frase, ‘Limiting Retributivism and Other Hybrid Theories’ in RS Frase (ed), *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press 2013).

⁵³ Frase, ‘Limiting Retributivism and Other Hybrid Theories’ (n 52), 82.

⁵⁴ See e.g. Frase, ‘Sentencing Principles in Theory and Practice’ (n 52); Frase, ‘Limiting Retributivism and Other Hybrid Theories’ (n 52).

The theories that will be relied upon to explore the arguments and scope for offender agency – communicative variations of desert theory, Lacey and Pickard’s theory of punishing with forgiveness, and therapeutic jurisprudence – come from different philosophical traditions and differ in their conception and justification of punishment. At their most basic level, communicative variations of desert theory emphasise censure, Lacey and Pickard focus on forgiveness, and therapeutic jurisprudence is concerned with maximising therapeutic outcomes. Although these theories differ in their justification of punishment and may in certain respects even conflict, it will be argued that in their arguments for offender agency they converge and may to some extent overlap. The normative framework for offender agency developed in this thesis thus draws on more than one theory of punishment to support the justifications for offender agency. Since the criminal law comprises a set of institutional practices with a long and complex history, any plausible normative theory of criminal law is liable to be complex and messy and necessarily comprise values and aims that cannot fit together into a tidy whole.⁵⁵ By implication, the same is true for the proposed normative framework for offender agency at sentencing, since it concerns a penal aspect of the criminal law and closely relates to broader justificatory theories of punishment.

Jurisdictional focus

In Part II, the thesis adopts a primarily conceptual approach, aiming to explore what a sentencing system that is built more consistently around offender agency might look like. It does not set out how offender agency could and should be implemented in current sentencing practice in a particular jurisdiction. By contrast, the doctrinal enquiry in Part III focusses

⁵⁵ RA Duff, ‘Responsibility, Citizenship and Criminal Law’ in RA Duff and SP Green (eds), *Philosophical Foundations of the Criminal Law* (Oxford University Press 2013), 125-126. See also RA Duff and SP Green, ‘Introduction: Searching for Foundations’ in RA Duff and SP Green (eds), *Philosophical Foundations of the Criminal Law* (Oxford University Press 2013), 7-10.

specifically on England and Wales, yet many of the conclusions may be relevant to other jurisdictions.

Distinction between the determination and implementation of the sentence

The thesis makes a conceptual distinction between sentencing and the implementation of the sentence. The latter is outside the scope the thesis. The focus is on sentencing, defined as the ‘determination of the precise modes and levels of punishment to be imposed on particular (kinds of) offenses and offenders’.⁵⁶ This is the second stage of the bifurcated criminal trial, following the stage in which guilt is assessed and a conviction established. The two stages of the bifurcated criminal trial are distinct from the phase of the implementation of the sentence. The latter is also referred to as the infliction, administration, or execution of punishment. The distinction between the process of determining the sentence as part of the criminal trial on the one hand, and the implementation of the sentence on the other, is made for two reasons. First, both phases are underpinned by different principles, because there is a ‘relative autonomy’ of the implementation of sentences from their imposition. This theory of relative autonomy acknowledges that the various aims of punishment operate in different ways at different stages of the criminal justice process, and their importance may vary between the moment of imposing the sentence and executing it.⁵⁷ On a retributivist and specifically censure-based account of punishment, the focus at sentencing is on determining a sentence proportionate to the seriousness of the offence.⁵⁸ The principle of proportionality functions either as the primary principle in determining the punishment, or as a constraining principle upon the permissible

⁵⁶ Duff, *Punishment, Communication, and Community* (n 33), 131.

⁵⁷ K Beyens, S Snacken and D Van Zyl Smit, ‘Truth in (the Implementation of) Sentencing: Belgium and Elsewhere’ in T Daems, D Van Zyl Smit and S Snacken (eds), *European Penology?* (Hart 2013), 272-273.

⁵⁸ von Hirsch and Ashworth (n 43).

severity of punishment.⁵⁹ On a communicative account, sentencing allows the judge to publicly express censure for the wrongful conduct, taking into account the magnitude of the harm and the offender's culpability.⁶⁰ The sentence is primarily backward-looking, as a response to the offence that has been committed.

By contrast, different considerations and principles are in play in the implementation of the sentence. Some argue that the execution of a prison sentence should be focussed on rehabilitating and reintegrating the offender into society, and should thus look forward to the offender's future.⁶¹ Additionally, (early) release from prison raises different issues than the sentencing decision itself. The parole board is not required to ensure proportionality, but must assess the offender's risk of re-offending, as well as the likelihood that the offender will benefit from release in the community.⁶²

A powerful counterview is that punishment should not be conceived as the imposition of hard treatment as an institutionalised form of blaming, constrained by a principle of proportionality,⁶³ but rather as the imposition of 'consequences' enacted with forgiveness, which requires that such consequences should aim to achieve reparative and rehabilitative ends.⁶⁴ Consistent with this approach of forgiveness, reparation and rehabilitation clearly should be the guiding aims for criminal justice institutions and practices. Nonetheless, the way

⁵⁹ JV Roberts, 'Crime Victims, Sentencing, and Release From Prison' in J Petersilia and KR Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press 2012), 105.

⁶⁰ Duff, *Trials and Punishment* (n 43); Duff, *Punishment, Communication, and Community* (n 33); von Hirsch, *Censure and Sanctions* (n 33).

⁶¹ Beyens, Snacken and Van Zyl Smit (n 57), 273.

⁶² Roberts, 'Crime Victims, Sentencing, and Release From Prison' (n 59), 106; EE Rhine, 'The Present Status and Future Prospects of Parole Boards and Parole Supervision' in J Petersilia and KR Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press 2012).

⁶³ For a critical discussion of what the principle of proportionality can, or rather cannot, achieve see Lacey and Pickard, 'The Chimera of Proportionality' (n 49).

⁶⁴ Lacey and Pickard, 'To Blame or to Forgive?' (n 34), 668, 672, 683. For a detailed discussion of this account see Section 3.3.2.

in which institutions are organised to achieve these goods may differ depending on the stage of the process concerned. In this sense, there may still be a conceptual difference between the sentencing stage and the implementation of the sentence.

A second reason for maintaining a distinction between the determination and implementation of the sentence, is that offender agency in these two phases also varies in degree and form. For example, different rules may apply to offender participation in the sentencing and the parole hearing. An offender may have considerable agency in the implementation of an active mode of punishment, such as a community order with an unpaid work requirement, but have comparatively little agency at the point where the judge decides to impose said sentence. Consequently, offender agency cannot be theorised in the same way for the determination and the implementation of the sentence. Any reference hereafter to the sentencing process will thus be taken to mean a reference to the determination of the sentence in court. This may include stages of the criminal process that occur pre-sentencing to the extent that they have a bearing on the actual sentence, for example the guilty plea which can be entered before the trial.

Theoretical and doctrinal enquiry

Finally, as the thesis adopts a theoretical and doctrinal methodology, it does not engage with empirical research questions. Such questions might include whether offenders would in fact want to exercise agency at sentencing, in what way, and what the (long-term) consequences might be of upholding the offender's agency. Instead, the thesis is concerned with the prior normative questions of whether there are justifications for offender agency at sentencing, what an agentic sentencing model might look like, what the constraints should be, and what might be the possible objections. Arguably, these questions require answers before we can consider what the empirical problems might be with agency in practice. In addressing these questions,

the thesis will argue that while current sentencing practice does not respect offender agency in a principled manner, there is both value in and scope for allowing offenders to exercise agency at sentencing in a state-centred criminal justice system.

1 THE RELEVANCE OF AGENCY IN CRIMINAL JUSTICE

This chapter first defines the concept of agency as it is used throughout the thesis (Section 1.1). It then surveys existing criminal justice literature on agency and highlights the double gap this thesis seeks to fill. The importance of the offender's agency at the point of sentencing merits consideration for two reasons. First, the inattention to offender agency at the point of sentencing creates a disjuncture between sentencing and other stages of the criminal process (Section 1.2). Secondly, the last few decades have seen increased scholarly attention to victim agency and victim participation in the criminal justice process in general, and at sentencing in particular. By contrast, there has been little consideration of why offenders have no active role to play in the determination of their sentence or whether they should (Section 1.3).

1.1 Defining agency

1.1.1 Towards a definition of agency in criminal justice

The emergence of the concept of agency can be traced back at least to the Enlightenment, which fuelled the promotion of the individual as a free agent who is capable of making rational choices.⁶⁵ Today, the notion of agency does not have a single meaning. It has been conceptualised in many ways in disciplines such as sociology, psychology, and philosophy.⁶⁶

⁶⁵ M Emirbayer and A Mische, 'What is Agency?' (1998) 103 *American Journal of Sociology* 962, 964. See also S Lukes, *Individualism* (Blackwell 1973).

⁶⁶ In sociology and psychology see e.g. A Bandura, 'Self-Efficacy Mechanism in Human Agency' (1982) 37 *American Psychologist* 122; A Bandura, 'Human Agency in Social Cognitive Theory' (1989) 44 *American Psychologist* 1175; A Bandura, 'Human Agency: The Rhetoric and the Reality' (1991) 46 *American Psychologist* 157; Emirbayer and Mische (n 65); A Bandura, 'Social Cognitive Theory: An Agentic Perspective' (2001) 52 *Annual Review of Psychology* 1; MS Archer, *Being Human: The Problem of Agency* (Cambridge University Press 2000); T Bakken and C Bransford, 'The Role of Human Agency in the Creation of Normative Influences Within Individuals and Groups' (2002) 5 *Journal of Human Behavior in the Social Environment* 89; MS Archer, *Structure, Agency, and the Internal Conversation* (Cambridge University Press 2003); A Bandura, 'Toward a Psychology of Human Agency' (2006) 1 *Perspectives on Psychological Science* 164; A Bandura, 'Reconstruction of "Free Will" From the Agentic Perspective of Social Cognitive Theory' in J Baer, JC Kaufman and RF Baumeister (eds), *Are We Free?: Psychology and Free Will* (Oxford University Press 2008); K Dowding, 'Agency' in K Dowding (ed), *Encyclopedia of Power* (Sage 2011). In philosophy see e.g. Deigh (n 32); M Bratman, *Faces of*

Different authors emphasise particular aspects of agency. It is the combination of those aspects that is necessary to capture the essence of agency or to understand what it means to speak of someone acting with agency.⁶⁷ Emirbayer and Mische write:

[T]he term *agency* itself has maintained an elusive, albeit resonant, vagueness; it has all too seldom inspired systematic analysis, despite the long list of terms with which it has been associated: self-hood, motivation, will, purposiveness, intentionality, choice, initiative, freedom, and creativity.⁶⁸

Equally, in criminal justice, different meanings have been attached to the concept of agency. For instance, relying on Foucault's work, Garland suggests:

The idea of agency refers to the capacity of an agent for action, its possession of the 'power to act', which is the capacity to originate such actions on the basis of calculations and decisions. Agency is a universal attribute of (socialized) human beings....⁶⁹

Ashworth and von Hirsch offer a comprehensive definition of moral agency in criminal justice, and specifically retributivist accounts of punishment:

A person is treated as a moral agent if the reasons he is offered for specified choices are of a moral character, and if he is assumed capable of comprehending and acting on such reasons. Normal human beings (other than those suffering from certain mental disabilities) possess this capacity, it is assumed – whether they decide actually to make good choices or not.⁷⁰

Under a restorative justice model, agency entails 'empowering and enabling those impacted by crime the capacity to make choices and play an active part in the process and decision-making

Intention: Selected Essays on Intention and Agency (Cambridge University Press 1999); M Bratman, *Structures of Agency: Essays* (Oxford University Press 2007); M Bratman, *Shared Agency: A Planning Theory of Acting Together* (Oxford University Press 2014).

⁶⁷ S Troonbeeckx, 'An Agency Graded Theory of Crime: An Integrated Explanation of the Onset and Endphase of Youth Crime' (PhD thesis, KU Leuven 2017), 85.

⁶⁸ Emirbayer and Mische (n 65), 962.

⁶⁹ Garland, "Governmentality" and the Problem of Crime' (n 36), 196.

⁷⁰ von Hirsch and Ashworth (n 43), 17, footnote e.

that takes place throughout the criminal process.⁷¹ Even though these definitions differ subtly, at their core lies the same idea, namely that individuals have the capacity to make choices and act. Consistent with the ways in which the term agency has been construed in criminal justice, for the purposes of this thesis agency is defined as an individual's ability and capacity to act. In specific relation to an adversarial sentencing hearing, offender agency is understood to mean that the offender has the capacity to exercise choice and play an active part in the process of decision-making in respect of their sentence. Chapter 5, which sets out the defining lines of an agentic sentencing model, will develop further the concept of offender agency in an adversarial sentencing hearing, and particularly in the context of the proposed sentencing dialogue. It will argue that giving offenders the opportunity to engage in a dialogue with the judge about their sentence – which includes allowing offenders to convey their views regarding the sentence, be consulted, and give information, albeit subject to constraints – is in itself a meaningful exercise of the offender's agency.

1.1.2 Agency and autonomy

The notion of agency is closely intertwined with the notion of autonomy. Even though agency and autonomy are often used interchangeably, they are not synonymous. The etymology of both words helps clarify the distinction. The term agency has its roots in the Latin noun 'agentia', meaning action or activity, and the verb 'agere', which means to do or to act.⁷² Autonomy comes from the ancient Greek term 'autonomia' (αὐτονομία), referring to a state's freedom to use its own laws and be independent.⁷³ In present-day use of the terms, agency

⁷¹ D O'Mahony and J Doak, *Reimagining Restorative Justice: Agency and Accountability in the Criminal Process* (Hart 2017), 70.

⁷² *Oxford English Dictionary* (Oxford University Press 2018).

⁷³ *Ibid.*

refers to one's capacity to act, whereas autonomy refers to self-government or self-direction.⁷⁴

To be autonomous is to act on motives, reasons, or values that are one's own.⁷⁵

Even though the two notions are not synonymous, they have a close bearing on one another. It is not straightforward to discern the precise relationship between agency and autonomy. Griffin argues:

[O]ne can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own path through life – that is, not be dominated or controlled by someone or something else (call it 'autonomy').⁷⁶ ... One of the features of the spare, abstract agent would be autonomy; that would have to be a feature if the concept of agency were to yield any rights at all.⁷⁷

In this sense, autonomous agency can be considered a particular kind of agency, namely a refined, excellent, or complete kind of human agency. Autonomous agency is self-controlled, wholehearted, or free agency.⁷⁸ In the simplest sense, it can be expressed as follows: if an agent is one who acts, an autonomous agent is a distinct type of agent, namely a self-governing agent.

⁷⁴ S Buss and A Westlund, 'Personal Autonomy' in *The Stanford Encyclopedia of Philosophy* (Spring edn, 2018) <<https://plato.stanford.edu/archives/spr2018/entries/personal-autonomy/>> accessed 1 October 2018. For detailed accounts of personal autonomy see e.g. G Watson, *Free Will* (Oxford University Press 1982); AR Mele, *Autonomous Agents: From Self-Control to Autonomy* (Oxford University Press 1995); N Arpaly, 'Which Autonomy?' in JK Campbell, M O'Rourke and D Shier (eds), *Freedom and Determinism* (MIT Press 2004); Bratman, *Structures of Agency: Essays* (n 66). On different conceptions of autonomy in moral and political philosophy see e.g. I Kant, *Groundwork of the Metaphysic of Morals* (first published in 1785, Harper & Row 1964); N McCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press 1982), 22; G Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988); J Feinberg, 'Autonomy' in JP Christman (ed), *The Inner Citadel: Essays on Individual Autonomy* (Oxford University Press 1989); JP Christman and J Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press 2005).

⁷⁵ N Stoljar, 'Feminist Perspectives on Autonomy' in *The Stanford Encyclopedia of Philosophy* (Fall edn, 2015) <<https://plato.stanford.edu/archives/fall2015/entries/feminism-autonomy/>> accessed 1 October 2018.

⁷⁶ J Griffin, *On Human Rights* (Oxford University Press 2008), 33.

⁷⁷ *Ibid*, 34.

⁷⁸ M Schlosser, 'Agency' in *The Stanford Encyclopedia of Philosophy* (Fall edn, 2015) <<https://plato.stanford.edu/archives/fall2015/entries/agency/>> accessed 1 October 2018.

The concepts of agency and autonomy are frequently used in conjunction in criminal justice. Autonomy is a fundamental principle of legitimacy in a liberal democratic state,⁷⁹ and consequently in liberal criminal justice systems, which can be traced back to Kantian visions of the rational, autonomous agent.⁸⁰ An important feature of liberalism is:

[T]he vision of the individual as an autonomous agent capable of choice and control...Both rationality and the capacity for responsible action are thus for liberalism at once factual features of human nature and sources of normative limits on the ways in which human beings may be treated, particularly by political and other public institutions.⁸¹

Having clarified the difference between agency and autonomy in criminal justice in basic terms, this distinction will not be explored in further depth. Mindful of the close relation between the two terms and their possible overlap, for consistency the thesis will continue to use the term ‘agency’.

1.1.3 Agency and structural constraints

Agency has an obvious relation to conceptions of power.⁸² To emphasise agency is to highlight the power as a property of the agent. However, people do not act in a vacuum. Individual agency can be both enabled and constrained by environmental or structural factors. This is why agency is often discussed in relation to structure. There are many different definitions of structure, but for the purpose of this thesis structure refers to recurrent ‘sets of rules and resources that enable or restrain people’.⁸³ The primacy of structure or agency in shaping human behaviour, also known as the ‘agency-structure’ problem, has been the subject of

⁷⁹ Dubber (n 35), 86. See also N Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988), 146.

⁸⁰ See Kant (n 74).

⁸¹ Lacey, *State Punishment* (n 79), 146.

⁸² Dowding (n 66), 6.

⁸³ Ibid, 10.

considerable scholarship in the social sciences.⁸⁴ In short and slightly oversimplified terms, the ‘agency-structure’ problem concerns how much importance is placed on the individual’s power or on the power of structure. The problem can be understood as a debate concerning the extent to which an individual’s actions are determined by their autonomy and individual agency or by social structure. For the purpose of this thesis, it suffices to acknowledge that power is a property of agents without denying the structural conditions that influence and constrain an agent’s capacity to exert that power.⁸⁵ Any account of agency that fails to acknowledge the different dynamics of both the capacity to act and structural constraints would be incomplete.

The structural constraints on agency in criminal justice vary in nature, depending on the stage of the criminal justice process in which agency is exerted. For instance, autonomous agency is the central principle underpinning the legal concept of criminal responsibility.⁸⁶ It is appropriate in the context of criminal responsibility to discuss autonomy and agency in conjunction, since only individuals with the capacity for free action can be held responsible for their actions. However, as argued below, this premise is contested. Some authors have argued that the idea of autonomy and free will is qualified.⁸⁷ In extreme adverse circumstances

⁸⁴ See e.g. P Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press 1977); A Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (3rd edn, Macmillan 1979); MS Archer, ‘Morphogenesis versus Structuration: On Combining Structure and Action’ (1982) 33 *British Journal of Sociology* 455; A Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity 1984); Archer, *Being Human: The Problem of Agency* (n 66); Archer, *Structure, Agency, and the Internal Conversation* (n 66); K Dowding, ‘Agency and Structure: Interpreting Power Relationships’ (2008) 1 *Journal of Power* 21.

⁸⁵ Dowding, ‘Agency’ (n 66), 10.

⁸⁶ See below Section 1.2.1.

⁸⁷ B Hudson, ‘Punishing the Poor: a Critique of the Dominance of Legal Reasoning in Penal Policy Practice’ in RA Duff and others (eds), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (Manchester University Press in association with the Fulbright Commission, London 1994), 302-303; B Hudson, ‘Doing Justice to Difference’ in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Clarendon Press 1998), 243-244; A Ashworth and L Zedner, ‘Punishment Paradigms and the Role of the Preventive State’ in AP Simester, A du Bois-Pedain and U Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014), 15. See also M Tonry, ‘Can Deserts be Just in an Unjust World?’ in AP Simester, A du Bois-Pedain and U Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014).

people's autonomous agency may be limited and constrained. They may therefore not have free will and choice to the same degree as others to choose to commit or desist from crime.

In the criminal process and specifically the criminal trial, the structural constraints on defendant/offender agency are numerous. The relation between the state and the defendant/offender is characterised by a structural imbalance, both in terms of power and resources. The criminal process is controlled by the state, which has a monopoly of force, as well as far-reaching powers and resources to investigate crime, prosecute, bring the accused to trial, and sentence the offender.⁸⁸ This power imbalance might be reversed, however, when the offender is a very wealthy individual or a multi-national corporation.⁸⁹ But, ordinarily, offenders lack the independent investigatory and coercive powers of the police and the prosecution, and they do not have access to the same type of information or technology.⁹⁰ The offender's generally weaker position is exacerbated in respect of sentencing and punishment, where the offender faces the prospect of restrictions on or the loss of his property and/or liberty. For instance, much of the controversy around consent to out-of-court disposals centres on the pressure put on suspects to admit they have committed an offence.⁹¹ It is questionable whether the consent of the accused is a sufficient safeguard to justify this abridged form of the criminal process, especially given the possibility of the imposition of a 'non-judicial punishment'.⁹² Similar considerations apply to the 'choice' to enter a guilty plea, when the defendant knows that exercising the right to a contested criminal trial might result in a considerably higher

⁸⁸ R Assy, *Injustice in Person: the Right to Self-Representation* (Oxford University Press 2015), 36.

⁸⁹ See e.g. B Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (The Belknap Press of Harvard 2014).

⁹⁰ Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35), 11.

⁹¹ L Campbell, A Ashworth and M Redmayne, *The Criminal Process* (5th edn, Oxford University Press 2019), 176-177, 186, 189.

⁹² Ibid, 183. See D Van Zyl Smit, 'Legal Standards and the Limits of Community Sanctions' (1994) 1 *European Journal of Crime, Criminal Law and Criminal Justice* 309, 324 on the withdrawal of charges on the condition that the accused consents to a community sanction.

sentence (see Chapter 8).⁹³ Another example is consent to a community order, where the alternative is often imprisonment (see Chapter 8).⁹⁴ The extent to which these choices are freely made and thus constitute an instance of agency, given they are made in the shadow of harsher punishment, is one of the central themes of this thesis.

Conversely, if we are to preserve the role of the state and associated rule-of-law and due process safeguards, as well as proportionality and other penal aims (see Chapter 2), it is both inevitable and necessary that the offender's agency be constrained. The thesis does not suggest that the criminal justice process ought to – or is even capable of – facilitating absolute offender agency at all stages. Rather, the thesis aims to explore the grounds and scope for offender agency at sentencing in a state-centred criminal justice system. The coercive constraints of the criminal justice system, the extent to which they are justified, how they might legitimately restrict agency, or unduly undermine it, will be discussed in later chapters, particularly in Parts II and III. For now, it suffices to note that agency as employed in this thesis needs to be understood in the particular context of the state monopoly over the criminal justice system, and the inherent constraints this imposes on the offender and his agency.

1.1.4 Why the term 'agency'?

It is worth briefly setting out why the term agency is used, rather than more straightforward alternatives. Other authors have sought to capture the same essential meaning, but have employed different terms and in different contexts. For instance, some speak of 'engaging'⁹⁵

⁹³ See e.g. J Baldwin and M McConville, *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson 1977), 45, 107; P Darbyshire, 'The Mischief of Plea Bargaining and Sentencing Rewards' [2000] *Criminal Law Review* 895, 901; M Blake and A Ashworth, 'Ethics and the Criminal Defence Lawyer' (2004) 7 *Legal Ethics* 167, 182; L Bridges, 'The Ethics of Representation on Guilty Pleas' (2006) 9 *Legal Ethics* 80, 85; Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35), 43-45.

⁹⁴ See e.g. Van Zyl Smit (n 92), 324; Dubber (n 35), 96-97.

⁹⁵ W Hughes, 'Promoting Offender Engagement and Compliance in Sentence Planning: Practitioner and Service User Perspectives in Hertfordshire' (2011) 59 *Probation Journal* 49; A Kirby, 'Effectively Engaging Victims,

or ‘involving’⁹⁶ parties. The most commonly used term to describe involvement of both defendants and victims in the criminal process is ‘participation’.⁹⁷ The notion of the offender’s ‘consent’ to sentence has also been theorised.⁹⁸ Yet the term agency seems most accurate to describe the focus of this thesis for three reasons. First, it is best suited to capture the fundamental idea that humans are autonomous agents, they are individuals who have the capacity to act. Arguably, the use of this term in criminal justice makes it possible to reveal the importance of agency (or lack thereof) at the various stages of the criminal justice process, ranging from the commission of crime to the point of desistance. Section 1.2 of this chapter explores how offender agency at sentencing has been understudied by comparison to other stages of the criminal justice process.

Secondly, agency at sentencing can take various forms. The notions ‘participation’ and ‘consent’ only describe one form of agency and are quite restrictive notions. Chapter 8 argues that consent to a penal measure is binary, in the sense that the offender’s agency is limited to either accepting or refusing the penal measure suggested by a state authority. Participation can

Witnesses and Defendants in the Criminal Courts: A Question of ‘Court Culture’? (2017) 12 Criminal Law Review 949.

⁹⁶ L Ansems and I Braam, ‘It Takes Two to Tango: Offenders’ Involvement in Decisions Regarding Sanctions, Measures and Conditions in Light of the ERCSM and the ERProb. A Dutch Case Study’ (2016) 8 European Journal of Probation 16.

⁹⁷ For defendants see Kirby, Jacobson and Hunter (n 4); Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35); Owusu-Bempah, ‘The Interpretation and Application of the Right to Effective Participation’ (n 35). For victims see e.g. E Erez, ‘Victim Participation in Sentencing: Rhetoric and Reality’ (1990) 18 Journal of Criminal Justice 19; E Erez and P Tontodonato, ‘Victim Participation in Sentencing and Satisfaction with Justice’ (1992) 9 Justice Quarterly 393; M Joutson, ‘Victim Participation in Proceedings and Sentencing in Europe’ (1994) 3 International Review of Victimology 57; I Edwards, ‘Victim Participation in Sentencing: The Problems of Incoherence’ (2001) 40 Howard Journal of Criminal Justice 39; A Ashworth, ‘Responsibilities, Rights, and Restorative Justice’ (2002) 42 British Journal of Criminology 578; I Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making’ (2004) 44 British Journal of Criminology 967.

⁹⁸ See e.g. X Pin, *Le Consentement en Matière Pénale* (Librairie Générale de Droit et de Jurisprudence 2002), part 2 on consent to a penal measure; R Canton, ‘Yes, No, Possibly, Maybe: Community Sanctions, Consent and Cooperation’ (2014) 6 European Journal of Probation 209; C Morgenstern and G Robinson, ‘Consent and Cooperation of the Unfree: Introduction to the Special Issue’ (2014) 6 European Journal of Probation 203; P Raynor, ‘Consent to Probation in England and Wales: How it was Abolished, and Why it Matters’ (2014) 6 European Journal of Probation 296; M Herzog-Evans, ‘Consent and Probation: An Analogy with Contract Law’ (2015) 7 European Journal of Probation 143. See Chapter 8.

refer to a party's right to take part in the proceedings that concern them. Agency, by contrast, is a more complete term, referring to the individual's capacity to act and be actively engaged in a decision-making process that concerns him, in a manner that suggests he should take responsibility, not just for the wrong he has committed but also for the response to that wrong, i.e. the sentence. To use the term agency is to approach the issue of the offender's involvement at sentencing from a different angle than merely the right of participation.

Thirdly, while agency can be expressed by existing legal concepts such as participation, consent, and negotiation, it can equally take other forms, which are less easily captured in an existing legal term. More generic terms such as engaging or involving the offender, giving the offender a voice, or allowing the offender input in his sentence, may be more suited in certain cases. Agency can, in that sense, be considered an umbrella term that encompasses various forms or instances of active engagement in the criminal process. A major focus of this thesis is to explore what is the optimal form of offender agency in an agentic sentencing model (Part II), and to evaluate existing forms of offender agency in current sentencing practice (Part III).

1.2 The concept of defendant or offender agency at various stages of the criminal process

The concept of agency in criminal justice has been applied in at least three ways in respect of the defendant or offender. First, agency plays a key role in the commission of crime, and, indeed, holding individuals to account for their choices is central to the attribution of criminal responsibility (Section 1.2.1). Secondly, the defendant's right, or freedom not to, participate in the criminal process can be theorised as a form of agency (Section 1.2.2). Thirdly, offender agency plays a role in the implementation of the sentence and the phase thereafter (Section 1.2.3). The following sections explore these three conceptualisations of agency in criminal

justice, and conclude that the prominence accorded to individual agency in other parts of the criminal process contrasts with the lack of attention to the offender's agency at sentencing.

1.2.1 Agency as responsibility for the commission of an offence

Individual agency is one of the fundamental notions in the justification of criminal law as it is the basis for criminal responsibility.⁹⁹ Various terms have been used to express the notion of agency as responsibility, including 'moral autonomy',¹⁰⁰ 'moral agency',¹⁰¹ 'responsible agency',¹⁰² and 'responsible moral agency'.¹⁰³ There is a debate among criminal theorists as to whether the criminal law is better understood as a matter of legal moralism or as a branch of public law.¹⁰⁴ It follows that the difference between the aforementioned terms may not simply be a matter of semantics but could have normative significance. However, it is not possible to explore the various claims made in this debate here. For the purposes of the thesis these terms for agency will be used interchangeably. In essence, the notion of responsible moral agency can be defined as the 'cognitive and volitional capacities such that [one] know[s] what they are

⁹⁹ For a comprehensive account of criminal responsibility see e.g. Duff, *Intention, Agency and Criminal Liability* (n 31); V Tadros, *Criminal Responsibility* (Oxford University Press 2005); RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007); RA Duff, 'Responsibility and Liability in Criminal Law' in MH Kramer and others (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (Oxford University Press 2008); HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, Oxford University Press 2008); Duff, 'Responsibility, Citizenship and Criminal Law' (n 55); Lacey, *In Search of Criminal Responsibility* (n 31).

¹⁰⁰ J Horder, *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press 2019), 67-70.

¹⁰¹ See e.g. von Hirsch, *Censure and Sanctions* (n 33), ch 2; von Hirsch and Ashworth (n 43), ch 2; Duff, *Punishment, Communication, and Community* (n 33), ch 3.

¹⁰² See e.g. Lacey and Pickard, 'From the Consulting Room' (n 34); Lacey and Pickard, 'To Blame or to Forgive?' (n 34); Duff, *Answering for Crime* (n 99), 23.

¹⁰³ See e.g. RA Duff, 'Punishment, Communication, and Community' in M Matravers (ed), *Punishment and Political Theory* (Hart 1999), 50; Duff, *Punishment, Communication, and Community* (n 33), 27-30; M Thorburn, 'Criminal Law as Public Law' in RA Duff and SP Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011), 22.

¹⁰⁴ For a legal moralist account of the criminal law see e.g. J Gardner, 'Introduction' in HLA Hart (ed), *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, Oxford University Press 2008); Duff, *Trials and Punishment* (n 43); Duff, *Punishment, Communication, and Community* (n 33); Duff, *Answering for Crime* (n 99). For a defence of a public law account of the criminal law and argument as to why a moralist account is problematic see Thorburn (n 103).

doing when they commit an offence, and a sufficient degree of control in doing so'.¹⁰⁵ The fact that individuals are responsible moral agents is the foundation for treating each individual as responsible for their own conduct.¹⁰⁶ By attributing responsibility for wrongdoing we acknowledge that the individual in question is autonomous and has the capacity for moral choice.¹⁰⁷ Responsibility can thus be considered the legal corollary of the sociological notion of autonomous agency.

This conception of autonomous agency has both normative and factual implications for the treatment of individuals in the criminal process.¹⁰⁸ The normative aspect of autonomous agency entails that individuals should be respected and treated as agents who are capable of choosing their acts and omissions.¹⁰⁹ The factual aspect of autonomous agency is that individuals generally¹¹⁰ have the capacity and sufficient free will to make choices. This premise is contested. There is a large body of literature on the question of whether and to what extent individuals have free will and to what extent they are determined by causes that are outside of their control.¹¹¹ Some have argued that the idea of free will is not unqualified, and especially that people with limited or no financial means and power may find themselves in a situation

¹⁰⁵ Lacey and Pickard, 'From the Consulting Room' (n 34), 2; Lacey and Pickard, 'To Blame or to Forgive?' (n 34), 666.

¹⁰⁶ Lacey and Pickard, 'From the Consulting Room' (n 34), 17, 19.

¹⁰⁷ Lacey, *In Search of Criminal Responsibility* (n 31), 27-33.

¹⁰⁸ Ashworth and Horder (n 31), 23. Ashworth and Horder refer to autonomy, rather than agency. However, for the reasons set out in Section 1.1.2, arguably the correct term to use in the context of criminal responsibility is autonomous agency. It is the intersection of both autonomy and agency that forms the principled foundation of the legal concept of criminal responsibility.

¹⁰⁹ Ibid, 24.

¹¹⁰ If individuals lack the requisite cognitive and volitional capacities to know what they are doing when they commit an offence and to have sufficient control over their actions, or if these capacities are diminished, they will be able to rely on complete or partial criminal defences: see below page 35-37.

¹¹¹ See e.g. V Haksar, 'Free-will, Responsibility and Punishment' (DPhil thesis, University of Oxford 1968); A Kenny, *Freewill and Responsibility* (Routledge & Kegan Paul 1978); D Matza, *Delinquency and Drift* (Transaction Publishers 1990).

where their free choice is much more constrained by external circumstances.¹¹² Ashworth and Zedner acknowledge that ‘the assumption of moral autonomy at the heart of liberalism may fail to take adequate account of the extreme adverse circumstances in which some offenders act.’¹¹³ Unconstrained free will is a convenient myth for the purpose of the criminal law. Packer accepts that the criminal law’s emphasis on rational choice, free will, and agency as a foundational premise for responsibility is not a statement of fact, but rather ‘a value preference having very little to do with the metaphysics of determinism or free will ... Very simply, the law treats man’s conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.’¹¹⁴ An extensive discussion of the debate between rational choice theorists and determinists is outside the scope of this thesis. Suffice it to say that to the extent that individuals have free will and the capacity to make their own choices, they can be considered responsible for those choices, and that individual responsibility is a fundamental principle underlying criminal law,¹¹⁵ despite the fact that it is subject to debate. It is generally assumed that individuals may be held liable for their conduct and for matters within their control, and that the criminal law exempts defendants from liability where they lack such control (see below page 36-37).¹¹⁶

The conception of agency as responsibility is influential in substantive criminal law in various ways. First, autonomous agency is an important feature of the requirement that criminal conduct must have been voluntary.¹¹⁷ The voluntariness requirement, which is part of the *actus reus* of a crime, entails that the defendant can only be guilty for his conduct if he was capable

¹¹² Hudson, ‘Punishing the Poor’ (n 87), 302-303; Hudson, ‘Doing Justice to Difference’ (n 87), 239-249.

¹¹³ Ashworth and Zedner (n 87), 15.

¹¹⁴ HL Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968), 74-75.

¹¹⁵ See n 99.

¹¹⁶ Bottoms and others (n 38), footnote 14; Ashworth and Horder (n 31), 24.

¹¹⁷ Horder (n 100), 69.

of exercising choice and at least a degree of control over his behaviour when he acted.¹¹⁸ The defendant cannot be held liable for the occurrence of the *actus reus* unless he was legally responsible for it.¹¹⁹ One of the corollaries of paying people the respect due to them as autonomous moral agents is that humans should only be held criminally liable for actions that are attributable to them as a reasoning person. Whenever the ‘willed voluntary action’ when committing an act or omitting to do something is absent, the defendant will be able to rely on the defence¹²⁰ of non-insane automatism.¹²¹

Secondly, the notion of agency as responsibility is reflected in the range of fault or *mens rea* requirements.¹²² Standard criminal law doctrine holds that a crime is only committed if there is both a criminal act (*actus reus*), and if there is proof of intention, knowledge, recklessness, or negligence (*mens rea*).¹²³ In practice, however, over half of all criminal offences in English law are strict liability offences, for which little or no fault at all is required. This contrasts with the rhetoric of English criminal law that emphasises the *mens rea* of intention or recklessness.¹²⁴ This tension cannot be explored further here.¹²⁵

Thirdly, the notion of agency as responsibility is reflected in various criminal defences as a matter of substantive criminal law, namely as a reduction or denial of offenders’

¹¹⁸ Lacey and Pickard, ‘From the Consulting Room’ (n 34), 16.

¹¹⁹ AP Simester and others, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (6th edn, Hart 2016), 115.

¹²⁰ However, in terms of substantive legal doctrine, non-insane automatism is a denial of the *actus reus*, rather than a plea that the defendant’s actions were justified or excused.

¹²¹ Horder (n 100), 100-104.

¹²² Lacey, *In Search of Criminal Responsibility* (n 31), 28-31.

¹²³ Bottoms and others (n 38), 375.

¹²⁴ Ashworth and Horder (n 31), 160, 180.

¹²⁵ For a critical appraisal of strict liability see AP Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005).

responsibility for the offence through justifications and excuses for their conduct.¹²⁶ Some defences are available in situations where humans were not fully responsible in exercising agency, i.e. where the normal conditions of choice or opportunity-taking were disrupted by external circumstances or the behaviour of third parties, for instance in situations of duress.¹²⁷ Other defences are based on exempting conditions, where the absence of the requisite cognitive and/or volitional capacities means that an individual should not be held responsible for their conduct, such as the insanity defence or defence of infancy.¹²⁸ Du Bois-Pedain suggests that in a constitutional liberal democracy, the reason for wanting not only *mens rea* but also exculpatory defences to matter at the adjudication stage is that:

[R]elating to each other as moral agents (as opposed to something like harm-causing automatons) requires us to be responsive to the reasoning processes and the motives of the other person – to her culpability, above and beyond the kinds of mental states that made her conduct a token of the exercise of her agential powers in the world.¹²⁹

In other words, various rules of substantive criminal law take the offender's agency as responsibility seriously, underpinned by the commitment of a liberal constitutional democracy to engage with offenders as moral agents.

Agency in respect of criminal defences is equally important as a matter of criminal procedure. The European Court of Human Rights (ECtHR) has established that the Article 6 European Convention on Human Rights (ECHR) right to fair trial in criminal proceedings requires an adversarial process and equality of arms between the prosecution and the

¹²⁶ Lacey, *In Search of Criminal Responsibility* (n 31), 31.

¹²⁷ For a general overview of excusatory defences see Horder (n 100), ch 7.

¹²⁸ Ashworth and Horder (n 31), ch 5.2, 139-146; Horder (n 100), 158-165. The present state of English substantive criminal law does not permit a logically derived scheme for categorising defences. Insanity and infancy entail a lack of criminal capacity of the defendant and are thus not defences in the sense of providing a justification or excuse for the criminal conduct.

¹²⁹ A du Bois-Pedain, 'Punishment as an Inclusionary Practice: Sentencing in a Liberal Constitutional State' in A du Bois-Pedain, M Ulväng and P Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017), 208.

defendant.¹³⁰ The right to an adversarial process in a criminal case entails that ‘both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.’¹³¹ To accommodate both civil law jurisdictions with a predominantly inquisitorial system, and common law jurisdictions with a predominantly adversarial system, the ECtHR has said that there are various ways in which national law may secure that the right to an adversarial trial, and the requirements it encompasses, are met. Whatever method is chosen, national law ‘should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon.’¹³² This way, the ECtHR requires that both civil law and common law member states adjust their criminal proceedings accordingly, while allowing scope for the states to keep their own pre-established norms and regulations.¹³³ Commenting on the independent and conflicting functions of the protagonists in an adversarial model, Damaska states that it is the ‘prosecutor’s role ... to obtain a conviction’ and it is ‘the defendant’s role ... to block this effort’.¹³⁴ It is thus a key aspect of adversarialism that the defendant is called upon to act in his own interest in the criminal trial. Consequently, it is incumbent on the defendant to raise defences and deliver proof of them with the aim of securing a lesser charge or complete acquittal. This can be considered a manifestation of defendant agency – albeit most often through the defence lawyer

¹³⁰ *Brandstetter v Austria* (1993) 15 EHRR 378 [66]; *Belziuk v Poland* (2000) 30 EHRR 614 [37]; *Fitt v UK* (2000) 30 EHRR 480 [44]; *Jasper v UK* (2000) 30 EHRR 441 [51]; *Rowe and Davis v UK* App no 28901/95 (ECtHR, 16 February 2000) [60]; *IJL, GMR and AKP v UK* (2001) 33 EHRR 11 [112]; *PG and JH v UK* (2008) 46 EHRR 51 [69].

¹³¹ *Brandstetter v Austria* (n 130) [66]-[67]; *Lobo Machado v Portugal* (1997) 23 EHRR 79 [31]; *Fitt v UK* (n 130) [44]; *Jasper v UK* (n 130) [51]; *Rowe and Davis v UK* (n 130) [60].

¹³² *Brandstetter v Austria* (n 130), [67].

¹³³ M Langer, ‘The Long Shadow of the Adversarial and Inquisitorial Categories’ in MD Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014), 901. For an overview and discussion of the essential characteristics of both systems see e.g. J Jackson, ‘The Effect of Human Rights on Criminal Evidentiary Processes: Convergence, Divergence or Realignment?’ (2005) 68 *Modern Law Review* 737, 742-744.

¹³⁴ M Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’ (1973) 121 *University of Pennsylvania Law Review* 506, 563.

– at the criminal trial. A more general discussion of instances of defendant agency in the criminal trial follows below.¹³⁵

The same notion of responsible moral agency central to criminalisation is one of the underlying premises of punishment in retributive theories of punishment, which in their modern form are most commonly known as desert theory.¹³⁶ In desert theory there is a strong connection between the justification of punishment, the attribution of responsibility for the offence, and the appropriateness of blame. The central idea in desert theory is that punishing an offender in accordance with their deserts can only be justified if the offender is a moral agent who is responsible and thus blameworthy for their offence.¹³⁷ To regard offenders as agents who deserve punishment is to regard them as responsible for their actions. Even though desert theory has long been viewed as the main account of punishment compatible with respect for offenders as responsible moral agents, Chapter 3 will demonstrate how Lacey and Pickard's account of punishing with forgiveness distances itself from the practice of blaming that characterises desert theory, while still emphasising respect for offenders as responsible moral agents.¹³⁸

¹³⁵ Section 1.2.2.

¹³⁶ See Ashworth, 'Desert' (n 48).

¹³⁷ JG Murphy, 'Marxism and Retribution' (1973) 2 *Philosophy and Public Affairs* 217; von Hirsch, *Doing Justice* (n 32); von Hirsch, *Censure and Sanctions* (n 33), ch 2, specifically 9-14; Deigh (n 32), 18; J Gardner, 'Punishment - in Proportion and in Perspective' in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Clarendon Press 1998), 35; Duff, 'Punishment, Communication, and Community' (n 103), 50; Duff, *Punishment, Communication, and Community* (n 33), 27-30, 130; von Hirsch and Ashworth (n 43), ch 2, specifically 13, 17-19, 24-27; Brudner (n 32), ch 1; Duff, 'Punishment, Retribution and Communication' (n 22), 126.

¹³⁸ Lacey and Pickard, 'From the Consulting Room' (n 34); Lacey and Pickard, 'To Blame or to Forgive?' (n 34).

1.2.2 Agency as a basis for participation in the criminal process

Certain instances of defendant agency can be found in the criminal process, i.e. the phase of crime investigation, prosecution, and the contested criminal trial.¹³⁹ This section highlights certain procedural rights that can be said to be underpinned, at least in part, by the defendant's agency.

Suspects/defendants can exercise agency in a positive manner by participating in the criminal process. In the investigation stage, a suspect/defendant can choose to cooperate with the police. He may consent to be searched,¹⁴⁰ confess and provide evidence, or ask for other offences to be taken into consideration.¹⁴¹ In the adjudication stage, the adversarial nature of criminal proceedings ensures participation of the defendant through the exercise of his defence rights. The basic premise of the adversarial trial in a criminal case is that both prosecution and defence can state their arguments before a judge and refute the other parties' arguments.¹⁴² Another example of positive agency is the possibility of waiving one's procedural rights. The waiver of certain rights constitutes an expression of self-determination, as defendants are given the power to decide whether or not to invoke the protection of a certain right. The ECtHR has accepted that parties can waive certain procedural rights under Article 6 ECHR, including the right to a public hearing,¹⁴³ the right to attend the appeal hearing and to defend oneself in

¹³⁹ Dubber (n 35), 85.

¹⁴⁰ See Police and Criminal Evidence Act 1984, Code A (2015), 1.5; Campbell, Ashworth and Redmayne (n 91), 87.

¹⁴¹ See Code for Crown Prosecutors (2018), para 9.7; Sentencing Council, *Offences Taken Into Consideration and Totality: Definitive Guideline* (2012).

¹⁴² See ECtHR cases in n 131. See also M Chiavario, 'Private Parties: the Rights of the Defendant and the Victim' in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002), 568; Assy (n 88), 11.

¹⁴³ *Håkansson and Sturesson v Sweden* (1991) 13 EHRR 1 [66].

person,¹⁴⁴ and the right to appear at trial.¹⁴⁵ Entering a guilty plea also constitutes a waiver of rights.¹⁴⁶ While the guilty plea is situated in the pre-trial or trial stage, it can nonetheless be considered an instance of defendant agency pertaining to sentence because entering a guilty plea may result in a sentence discount of up to a third.¹⁴⁷ Chapter 8 will explore whether the guilty plea is a true instance of defendant agency in respect of sentence, or whether it undermines agency because of the significant pressure put on the defendant.

Defendants can also exercise agency in a negative manner, namely by refusing to participate actively in the criminal process. Negative agency encompasses the idea that a defendant is free not to participate and cannot be compelled to cooperate with the state's prosecution against him. Owusu-Bempah argues that this negative agency is increasingly compromised in the English criminal process.¹⁴⁸ The defendant is often compelled to participate actively in the English criminal process, and subject to penalties attached to non-cooperation. Owusu-Bempah points to an increasingly restrictive notion of the privilege against self-incrimination,¹⁴⁹ legislative reforms to the right to silence,¹⁵⁰ and defence disclosure obligations.¹⁵¹ She concludes that respect for the defendant's autonomy and rights of defence have been trumped by the pursuit of efficient fact-finding.¹⁵²

¹⁴⁴ *Poitrinol v France* (1994) 18 EHRR 130 [31].

¹⁴⁵ *Sejdovic v Italy* (2006) 42 EHRR 17 [86]; *Hermi v Italy* (2008) 46 EHRR 46 [73].

¹⁴⁶ *Scoppola v Italy (No 2)* (2010) 51 EHRR 12 [135]; *Natsvlishvili and Togonidze v Georgia* App no 9043/05 (ECtHR, 29 April 2014) [91]. For a critique of the inconsistencies in the ECtHR case law on Article 6 ECHR see R Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Hart 2014).

¹⁴⁷ CJA 2003, s 144(1); Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2017).

¹⁴⁸ Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35).

¹⁴⁹ *Saunders v UK* (1997) 23 EHRR 313.

¹⁵⁰ See e.g. Criminal Justice and Public Order Act 1994, ss 34-39 regarding inferences that can be made from the accused's silence.

¹⁵¹ Criminal Procedure and Investigations Act 1996, ss 5-6D; Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35), ch 5-7.

¹⁵² Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35), 183.

Owusu-Bempah points out a painful truth about defendant agency in the investigation, prosecution, and trial stage. In many ways, her findings are also relevant to offender agency in respect of the guilty plea since it is situated in the pre-trial or trial stage, but also pertains to sentence since it can warrant a discount of up to a third.¹⁵³ However, with the exception of the guilty plea, Owusu-Bempah's argument concerning the defendant's agency in the criminal process cannot be transplanted to the sentencing stage for two reasons. First, the specific problems surrounding defendant/offender agency differ depending on the stage of the criminal proceedings. During the investigation, prosecution, and trial stage, the presumption of innocence and privilege against self-incrimination are of fundamental importance, whereas this is no longer the case at sentencing when guilt has been established. Secondly, at sentencing there is no obligation on the state to ensure the offender's cooperation, unlike in the investigation, prosecution, and trial stage, where it is the state's duty to carry out efficient fact finding. The offender's agency in current sentencing practice is not undermined because the offender is forced to participate, quite the contrary. Current sentencing practice is marked by a limitation of offenders' positive agency, which is different from the increasing denial of defendants' negative agency at earlier stages in the criminal process.

1.2.3 Agency in the implementation of the sentence

In the sentence implementation phase and the phase thereafter, the concept of agency has been invoked in connection with 'responsibilisation'. Responsibilisation is a term developed in the governmentality literature, which can be traced back to the writings of Foucault.¹⁵⁴ In the

¹⁵³ See n 147.

¹⁵⁴ See e.g. M Foucault, *Discipline and Punish* (Allen Lane 1977); M Foucault, 'The Subject and Power' in HL Dreyfus and P Rabinow (eds), *Michel Foucault Second Edition* (Chicago University Press 1982); G Burchell, C Gordon and P Miller (eds), *The Foucault Effect: Studies in Governmentality, with Two Lectures by and an Interview with Michel Foucault* (University of Chicago Press 1991). See also N Rose and P Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43 *British Journal of Sociology* 172; A Barry, T

context of governmentality, responsabilisation has been described as ‘the process whereby subjects are rendered individually responsible for a task which previously would have been the duty of another – usually a state agency – or would not have been recognized as a responsibility at all.’¹⁵⁵ Responsibilisation has been associated with neo-liberal political discourses, characterised by the assumption that under the governance of the welfare state, individuals and communities had ceded their responsibility of self-government to the state. Responsibilisation is then understood as the process whereby the government ‘passes back’ those responsibilities to individuals and communities in order to shrink the realm of the neo-liberal state.¹⁵⁶

In criminal justice, responsabilisation has been conceptualised in various ways, not all of which can be explored here.¹⁵⁷ Suffice it to say that in any version of responsabilisation, there is an emphasis on individual responsibility. The focus here is on responsabilisation in the context of corrections and punishment, where the term has been described as ‘the process through which delinquents are to be transformed and ethically reconstructed into prudential and self-governing individuals who take full responsibility for their lives and actions and align themselves with the neo-liberal project of governing.’¹⁵⁸ Since the 1970s, which saw the decline of the old rehabilitative ideal,¹⁵⁹ there has been a clear shift in crime control and criminal justice from reforming offenders as a central role of the welfare state, towards delivering justice to protect the public.¹⁶⁰ In correctional institutions, responsabilisation

Osborne and N Rose, *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (University of Chicago Press 1996); Garland, ‘“Governmentality” and the Problem of Crime’ (n 36).

¹⁵⁵ O'Malley (n 36), 276.

¹⁵⁶ Ibid.

¹⁵⁷ Phoenix and Kelly (n 36), 421-425.

¹⁵⁸ Gradin Franzén (n 36), 252-253.

¹⁵⁹ See e.g. R Martinson, ‘What Works? - Questions and Answers about Prison Reform’ (1974) 35 *The Public Interest* 22; A Bottoms and W McWilliams, ‘A Non-Treatment Paradigm for Probation Practice’ (1979) 9 *British Journal of Social Work* 159; FA Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (Yale University Press 1981).

¹⁶⁰ Garland, ‘Probation and the Reconfiguration of Crime Control’ (n 36), 9.

entailed that the individual took responsibility for their own rehabilitation through self-governance.¹⁶¹ Responsibilisation in this sense emerged as a response to the welfare state, which seemingly made excuses for criminal behaviour by attributing criminal conduct to adverse social conditions, rather than emphasising the individual's rational choice.¹⁶² Central to the rational choice model is the view that the offender is a free and thus 'voluntary' agent, who has the choice to commit or desist from crime.¹⁶³ A rational approach to crime entailed a calculation of risk and an attempt to manage it in cost-effective ways.¹⁶⁴ Viewing offenders as rational agents¹⁶⁵ deflected attention from the social causes of offending.¹⁶⁶ Factors such as class, race, and gender, which were previously considered to be foundations of or contributing to crime in causal criminology, were then excluded from consideration except insofar as they increased risk.¹⁶⁷ The practice of rehabilitation became increasingly inscribed in a framework of risk rather than a framework of welfare, and was presented as 'a targeted intervention inculcating self-controls, reducing danger, enhancing the security of the public.'¹⁶⁸ Responsibilisation aimed to transform the individual 'from deviant citizens' into "'ideal" non-deviant, neo-liberal citizens: that is to say, rational, risk-calculating individuals who actively

¹⁶¹ Gradin Franzén (n 36), 252.

¹⁶² O'Malley (n 36), 277.

¹⁶³ P O'Malley, 'Risk, Power and Crime Prevention' (1992) 21 *Economy and Society* 252, 264-265.

¹⁶⁴ Garland, 'Probation and the Reconfiguration of Crime Control' (n 36), 9.

¹⁶⁵ D Garland, 'Penal Modernism and Postmodernism' in TG Blomberg and S Cohen (eds), *Punishment and Social Control* (Enl. 2nd edn, Aldine de Gruyter 2003), 55.

¹⁶⁶ O'Malley, 'Risk, Power and Crime Prevention' (n 163).

¹⁶⁷ Ibid, 265.

¹⁶⁸ D Garland, *The Culture of Control* (Oxford University Press 2001), 176. See also Garland, 'Probation and the Reconfiguration of Crime Control' (n 36), 4. For further critical analysis of this risk-based conception of rehabilitation see for instance K Hannah-Moffat, 'Moral Agent or Actuarial Subject: Risk and Canadian Women's Imprisonment' (1999) 3 *Theoretical Criminology* 71; G Robinson, 'Risk Management and Rehabilitation in the Probation Service: Collision and Collusion' (1999) 38 *Howard Journal of Criminal Justice* 421; H Kemshall, 'Effective Practice in Probation: An Example of 'Advanced Liberal' Responsibilisation?' (2002) 41 *Howard Journal of Criminal Justice* 41; G Robinson, 'Exploring Risk Management in the Probation Service: Contemporary Developments in England and Wales' (2002) 4 *Punishment and Society* 5; K Hannah-Moffat, 'Criminogenic Need and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty' (2005) 7 *Punishment and Society* 29

aspire to full, law-abiding social participation.’¹⁶⁹ In short, responsabilisation is linked to both the neo-liberal school of thought and the increasing emphasis on risk as a way of governing.¹⁷⁰

The process of responsabilisation has been rightly criticised for its association with neo-liberal political discourses.¹⁷¹ The over-emphasis on individual responsibility neglects structural properties and adversities as contributing causes of offending behaviour and dismisses the state’s responsibility towards actors. Nonetheless, it is possible to see the value of responsabilisation and agency, to the extent that it does not negate structural social and economic causes of crime and does not deny the offender’s status as a moral agent by coercing them to conform to a neo-liberal standard of the ideal citizen for the wider good of society. O’Malley writes that ‘[a]s a theoretical tool, it is perhaps too readily assumed that responsabilization is something foisted on the unwilling and that it invariably represents a cynical or calculated exercise in relieving government of its responsibilities.’¹⁷²

In contrast to the decline of the old rehabilitative ideal and the ‘nothing works’ rhetoric that dominated the 1970s,¹⁷³ rehabilitation, therapeutic approaches, and probation seem to have enjoyed a renewed legitimacy since the 1980s.¹⁷⁴ In this more modern conception, rehabilitation aims to achieve behavioural change which ultimately leads to desistance from offending.¹⁷⁵ The desistance literature emphasises the importance of the offender’s agency as

¹⁶⁹ Phoenix and Kelly (n 36), 424.

¹⁷⁰ O’Malley, ‘Responsibilization’ (n 36), 277.

¹⁷¹ See e.g. Rose (n 36); Gray (n 36).

¹⁷² O’Malley, ‘Responsibilization’ (n 36), 277.

¹⁷³ See n 159.

¹⁷⁴ See e.g. Cullen and Gilbert (n 39); J McGuire, *What Works: Reducing Reoffending: Guidelines from Research and Practice* (Wiley 1995); CR Hollin, ‘Treatment Programs for Offenders: Meta-Analysis, "What Works," and Beyond’ (1999) 22 *International Journal of Law and Psychiatry* 361; J McGuire, ‘Maintaining Change: Converging Legal and Psychological Initiatives in a Therapeutic Jurisprudence Framework’ (2003) 4 *Western Criminology Review* 108; P Raynor and G Robinson, ‘Why Help Offenders? Arguments for Rehabilitation as a Penal Strategy’ (2009) 1 *European Journal of Probation* 3.

¹⁷⁵ McNeill (n 38), 45.

a positive element that will help offenders cease to commit crimes in the future.¹⁷⁶ The notion of agency in this context refers to an individual's ability to decide to start desisting and take action to that end, thus emphasising the cognitive component of desistance.¹⁷⁷ The desistance paradigm for offender management implies a shift in perspective from the old treatment paradigm, by re-emphasising the offender's viewpoint. The desistance paradigm does not reject treatment as such, but sees professional intervention in the context of responding to crime as being 'subservient to a wider process that belongs to the desister'.¹⁷⁸ This paradigm avoids some of the criticisms voiced against the traditional conception of responsabilisation, notably ignoring structural causes of crime, by advocating for 'a rights-based approach to rehabilitation which entails that both the offender makes good to society and that, where injustice has been suffered by the offender, society makes good to the offender.'¹⁷⁹

The case for a desistance paradigm is further supported by the work of what has been labelled 'new rehabilitationists'.¹⁸⁰ They advocate for a rights-based approach to rehabilitation, which is in contrast to the instrumental version of rehabilitation that emphasises public safety and risk management. The principles of the new rehabilitationists include the state's duty to provide rehabilitative programmes; setting limits of proportionality on the intrusions of rehabilitation; maximising voluntariness in the process of rehabilitation; and using prison only as a last resort.¹⁸¹ In the new rehabilitative framework, the offender is not perceived 'as the

¹⁷⁶ See n 38.

¹⁷⁷ Shapland and Bottoms, 'Desistance from Crime and Implications for Offender Rehabilitation' (n 38), 753.

¹⁷⁸ McNeill (n 38), 46.

¹⁷⁹ Ibid, 56.

¹⁸⁰ Arguably, this stream in the rehabilitation literature should no longer be considered 'new', since the label was coined in the 1990s. See for instance Cullen and Gilbert (n 39); Rotman (n 39); Cullen and Gendreau (n 39).

¹⁸¹ See Lewis (n 39).

passive recipient of treatment, but rather as an active agent who must engage fully in order to benefit from treatment.¹⁸²

Mixed or quasi-retributive theories equally emphasise the importance of treating offenders as responsible moral agents in the implementation of the sentence. Even though he labels himself a retributivist,¹⁸³ Duff is sometimes placed in the category of new rehabilitationists,¹⁸⁴ as he conceives of punishment as an effort in ‘transparent persuasion’.¹⁸⁵ On Duff’s account, probation communicates censure, in the sense that treatment programmes are a response to criminal wrongdoing. But equally they aim to persuade the offender to recognise that he has done wrong and the implications of the wrong, which will in turn persuade him to recognise that he needs to change his behaviour in order to desist from crime in the future.¹⁸⁶ Offender agency is also an important value in Roberts and Dagan’s quasi-retributive¹⁸⁷ model of dynamic or responsive penal censure.¹⁸⁸ Building upon Duff’s communicative conception of punishment,¹⁸⁹ Roberts and Dagan argue that responsive censure requires that the appropriate level of censure is not rigidly fixed at sentencing, but should be reviewed during the implementation of the sentence, and that the sentence should be adjusted

¹⁸² Robinson, ‘Late-Modern Rehabilitation: The Evolution of a Penal Strategy’ (n 39), 438.

¹⁸³ Duff, *Punishment, Communication, and Community* (n 33), 27; RA Duff, ‘Probation, Punishment and Restorative Justice: Should Al Turism be Engaged in Punishment?’ (2003) 42 *Howard Journal of Criminal Justice* 181, 190. See Chapter 3.

¹⁸⁴ McNeill (n 38), 40-41; Robinson, ‘Late-Modern Rehabilitation: The Evolution of a Penal Strategy’ (n 39), 438.

¹⁸⁵ Duff, *Punishment, Communication, and Community* (n 33), 58, 81-82, 101, 107.

¹⁸⁶ *Ibid*, 101.

¹⁸⁷ Their model is properly labelled ‘quasi-retributive’ because the authors suggest that the amount of punishment an offender deserves is affected by his subsequent conduct with respect to his crime and sentence (Roberts and Dagan (n 37), 141, footnote 3). This contrasts with a pure retributive approach to sentencing, as advanced by von Hirsch in *Doing Justice*, on which sentence severity is determined solely by reference to the seriousness of the crime (von Hirsch, *Doing Justice* (n 32)).

¹⁸⁸ Roberts and Dagan (n 37); Dagan and Roberts (n 37).

¹⁸⁹ See e.g. Duff, *Punishment, Communication, and Community* (n 33); RA Duff and others (eds), *The Trial on Trial: Volume 2: Judgment and Calling to Account* (Hart 2006). See Chapter 3.

accordingly. If the offender demonstrates in his conduct post-conviction and post-admission to prison that he has heard the message of censure and responded to it in a way expected of a responsible moral agent, then this should be a ground for releasing the offender early from prison.¹⁹⁰ In contrast to a static censure approach,¹⁹¹ a dynamic censure model takes into account the offender's capacity and efforts to undertake action related to the offence for which censure was originally expressed,¹⁹² thus acknowledging the offender's agency and capacity to participate in his own moral evolution.¹⁹³

Finally, the emerging field of therapeutic jurisprudence (TJ) also lends further support to the idea that rehabilitation and desistance, and the offender's agency and responsibility in that context, need not be hijacked for neo-liberal purposes.¹⁹⁴ As will be argued later in the thesis,¹⁹⁵ in theory TJ emphasises rehabilitation and desistance in a manner that is respectful of the offender's agency. TJ explicitly rejects paternalism and coercion,¹⁹⁶ and thereby seeks to distance itself from the old rehabilitative ideal.¹⁹⁷ At least in theory, TJ is intentionally focussed on understanding therapeutic or anti-therapeutic effects as they are perceived by the individual.¹⁹⁸ However, as Chapter 4 will argue, the manner in which therapeutic principles have been applied in practice so far is not devoid of coercion, which impacts on the scope for

¹⁹⁰ Roberts and Dagan (n 37), 149-158; Dagan and Roberts (n 37), 10-19. Why certain post-offence conduct should be a ground for mitigation at sentencing on a dynamic censure-based account see JV Roberts and H Maslen, 'After the Crime: Post-Offence Conduct and Penal Censure' in AP Simester, A du Bois-Pedain and U Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014).

¹⁹¹ Roberts and Dagan (n 37), 145-147; Dagan and Roberts (n 37), 3-10.

¹⁹² For an overview of which actions post-conviction and during the implementation of sentence are relevant on a responsive censure account see Roberts and Dagan (n 37), 155-157.

¹⁹³ Ibid, 158-159; Dagan and Roberts (n 37), 13.

¹⁹⁴ See n 45.

¹⁹⁵ Chapter 4.

¹⁹⁶ Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence' (n 40), 518; Wexler, 'New Directions in Therapeutic Jurisprudence' (n 40), 762; Wexler and Winick, *Law in a Therapeutic Key* (n 40), xvii; Winick and Wexler (n 40), 484.

¹⁹⁷ Nolan (n 40), 186-187.

¹⁹⁸ Ibid, 186.

offender agency in a therapeutic framework. In short, some of the renewed attention to rehabilitation and desistance is premised on acknowledging an offender's capacity for moral choice, and underscores the idea that offenders can take responsibility and use their decision-making power to make changes in their life and desist from crime.

1.3 Victim participation at sentencing

Over the last half century, there has been an increase in scholarly attention to and advocacy for victims' rights in the criminal process.¹⁹⁹ The promotion of victims' interests has led to the emergence of the field of RJ, and has driven radical policy development in respect of victims' service and procedural rights in the criminal justice system, which are all reforms that purport to enhance justice for victims.²⁰⁰ As the thesis focusses on offenders rather than victims, this section does not aim to address all the complex normative issues arising in respect of victim participation at sentencing, which have already been the subject of previous scholarship.²⁰¹ It suffices to set out briefly the extent of victims' rights in current English sentencing practice, and to highlight the discrepancy between attention to agency at sentencing in respect of victims and the comparative lack thereof in respect of offenders.

It is useful to distinguish victims' rights to services from victims' procedural rights.²⁰² Service rights refer to provision of services to victims, which generally do not affect the procedure. In England and Wales, the Code of Practice for Victims of Crime (Victims' Code) sets out various obligations on criminal justice actors, notably the police and the Crown

¹⁹⁹ See n 41.

²⁰⁰ C Hoyle, 'Victims, the Criminal Process and Restorative Justice' in M Maguire, R Morgan and R Reiner (eds), *Oxford Handbook of Criminology* (5th edn, Oxford University Press 2012), 398.

²⁰¹ See n 41.

²⁰² Ashworth, 'Some Doubts about Restorative Justice' (n 41), 281ff; Hoyle (n 200), 407; Ashworth, *Sentencing and Criminal Justice* (n 26), 438 ff.

Prosecution Service (CPS), to provide services to victims.²⁰³ Service rights include the right to receive information on what to expect from the criminal justice system; the right to be referred to organisations supporting victims of crime; the right to be informed about the police investigation, for instance if the police arrests a suspect and subsequently releases him on bail; the right to be informed of the decision by the CPS to prosecute the suspect or not, or to give an out-of-court disposal; the right to be informed of the time, date, location, and outcome of the court hearings; the right to be informed of any appeal against conviction or sentence; the right to be informed of the right to make a victim personal statement (VPS).²⁰⁴

The Victims' Code itself does not employ the language of rights. Instead, it speaks of 'key entitlements' and sets out a series of obligations of service providers,²⁰⁵ but failure to deliver those obligations does not, in itself, result in liability to legal proceedings.²⁰⁶ Despite the fact that the Victims' Code does not create enforceable rights for victims, the term 'victims' rights' is widespread. This is evidenced by the fact that certain government and Victim Support websites employ the language of 'rights' when detailing the level of service victims can expect from the criminal justice system, and when referring to the Victims' Code as a document that explains victims' 'rights'.²⁰⁷ The terms 'victims' service rights' and 'victims' procedural

²⁰³ Ministry of Justice, *Code of Practice for Victims of Crime* (2015). The Victims' Code is the main mechanism to transpose the EU Victims' Directive 2012/20/EU into domestic legislation (Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime). See also Victim Support, *The Rights of Victims of Crime* (1995); an overview of the five main principles of this report can be found in H Reeves and K Mulley, 'The New Status of Victims in the UK: Opportunities and Threats' in A Crawford and J Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Routledge 2000), 129-130.

²⁰⁴ Ministry of Justice (n 203).

²⁰⁵ Ibid.

²⁰⁶ House of Commons Library, *Rights of Victims of Crime* (CDP-2018-0066, 2018), 2.

²⁰⁷ See e.g. 'After a Crime: Your Rights' (*UK Government*) <<https://www.gov.uk/your-rights-after-crime>> accessed 20 December 2018; 'Your Rights' (*Victim Support*) <<https://www.victimsupport.org.uk/help-and-support/your-rights>> accessed 20 December 2018; 'Victims' Right to Review Scheme' (*Crown Prosecution Service*) <<https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme>> accessed 20 December 2018.

rights' are also widely accepted in legal scholarship.²⁰⁸ Consequently, this thesis will continue to use these terms.

While service rights do little to include the victim in the criminal process, procedural rights generally entail some form of active victim participation. Procedural rights include the victim's right to be consulted on the decision whether or not to prosecute, whether the suspect should be detained pre-trial or released on bail, on the acceptance of a guilty plea in return for sentence discount, and the sentencing decision.²⁰⁹ The focal point of victim procedural rights in respect of sentencing in England and Wales is the use of VPSs.²¹⁰ The Victims' Code states that the police have to give victims the opportunity to make a VPS, and allow them to indicate their preference as to having the VPS read aloud or played in court if a suspect is found guilty.²¹¹ The Victims' Code states the following on the purpose of the VPS:

A Victim Personal Statement (VPS) gives you an opportunity to explain in your own words how a crime has affected you, whether physically, emotionally, financially or in any other way. This is different from a witness statement about what happened at the time, such as what you saw or heard. The VPS gives you a voice in the criminal justice process. However you may not express your opinion on the sentence or punishment the suspect should receive as this is for the court to decide.²¹²

The Criminal Practice Direction sets out the approach courts should take when presented with a VPS, including that the court must pass a sentence that it deems appropriate, taking into consideration the circumstances of the offence and the offender and, so far as the court deems it appropriate, the impact on the victim. The opinions of victims or their close relatives as to

²⁰⁸ See n 202.

²⁰⁹ Ashworth, 'Some Doubts about Restorative Justice' (n 41), 282.

²¹⁰ Sanders and others (n 41), 449. VPS schemes are used in other common law jurisdictions as well: see A Sanders, *Taking Account of Victims in the Criminal Justice System: A Review of the Literature* (Scottish Office Central Research Unit, 1999).

²¹¹ Ministry of Justice (n 203), para 1.13.

²¹² Ibid, para 1.12.

what the sentence should be are therefore irrelevant, unlike the consequences of the offence on them. Victims should be advised of this. If, despite the advice, opinions regarding the sentence are included in the statement, the court should pay no attention to them.²¹³

Opinions on the value of VPSs, and more broadly victim participation at sentencing, are divided. Proponents of victim participation have given a range of justifications for the use of VPSs. A first justification is that a VPS can provide sentencers with information about the harm, i.e. the physical, psychological, and financial impact of the crime, which in turn allows them to determine the appropriate sentence.²¹⁴ The VPS thus enables the interests and views of the victim to be taken into account and can enhance the quality of the sentencing decision. A second justification centres on the beneficial effects for the victim of making a statement. It is said that a VPS presents an opportunity to give victims a voice in a system where they often lack one.²¹⁵ This can help victims recover from the crimes committed against them, have therapeutic effects, and possibly even be empowering for them.²¹⁶ Thirdly, it has been argued that letting victims participate at sentencing can improve their perception of fairness of sentencing, increase victim satisfaction with the sentencing outcome, and in turn ensure

²¹³ Criminal Practice Direction (2015, as amended April 2019) <<https://www.judiciary.uk/wp-content/uploads/2019/03/crim-pd-amendment-no-8-consolidated-mar2019.pdf>> accessed 22 August 2019 (CPD 2015), VII Sentencing, F.3, 160-161.

²¹⁴ Victim Support (n 203); E Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' [1999] Criminal Law Review 545; Reeves and Mulley (n 203), 129-130; E Erez, 'Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements' in A Crawford and J Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000); Edwards, 'Victim Participation in Sentencing: The Problems of Incoherence' (n 97), 41-43; Edwards, 'An Ambiguous Participant' (n 97), 978; P Cassell, 'In Defence of Victim Impact Statements' (2009) 6 Ohio State Journal of Criminal Law 611, 619-621; Victim Support, *Victims' Justice? What Victims and Witnesses Really Want from Sentencing* (2010), 21.

²¹⁵ Victim Support, *Victim of the System: The Experiences, Interests and Rights of Victims of Crime in the Criminal Justice Process* (2017), 19; Katz (n 41).

²¹⁶ Erez, 'Who's Afraid of the Big Bad Victim?' (n 214); Erez, 'Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements' (n 214); Edwards, 'Victim Participation in Sentencing: The Problems of Incoherence' (n 97), 43; Edwards, 'An Ambiguous Participant' (n 97), 977-978; Cassell (n 214), 621-623; Katz (n 41), 210-212.

cooperation with the criminal justice system.²¹⁷ Fourthly, a VPS may allow the victim to communicate the effects of the crime to the offender.²¹⁸ A fifth argument is that a VPS can help to inform and educate the offender about the impact of his crime, which can in turn lead to greater acceptance of responsibility and rehabilitation.²¹⁹ Finally, some authors have rooted victims' rights – and even duties – to participate at sentencing in the victim's status as a citizen.²²⁰

Arguments against victim participation at sentencing can be grouped together into roughly three categories. A first argument is that the victim does not have a legitimate interest in determining the punishment imposed.²²¹ A second set of arguments pertains to sentencing principles. The VPS may jeopardise the objectivity of the sentencing process. The content and tone of a VPS may be very emotive, which may prejudice the sentencer against the defendant and in turn lead to higher sentences, and a VPS may allow inappropriate factors to impact the sentence.²²² Some victims may feel particularly vengeful, others may be forgiving. Giving weight to these feelings risks disparate and disproportionate sentencing, and jeopardises the right to a fair hearing by an independent and impartial tribunal.²²³ A final set of arguments suggests that VPSs do not achieve their intended purposes, and may even impact victims

²¹⁷ Erez and Tontodonato (n 97); Edwards, 'Victim Participation in Sentencing: The Problems of Incoherence' (n 97), 43; Cassell (n 214), 624-625; Katz (n 41), 208-210.

²¹⁸ Erez, 'Who's Afraid of the Big Bad Victim?' (n 214); JV Roberts, 'Victim Impact Statements and the Sentencing Process: Enhancing Communication in the Courtroom' (2003) 47 *Criminal Law Quarterly* 365.

²¹⁹ MD Dubber, *Victims in the War on Crime: the Use and Abuse of Victims' Rights* (New York University Press 2002), 338; Cassell (n 214), 623-624.

²²⁰ SE Marshall, 'Victims of Crime: Their Station and its Duties' (2005) 7 *Critical Review of International Social and Political Philosophy* 104; J Kennedy, 'The Citizen Victim: Reconciling the Public and Private in Criminal Sentencing' (2019) 13 *Criminal Law and Philosophy* 83.

²²¹ Ashworth, 'Some Doubts about Restorative Justice' (n 41); Ashworth, 'Responsibilities, Rights, and Restorative Justice' (n 97), 584-585.

²²² D Hall, 'Victims' Voices in Criminal Court: The Need for Restraint' (1991) 28 *American Criminal Law Review* 233.

²²³ Ibid; A Ashworth, 'Victim Impact Statements and Sentencing' [1993] *Criminal Law Review* 498; Ashworth, 'Responsibilities, Rights, and Restorative Justice' (n 97), 585-588; Campbell, Ashworth and Redmayne (n 91), 51.

negatively. Ashworth suggests that the VPS is no more than a ‘sweetener’, which tricks victims into thinking that their interests are being looked after, thus ensuring their participation with and satisfaction within the criminal justice system.²²⁴ Sanders et al argue that victim statements are rarely taken into account in decision-making and infrequently have an effect on the ultimate sentence.²²⁵ Some victims may have certain expectations, such as that their statement will have a significant impact on the sentence, and may be disappointed if this is not the case.²²⁶ This risks further traumatisation and secondary victimisation.

Part II will explore to what extent these arguments for and against victim participation are relevant to offender agency at sentencing. For now, it suffices to conclude that, regardless of whether one supports victims’ procedural rights at sentencing, the last decades have seen a significant expansion of victims’ rights to influence cautioning and charging decisions, plea negotiations, sentencing, parole, and release.²²⁷ Rossner observes that ‘[v]ictims are sometimes invited to give impact statements in selected cases, offenders rarely speak at all.’²²⁸ While the role of the victim has been the subject of various scholarly debates over the past few decades, the role of the offender is not frequently noted or questioned. The thesis does not argue that the expansion of victims’ rights at sentencing should be met with a similar increase in offenders’ rights. However, as a starting point, it should be noted that the scholarly focus on the question of the extent to which victims should be involved at sentencing is not matched by similar

²²⁴ A Ashworth, ‘Victims’ Rights, Defendants’ Rights and Criminal Procedure’ in A Crawford and J Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Routledge 2000).

²²⁵ Sanders and others (n 41); A Sanders, ‘Involving Victims in Sentencing: A Conflict with Defendants’ Rights?’ in E Cape (ed), *Reconcilable Rights? Analysing the Tension between Victims and Defendants* (Legal Action Group 2004), 101-102.

²²⁶ Sanders and others (n 41). See also Edwards, ‘An Ambiguous Participant’ (n 97), 979; Victim Support, *Victims’ Justice? What Victims and Witnesses Really Want from Sentencing* (n 214), 21; Roberts, ‘Listening to the Crime Victim’ (n 41), 371.

²²⁷ Hoyle (n 200), 411, 413.

²²⁸ Rossner (n 42), 967.

attention to the question of how far offenders should be actively engaged at sentencing. At least the latter question merits further consideration.

1.4 Conclusion

Two observations about the existing criminal justice literature highlight the gap this thesis seeks to fill. First, legal scholarship has focussed on various manifestations of defendant/offender agency in the substantive criminal law, in the criminal process, and in the implementation of sentences. By contrast, offender agency at sentencing is limited in practice, and is understudied and under-theorised. Prima facie, the inattention to offender agency at the point of sentencing creates a disjuncture between sentencing and other stages of the criminal process. The question arises on what grounds and to what extent offenders should exercise agency at sentencing. Secondly, the rather limited role for the offender at sentencing has thus far not been studied in depth, which is very different from the increased scholarly attention to and advocacy for victim participation. This thesis addresses this double gap in the literature, by focusing on agency at the intersection of a specific stage in the criminal justice process, namely sentencing, and a particular actor, namely the offender.

**PART I: ARGUMENTS FOR OFFENDER
AGENCY AT SENTENCING**

2 THE ROLE OF THE STATE IN PUNISHMENT

Part I undertakes a legal theoretical enquiry into possible arguments for allowing offenders to exercise agency at sentencing. In order to determine on what grounds and to what extent the offender should be allowed to exercise agency, other preliminary questions need to be answered about who has standing to determine what constitutes harm, whose role it is to set the appropriate form and level of punishment, and impose punishment. It is thus vital that any normative account of offender agency at sentencing be rooted in a larger political theory of the role of the state. Section 2.1 explores what the role of the state should be in the institution of legal punishment. There may be good reasons to suggest that authority to determine and allocate punishment cannot be viewed as separate from authority to deliver punishment. As the delivery of punishment can have an impact on severity and length of sentence, it cannot be maintained that the state retains control over the allocation of punishment when its delivery is in the hands of private actors.²²⁹ Nonetheless, the primary focus of the thesis, and therefore of this chapter, is the determination of the precise modes and levels of punishment allocated to the offender at sentencing.

A coherent theoretical foundation for the role of the state in punishment will have consequences for the accounts of punishment that can provide bases for offender agency at sentencing. Section 2.2 argues that restorative justice (RJ), despite its obvious focus on victim and, to a lesser extent, offender agency, is nonetheless rejected as a theoretical basis for offender agency at sentencing as it is incompatible with a state-centred account of punishment.

²²⁹ L Zedner, 'What is Lost When Punishment is Privatised?' in T Daems and T Vander Beken (eds), *Privatising Punishment in Europe?* (Routledge 2019), 169-170. See also A Harel, 'Why Only the State may Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions' (2008) 14 *Legal Theory* 113.

Section 2.2 further explores which theories of punishment can instead provide theoretical bases for offender agency, consistent with the theory of the state set out in Section 2.1.

2.1 Justifying the role of the state

There are some well-known instrumental justifications for why the state should determine and impose the criminal sanction. Social instability and chaos would ensue if the task of responding to injurious wrongdoing was solely in the hands of individual victims or their families. Such a system might lead to escalating feud, vendetta, and anarchy.²³⁰ MacCormick and Garland suggest that to safely determine, impose, and administer justified punishment, the institutionalisation of agencies of impartial judgement is required.²³¹ They argue that the public agencies of the state are better capable of approximating the ideal of providing an impartial response to wrongdoing than unregulated individuals.²³² The basic premise of this instrumental justification for the state's role in punishment is that the state is best capable or most qualified to determine and impose the appropriate criminal sanction efficiently, as the state is deliberative and impartial. However, on this instrumental account, the state has no unique standing. The determination and infliction of criminal sanctions could, in theory, be outsourced to non-state actors and agencies – such as private enterprises, local communities and voluntary associations of individuals – if they could do as good a job as the state.²³³

Another instrumental argument for putting the institution of punishment in the hands of the state is that it relieves victims of the burden of having to bring 'their' offenders to

²³⁰ N MacCormick and D Garland, 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish' in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Clarendon Press 1998); von Hirsch and Ashworth (n 43), 28; Campbell, Ashworth and Redmayne (n 91), 50.

²³¹ MacCormick and Garland (n 230), 27.

²³² Ibid, 27.

²³³ Ashworth, 'Responsibilities, Rights, and Restorative Justice' (n 97), 580; Harel (n 229), 117-120; Campbell, Ashworth and Redmayne (n 91), 50; Zedner, 'What is Lost When Punishment is Privatised?' (n 229), 170-171.

justice.²³⁴ But again, on this view, punishment could be delegated to non-state actors if they were mandated and given the resources to bring proceedings against the perpetrator, as this would serve the consequentialist aim of relieving the victim of the burden of having to do so. While instrumental accounts of the state's role can provide supplementary arguments for entrusting public officials with the powers to criminalise, prosecute, convict, and punish, those accounts alone are insufficient to explain why the state should have a monopoly of coercion in response to crime.²³⁵

Legal punishment presupposes a crime for which that punishment is imposed, and a criminal law that defines criminal prohibitions and injunctions. In turn, a system of criminal law presupposes an actor or entity with the authority to make the criminal law and enforce it by imposing punishment.²³⁶ The question of who has authority to exercise coercive power and punish is thus analytically inseparable from the issue of who has authority to criminalise.²³⁷ To establish why the state has a fundamental role in criminalising certain behaviour and imposing punishment, a conception of the state's proper powers and functions is required. Different political theories will give rise to a different account of how criminal law and punishment can be justified.²³⁸ This thesis is not concerned with assessing various political theories of the state

²³⁴ See Victim Support, *The Rights of Victims of Crime* (n 203), 8 and 15; Reeves and Mulley (n 203), 130.

²³⁵ See J Wall, 'Public Wrongs and Private Wrongs' (2018) 31 Canadian Journal Of Law And Jurisprudence 177, 193-195.

²³⁶ RA Duff and Z Hoskins, 'Legal Punishment' in *The Stanford Encyclopedia of Philosophy* (Fall edn, 2018) <<https://plato.stanford.edu/entries/legal-punishment/#PunCriSta>> accessed 16 May 2019.

²³⁷ Harel (n 229), 123; Thorburn (n 103), 37; RA Duff, *The Realm of Criminal Law* (Oxford University Press 2018), 39-40; Wall (n 235), 187-191; Zedner, 'What is Lost When Punishment is Privatised?' (n 229), 168.

²³⁸ See e.g. M Philips, 'The Justification of Punishment and the Justification of Political Authority' (1986) 5 Law and Philosophy 393; P Pettit, 'Republican Theory and Criminal Punishment' (1997) 9 Utilitas 59; M Matravers, *Justice and Punishment: The Rationale of Coercion* (Oxford University Press 2000); S Dolovich, 'Legitimate Punishment in Liberal Democracy' (2004) 7 Buffalo Criminal Law Review 307; S Garvey, 'Lifting the Veil on Punishment' (2004) 7 Buffalo Criminal Law Review 443; C Brettschneider, 'The Rights of the Guilty: Punishment and Political Legitimacy?' (2007) 35 Political Theory 175; R Dagger, 'Republican Punishment: Consequentialist or Retributivist' in C Laborde and J Maynor (eds), *Republicanism and Political Theory* (Blackwell 2007); D Markel, 'Retributive Justice and the Demands of Democratic Citizenship' (2012) 1 Virginia Journal of Criminal Law 1. For a contrasting view see M Davis, 'The Relative Independence of Punishment Theory' (1989) 7 Law and Philosophy 321.

and their influence on a normative account of punishment, but will give a short account of the political theory of liberalism relied upon.

Liberal theories of the state focus on the mutual obligations of the state and citizens.²³⁹ This goes back to the metaphor of the ‘social contract’ in political theory, as developed by Hobbes, Locke, and Rousseau.²⁴⁰ Put succinctly, the notion of the social contract entails that citizens agree to obey the law and in return the state protects citizens’ vital interests.²⁴¹ One of the state’s major obligations is to maintain order in society, keep citizens secure, and prevent harm.²⁴² This is partially fulfilled by creating criminal laws, with sanctions attached to disincentivise certain behaviour,²⁴³ as well as by maintaining a police force, public prosecutions, a court system, and punishment.²⁴⁴ Thorburn suggests that the point of the liberal constitutional state is not to maximise utility or punish moral wrongdoers as an aim in itself, but rather to ‘set the framework within which we may interact with others in a way that preserves the freedom and dignity of all.’²⁴⁵ The liberal constitutional state derives its legitimacy from the fact that ‘[u]nlike any private actor, the state claims to speak in the name

²³⁹ A Ashworth and L Zedner, *Preventive Justice* (Oxford University Press 2014), 7; Ashworth, *Sentencing and Criminal Justice* (n 26), 77.

²⁴⁰ T Hobbes, *Leviathan* (first published in 1651, Oxford University Press 2012); J Locke, *Two Treatises of Government* (first published in 1689, Cambridge University Press 1988 student edition); J-J Rousseau, *The Social Contract* (M Cranston tr, first published in 1762, Penguin Books 2006).

²⁴¹ See J Dunn, *The Political Thought of John Locke: a Historical Account of the Argument of the "Two Treatises of Government"* (Cambridge University Press 1969); A Ryan, ‘Hobbes’ Political Philosophy’ in T Sorell (ed), *The Cambridge Companion to Hobbes* (Cambridge University Press 2006); K Günther, ‘Responsibility to Protect and Preventive Justice’ in A Ashworth, L Zedner and P Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013).

²⁴² Ashworth and Zedner, *Preventive Justice* (n 239), 7-8; Ashworth and Zedner, ‘Punishment Paradigms and the Role of the Preventive State’ (n 87), 3; Zedner, ‘What is Lost When Punishment is Privatised?’ (n 229), 171.

²⁴³ von Hirsch and Ashworth (n 43), 28; Ashworth and Zedner, *Preventive Justice* (n 239), 7-8; L Zedner, ‘Penal Subversions: When is a Punishment not Punishment, Who Decides and On What Grounds?’ (2016) 20 *Theoretical Criminology* 3, 11.

²⁴⁴ Ashworth, ‘Responsibilities, Rights, and Restorative Justice’ (n 97), 580; Zedner, ‘What is Lost When Punishment is Privatised?’ (n 229), 175.

²⁴⁵ M Thorburn, ‘Constitutionalism and the Limits of the Criminal Law’ in RA Duff and others (eds), *The Structures of the Criminal Law* (Oxford University Press 2011), 99.

of everyone's claim of freedom equally.²⁴⁶ In return for the promise of security, citizens are assumed to agree to give up the right to self-govern and submit to the coercive force of the state.²⁴⁷

This leaves open the question of what wrongs can be properly defined as criminal wrongs. Legal moralist and public law accounts of the criminal law differ on this point. If criminal offences are best understood as a matter of legal moralism, this implies that in principle legitimate criminal wrongs must all be moral wrongs.²⁴⁸ By contrast, on a political or public interest account of the criminal law, a crime is an offence against society and its collective interests.²⁴⁹ Consistent with this view, something being merely morally wrong is insufficient for it to be declared criminal.²⁵⁰ Thorburn suggests that '[t]he crucial question for criminal law theory is not what makes theft morally wrong, but what makes it properly the object of criminal punishment by the state.'²⁵¹ It is not possible to explore this debate within the confines of the thesis. It is worth pointing out, however, that while Duff can be considered a legal moralist, he refines the notion of moral wrongdoing to what he calls 'public wrongs'. He argues that a crime is a public wrong as it concerns the whole polity, it is an offence against the polity's central values that are embodied in its criminal law.²⁵² Since criminal wrongs are

²⁴⁶ Ibid, 98. See also M Thorburn, 'Reinventing the Nightwatchman State' (2010) 60 University of Toronto Law Journal 425 (arguing that police forces must be provided by a party that acts in the name of the polity as a whole, and not in the name of some narrower private interest).

²⁴⁷ Günther (n 241), 76; Ashworth and Zedner, *Preventive Justice* (n 239), 7-8; Ashworth, *Sentencing and Criminal Justice* (n 26), 77.

²⁴⁸ For a legal moralist account of the criminal law see e.g. Gardner, 'Introduction' (n 104); Duff, *Trials and Punishment* (n 43); Duff, *Punishment, Communication, and Community* (n 33); Duff, *Answering for Crime* (n 99).

²⁴⁹ For a public law account of the criminal law see Thorburn, 'Criminal Law as Public Law' (n 103).

²⁵⁰ Ibid, 24-32, 41 on why a moralist account of the criminal law is problematic.

²⁵¹ M Thorburn, 'Punishment and Public Authority' in A du Bois-Pedain, M Ulväng and P Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017), 25.

²⁵² Duff, *Punishment, Communication, and Community* (n 33), 59; Duff, 'Probation, Punishment and Restorative Justice' (n 183), 183; SE Marshall and RA Duff, 'Criminalization and Sharing Wrongs' (1998) 11 Canadian Journal Of Law And Jurisprudence 7, 20; RA Duff and SE Marshall, 'Public and Private Wrongs' in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010), 71. The conception of crimes as 'public wrongs' appears in nearly every account Duff gives of the

wrongs that are so serious that the public as a whole – i.e. the community or the state – is properly interested in them,²⁵³ it is left to the state to define these wrongs.²⁵⁴ In this sense, Thorburn and Duff's accounts of the criminal law converge somewhat, as they both conceive of criminal wrongs as wrongs against the community or polity's interests as a whole.

When a wrong is identified as a wrong against the public interest, it follows that a public response is appropriate. As it is the state's obligation to determine what constitutes a public wrong, it is also the state's duty to determine the response to that public wrong. Thus, there is an interdependence between the state's power to issue criminal prohibitions and injunctions on the one hand, and the power to determine and inflict sanctions triggered by violation of these prohibitions and injunctions on the other.²⁵⁵ On an expressive or communicative retributive conception of punishment, labelling a wrong as public in the sense that it properly concerns the whole community, implies that the response to the wrong should be a condemnatory one.²⁵⁶ In turn, this means that punishment should be in the hands of the state because sanctions for wrongdoing should reflect the state's judgement concerning the wrongfulness of the act. The

criminal law in a liberal democracy in which we should be criminally responsible as citizens: see e.g. RA Duff, 'Who is Responsible? For What? To Whom?' (2005) 2 *Ohio State Journal of Criminal Law* 441, 445; Duff, 'Responsibility and Liability in Criminal Law' (n 99), 107; RA Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial' (2010) 23 *Ratio Juris* 123, 138; RA Duff, 'Authority and Responsibility in International Criminal Law' in S Besson and J Tasioulas (eds), *Philosophy of International Law* (Oxford University Press 2010), 595-7; Duff, *The Realm of Criminal Law* (n 237), ch 2.

²⁵³ Duff, *Punishment, Communication, and Community* (n 33), 60-61; RA Duff, 'A Criminal Law for Citizens' (2010) 14 *Theoretical Criminology* 293, 302.

²⁵⁴ The analytical ordering of Duff and Marshall's argument why crimes are public wrongs seems correct. It is necessary to identify first which types of wrongs can properly be defined as criminal, before it is justified to attach a state-ist punitive response to them. For a different analytical ordering in the definition of a public wrong see G Lamond, 'What is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609, 621, who defines crimes 'not as wrongs to the public but as wrongs that the community is *responsible* for punishing'. See also Kelsen's positivist conception of legal norms, who argues that a legal norm is that which if breached imposes a duty on public officials to respond with sanction (H Kelsen, 'On the Pure Theory of Law' (1966) 1 *Israel Law Review* 1; H Kelsen, *Pure Theory of Law* (University of California Press 1967)). For a critical appraisal of both Duff and Marshall's and Lamond's conception of a public wrong see Wall (n 235).

²⁵⁵ Harel (n 229), 115 and 123; Thorburn, 'Constitutionalism and the Limits of the Criminal Law' (n 245), 88.

²⁵⁶ For a counterview see Lacey and Pickard, 'From the Consulting Room' (n 34) and Lacey and Pickard, 'To Blame or to Forgive?' (n 34), which will be discussed in detail in Section 3.3.2.

state responds to criminal wrongs by censuring perpetrators through the imposition of punishment. In other words, the state's involvement in penal censure stems from the need to provide authoritative public valuation of the conduct.²⁵⁷ In conveying penal censure, the state not only speaks on behalf of the victims or their sympathisers, but on behalf of the wider community of citizens.²⁵⁸ Privately determined and inflicted sanctions are thus illegitimate because they do not reflect the state's judgement concerning the wrongfulness of the act or concerning the appropriateness of the sanction. It would be impermissible to leave the determination and infliction of punishment to private individuals, for doing so would be to endorse a citizen's independent judgement concerning the wrongfulness of the act, which would give undue weight to the private moral convictions of one individual.²⁵⁹ To summarise, drawing on Thorburn, the reason why the administration of criminal justice, including the determination and imposition of punishment, is the proper role of the state 'flows from the fact that only the state has the standing to act in the name of the system of rights itself rather than in some narrower, partisan interest'.²⁶⁰

The fact that the community as a whole takes an interest in criminal wrongs is what sets them apart from mere private wrongs. A different legal process and remedial response are appropriate for private wrongs.²⁶¹ Private wrongs are dealt with under the law of tort, which allows those who have been wronged by the conduct of others to claim compensation. It is left to the person who was wronged to take the necessary procedural steps to receive such

²⁵⁷ von Hirsch and Ashworth (n 43), 27-31.

²⁵⁸ Ibid, 30.

²⁵⁹ Harel (n 229), 132-133.

²⁶⁰ M Thorburn, 'Proportionate Sentencing and the Rule of Law' in L Zedner, JV Roberts and A Ashworth (eds), *Principles and Values in Criminal law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012), 282.

²⁶¹ For an overview of the differences between the paradigmatic ways in which crimes and torts are dealt with see Duff, *The Realm of Criminal Law* (n 237), 25-29.

compensation. By contrast, on a communicative account, the criminal law is an instrument of censure, concerned with punishing the individual wrongdoer, in the name of the state.²⁶² A public wrong must be condemned in an authoritative and communal manner. Duff states that '[public wrongs] are not simply matters of private conscience or matters on which only those directly involved have the standing to pronounce, but matters on which the community as a whole can and should take a stand, through the authoritative voice of the law.'²⁶³ Unlike in a civil process which is brought and controlled by the claimant, it follows from the conception of a crime as a public wrong that it should not be left to the victim to bring the perpetrator of harm to justice.²⁶⁴ The public character of a criminal wrong entails that when the state prosecutes, convicts, and sentences an offender, it does not merely 'stand in the shoes of the victim nor does it appropriate a private quarrel.'²⁶⁵ However, the statist approach also deprives the victim of the authority to decide whether or not to bring a case and how the case should proceed.²⁶⁶ In practice, victims do have some de facto influence on the criminal process. They retain the right not to report to the police in the first place, the police or the prosecutor might not pursue the case if the victim asks them not to, and for certain crimes the victim may retain some decisive power if the prosecution is wholly dependent on the victim's testimony.²⁶⁷ Nonetheless, at least in predominantly adversarial jurisdictions, the statist approach inevitably entails that the victim loses some control over how the crime is dealt with, since the victim has no formal standing to demand that the perpetrator be prosecuted or not.²⁶⁸

²⁶² Ashworth, 'Some Doubts about Restorative Justice' (n 41), 283.

²⁶³ Duff, *Punishment, Communication, and Community* (n 33), 61.

²⁶⁴ Ashworth, 'Responsibilities, Rights, and Restorative Justice' (n 97), 579.

²⁶⁵ Ashworth and Zedner, 'Punishment Paradigms and the Role of the Preventive State' (n 87), 7; contra Christie (n 47).

²⁶⁶ Duff, *Punishment, Communication, and Community* (n 33), 61.

²⁶⁷ See e.g. C Hoyle, *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Clarendon Press 1998).

²⁶⁸ Duff, *The Realm of Criminal Law* (n 237), 26.

The execution of the criminal law through the imposition of punishment involves deprivation of fundamental liberties and hard treatment.²⁶⁹ It is thus vital that the state responds to wrongs by imposing punishment in a manner that shows respect for the offender as a rational citizen and is consistent with fundamental rule-of-law or *Rechtsstaat*²⁷⁰ principles, due process, and human rights.²⁷¹ Only then can the state's coercive powers in declaring criminal norms and enforcing them be defended.²⁷² The rule of law requires that the state acts and takes decisions – at all stages of the criminal process, including sentencing – according to the law. This is enshrined in the maxim *nullum crimen, nulla poena sine lege* (no crime or punishment without law). This principle functions as an important limit on the authority of the state to define criminal norms and enforce them.²⁷³ Specific manifestations of this principle are found in constitutions and human rights treaties. For instance, the state must provide a response to crime that is predictable and certain, which is an aspect of the principle of legality in criminal law enshrined inter alia in Article 7 ECHR.²⁷⁴ In determining and imposing punishment, the state should ensure respect for human rights, notably the right to a fair hearing by an independent and impartial tribunal as enshrined in Article 6 ECHR.²⁷⁵ The state has to respect the principle of equality before the law, which at sentencing entails that 'sentencing decisions should treat offenders equally, irrespective of their wealth, race, colour, sex, abilities, or employment or family status.'²⁷⁶ The state must honour the principle of equal impact of sanctions, meaning

²⁶⁹ Zedner, 'What is Lost When Punishment is Privatised?' (n 229), 173.

²⁷⁰ *Rechtsstaat* is defined as 'a State that lives under law and respects fundamental rights' (MacCormick and Garland (n 230), 16).

²⁷¹ Ashworth, 'Responsibilities, Rights, and Restorative Justice' (n 97), 581; Ashworth and Zedner, 'Punishment Paradigms and the Role of the Preventive State' (n 87), 8; Ashworth, *Sentencing and Criminal Justice* (n 26), 79; Campbell, Ashworth and Redmayne (n 91), 50.

²⁷² L Zedner, 'Security Against Arbitrary Government in Criminal Justice' in A du Bois-Pedain, M Ulväng and P Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017), 89.

²⁷³ Zedner, 'What is Lost When Punishment is Privatised?' (n 229), 173.

²⁷⁴ Horder (n 100), 81-84.

²⁷⁵ Ashworth, 'Responsibilities, Rights, and Restorative Justice' (n 97), 586-588.

²⁷⁶ Ashworth, *Sentencing and Criminal Justice* (n 26), 104.

that the state should strive to ‘avoid grossly unequal impacts [of sentences] on offenders with differing resources and sensitivities, because that would be unjust.’²⁷⁷

If the power to provide a response to offences were delegated entirely to private individuals, they could not be expected to respond in a principled manner and would rather respond on the basis of their own views and preferences,²⁷⁸ which would in turn give undue weight to their own opinion. Privatisation of punishment would weaken rule-of-law limits on state coercion that protect the individual from arbitrary interference with their rights and liberties. It would risk ‘releasing the brakes on the exercise of the state’s most coercive powers and, by so doing, [would undermine] the very authority of the state to criminalise in the first place.’²⁷⁹

The first section of this chapter has established why the state should play a fundamental role in the determination and imposition of punishment. The justification for the state’s role is not purely instrumental. Rather, it derives from the social contract that it is the state’s duty to protect public goods and maintain order and peace. As it is the state’s proper role in a liberal political community to define what constitutes criminal behaviour, the state is the source of criminal prohibitions and injunctions, and is tasked with enforcing them, *inter alia* through criminal sanctions. In other words, the state’s role is justified because there is an inextricable link between the state’s power to declare criminal norms as a way of fulfilling its obligation to prevent and reduce harm, and the power to determine the severity of these sanctions and impose them upon breach of those norms.

²⁷⁷ Ibid, 105. See also *ibid*, 250-271.

²⁷⁸ Ashworth, ‘Responsibilities, Rights, and Restorative Justice’ (n 97), 581.

²⁷⁹ Zedner, ‘What is Lost When Punishment is Privatised?’ (n 229), 173. For another robust argument against privatisation of punishment see A Dorfman and A Harel, ‘Against Privatisation As Such’ (2015) 36 *Oxford Journal of Legal Studies* 1. See also A Harel, ‘Why Privatisation Matters’ in A du Bois-Pedain, M Ulväng and P Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017).

Initially it might seem that there is no scope for input from the offender in a sentencing process that should retain its public character. Indeed, the question arises as to how the fundamental agency of the state can be compatible with facilitating the offender's agency at sentencing. The above account entails that the state has unique standing to call those who violate criminal norms to account in criminal courts, and convict and punish them. Yet, it does not in and of itself contain the principles that should guide the sentencing process, let alone what role should be attributed to the offender in this process. To what extent the offender could, and indeed should, exercise agency at sentencing is not only dependent on the role of the state, but also on the theory of punishment one adopts, as the next section explores.

2.2 The case for offender agency in state-centred theories of punishment

Prima facie, it would seem that RJ is not only an adequate theory, but also the most appropriate theory within which to consider offender agency. This seems to be because a central tenet in RJ is the importance of giving a voice to stakeholders – that is the victim, the offender, and often also the community.²⁸⁰ Focussing on the procedural dimension of RJ rather than on restorative outcomes, RJ has been described as a 'process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.'²⁸¹ The affirmation of agency of the parties to the 'conflict'²⁸² under RJ eschews any single determinative vision of what RJ theory would require, and there is no single version of the restorative paradigm in theory or in terms of process.²⁸³ What has emerged

²⁸⁰ See e.g. Hudson, 'Victims and Offenders' (n 5).

²⁸¹ TF Marshall, *Restorative Justice: An Overview* (Home Office Research Development and Statistics Directorate, 1999), 5.

²⁸² Christie (n 47).

²⁸³ Ashworth, 'Some Doubts about Restorative Justice' (n 41), 280; Ashworth, 'Responsibilities, Rights, and Restorative Justice' (n 97), 578. For an RJ theory explicitly based on the twin values of agency and accountability see O'Mahony and Doak (n 71).

is a range of practices and theories that come under the wide umbrella of RJ, each with their own variations and adaptations of a few central themes.²⁸⁴

One of the central themes of the RJ movement is its rejection of the punishment paradigm – i.e. the notion that people who commit crimes deserve to be punished and that the primary function of the criminal court is to convey public censure²⁸⁵ – in favour of a restorative paradigm.²⁸⁶ RJ challenges the view that the state should have exclusive responsibility for the administration of criminal justice.²⁸⁷ Despite making no explicit reference to RJ, Christie's paradigmatic text 'Conflicts as Property' is widely regarded as an important theoretical basis for the RJ movement.²⁸⁸ Central to his theory are the philosophical conceptualisation of crime as a conflict and of the proprietary interests of stakeholders in the conflict. Christie argues that, when punishing, the state takes away the conflict from its rightful owners, namely the victim, the offender, and the community.²⁸⁹ The power the state has unjustly taken should be given back to victims and offenders. By introducing a fundamentally different conception of crime and punishment, Christie profoundly questions the legitimacy of the traditional criminal justice response. One of the main aims of RJ movements is thus to replace forms of state justice with

²⁸⁴ See e.g. J Dignan, 'Reintegration through Reparation: a Way Forward for Restorative Justice?' in RA Duff and others (eds), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (Manchester University Press in association with the Fulbright Commission, London 1994); K Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in H Strang and J Braithwaite (eds), *Restorative Justice: Philosophy to Practice* (Ashgate 2000); J Braithwaite, 'In Search of Restorative Jurisprudence' in L Walgrave (ed), *Restorative Justice and the Law* (Willan 2002); J Dignan, 'Towards a Systemic Model of Restorative Justice' in A von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart 2003); A von Hirsch, A Ashworth and C Shearing, 'Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model?' in A von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart 2003); L Walgrave, 'Imposing Restoration Instead of Inflicting Pain' in A von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart 2003).

²⁸⁵ Ashworth, 'Some Doubts about Restorative Justice' (n 41), 280.

²⁸⁶ On the possibilities and limits of whether the two paradigms could be reconciled see e.g. L Zedner, 'Reparation and Retribution: are they Reconcilable?' (1994) 57 *Modern Law Review* 228; Cavadino and Dignan (n 41); von Hirsch and others (n 284).

²⁸⁷ Campbell, Ashworth and Redmayne (n 91), 52.

²⁸⁸ Christie (n 47). See also N Christie, *Limits to Pain* (Martin Robertson 1981).

²⁸⁹ Christie, 'Conflicts as Property' (n 47), 7-10.

alternative responses to crime where the stakeholders take charge of the resolution of the ‘conflict’. In authorising the victim and offender to negotiate the response to criminal wrongdoing, RJ essentially entails a delegation of state power.²⁹⁰ While some scholars take a more moderate view – suggesting that criminal courts should retain their function, but that other actors should be given procedural rights to participate at key stages of the criminal process, including sentencing – their focus has been almost exclusively on increased participation for victims.²⁹¹ On balance, RJ advocacy for agency of the stakeholders in the resolution of the criminal conflict has mostly resulted in the idea that their agency should be affirmed outside the courtroom, often assuming that the rights and interests of victims and offenders are reconcilable.²⁹² This is evidenced in practices such as victim-offender mediation, in which information is passed between victim and offender by a mediator or between the two stakeholders directly but with a mediator present. RJ conferences, where victims, offenders, and their supporters sit in a circle to talk through the effect of a crime and determine the response,²⁹³ are another example of how affirmation of agency is seen as something best achieved – or that can only be achieved – without state involvement.

While RJ certainly has its merits, it is not considered here as a framework for offender agency at sentencing since it is in tension with the account of the fundamental role of the state set out in Section 2.1. On that account, a crime is more than a harm inflicted on a victim, it is

²⁹⁰ von Hirsch and Ashworth (n 43), 31.

²⁹¹ See e.g. Erez, ‘Who's Afraid of the Big Bad Victim?’ (n 214); Erez, ‘Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements’ (n 214); Edwards, ‘Victim Participation in Sentencing: The Problems of Incoherence’ (n 97); Roberts, ‘Victim Impact Statements and the Sentencing Process’ (n 218); Edwards, ‘An Ambiguous Participant’ (n 97); Erez, ‘Integrating Restorative Justice Principles in Adversarial Proceedings through Victim Impact Statements’ (n 41); Cassell (n 214); Katz (n 41); Kennedy (n 220).

²⁹² Sanders, ‘Involving Victims in Sentencing’ (n 225), 108.

²⁹³ See e.g. J Shapland and others, *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes* (Ministry of Justice Research Series 10/08, 2008); Johnstone (n 42); L Sherman and others, ‘Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review’ (2014) 31 *Journal of Quantitative Criminology* 1.

a wrong against the public. Sentencing is a matter of public decision-making rather than a particular mode of private conflict resolution that belongs to the victim and offender. The victim should have a right to compensation and reparation, but the state has the primary interest in the sentence.²⁹⁴ Indeed, there must be a sentence, which is something most proponents of RJ would deny. This conception of crime and punishment conflicts with the characterisation of stakeholders' rights in the resolution of the conflict as proprietary rights. Because of these radically opposing accounts of crime and punishment, and the role of the state and victim in them, RJ is rejected as a plausible theory from which arguments can be derived for offender agency in a state-centred sentencing system.

Instead, the thesis examines arguments that might be thought to support offender agency at sentencing in theories of punishment and criminal justice that are consistent with a state-centred account of punishment. Chapter 3 explores arguments for offender agency in expressive and communicative variations of desert theory, some of which are compared with Lacey and Pickard's view that we should punish with forgiveness. Chapter 4 does so in respect of the more consequentialist perspective of therapeutic jurisprudence.

2.3 Conclusion

This chapter has defended a public interest account of the criminal law and the institution of punishment. It has demonstrated why it is the proper role of the state to define criminal norms, to make determinations concerning the severity of the sanctions necessary to enforce said norms, and to impose the sanctions. This contrasts with RJ theories which have a more sceptical view of state power in sentencing, whilst attributing more far-reaching powers to victims and offenders regarding the resolution of the 'conflict'. RJ has primarily led to the conclusion that

²⁹⁴ In the same sense see Ashworth, 'Some Doubts about Restorative Justice' (n 41), 282-286.

victim agency, and to a lesser extent offender agency, is best affirmed outside the courtroom in RJ conferences and mediation. Because of these conflicting accounts of crime and punishment, RJ was rejected as an adequate theory within which to explore arguments for offender agency at sentencing.

The argument developed in this thesis is not that the state should play a reduced role in sentencing. Sentencing and punishment should remain a public function. It is thus evident that any scope for offender agency will be limited by the constraints inherent in a state-centred account of punishment. That does not entail, however, that there is no scope for offender agency. It is conceivable to alter the way in which the state and the offender interact in the process of determining the punishment in order to allow the offender to exercise agency, provided that constraints are placed on offender agency to ensure that the core function of the state is not eroded. Before exploring in Part II how such an agentic sentencing model should be conceived, it is necessary to explore why, if at all, offenders should be allowed to exercise agency at sentencing, which is the subject of the following two chapters.

3 THE CASE FOR OFFENDER AGENCY: EXPRESSIVE AND COMMUNICATIVE THEORIES OF PUNISHMENT

This chapter explores arguments for offender agency in expressive and communicative theories of punishment. It starts by introducing the expressive and communicative theories of punishment this chapter draws on, and explaining why these are apposite frameworks within which to explore the arguments and scope for offender agency (Section 3.1). The remainder of the chapter argues that the principles to which truly communicative conceptions of punishment adhere support arguments for offender agency at sentencing, in contrast to expressive theories of punishment, as the latter limit the conception and justification of punishment to conveying the authoritative message of blame to the offender. The arguments for offender agency derive from two defining features of communicative variations of desert theory. First, allowing the offender to exercise agency in the sentencing process may better serve the communicative functions of punishment (Section 3.2). Secondly, allowing the offender to exercise agency at sentencing is more respectful of the offender's responsible moral agency (Section 3.3.1). However, it is not only through the communication of censure or blame that the offender can be taken seriously as a responsible moral agent. It will be demonstrated that Lacey and Pickard's account of punishing with forgiveness is equally respectful of the offender as a responsible moral agent, and indeed also provides arguments and scope for the offender to exercise agency at sentencing (Section 3.3.2).

3.1 Introducing expressive and communicative theories of punishment

This chapter explores arguments for offender agency in three prominent retributive-oriented expressive and communicative theories of punishment, namely those of Duff,²⁹⁵ von Hirsch (partly in collaboration with Ashworth),²⁹⁶ and Bennett.²⁹⁷ Expressive and communicative retributive theories of punishment claim that criminal punishment should be conceived as a way of expressing or communicating moral condemnation and that the expressive or communicative function is the primary justification of punishment.²⁹⁸ Throughout the chapter, the difference between expressive and communicative theories will be explained, and it will be argued that von Hirsch and Bennett's accounts should be characterised as expressive and Duff's as communicative. For the purpose of this introduction, both types of accounts will be labelled generally as communicative theories of punishment. Communicative theorists specify in different ways what the communicative content of punishment entails. Duff argues that moral wrongdoing deserves 'censure'.²⁹⁹ Von Hirsch employs both the terms 'censure' and 'blame',³⁰⁰ suggesting that censure is the authoritative analogue of blame.³⁰¹ Bennett argues

²⁹⁵ Duff, *Trials and Punishment* (n 43); RA Duff, 'Desert and Penance' in A Ashworth and A von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd edn, Hart 1998); RA Duff, 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 *Oxford Journal of Legal Studies* 189; RA Duff, 'In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara' (2000) 24 *Melbourne University Law Review* 411; Duff, *Punishment, Communication, and Community* (n 33); Duff, 'Penance, Punishment, and the Limits of Community' (n 43); RA Duff, 'Punishment' in H LaFollette (ed), *The Oxford Handbook of Practical Ethics* (Oxford University Press 2003); Duff, 'Punishment, Retribution and Communication' (n 22).

²⁹⁶ von Hirsch, *Censure and Sanctions* (n 33); von Hirsch and Ashworth (n 43).

²⁹⁷ Bennett, *The Apology Ritual* (n 33); Bennett, 'Expressive Punishment and Political Authority' (n 43); C Bennett, 'The Expressive Function of Blame' in J Coates and N Tognazzini (eds), *Blame: Its Nature and Norms* (Oxford University Press 2013); Bennett, 'Punishment as an Apology Ritual' (n 43).

²⁹⁸ See Duff, *Trials and Punishment* (n 43); Duff, *Punishment, Communication, and Community* (n 33); von Hirsch, *Censure and Sanctions* (n 33), ch 2; von Hirsch and Ashworth (n 43), ch 2; Bennett, *The Apology Ritual* (n 33); J Feinberg, 'The Expressive Function of Punishment' (1965) 49 *Monist* 397.

²⁹⁹ See Duff, *Trials and Punishment* (n 43); Duff, 'Desert and Penance' (n 295); Duff, 'Law, Language and Community' (n 295); Duff, 'In Defence of One Type of Retributivism' (n 295); Duff, *Punishment, Communication, and Community* (n 33); Duff, 'Penance, Punishment, and the Limits of Community' (n 43); Duff, 'Punishment' (n 295); Duff, 'Punishment, Retribution and Communication' (n 22).

³⁰⁰ von Hirsch, *Censure and Sanctions* (n 33), ch 2; von Hirsch and Ashworth (n 43), ch 2.

³⁰¹ von Hirsch and Ashworth (n 43), 17-19.

we owe it to wrongdoers to ‘blame’ them and expect them to apologise.³⁰² According to Feinberg, punishment is a device for ‘the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation’.³⁰³

Prima facie, expressive and communicative theories are apposite frameworks in which to explore the scope and arguments for offender agency for two reasons. First, since these theories conceive of punishment as an expressive or communicative enterprise, it is appropriate to explore what role the offender should play in relation to this expression or communication, and what the implications might be for sentencing. Secondly, communicative theorists suggest that punishment imputes a judgement of blame and individual responsibility, and this takes the offender seriously as a rational being and as a member of the moral community, i.e. as a moral agent.³⁰⁴ To the extent that this respect for the offender as a moral agent is a central precept of these theories, the question arises how, if at all, this is borne out at sentencing. However, it will be argued below in Section 3.3.2 that the imputation of responsibility to an agent through censure is not the only way of taking offenders seriously as moral agents, and that this can also be done if punishment is reconceived as an institutionalised form of forgiving.³⁰⁵

Because censure and sanction in retributive theories are justified by reference to the offender’s desert, censure needs to be communicated primarily to the offender. For Duff, this does not preclude that censure is also ‘owed to’ the victim ‘as expressive of a concern for their

³⁰² Bennett, *The Apology Ritual* (n 33), 8.

³⁰³ Feinberg, ‘The Expressive Function of Punishment’ (n 298), 400.

³⁰⁴ Duff, ‘Punishment, Communication, and Community’ (n 103), 50; Duff, *Punishment, Communication, and Community* (n 33), 130; Duff, ‘Punishment, Retribution and Communication’ (n 22), 126; von Hirsch, *Censure and Sanctions* (n 33), 9-14; von Hirsch and Ashworth (n 43), 17-19, 24-27; Bennett, *The Apology Ritual* (n 33), 8. See also K Seelmann, ‘Does Punishment Honour the Offender?’ in AP Simester, A du Bois-Pedain and U Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014).

³⁰⁵ See Lacey and Pickard, ‘To Blame or to Forgive?’ (n 34).

wronged status', and to the whole society, 'whose values the law claims to embody'.³⁰⁶ Von Hirsch equally acknowledges that censure addresses not only the victim and the perpetrator of the criminal act, but also 'third parties', namely the members of the public.³⁰⁷ The criminal sanction expresses blame, thus conveying the message to society that the conduct is reprehensible and providing individuals with a reason for desistance.³⁰⁸ Feinberg states that censure might be expressed, for different purposes, to offenders, victims, and the public at large.³⁰⁹ However, retributivist theorists focus on the communication with the offender, because it is the offender who is owed his just deserts.

The theories examined in this chapter are essentially retributive because they are concerned with retrospective punishment as the communication of censure in response to wrongdoing, which is considered deserved and is not just instrumental.³¹⁰ Censure is delivered because it is the intrinsically appropriate response to wrongdoing. This function is the primary justification of punishment, rather than punishment being aimed at achieving certain extrinsic aims.³¹¹ However, the retributive label attributed to the theories examined in this chapter ought to be refined. On von Hirsch's account, punishment involves penal censure, i.e. it conveys authoritative disapproval for the wrong the offender has committed.³¹² However, punishment does not only involve censure, but also hard treatment. Von Hirsch argues that hard treatment

³⁰⁶ Duff, 'Punishment, Communication, and Community' (n 103), 50; Duff, *Punishment, Communication, and Community* (n 33), 27-28. See also Duff, *Trials and Punishment* (n 43); Duff, 'Law, Language and Community' (n 295); Duff, 'In Defence of One Type of Retributivism' (n 295); Duff, 'Penance, Punishment, and the Limits of Community' (n 43); Duff, 'Punishment' (n 295); Duff, 'Punishment, Retribution and Communication' (n 22).

³⁰⁷ von Hirsch, *Censure and Sanctions* (n 33), 10-11; von Hirsch and Ashworth (n 43), 18.

³⁰⁸ von Hirsch, *Censure and Sanctions* (n 33), 11, von Hirsch and Ashworth (n 43), 18.

³⁰⁹ Feinberg, 'The Expressive Function of Punishment' (n 298), 404-408.

³¹⁰ Duff, *Punishment, Communication, and Community* (n 33), 27; Duff, 'Probation, Punishment and Restorative Justice' (n 183), 190; von Hirsch, *Censure and Sanctions* (n 33), ch 2; von Hirsch and Ashworth (n 43), 17-19; Bennett, *The Apology Ritual* (n 33), 8.

³¹¹ N Hanna, 'Say What? A Critique of Expressive Retributivism' (2008) 27 *Law and Philosophy* 123, 123; Bennett, *The Apology Ritual* (n 33), 8; Bennett, 'Expressive Punishment and Political Authority' (n 43), 287.

³¹² von Hirsch and Ashworth (n 43), 17. See also von Hirsch, *Censure and Sanctions* (n 33), 9-12.

cannot be justified on communicative grounds alone but also on preventive grounds,³¹³ thereby drawing a consequentialist aim into a primarily retributive theory. According to von Hirsch, if there were no use for criminal sanctions for the purpose of preventing crime, then his theory would even permit the abolition of the institution of punishment.³¹⁴ Von Hirsch argues that this preventive purpose of punishment can still co-exist with sentencing as a practice that treats offenders as moral agents, as the hard treatment serves as a prudential deterrent to those insufficiently motivated by the penal censure's moral appeal.³¹⁵ Even though persons are assumed to be moral agents, who are capable of receiving the message conveyed through the sanction, von Hirsch acknowledges that humans are fallible and might face temptation.³¹⁶ Since both retributivist and consequentialist considerations underlie it, his theory of desert is a mixed theory.³¹⁷ However, retribution, in the sense that punishment is conceived as the communication of deserved censure, remains the primary justifying aim of punishment, whereas the consequentialist aim of crime prevention is a mere additional consideration *within* a censuring framework.³¹⁸ The preventive purpose of hard treatment supplements rather than replaces its moral function of conveying censure for disobeying the law.³¹⁹

³¹³ von Hirsch, *Censure and Sanctions* (n 33), 14; von Hirsch and Ashworth (n 43), 21-28; von Hirsch, 'Proportionate Sentences: a Desert Perspective' (n 48), 117. On prevention in von Hirsch's theory see also Ashworth and Zedner, 'Punishment Paradigms and the Role of the Preventive State' (n 87). Von Hirsch's previous writings emphasised mostly the crime-prevention function of hard treatment. In his recent work, however, he develops a revised account of punishment which primarily emphasises the function of hard treatment as the 'currency' through which penal censure is expressed. But even on this revised account the deterrent function of hard treatment continues to play a supplementary role (A von Hirsch, 'Censure and Hard Treatment in Punishment's Justification' in A du Bois-Pedain and A Bottoms (eds), *Penal Censure: Engagements within and Beyond Desert Theory* (Hart 2019)).

³¹⁴ von Hirsch, *Censure and Sanctions* (n 33), 14; von Hirsch and Ashworth (n 43), 24; von Hirsch, 'Proportionate Sentences: a Desert Perspective' (n 48), 117.

³¹⁵ von Hirsch, 'Proportionate Sentences: a Desert Perspective' (n 48), 117-118.

³¹⁶ von Hirsch, *Censure and Sanctions* (n 33), 13; von Hirsch and Ashworth (n 43), 23.

³¹⁷ Ashworth and Zedner, 'Punishment Paradigms and the Role of the Preventive State' (n 87), 4.

³¹⁸ von Hirsch, *Censure and Sanctions* (n 33), 14.

³¹⁹ von Hirsch and Ashworth (n 43), 22-23; von Hirsch, 'Proportionate Sentences: a Desert Perspective' (n 48), 117-118.

Bennett's account of punishment is primarily retributive, because he conceives the imposition of proportionate hard treatment on offenders in a manner that conveys blame as the morally necessary response to wrongdoing.³²⁰ However, his account also shares elements with restorative justice (RJ), owing to the importance he places on the offender's apology in response to state censure.³²¹ His theory is both backward-looking to the crime and forward-looking because it seeks to restore the moral and civil position of the offender.

Essential to Duff's theory are the additional benefits and aims that censure has, namely inducing a process of repentance, reform, and reconciliation.³²² Despite these forward-looking purposes of punishment, Duff insists that his theory is not a mixed penal theory. The communication of censure through punishment is necessary to achieve such aims. Hence, the relation between punishment and its ends is internal, rather than purely contingent.³²³ However, Duff's theory should be considered a pluralistic one, as it is characterised by the fact that the aims of the communicative process are more varied than merely the communication of censure. But since deserved censure is the primary rationale for punishment, his theory lies more towards the retributive than the consequentialist end of the spectrum. As will be demonstrated below, it is precisely the combination of the pluralistic aims of punishment and the truly dialogic conception of punishment that makes the arguments for offender agency at sentencing

³²⁰ Bennett, *The Apology Ritual* (n 33), 7-8.

³²¹ Ibid, 7-8.

³²² Duff, 'In Defence of One Type of Retributivism' (n 295), 412; Duff, *Punishment, Communication, and Community* (n 33), xix, 30, 106-109; Duff, 'Probation, Punishment and Restorative Justice' (n 183), 188-189; Duff, 'Punishment, Retribution and Communication' (n 22), 131.

³²³ Duff, 'Punishment, Communication, and Community' (n 103), 52; Duff, *Punishment, Communication, and Community* (n 33), 30.

particularly strong in Duff's account. In short, the penal theories examined in this chapter are closer to retributivism than to consequentialism, but none are purely retributive.³²⁴

3.2 Enhanced communicative efficacy

3.2.1 Communicative functions of punishment in Duff's theory

The first argument for offender agency at sentencing derived from a communicative retributive account is that engaging the offender in the process of determining the punishment may enhance the punishment's communicative efficacy. Compared to von Hirsch and Bennett,³²⁵ Duff takes a stronger view on the interrelation between censure and hard treatment. The criminal sanction communicates censure through the imposition of hard treatment on the offender. Duff argues that hard treatment is entirely justified because of the communicative purpose it serves.³²⁶ He claims that hard treatment is necessary to serve the aims of the communicative enterprise, which a mere verbal or symbolic communication of censure would not achieve.³²⁷ On his account, criminal punishment is to be understood as a species of 'secular penance':³²⁸ that is, hard treatment should aim not just to communicate censure but also thereby persuade offenders to achieve repentance, self-reform, and reconciliation.³²⁹ Duff argues that,

³²⁴ For a purely retributive conception of punishment see e.g. M Moore, 'The Moral Worth of Retribution' in F Schoeman (ed), *Responsibility, Character and the Emotions: New Essays in Moral Psychology* (Cambridge University Press 1987).

³²⁵ See Section 3.2.2.

³²⁶ Duff, *Punishment, Communication, and Community* (n 33), 82. Matravers argues, however, that this aspect of Duff's theory is not fully justified and consistent with the rest of his account: see Matravers (n 238), ch 3, specifically 87-92; M Matravers, 'Duff on Hard Treatment' in R Cruft, MH Kramer and MR Reiff (eds), *Crime, Punishment, and Responsibility: the Jurisprudence of Antony Duff* (Oxford University Press 2011).

³²⁷ Duff, 'Punishment, Retribution and Communication' (n 22), 129.

³²⁸ Duff, *Punishment, Communication, and Community* (n 33), xix, 30, 106.

³²⁹ Duff, 'In Defence of One Type of Retributivism' (n 295), 412; Duff, *Punishment, Communication, and Community* (n 33), 106-109; Duff, 'Probation, Punishment and Restorative Justice' (n 183), 188-189; Duff, 'Punishment, Retribution and Communication' (n 22), 131. In his earlier work, Duff includes a longer list of the purposes of penal hard treatment (see Duff, 'Punishment, Communication, and Community' (n 103), 51).

despite the fact that ‘penance’ may have a religious connotation and may therefore appear to conflict with liberal ideas, criminal punishment should be conceived as a purely secular communicative and inclusionary response to public wrongs committed by citizens of a liberal polity.³³⁰ Throughout this chapter, Duff’s theory will be interpreted as a theory that conceptualises punishment as a two-way or reciprocal communicative enterprise that serves the aims of repentance, reform, and reconciliation, with hard treatment being central to those aims. The community censures the offender and thereby attempts to bring the offender to a penitential understanding of his wrong through hard treatment, i.e. persuade the offender to repent, reform, and reconcile. In turn, we hope the offender *responds* by embracing the hard treatment as a penitential space which offers the opportunity to reflect on the wrong done, and as a vehicle to communicate his repentant understanding of the wrong to the community and the victim, and thereby restore himself to his community. It will be argued that by engaging the offender in the sentencing discussion these two communicative functions of punishment may be better served.

3.2.1.1 *What the community communicates to the offender*

Duff describes the communicative role of the community (through the court) as one of ‘transparent persuasion’.³³¹ In censuring the offender for a wrong, we hope to bring the offender to recognise the fact and implications of that wrong; and that he needs to amend his behaviour and the attitudes that informed it to avoid such wrongdoing in the future.³³² Censure – expressed through hard treatment – is the appropriate way of trying to bring the offender to

Fundamentally, however, Duff’s conception of punishment and the communicative aims of penal hard treatment in his later work remain the same as in his earlier work (see Matravers, ‘Duff on Hard Treatment’ (n 236), 70-71.)

³³⁰ Duff, *Punishment, Communication, and Community* (n 33), 106.

³³¹ Ibid, 58, 81-82, 101, 107.

³³² Ibid, 101.

repent his wrongdoing. According to Duff, the penal hard treatment is necessary because it makes it harder for the offender to ignore the message that punishment communicates, and encourages attention to that message.³³³ Punishment should aim to instil a sense of repentant recognition of the wrong in the offender.

If we accept these foundational premises of Duff's theory, it can be argued that engaging the offender in the sentencing process may draw offenders' attention to the nature of the wrong, thereby allowing them to take responsibility for the wrong, helping them to consider what is required to repair it, and fostering a greater moral understanding of the wrong. As Duff explains:

[A]s far as punishment in particular is concerned, its communicative efficacy would surely be enhanced if offenders could take part in determining their own sentences. We are more likely to bring offenders to understand the nature and implications of their crimes and to make their punishments their own as genuine modes of apologetic reparation if they are involved in a discussion of what kind of reparation the crime requires.³³⁴

If offenders have a voice in determining their sentence, it is thought that they will be more inclined to recognise that they have committed a wrong, and undertake the punishment as a form of secular penance, i.e. as a way of repenting, reforming, and reconciling. Conversely, where courts determine a sentence top-down and impose it on offenders without engaging them in the process, this might foster their resentment towards society and the authority that imposes such punishment, thereby further alienating and isolating them.

³³³ Duff, 'Punishment, Retribution and Communication' (n 22), 129.

³³⁴ Duff, *Punishment, Communication, and Community* (n 33), 160.

3.2.1.2 *What the offender communicates to the community and the victim*

Duff's account of penal censure is dialogical, because there is scope for the offender to *respond* to state censure, by undertaking the punishment as a vehicle for repentance, reform, and reconciliation. The hard treatment should bring the offender to understand and acknowledge that his behaviour is wrong, to repent of his wrongdoing, and it should provide a vehicle through which the offender can express and communicate his repentant apologetic desire to make reparation to the community and the victim.³³⁵ Duff phrases it as follows:

The punishment imposed on an offender must be one that constitutes an appropriate apologetic communication of the offender's recognition of what he has done: it must, that is, be something that a repentant offender can properly undergo or undertake as the reparation that (he now sees) he owes to those whom he wronged.³³⁶

Duff conceives of reparation as a moral reparation rather than a material one.³³⁷ Central to such moral reparation is the idea of apology. In criminal cases, the apology and penitent recognition of the wrong should be conveyed through something burdensome that the wrongdoer undertakes.³³⁸ It is the hard treatment that gives the apology its material form, thereby intensifying its moral force.³³⁹ In short, the punishment is said by Duff to serve as a vehicle by which the offender can communicate his repentant apology.

The argument for allowing the offender to exercise agency at sentencing is that this function of punishment – namely to encourage the offender to undertake the punishment as a

³³⁵ Duff, 'Punishment, Retribution and Communication' (n 22), 131.

³³⁶ RA Duff, 'In Response' in R Cruft, MH Kramer and MR Reiff (eds), *Crime, Punishment, and Responsibility: the Jurisprudence of Antony Duff* (Oxford University Press 2011), 376-377. See also Duff, 'Punishment, Retribution and Communication' (n 22), 131.

³³⁷ Duff, 'Punishment, Retribution and Communication' (n 22), 130. See also Duff, 'In Defence of One Type of Retributivism' (n 295), 413.

³³⁸ Duff, *Punishment, Communication, and Community* (n 33), 109; Duff, 'Probation, Punishment and Restorative Justice' (n 183), 189.

³³⁹ Duff, 'Punishment, Retribution and Communication' (n 22), 130.

way of communicating his apology to the victim and the community – would be undermined if the state dictated precisely what the offender should communicate. A top-down determination and imposition of punishment allows the state to express the degree of disapprobation for the wrongful conduct, but it might impede punishment from constituting a vehicle through which the offender can communicate. The communication takes its optimal form when the offender is engaged in the process of determining what he should communicate and how.

One issue with the centrality of apology in the offender's communication on Duff's account is that many offenders may not be genuinely apologetic, nor will the hard treatment make them so. Brownlee labels this the 'Scripting Problem':

Since punishment is *imposed* upon an offender irrespective of her will, and *requires* her to engage in the public ritual of apology and penance with its expected expressions of grief and remorse regardless of whether she feels those emotions or accepts the judgement upon her, it is a process that fails to respect the offender as a person and as a full and equal citizen.³⁴⁰

In response, Duff emphasises that there is a value in making these 'required apologies' that are punishments, whether or not they are sincere. The fact that the offender did not mean it as such does not make the punishment inadequate. The moral possibility of punishment in bringing offenders to engage in the communicative enterprise, and to repent and make amends, does not depend on its actual success in doing so. Rather, 'we must address the wrongdoer as someone who *could* respond appropriately'.³⁴¹ Duff claims that the offender's autonomy is still respected as it remains up to the offender to make, or refuse to make, the 'required apology' a genuine, remorseful apology. He maintains that sentencing is an exercise in rational communication,

³⁴⁰ K Brownlee, 'The Offender's Part in the Dialogue' in R Cruft, M H Kramer and M R Reiff (eds), *Crime, Punishment, and Responsibility: the Jurisprudence of Antony Duff* (Oxford University Press 2011), 55.

³⁴¹ RA Duff, 'Can We Punish the Perpetrators of Atrocities?' in T Brudholm and T Cushman (eds), *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspective* (Cambridge University Press 2009), 91.

rather than in improper coercion or manipulation,³⁴² since it is left to the offender to be persuaded or remain unpersuaded to accept the message punishment communicates.³⁴³

Duff argues that, while the offender is made to take part in the public ritual of being required to apologise by undergoing punishment, this public ritual has ‘other dimensions of meaning than that of apology ... and whose apologetic dimension has a formality that is intended and known to leave the question of sincerity open’.³⁴⁴ This indicates that the notion of apology in Duff’s work is a mere formal and symbolic one, in the sense that it is irrelevant whether the offender is genuinely remorseful and repentant. Rather, a ‘forced’ apology serves to make it clear to the offender that he ought to offer sincere apologies, and it signals to the victim that the community acknowledges and takes seriously the wrong suffered. Even if the offender’s apology is not sincere and the offender is not genuinely penitent, the offender’s fellow citizens still ought to accept that, by having undertaken the punishment, the offender has ‘paid her debt of apology and reparation’³⁴⁵ since he has undertaken what would constitute an adequate apology if he would have meant it as such.³⁴⁶ Yet, Duff has doubts about his own response to the objection. He concedes that the idea of ‘required apologies’ sits uneasily with the central notion of treating offenders as fellow citizens of a liberal polity. He acknowledges that requiring offenders to apologise is to write their side of the communicative dialogue for them.³⁴⁷

³⁴² Duff, ‘Punishment, Retribution and Communication’ (n 22), 130-131.

³⁴³ Duff, *Punishment, Communication, and Community* (n 33), 113.

³⁴⁴ Ibid, 110.

³⁴⁵ Ibid, 110. See also A Lee, ‘Defending a Communicative Theory of Punishment: The Relationship between Hard Treatment and Amends’ (2017) 37 *Oxford Journal of Legal Studies* 217, 232: Lee argues that on a communicative conception of punishment unrepentant offenders who have served their sentence should not be subjected to further punishment to induce further repentance. Instead, the offender can be said to have reconciled himself with others simply by virtue of performing the amends (in the form of hard treatment) that he has been burdened with.

³⁴⁶ Duff, *Punishment, Communication, and Community* (n 33), 111.

³⁴⁷ Ibid, 110-111. For further critical discussion of this issue in Duff’s theory see Brownlee (n 340), 55-56, 59-61.

Indeed, this is one of the limitations of Duff's communicative theory. If the state imposes punishment on the offender who is not genuinely apologetic, thereby effectively indicating that the offender's message of defiance or absence of remorse cannot be heard, it is questionable whether such punishment can still be justified *on communicative grounds*. At the very least, this indicates that the notion of dialogue on a state-centred account of punishment is more restricted than it appears initially in Duff's theory. The centrality of apology on Duff's account raises two possible issues for an agentic sentencing model premised on the paradigm of dialogue. First, there is the risk that an offender who is not sincerely apologetic may say whatever he thinks will secure the least onerous sentence possible, thus using the opportunity to exercise agency to maximise his self-interest.³⁴⁸ Secondly, the question arises whether on an agentic sentencing model the court should and could be open to hearing the offender's accounts of defiance and absence of remorse.³⁴⁹ Chapter 6 will address both issues.

This section argued that, based on a communicative conception of punishment, one of the justifications for offender agency is that offering the offender the opportunity to have a say in the determination of the punishment will increase its communicative efficacy, both in terms of what the community communicates to the offender and vice versa. Empirical verification of this claim is required to demonstrate how, if at all, allowing an offender to take part in the determination of the sentence would affect his understanding of the wrong, and his repentance, reform, and reconciliation. Yet, it is clear that an account of punishment as a communicative, reciprocal enterprise theoretically supports a conception of sentencing as a process in which the offender should be an active participant.

³⁴⁸ Section 6.3.1.

³⁴⁹ Section 6.3.2.

3.2.2 Expressive functions of punishment in Bennett's and von Hirsch's theory

In contrast to Duff's account, Bennett and von Hirsch's theories take a narrower view of the aim of censure, which has an impact on the scope for offender agency. Bennett's 'apology ritual' is an expressive, non-communicative theory of punishment, since on his view mere expression of condemnation suffices.³⁵⁰ What matters according to Bennett is that the censure is symbolically adequate, which is expressed through the symbols of blame and apology.³⁵¹ Bennett argues that when an offender commits a wrong, the state should express collective censure. The expression of blame takes material form by imposing hard treatment on the offender. On Bennett's account, this means the proportionate withdrawal of certain forms of respect from the offender, in particular the 'partial and temporary suspension of the normal rights and liberties – deprivation of freedom – which is necessary so that it becomes legitimate to *require* the offender to make amends'³⁵² and the 'imposition of amends'.³⁵³ The hard treatment expresses

how sorry someone *ought to be* for their crime – that is, how serious we think it is, the degree of our condemnation – by setting a certain level of amends to be made for a crime (given a level of responsibility): a level of amends that represents a view of what the offender ought to be motivated to undertake if she were appropriately sorry.³⁵⁴

In short, the main purpose of punishment is condemnation of the public wrong, which is best expressed by requiring the offender to undertake proportional amends for his crime.³⁵⁵

³⁵⁰ Bennett, *The Apology Ritual* (n 33), 193.

³⁵¹ Ibid, 8, 144-149.

³⁵² Ibid, 171.

³⁵³ Ibid, 148, 171.

³⁵⁴ Ibid, 145-146.

³⁵⁵ Ibid, 152.

The notion of apology is central to Bennett's work. A similar question to the one raised above regarding Duff's theory arises in respect of Bennett's: what if the offender is not truly apologetic, and does not feel the need to make amends? Bennett suggests that by blaming wrongdoers and expecting them to apologise, the offender's moral status as citizen in the political community will eventually be restored, regardless of whether the attitude with which the offender made amends is truly apologetic.³⁵⁶ It is questionable whether offenders undertaking punishment do so in an apologetic manner. Bennett acknowledges that there is a limit to which the state can require offenders to apologise.³⁵⁷ The state can only legitimately ask the offender to 'undo' a public wrong by making him complete a sentence of proportionate apologetic action, regardless of whether the offender's apology is sincere.³⁵⁸ But it is clear from Bennett's theory that whether the offender's attitude is truly apologetic does not undermine his justification of punishment, as the justification lies in the *symbol* of blame and apology by making the offender undertake proportionate amends. This is why Bennett refers to his account of punishment as an apology 'ritual':

A ritual, in this usage, is an act the form of which expresses the attitude that a participant ought to have in performing it (think of kneeling in order to pray). The idea is that, by requiring offenders to undertake the sort of reparative action that they would be motivated to undertake were they genuinely sorry for what they have done, the state condemns crimes in a way that is symbolically adequate and hence more meaningful than simple imprisonment or fining.³⁵⁹

In response to wrongdoing, it is appropriate for the criminal justice system to 'suspend some civic rights'³⁶⁰ as well as to require the offender 'to do the sort of thing she would be motivated

³⁵⁶ Ibid, 154.

³⁵⁷ Ibid, 172-173.

³⁵⁸ Ibid, 173.

³⁵⁹ Ibid, 8-9. See also *ibid*, 146.

³⁶⁰ Ibid, 154. Similar phrasings at *ibid*, 147, 148. Without further specification of which (fundamental) rights and liberties can be suspended in response to wrongdoing, Bennett's account risks being open to abuse of rights. In other places, however, Bennett seems to equate the suspension of normal civic rights with the deprivation of

to do spontaneously were she appropriately sorry for her offence.’³⁶¹ On both Duff’s and Bennett’s accounts the apology is a formal one and the offender is seen as having paid his dues once he has undertaken the hard treatment, regardless of whether he was truly apologetic. It was argued that requiring offenders who are not genuinely remorseful to apologise is problematic on Duff’s communicative theory since this conflicts with the idea that punishment can be a dialogue.³⁶² By contrast, this is not an issue on Bennett’s expressive account, on which the state’s role is only to express blame and not to tailor the sanction to elicit certain responses from the offender and attend to the offender’s response.

Bennett rejects the idea that punishment is aimed at making the offender understand and accept the condemnation and at inducing repentance, reform, and reconciliation.³⁶³ On his account, the point of expressing blame is not to get the offender to understand and accept the reasons for the blame, but rather for the state to treat the offender in a way that ‘reflects the new terms of their relationship’.³⁶⁴ The expression of blame symbolises the altered status of the relationship between the state and the offender. On Bennett’s account, the censure is rather more symbolic and less explicitly dialogical than it is on Duff’s account. Consequently, there is less scope for offender agency at sentencing in Bennett’s expressive theory of punishment. The offender need not be actively engaged in the sentencing process in order for the message of condemnation and apology requirement to be expressed. The symbolism of state blame as an expression of the requirement for the offender to be apologetic need not necessarily be translated into a sentencing discussion. While genuine remorse and apology are the desired

liberty (see e.g. Ibid, 171, 173). In doing so, he indicates that offenders do not forfeit *all* of their civic rights, although this raises the question of how sanctions other than imprisonment can be accounted for.

³⁶¹ Ibid, 152.

³⁶² Section 3.2.1.2.

³⁶³ Bennett, *The Apology Ritual* (n 33), 194, 196.

³⁶⁴ Ibid, 193.

response to wrongdoing, on an expressive account it is not the state's role to tailor the punishment to prompt such a response.

Like Bennett, von Hirsch's account allows scope for the offender's response to censure, but similarly that response is more symbolic and less obviously dialogic.³⁶⁵

A response to criminal wrongdoing that conveys disapprobation gives the individual the opportunity to respond in ways that are typically those of an agent capable of moral deliberation: to recognize the wrongfulness of the action; to feel remorse; to express regret; to make efforts to desist in future – or else, to try to give reasons why the conduct was not actually wrong.³⁶⁶

On von Hirsch's account, the offender is confronted with a message of disapproval regarding the wrongfulness of his conduct, and this message is not solely conveyed to achieve some preventive or other societal benefit.³⁶⁷ For von Hirsch, the purpose of the communication of judgement is not to motivate the offender to change his behaviour, it merely offers the offender the *opportunity* to do so.³⁶⁸ Von Hirsch argues that there is a difference between state expression of condemnation and the aim of inducing repentance in offenders: '[t]he disapproval conveyed by the sanction gives the actor the opportunity to reconsider his actions and feel shame or regret. However, it is left to him to respond.'³⁶⁹ While censure serves to give the offender the opportunity to make a repentant response, there is no need to tailor the sentence to elicit a repentant response to the wrongdoing.³⁷⁰ Von Hirsch does not conceive censure as a technique for evoking penitent reflection for two reasons. First, it is not the proper role for the liberal state to use its coercive powers to instil moral sentiments of repentance in citizens who

³⁶⁵ H Maslen, *Remorse, Penal Theory and Sentencing* (Hart 2015), 98.

³⁶⁶ von Hirsch and Ashworth (n 43), 98. See also von Hirsch, 'Proportionate Sentences: a Desert Perspective' (n 48), 116.

³⁶⁷ von Hirsch and Ashworth (n 43), 17.

³⁶⁸ Ibid, 18.

³⁶⁹ von Hirsch, *Censure and Sanctions* (n 33), 72.

³⁷⁰ Ibid, 10, 72-77; von Hirsch and Ashworth (n 43), 18.

have committed a wrong,³⁷¹ for this would be too intrusive. Von Hirsch likens the person delivering censure in Duff's theory to an abbot in a monastery who takes a legitimate interest in the spiritual welfare of his brethren. Von Hirsch distances himself from this view, stating that 'when censuring, we act more as judges than as abbots.'³⁷² He argues that the state ought not to be concerned with citizens' spiritual welfare, whereas the abbot may be expected to care about the monk's spiritual welfare because he is in a paternalistic and spiritual relationship with his monks. Administering penances is not the proper role of the liberal state, as citizens have not entrusted their moral development to the state.³⁷³

Von Hirsch's position that citizens' spiritual development is not a legitimate concern of the state is consistent with a liberal account of the role of the secular state. Yet, arguably rehabilitation and reparation are legitimate aims of state punishment, within limits of proportionality and with respect for the offender's moral agency. It can be argued that if the majority of offenders serve their sentence in the community or are eventually released back in the community, the state should not just be concerned with expressing condemnation for the wrongful conduct, but equally with the offender's moral deliberation and progress following the commission of a crime. Du Bois-Pedain suggests we should conceive of state punishment as setting the terms for the future existence of the offender in the shared social world.³⁷⁴ She argues that if punishment is to be an inclusive practice, aimed at reintegrating the offender into society, then rehabilitation becomes the appropriate concern of the liberal state and the conceptually dominant goal of proportionate punishment.³⁷⁵ On a conception of punishment as

³⁷¹ von Hirsch, *Censure and Sanctions* (n 33), 73.

³⁷² Ibid, 73.

³⁷³ A von Hirsch, 'Punishment, Penance, and the State: A Reply to Duff' in M Matravers (ed), *Punishment and Political Theory* (Hart 1999), 409.

³⁷⁴ du Bois-Pedain (n 129), 210-215.

³⁷⁵ Ibid, 214.

an inclusionary practice, the state is legitimately entrusted with the offender's rehabilitation. Furthermore, as the next section will argue, it is paradoxical that the state would require offenders to respond to censure in a way that is appropriate for a moral agent and offer them an opportunity to do so, while simultaneously being inattentive to this response. It will be argued that a responsive penal censure account is more respectful of the offender as a responsible moral agent than a mere expressive model of penal censure.

A second reason, on von Hirsch's account, for why the state should not be concerned with eliciting a penitent response from the offender is that, even if the chief aim of punishment would be to induce repentance, then different degrees of severity would be in order for the already repentant offender and the defiant offender. At best, the former would receive a disproportionately low sentence, whereas the latter, who maintains his innocence, would have to be punished significantly more in order to achieve the aim of penance.³⁷⁶ The latter position would be particularly problematic, considering the evidence that some convicted offenders are in fact innocent.³⁷⁷ At worst, it would make no sense to punish actors who are either repentant already or defiant at all. The repentant actor already understands that his conduct was wrong and regrets it, and therefore needs no expression of blame to make him regret his actions to try and desist in the future. The actor who seems defiant will not accept the message of disapproval that the censure communicates and so will not change and refrain from criminal behaviour in the future despite the censure.³⁷⁸ Von Hirsch maintains that we ought to convey blame on the repentant or seemingly defiant actor because in doing so we recognise them as moral agents

³⁷⁶ von Hirsch, *Censure and Sanctions* (n 33), 10.

³⁷⁷ See e.g. C Hoyle and M Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (Oxford University Press 2019).

³⁷⁸ von Hirsch, *Censure and Sanctions* (n 33), 10; von Hirsch, 'Proportionate Sentences: a Desert Perspective' (n 48), 116.

who are capable of understanding the message of censure.³⁷⁹ The communication of judgement is the essence of the moral discourse between rational agents.³⁸⁰ Duff concedes that in the case of the already repentant or defiant offender lack of proportionality in their respective punishments would undermine the aim of censure.³⁸¹ It is evident that, even if the state is legitimately entrusted with the offender's moral progression and rehabilitation following the commission of a crime, these aims should be pursued within the confines of proportionate punishment.

Because von Hirsch rejects the aim of inducing repentance, reform, and reconciliation, the argument for offender agency at sentencing is less strong in his theory. If the central aim of punishment is to convey condemnation for the conduct, then mere expression of state condemnation to the offender suffices. It is expected that the offender responds, but it is not the state's role to attend to this response. Von Hirsch does not envisage an active exchange.³⁸² The offender is not integral to the aim of expressing condemnation, and therefore there is no need to engage the offender in a dialogue about the nature of the wrong, its implications, and how the punishment can achieve the aims of repentance, reform, and reconciliation, as would be required on Duff's account.

3.3 Respect for the offender as a responsible moral agent

The second ground for offender agency at sentencing pertains to the value of respecting the offender as a responsible moral agent. Section 3.3.1 argues that actively engaging the offender in the determination of sentence, as a communicative conception of punishment would require,

³⁷⁹ von Hirsch, *Censure and Sanctions* (n 33), 10.

³⁸⁰ Ibid, 10.

³⁸¹ Duff, *Punishment, Communication, and Community* (n 33), 118-125.

³⁸² Maslen (n 365), 98.

is more respectful of the offender as a moral agent than mere expression of condemnation for wrongdoing without giving the offender a voice. Section 3.3.2 contrasts censure-based theories with Lacey and Pickard's forgiveness-based account of punishment.³⁸³ It demonstrates that the latter, which is premised on responsibility without blame, also takes the offender's responsible moral agency seriously, and indeed equally provides scope to give the offender a more active role at sentencing.

3.3.1 Responsible moral agency in censure-based theories of punishment

Truly communicative theories of punishment, such as Duff's, conceive of moral agency as a more elaborate, embodied notion than expressive theories of punishment, such as those of von Hirsch and Bennett. On von Hirsch's account, moral agency in punishment is central to the originating ground for criminalising and sanctioning: the censuring function of punishment conveys to the offender that his conduct was wrong and is disapproved of, and thereby serves to recognise the offender's status as a moral agent, as a person who is capable of understanding why his conduct was wrong.³⁸⁴ By contrast, according to von Hirsch 'neutral' sanctions, which are designed to visit material deprivation but convey no blame,³⁸⁵ deny the status of the person as an agent capable of moral deliberation.³⁸⁶ Neutral sanctions would treat 'offenders or potential offenders much as tigers might be treated in a circus, as beings that have to be restrained, intimidated, or conditioned into compliance because they are incapable of understanding why biting people (or other tigers) is wrong.'³⁸⁷ In sum, on von Hirsch's

³⁸³ Lacey and Pickard, 'From the Consulting Room' (n 34); Lacey and Pickard, 'To Blame or to Forgive?' (n 34).

³⁸⁴ von Hirsch, *Censure and Sanctions* (n 33), 11; von Hirsch and Ashworth (n 43), 17-18; von Hirsch, 'Proportionate Sentences: a Desert Perspective' (n 48), 117.

³⁸⁵ von Hirsch, *Censure and Sanctions* (n 33), 11.

³⁸⁶ Ibid, 14.

³⁸⁷ Ibid, 11; von Hirsch, 'Punishment, Penance, and the State: A Reply to Duff' (n 373), 69.

account, the offender is said to be treated as a moral agent because he is censured for moral reasons, and because he is given the opportunity to respond as a moral agent.

Bennett's account is similar to von Hirsch's in this respect. He states that the notion of moral agency is central to the censuring function of punishment: 'punishment is owed to the wrongdoer; in absence of punishment we would be failing to respect the status of the wrongdoer as a moral agent.'³⁸⁸ According to Bennett, by blaming wrongdoers and expecting them to apologise, the offender's moral status as citizen in the political community will eventually be restored, regardless of whether the attitude with which the offender made amends was truly apologetic.³⁸⁹

Von Hirsch and Bennett's theories share the view that, to treat offenders as moral agents, it suffices to express state condemnation through the imposition of punishment. Doing so addresses offenders as fellow citizens who have transgressed the boundaries of acceptable behaviour, and both offers them the opportunity and expects them to react appropriately by being apologetic. In practice, however, this means that the offender is told that his conduct was wrong, is offered reasons for why it was wrong, and subsequently passively receives the punishment. Whether and how the offender actually responds is of limited interest to the state on von Hirsch's and Bennett's account. However, as Roberts and Dagan argue, it makes little sense to provide offenders with an opportunity to respond to state censure but then to remain oblivious to whether they actually avail themselves of that opportunity.³⁹⁰ Levanon goes even further, arguing that a mere expressive, unilateral account of punishment, in which only the state participates actively, ignores the offender's subjectivity in what is ultimately a bilateral

³⁸⁸ Bennett, *The Apology Ritual* (n 33), 8.

³⁸⁹ Ibid, 154. See Section 3.2.2.

³⁹⁰ Roberts and Dagan (n 37), 143; Dagan and Roberts (n 37), 4.

relationship.³⁹¹ To say that expressive accounts of punishment are not respectful at all of the offender's moral agency would be an overgeneralisation at best, or inaccurate at worst. But on expressive accounts, the opportunity for the offender to engage with and respond to the message of censure as a moral agent is more limited than a dialogic, communicative conception of punishment would allow.

On communicative accounts of punishment, the notion of moral agency is more elaborate and embodied. It requires that the offender is given the opportunity to be actively engaged in the sentencing process:

[C]ommunication involves, as expression need not, a *reciprocal* and *rational* engagement. Expression requires only one who expresses. If there is (as there need not be) someone at whom it is directed, that person need figure only as its passive object or recipient; ... By contrast, communication requires someone to or with whom we try to communicate. It aims to engage that person as an active participant in the process who will receive and respond to the communication, and it appeals to the other's reason and understanding – the response it seeks is one that is mediated by the other's rational grasp of its content. Communication thus addresses the other as a rational agent, whereas expression need not.³⁹²

According to Duff, communication is essentially a two-way rational activity that addresses the other party as a moral agent by appealing to that party's understanding and seeking a rational response from her. There is thus a clear connection between respecting the offender as a moral agent and engaging that person as an active participant in the process.

³⁹¹ L Levanon, 'Reflective Censure: Punishment and Human Development' in A du Bois-Pedain and A Bottoms (eds), *Penal Censure: Engagements within and Beyond Desert Theory* (Hart 2019), 65.

³⁹² Duff, *Punishment, Communication, and Community* (n 33), 79-80. See also RA Duff, 'Alternatives to Punishment – or Alternative Punishments?' in W Cragg (ed), *Retributivism and Its Critics* (Franz Steiner Verlag 1992), 51-52; RA Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 *Crime and Justice* 1, 32-33; Duff, 'Punishment, Communication, and Community' (n 103), 49.

Duff's dialogic conception of punishment has implications for the sentencing process. It follows from the commitment to treat offenders as responsible moral agents that they should be given a say in determining the sentence:

Punishment, on my account, aims not merely to communicate with the offender, but also to provide a means by which *she* can communicate apologetically with her victim and the community. One who is required to engage in such a communicative exercise must surely, if she is to be treated as a responsible agent, be allowed a say in determining just what and how she should communicate.³⁹³

As on Duff's account the sanction is not only the means through which the state communicates but also through which the offender can communicate by undertaking the sanction as a vehicle for apology, this entails that the offender should have a say in determining what the appropriate sanction should be. A communicative enterprise that ignores the offender's voice in this enterprise is thus less respectful of rational moral agency.³⁹⁴

3.3.2 An alternative view: responsible moral agency in a forgiveness-based theory of punishment

It seems obvious that censure which is responsive to the offender is more respectful of the offender as a moral agent and has greater moral and communicative legitimacy than mere expression. However, the censuring imputation of responsibility to an agent is only one way of taking the offender seriously as a responsible moral agent. Seelmann argues that it is possible to arrive at an equivalent position from a completely different philosophical direction.³⁹⁵ Alongside censure, a forgiveness-based account of punishment may also be compatible with

³⁹³ Duff, *Punishment, Communication, and Community* (n 33), 159.

³⁹⁴ For a similar argument regarding the role of the offender's remorse in a censure-based conception of punishment see Maslen (n 365), 102.

³⁹⁵ Seelmann (n 304).

treating the offender as a responsible moral agent. Seelmann suggests that, if forgiveness is triggered by the thought that we are all fallible and should therefore exercise great restraint in blaming others, the practice of forgiveness serves to take the other person seriously as a member of the moral community.³⁹⁶ While Seelmann does not develop this claim further, Lacey and Pickard suggest a more elaborate account of ‘punishing with forgiveness’, based on a connection between punishment, forgiveness, and respect for the offender as a responsible agent.³⁹⁷ Drawing upon their theory, it will be demonstrated that communicative censure accounts of punishment cannot make a unique claim to treating offenders as responsible moral agents, and indeed are not the only theories that offer scope for offender agency at sentencing based on the notion of responsible moral agency.

The core of Lacey and Pickard’s argument is that punishment should be an institutional form of forgiving rather than blaming. They suggest a conception of punishment which rejects the strong association between punishment and blame that characterises the retributivist tradition of punishment,³⁹⁸ while still retaining the emphasis on the offender’s capacity for responsible agency.³⁹⁹ Their starting point is a clinically-derived conceptual framework of ‘responsibility without blame’.⁴⁰⁰ For treatment to be effective, it is essential that clinicians engage and develop a patient’s capacity for responsible agency,⁴⁰¹ which entails that

³⁹⁶ Ibid, 120-121.

³⁹⁷ Lacey and Pickard, ‘From the Consulting Room’ (n 34); Lacey and Pickard, ‘To Blame or to Forgive?’ (n 34).

³⁹⁸ See Murphy (n 137); von Hirsch, *Doing Justice* (n 32); von Hirsch, *Censure and Sanctions* (n 33), ch 2; Duff, *Punishment, Communication, and Community* (n 33), ch 3; von Hirsch, Ashworth and Shearing (n 284), 25-26; von Hirsch and Ashworth (n 43), ch 2; Brudner (n 32), ch 1.

³⁹⁹ Lacey and Pickard, ‘From the Consulting Room’ (n 34), 2-3, 28.

⁴⁰⁰ Ibid, 11-20; Lacey and Pickard, ‘To Blame or to Forgive?’ (n 34), 669-672. For a detailed discussion of this clinical model see H Pickard, ‘Responsibility Without Blame: Empathy and the Effective Treatment of Personality Disorder’ (2011) 18 *Philosophy, Psychiatry and Psychology* 209; H Pickard and L Ward, ‘Responsibility without Blame: Philosophical Reflections on Clinical Practice’ in KWM Fulford and others (eds), *The Oxford Handbook of Philosophy and Psychiatry* (Oxford University Press 2013).

⁴⁰¹ The language of agency and responsibility also permeates the culture of therapeutic communities in prison (Lacey and Pickard, ‘From the Consulting Room’ (n 34), 12). See E Genders and E Player, *Grendon: A Study of*

individuals are held accountable for their conduct and are capable of change.⁴⁰² Part of asking patients to take responsibility for their behaviour involves imposing negative consequences should they fail.⁴⁰³ But these negative consequences should be effected with ‘an attitude of concern, respect and compassion’, rather than ‘affective blame’.⁴⁰⁴ ‘Affective blame’ refers to ‘the range of hostile, negative attitudes and emotions that are typical human responses to blameworthiness’,⁴⁰⁵ which according to Lacey and Pickard are embodied in the hard treatment and stigma as components of retributive practices of sentencing and punishment.⁴⁰⁶ Based on this clinically derived framework, Lacey and Pickard suggest an alternative conception of punishment. On their account, punishment is still justified by responsibility for and in proportion to blameworthy conduct, but is severed from ‘affective blame’.⁴⁰⁷ This severance from blame allows punishment to be used for therapeutic ends, in particular reparation and rehabilitation.⁴⁰⁸ These ends are best served, they argue, if we do not punish with blame but with forgiveness.⁴⁰⁹ Hence, punishment should be reconceptualised, not as the imposition of hard treatment in response to blameworthiness, but as the imposition of ‘consequences’ in response to responsibility for a crime, enacted with forgiveness in the sense that these consequences should aim to achieve reparative and rehabilitative ends.⁴¹⁰

a Therapeutic Prison (Clarendon Press 1995); E Genders and E Player, ‘Therapy in Prison: Revisiting Grendon 20 Years On’ (2010) 49 *Howard Journal of Criminal Justice* 431.

⁴⁰² Lacey and Pickard, ‘From the Consulting Room’ (n 34), 11-14, 17.

⁴⁰³ *Ibid*, 13.

⁴⁰⁴ *Ibid*, 13-14, 20.

⁴⁰⁵ *Ibid*, 3, 19; Lacey and Pickard, ‘To Blame or to Forgive?’ (n 34), 671. For further discussion of the concept of ‘affective blame’ see Pickard (n 400); Pickard and Ward (n 400).

⁴⁰⁶ Lacey and Pickard, ‘From the Consulting Room’ (n 34), 9-10.

⁴⁰⁷ *Ibid*, 2-3, 20, 29.

⁴⁰⁸ *Ibid*, 3; Lacey and Pickard, ‘To Blame or to Forgive?’ (n 34), 678.

⁴⁰⁹ Lacey and Pickard, ‘To Blame or to Forgive?’ (n 34), 672.

⁴¹⁰ *Ibid*, 668, 672, 683.

Lacey and Pickard suggest that these ‘consequences’ imposed in response to offending will more often than not be negative.⁴¹¹ Insofar as these predominantly negative consequences are imposed by courts rather than in the clinical context,⁴¹² there may be a risk that negative consequences may not be so different from hard treatment. A clear merit of Lacey and Pickard’s model lies in the theoretical reconciliation of principles traditionally associated with ‘just deserts’ with a rehabilitative ideal. Their conception of punishment insists that punishment is justified only when imposed in response to, by reason of, and in proportion to an agent’s blameworthy conduct, which in turn requires that the offender has the capacity for responsible moral agency.⁴¹³ Simultaneously, they argue that punishment need not be stigmatising, exclusionary, or merciless, but can aim to achieve therapeutic ends.

For, according to our alternative model, rehabilitation need not entail the effacement of moral responsibility, and justice need not entail the hard treatment and stigma that is typical of affective blame, even when negative consequences are justified and imposed.⁴¹⁴

This welcome acknowledgment of the plural purpose of punishment makes Lacey and Pickard’s account a sound theoretical basis for considering the role of the offender at sentencing.

The combination of concepts traditionally associated with just deserts on the one hand, and treatment and rehabilitation on the other, has consequences for how the sentencing process should be conceived,⁴¹⁵ and, crucially for this thesis, for the role of the offender. Essential to

⁴¹¹ Lacey and Pickard, ‘From the Consulting Room’ (n 34), 3; Lacey and Pickard, ‘To Blame or to Forgive?’ (n 34), 669.

⁴¹² On what ‘consequences’ entail in the clinical context see Lacey and Pickard, ‘From the Consulting Room’ (n 34), 13-14.

⁴¹³ Ibid, 5, 20.

⁴¹⁴ Ibid, 3.

⁴¹⁵ For how the clinically derived framework of ‘responsibility without blame’ can be imported to various areas of the criminal law see *ibid*, 20-28; Lacey and Pickard, ‘To Blame or to Forgive?’ (n 34), 688-695.

Lacey and Pickard's model is the view that forgiveness is a co-operative strategy, one that requires both the state and offender to participate.⁴¹⁶ Regarding sentencing, they acknowledge that, in practice, sentences are currently being decided and delivered by the judge '*de haut en bas*' and then passively received by the offender.⁴¹⁷ There is, however, scope to actively encourage offenders to participate in the sentencing process:

[T]he sentencing process could aim to create dialogue and discussion with offenders about the nature of the consequences – within, necessarily, the established framework that already exists – that might genuinely allow them to feel they had the opportunity for reparation and rehabilitation as a component in their sentence.⁴¹⁸

Lacey and Pickard further explain that a dialogue and discussion about the nature of the consequences appropriate to the offence gives offenders the opportunity to have a voice and a role within sentencing, and thus allows them to take responsibility for their offence, and consider what might realistically help them repair the damage and move forward.⁴¹⁹ This implies that the argument for providing offenders with the opportunity to have a voice in the determination of their sentence is consequentialist. Inviting offenders to express their view on what the reparation and rehabilitation should involve, might increase the possibility that these aims are achieved.⁴²⁰ A forgiveness-based model of punishment is not just theoretically consistent with allowing the offender to exercise agency at sentencing, it even requires it. As the next chapter will argue, a similar consequentialist argument for offender agency derives from therapeutic jurisprudence. This is unsurprising, given the therapeutic origins of both frameworks, and the consequent emphasis on reparation and rehabilitation at sentencing.

⁴¹⁶ Lacey and Pickard, 'To Blame or to Forgive?' (n 34), 689.

⁴¹⁷ Ibid, 693.

⁴¹⁸ Ibid, 693.

⁴¹⁹ Ibid, 693.

⁴²⁰ Ibid, 693-694.

Although Lacey and Pickard do not make this point explicitly, arguably there could be a second rationale for offender agency at sentencing on a forgiveness-based account of punishment. Based on the value attached to responsible agency in a clinical framework, respect for the offender's capacity for responsible moral agency is a defining principle of Lacey and Pickard's account of punishment.⁴²¹ Offering the offender the opportunity to participate in a dialogue about the appropriate 'consequences' for their offence might not only induce reparation and rehabilitation, as Lacey and Pickard suggest.⁴²² Arguably, doing so also reaffirms offenders' capacity for responsible agency, by drawing their attention to the wrong they have committed and the sentence that should be imposed in response, thus encouraging them to take responsibility for both. In this sense, there is a connection between responsible moral agency and the importance of allowing the offender to exercise agency at sentencing.

It is clear how Lacey and Pickard's account diverges from that of expressive theorists, such as von Hirsch and Bennet. The latter two not only argue for the relevance of censure and sanction to the institution of state punishment, but also do not see it as the state's role to elicit certain responses from the offender, such as reparation and rehabilitation. Lacey and Pickard's account lies closer to Duff's, who explicitly says that punishment should aim to induce a process of reform, reparation, and reconciliation in the offender. Yet, Duff maintains that these aims are intrinsic to, rather than contingent on, the communication of censure through hard treatment,⁴²³ which Lacey and Pickard reject in their advocacy of forgiveness. Nonetheless, it is at least implicit in both Duff's censure-based theory and Lacey and Pickard's forgiveness-based account of punishment that allowing the offender to engage in a dialogue about their

⁴²¹ Lacey and Pickard, 'From the Consulting Room' (n 34), 2-5, 11-20; Lacey and Pickard, 'To Blame or to Forgive?' (n 34), 669-672.

⁴²² Lacey and Pickard, 'To Blame or to Forgive?' (n 34), 693-694.

⁴²³ Duff, 'Punishment, Communication, and Community' (n 103), 52; Duff, *Punishment, Communication, and Community* (n 33), 30.

sentence might not only help achieve these aims of reparation and reform, but is also theoretically consistent with treating the offender as a responsible moral agent.

3.4 Conclusion

This chapter has demonstrated that the explicitly dialogical conception of punishment, in combination with the pluralistic aims of punishment, make Duff's account a particularly strong theoretical basis for offender agency at sentencing. First, it was argued that actively engaging the offender as a participant in the sentencing process will better serve the communicative aims and enhance the overall communicative efficacy of punishment. Secondly, if we accept that punishment ought to be a reciprocal communicative enterprise, the offender should be given the opportunity to be an active participant in order to be truly respectful of their moral agency. By contrast, conceptions of punishment focused on expression rather than communication, such as the ones advocated for by von Hirsch and Bennett, imply a conception of sentencing as a process with less scope for any voice other than that of the state.

Censure-based variations of desert theory are not the only ones that are compatible with respect for offenders as responsible moral agents. Lacey and Pickard's account of punishment as an institutional practice of conveying forgiveness rather than blame still insists on the offender's capacity for responsible agency. It was argued that it is implicit in their account that engaging offenders at sentencing is consistent with respecting them as moral agents. Furthermore, there is an explicit argument for inviting offenders to express their view on what reparation and rehabilitation should entail, namely that doing so may increase the likelihood of achieving these therapeutic aims. This ties in neatly with the focus of the next chapter, which explores arguments for offender agency in therapeutic jurisprudence.

4 THE CASE FOR OFFENDER AGENCY:

THERAPEUTIC JURISPRUDENCE

This chapter explores arguments for offender agency in therapeutic jurisprudence (TJ). As a theory that focusses on enhancing the therapeutic benefits of the law, TJ may be thought to be compatible with engaging the offender in the sentencing process, while preserving the fundamental role of the criminal court. Section 4.1 sets out the essential principles of TJ and its relationship with problem-solving courts. Section 4.2 explores the possibilities and limits of TJ as a framework within which to explore the scope for offender agency. Section 4.3 argues that in theory TJ provides arguments and scope for offender agency, and that offender agency can be conceptualised as expression on the one hand, and self-determination on the other. Section 4.4 concludes that, in practice, the scope for offender agency may be more limited than the theoretical ideal would suggest, owing to various sources of covert coercion.

4.1 Introducing therapeutic jurisprudence and problem-solving courts

4.1.1 General principles of therapeutic jurisprudence

TJ was first developed in the United States in the early 1990s by Professors Wexler and Winick.⁴²⁴ TJ emerged initially as a new approach to mental health law,⁴²⁵ but has since then

⁴²⁴ Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (n 45); Wexler and Winick, *Essays in Therapeutic Jurisprudence* (n 45). For later work see e.g. Wexler and Winick, *Law in a Therapeutic Key* (n 40); DP Stolle, DB Wexler and BJ Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press 2000); BJ Winick and DB Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press 2003); DB Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Justice Law Practice* (Carolina Academic Press 2008).

⁴²⁵ DB Wexler, 'Putting Mental Health into Mental Health Law' (1992) 16 *Law and Human Behavior* 27; Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence' (n 40); Wexler, 'New Directions in Therapeutic Jurisprudence' (n 40); PF Hora, WG Schma and JTA Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439, 442; DB Wexler, 'Therapeutic Jurisprudence: An Overview'

been applied to other areas of law,⁴²⁶ including criminal law and criminal adjudication.⁴²⁷ TJ has both an analytical-empirical and a normative dimension.⁴²⁸ As a scholarly discipline, it analyses the therapeutic and anti-therapeutic consequences of the law.⁴²⁹ It is described as the ‘study of the role of the law as a therapeutic agent.’⁴³⁰ It is interdisciplinary at its core:⁴³¹ based on findings from the medical, social, and behavioural sciences, TJ aims to examine the emotional and psychological impact of the law on its subjects.⁴³² Legal rules, procedures, and actors (such as lawyers and judges) are seen as social forces that can have therapeutic or anti-therapeutic effects on participants in the legal process.⁴³³

in DB Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Justice Law Practice* (Carolina Academic Press 2008), 6.

⁴²⁶ DB Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ (1993) 35 William and Mary Law Review 279, 281; C Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ (1995) 1 Psychology, Public Policy, and Law 193, 193; Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (n 45), 184.

⁴²⁷ DB Wexler, ‘Inducing Therapeutic Compliance Through the Criminal Law’ (1990) 14 Law and Psychology Review 43; DB Wexler and BJ Winick, ‘Therapeutic Jurisprudence and Criminal Justice Mental Health Issues’ (1992) 16 Mental and Physical Disability Law Reporter 225; K Gould, ‘Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?’ (1993) 10 New York Law School Journal of Human Rights 835; Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ (n 426); Nolan (n 40), 185; DB Wexler, ‘Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law’ (2002) 38 Criminal Law Bulletin 205; A Freiberg, ‘Non-Adversarial Approaches to Criminal Justice’ (2007) 16 Journal of Judicial Administration 205, 211; M King and S Ford, ‘Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime’ (2007) Special series(1) Elaw Journal: Murdoch University Electronic Journal of Law 9, 9.

⁴²⁸ Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ (n 426), 280; Nolan (n 40), 185.

⁴²⁹ Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (n 45), 185.

⁴³⁰ Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (n 45); Wexler and Winick, *Essays in Therapeutic Jurisprudence* (n 45), 8; Wexler, ‘Justice, Mental Health, and Therapeutic Jurisprudence’ (n 40), 517-518; Wexler, ‘New Directions in Therapeutic Jurisprudence’ (n 40), 762; Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ (n 426), 280; Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (n 45), 185.

⁴³¹ Wexler, ‘New Directions in Therapeutic Jurisprudence’ (n 40), 761; Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (n 45), 191.

⁴³² Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (n 45), 187. In Wexler’s own terms, these auxiliary disciplines can be considered the ‘vineyards’ from which TJ practices and techniques are produced, and TJ itself can be considered the ‘wine’ (DB Wexler, ‘New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices’ (2014) 7 Arizona Summit Law Review 463; DB Wexler, ‘Guiding Court Conversation Along Pathways Conducive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence’ (2016) 1 International Journal of Therapeutic Jurisprudence 367, 367-368).

⁴³³ Wexler, ‘New Directions in Therapeutic Jurisprudence’ (n 40), 762; Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ (n 426), 280.

Besides its analytical-empirical dimension, TJ also has a normative dimension: it suggests that the law should seek to further therapeutic ends and avoid anti-therapeutic effects.⁴³⁴ The normative basis of TJ seems to be that ‘other things being equal, positive therapeutic effects are desirable and should generally be a proper aim of the law, and that anti-therapeutic effects are undesirable and should be avoided or minimized.’⁴³⁵ Because TJ as a scholarly discipline is driven by this normative agenda, it does not merely observe and analyse the law in a neutral, value-free manner.⁴³⁶ In this sense, TJ is comparable with other schools of jurisprudence, such as law and economics, critical legal studies, feminist jurisprudence, and critical race theory, in that it examines the law with a clear normative orientation.⁴³⁷

Since TJ has a distinctive aim to further the therapeutic effects of the law and minimise its anti-therapeutic effects, its normative orientation is predominantly consequentialist.⁴³⁸ However, to call it a purely consequentialist theory would be a misnomer. TJ does not suggest that the law’s sole aim should be to further therapeutic effects at the expense of other fundamental justice principles and considerations, such as ‘autonomy, integrity of the fact-finding process, community safety, and many more.’⁴³⁹ Instead, TJ is meant to explore ways in which insights from mental health, behavioural sciences, and related disciplines can help shape the law, and seeks to ensure that the law’s ‘antitherapeutic consequences can be reduced and its therapeutic consequences enhanced without subordinating due process and justice

⁴³⁴ Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (n 45), 188.

⁴³⁵ Ibid, 188.

⁴³⁶ Winick notes that disciplines such as social science or psychology attempt to observe and analyse the law in a neutral manner (ibid, 188) but it is questionable whether any discipline can ever provide a neutral account of how the law operates.

⁴³⁷ Ibid, 188-189. See also Slobogin (n 426), 199-200.

⁴³⁸ Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (n 45), 188 and 190; R Boldt, ‘A Circumspect Look at Problem-Solving Courts’ in P Higgins and MB Mackinem (eds), *Problem-Solving Courts: Justice for the Twenty-First Century?* (Praeger 2009), 13.

⁴³⁹ Wexler, ‘New Directions in Therapeutic Jurisprudence’ (n 40), 762; Winick and Wexler, ‘Drug Treatment Court: Therapeutic Jurisprudence Applied’ (n 40), 484.

values'.⁴⁴⁰ TJ thus defers, at least rhetorically, to just desert principles.⁴⁴¹ This raises the question of how competing principles should be balanced in a therapeutic framework, if a legal rule or practice is shown to be therapeutic or anti-therapeutic but there are countervailing considerations. TJ scholars tend to avoid this issue by saying that TJ does not 'purport to resolve the value questions, although it sets the stage for their sharp articulation'.⁴⁴² It is unsurprising that critics have pointed out that TJ scholars have failed to establish clear rules for whether and when therapeutic values must yield to other values.⁴⁴³ This issue is integral to TJ and cannot be explored further here. Because TJ is focussed on the therapeutic and anti-therapeutic effects of the law, while acknowledging that there may be countervailing and more important justice principles that ought to be respected, TJ should be characterised as pluralistic in nature, albeit with a predominantly consequentialist orientation.

4.1.2 The relationship between therapeutic jurisprudence and problem-solving courts

Problem-solving courts (PSCs) are 'specialized tribunals established to deal with specific problems, often involving individuals who need social, mental health, or substance abuse treatment services.'⁴⁴⁴ The most well-known of these PSCs with criminal case jurisdiction are drug courts, domestic violence courts, community courts, and mental health courts.⁴⁴⁵ These

⁴⁴⁰ Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence' (n 40), 518; Wexler, 'New Directions in Therapeutic Jurisprudence' (n 40), 762.

⁴⁴¹ J Nolan, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton University Press 2009), 34.

⁴⁴² Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence' (n 40), 518; Wexler, 'New Directions in Therapeutic Jurisprudence' (n 40), 762.

⁴⁴³ J Petrila, 'Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence' (1993) 10 New York Law School Journal of Human Rights 877, 890; Slobogin (n 426), 210-218.

⁴⁴⁴ Winick and Wexler, *Judging in a Therapeutic Key* (n 424), 3.

⁴⁴⁵ Winick and Wexler, 'Drug Treatment Court: Therapeutic Jurisprudence Applied' (n 40), 480; P Bamberger, 'Specialized Courts: Not A Cure-All' (2003) 30 Fordham Urban Law Journal 1091, 1091; Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (n 45), 1057-1059; Boldt (n 438), 13; Nolan, *Legal Accents* (n 441),

PSCs offer to help individuals with the problems that are commonly seen to underlie specific kinds of criminal behaviour, such as drug and alcohol addiction, domestic violence, mental disability, and the ‘antisocial’ behaviour that affects the quality of life in local communities.⁴⁴⁶ The courts were set up in response to the recognition that existing judicial approaches only addressed the symptoms, but failed to change the underlying problems that led to the criminal behaviour.⁴⁴⁷ Their main goal is to avoid incarceration and instead focus on rehabilitation, and they tend to focus on a particular set of offences or a specific type of offender.⁴⁴⁸ PSCs operate at the sentencing stage,⁴⁴⁹ and can play a role in dealing with criminal cases either pre-plea or pre-adjudication, as a means of diversion from the traditional adjudication process, or post-plea, where participation in the programme is often a condition of probation or part of a deferred sentence.⁴⁵⁰

PSCs represent a fundamentally new and different form of adjudication mostly for low-level criminal offenders.⁴⁵¹ Although there are differences between various PSCs, they have certain defining characteristics which set them apart from mainstream (criminal) courts: (1) hands-on judicial involvement, which includes close and ongoing judicial monitoring; (2) a

ch 1; G McIvor, ‘Beyond Supervision: Judicial Involvement in Offender Management’ in F McNeill, P Raynor and C Trotter (eds), *Offender Supervision: New Directions in Theory, Research and Practice* (Willan 2010), 216.

⁴⁴⁶ Nolan, *Legal Accents* (n 441), 8. In reality, the problems that PSCs address are broader and interrelated. Nolan states that PSCs address three types of problems: ‘[problems] (1) of individual offenders, (2) of a troubled court system seeking to regain its legitimacy, and (3) of society more broadly (due, ostensibly, to the failure of other social institutions to handle perennials social ills).’ Nonetheless, the problems people generally refer to in PSCs are those of the individual offenders who appear before them. See *ibid*, 10.

⁴⁴⁷ Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’ (n 45), 1060.

⁴⁴⁸ NV Demleitner, ‘Types of Punishment’ in MD Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014), 955.

⁴⁴⁹ J Donoghue, *Transforming Criminal Justice?: Problem-Solving and Court Specialization* (Routledge 2014), 16.

⁴⁵⁰ R Boldt, ‘Rehabilitative Punishment and the Drug Treatment Court Movement’ (1998) 76 Washington University Law Quarterly 1205, 1255; E Miller, ‘Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism’ (2004) 65 Ohio State Law Journal 1479, 1489; Nolan, *Legal Accents* (n 441), 18.

⁴⁵¹ J Nolan, ‘Problem-Solving Courts: An International Comparison’ in J Petersilia and KR Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press 2012), 150.

therapeutic or treatment orientation; (3) a multidisciplinary or team-oriented approach that brings together the judge, prosecutor, defence counsel, treatment provider and correctional staff; (4) the altering of traditional roles in the adjudication process, which may include a non-adversarial approach; and (5) an emphasis on solving the problems of individual offenders.⁴⁵² These five defining traits illustrate that the therapeutic dynamics of PSCs are not only realised through court-ordered treatment programmes. The close and regular interaction between the judge and the defendant/offender are equally central to the therapeutic approach taken.⁴⁵³ In line with the therapeutic nomenclature, the individuals who go through PSCs are referred to as ‘clients’ rather than defendants/offenders.⁴⁵⁴ This altered terminology, compared to the labels used in traditional criminal courts, illustrates how these people are understood and treated in PSCs and reflects these courts’ distinct ethos.⁴⁵⁵ To ensure consistency throughout the thesis the terms defendant and offender will continue to be used, and the term client will be restricted to the context of the relationship between individuals and their defence lawyer.

Initially, the emergence and evolution of PSCs was largely atheoretical and grew out of experimental approaches used in drug treatment courts.⁴⁵⁶ But since 1999, TJ has come to be seen as a theoretical basis for PSCs.⁴⁵⁷ Nowadays, it is thought that PSCs have a symbiotic relationship with TJ.⁴⁵⁸ TJ and PSCs share a common mission, namely to analyse the legal

⁴⁵² Hora, Schma and Rosenthal (n 425), 453; Winick and Wexler, ‘Drug Treatment Court: Therapeutic Jurisprudence Applied’ (n 40), 480; Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’ (n 45), 1060-1061; Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 22; Nolan, *Legal Accents* (n 441), 11; Nolan, ‘Problem-Solving Courts: An International Comparison’ (n 451), 154; J Ward, ‘Problem-Solving Criminal Justice: Developments in England and Wales’ (2018) 14 *Utrecht Law Review* 7, 7.

⁴⁵³ Nolan, *Legal Accents* (n 441), 16.

⁴⁵⁴ See e.g. Nolan, *Reinventing Justice* (n 40), 6; J Nolan, ‘Therapeutic Adjudication’ (2002) 39 *Society* 29, 30.

⁴⁵⁵ Nolan, *Reinventing Justice* (n 40), 75.

⁴⁵⁶ *Ibid.*, 190; Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’ (n 45), 1062.

⁴⁵⁷ Hora, Schma and Rosenthal (n 425); Nolan, ‘Problem-Solving Courts: An International Comparison’ (n 451), 154.

⁴⁵⁸ BJ Winick and DB Wexler, ‘Therapeutic Jurisprudence and Drug Treatment Courts: A Symbiotic Relationship’ in AW Graham and others (eds), *Principles of Addiction Medicine* (3rd edn, American Society of Addiction Medicine 2007).

rules, judicial practices, and courts structures in terms of their impact on the emotional wellbeing of their subjects, and redesign them to facilitate rehabilitation.⁴⁵⁹ PSCs, and specifically drug courts, are said to represent the first consistent use of TJ in the criminal justice system.⁴⁶⁰ Nevertheless, PSCs are a practical legal innovation, whereas TJ is a theoretically grounded academic conceptualisation of justice.⁴⁶¹

PSCs emerged in the United States,⁴⁶² but have since also developed in the United Kingdom, Australia, Canada, and elsewhere.⁴⁶³ Since 1998, there has been a notable creation of several drug courts, domestic violence courts, and community courts in the UK.⁴⁶⁴ It is questionable whether TJ has informed the practices and philosophies of PSCs in the UK. While their implementation in the UK has been strongly influenced by the American model and they mirror these in important respects, they have also been adapted to fit British culture in a manner that has eroded some core concepts of TJ as applied in PSCs in the US.⁴⁶⁵ There are some structural constraints that place limits on the particular form that PSCs assume in the UK.⁴⁶⁶ One such structural factor is that many cases in British drug courts are decided by lay magistrates, who have limited sentencing powers, and the continuity and close personal

⁴⁵⁹ Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (n 45), 1090.

⁴⁶⁰ Hora, Schma and Rosenthal (n 425), 536. See also T Casey, 'When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy' (2004) 57 Southern Methodist University Law Review 1459, 1479-1480.

⁴⁶¹ Nolan, *Legal Accents* (n 441), 32; Donoghue (n 449), 36.

⁴⁶² In drug courts see Hora, Schma and Rosenthal (n 425), 448-449; Nolan, *Reinventing Justice* (n 40), ch 1; Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (n 45), 1057.

⁴⁶³ Freiberg (n 427), 209; Boldt, 'A Circumspect Look at Problem-Solving Courts' (n 438), 13; Donoghue (n 449), 3-4. For a comparative analysis see Nolan, *Legal Accents* (n 441); G McIvor, 'Drug Courts: Lessons from the UK and Beyond' in A Hucklesby and E Wincup (eds), *Drug Interventions in Criminal Justice* (Open University Press 2010), 137; Nolan, 'Problem-Solving Courts: An International Comparison' (n 451).

⁴⁶⁴ See e.g. J Nolan, 'Separated by an Uncommon Law: Drug Courts in Great Britain and America' in J Nolan (ed), *Drug Courts: In Theory and in Practice* (Aldine de Gruyter 2002); Nolan, *Legal Accents* (n 441), ch 3; G Berman and A Fox, 'The Future of Problem-Solving Justice: An International Perspective' (2010) 10 University of Maryland Law Journal of Race, Religion, Gender and Class 1; McIvor, 'Beyond Supervision' (n 445); McIvor, 'Drug Courts: Lessons from the UK and Beyond' (n 463); Donoghue (n 449), ch 3-6; Ward (n 452).

⁴⁶⁵ Nolan, *Legal Accents* (n 441), ch 3.

⁴⁶⁶ *Ibid.*, 44-53.

interaction between the judge and the client is impeded as lay magistrates serve only part-time in panels of three on a rotating basis.⁴⁶⁷

In addition to the structural factors, cultural factors equally influence British PSCs. For instance, the British regard the American drug court culture as not wholly void of ‘therapeutic theater’.⁴⁶⁸ The more theatrical aspects of American PSCs – including judicial hugging, judges not wearing robes, judges doing cartwheels when offenders successfully complete a programme⁴⁶⁹ – are regarded with scepticism and resistance in the UK.⁴⁷⁰ In a comparative study of PSCs in other jurisdictions commissioned by the British government, it was noted that TJ ‘envisages a completely new role for the judge, one that is in stark contrast with judicial tradition in the UK.’⁴⁷¹ Furthermore, British domestic violence courts tend to be oriented towards quick adjudication, higher conviction rates, and a focus on protection of witnesses and victims.⁴⁷² Consequently, in British domestic violence courts there is no real therapeutic approach towards the offender. British judges in domestic violence courts are described as seeing the therapeutic nature of the court as ‘somewhat gratuitous, unique to the United States, and not really transferable to England and Wales.’⁴⁷³ Nolan’s research on British PSCs reveals how concepts of TJ have (or rather have not) been implemented in British community courts. When he asked British community court representatives whether and to what extent TJ

⁴⁶⁷ Ibid, 47-50. On the capacity of magistrates’ courts to implement problem-solving practices and the role of lay magistrates see Donoghue (n 449), 47-61.

⁴⁶⁸ Nolan, *Reinventing Justice* (n 40), ch 3; Nolan, *Legal Accents* (n 441), 44; Nolan, ‘Problem-Solving Courts: An International Comparison’ (n 451), 152.

⁴⁶⁹ Wexler, ‘Robes and Rehabilitation’ (n 45), 21; MB Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous’ (2002) *Fordham Urban Law Journal* 2063, 2066; Nolan, ‘Therapeutic Adjudication’ (n 454), 34-35; Miller (n 450), 1498-99; Nolan, *Legal Accents* (n 441), 44.

⁴⁷⁰ Nolan, *Legal Accents* (n 441), 44, 54-59.

⁴⁷¹ J Plotnikoff and R Woolfson, *Review of the Effectiveness of Specialist Courts in Other Jurisdictions* (Department of Constitutional Affairs Research series 3/05, 2005), 4.

⁴⁷² Nolan, *Legal Accents* (n 441), 60.

⁴⁷³ Ibid, 61.

informed the operations and philosophy of their courts, he was told they had not even heard of the concept.⁴⁷⁴ While problem solving is at the core of British community courts, this finding suggests that these courts do not base their approach on a principled application of TJ. Nonetheless, UK PSCs in general can be considered illustrative of a wider problem-solving movement that embodies an altered conception of criminal justice, as the next section explores.

4.2 Therapeutic jurisprudence as a framework for offender agency at sentencing

This section explains why TJ is in principle an apt theory within which to explore the arguments and scope for offender agency at sentencing. First, as it preserves the fundamental role of the state in sentencing and punishment, it is consistent with the public law account developed in Chapter 2 (Section 4.2.1). Secondly, while TJ is not in and of itself a theory of sentencing or punishment, its principles are relevant and have been applied to those areas of law and suggest a pluralistic conception of punishment (Section 4.2.2).

4.2.1 Therapeutic jurisprudence and the public dimension of criminal justice

Sentencing is an area of law that is considered an appropriate issue for TJ scholars, as it concerns aspects of psychological wellbeing and social adjustment.⁴⁷⁵ TJ does not focus solely on the punishment itself but rather suggests that the conduct of the proceedings of determining and imposing punishment is also important, particularly the manner in which judicial officers interact with the parties.⁴⁷⁶ Furthermore, TJ preserves the public dimension of criminal justice,

⁴⁷⁴ Ibid, 69.

⁴⁷⁵ Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (n 45), 193-194.

⁴⁷⁶ King, 'The Therapeutic Dimension of Judging' (n 10), 93. Nolan states that, before the emergence of drug courts, therapeutic considerations were not used as a lens for making decisions in the courtroom but were primarily applied by the court in determining what form and length of sanction were appropriate. Therapeutic considerations

and is thus consistent with the account of the role of the state set out in Chapter 2. It is therefore better suited as a theoretical basis for offender agency at sentencing than other theories that can be thought to provide support for giving the offender (and victim) a voice, but that seek to curtail the role of criminal justice professionals and give the victim and offender control over the conflict and its resolution in the attempt to empower them, notably restorative justice (RJ).⁴⁷⁷ While active participation is a hallmark of both TJ and RJ – two movements that seek holistic, contextualised solutions to the problems related to crime⁴⁷⁸ – they differ in their conception of what active participation entails and how it should operate. RJ is centred on dealing with crime as a private conflict and the need to return the process of resolving the conflict to the victim and offender.⁴⁷⁹ By contrast, TJ in criminal justice offers a means of adjudicating crime that does not lie outside the realm of the public court system.⁴⁸⁰ Rather, TJ suggests that the role of the public justice system is more than just resolving disputes. TJ recognises the therapeutic value of RJ processes, but in contrast to RJ, it does not claim that these should be the primary response of the justice system.⁴⁸¹ TJ has focussed more on improving existing court processes and advocacy through the application and implementation of TJ principles such as self-determination and giving the offender and victim a voice in the

generally did not inform the style, philosophy, and structure of the trial and sentencing process, with the exception of juvenile justice (Nolan, *Reinventing Justice* (n 40), 171).

⁴⁷⁷ von Hirsch and Ashworth (n 43), 31; Freiberg (n 427), 214; JV Roberts, 'Restorative Justice' in A von Hirsch, A Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009), 164; Campbell, Ashworth and Redmayne (n 91), 52.

⁴⁷⁸ DB Wexler and BJ Winick, 'Foreword: Expanding the Role of the Defense Lawyer and Criminal Court Judge Through Therapeutic Jurisprudence' (2002) 38 Criminal Law Bulletin 200, 202.

⁴⁷⁹ See Christie, 'Conflicts as Property' (n 47).

⁴⁸⁰ For a detailed discussion of the relationship between RJ and TJ see J Braithwaite, 'Restorative Justice and Therapeutic Jurisprudence' (2002) 38 Criminal Law Bulletin 244; Nolan, *Legal Accents* (n 441), 32-37.

⁴⁸¹ King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (n 45), 1115.

process.⁴⁸² It acknowledges and emphasises the role of the state in the resolution of conflicts and attributes an important role to the judge in this resolution.

4.2.2 A new conception of sentencing?

The development and application of TJ and problem-solving justice to crime and sentencing raises questions about punishment, how it should be conceptualised, and what purpose it serves.⁴⁸³ While it is beyond the scope of this thesis to analyse these issues extensively,⁴⁸⁴ they are touched upon briefly as they influence whether TJ is an appropriate framework within which to consider offender agency at sentencing. Several features of problem-solving justice and TJ display a clear focus on treatment, rather than on punishment. Nolan demonstrates that American drug courts judges consider that ‘[j]ustice ... in a legal culture of therapeutic jurisprudence, has more to do with “just treatment” than with “mere punishment.”’⁴⁸⁵ Donoghue states that PSCs ‘shift their focus from sentencing to a broader problem-solving methodology that is designed to enable sentencers to address the social and personal issues of offenders through an intersection with service frameworks outside the justice system in order to develop more effective solutions to criminal behaviour.’⁴⁸⁶ Similarly, Braithwaite believes that TJ is focussed on problem-oriented adjudication, where ‘narrow framings like “what is the right punishment?” are eschewed in favour of “what is the right solution to the problem?”’⁴⁸⁷

⁴⁸² BJ Winick, ‘On Autonomy: Legal and Psychological Perspectives’ (1992) 37 Villanova Law Review 1705, 1715-1721; King, ‘What Can Mainstream Courts Learn from Problem-Solving Courts?’ (n 45), 92.

⁴⁸³ Donoghue (n 449), 19 and 21.

⁴⁸⁴ On how TJ has transformed the very meaning of justice see Nolan, *Reinventing Justice* (n 40), ch 7 and 8.

⁴⁸⁵ Ibid, 193.

⁴⁸⁶ Donoghue (n 449), 31.

⁴⁸⁷ Braithwaite, ‘Restorative Justice and Therapeutic Jurisprudence’ (n 480), 246.

As the response to crime provided by PSCs is aimed at therapy and treatment, in theory it does not include hard treatment as part of its underlying rationale. In principle, the PSC response to crime stands outside the retributive definition of punishment, where the two constitutive components of punishment are censure and hard treatment.⁴⁸⁸ Practice suggests, however, that sanctions do form part of problem-solving justice. Drug courts impose sanctions to punish behaviours that violate court requirements, for instance when urine tests turn out positive or when offenders miss treatment appointments.⁴⁸⁹ Community courts often impose community service sanctions, aimed at compensating the damage done to the community. These PSCs usually deal with low-level criminal behaviour in disorderly communities, such as prostitution, illegal vending, public drinking, disorderly conduct, vandalism, noise ordinance violations, shoplifting, etc. The sanctions can typically take the form of painting over graffiti, picking up litter in local parks, removing snow from public sites, and feeding the homeless.⁴⁹⁰ Some domestic violence courts tend to put more emphasis on punishment than on treatment as they are dealing with offences where there is a clearly identifiable victim.⁴⁹¹ Critics have stressed that problem-solving court practices may often be more punitive than traditional criminal court practices because they may coerce offenders into treatment,⁴⁹² the treatment can be experienced as intrusive and burdensome on the offender,⁴⁹³ and courts can impose

⁴⁸⁸ See Duff, *Trials and Punishment* (n 43); Duff, *Punishment, Communication, and Community* (n 33); von Hirsch, *Censure and Sanctions* (n 33), ch 2; von Hirsch and Ashworth (n 43), ch 2; Bennett, *The Apology Ritual* (n 33); Feinberg, 'The Expressive Function of Punishment' (n 298); Zedner, 'Penal Subversions' (n 243), 7. See Chapter 3.

⁴⁸⁹ Miller (n 450), 1499; CA Saum and AR Gray, 'Facilitating Change for Women? Exploring the Role of Therapeutic Jurisprudence in Drug Court' in T Anderson (ed), *Neither Villain nor Victim: Empowerment and Agency Among Women Substance Abusers* (Rutgers University Press 2008), 105; S Belenko, 'The Role of Drug Courts in Promoting Desistance and Recovery: a Merging of Therapy and Accountability' (2019) 27 *Addiction Research and Theory* 3, 5.

⁴⁹⁰ Nolan, *Legal Accents* (n 441), 13.

⁴⁹¹ *Ibid.*, 14-15.

⁴⁹² Hora, Schma and Rosenthal (n 425), 526; Nolan, *Reinventing Justice* (n 40), 199-200; Casey (n 460), 1498-1499.

⁴⁹³ Hora, Schma and Rosenthal (n 425), 522-523; Boldt, 'A Circumspect Look at Problem-Solving Courts' (n 438), 17.

sanctions for failure to comply with the treatment conditions,⁴⁹⁴ including short prison sentences.⁴⁹⁵ Consequently, the distinction between treatment and punishment becomes blurred.⁴⁹⁶ This has implications for the scope for offender agency at sentencing, as will be argued below.⁴⁹⁷

The reality is probably that problem-solving justice and TJ are not wholly about punishment in a retributive sense, nor solely focussed on treatment in a rehabilitative sense. Rather, these evolutions present a new conception of sentencing. Donoghue notes:

Problem-solving justice is ... not about a wholesale departure from punishment per se, it is about transforming the substantive nature of punishment to make it more socially productive, which includes an emphasis upon reducing the social exclusion, stigmatisation and marginalisation experienced by recidivist offenders in their neighbourhoods through treatment to address the causes of their offending; recognition of and engagement with community dynamics; and enhanced procedural justice through offender 'voice' in the court process. ... [P]roblem-solving justice remains 'about' punishment.⁴⁹⁸

This statement is a testament to TJ's pluralistic nature. PSCs and mainstream courts applying therapeutic principles operate with a conception of punishment on which the punitive and therapeutic aims work in a complementary fashion.⁴⁹⁹ Not only is it possible that a punitive response and a therapeutic response go hand in hand and are not necessarily mutually

⁴⁹⁴ RB Fritzler and LMJ Simon, 'The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms' (2000) 69 *Kansas City Law Review* 139, 171.

⁴⁹⁵ MB Hoffman, 'The Rehabilitative Ideal and the Drug Court Reality' (2001) 14 *Federal Sentencing Reporter* 172, 174; Miller (n 450), 1499; Boldt, 'A Circumspect Look at Problem-Solving Courts' (n 438), 17; Nolan, *Legal Accents* (n 441), 13-14; MC Quinn, 'The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform' (2009) 31 *Washington University Journal of Law and Policy* 57, 65; McIvor, 'Beyond Supervision' (n 445), 218.

⁴⁹⁶ P Bean, 'Drug Courts, the Judge, and the Rehabilitative Ideal' in J Nolan (ed), *Drug Courts: In Theory and in Practice* (Aldine de Gruyter 2002), 246; Miller (n 450), 1572; Boldt, 'A Circumspect Look at Problem-Solving Courts' (n 438), 15-18.

⁴⁹⁷ Section 4.4.

⁴⁹⁸ Donoghue (n 449), 22. See also *ibid*, 141.

⁴⁹⁹ Nolan, *Legal Accents* (n 441), 13 and 16.

exclusive,⁵⁰⁰ it may also be desirable to respond to crime both with just punishment and with treatment aimed at addressing the problem underlying the crime, insofar as there is one. Punishment, in that sense, is to be understood as a response to crime that should not be exclusively punitive but also ‘(socially) meaningful’.⁵⁰¹

Section 4.2 has demonstrated that TJ is an apposite framework within which to consider the scope and arguments for offender agency at sentencing. As TJ has been applied to the sentencing process while preserving the public dimension of criminal justice, and it places a bifocal emphasis on both punishment and treatment, it is worth exploring the implications for the role of the offender at sentencing in the rest of the chapter.

4.3 Arguments for offender agency in theory

4.3.1 Offender agency as expression

In theory, there is a clear scope for offender agency at sentencing in a therapeutic and problem-solving framework. The arguments for offender agency have their basis in procedural justice research⁵⁰² and findings drawn from behavioural sciences regarding what works in motivating behavioural change,⁵⁰³ which is relevant when it comes to promoting desistance and rehabilitation. Procedural justice encompasses more than the right to a fair trial and all its aspects such as the rights to notice, to be heard, to have an independent and impartial tribunal,

⁵⁰⁰ Nolan, *Reinventing Justice* (n 40), 51-57.

⁵⁰¹ Donoghue (n 449), 18.

⁵⁰² See e.g. EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988); TR Tyler, ‘Procedural Justice, Legitimacy, and the Effective Rule of Law’ (2003) 30 *Crime and Justice* 283; TR Tyler, *Procedural Justice* (Ashgate 2005); TR Tyler, *Why People Obey The Law* (2nd edn, Princeton University Press 2006).

⁵⁰³ M King, ‘Therapeutic Jurisprudence, Criminal Law Practice and the Plea of Guilty’ in DB Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Justice Law Practice* (Carolina Academic Press 2008), 231.

etc.⁵⁰⁴ The theory of procedural (or natural) justice holds that an individual's sense of justice in any given case depends to a large extent on whether the procedure and social processes that led to the decision are perceived as just and fair, and not merely on the outcome.⁵⁰⁵ Tyler states that the root of legitimacy⁵⁰⁶ lies in people's assessment of the fairness of the decision-making procedures used by authorities and institutions and that if people perceive the courts and their actions as legitimate, they are more willing to support legal institutions, accept legal decisions, and abide by them.⁵⁰⁷ Drawing on procedural justice research, TJ emphasises three central values: voice (providing an environment where a person can present his case to an attentive tribunal), validation (the acknowledgment by the tribunal that the case has been heard and taken into account), and respect (the manner in which the judicial officer interacts with the person, whether the judicial officer takes time to listen to the party, and the tone of voice, language, and body language of the judicial officer in interacting with the participant).⁵⁰⁸

These three values underpin some of the practices in PSCs. One of the defining characteristics of PSCs is the enhanced judicial function.⁵⁰⁹ The PSC judge plays an active and ongoing role in the offender's treatment and progress.⁵¹⁰ Additionally, the enhanced judicial

⁵⁰⁴ Freiberg (n 427), 214.

⁵⁰⁵ See Lind and Tyler (n 502), 1-2.

⁵⁰⁶ On legitimacy of state power see e.g. D Beetham, *The Legitimation of Power* (2nd edn, Palgrave Macmillan 2013). Specifically on legitimacy in criminal justice see *ibid*, 256-259.

⁵⁰⁷ See TR Tyler and YJ Huo, *Trust in the Law: Encouraging Public Cooperation With the Police and Courts* (Russell Sage Foundation 2002); Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (n 502); Tyler, *Why People Obey The Law* (n 502). Similar findings in King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?' (n 45), 92; King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (n 45), 1114.

⁵⁰⁸ Winick and Wexler, *Judging in a Therapeutic Key* (n 424), 129; King, 'The Therapeutic Dimension of Judging' (n 10), 95.

⁵⁰⁹ Boldt, 'Rehabilitative Punishment and the Drug Treatment Court Movement' (n 450), 1261-1266; Hora, Schma and Rosenthal (n 425), 453, 476-77, 531; Nolan, *Reinventing Justice* (n 40), 43; Nolan, 'Therapeutic Adjudication' (n 454); Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (n 45), 1060-1061; Nolan, *Legal Accents* (n 441), 11; Nolan, 'Problem-Solving Courts: An International Comparison' (n 451), 154; Donoghue (n 449), 37-38; Ward (n 452), 7.

⁵¹⁰ Miller (n 450), 1481-82, 1492-149-1495; McIvor, 'Beyond Supervision' (n 445), 215; Nolan, 'Problem-Solving Courts: An International Comparison' (n 451), 152.

role is exemplified by the informal, personal, and expressive dialogue between the judge and offender.⁵¹¹ The main dialogue in the courtroom takes place between the offender and the judge, as opposed to between the prosecutor and the defence lawyer in traditional adversarial court proceedings.⁵¹² When the British government published a Green Paper in 2009, setting out its intention to implement problem-solving practices in magistrates' courts, it suggested that once guilt has been established, the judge could speak directly with the offender about why they committed the crime, help the offender identify which causes may be underlying the offending behaviour, and discuss solutions to these issues 'in co-ordination with sentencing'.⁵¹³ McIvor argues that the judge can play an active role in supporting offenders' efforts to change.⁵¹⁴ Her empirical research in Scottish drug courts demonstrates that at review hearings sheriffs routinely engaged in a direct dialogue with offenders about their progress, and that offenders were generally responsive to sheriffs' positive feedback throughout the implementation of the court order.⁵¹⁵ Engaging offenders in such a direct dialogue is said to increase offenders' perceived legitimacy of the court and in turn foster compliance with the court order and desistance from crime.⁵¹⁶ Through this direct dialogue between the judge and offender, the offender becomes an active participant in the courtroom proceedings.⁵¹⁷

⁵¹¹ Nolan, *Reinventing Justice* (n 40), 99; Bean (n 496), 236.

⁵¹² Nolan, *Reinventing Justice* (n 40), 75; Nolan, 'Problem-Solving Courts: An International Comparison' (n 451), 152.

⁵¹³ Cabinet Office (n 19), 27. The phrase 'in co-ordination with sentencing' is rather vague. The government could have provided more clarity on what precisely the aims of the sentencing process should be, and what balance should be struck between punishment and treatment.

⁵¹⁴ McIvor, 'Beyond Supervision' (n 445), 233.

⁵¹⁵ G McIvor, 'Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts' (2009) 9 *Criminology and Criminal Justice* 29.

⁵¹⁶ *Ibid.*

⁵¹⁷ Saum and Gray (n 489), 105; Belenko (n 489), 7.

Additionally, the offender is encouraged to participate in the court process by expressing emotions. Emotions occupy centre stage in TJ.⁵¹⁸ There is a large literature on the nature of the offender's emotions in criminal justice, which refers to offenders' feelings of anger and frustration, resentment, protests of innocence, messages of hatred and defiance, remorse and shame.⁵¹⁹ Advocates of 'emotionally intelligent justice'⁵²⁰ argue that offenders should be able to express their emotions in the courtroom,⁵²¹ as to do so has the potential for therapeutic benefit. The therapeutic benefit is formulated in terms of increased rehabilitation and desistance:

Participation in the justice system might be used as a means of processing the myriad of sometimes conflicting emotions that an offender may experience before, during and after committing the offence. If we accept that rehabilitation and desistance are desirable goals for criminal justice, then we should do everything to encourage verbalisation and the construction of personal narratives. This is, after all, a proven means by which individuals can be encouraged to accept responsibility for their actions, identify reasons for their offending behaviour, and learn practical techniques that may help them to desist in the future.⁵²²

⁵¹⁸ Doak and Taylor (n 4).

⁵¹⁹ See e.g. J Braithwaite, 'Shame and Modernity' (1993) 33 *British Journal of Criminology* 1; S Bandes, *The Passions of Law* (New York University Press 1999); MJ Proeve, DI Smith and D Mead Niblo, 'Mitigation without Definition: Remorse in the Criminal Justice System' (1999) 32 *Australian and New Zealand Journal of Criminology* 16; W De Haan and I Loader, 'On the Emotions of Crime, Punishment and Social Control' (2002) 6 *Theoretical Criminology* 243; S Karstedt, 'Emotions and Criminal Justice' (2002) 6 *Theoretical Criminology* 299; DV Canter and M Ioannou, 'Criminals' Emotional Experiences During Crimes' (2004) 1 *International Journal of Forensic Psychology* 71; ML Benson and T Livelsberger, 'Emotions, Choice, and Crime' in FT Cullen and P Wilcox (eds), *The Oxford Handbook of Criminological Theory* (Oxford University Press 2012); S Karstedt, I Loader and H Strang (eds), *Emotions, Crime and Justice* (Hart 2014).

⁵²⁰ Sherman describes an emotionally intelligent approach to criminal justice as a 'paradigm ... in which central tools will be inventions for helping offenders, victims, communities, and officials manage each others' emotions so as to minimize harm.' (LW Sherman, 'Reason for Emotion: Reinventing Justice with Theories, Innovations and Research' (2003) 41 *Criminology* 1, 6). The concept of emotional intelligence is generally attributed to Howard Gardner: H Gardner, *Frames of Mind: The Theory of Multiple Intelligences* (3rd edn, Basic Books 2011).

⁵²¹ Doak and Taylor (n 4), 37.

⁵²² Ibid, 29. These benefits have been noted in treating offenders: see e.g. RE Masters, *Counseling Criminal Justice Offenders* (2nd edn, Sage 2004); A Monster, D Wnuk and E Jeglic, 'Cognitive Behavioral Therapy Interventions with Sex Offenders' (2008) 14 *Journal of Correctional Health Care* 109. Regarding treatment for juvenile offenders see e.g. S Tarolla and others, 'Understanding and Treating Juvenile Offenders: A Review of Current Knowledge and Future Directions' (2002) 7 *Aggression and Violent Behavior* 125.

Based on the foregoing, it can be argued that in a therapeutic framework one way in which offender agency can be conceptualised is as expression. The offender is invited to communicate in his own words with the judge about issues underlying his offending behaviour, his difficulties or progress towards rehabilitation, and may express emotions if he so chooses, thus giving him a voice and increasing his participation in the problem-solving process.

4.3.2 Offender agency as self-determination

In addition to expression, on a therapeutic paradigm, offender agency can be understood as self-determination. Self-determination is said to be important in motivating people to act and engage in behavioural change.⁵²³ By including an individual in decision making, ‘one can tap into deep sources of motivation within.’⁵²⁴ A court that involves a party in the decision making in matters that are intimately related to the party’s wellbeing are more likely to earn that party’s respect and foster compliance with court orders, in contrast to a court that takes a coercive and paternalistic approach.⁵²⁵ TJ rejects a coercive paternalistic approach as it is offensive to the person,⁵²⁶ it fuels resistance to change, has a reverse effect on the offender’s acceptance of a court decision and compliance with its requirements, and is thus liable to be counterproductive.⁵²⁷ By contrast, it is argued that protecting individual autonomy can have a positive therapeutic value.⁵²⁸

⁵²³ M King, ‘Therapeutic Jurisprudence’ in JK Wright (ed), *Lawyers as Peacemakers Practicing Holistic, Problem-Solving Law* (American Bar Association 2014), 313.

⁵²⁴ Ibid, 313. See also M King and others, *Non-Adversarial Justice* (2nd edn, The Federation Press 2014), 31.

⁵²⁵ Winick, ‘On Autonomy’ (n 482), 1767-1768.

⁵²⁶ King, ‘The Therapeutic Dimension of Judging’ (n 10), 94.

⁵²⁷ Winick, ‘On Autonomy’ (n 482), 1770-1771.

⁵²⁸ Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (n 45), 192.

Self-determination can be promoted in the legal system by involving litigants in the formulation of trial strategy and allowing offenders to decide whether or not to participate in a problem-solving court or treatment programme.⁵²⁹ TJ advocates argue that a sufficient degree of choice and responsibility should be given to individuals in solving their problems. It is said that there is a 'therapeutic value' in choice.⁵³⁰ If a defendant's choices are made voluntarily, rather than being coerced, this will foster a degree of 'commitment that mobilizes the self-evaluative and self-reinforcing mechanisms'⁵³¹ and may indicate the offender's dedication to complete the programme.⁵³² Consistent with the importance attached to the value of choice and professed rejection of coercion and paternalism, in theory offenders have a right to refuse treatment. Winick and Wexler suggest that, when an offender faces the decision to either accept a diversion to a drug treatment court or face a traditional trial and the possibility of punishment, judges should remind offenders that the choice is entirely up to them.⁵³³ To make offenders feel that they have a voluntary choice to accept treatment and to maximise the prospect that they will internalise the treatment goal, judges 'should always strive to treat offenders with dignity and respect, to inspire their trust and confidence that the judge has their best interests at heart, and to provide them a full opportunity to participate, and to listen attentively to what they have to say.'⁵³⁴ This demonstrates that, on a therapeutic paradigm, offender agency can be facilitated by respecting offenders' self-determination and letting them make their own

⁵²⁹ M King and J Wagner, 'Therapeutic Jurisprudence and Problem-solving Case Management' (2005) 15 *Journal of Judicial Administration* 28, 31; King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (n 45), 1115.

⁵³⁰ A Birgden, 'Therapeutic Jurisprudence and Responsivity: Finding the Will and the Way in Offender Rehabilitation' (2004) 10 *Psychology, Crime and Law* 283, 290.

⁵³¹ King, 'Therapeutic Jurisprudence' (n 523), 313.

⁵³² BJ Winick, 'Competency to Consent to Treatment: The Distinction Between Assent and Objection' in DB Wexler and BJ Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press 1991), 73.

⁵³³ Winick and Wexler, 'Drug Treatment Court: Therapeutic Jurisprudence Applied' (n 40), 483.

⁵³⁴ *Ibid*, 483.

choices in matters that concern them. Doing so will maximise the offender's motivation to rehabilitate and in turn increase the chances that rehabilitation is successful.⁵³⁵

However, it is questionable to what extent a choice to enter a treatment programme is truly voluntary if this occurs in the shadow of the traditional criminal trial and possible punishment, no matter how frequently a judge emphasises that the offender's choice is entirely voluntary. Many offenders entering a treatment programme are simply choosing what they perceive to be the shortest route to liberty.⁵³⁶ Furthermore, what seems to matter in fostering individual motivation to engage in a treatment programme is not the fact that offenders actually have a choice between alternatives, but rather that they *perceive* that they have a choice.⁵³⁷

Winick and Wexler thus suggest:

According individuals procedural justice also will diminish their *perception* of coercion in the judicial process, and increase the changes that they will *experience* the decision to enter into a treatment or rehabilitative program to have been voluntarily made. The resulting perception can itself help to increase the likelihood of genuine participation on the part of the individual, and can increase intrinsic motivation, program compliance, and treatment success.⁵³⁸

Similarly, King says that abiding by the court decision is not the offender's response to the authority's coercive power but rather to an internal commitment based on the *perception* that they have been treated fairly.⁵³⁹ Arguably, this conception of procedural justice has its limitations, as it reduces fairness in criminal justice to what participants perceive and experience as fair, and contains no notion of substantive fairness. For all the claimed benefits

⁵³⁵ Ibid, 483.

⁵³⁶ MC Quinn, 'Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice' (2000) 26 New York University Review of Law and Social Change 37, 56, footnote 116.

⁵³⁷ WR Miller, 'Motivation for Treatment: A Review with Special Emphasis on Alcoholism' (1985) 98 Psychological Bulletin 84, 93-94.

⁵³⁸ Winick and Wexler, *Judging in a Therapeutic Key* (n 424), 129 (emphasis added).

⁵³⁹ King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?' (n 45), 92; King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (n 45), 1114.

in terms of compliance with court orders and rehabilitation, it will be argued below that these limited notions of procedural justice and fairness can lead to disguised coercion in practice, which in turn entails that the true scope for offender agency is more restricted than the theory of TJ might suggest.⁵⁴⁰

Another way in which offenders' self-determination can be respected is by giving them the chance to design their own rehabilitation programme.⁵⁴¹ This is a common practice in drug courts, as is illustrated by the following response from a Vancouver drug treatment court judge, having listened to an offender explain his reasons for wanting to be admitted to the court:

I think you are very sincere about wanting to get treatment and wanting to get clean but I am not convinced by your plan so far. I want you to go to develop a tight plan that will get you into a recovery and show me you've done this and that will show me your commitment.⁵⁴²

The rehabilitation plan is often drawn up as a behavioural contract, which is concluded between the offender and the court.⁵⁴³ By engaging the offender in formulating the terms of the behavioural contract, often as part of a probation order, the offender is given a say in determining what they consider an appropriate response to the offence and necessary in order for them to desist in the future. It is said that behavioural contracts send the message to the offender that they are a person capable of making decisions for themselves,⁵⁴⁴ thus emphasising their agency. Formulating a rehabilitation plan can enable the offender to identify the

⁵⁴⁰ Section 4.4.

⁵⁴¹ Wexler, 'Robes and Rehabilitation' (n 45), 20; King and Wagner (n 529), 31; King, 'The Therapeutic Dimension of Judging' (n 10), 102; King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?' (n 45), 93.

⁵⁴² D Moore, 'Translating Justice and Therapy' (2007) 47 *British Journal of Criminology* 42, 49.

⁵⁴³ The practice of behavioural contracts in criminal justice initially emerged and became central in RJ. The deliberations within victim-offender mediation and in other RJ contexts are essentially a form of contract negotiation (A Crawford, 'Contractual Governance' of Deviant Behaviour' (2003) 30 *Journal of Law and Society* 479, 497).

⁵⁴⁴ King and Wagner (n 529), 32.

underlying causes of their offending behaviour and places an active responsibility on them.⁵⁴⁵ The system of imposing probation conditions is thus transformed into one that is more tailored towards the individual needs of the offender.⁵⁴⁶ If legal personnel and offenders can both participate in the preparation of treatment plans, the offender becomes central rather than peripheral in the proceedings.⁵⁴⁷ To the extent that the judge engages the offender in formulating a rehabilitation plan, behavioural contracts can be said to be more consensual and less coercive than other forms of punishment. Moreover, it is more likely that the offender will desist in the future, as individuals are often more willing to abide by the terms of a contract when they have actively participated in its formulation.⁵⁴⁸ Contractual governance can highlight the role of the active agent and the responsible, self-maximising subject.⁵⁴⁹

However, the notion of behavioural contracts disguises more problematic aspects. Crawford aptly describes the reality of behavioural contracts: ‘the logic of membership and contract has penetrated into the heart of the criminal process, where notions of consent are encircled by coercion.’⁵⁵⁰ One characteristic of these forms of ‘contractual governance’ of deviant behaviour is that they assume a sense of choice:

They presuppose participation in contractual deliberations to be voluntary. However, a concept of contract does not require that choice to be real, only that we act as if it is. It is the voluntary acceptance of imposed obligations that provides the essential quality of contracts.⁵⁵¹

⁵⁴⁵ Wexler, ‘Robes and Rehabilitation’ (n 45), 20.

⁵⁴⁶ Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ (n 426), 296.

⁵⁴⁷ McGuire, ‘Can the Criminal Law Ever be Therapeutic?’ (n 45), 421.

⁵⁴⁸ Crawford (n 543), 502.

⁵⁴⁹ Ibid, 504.

⁵⁵⁰ Ibid, 500.

⁵⁵¹ Ibid, 489.

The requirements of consent and voluntariness are merely formal. The notion of a contract and the choice it implies evoke an image of offender agency, which in reality needs to be understood in the coercive context of the criminal process. This is not to suggest that there is no scope whatsoever for offender agency in the criminal justice system. But the inevitable limits of offender agency should be made explicit rather than disguised, something which a contract is ill-equipped to do in the criminal justice context. A contract in the criminal justice process creates the illusion of freedom of choice to conclude such a contract, whereas this freedom is significantly restricted owing to the power imbalance between the state and the offender.⁵⁵²

In sum, several of the approaches TJ advocates argue for are centred on engaging offenders in the process of responding to their crime. This section has argued that offender agency in a therapeutic framework can be conceptualised in two ways. First, it can be understood as expression, which is facilitated through an open dialogue between the judge and offender, and by allowing offenders to express their emotions in court. Secondly, offender agency can be understood as self-determination. By letting offenders decide whether to participate in a treatment programme, and engaging them in designing their own rehabilitation programme, the offender has a direct input in the decision-making process. The rationale for engaging offenders in the sentencing process is instrumental, namely to increase the chances of rehabilitation. Whereas in traditional court models rehabilitation may be an aim of criminal justice processing, within a model of TJ at sentencing the therapeutic benefits are often formulated in terms of offender rehabilitation,⁵⁵³ and this goal is intrinsic to the process.⁵⁵⁴ This

⁵⁵² For a counterview arguing for more extensive use of contracts in criminal justice see Herzog-Evans (n 98).

⁵⁵³ Winick and Wexler, 'Drug Treatment Court: Therapeutic Jurisprudence Applied' (n 40), 485; Birgden (n 530); Casey (n 460), 1496; Miller (n 450), 1481; Boldt, 'A Circumspect Look at Problem-Solving Courts' (n 438), 14.

⁵⁵⁴ McIvor, 'Beyond Supervision' (n 445), 217; McIvor, 'Drug Courts: Lessons from the UK and Beyond' (n 463), 135.

is consistent with the consequentialist nature of TJ.⁵⁵⁵ While early critics of the TJ movement noted that the term ‘therapeutic’ is open to many interpretations,⁵⁵⁶ it has become synonymous with, or at least has been given the primary meaning of ‘rehabilitative’.⁵⁵⁷ On a theoretical conception of TJ, the ultimate power to determine the final sentence, both the type and the amount, still rests with the court, but the offender is engaged in the decision-making and is not a mere passive recipient of a court-imposed sentence. However, the next section will argue that TJ and PSCs can still constitute coercive environments, which in practice restricts the scope for offender agency.

4.4 Offender agency in practice: the coercive side of the therapeutic ideal

While in theory there is scope for offender agency in a therapeutic framework, the way in which TJ has been applied in practice in problem-solving and mainstream courts suggests that the scope for offender agency is more restricted. TJ and PSCs are veiled in the language of autonomy and choice, yet in practice they can still constitute coercive environments.⁵⁵⁸ TJ scholars themselves see the TJ model as distinct from the rehabilitative ideal.⁵⁵⁹ As such, TJ deliberately rejects the coercive and paternalistic tendencies that characterised the rehabilitative ideal and were criticised in the 1970s.⁵⁶⁰ For instance, Wexler notes that TJ does not advocate for coercion, paternalism, or a ‘therapeutic state’.⁵⁶¹ Yet, he also notes that the

⁵⁵⁵ Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (n 45), 188 and 190.

⁵⁵⁶ Slobogin (n 426), 201-204.

⁵⁵⁷ MC Quinn, ‘An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged’ (2007) 48 *Boston College Law Review* 539, 567.

⁵⁵⁸ In a similar sense Petrila (n 443), 882.

⁵⁵⁹ Nolan, *Reinventing Justice* (n 40), 186-187.

⁵⁶⁰ Allen (n 159).

⁵⁶¹ Wexler, ‘Justice, Mental Health, and Therapeutic Jurisprudence’ (n 40), 518; Wexler, ‘New Directions in Therapeutic Jurisprudence’ (n 40), 762; Wexler and Winick, *Law in a Therapeutic Key* (n 40), xvii; Winick and Wexler, ‘Drug Treatment Court: Therapeutic Jurisprudence Applied’ (n 40), 484.

distinct approach of TJ will be better served if rehabilitation is ‘at least regarded without hostility’.⁵⁶² Even though in theory TJ distances itself from the rehabilitative ideal, in practice rehabilitation is clearly the dominant rationale that governs sentencing and the problem-solving approach. Considering this emphasis on rehabilitation, it is not surprising that TJ and PSCs have been subject to criticisms like those levelled against the rehabilitative ideal.⁵⁶³

In the same way the rehabilitative ideal was criticised for blurring the lines between therapy and repression,⁵⁶⁴ it is said that on a therapeutic model the distinction between treatment and punishment fades.⁵⁶⁵ Problem-solving court practices may be more punitive than those in mainstream criminal courts. For instance, the treatment programmes are often characterised by regular urine testing, frequent and periodic court appearances, and long-term court supervision.⁵⁶⁶ This may contribute to a feeling of prolonged intrusion in the offender’s life. Additionally, the treatment requirements themselves place considerable burdens on the offender. In the US, the measures that can be coercively imposed include alcohol and drug treatment obligations, parenting classes, employment monitoring, and others. This has led some to conclude that PSC-ordered treatment requirements may not only place more burdens

⁵⁶² Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ (n 426), 280.

⁵⁶³ For criticisms of TJ see e.g. Petrila (n 443); Slobogin (n 426); Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism’ (n 469). For criticisms of PSCs see e.g. Boldt, ‘Rehabilitative Punishment and the Drug Treatment Court Movement’ (n 450); MB Hoffman, ‘The Drug Court Scandal’ (2000) 78 North Carolina Law Review 1437; Hoffman, ‘The Rehabilitative Ideal and the Drug Court Reality’ (n 495); Nolan, *Reinventing Justice* (n 40), 190-208; Bean (n 496); Bamberger (n 445); Casey (n 460); Miller (n 450); Quinn, ‘An RSVP’ (n 557); Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438); Quinn, ‘The Modern Problem-Solving Court Movement’ (n 495); McIvor, ‘Beyond Supervision’ (n 445), 228-233; Donoghue (n 449), 7-9, 65-67. The critique is the loudest regarding the praxis of drug courts, presumably since they constitute the majority of PSCs (Casey (n 460), 1459) and are the most visible judicial application of TJ (Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism’ (n 469), 2067).

⁵⁶⁴ Allen (n 159), 46.

⁵⁶⁵ Bean (n 496), 246; Miller (n 450), 1572; Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 15-18.

⁵⁶⁶ Hora, Schma and Rosenthal (n 425), 523; Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 17.

on the offender than normal probation conditions,⁵⁶⁷ but may even be more invasive and coercive than a traditional prison sentence.⁵⁶⁸

Moreover, PSCs also use traditional forms of criminal punishment. Although this is not possible in in England and Wales,⁵⁶⁹ if defendants do not comply with the requirements and conditions of the treatment programme they may face sanctions, such as more frequent reviews, electronic home confinement, alternative community service, more restrictive terms of probation, more intensive treatment,⁵⁷⁰ and even short periods in prison.⁵⁷¹ Punitive practices are often disguised by giving them therapeutic classifications.⁵⁷² For instance, in US PSCs short terms of incarceration are referred to as ‘shock therapy’, ‘motivational jail’, or ‘my motel’.⁵⁷³ Judges view treatment regimes not as punishment, but as ‘the restructuring of the defendant’s lifestyle’.⁵⁷⁴ However, it remains the case that the court uses its coercive power to direct participants to treatment and, in that sense, it is arguable that treatment, if coercively imposed, may become the punishment. In sum, problem-solving court practices can be more onerous, invasive, and coercive than the equivalent conventional court dispositions for the same offence.⁵⁷⁵

⁵⁶⁷ Hora, Schma and Rosenthal (n 425), 523.

⁵⁶⁸ Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 17.

⁵⁶⁹ British magistrates’ courts (operating as PSCs) do not have the power to impose such intermediate sanctions for failure to comply with treatment (Bean (n 496), 240; Nolan, *Legal Accents* (n 441), 47; Donoghue (n 449), 65). They only have the power to revoke the probation order, which effectively ends the offender’s participation in the programme (Nolan, *Legal Accents* (n 441), 48).

⁵⁷⁰ Fritzler and Simon (n 494), 171.

⁵⁷¹ Hoffman, ‘The Rehabilitative Ideal and the Drug Court Reality’ (n 495), 174; Bean (n 496), 239; Miller (n 450), 1499; Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 17; Nolan, *Legal Accents* (n 441), 13-14; Quinn, ‘The Modern Problem-Solving Court Movement’ (n 495), 65; McIvor, ‘Beyond Supervision’ (n 445), 218.

⁵⁷² Nolan, *Reinventing Justice* (n 40), 195; Bean (n 496), 243, 249-250; Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 17; Nolan, ‘Problem-Solving Courts: An International Comparison’ (n 451), 160.

⁵⁷³ Nolan, *Reinventing Justice* (n 40), 195.

⁵⁷⁴ Hora, Schma and Rosenthal (n 425), 523.

⁵⁷⁵ Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 17.

The therapeutic intent behind PSCs can lead to indeterminate periods of involvement with the criminal justice system. In contrast to previous rehabilitative practices in the 20th century, the issue of indeterminacy in drug courts pertains not to the length of a prison sentence, but to the amount of time spent completing a treatment programme under judicial supervision.⁵⁷⁶ Rather than proportionality being the dominant principle at sentencing, the main aim is to ensure that the offender receives treatment and effectively addresses the issue underlying the offending behaviour, however long that may take.⁵⁷⁷ Such practices are clearly objectionable. In keeping with an overarching framework of limiting retributivism,⁵⁷⁸ rehabilitation is a legitimate penal objective so long as it is set within the parameters of a deserved proportionate sentence. A sentence should not be extended beyond what is proportionate to the seriousness of the offence in order to ‘treat’ or ‘heal’ the offender.

Since PSCs operate before or after an individual has entered a plea or has been adjudicated,⁵⁷⁹ procedures for referring offenders to these courts vary across jurisdictions.⁵⁸⁰ Offenders who are given the opportunity to participate in a PSC programme in the US and Canada are routinely asked to waive certain fundamental rights, such as the presumption of innocence and certain fair trial rights.⁵⁸¹ In those jurisdictions, it is fair to say that the waiver of fundamental rights, in combination with judges in PSCs using their coercive power to direct

⁵⁷⁶ Nolan, *Reinventing Justice* (n 40), 197.

⁵⁷⁷ Hora, Schma and Rosenthal (n 425), 508; Casey (n 460), 1496; Nolan, ‘Problem-Solving Courts: An International Comparison’ (n 451), 161.

⁵⁷⁸ See Introduction, n 51 and n 52.

⁵⁷⁹ Boldt, ‘Rehabilitative Punishment and the Drug Treatment Court Movement’ (n 450), 1255; Miller (n 450), 1489; Nolan, *Legal Accents* (n 441), 18; Donoghue (n 449), 16.

⁵⁸⁰ Donoghue (n 449), 63.

⁵⁸¹ In the US see Boldt, ‘Rehabilitative Punishment and the Drug Treatment Court Movement’ (n 450), 1255-1256; Hora, Schma and Rosenthal (n 425), 521; Nolan, *Reinventing Justice* (n 40), 198-199. In Canada see Moore (n 542), 54.

offenders into the relevant treatment programmes,⁵⁸² entail that the offender's choice to participate in a treatment programme is significantly more restricted than it appears in theory. A framework of limiting retributivism can accommodate rehabilitation in the sense of 'treatment', but only insofar as it is within the confines of proportionality, and if it is voluntary.⁵⁸³ In setting out the extent of the state's obligation to offenders to offer rehabilitative programmes within the framework of community sentences, Ashworth and Zedner usefully distinguish between those aspects of a community sentence that consist of attendance as required (e.g. for discussions with a probation officer or to perform unpaid work) and those that consist of a rehabilitation programme intended to bring about changes in attitude or personality. Whereas the former necessarily has a compulsory element, the latter should be undertaken voluntarily, once the offender's suitability has been assessed.⁵⁸⁴

In addition to these PSC features that indicate that the offender's agency as self-determination is restricted, there is evidence that the offender's agency as expression is also limited. The close interaction between the judicial officer and offender that TJ and problem-solving justice encourage may do little in practice to create a setting in which the offender can have a voice. Miller points out:

The relationship [between the drug court judge and offender] is not one between peers engaging in a free and open dialogue, in which the plurality of each other's values commands equal respect. Rather, it is a relationship in which one is dominant, dictating the nature of the courtroom reality, and the other subservient, required to learn to accept that reality and speak in the governing language of therapy.⁵⁸⁵

⁵⁸² Hora, Schma and Rosenthal (n 425), 526; Nolan, *Reinventing Justice* (n 40), 199-200; Casey (n 460), 1498-1499.

⁵⁸³ R Canton, 'Censure, Dialogue and Reconciliation' in A du Bois-Pedain and A Bottoms (eds), *Penal Censure: Engagements within and Beyond Desert Theory* (Hart 2019), 269.

⁵⁸⁴ Ashworth and Zedner, 'Punishment Paradigms and the Role of the Preventive State' (n 87), 18-19.

⁵⁸⁵ E Miller, 'Drugs, Courts, and the New Penology' (2009) 20 *Stanford Law and Policy Review* 417, 432-433.

Similarly, Bean notes that, while the dialogue between the judge and offender in drug courts tends to be viewed as informal and personal,⁵⁸⁶ the judge ultimately ‘lays down the terms, decides when they are violated, and determines the nature of the sanctions.’⁵⁸⁷ The danger is thus that one of the core characteristics of the therapeutic and problem-solving model which offers scope for offender agency at sentencing, namely the open dialogue between the judge and offender, may in practice become a tool for paternalism and coercion. This contrasts sharply with TJ scholars’ professed rejection of a coercive paternalistic approach.⁵⁸⁸ Therapeutic practice reveals that it is ultimately more paternalistic than the theoretical ideal might suggest, since it ‘honours autonomy as a value only until professionals decide that other values should triumph’.⁵⁸⁹

In addition to these coercive tendencies which have an impact on the extent to which the offender is able to exercise agency in a therapeutic model, there are a range of other criticisms that have been levelled against the therapeutic ideal and PSCs. Some have argued that the development of PSCs has led to net-widening, i.e. the expansion of sanctions on a group of offenders who previously either might not have been prosecuted or whose sentences would have been more limited and less onerous.⁵⁹⁰ Furthermore, some scholars have raised concerns about the departure from the traditional adversarial model and the procedural fairness

⁵⁸⁶ Bean (n 496), 236-237.

⁵⁸⁷ Ibid, 247.

⁵⁸⁸ Winick, ‘On Autonomy’ (n 482), 1765-1768; King, ‘The Therapeutic Dimension of Judging’ (n 10), 94.

⁵⁸⁹ Petrila (n 443), 905. See also *ibid*, 881, 891.

⁵⁹⁰ Hoffman, ‘The Rehabilitative Ideal and the Drug Court Reality’ (n 495), 174; Nolan, *Reinventing Justice* (n 40), 155, 201-204; Bean (n 496), 240; Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 17; Nolan, ‘Problem-Solving Courts: An International Comparison’ (n 451), 161; Demleitner (n 448), 956.

of PSCs.⁵⁹¹ This includes criticisms that due to a conflation of roles judges are no longer neutral,⁵⁹² that they cannot be impartial, nor ensure consistency.⁵⁹³

The merging of justice and treatment is crucial to understanding how legal coercion operates in the therapeutic and problem-solving context. The conflation of punishment and treatment fosters a dual conception of offenders, which impacts on the scope for offender agency. On the one hand, offenders with substance abuse issues are seen as suffering from chronic disorders that require therapeutic intervention to interrupt a pathological pattern over which they have no control. On the other hand, the same offenders are viewed as responsible moral agents who are capable of autonomous decision making and who are held responsible for their choices. Boldt argues that ‘the mechanism that mediates this apparent tension is the use of “legal coercion”, the threat of legally sanctioned punishment as a device for encouraging treatment readiness and treatment retention.’⁵⁹⁴ This conceptual duality regarding the offender has consequences for how offender agency operates in a therapeutic framework. Consistent with the notion that the offender is a responsible moral agent, he should be allowed to have a voice in matters that concern him, such as sentencing, and self-determination and choice should be respected. However, as the offender is simultaneously viewed as an individual suffering from a disease that is beyond his control, a paternalistic treatment intervention is considered necessary and legitimate, thus restricting or even undermining offender agency. This duality

⁵⁹¹ Boldt, ‘Rehabilitative Punishment and the Drug Treatment Court Movement’ (n 450), 1252-1269; Quinn, ‘Whose Team Am I on Anyway?’ (n 536), 54-56, 61-63; Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism’ (n 469); Casey (n 460); Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 22-27.

⁵⁹² Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism’ (n 469).

⁵⁹³ Nolan, *Reinventing Justice* (n 40), 102-104; Bean (n 496), 239, 241-242; Nolan, ‘Therapeutic Adjudication’ (n 454), 35-36.

⁵⁹⁴ Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 14.

illustrates the gap between offender agency in theory and in practice in a therapeutic framework.

However, it would be inaccurate to paint all PSCs and mainstream courts taking a therapeutic approach with the same brush. Nolan points out that these worrying tendencies – including the blurring of treatment and punishment, indeterminate involvement with the criminal justice system, interference with fair trial rights, and net-widening – have remained largely confined to PSCs in the US, and are less pronounced in other jurisdictions such as Canada, Australia, Scotland, Ireland, and England.⁵⁹⁵ Whereas the American PSCs are an expression of American exceptionalism, characterised by ‘enthusiasm, boldness, and pragmatism’, the other five jurisdictions are marked by their ‘moderation, deliberation, and restraint’.⁵⁹⁶ Nonetheless, despite the early signs that non-US PSCs rejected many of the American features, Nolan also notes that there is an increasing ‘Americanisation’ occurring, including in England.⁵⁹⁷ Some individual British judges have embraced the rather expressive style of American PSCs.⁵⁹⁸ In general, there seems to be a slow shift from a culture marked by emotional reserve and stoicism, especially in court settings, towards more ‘open and emotional forms of public communication’.⁵⁹⁹ This makes the implementation of American therapeutic practices, including the emotional interchanges in court, less surprising.⁶⁰⁰ However, overall

⁵⁹⁵ Nolan, ‘Problem-Solving Courts: An International Comparison’ (n 451), 160-161.

⁵⁹⁶ Ibid, 156. For a detailed discussion of the differences between these jurisdictions see Nolan, *Legal Accents* (n 441), especially ch 6. For a comparison between American and British versions of the drug court movement specifically see Nolan, ‘Separated by an Uncommon Law’ (n 464).

⁵⁹⁷ Nolan, ‘Problem-Solving Courts: An International Comparison’ (n 451), 162-164.

⁵⁹⁸ Nolan, *Legal Accents* (n 441), 56-57, 73; Nolan, ‘Problem-Solving Courts: An International Comparison’ (n 451), 163-164.

⁵⁹⁹ Nolan, *Legal Accents* (n 441), 74.

⁶⁰⁰ Ibid, 75.

British PSCs have not yet approximated the levels of intimacy and expressivism that characterise American PSCs.⁶⁰¹

Additionally, traditional criminal courts could take a more therapeutic approach if they were provided with the wide range of problem-solving services,⁶⁰² while avoiding some of the excesses of PSCs. While PSCs currently present the most consistent application of the therapeutic ideal, problem-solving practices that promote self-determination and motivation for rehabilitation are not exclusive to specialist courts.⁶⁰³ In 2009, the British Government announced its intention to implement problem-solving principles in all magistrates' courts in England and Wales, which included encouraging courts to make greater use of section 178 CJA 2003 powers to review community orders.⁶⁰⁴ This section allows the Secretary of State to give courts the power to review an offender's progress under and compliance with the community order, which is a central part of the problem-solving court model.⁶⁰⁵ However, use of these powers in English courts has been limited.⁶⁰⁶ Furthermore, the community order scheme gives courts the power to impose requirements under a community order, some of which have the potential to rehabilitate the offender by addressing the underlying cause of the offending behaviour, notably alcohol treatment,⁶⁰⁷ mental health treatment,⁶⁰⁸ and drug treatment requirements.⁶⁰⁹ The three requirements entail that the offender must submit, during

⁶⁰¹ Ibid, 74.

⁶⁰² Bamberger (n 445).

⁶⁰³ Donoghue (n 449), 46.

⁶⁰⁴ Cabinet Office (n 19), 28, 31-33.

⁶⁰⁵ McIvor, 'Beyond Supervision' (n 445), 221; Donoghue (n 449), 54-57.

⁶⁰⁶ Donoghue (n 449), 55.

⁶⁰⁷ CJA 2003, s 212.

⁶⁰⁸ Ibid, s 207.

⁶⁰⁹ Ibid, s 209. The drug treatment requirements replaced the Drug Treatment and Testing Orders (DTTOs), which were probation based court orders that mirror some features of the American drug court model (Nolan, 'Separated by an Uncommon Law' (n 464), 90-91; Nolan, *Legal Accents* (n 441), 45-46; McIvor, 'Beyond Supervision'

a period specified in the order, to some form of treatment, with a view to reduce or eliminate the offender's dependency on alcohol, or drugs, or to improve the offender's mental condition. In respect of drug rehabilitation requirements, sentencers can take an active role in reviewing the offender's progress and periodically reviewing the order itself,⁶¹⁰ which is a common practice in drug courts in the US and the UK.⁶¹¹ Mainstream courts may not be able to embrace all features of PSCs, such as the multi-professional team approach to treatment with active and ongoing judicial involvement in the determination, implementation, and oversight of the sentence. But perhaps in turn they can preserve the traditional adversarial process and its associated rule-of-law and due process safeguards to a greater extent than PSCs do. As Miller suggests, the due process model can be used to refine drug courts practices, which may in turn improve traditional courtroom practices.⁶¹² It may thus also be possible for mainstream courts to allow offenders to exercise agency, while respecting due process values. Chapter 5 will set out the defining principles of a sentencing system based more consistently on offender agency, and suggest how offender agency and due process could be balanced.

In sum, TJ and PSCs are not a magic cure for all the issues the current criminal system faces. It is a defensible goal to seek to address the issues that underlie criminal behaviour, attempt to provide a constructive response to crime that is not purely based on hard treatment, and encourage the offender to play a more active role in determining this response. Yet, it seems that TJ and PSCs also run the risk of discarding fundamental values and principles of the traditional criminal justice system.⁶¹³ PSCs can still constitute coercive environments, in

(n 445), 219; Nolan, 'Problem-Solving Courts: An International Comparison' (n 451), 155) and were introduced in English courts in the 1990's.

⁶¹⁰ CJA 2003, ss 210-211.

⁶¹¹ On the use of such drug rehabilitation requirements see Donoghue (n 449), 71-72.

⁶¹² Miller, 'Embracing Addiction' (n 450).

⁶¹³ Quinn, 'An RSVP' (n 557), 591.

which offender agency is more restricted than the theoretical ideal of TJ might suggest. Some level of coercion is of course inevitable if the fundamental role of the court in sentencing is to be retained. Offender agency in a state-centred criminal justice system always needs to be understood within this inevitably coercive framework. The issue with the practical application of therapeutic principles, however, is that coercion is often disguised.

4.5 Conclusion

Just as there is a chasm between the rhetoric about and the reality of TJ and the problem-solving movement,⁶¹⁴ this chapter has demonstrated that there is also a disjuncture between the arguments and scope for offender agency deriving from TJ in theory and practice. In theory, on a therapeutic paradigm the criminal justice system should give offenders the opportunity to be actively engaged in determining the response to their offence. This is based on the procedural justice ideals of voice, validation, respect, and behavioural science research indicating the importance of self-determination in ensuring offenders' motivation to complete treatment programmes and abide by court decisions. The justification for offender agency is instrumental, as the therapeutic benefits of engaging an offender at sentencing are mostly formulated in terms of offender rehabilitation and desistance. On this view, the court should take the offender's views into account, but the ultimate power to determine the type and amount of punishment remains in the hands of the sentencing judge, thereby preserving the fundamental role of court in sentencing. However, the practical application of therapeutic principles, notably in American PSCs, demonstrates that coercion may be disguised under the veil of the therapeutic nomenclature, which is an impediment to offender agency.

⁶¹⁴ Quinn, 'The Modern Problem-Solving Court Movement' (n 495), 57.

Part I of the thesis has demonstrated that there are jurisprudential arguments for allowing offenders to play a more active role at sentencing. These arguments derive from three theories of punishment and criminal justice: Duff's communicative conception of punishment, Lacey and Pickard's model of punishment with forgiveness, and TJ. Expressive theories of punishment, it was argued, offer less scope for an increased role for the offender. While the theories drawn on in Part I offer scope for offender agency based on their conception of punishment and criminal justice, they do not constitute coherent theories of offender agency in and of themselves. They do not comprehensively set out justifications for offender agency, nor do they offer a conception of sentencing built consistently on offender agency. Hence, several questions remain unanswered. For instance, what are the justifications for allowing an offender to exercise agency at sentencing that should underpin an agentic sentencing model? If we accept these justifications, then what form should offender agency at sentencing take in terms of procedural rights? Are there circumstances under which it would be justified to give the offender determinative and direct influence over the sentencing decision? Or should offender agency remain restricted to allowing the offender to express himself, without the guarantee that this will be taken into account in determining the quantum and type of sentence? What restrictions should be placed on offender agency to preserve the role of the state and rule-of-law safeguards? What objections could be levelled against an agentic sentencing system? Part II will address these questions, thus developing a normative theory for offender agency at sentencing.

PART II: A NORMATIVE FRAMEWORK FOR OFFENDER AGENCY AT SENTENCING

5 TOWARDS AN AGENTIC SENTENCING MODEL

Part II develops a normative framework for offender agency at sentencing. This chapter sets out the defining principles of an agentic sentencing model, exploring conceptually what a sentencing system that is built more consistently around offender agency might look like. Drawing on Part I, Section 5.1 sets out the justifications for offender agency, thus addressing the question ‘On what grounds should offenders exercise agency at sentencing?’ The chapter then asks, ‘To what extent should offenders exercise agency at sentencing?’ It explores the procedural implications of facilitating the offender’s agency. It proposes a paradigm for an agentic sentencing model of a dialogue between the state – personified by the judge – and the offender, in which the offender’s agency is non-dispositive. While the offender’s input may influence the sentencing decision where appropriate, there should be no guaranteed determinative influence (Section 5.2). The chapter suggests that the offender should be offered the opportunity to express his viewpoint on the appropriate sentence for his crime, and explores what the communication between the judge and offender should comprise (Section 5.3). Constraints should be placed on the exercise of offender agency, to preserve the fundamental role of the state in sentencing. There should be limits in terms of the subject of the dialogue, constraints of proportionality, and constraints on the type of sentence (Section 5.4). While it is important that the dialogue takes place directly between the judge and the offender, the defence lawyer continues to play an important role in the sentencing dialogue (Section 5.5). Section 5.6 argues that for an agentic sentencing model the paradigm of a dialogue, where offender agency is non-dispositive, is preferable to that of a negotiation, where offender agency is dispositive. Section 5.7 addresses when it is legitimate for the offender’s viewpoint to influence the sentencing decision. Finally, Section 5.8 argues why, even though the proposed agentic sentencing model may have implications for the victim, a comprehensive account of the role of the victim is beyond the scope of the thesis.

5.1 Justifications for offender agency at sentencing

5.1.1 Ethical justification: respecting the offender as a responsible moral agent

Giving the offender the opportunity to be engaged in the process of determining his sentence is more consistent with respecting the offender as a responsible moral agent.⁶¹⁵ The notion of responsible moral agency is fundamental to the criminal law in many ways. Chapter 1 argued that autonomous agency is a fundamental principle of legitimacy in a liberal democratic state.⁶¹⁶ Attributing responsibility for crime recognises that the individual is an autonomous agent who has the capacity for moral choice.⁶¹⁷ Retributive accounts of punishment are premised on the idea that punishment is only justified if the offender is a moral agent who is responsible and therefore blameworthy for his offence, and have represented themselves as the main accounts compatible with respect for offenders as responsible moral agents.⁶¹⁸ This notion of agency as responsibility is backward looking. ‘Retrospective responsibility is responsibility as answerability: to be held retrospectively responsible is to be called to answer for my actions, by those who have the standing to do so ...’⁶¹⁹

Arguably, the idea that perpetrators of crimes need to be held responsible for their wrongdoing as moral agents should not only be reflected in the criminalisation of conduct and imposition of punishment on a retributivist account, but equally in the process of determining the appropriate punishment in response to wrongful conduct. By engaging offenders in the

⁶¹⁵ For an analysis of respect as a value in criminal justice, specifically a critique of the respect deficit in policing and imprisonment, see G Watson, *Respect and Criminal Justice* (Oxford University Press 2019) (forthcoming).

⁶¹⁶ Dubber, ‘The Criminal Trial and the Legitimation of Punishment’ (n 35), 86. See also Lacey, *State Punishment* (n 79), 146.

⁶¹⁷ Lacey, *In Search of Criminal Responsibility* (n 31), 27-33.

⁶¹⁸ See n 137.

⁶¹⁹ RA Duff, ‘Towards a Theory of Criminal Law?’ (2010) 84 *Proceedings of the Aristotelian Society*, Supplementary Volumes 1, 16. See also Thorburn, ‘Criminal Law as Public Law’ (n 103), 22.

sentencing discussion, their attention might be turned to the wrong committed and the appropriate response to that wrong. In turn, this could allow offenders to take responsibility for past offending behaviour and for the sentence. The first justification is based on ethical grounds: there is inherent value in giving offenders a voice at sentencing namely that doing so originates in and is consistent with acknowledging them as responsible moral agents. However, as will be argued below, respect for offenders' moral agency does not entail that they should have any guaranteed determinative influence on the sentencing outcome. Respect for offenders as responsible moral agents may entail that they should have a voice in the determination of their punishment, but it does not mean that their voice should be the loudest, nor should it trump other considerations.

This first justification for offender agency at sentencing has a theoretical basis in Duff's communicative conception of punishment.⁶²⁰ The state communicates censure and expects that the offender hears this message and responds as a moral agent. In turn, the offender has a legitimate expectation that the state hears and takes notice of his viewpoint on the offence and, indeed, on the sentence. This could include thoughts about what intervention the offender may need to avoid further offending.⁶²¹ Such communication which seeks to engage the other party as an active participant in the process is more respectful of the offender as a moral agent than mere expressive accounts of punishment.⁶²²

The emphasis on responsible moral agency is not unique to censure-based theories of punishment. This notion is also of fundamental importance in Lacey and Pickard's forgiveness-

⁶²⁰ See Chapter 3, n 295.

⁶²¹ Canton, 'Censure, Dialogue and Reconciliation' (n 583), 264.

⁶²² Duff, *Punishment, Communication, and Community* (n 33), 79-80. See also Duff, 'Alternatives to Punishment – or Alternative Punishments?' (n 392), 51-52; Duff, 'Penal Communications' (n 392), 32-33; Duff, 'Punishment, Communication, and Community' (n 103), 49.

based account,⁶²³ which equally provides a theoretical basis for the first justification for offender agency. Lacey and Pickard conceive punishment as consequences imposed in response to, by reason of, and in proportion to responsibility and blameworthiness, but not out of or in connection with affective blame.⁶²⁴ If we accept that we should punish with forgiveness,⁶²⁵ based on a clinically-derived framework in which responsible agency occupies a central role,⁶²⁶ then inviting offenders to say what the response to their wrong should entail encourages them to accept the sentence, and might allow them to begin to take responsibility for their conduct.⁶²⁷ By offering the offender a voice at sentencing, their responsible agency in respect of the wrong and the sentence is acknowledged.

5.1.2 Consequentialist justification: encouraging reparation, rehabilitation, and desistance

Secondly, offender agency could be instrumental to achieve certain therapeutic and rehabilitative aims such as reparation, rehabilitation, and desistance. This justification finds theoretical support both in Duff's communicative and Lacey and Pickard's forgiveness-based accounts of punishment. If we accept that punishment should be a communicative, reciprocal enterprise,⁶²⁸ the communicative efficacy of punishment 'would surely be enhanced if offenders could take part in determining their own sentences'.⁶²⁹ According to Duff, we are more likely to draw the offender's attention to the wrong and thus bring him to repent, reform,

⁶²³ Lacey and Pickard, 'From the Consulting Room' (n 34), 2-5, 11-20; Lacey and Pickard, 'To Blame or to Forgive?' (n 34), 669-672.

⁶²⁴ Lacey and Pickard, 'From the Consulting Room' (n 34), 20; Lacey and Pickard, 'To Blame or to Forgive?' (n 34), 668.

⁶²⁵ See discussion in Section 3.3.2.

⁶²⁶ See n 400.

⁶²⁷ Lacey and Pickard, 'To Blame or to Forgive?' (n 34), 693.

⁶²⁸ See discussion Chapter 3.

⁶²⁹ Duff, *Punishment, Communication, and Community* (n 33), 160.

and reconcile,⁶³⁰ if he is involved in a discussion about the sentence.⁶³¹ In their forgiveness-based model of punishment, Lacey and Pickard also suggest that sentencers should invite offenders to say what they think reparation and rehabilitation as components of the sentence should include, thus increasing the likelihood that these goods might be realised.⁶³²

These theoretical foundations for the second justification for offender agency are in part supplemented by therapeutic jurisprudence (TJ). Chapter 4 demonstrated why and how allowing offenders to exercise agency at sentencing could in theory be a means of encouraging rehabilitation and desistance. However, it also argued that the practical application of therapeutic principles, notably in drug courts, is not devoid of coercion and the scope for offender agency is therefore more limited than the theoretical ideal would suggest. Despite the gap between offender agency in theory and in practice, the arguments for offender agency derived from TJ can still inform a model for a sentencing system built on offender agency. Yet, an agentic sentencing model would need to be wary of importing the excesses of American problem-solving courts (PSCs).⁶³³ Any sentencing system must have robust safeguards to ensure substantive legitimacy, including respect for the principles of proportionality, consistency, and the right to an independent and impartial tribunal. It will be explored in the rest of the chapter where the balance should lie in an agentic sentencing system between allowing offenders to exercise agency, and respecting the fundamental role of the state, adversarial procedures, and rule-of-law safeguards.

⁶³⁰ Duff, 'In Defence of One Type of Retributivism' (n 295), 412; Duff, *Punishment, Communication, and Community* (n 33), xix, 30, 106-109; Duff, 'Probation, Punishment and Restorative Justice' (n 183), 188-189; Duff, 'Punishment, Retribution and Communication' (n 22), 131.

⁶³¹ Duff, *Punishment, Communication, and Community* (n 33), 160.

⁶³² Lacey and Pickard, 'To Blame or to Forgive?' (n 34), 693.

⁶³³ See discussion Section 4.4, n 563.

Agency as it relates to rehabilitation and desistance is forward-looking, in the sense of ‘being left free to determine one’s own actions’.⁶³⁴ It echoes the notion of ‘responsibilisation’ in the implementation of the sentence, explained in Chapter 1. What is referred to here, however, is an altered conception of responsibilisation, traces of which are found in desistance⁶³⁵ and ‘new rehabilitation’ literature,⁶³⁶ and which can avoid the criticisms associated with neo-liberal modes of governance.⁶³⁷ The desistance and ‘new rehabilitationist’ literature emphasise the role of the offender as a moral agent in the implementation of the sentence and thereafter, at least in theory. Arguably, the offender’s agency in respect of his rehabilitation and desistance is equally relevant at an earlier stage, namely in determining the content of their sentence.

The consequentialist justification for offender agency has its limitations. First, empirical evidence is required to demonstrate conclusively how engaging offenders in the process of determining their sentence contributes to increased rehabilitation and desistance. Secondly, it is unlikely that a single interaction between the offender and the judge as part of the sentencing hearing alone could achieve rehabilitation and desistance. However, engaging the offender in determining their sentence could be one component of successful rehabilitation. Regardless, to focus solely on the possible instrumental benefits of engaging the offender at sentencing is to miss the bigger picture. The consequentialist justification for offender agency at sentencing is secondary to the ethical justification. Offender agency at sentencing is not primarily outcome oriented. Even if there is no added benefit in terms of rehabilitation, offering the offender the opportunity to be engaged directly in sentencing is first and foremost justified

⁶³⁴ Duff, ‘Towards a Theory of Criminal Law?’ (n 619), 16.

⁶³⁵ See n 38.

⁶³⁶ See n 39.

⁶³⁷ See discussion Section 1.2.3.

on the grounds that it is more respectful of the offender as a moral agent. If the sentencing discussion focuses on how the sentence can help address problems underlying offending behaviour and achieve rehabilitation, this affirms the offender's agency and capacity to change his conduct, independent of whether rehabilitation and desistance are actually achieved.

In sum, the notion of responsibility – associated with the commission of the offence, and traditionally desert theory and retrospectivity – and the notion of responsabilisation – associated with rehabilitation and consequentialism – play a crucial role in justifying offender agency at sentencing. These two notions which belong to seemingly competing penal theories thus converge in respect of offender agency at sentencing. There are theoretical reasons to suggest that offering offenders the opportunity to express their views on the sentence and engage in a dialogue is likely to focus their attention on the wrong and the sentence – thus emphasising the offender's responsibility as moral agents – and on the potential of the sentence to reform – thus acknowledging the offender's capacity to change and play an active role in his own moral development, and increasing the likelihood that reform and desistance might be achieved.

5.2 Non-dispositive offender agency in a dialogical model

The proposed agentic sentencing system is based on two core, interrelated principles. An agentic sentencing system should be premised on the paradigm of a dialogue (Section 5.2.1), in which offender agency is non-dispositive (Section 5.2.2).

5.2.1 The conception of a sentencing dialogue

In line with the justifications for respecting the offender's agency at sentencing set out in Section 5.1, it is argued that the best way to do so is by offering offenders the opportunity to

communicate their views on the sentence and engage in a dialogue with the judge, as part of the sentencing hearing. The focus of the dialogue should be what the appropriate sentence for the crime might be. This raises other questions, including what the offender should communicate in the sentencing dialogue,⁶³⁸ which restrictions should be placed on such communication,⁶³⁹ whether it is justifiable and feasible that the communication occurs directly between the judge and offender in the courtroom,⁶⁴⁰ and whether and how the content of the communication may influence the type and quantum of sentence.⁶⁴¹ These questions will be addressed throughout the rest of the chapter. For now, it suffices to clarify how the concept of dialogue should be understood, and distinguish it from other conceptions of dialogue in criminal justice.

The sentencing dialogue is an opportunity first and foremost for the offender to express his view and be heard, but it is equally an occasion for the judge to engage in a conversation with the offender. The communication process does not stop after the judge has offered the offender the opportunity to express his perspective on the sentence. Were the process to end there, it could hardly be considered reciprocal and the paradigm underpinning the agentic sentencing model would be one of expression rather than dialogue. At the heart of the dialogue is the idea that the judge can attend to the offender's perspective on his sentence by hearing the offender, asking certain questions, and engaging with the offender's answers. Conceived as such, the sentencing dialogue is a literal, verbal exchange between the judge and offender in the courtroom about the type and quantum of the sentence.

⁶³⁸ Section 5.3.

⁶³⁹ Section 5.4.

⁶⁴⁰ Section 5.5.

⁶⁴¹ Section 5.7.

The dialogue is one distinct part of the sentencing hearing. It should occur alongside other stages of the traditional sentencing process, including the prosecution's statement and the defence plea in mitigation. The most appropriate time for the sentencing dialogue to take place is towards the end of the sentencing hearing, after the prosecution and defence lawyer have made their submissions, but prior to the court passing the sentence. At that moment, the judge will be best informed to engage in a meaningful dialogue with the offender. The offender may wish to raise points not yet raised by the prosecution or defence lawyer, but he feels are essential to him.⁶⁴² To ensure procedural fairness, it is vital that if the offender raises anything during the dialogue that may materially affect the disposition, the prosecution is given the opportunity to respond. The right to a fair trial encompasses the right to an adversarial process, which entails that both the prosecution and defence should be given the opportunity not only to adduce arguments and evidence they consider relevant to their case, but also to comment upon and challenge the arguments and evidence adduced by the other party.⁶⁴³

In some continental jurisdictions, the defendant always has the 'last word': after all the evidence is assessed and the prosecution and defence lawyer have made their final arguments, the defendant is entitled to speak last at trial.⁶⁴⁴ While the proposed sentencing dialogue thus bears a resemblance to this established practice in continental jurisdictions, there are important differences. In contrast to US and Commonwealth jurisdictions, many continental jurisdictions do not bifurcate the phases in which issues of guilt and sentence are discussed.⁶⁴⁵ Consequently,

⁶⁴² King, 'The Therapeutic Dimension of Judging' (n 10), 94-95.

⁶⁴³ See ECtHR cases in n 131.

⁶⁴⁴ G Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013), 673-674. In the Netherlands: Article 311(4) Code of Criminal Procedure (Netherlands); Pakes (n 3), 126. In France: Article 346 Code of Criminal Procedure (France); RS Frase, 'Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?' (1990) 78 California Law Review 539, 681. In Germany: Article 258(3) Code of Criminal Procedure (Germany).

⁶⁴⁵ Frase, 'Comparative Criminal Justice as a Guide to American Law Reform' (n 644), 680; W Pizzi, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (New York University Press 1999), 95-6, 99; T Weigend, 'Sentencing and Punishment in Germany' in M Tonry and RS Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001),

in these jurisdictions, the defendant has the ‘last word’ at a stage when guilt has not yet been established. Arguably, the absence of a bifurcated trial puts the defendant at a disadvantage by not being allowed to wait until guilt has been established before deciding whether and how to present mitigating factors relevant to sentence.⁶⁴⁶ Anything the defendant says can influence the question of guilt or innocence, as well as the possible sentence. It is thus hard to imagine how any real sentencing dialogue of the kind proposed here can take place when the offender has a vested interest in maintaining innocence at the stage when he is offered the opportunity to speak. The proposed sentencing dialogue would require a bifurcated trial, and for that reason alone it is to be distinguished from the defendant’s right to speak last in continental jurisdictions. Additionally, in contrast to the proposed sentencing dialogue, it is doubtful that the defendant’s right to have the ‘last word’ in continental jurisdictions is underpinned by a principled commitment to respect the offender’s agency regarding sentence.

5.2.1.1 Distinguishing conceptions of dialogue

The concept of the sentencing dialogue underpinning the proposed agentic sentencing model should be distinguished from that employed in responsive censure accounts of punishment defended by Duff⁶⁴⁷ and Maslen.⁶⁴⁸ Both use the language of dialogue in a symbolic sense, whereas the conception of a sentencing dialogue defended in this thesis uses that terminology in a literal, standard sense. Communicative theorists have argued that through the imposition of punishment the state expresses or communicates censure to the offender, and the offender is

188; K Beyens and V Scheirs, ‘Encounters of a Different Kind. Social Enquiry and Sentencing in Belgium’ (2010) 12 *Punishment and Society* 309, 321.

⁶⁴⁶ Frase, ‘Comparative Criminal Justice as a Guide to American Law Reform’ (n 644), 681, footnote 730; J Rozie, ‘Tegenspraak in de Bestrafing’ (2014) 2 *Nullum Crimen* 91, 98.

⁶⁴⁷ Duff, *Punishment, Communication, and Community* (n 33). See Chapter 3.

⁶⁴⁸ Maslen (n 365), ch 5, 90-118.

thereby addressed as a moral agent.⁶⁴⁹ Duff's position is unique in the sense that he adds that the offender is given the opportunity to *respond* to state censure, by undertaking the punishment as a vehicle for repentance, reform, and reconciliation.⁶⁵⁰ It is inherent in the idea of punishment as the communication of censure⁶⁵¹ that 'punishment speaks to the offender not just through the words that are said to her, but through the material forms that it takes.'⁶⁵² It is thus evident that Duff's dialogical conception of punishment does not refer to literal speech.

Making the case for the relevance of the offender's expressions of remorse to sentencing, Maslen also defends an account of responsive censure.⁶⁵³ Her account of censure-based punishment 'suggests a model of sentencing as a species of dialogue; as something that is two-way, in which both participants seek to better understand the subject matter.'⁶⁵⁴ Yet, her conception of dialogue differs from the one used in this thesis in several ways. First, like Duff's dialogical conception of punishment, Maslen's uses the term dialogue in a non-standard way, divergent from its literal meaning. She insists that the sentencing hearing is not 'a drawn-out iterative exchange', nor 'a critical reasoning exercise', or 'a literal conversation that occurs between the offender and the judge'.⁶⁵⁵ The agentic sentencing model developed in this thesis is premised on a literal, verbal exchange between the judge and offender, rather than a symbolic one. Secondly, Maslen's conception of dialogue is not restricted to mere verbal communication

⁶⁴⁹ See n 304.

⁶⁵⁰ Duff, 'Punishment, Communication, and Community' (n 103), 51; Duff, 'In Defence of One Type of Retributivism' (n 295), 412; Duff, *Punishment, Communication, and Community* (n 33), xix, 30, 106-109; Duff, 'Probation, Punishment and Restorative Justice' (n 183), 188-189; Duff, 'Punishment, Retribution and Communication' (n 22), 131.

⁶⁵¹ On the idea of punishment as communication see K Günther, 'Criminal Law, Crime and Punishment as Communication' in AP Simester, A du Bois-Pedain and U Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014).

⁶⁵² Duff, *Punishment, Communication, and Community* (n 33), 222.

⁶⁵³ See Maslen (n 365), ch 5, 90-118.

⁶⁵⁴ *Ibid*, 99.

⁶⁵⁵ *Ibid*, 99.

but incorporates other modes. She suggests that, while the offender could communicate his remorse through speech, he can equally do this in other ways, such as through the display of emotion, significantly changing his life, and making reparation.⁶⁵⁶ This communication may occur before the offender meets the sentencing judge, and the communication will mostly likely not be directed at the judge.⁶⁵⁷ By contrast, the thesis focuses on the direct, verbal exchange between the judge and offender in the courtroom. Maslen's account of responsive censure that accommodates for expressions of remorse as a mitigating factor, rests on a broader notion of a dialogue compared to the one discussed here.

5.2.1.2 The plausibility of viewing sentencing in dialogical terms

Brownlee has raised some objections to Duff's dialogical conception of punishment, and critically addressed the offender's part in the dialogue.⁶⁵⁸ Brownlee's objections merit attention,⁶⁵⁹ but it is questionable whether they apply to the agentic sentencing model developed in this thesis. First, to the extent that the justifications for offender agency set out in Section 5.1 not only derive from Duff's account but have a broader theoretical basis including Lacey and Pickard's forgiveness-based account of punishment and TJ, Brownlee's criticisms do not necessarily affect the validity of the agentic sentencing model.

Secondly, the agentic sentencing model, although based on a dialogical paradigm, diverges from Duff's account of punishment and sentencing. Duff argues that, on a communicative paradigm of punishment, criminal mediation is appropriate, and a system of negotiated sentences is at the core of that model.⁶⁶⁰ In Duff's view, offender and victim should

⁶⁵⁶ Ibid, 99.

⁶⁵⁷ Ibid, 99.

⁶⁵⁸ Brownlee (n 340).

⁶⁵⁹ For a comprehensive rebuttal of Brownlee's criticism see Maslen (n 365), 108-116.

⁶⁶⁰ Duff, *Punishment, Communication, and Community* (n 33), 158-163.

negotiate the type and amount of reparation, in the form of a punishment, with a mediator's assistance.⁶⁶¹ In his later work, Duff uses the more generic term 'sentencing discussion'.⁶⁶² Nonetheless, Duff's model remains largely the same, as he indicates that the discussion must be 'an exercise in negotiated sentencing'.⁶⁶³ By contrast, the proposed agentic sentencing model explicitly rejects a negotiation paradigm in favour of a dialogical one, for reasons set out in Section 5.6.

Thirdly, Brownlee objects to the conception of *punishment* in dialogical terms, which is distinct from the conception of *sentencing* as a dialogue. As argued, the former uses the language of dialogue in a symbolic sense, whereas the dialogic sentencing account developed in this chapter is premised on a literal, verbal exchange between judge and offender. Consequently, Brownlee's objections to dialogical conceptions of punishment do not apply with the same force to dialogue within the sentencing process.

5.2.2 Non-dispositive agency

In principle, the offender's perspective on the sentence should be non-dispositive.⁶⁶⁴ Whilst the judge should hear the offender's perspective, take notice of his views, and engage with them, it remains for the judge to determine and impose the sentence. To suggest that offenders should have a level of control over the process would undermine the authority of the court to impose the sentence. External regulation of the sentencing process is paramount in order to achieve a

⁶⁶¹ Ibid, 159.

⁶⁶² Duff, 'Probation, Punishment and Restorative Justice' (n 183), 184-187.

⁶⁶³ Ibid, 186-187.

⁶⁶⁴ In respect of victim participation see Edwards, 'An Ambiguous Participant' (n 97). Drawing on Arnstein's typology of citizen participation (SR Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 Journal of the American Institute of Planners 216), Edwards distinguishes between dispositive and non-dispositive types of victim participation, and sets out four corresponding forms of participation.

just outcome. The non-dispositive nature of offender agency is one the fundamental constraints of the proposed sentencing model.

However, the offender's input could influence the decision, insofar as it is aligned with the public interest. If offenders were to say something on their own behalf in the sentencing dialogue, without even the *possibility* of influence, they may feel that the judge was simply going through the motions. The proposed model would do little to respect the offender as a responsible moral agent or facilitate reform. If as a result of the sentencing dialogue, the judge imposes a different sentence to the one he previously had in mind, this is not a derogation of state power but an exercise of it.

There may appear to be some ambiguity between the principled non-dispositive nature of offender agency, and the possibility that the offender's input could influence the sentence insofar as it is aligned with the public interest. This ambiguity is rooted in a possible tension between the justifications for offender agency underpinning the proposed model. On the one hand, based on the ethical justification of respecting offenders as moral agents, there is inherent value in offering offenders the opportunity to engage in a dialogue about their sentence, regardless of whether and to what extent the offender's communication is determinative in the sentencing outcome. On the other hand, on a consequentialist account the extent of the offenders' influence on the disposition matters. Not only in theory but also in practice it is conceivable that offenders would want to know in advance whether engaging in the dialogue is 'worth their while'. In determining this, they would need to know whether and how the court may change the sentence imposed after hearing the offender's viewpoint as part of the dialogue. This tension could be navigated by telling the offender upfront that the judge will hear what the offender communicates in the sentencing dialogue and that this can impact the sentencing outcome, but that there is no guarantee that it will. Whether the offender's input actually makes

a material difference is dependent on the content of the communication. How, then, should the judge decide when the offender's viewpoint can legitimately impact the sentencing decision, and when this would be inappropriate? Section 5.7 will address this question. Additionally, to say that offender agency should be non-dispositive but may on occasion influence the sentence entails several possible risks, which Chapter 6 will address. Section 6.2 will discuss the risk that the offender's expectations to influence the sentence will not be met, or that offender agency might become tokenistic. Section 6.3 will explore to what extent the offender's input can lower or increase the sentence.

5.3 The content of the sentencing dialogue

5.3.1 Communication from the court

After the prosecution and defence lawyer have been heard, the judge should directly address the offender. The judge may start by simply asking the offender whether he wishes to add anything relevant to the sentencing decision. If the offender wishes to do so, this may naturally lead to a dialogue concerning the appropriate sentence. If the offender does not wish to add anything, the judge could directly ask the offender for his views pertaining to sentence. The offender may still decline to engage, at which point the judge should ask no further questions and may proceed to sentence. As Chapter 6 will argue, the offender's unwillingness to engage in the dialogue does not undermine the validity of the agentic sentencing system.

It would be difficult to provide a script that the judge should follow in every single case, since the dialogue will differ depending on the individual case. In line with the justifications for offender agency, part of the sentencing dialogue aims to encourage the offender to take responsibility not just for the offence but also for the sentence. During the dialogue the judge may seek to gauge whether the offender takes responsibility for his actions and the judge's

questions may facilitate the taking of responsibility.⁶⁶⁵ While the offender may refuse to take responsibility by attributing blame to external factors, not all such factors should be treated alike. Some have argued that certain external factors, such as having suffered systemic socio-economic deprivation, may entail that the offender's blameworthiness is diminished or even absent.⁶⁶⁶ The judge should invite the offender to reflect on how his punishment can repair the harm done to the victim and the community. The judge can ask the offender why he committed the offence, thus trying to help the offender identify issues contributing to the offending behaviour. The judge may ask the offender what he proposes to do about these factors, to the extent they are under his control, and how his sentence can help him address them and allow him to rehabilitate.⁶⁶⁷

The judge should probe when the offender says something that is not clear, seems to make excuses, or gives inconsistent information. The judge may ask the offender to explain his reasons for a particular viewpoint, seek to influence that viewpoint, contest and challenge the offender's reasons, explain why the offender's view may be problematic, offer additional reasons for why a particular sentence would be better, recognise aggravating and mitigating factors,⁶⁶⁸ and choose to disregard certain of the offender's reasons. For example, an offender may consider a community order appropriate for the offence he has committed and set out his reasons for this view. The judge can in turn challenge that view and give arguments for why

⁶⁶⁵ King, 'The Therapeutic Dimension of Judging' (n 10), 103.

⁶⁶⁶ See e.g. R Delgado, '"Rotten Social Background": Should the Criminal Law Recognize a Defence of Severe Environmental Deprivation?' (1985) 3 *Law and Inequality* 9; PH Robinson, 'Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and Rotten Social Background' (2011) 2 *Alabama Civil Rights and Civil Liberties Law Review* 53. For critical assessment see S Morse, 'Deprivation and Desert' in WC Heffernan and J Kleinig (eds), *From Social Justice to Criminal Justice: Poverty and the Administration of criminal law* (Oxford University Press 2000).

⁶⁶⁷ In a similar sense see King, 'The Therapeutic Dimension of Judging' (n 10), 102.

⁶⁶⁸ On aggravating and mitigating factors at sentencing in theory and practice in England see e.g. JV Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011); J Cooper, 'Nothing Personal: The Impact of Personal Mitigation at Sentencing' in A Ashworth and JV Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013); Ashworth, *Sentencing and Criminal Justice* (n 26), ch 5, 163-204.

the sentence should be different. Throughout the sentencing dialogue, the judge's task would be to ask the offender open questions in order to encourage him to speak rather than shutting the conversation down,⁶⁶⁹ listen to the offender, and engage with the offender in the dialogue on the basis of his answers rather than lecturing him.⁶⁷⁰

5.3.2 Communication from the offender

Drawing on Edwards' taxonomy of non-dispositive forms of victim participation,⁶⁷¹ this section explores what the content of the offender's contribution to the dialogue should be. While the following sections analyse the component parts of the offender's contribution, in a dialogue between the judge and offender these parts may blend into one and not be clearly distinguishable.

A central aspect of the sentencing dialogue is that the judge should consult the offender about what the appropriate sentence might be for the wrong he has committed.⁶⁷² It is conceivable that, as part of the sentencing dialogue, the offender reflects on problems underlying his offending behaviour and may suggest useful components of his sentence. For instance, the offender may have a view on the type of probation conditions that can help him refrain from reoffending. From a TJ perspective, it is expected that tailoring the conditions of the sentence specifically to the offender's situation and giving the offender a voice in designing the sentence, may have a range of positive consequences. The offender is more likely to regard the procedure of arriving at the sentence as fair, and less likely to consider the sentence conditions unjust. This may enhance procedural justice and legitimacy and may increase the

⁶⁶⁹ Regarding review hearings in mainstream courts adopting a therapeutic approach: King, 'The Therapeutic Dimension of Judging' (n 10), 103.

⁶⁷⁰ In drug courts: Nolan, 'Therapeutic Adjudication' (n 454), 34.

⁶⁷¹ Edwards, 'An Ambiguous Participant' (n 97), 975-977.

⁶⁷² On how the concept of consultation should be understood in respect of victim participation see *ibid*, 975-976.

chance that the offender abides by the conditions of the sentence.⁶⁷³ An offender who claims to be remorseful may simply say to the judge that he accepts whatever sentence the judge deems appropriate. However, if an offender expresses remorse, the judge may follow this up by asking the offender what he thinks his sentence should entail and how it could achieve reparation, considering that he regrets what he has done, thus encouraging the offender to take responsibility for the wrong and sentence.

Since the sentencing dialogue should take place after the judge has heard from the prosecution and the defence, it may be the case that all relevant matters have already been brought to the judge's attention. Nonetheless, the offender should be offered the opportunity to raise points which have not been stressed before by the prosecution or defence lawyer and he feels are essential to him.⁶⁷⁴ The offender may supply the court with information relevant to sentencing, if he so wishes.⁶⁷⁵ In respect of victim participation, it has been suggested that one of the underlying justifications of victim personal statements is the provision of accurate information on which sentencers can act to achieve a particular sentencing aim.⁶⁷⁶ Similarly, during the dialogue the offender may offer information relevant to the disposition. As the thesis is concerned with theory rather than practice, it is beyond the scope to give a comprehensive overview of which particular factors could be considered relevant to sentencing, as this will largely depend on the specific jurisdiction concerned and the facts of each case. In general, it is conceivable that during the sentencing dialogue the offender offers information pertaining to harm or culpability, efforts he has taken since the commission of the offence to change his

⁶⁷³ DB Wexler, 'Relapse Prevention Planning Principles for Criminal Law Practice' (1999) 5 *Psychology, Public Policy, and Law* 1028, 1031.

⁶⁷⁴ King, 'The Therapeutic Dimension of Judging' (n 10), 94-95.

⁶⁷⁵ Regarding victim participation, Edwards distinguishes between merely providing information required by the decision-maker, and the victim *wanting* to provide information, characterising the latter as 'expression' (Edwards, 'An Ambiguous Participant' (n 97), 976).

⁶⁷⁶ Erez, 'Who's Afraid of the Big Bad Victim?' (n 214); Edwards, 'An Ambiguous Participant' (n 97), 976, 978; Cassell (n 214), 619-621.

behaviour or compensate the victim, or demonstrate his remorse. The offender may give evidence of the fact that he does not pose a risk. He may suggest that a drug treatment programme would be an appropriate sentence, supplying evidence that he has undertaken steps in the months prior to sentence to address his addiction. Allowing the offender to draw the judge's attention to relevant factors may in turn also enhance individualisation of sentences.⁶⁷⁷

While the offender can select the information that he wishes to communicate to the court, existing instances of the sentencing process focussed on information-provision should also remain in place. In particular, the *Newton* hearing,⁶⁷⁸ pre-sentence reports,⁶⁷⁹ and the defence speech in mitigation,⁶⁸⁰ are designated parts of the sentencing procedure that are, at least in part, concerned with gathering accurate and verified information that sentencers can rely on and take into account when deciding sentences.⁶⁸¹ Restrictions on the type of information gathered and the manner in which it is supplied are appropriate in these contexts.

Information provision as part of the sentencing dialogue should remain optional. *Requiring* the offender to provide information would undermine the main aim of the sentencing dialogue as a means to facilitate the offender's agency. Restricting the sentencing dialogue to required information-provision and information-gathering would make the opportunity for dialogue contingent on the sentencer's need for such involvement.⁶⁸² Consequently, when this

⁶⁷⁷ See e.g. L Hyde, 'Individualization in Criminal Punishment' (1945) 31 Iowa Law Review 200; BA Koons-Witt, 'Equal Justice versus Individualized Justice: Discretion and the Current State of Sentencing Guidelines' (2009) 8 Criminology & Public Policy 279; M Tonry, 'Individualizing Punishments' in A von Hirsch, A Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009); JV Roberts, J Pina-Sanchez and I Marder, 'Individualisation at Sentencing: The Effect of Guidelines and "Preferred" Numbers' (2018) 2 Criminal Law Review 123.

⁶⁷⁸ *R v Newton* (1982) 4 Cr App 4 (S) 388; CPD 2015 (n 213), VII Sentencing B.6-B.14, 152-155; Ashworth, *Sentencing and Criminal Justice* (n 26), 425-427.

⁶⁷⁹ CJA 2003, ss 156-158; Ashworth, *Sentencing and Criminal Justice* (n 26), 432-434.

⁶⁸⁰ Ashworth, *Sentencing and Criminal Justice* (n 26), 434-435.

⁶⁸¹ For a more detailed discussion see Chapter 7.

⁶⁸² In respect of victims' rights: Edwards, 'An Ambiguous Participant' (n 97), 976.

need does not arise, the offender may not be given an opportunity to engage in the dialogue. This would run counter to the aims of the sentencing dialogue.

According to the offender a consultative role raises the question of how such a role is consistent with the conception of criminal offences as public wrongs. Furthermore, if the offender wishes to supply information, it is likely that the offender may express things that cannot legally be taken into consideration in determining the sentence. Alternatively, the offender may present information relevant to the determination of the sentence, but in a manner that is emotional, conveyed in overly subjective terms, goes into greater detail than the court needs, or gives information beyond what the court requires.⁶⁸³ Indeed, the offender may not be able to offer information in the objective, dispassionate way required for sentencing. It is important that there are safeguards against the risk that the exercise of agency, including uncontrolled expressions of emotions, might have an unacceptable influence on the sentencing judge, as has been noted in respect of victim statements.⁶⁸⁴ First, recall that under the proposed agentic sentencing model offender agency is non-dispositive. The point of the sentencing dialogue is to offer the offender the opportunity to be consulted and express his views, and it is a separate matter if and when the content of the offender's expression should in fact influence the sentence.⁶⁸⁵ Secondly, if the judge identifies an element that is possibly relevant to sentencing, it is vital that any information which speaks to the disposal imposed is subjected to scrutiny by the prosecution to safeguard the right to an adversarial process.⁶⁸⁶ The court can only take verified information into account as a factual basis for sentencing. The prosecution

⁶⁸³ In respect of victims: *ibid*, 976.

⁶⁸⁴ C Hoyle, 'Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence' in E Erez, M Kilchling and J Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press 2011), 275-279.

⁶⁸⁵ See Section 5.7.

⁶⁸⁶ See ECtHR cases in n 131.

must prove aggravating and other offence-related factors to the criminal standard of proof, i.e. beyond reasonable doubt.⁶⁸⁷ The defence, on the other hand, needs to establish mitigating factors and so-called extraneous matters not connected with the facts or circumstances of the offence only to the civil standard, i.e. the ‘balance of probabilities’ standard, although ‘in the general run of cases the sentencer would readily accept the accuracy of defending counsel’s statements’.⁶⁸⁸ Thirdly, the judge should hear the offender’s perspective, but weigh it against other factors that should be taken into account in deciding on the final sentence. These other factors include constraints of proportionality, consistency, the risk the offender poses to society, realistic prospects of rehabilitation, and impact on the victim and on the victim’s family. To ensure that the offender’s viewpoint in terms of sentence does not override these important principles of sentencing, a range of constraints should be put in place, set out in the following section.

5.4 Constraints on offender agency and the risk of privatisation

Chapter 2 argued that the state has a fundamental role in the institution of punishment. It suggested that crimes constitute public wrongs and therefore the response to crime ought to be administered in the public interest. The state’s authority over the offender is an important dimension of all criminal punishment. However, the court’s power to determine and impose a sanction does not prevent sentencing from encompassing a dialogue in which the offender’s voice is heard. The tension between the authoritative role of the state in sentencing and a more active role for the offender is not insoluble. To avoid privatisation of punishment and preserve

⁶⁸⁷ *Davies* [2009] 1 Cr App R (S) 79.

⁶⁸⁸ *Guppy and Marsh* (1995) 16 Cr App R (S) 25. For an overview of the evidentiary standards to establish aggravating and mitigating facts at sentencing in common law legal system see KR Reitz, ‘Proof of Aggravating and Mitigating Facts at Sentencing’ in JV Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011).

the role of the state, and the fundamental criminal justice principles it embodies and protects, principled constraints must be placed on offender agency.

Two such constraints were discussed above, namely that the offender's agency should be non-dispositive, and that if the offender raises issues during the sentencing dialogue that speak to the disposition this should be subject to scrutiny by the prosecution to ensure the right to an adversarial process. Thirdly, the judge should instruct the offender that the sentencing dialogue is not an opportunity for the offender to contest the conviction, as this has already been established prior to the sentencing hearing.

Fourthly, the judge should make it clear to the offender that he must impose a punishment proportionate to the seriousness of the offence. Recall that while proportionality alone cannot provide substantive limits on punishment,⁶⁸⁹ for the purpose of developing a conceptual and normative framework for offender agency at sentencing it can still be a constraining principle. The model developed here is developed within a framework of limiting retributivism, as conceived by Morris, Tonry, and Frase,⁶⁹⁰ and consequently proportionality should be prioritised. A feature of limiting retributivism is the concept of broad proportionality or negative proportionality.⁶⁹¹ A broad notion of proportionality entails that the gravity of the offence sets upper and lower limits of a sentencing range. This results in a range of 'not undeserved' penalties.⁶⁹² This notion of proportionality prohibits clearly disproportionate sentences. The constraint of (negative) proportionality is vital because it preserves the fundamental role of the state in sentencing, ensures that there are limits on state coercion, and

⁶⁸⁹ Lacey and Pickard, 'The Chimera of Proportionality' (n 49). See Introduction.

⁶⁹⁰ See Introduction, n 51 and n 52.

⁶⁹¹ Duff places a similar constraint on his model of negotiated sentences: see Duff, *Punishment, Communication, and Community* (n 33), 141-143.

⁶⁹² Frase, 'Limiting Retributivism' in A von Hirsch, A Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009).

ensures consistency to the extent possible within the limits of negative proportionality. Additionally, offenders are likely to be unaware of the sentence range for their crime and need advice to be able to engage meaningfully in a sentencing dialogue. Imposing limits of proportionality on severity of sentence may facilitate the offender's engagement by focussing on what constitutes an appropriate sentence, and making clear that excessively lenient or severe sentences cannot be discussed.⁶⁹³ Furthermore, negative proportionality preserves outer limits on a desert-based rationale, but within these limits other considerations may play a role in determining the appropriate sentence. The proportionality limits ensure that the sentence reflects public understandings of the degree of harm and culpability, while within the range of not undeserved penalties there is scope for offenders to exercise agency in sentencing and express their view on matters that are relevant in determining the punishment in each individual case.

The principle of negative proportionality offers more scope for offender agency than the principle of strict proportionality or positive proportionality.⁶⁹⁴ The notion of 'positive' proportionality, as advanced by von Hirsch, Wasik, and Greene, refers to the fact that the principle is formulated in the positive, i.e. sentencers must impose proportionate sentences.⁶⁹⁵ The desert model of positive proportionality entails that there is such thing as *the* proportionate sentence, which can be determined by providing unitary rankings of offences in terms of their seriousness and penalties in terms of their severity. Von Hirsch, Wasik, and Greene propose a scheme of limited substitutability: only when two or more punishments with equivalent penal

⁶⁹³ In a similar sense regarding the victim and offender's role in the negotiating process in a 'making amends model': von Hirsch, Ashworth and Shearing (n 284), 39.

⁶⁹⁴ In an RJ context, Cavadino and Dignan also argue that 'the goal of empowering victims and offenders to participate actively in the offense resolution process is not compatible with the principle of strict proportionality': Cavadino and Dignan (n 41), 353.

⁶⁹⁵ See A von Hirsch, M Wasik and J Greene, 'Punishment in the Community and the Principles of Desert' (1989) 20 Rutgers Law Journal 595; von Hirsch, *Censure and Sanctions* (n 33), ch 7.

value can be found proportionate to the offence can they be substituted for one another, and can considerations other than proportionality weigh in to determine which sentence should be imposed.⁶⁹⁶

Fifthly, there should be constraints on the appropriate type of punishment. For instance, it is up to the state to specify whether a crime is so serious that it warrants a prison sentence.⁶⁹⁷ In principle, the agentic sentencing model developed here should apply to all modes of punishment. In practice, however, some modes of punishment may be more amenable to the exercise of offender agency at sentencing than others. For instance, when focussing narrowly on one particular rationale for offender agency, inducing a process of reform, particular types of punishment may be more suited to the exercise of offender agency to achieve those aims. In line with a therapeutic approach to sentencing, the judge and offender can consider alternative problem-solving approaches to address the offender's behaviour that contributes to offending.⁶⁹⁸ Sentences such as community orders and probation orders may be more suited to address problems underlying offending behaviour. For a certain group of offenders who have committed mid-to-low level offences and are not dangerous, allowing them to remain in the community permits them to stay with their family or support group, engage or continue to engage in productive employment, which in turn can help them earn funds to compensate the victim, and remain in rehabilitative treatment or education programmes.⁶⁹⁹

This does not entail, however, that more passive modes of punishments, such as imprisonment, are not suited to the exercise of offender agency at sentencing. Where serious

⁶⁹⁶ von Hirsch, Wasik and Greene (n 695), 604-606; von Hirsch, *Censure and Sanctions* (n 33), 63.

⁶⁹⁷ In the same sense: Duff, *Punishment, Communication, and Community* (n 33), 160.

⁶⁹⁸ Wexler, 'Relapse Prevention Planning Principles for Criminal Law Practice' (n 673), 1031.

⁶⁹⁹ BJ Winick, 'Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model' (1999) 5 *Psychology, Public Policy, and Law* 1034, 1050.

offences have been held to warrant a prison sentence, one might think there is little scope for offender agency. The range of appropriate sentences for a very serious crime under a principle of proportionality will be determined by the duration of the sentence, not the type. Consequently, it would seem that any dialogue between the judge and offender can only concern the length of the prison sentence. Even in those cases, the offender should be allowed to engage in a dialogue and express his views on the sentence. Even for the most heinous offences, it is important to acknowledge the offender as an agent and focus his attention on the wrong and the sentence. Furthermore, the sentencing dialogue can focus on how rehabilitation can be achieved in prison. Ashworth and Zedner argue that it follows from the state's obligation to prevent harm that it should make available rehabilitative programmes during prison sentences.⁷⁰⁰ Equally, it has been demonstrated that the therapeutic model has its merits when applied to incarceration.⁷⁰¹ The judge can thus ask the offender's views on how rehabilitation and treatment might be achieved as part of their prison sentence. This could be considered more an exercise of agency concerning the *implementation* of the sentence, rather than the determination of it, as the punishment that will ultimately be imposed remains a prison sentence. However, while there is currently no provision in English law that permits judges to do this, theoretically there should be nothing to stop them from incorporating rehabilitative components in the prison sentence. If anything, this would further add to the idea, often espoused in a therapeutic framework, that sentences are not just about punishment, nor just about treatment, but should be a socially meaningful way of combining the two.⁷⁰² The conversation between the judge and offender about problems underlying offending behaviour and the extent to which the offender is prepared to address these, should not be limited to

⁷⁰⁰ Ashworth and Zedner, 'Punishment Paradigms and the Role of the Preventive State' (n 87), 18.

⁷⁰¹ See e.g. Genders and Player, *Grendon: A Study of a Therapeutic Prison* (n 401); Genders and Player, 'Therapy in Prison: Revisiting Grendon 20 Years On' (n 401).

⁷⁰² Donoghue (n 449), 18, 22, 141. Specifically in respect of problem-solving courts: Nolan, *Reinventing Justice* (n 40), 51-57; Nolan, *Legal Accents* (n 441), 13 and 16. See Chapter 4.

community sentences. Consequently, the agentic sentencing model developed here is not inherently restricted to offences of mid-level seriousness that tend to correspond on the proportionality ladder with intermediate community sentences,⁷⁰³ but can, in principle, be applied across the board.

In sum, the limits operating on offender agency allow the penal process to retain its overall public nature and not become a process aimed at the resolution of a private dispute.⁷⁰⁴ The constraints inevitably entail that the offender's agency is qualified; there is no place for absolute offender agency in democratic, liberal criminal justice systems. The offender's agency is subject to principled restraint. The limits restrict offender agency, but do not preclude it. Within those principled limitations, the offender should have the power to convey his view on the elements that are relevant to the punishment. The offender's viewpoint remains subordinate, or at best can exist alongside or coincide with the public interest if the two are not in conflict. To the extent that offender agency can be reconciled with the fundamental role of the state and the rule-of-law principles it seeks to protect, allowing the offender to exercise agency at sentencing through a sentencing dialogue does not privatise sentencing and punishment. Rather, it alters the manner in which the state – through the judge – and the offender interact in the process of determining the punishment.

5.5 Direct judicial engagement with the offender

Under an agentic sentencing model, it is important that the judge engages directly with the offender rather than with the defence lawyer. There is the risk that if the defence lawyer speaks

⁷⁰³ See e.g. Morris and Tonry (n 51); A von Hirsch, 'Scaling Intermediate Punishments: A Comparison of Two Models' in JM Byrne, AJ Lurigio and J Petersilia (eds), *Smart Sentencing: The Emergence of Intermediate Sanctions* (Sage 1992); W Spelman, 'The Severity of Intermediate Sanctions' (1995) 32 *Journal of Research in Crime and Delinquency* 107.

⁷⁰⁴ Contra Christie, 'Conflicts as Property' (n 47).

on behalf of his client the offender might feel that decisions are being made about him without his own view being heard, which would undermine the justifications for respecting the offender's agency at sentencing. In order for the offender to feel acknowledged as a moral agent, it is vital he can speak, without being framed by the narrative of counsel, and feel that he has been heard by the judge. It is the offender who is called to account, not only regarding the wrong he has committed but also regarding the response to the wrong in the form of a sentence. The offender, not his lawyer or the state, will bear the consequences of a conviction and suffer the punishment.⁷⁰⁵

Furthermore, consistent with a TJ perspective, the direct dialogue between the judge and offender could be instrumental in fostering rehabilitation and desistance, which is the second rationale for offender agency.⁷⁰⁶ It is said that the judge can help the offender identify the underlying causes of the offending behaviour,⁷⁰⁷ and the judge can actively assist offenders' efforts to change their behaviour.⁷⁰⁸ An open dialogue between the court and offender is said to engender respect between the participants,⁷⁰⁹ and it may enhance procedural justice by positively affecting the offender's perceived legitimacy of the court, which can foster compliance with the court order and desistance from crime.⁷¹⁰ Judicial involvement has also been said to promote rehabilitation by contributing to 'desistance narratives'.⁷¹¹ Participants in drug courts reported that the intensity of the interaction between the offender and the judge

⁷⁰⁵ Assy (n 88), 36.

⁷⁰⁶ On the dialogue between the judge and offender in problem-solving courts see Nolan, *Reinventing Justice* (n 40), 99; Bean (n 496), 236; Nolan, 'Problem-Solving Courts: An International Comparison' (n 451), 152.

⁷⁰⁷ Cabinet Office (n 19), 27.

⁷⁰⁸ McIvor, 'Beyond Supervision' (n 445), 233.

⁷⁰⁹ CJ Petrucci, 'Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court That Utilizes Therapeutic Jurisprudence' (2002) 38 *Criminal Law Bulletin* 263.

⁷¹⁰ McIvor, 'Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts' (n 515).

⁷¹¹ Maruna (n 38).

was central to the success of the treatment programme.⁷¹² A British drug court magistrate said that she prefers solicitors to be absent at review hearings, as it avoids the ‘legal-speak’ and hearing from the offender himself allows the judge to get a better sense of the offender’s reality.⁷¹³ An offender’s personal testimony and direct dialogue with the judge, in which the judge can interrogate the offender and enquire about his true motivation, could reveal how genuine the offender is about his perspective on the offence and his sentence. Hence, it is common practice in PSCs that the judge assumes an active role in the problem-solving process and that the prosecutor and defence lawyer step aside,⁷¹⁴ to ensure unfiltered communication between the offender and the judge.⁷¹⁵

However, a direct dialogue between the judge and offender and a reduced adversarial role for the defence lawyer is not without hazards. In particular, the absence of defence lawyers in PSCs and more generally the departure from the traditional adversarial model and due process protections, has been the subject of criticism.⁷¹⁶ While direct engagement between the judge and offender is important to facilitate offender agency in an agentic sentencing model, this does not and should not entail that the need for legal representation at sentencing is diminished or even obsolete, on the contrary. It would be unjustified in an agentic sentencing model to side-line the defence lawyer completely. The right to defend oneself and have the assistance of counsel is a fundamental human right.⁷¹⁷ Adequate defence is especially

⁷¹² Nolan, *Reinventing Justice* (n 40), 85. See also RS Gebelein, ‘The Rebirth of Rehabilitation: Promise and Perils of Drug Courts’ (2000) 9 *Corrections Forum* 36.

⁷¹³ Nolan, *Legal Accents* (n 441), 56.

⁷¹⁴ Boldt, ‘Rehabilitative Punishment and the Drug Treatment Court Movement’ (n 450), 1252; Nolan, ‘Therapeutic Adjudication’ (n 454), 30.

⁷¹⁵ Casey (n 460), 1497-1498.

⁷¹⁶ See e.g. Boldt, ‘Rehabilitative Punishment and the Drug Treatment Court Movement’ (n 450); Quinn, ‘Whose Team Am I on Anyway?’ (n 536); Hoffman, ‘Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism’ (n 469); Casey (n 460); Boldt, ‘A Circumspect Look at Problem-Solving Courts’ (n 438), 22-27.

⁷¹⁷ Article 6(3) European Convention on Human Rights (ECHR); Article 14(3) International Covenant on Civil and Political Rights (ICCPR). See Trechsel and Summers (n 24), ch 10, 242-290; B Emmerson and others, *Human Rights and Criminal Justice* (3rd edn, Sweet & Maxwell 2012), 890-897.

important for the fairness of the criminal justice system,⁷¹⁸ where the offender's position is commonly weaker than that of the state, as an important safeguard against abuse of power.⁷¹⁹ The defence lawyer often plays an important part in promoting justice generally between the relatively powerless individual and the more powerful state.⁷²⁰ Part of the defence lawyer's role in traditional adversarial criminal proceedings is to limit the arbitrary exercise of coercive state power by safeguarding the offender's entitlement to basic procedural rights.⁷²¹ The thesis does not suggest that self-representation in the criminal process should be the norm. But an opportunity to speak directly with the judge, as a distinct part of the sentencing hearing, could be satisfied in a way that falls short of self-representation in the criminal process as a whole.

In the proposed agentic sentencing model, the sentencing dialogue should constitute only a part of the sentencing hearing. To facilitate the offender's agency by allowing him to engage in a direct dialogue with the judge it is necessary that this dialogue itself is more informal in nature, avoids unnecessary jargon and technical language, and that the judge adjusts his communication to the offender before him.⁷²² By contrast, the other stages of the sentencing hearing, including the prosecution's statement and the defence plea in mitigation, will be characterised by specialised, more formal, legal language, often not intelligible to the general public.⁷²³ Additionally, sentencing is a complex and technical process formally structured by statutes, case law, and sentencing guidelines.⁷²⁴ The formal legal language and the technical aspects of the sentencing hearing require representation by a person who possesses specialised

⁷¹⁸ *Lala v the Netherlands* (1994) 18 EHRR 586 [33]; *Pelladoah v the Netherlands* (1995) 19 EHRR 81 [40].

⁷¹⁹ Assy (n 88), 48.

⁷²⁰ Blake and Ashworth (n 93), 169.

⁷²¹ Boldt, 'Rehabilitative Punishment and the Drug Treatment Court Movement' (n 450), 1264.

⁷²² For a more detailed discussion of how the judge can achieve this see Chapter 6.

⁷²³ Shapland (n 25), 87-90.

⁷²⁴ In current English sentencing practice see Ashworth, *Sentencing and Criminal Justice* (n 26), 19-42.

skills, including an understanding of the legal language in which the rules are couched and the formal language used in court, as well as the ability to identify the pertinent legal rules, recognise relevant facts and engage in a particular type of legal interpretation and reasoning.⁷²⁵

The role of defence lawyers should not be limited to the other stages of the sentencing hearing. They should equally play a vital part in respect of the sentencing dialogue itself. While the judge should carefully instruct the offender on what the appropriate sentence range is for the particular offence, it would be the lawyer's duty to prepare his client for the sentencing dialogue. Ahead of the sentencing hearing the lawyer should discuss the process with his client.⁷²⁶ The lawyer should encourage his client to reflect thoroughly on the sentence that might be appropriate in his specific case, and the reasons for this. Additionally, the lawyer should discuss any anticipated objections the judge might raise. The offender should be prepared to address those objections, and think further how the judge's concerns could be accommodated. The judge should raise his own questions and concerns in response to what the offender communicates, including for instance that the proposed sentence does not accurately reflect the offence seriousness, that it is not suitable in high risk situations, or fails to take the victim's concerns into consideration.⁷²⁷ The offender should then be given the opportunity to respond, and offer suggestions for how the judge's concerns can be addressed.

The preparation with the lawyer could present yet another opportunity for the offender to reflect on the crime and the sentence. In his defence of a therapeutic and preventive approach to the plea and sentencing process, TJ scholar Winick argues for instance that 'lawyers can take a holistic approach to the representation of the client, seeking to understand and be

⁷²⁵ Trechsel and Summers (n 24), 245; Assy (n 88), 73.

⁷²⁶ Regarding the sentencing hearing in which the court considers a probation sentence see Wexler, 'Relapse Prevention Planning Principles for Criminal Law Practice' (n 673), 1031.

⁷²⁷ In a similar sense see *ibid.*

interested in all aspects of the client, not only his or her legal problems.’⁷²⁸ It is doubtful whether lawyers are currently equipped to undertake the task of preparing their clients for something like the sentencing dialogue suggested here. At the very least, redefining the defence lawyer’s role to encompass more ‘therapeutic duties’, in addition to the legal-technical assistance and representation they are required to provide, would entail a considerable shift from the way in which the criminal defence lawyer’s role is currently conceptualised.⁷²⁹ However, that is not to say that they could never develop such a role.⁷³⁰

While direct judicial engagement with the offender is important, the defence lawyer should be present during the sentencing dialogue. Defence lawyers should intervene when necessary to ensure that their clients’ legal rights and interests are protected. During the sentencing dialogue, an offender may bring up something damaging to his case which may prejudice the court against him. This risk is reduced if the defence lawyer and offender discuss beforehand whether the offender wishes to engage in the dialogue at all, and if so what he wants to say to the judge. Nonetheless, this risk cannot be eradicated altogether. If a lawyer is

⁷²⁸ Winick, ‘Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing’ (n 699), 1041.

⁷²⁹ On how TJ can inform the role of the criminal defence lawyer see e.g. Wexler, ‘Relapse Prevention Planning Principles for Criminal Law Practice’ (n 673); A Birgden, ‘Dealing With the Resistant Criminal Client: A Psychologically-minded Strategy for More Effective Legal Counseling’ (2002) 38 Criminal Law Bulletin 225; M Reisig, ‘The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process’ (2002) 38 Criminal Law Bulletin 216; Wexler, ‘Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law’ (n 427); C Clarke and J Neuhard, ‘From Day One: Who’s in Control as Problem-Solving and Client-Centred Sentencing Take Center Stage?’ (2004) 29 New York University Review of Law and Social Change 11; DB Wexler, ‘Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer’ (2005) 17 St Thomas Law Review 743. For criticisms see e.g. TM Meekins, ‘Specialized Justice: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm’ (2006) 40 Suffolk University Law Review 1; TM Meekins, ‘Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender’ (2007) 12 Berkeley Journal of Criminal Law 75; Quinn, ‘An RSVP’ (n 557).

⁷³⁰ See e.g. Wexler, ‘Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law’ (n 427), 205-208. Wexler describes the criminal law practice of Texas lawyer John McShane, which is focused solely on rehabilitation and mitigation of punishment. Representation is only possible if the client contractually agrees to the TJ approach, and is willing to ‘accept responsibility for his actions, submit to an evaluation, treatment, and relapse prevention program, and to use this approach in mitigation of the offence in plea bargaining or the sentencing hearing’.

present, while he cannot and should not retract the offender's statement, he can intervene and add nuance to the offender's admission or place it in a wider context. Because the offender is the person who will suffer the punishment, he is likely to have an excessive interest and emotional involvement in the case.⁷³¹ While it remains important that the offender can speak for himself and that the defence lawyer does not substitute the offender's narrative, the lawyer's intervention may prevent counterproductive comments by the offender. Finally, the defence lawyer's presence may be especially important for vulnerable and less articulate offenders. Not only do these offenders by definition require someone who will protect their legal rights and interests, but the defence lawyer may also help his client express his viewpoint in court and thus facilitate their agency. The position of those offenders in an agentic sentencing model will be explored in Chapter 6.

An agentic sentencing model requires that both the judge and the defence lawyer do more to involve the offender in the determination of the sentence than is presently the case in traditional criminal proceedings. However, in a state-centred adversarial criminal justice system, loss of judicial neutrality and the danger of judicial activism, as well as forsaking due process safeguards including the assistance of a defence lawyer, are not a price to be paid for offender agency. This section has offered a balanced account of why a direct judicial engagement with the offender is important and why the defence lawyer should not substitute the offender's narrative, but why equally the defence lawyer should not be absent during the sentencing dialogue.

⁷³¹ Trechsel and Summers (n 24), 245-246.

5.6 Why sentencing should be a dialogue rather than a negotiation

The agentic sentencing model developed in this chapter is based on the paradigm of a dialogue. This can be contrasted with the paradigm of a negotiation. At its core, a negotiation is a process whereby two or more parties with competing interests engage in argument and discussion, propose offers and counteroffers, and ultimately aim to reach an agreement about a certain issue.⁷³² A sentencing negotiation could take different forms. The main parties would be the state and the offender, but the negotiation could also include the victim.⁷³³ The state could be personified by different actors, whether the probation officer,⁷³⁴ the prosecution, and/or the judge. The nature and degree of the constraints on the negotiation can differ. This thesis is not concerned with analysing various possible negotiated sentencing models. Rather, it is concerned with the core characteristics of a dialogical and negotiated sentencing model that explain why a dialogical model is preferable. The dialogical model suggested here shares certain characteristics with the negotiation model. At the heart of both models is communication, which can be characterised as a process of sharing information and learning about the other party's perspective and wishes.⁷³⁵ Despite this similarity, there is one important difference, namely whether or not offender agency takes a dispositive form. In a negotiation model, the offender's view on the sentence is dispositive, meaning that the parties determine the outcome to a certain extent, or have some level of control over the result of the negotiation. By contrast, in a dialogical model offender agency is in principle non-dispositive, in that the offender has no guaranteed determinative influence on the sentencing outcome. This difference

⁷³² PH Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press 1979), 3-7; S Roberts and M Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (Cambridge University Press 2005), 113-114.

⁷³³ See Duff, *Punishment, Communication, and Community* (n 33), 158-163.

⁷³⁴ See *ibid*, 162-163; Duff, 'Probation, Punishment and Restorative Justice' (n 183), 185.

⁷³⁵ Roberts and Palmer (n 732), 133.

has several consequences which make a dialogical paradigm preferable to a negotiation paradigm as the basis of an agentic sentencing model.

First, negotiation is too transactional a model to apply to sentencing. Dispositive agency in sentencing entails that the offender has a determinative influence on the outcome of the sentencing negotiation, as the offender is considered a party to the joint-decision making process with the state. Under this form of agency, criminal justice actors would be under an obligation not only to ascertain the offender's view on the sentence, but also to take the offender's preference in the particular case into account,⁷³⁶ at least to a certain extent. In a negotiation model, whatever motivation the offender has to suggest a particular sentence would influence the sentencing negotiation and thus the outcome. By setting up sentencing as a negotiation, the scope for a true exchange of viewpoints is significantly reduced in favour of a narrow focus on getting the best deal. This turns sentencing into a strategic game where whoever negotiates best achieves the outcome optimal to them.

Secondly, in the majority of criminal cases it would be illusory to think that the offender *can* have any determinative influence over their sentence. The criminal process is controlled by state agents who have extensive powers and a monopoly of force.⁷³⁷ The criminal process is characterised by coercion, and the relation between the state and the offender by a structural imbalance in terms of power and resources.⁷³⁸ The offender's generally weaker position is exacerbated in respect of sentencing and punishment where the offender faces the possible deprivation of liberty and/or property. It may be true that negotiation need not be solely about bargaining in all contexts and that there are occasions where the process of communication may lead to a better understanding of the respective positions of the parties, which may result

⁷³⁶ In respect of victim participation: Edwards, 'An Ambiguous Participant' (n 97), 974.

⁷³⁷ Assy (n 88), 36.

⁷³⁸ Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35), 11.

in an agreed outcome with either party's perceived interest being modified.⁷³⁹ However, this would rarely be true of a negotiation within the criminal justice system, where equality of the negotiating parties is a myth.⁷⁴⁰ The power imbalance is such that a sentencing negotiation most often will not be a process of convergence or joint-decision making. This might be different in situations where the other party has more resources and power than the state prosecutor, for instance when the defendant or offender is a multi-national corporation⁷⁴¹ or a very wealthy individual. In the majority of criminal cases, however, the least powerful party is the offender. In those instances, the offender might be induced, if not coerced, into 'accepting' the other party's position. Negotiations in such situations of gross power imbalance are likely to exacerbate the imbalance. Since sentencing involves the state and the offender, it is a process of decision-making crossing lines of hierarchy and power structures, which is not well resolved through negotiation.⁷⁴²

Thirdly, as a matter of principle it is objectionable that the offender has any guaranteed determinative influence over their sentence. Giving offenders such power risks undermining the fundamental role of the state in sentencing, that sentences reflect a private rather than an authoritative public valuation of the conduct,⁷⁴³ and that the offender's agency trumps fundamental criminal justice principles such as equality before the law,⁷⁴⁴ or the retributive principle of proportionality.⁷⁴⁵ This would be the case in situations where the traditional power and resource imbalance between the state and the offender is reversed, for instance when the

⁷³⁹ Roberts and Palmer (n 732), 133.

⁷⁴⁰ Tulkens (n 35), 678-680. On the impact of power imbalances on dispute resolution processes in predominantly civil contexts see e.g. O Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 1073, 1076.

⁷⁴¹ Garrett (n 89).

⁷⁴² Roberts and Palmer (n 732), 133.

⁷⁴³ On why this is objectionable see Chapter 2.

⁷⁴⁴ Ashworth, *Sentencing and Criminal Justice* (n 26), 104. For a detailed account of the rule-of-law principles the state protects at sentencing see Chapter 2.

⁷⁴⁵ Ashworth, 'Responsibilities, Rights, and Restorative Justice' (n 97), 585-586.

defendant or offender is a major corporation, a wealthy individual, or an actor involved in large-scale organised crime. Those offenders can be considered comparatively powerful, as they may be well-educated, articulate and/or tend to have considerable financial means to afford high quality legal representation. Additionally, there may be an economic disincentive to prosecute, convict, and sentence these offenders, notably big corporations.⁷⁴⁶ In a negotiation model, it is conceivable that such offenders would be able to negotiate a comparatively lower sentence. A negotiated sentencing model may thus exacerbate existing inequalities by being more favourable to powerful offenders and detrimental to the mass of relatively powerless offenders. However, the same objection could also be levelled to an extent against a dialogical model, as Chapter 6 will argue. Nonetheless, the force of this objection is mitigated in a dialogical model, as it is not built into the sentencing model that the offender's negotiation power will have a direct impact on the sentencing outcome. Of course, it could be argued that a sentencing negotiation should be subject to the same constraint of negative proportionality as the proposed sentencing dialogue.⁷⁴⁷ But, practically, it is questionable whether it is feasible to arrive at a proportionate sentence through negotiation, especially if the parties to a negotiation include not only the state and the offender but also the victim. The sentencing negotiation could lead to a proportionate sentence *by chance*. But there is no certainty that, even within the limits of not undeserved sentences set under the principle of negative proportionality, the three parties will be able to negotiate and ultimately agree upon a proportionate sentence. It seems clear that negotiation is not the appropriate mode of communication to determine the most appropriate sentence, nor to uphold the offender's agency.

A dialogue is a preferable paradigm for agentic sentencing. First, it does not conceive of sentencing as a transaction. The dialogue acknowledges the offender's perspective, and why

⁷⁴⁶ Garrett (n 89), 1.

⁷⁴⁷ See Section 5.4.

he thinks a particular sentence would be justified. The offender is invited to give reasons for his viewpoint, is encouraged to take responsibility, and may suggest components of the sentence that may allow him to repair the harm and rehabilitate. Because the dialogical model is not transactional, offender agency should not be judged instrumentally, by reference to exactly how much direct impact the offender's words have on the quantum and type of the punishment. Judging offender agency in that manner would be to employ a metric suited to a negotiated sentencing model. In the dialogical model, the offender's agency in the sentencing process is to be gauged by reference to the extent to which he had the opportunity to express his view on the sentence, to provide information he considers relevant if he so wishes, and to communicate with the judge.

Secondly, in a dialogical model the judge retains the legitimate authority and responsibility to determine and impose the ultimate sentence, which is binding on the offender. The fact that the offender may be a willing participant does not detract from the imposed nature of the sentence. The judge remains the representative of the public interest and upholder of the rule of law. A dialogic agentic sentencing system does not tilt the power imbalance between the state and the offender in favour of the offender. Understandably, the offender will present information that paints a favourable picture of him. It is likely that the offender will try to persuade the judge to give a particular sentence. One of the objections to agentic sentencing systems may be that the offender approaches sentencing opportunistically to secure the least onerous sentence possible, which Chapter 6 will address. The main point here is that on a dialogical paradigm the judge retains the ultimate control over the sentencing decision.

Thirdly, the dialogical model does not disguise the power imbalance between state and offender, in contrast to the negotiation model, particularly when faced with relatively powerless offenders. The negotiation model creates the illusion that offenders have control over the

determination of their sentence. However, as argued, this would be misguided in most cases considering the power imbalance, not to mention that it is objectionable as a matter of principle. A dialogical model of sentencing, by contrast, does not purport to give offenders control in the decision-making process. To the extent that there is no guarantee that the offender's viewpoint will have an impact on the sentencing outcome, on balance the judge remains in a superior role. If the fundamental role of the state in sentencing is to be preserved, the power imbalance between state and offender will remain.

Section 5.6 has argued that a dialogue is the appropriate paradigm to underpin an agentic sentencing model, and that it is preferable to a negotiation paradigm. Nevertheless, it may be justifiable to introduce certain limited transactional elements in the sentencing procedure, as long as transaction does not become the dominant paradigm. Chapter 8 will analyse transactional aspects of current sentencing practice, such as the sentence discount for guilty plea and consent to particular community order requirements, as instances where the offender can exercise dispositive agency to a certain extent.

5.7 Influence of the dialogue on the sentencing decision

While agency should in principle be non-dispositive, the offender's input in the sentencing dialogue might and arguably should influence the sentencing decision, where this is appropriate. This section explores on what substantive grounds it is legitimate for sentencers to give weight to the offender's view and permit it to influence the sentencing decision, and when it would be inappropriate.

The offender's mere preference to serve a particular sentence should not in itself carry normative weight. Since sentences should continue to reflect the public interest, the defining criterion that should guide sentencers in this matter is how far the offender's view is aligned

with the public interest. Whether the offender's perspective can legitimately influence the sentence is contingent on the aims of punishment and the sentencing process. It is beyond the scope of this thesis to set out precisely which factors should be taken into consideration at sentencing, and how they should impact the sentence calculation. Nonetheless, certain examples can be given of how the offender's interests can be aligned with the public interest, and where it would be appropriate to give weight to the offender's perspective on his sentence. In general, this will be the case where the offender is remorseful, is prepared to undertake a proportionate sentence, is willing to undertake a form of punishment that will enable him to address problems underlying offending behaviour and reform, and repair the harm done to victim and community. An uncomplicated case for offender agency in the model suggested here would be a first-time drug offender who is willing to address his drug addiction. This offender would, in principle, be able to engage in a dialogue with the court about what his sentence may entail and whether a community order with a drug rehabilitation requirement would be an appropriate sentence. Another example might be a person who has committed a theft to support his alcohol addiction, and who can engage in a dialogue with the court about the need for and conditions of a treatment programme. An offender who has committed various acts of vandalism and who is willing to repent and repair the damage done to the community, could be engaged in a dialogue about whether community service would be the appropriate punishment and what it could encompass.

A remorseful offender may have a genuine insight into what punishment is deserved for his crimes and how he can repent by undertaking the punishment. Drawing on communicative accounts of punishment, Maslen argues that the offender's feelings of remorse are a relevant contribution to the dialogue about the offence.⁷⁴⁸ Maslen suggests that dialogical

⁷⁴⁸ Maslen (n 365), ch 5.

censure must be responsive to the fact that the remorseful offender appreciates the wrong he has committed. Since censure is conveyed through hard treatment, its severity should be decreased if the offender has already responded in a manner expected of a moral agent prior to the sentencing decision.⁷⁴⁹ While Maslen suggests that remorse could be communicated in a range of different ways, prior to the offender meeting the sentencing judge, this does not preclude that the offender may also express his remorse verbally to the judge at the sentencing hearing. In this instance and the other examples given above, the offender's interest in their sentence is closely aligned with the public interest. Here, it would be appropriate to take into account the offender's viewpoint and for it to have some influence on the sentencing outcome.

Conversely, in instances where the offender's opinion on the sentence is not closely aligned with the public interest, it would be inappropriate to let it influence the sentencing decision. It is well-known that offenders use a range of excuses and justifications to rationalise their behaviours,⁷⁵⁰ which may prevent them from taking responsibility for the wrong, let alone for the sentence. The offender's own agenda and self-interest at sentencing can take various forms. For instance, an offender may maintain that he is innocent and should not be sentenced at all. It is straightforward that this viewpoint cannot be taken into account.⁷⁵¹ Recall that two

⁷⁴⁹ Ibid. See also H Maslen and JV Roberts, 'Remorse and Sentencing: An Analysis of Sentencing Guidelines and Sentencing Practice' in A Ashworth and JV Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013), 125-126.

⁷⁵⁰ Neutralization theory is primarily a framework for understanding deviant behaviour. Its central proposition is that the excuses and justifications offenders use to rationalise their offending behaviour might themselves explain (in part) why people (continue to) offend. See GM Sykes and D Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 *American Sociological Review* 664; D Matza, *Delinquency and Drift* (John Wiley 1964); D Matza, *Becoming Deviant* (John Wiley 1969); S Maruna and H Copes, 'What Have We Learned from Five Decades of Neutralization Research?' (2005) 32 *Crime and Justice* 221. Particularly sex offenders tend to deny and minimise their offences at the beginning of treatment: D Scully and J Marolla, 'Convicted Rapists' Vocabulary of Motive: Excuses and Justifications' (1984) 31 *Social Problems* 530; WL Marshall, 'Treatment Effects on Denial and Minimization in Incarcerated Sex Offenders' (1994) 32 *Behaviour Research and Therapy* 559; SL Schneider and RC Wright, 'Understanding Denial in Sexual Offenders: A Review of Cognitive and Motivational Processes to Avoid Responsibility' (2004) 5 *Trauma, Violence, and Abuse* 3.

⁷⁵¹ However, there is evidence to suggest that some convicted offenders are in fact later found to be innocent (see e.g. Hoyle and Sato (n 377)). Protestations of innocence cannot be addressed at the sentencing stage. Instead, offenders are required to follow the appropriate appeals procedures to challenge convictions, and after the appeal

constraints on offender agency at sentencing should be that the sentencing dialogue is not an opportunity to contest the conviction, and that it is non-negotiable that the offender has to serve a (negatively) proportionate sentence.⁷⁵² For the same reason, offenders suggesting a disproportionately low or high sentence, should be heard, but their viewpoint cannot legitimately influence the sentence.

While the previous paragraphs have explored on what grounds the sentencing dialogue may influence the sentence, questions remain as to how far it may influence the sentencing decision. To suggest that the offender's viewpoint may influence the disposition where appropriate entails two possible risks. First, it is to be expected that the majority of offenders would be motivated by self-interest, as opposed to exercising agency to take responsibility for the wrong they have committed, for their sentence, and to reform. This entails the risk that the offender may try to secure the most lenient sentence possible. Secondly, there is a risk that offenders may say something that leads to a more severe sanction than the judge had in mind prior to the dialogue. These are two possible drawbacks of the proposed agentic sentencing model, and will be addressed alongside other objections in Chapter 6.

5.8 Implications for the role of the victim

In established criminal justice proceedings, the role of both the offender and victim is limited.⁷⁵³ It is not because one stakeholder is given a voice that therefore another should too. However, to the extent that the proposed agentic sentencing model is premised on an enhanced role of the offender, the implications of such a model for the victim merit consideration. As

process has been exhausted their case may be referred to or taken up by the Criminal Cases Review Commission (see Campbell, Ashworth and Redmayne (n 91), ch 12).

⁷⁵² See Section 5.4.

⁷⁵³ Hudson, 'Victims and Offenders' (n 5), 179.

argued in Chapter 1, there is an expansive scholarly literature on the various normative and practical questions surrounding victim participation at sentencing.⁷⁵⁴ It is not possible to do justice to these complex issues nor to develop a comprehensive account of the role of the victim within the confines of this thesis. Suffice it to say that the justifications underpinning offender agency put forward in this thesis are unique to the offender and cannot be transferred as easily to the victim, for each occupies a different position in the criminal justice process. Under a framework of limiting retributivism, which attributes a principal but limiting role to retributive justice, the primary interests in the application of the criminal sanction through the processes of the criminal justice system are those of the state and the suspect/defendant/offender.⁷⁵⁵ The suspect/defendant/offender is necessarily at the centre of the criminal justice proceedings. It is the defendant who is prosecuted and, if convicted, who will suffer the punishment.⁷⁵⁶ What underpins an offender's entitlement to exercise agency in respect of sentence is the liberal imperative to treat offenders as moral agents and the possibility of inducing reform.⁷⁵⁷

The role of the victim in the proposed agentic sentencing model raises a host of questions. For instance, what precisely are the justifications for victim participation at sentencing and what form should it take? It is conceivable that according a non-dispositive role to the victim, premised on communication rather than influence over the sentence, akin to the role of the offender proposed in this chapter, could be a way of engaging both stakeholders without compromising the role of the state and foregoing fundamental sentencing principles. As Roberts argues, focusing on the communicative value of victim participation need not necessarily 'transform the sentencing hearing into a tripartite proceeding, nor should it

⁷⁵⁴ See n 41.

⁷⁵⁵ Campbell, Ashworth and Redmayne (n 91), 50-51.

⁷⁵⁶ JR Spencer, 'Criminal Procedure: The Rights of the Victim versus the Rights of the Defendant' in E Cape (ed), *Reconcilable Rights? Analysing the Tension between Victims and Defendants* (Legal Action Group 2004), 37.

⁷⁵⁷ See Section 5.1.

undermine the central assumption of the adversarial system that a crime is committed against the state and not a private party.⁷⁵⁸ Sanders et al have also suggested that a system of ‘non-decision making involvement’, which rejects the ‘zero sum game’ and allows the interests of both victims and offenders to be pursued together might be a way forward.⁷⁵⁹ But to suggest that the victim may be allowed to comment on any aspect of the sentencing dialogue which relates to his legitimate interests, requires an account of what these interests are.

This chapter argued that the offender can legitimately be consulted on what the appropriate sentence might be, albeit without the guarantee that his viewpoint will be dispositive. By contrast, in current sentencing practice in England and Wales, victims are explicitly denied the ability to express an opinion on the sentence, being restricted to providing information about the impact of the crime.⁷⁶⁰ It requires further research to conclude whether such asymmetry between the offender and the victim might be justifiable in light of the differing grounds for engagement at sentencing. There may also be good reasons to suggest that victims’ needs and interests are best addressed in a different process than the one that seeks to determine criminal responsibility and sentence offenders,⁷⁶¹ and that the proposed agentic sentencing model should thus remain focussed on offenders. It is clear that the implications of an agentic sentencing model stretch beyond what can feasibly be considered in the scope of this thesis. These queries pertaining to victim involvement in respect of a model premised on offender agency should be the subject of a separate study.

⁷⁵⁸ Roberts, ‘Victim Impact Statements and the Sentencing Process’ (n 218), 377.

⁷⁵⁹ Sanders, ‘Involving Victims in Sentencing’ (n 225), 107-108. See also Sanders and others (n 41).

⁷⁶⁰ Ministry of Justice (n 203), para 1.12. See also CPD 2015 (n 213), VII Sentencing F.3, 160-161.

⁷⁶¹ See Lacey and Pickard, ‘A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame’ (n 41).

5.9 Conclusion

This chapter has presented justifications for offender agency at sentencing and suggested a corresponding agentic sentencing model. It has set out a way in which to think differently about what sentencing practice could be like, specifically when it allows a more dialogical, discursive space in which the state – through the judge – can hear and attend to the offender’s view on his sentence. By offering the offender the opportunity to communicate his view on the punishment for his crime, the offender’s agency at sentencing is respected rather than denied.

Inevitably, the scope for offender agency in a state-centred criminal justice system is limited. It is essential that the exercise of offender agency is subject to certain constraints to preserve the fundamental role of the state and related rule-of-law and due process values. Since the proposed model is premised on the principle of non-dispositive agency and the offender’s viewpoint should only influence the sentence to the extent that it is aligned with the public interest, the proposed agentic sentencing model will only make a *practical* difference in terms of an altered disposition in a handful of cases. However, the proposed model makes a *moral* difference in all cases, by virtue of offering the offender the opportunity to exercise agency through the sentencing dialogue. This chapter has proposed a sentencing model consistent with a conception of sentencing as something to be done *with* offenders, rather than *to* offenders. Nonetheless, a range of objections can be levelled against this agentic sentencing model: these will be addressed in the next chapter.

6 POSSIBLE OBJECTIONS TO AN AGENTIC SENTENCING MODEL

This chapter explores the limitations of and objections to the agentic sentencing model set out in Chapter 5. Section 6.1 discusses the offender's unwillingness to exercise agency and how an agentic sentencing system should accommodate this. Several objections pertain to a key principle of the agentic sentencing model: the offender's agency is non-dispositive and the offender thus does not have a right to influence the sentencing decision, but what he communicates to the judge may influence his sentence where appropriate. Section 6.2 addresses objections regarding the scenario in which the offender says something on his own behalf, but it is not taken into account in the disposition. Section 6.3 considers the reverse scenario in which the offender's view does influence the sentence. This entails the risk that offenders would misuse the opportunity to exercise agency as a way to maximise their self-interest, and the risk that offenders say something which may warrant a more severe sanction than the judge had in mind prior to the dialogue. Section 6.4 explores to what extent offenders have the communicative capacity to engage in a dialogue with the judge and how agentic sentencing might risk exacerbating existing societal inequities.

6.1 The offender's unwillingness to exercise agency

It cannot be assumed that all offenders would be willing to exercise agency in respect of their sentence. Some offenders may find it intrusive and uncomfortable to engage in the type of sentencing dialogue suggested in Chapter 5. This does not undermine the arguments for offender agency for two reasons. First, there is inherent value in upholding the offender's agency by giving him the opportunity to express his view, even if he does not do so, as it acknowledges the offender as a moral agent. It is true that if an offender subsequently refuses to engage in the dialogue, no constructive discussion about the sentence and its aims can occur.

However, this does not justify the state withholding the offender the opportunity to engage in the sentencing discussion.

Secondly, as important as it is to give the offender the opportunity to engage, it is equally important to respect the offender's wish not to be engaged in the sentencing process. Indeed, accommodating the offender's unwillingness to engage in the sentencing dialogue is an integral part of any agentic sentencing system. The offender's refusal to participate constitutes a negative form of agency. If the offender does not wish to engage and only wants to communicate through his defence lawyer as and when required, it is justified for the court to determine and authoritatively impose the punishment it deems appropriate. In short, in order to treat the offender as a rational agent capable of making decisions autonomously, both positive and negative expressions of offender agency must be respected.

6.2 Possible objections to non-dispositive agency

6.2.1 Disempowerment and dissatisfaction

A defining principle of the proposed model, namely that the offender's agency should be non-dispositive, may entail certain risks. First, offenders' expectations may be raised regarding their influence on their sentence, only to have them dashed by the judge. A similar argument has been made regarding victim participation at sentencing. Advocates for victims' procedural rights at sentencing argue that telling one's story in court must have an impact if it is to satisfy or empower the victim.⁷⁶² Pilot evaluations of the victim personal statement (VPS) in England and Wales demonstrated that, while around one third of victims making a VPS reported to feel

⁷⁶² See e.g. E Erez and L Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals' (1999) 39 *British Journal of Criminology* 216; Hudson, 'Victims and Offenders' (n 5), 180; Victim Support, *Victims' Justice? What Victims and Witnesses Really Want from Sentencing* (n 214), 21.

better as a result of making it,⁷⁶³ on the whole victim satisfaction rates were low.⁷⁶⁴ This can be explained by the discrepancy between victims' unrealistic expectations of the extent of the VPS's impact on the sentence and what the VPS is actually set out to do. Victims' inflated hope to influence the sentence is exacerbated by the fact that the rationale or purpose of the VPS is not clear.⁷⁶⁵ The Code of Practice for Victims of Crime states that the VPS gives victims an opportunity to explain in their own words how the crime has affected them, but that victims 'may not express [their] opinion on the sentence or punishment the suspect should receive as this is for the court to decide'.⁷⁶⁶ The VPS Scheme clearly allows victims to give information, but there is no guarantee that this information will actually be taken into account and impact upon decision-making. Edwards suggests that whereas victims may see their role at sentencing as one of providing information that will affect decisions or even being consulted and allowed to make decisions on the sentence, in fact the VPS only allows them to express themselves and even that role is limited.⁷⁶⁷ Additionally, much of the information victims provide is not sufficiently reliable, realistic, or relevant to have an influence on the sentencing decision.⁷⁶⁸ Victims' misguided expectation that their contribution will influence the sentence, only to have that contribution ignored, is likely to lead to bitterness and resentment that the judge has seemingly let them down and may leave victims dissatisfied.⁷⁶⁹ Even if there may be good

⁷⁶³ C Hoyle and others, *Evaluation of the "One-Stop Shop" and Victim Statement Pilot Projects* (Home Office Research Development and Statistics Directorate, 1998), 30, 33, 43.

⁷⁶⁴ Ibid; R Morgan and A Sanders, *The Uses of Victim Statements* (Home Office Research Development and Statistics Directorate 1999). See also e.g. Erez and Tontodonato (n 97); Erez, 'Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements' (n 214). In South Australia see E Erez, L Roeger and F Morgan, *Victim Impact Statements in South Australia: An Evaluation* (Office of Crime Statistics, South Australian Attorney-General's Department, Adelaide 1994), 57.

⁷⁶⁵ Edwards, 'Victim Participation in Sentencing: The Problems of Incoherence' (n 97), 40; Sanders and others (n 41), 454; Edwards, 'An Ambiguous Participant' (n 97), 977-979; Roberts, 'Listening to the Crime Victim' (n 41), 358; Hoyle, 'Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence' (n 684), 259, 264.

⁷⁶⁶ Ministry of Justice (n 203), para 1.12.

⁷⁶⁷ Edwards, 'An Ambiguous Participant' (n 97), 978-979.

⁷⁶⁸ Sanders and others (n 41), 454-455; Sanders, 'Involving Victims in Sentencing' (n 225), 102-104.

⁷⁶⁹ Sanders, 'Involving Victims in Sentencing' (n 225), 103; Roberts, 'Listening to the Crime Victim' (n 41), 371.

reasons to involve victims at sentencing, it seems VPSs frequently do not achieve the aim of victim empowerment and satisfaction.

While the absence of guaranteed impact on the sentence and the corresponding disappointment and lack of empowerment is perceived as a problem in respect of victim participation, this is less the case for offender participation. The justifications for engaging the offender and the victim at sentencing are fundamentally different.⁷⁷⁰ Hearing the offender's view is not meant to be satisfying or cathartic for the offender. Empowering the offender by allowing his viewpoint to influence the sentence is not the purpose of the sentencing dialogue. As argued in Section 6.1 above, it is conceivable that engaging in the sentencing dialogue and taking such responsibility is a painful process and that more often than not this will not be satisfying for the offender. It is conceivable that empowerment *may* follow from affording the offender the opportunity to communicate about the sentence and taking it into account in the disposition. However, empowering the offender is not a primary aim. It is important to be explicit about the fact that offenders are not invited to negotiate their sentence, and thus temper offenders' expectations regarding their influence on the sentencing decision.

6.2.2 Offender agency as a 'sweetener'

While the absence of victims' influence on the sentencing outcome through the VPS has been raised as an issue by proponents of victim participation, it has equally caused opponents to victim participation to express concern, albeit for different reasons. Ashworth's principled standpoint is that the victim does not have a legitimate interest in determining the punishment imposed, and that victims or their families should not have a right to influence the sentencing

⁷⁷⁰ See Section 5.8.

decision.⁷⁷¹ Criminal justice officials rely heavily on the cooperation of victims in the investigation and prosecution of crime,⁷⁷² not least since victim and witness statements form an important element in meeting the ‘sufficiency of evidence’ test that must be met to proceed with the prosecution.⁷⁷³ There may well be a risk that the VPS is a sham in the sense that it creates an illusion of influence on the sentence. Hence, the VPS can be misused to deceive victims into thinking that their interests are being looked after by the government, whereas in reality they are a way to continue to secure victim cooperation with the criminal justice system.⁷⁷⁴ VPSs should not be used as a means to trick victims into thinking they have a voice, in order to ensure that victims cooperate with the criminal justice system. ‘This, in blunt terms, is to use victim participation as a “sweetener”’.⁷⁷⁵

For a host of reasons, the same criticism does not extend to offender participation at sentencing. First, if the justifications for upholding the offender’s agency at sentencing set out in the previous chapter are accepted, the offender may well have a legitimate interest in the punishment. The offender’s legitimate interest in the sentence does not entail that he should have a guaranteed influence over their sentence, but it does suggest that there may be good reasons to hear his perspective and take it into account where appropriate.

Secondly, non-dispositive agency is one of the cornerstones of the proposed model. Offenders should be under no illusion that their viewpoint will influence the sentencing outcome, even though, insofar as it is aligned with the public interest, it might. There is nothing

⁷⁷¹ Ashworth, ‘Some Doubts about Restorative Justice’ (n 41); Ashworth, ‘Responsibilities, Rights, and Restorative Justice’ (n 97), 584-585; Campbell, Ashworth and Redmayne (n 91), 51.

⁷⁷² JUSTICE, *Victims in Criminal Justice: Report of the Committee on the Role of the Victim in Criminal Justice* (JUSTICE 1998), 4; Hoyle, ‘Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence’ (n 684), 252.

⁷⁷³ Campbell, Ashworth and Redmayne (n 91), 148.

⁷⁷⁴ Ashworth, ‘Victims’ Rights, Defendants’ Rights and Criminal Procedure’ (n 224); Sanders and others (n 41).

⁷⁷⁵ Ashworth, ‘Victims’ Rights, Defendants’ Rights and Criminal Procedure’ (n 224), 197.

deceptive about offering offenders the opportunity to engage in a dialogue about the sentence with the judge, if they are told upfront that the aim is not for them to negotiate their sentence.

Thirdly, the justifications for upholding the offender's agency at sentencing apply in principle equally to all offenders, not only those offenders who cooperate with criminal justice officials. Nonetheless, in practice, the sentencing judge may be more inclined to hear an offender who has cooperated in the investigation, prosecution, and trial. This risks offender agency becoming tokenistic, as the next section explores further.

6.2.3 Tokenism

It is conceivable that courts might pay mere lip service to respecting the offender's agency by nominally offering him an opportunity to speak but without engaging in a dialogue. Consequently, the proposed model may do little in substance to facilitate the offender's agency and respect for offender agency might become tokenistic. Just as there are differences between how judges interact with defendants, victims, and witnesses in court in the traditional criminal process depending on their personality and beliefs, judges may hold different attitudes towards the value of respecting the offender's agency and the merits of engaging in a dialogue with him about the sentence. Some judges may see the sentencing dialogue as an opportunity to engage directly with the offender, to bridge the distance between them and those on whom they need to impose a sentence.⁷⁷⁶ Regarding judicial involvement in offender supervision, as pioneered in drug courts, Raynor argues that nothing indicates that sentencers feel that their authority or dignity is undermined by having a discussion with offenders. Indeed, the achievement of good outcomes strengthens the judge's authority.⁷⁷⁷

⁷⁷⁶ McGuire, 'Can the Criminal Law Ever be Therapeutic?' (n 45), 422.

⁷⁷⁷ Raynor (n 98), 301.

By contrast, other judges may consider it inappropriate to give the perpetrator of the wrong any say in sentencing. If the principles of the proposed agentic sentencing model were implemented, this could only ensure consistency of approach amongst judges to a certain extent. Even if it were to become a legal requirement that offenders were given the opportunity to express their views on their sentence, it would still be for the individual judge whether or not to hear and take account of the offender's views. Unfortunately, there is little that can be done in terms of safeguards to ensure that offender agency does not become tokenistic. Any safeguards that would ensure the offender has a direct impact on the quantum and type of the punishment would risk making the sentencing process too much like a negotiation, which is objectionable for principled reasons.⁷⁷⁸ At most, it can be said that to ensure that judges value the dialogical process, they should be informed about the rationales underlying offender agency at sentencing.

6.2.4 The sentencing dialogue as a futile exercise and waste of court resources

Finally, opponents of offender agency might say that offering the offender the opportunity to express himself, only to take this message into account insofar as it is aligned with the public interest, would simply enable sentencers to take account of facts that would have informed the sentence anyway. If the offender were offered the opportunity to speak towards the end of the sentencing hearing, after the prosecution has already made its statement and the defence lawyer has made his plea in mitigation, all the relevant information may have already been brought to the judge's attention. The sentence would be the same, regardless of whether it is the outcome of a sentencing dialogue in an agentic sentencing model or whether it is unilaterally imposed

⁷⁷⁸ See Section 5.6.

by the judge. On this view, offering the offender the opportunity to express himself on the sentence would be unnecessary at best, and a futile waste of court time at worst.

Such criticism would be misguided. It is possible that the offender offers information relevant to the disposition that was missing from the prosecution or defence lawyer's statement. Provided that this information is subject to scrutiny by the prosecution, it could legitimately be taken into account in the determination of the sentence. There may be occasions on which the judge would have imposed *sentence x*, and in light of the perspective offered by the offender instead decides to impose *sentence y*. Both sentences are negatively proportionate, but *sentence y* is achieved by legitimately taking into account the offender's view. Such a sentence might not only be more individualised and tailored to the offender's needs in terms of rehabilitation,⁷⁷⁹ it would also be a sentence that is more just by virtue of having given the offender the opportunity to express himself and thus be respected as a moral agent. Furthermore, the value of facilitating offender agency is not primarily instrumental and thus should not be measured on the basis of an external metric, such as how much influence the offender has had on the sentencing decision. There is inherent value in offering the offender the opportunity to communicate about the sentence.

An agentic sentencing system premised on the paradigm of a dialogue with non-dispositive agency undoubtedly entails certain risks. Some of these are less problematic than they may seem, while others cannot be substantially reduced. However, any attempt to address the more problematic risks would entail even greater risks, namely undermining the role of the state and fundamental sentencing principles.

⁷⁷⁹ On individualisation of sentences see n 677.

6.3 Possible objections to the offender's influence on the sentence

If the offender's view may impact the sentence insofar as it is aligned with the public interest, this raises the question to which degree the dialogue may shift the court in terms of the disposition. An uncomplicated scenario is the one in which the sentencing dialogue leads to an altered sentence of equivalent severity to the one the judge had in mind prior the dialogue. However, more complex and possibly problematic scenarios are equally conceivable. This section explores the risk that offenders will seek to maximise their self-interest which could possibly lead to a more lenient sentence, and the risk that the judge imposes a more severe sentence than envisaged prior to the dialogue with the offender.

6.3.1 The risk of maximising the offender's self-interest

6.3.1.1 *The offender's (self-)interest*

The proposed agentic sentencing model entails the risk that the offender will seek to maximise their self-interest and aim to receive whichever sentence they consider optimal for them. For the majority of offenders who do not contest their guilt, the most obvious form of self-interest would be to avoid punishment as far as possible. There is no settled definition of what constitutes punishment and the practice of defining punishment is 'fraught with conceptual and methodological problems' which are central to theorising about punishment.⁷⁸⁰ Under desert theory, which is central to limiting retributivism,⁷⁸¹ it is accepted that some form of deprivation or hard treatment is integral to the notion of punishment,⁷⁸² which entails that there is

⁷⁸⁰ Lacey, *State Punishment* (n 79), 4.

⁷⁸¹ See Introduction, n 51 and 52.

⁷⁸² Zedner, 'Penal Subversions' (n 243), 7. See e.g. von Hirsch, *Censure and Sanctions* (n 33), ch 2, especially 9-15; von Hirsch and Ashworth (n 43), ch 2, especially 21-27; Duff, *Trials and Punishment* (n 43), ch 9; Duff, *Punishment, Communication, and Community* (n 33), xiv-xv, ch 3.

something inherently unpleasant, burdensome, or painful about it. It is human nature to want to avoid suffering hard treatment as much as possible. Any offender given the opportunity to express his view on the sentence may do so in a manner that results in the least onerous sentence possible. Indeed, there may be a link between offenders refusing to take responsibility for their crimes and not wanting to repent or reconcile with their victims, and the exercise of agency only to receive the least onerous sentence possible. Lippke observes in respect of plea bargaining: ‘Defendants who care little about how they have victimized others, or only care about minimizing their punishment, will be eager to cooperate with state officials in understating the number of their crimes or the seriousness of them.’⁷⁸³ The human desire to avoid hard treatment may be a key driver for the offender in the sentencing dialogue.

While it is obvious why an offender would want to receive the least onerous sentence possible, the offender’s self-interest may be such that he would want a punishment which is regarded as more severe in the hierarchy of sentences. In his study on community custody, Roberts suggests that offenders’ attitudes to community custody did not always align with popular conceptions of the relative severity of punishments.⁷⁸⁴ For instance, offenders sometimes preferred prison over community custody. The conditions of the community custody order may have been so restrictive that offenders worried they would breach the order and end up in prison anyway, possibly for a longer term than would have initially been imposed. Instead, offenders may rather go to prison and ‘get their sentence over with’.⁷⁸⁵ Equally, when a sample of Texan prisoners were asked to choose between one year in prison and three years on probation, approximately one-third of the participants chose imprisonment

⁷⁸³ RL Lippke, *The Ethics of Plea Bargaining* (Oxford University Press 2011), 223.

⁷⁸⁴ JV Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment* (Cambridge University Press 2004), ch 5.

⁷⁸⁵ *Ibid*, 97.

over probation.⁷⁸⁶ One possible explanation is that the difference between the two sentences lies in the duration of state intrusion into the offender's life, and that some offenders prefer a harsher but shorter prison sentence over the (perceived) more lenient but longer probation sentence. But this finding may equally suggest that some offenders view a prison sentence as easier or less punitive than probation.⁷⁸⁷ Furthermore, a Canadian study reported that women offenders in particular found community custody more difficult than a term of imprisonment, as the stress associated with serving their sentence at home is higher. Prison was regarded as easier because they had less to do, whereas under a community custody order they were confronted with the challenges of raising the children and running the household which was greatly complicated being confined to the home.⁷⁸⁸ The perception of a home confinement order as more onerous than imprisonment inverts the traditional hierarchy of sentences in which imprisonment is officially considered to be more severe than community custody.

In respect of financial penalties, sheriffs in Scotland in the 1980s indicated that they were aware that offenders who had been sentenced to pay a fine had a choice in deciding not to pay.⁷⁸⁹ A distinction needs to be made between those offenders who could not pay the fines because of the financial hardship they already endured,⁷⁹⁰ and those who were able to pay but chose not to.⁷⁹¹ From Moore's sample of defaulters, 23 per cent of interviewees indicated that

⁷⁸⁶ B Crouch, 'Is Incarceration Really Worse? Analysis of Offenders' Preferences for Prison over Probation' (1993) 10 *Justice Quarterly* 67.

⁷⁸⁷ See Roberts, *The Virtual Prison* (n 784), 96-97.

⁷⁸⁸ M Maidment, 'Toward a "Woman-Centred" Approach to Community-Based Corrections: A Gendered Analysis of Electronic Monitoring' (2002) 13 *Women and Criminal Justice* 47; Roberts, *The Virtual Prison* (n 784), 97-98.

⁷⁸⁹ P Young, 'Punishment, Money and a Sense of Justice' in P Carlen and D Cook (eds), *Paying for Crime* (Open University Press 1989), 50. See also P Young, 'Punishment, Money and Legal Order: An Analysis of the Emergence of Monetary Sanctions with Special Reference to Scotland' (PhD thesis, University of Edinburgh 1987).

⁷⁹⁰ R Moore, 'The Use of Financial Penalties and the Amounts Imposed: The Need for a New Approach' [2003] *Criminal Law Review* 13, 15-20.

⁷⁹¹ D Moxon and C Whittaker, *Imprisonment for Fine Default* (Home Office Research Findings, 1996); R Moore, 'The Methods for Enforcing Financial Penalties: The Need for a Multi-Dimensional Approach' [2004] *Criminal*

they would rather serve a community sentence than pay the fine. The predominant reason was that many offenders felt that doing something for the community would be more valuable and satisfying, whereas payment of a monetary penalty was experienced to be unrealistic and might even have led some to commit more crime.⁷⁹²

Another example of an offender who might prefer a seemingly harsher sentence is the homeless offender who wants to serve a prison sentence, as it increases his chances of setting up accommodation while in custody,⁷⁹³ or secures housing during winter months. A rarer case is the offender who suggests a higher sentence than would ordinarily be imposed because they feel so remorseful that they consider only a very harsh punishment sufficient.

While there is certainly a risk that offenders will seek to maximise their self-interest, and while it is obvious that mere preference in itself is not a legitimate consideration when deciding a sentence, we must guard against dismissing all offenders' narratives as being solely driven by their self-interest. Canton claims that if we too readily reject offenders' accounts as self-serving, the state loses opportunities to learn about the wider context, meaning, and significance of the offence.⁷⁹⁴ As the examples of fine defaulters, mothers preferring prison to home confinement, and even the very remorseful offender indicate, there may be legitimate reasons why offenders think a different sentence would be more appropriate in their case. The key for the judge is to discern those elements that are aligned with the public interest and the purposes of sentencing, and which can thus legitimately inform the sentencing decision. It is no small feat for the judge to engage in a sentencing dialogue with the offender, while

Law Review 728; J Raine, E Dunstan and A Mackie, 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' (2004) 43 *Howard Journal of Criminal Justice* 518.

⁷⁹² Moore, 'The Use of Financial Penalties and the Amounts Imposed' (n 790), 23.

⁷⁹³ See G Snowdon, 'The Criminal Defence Lawyer: On the Case' *The Guardian* (30 January 2010) <<https://www.theguardian.com/money/2010/jan/30/criminal-defence-lawyer>> accessed 22 August 2019.

⁷⁹⁴ Canton, 'Censure, Dialogue and Reconciliation' (n 583), 265.

discerning elements that he may legitimately take into account in determining the sentence, and at the same time not letting himself be influenced by any information that should not have that effect. To a large extent, however, this is a task judges are already required to undertake in traditional sentencing processes. As Bibas and Bierschbacht observe: '[o]ffenders often falsely portray themselves as less blameworthy, more peaceful, or more virtuous than they are, yet we trust sentencing judges to discern their sincerity and honesty... this task is similar to trusting judges or juries to determine witnesses' credibility.'⁷⁹⁵ The point remains that we must not assume from the outset that all offenders will only seek to secure the sentence they prefer and that this will automatically go against the public interest, and that it is part of judges' task to discern the relevant elements that may impact the sentence.

6.3.1.2 A response to the objection

Nonetheless, the risk that some, and indeed probably most, offenders will seek to maximise their self-interest in the sentencing dialogue is real. While this human desire itself cannot be changed, this risk does not undermine the validity of an agentic sentencing model. First, the extent to which an offender will be able to secure the lowest (or highest) sentence possible is constrained by the limits that should be put on offender agency discussed in Chapter 5. Even if an offender manages to be very convincing and ultimately receives a less onerous sentence than the one the judge would have ordinarily imposed, the least onerous sentence possible should still be negatively proportionate. Furthermore, restrictions can be set on particular modes of punishment. Ultimately, the state has the final say. This entails that, while the judge and offender can productively have a discussion about what the punishment should be, the sentence is still imposed by the court. These limits primarily serve the function of preserving

⁷⁹⁵ S Bibas and R A Bierschbacht, 'Integrating Remorse and Apology into Criminal Procedure' (2004) 114 Yale Law Journal 85, 142-143.

the fundamental role of the state and core criminal justice principles. Reducing the risk that offenders might misuse the opportunity for agency to foster their own interests and that their strategic skills will take the upper hand is an additional argument for setting limits.

Secondly, in addition to these constraints that seek to ensure substantive fairness, one important constraint to safeguard procedural fairness and the right to an adversarial trial is that the prosecution advocate should be given the opportunity to comment upon and challenge anything the offender says that may influence the disposition.⁷⁹⁶

Thirdly, the sentencing dialogue is not only an opportunity for the offender to express his opinion on the sentence, but also for the judge to respond. The dialogue can help reveal the offender's true motivation for suggesting a particular sentence, and the judge can challenge that perspective. The judge can ask the offender why he considers a sentence appropriate, and in turn explain how the facts of the crime may be such that a particular sentence is not justified. Where an offender fails to take responsibility for his actions, the judge's questions may help him to take responsibility.⁷⁹⁷ The entire dialogical exercise may focus the offender's attention on the wrong and the sentence, and invite him to take responsibility for both. If the dialogue does not offer any insights to the offender as to why the least onerous sentence would not be appropriate, it is important that the judge explains that, while he has heard the offender's view, he cannot take it into account in determining the final sentence.

Finally, even in those instances where the offender's interest in the sentence might be entirely self-motivated, it cannot be argued that the risk that an offender would exercise agency for the 'wrong' reasons would justify denying his agency. Independent of what the offender's

⁷⁹⁶ See ECtHR cases in n 131.

⁷⁹⁷ King, 'The Therapeutic Dimension of Judging' (n 10), 103.

motivation for expressing a particular view might be, there is inherent value in offering him the opportunity to do so, namely that it acknowledges him as an autonomous moral agent.

6.3.2 The risk of a more severe sentence

There is also the risk that the judge may wish to impose a more severe sentence than the one he had in mind prior to the dialogue. An offender may unwittingly say something to his own detriment. Alternatively, an offender may deliberately communicate something that diverts from the ‘ideal’ account of remorse, apology, and commitment to rehabilitate. For instance, he may have committed a drug offence as an act of civil disobedience.⁷⁹⁸ He may provide a sincere defence of his personal drug use, arguing that the state should not criminalise such behaviour, thereby signalling to the court a lack of future compliance with the law or admitting his lack of remorse to the judge. The question arises whether the judge should be open to hearing these accounts and whether they can justifiably lead to more severe sentences in an agentic sentencing model.

In principle, the judge should be receptive to hearing accounts of civil disobedience and absence of remorse. If the offender would be precluded from communicating this, the sentencing dialogue could hardly be considered reciprocal. In her account of why punishment cannot plausibly be understood as a dialogue, Brownlee raises a similar issue.⁷⁹⁹ According to Brownlee, the ‘Scripting Problem’ entails that punishment cannot be conceived as a dialogue ‘since punishment is *imposed* upon an offender irrespective of her will, and *requires* her to engage in the public ritual of apology and penance with its expected expressions of grief and

⁷⁹⁸ I.e. a person breaches the law because he does not accept the legitimacy of the particular law he has broken, or because he wishes to draw attention to laws or policies he believes require reassessment or rejection: see K Brownlee, ‘Civil Disobedience’ in *The Stanford Encyclopedia of Philosophy* (Fall edn, 2017) <<https://plato.stanford.edu/archives/fall2017/entries/civil-disobedience/>> accessed 8 July 2019.

⁷⁹⁹ Brownlee, ‘The Offender's Part in the Dialogue’ (n 340).

remorse regardless of whether she feels those emotions or accepts the judgement upon her'.⁸⁰⁰ Consequently, Brownlee argues, punishment is an exchange that does not respect the offender as a person and as a full and equal citizen, and thus cannot be characterised as a reciprocal dialogue.⁸⁰¹ Related to this issue is that of the conscientious or civil disobedient offender, who should not wish to 'recite the formal script of apology and commitment to self-reformation'.⁸⁰² If the civil disobedient offender is required to offer such narratives through the ritual of punishment and apology, this would not only disrespect the offender but also be inconsistent with the ideal of a moral dialogue undertaken voluntarily and reciprocally.⁸⁰³

Brownlee's objection pertains to Duff's conception of punishment as a dialogue, which differs from the idea proposed here that part of the sentencing hearing could encompass an actual verbal dialogue.⁸⁰⁴ Nonetheless, the issue is relevant to the proposed agentic sentencing model. Rather than rejecting a responsive censure account altogether as Brownlee does, her objection can be used to refine the proposed sentencing model. The crux of the Scripting Problem is that, on a communicative conception of punishment, the state writes the offender's side of the dialogue by forcing him to undergo punishment as a mode of apology, penance, and reparation. By contrast, facilitating the offender's agency in the sentencing process is precisely about the state and the offender entering into a dialogue *about* the punishment and *prior* to the punishment. The aim is for the court to hear what the offender has to say about the possible sentence. Arguably, affording the offender agency in the sentencing process is precisely aimed at making the punishment script less generic by considering the offender's views in the

⁸⁰⁰ Ibid, 55.

⁸⁰¹ Ibid, 55.

⁸⁰² Ibid, 60.

⁸⁰³ Ibid, 60.

⁸⁰⁴ On Duff's communicative conception of punishment see Chapter 3. On the difference between the two conceptions of dialogue see Section 5.2.1.

determination of the punishment. A judge in an agentic sentencing model should thus be open to hearing the offender's accounts of defiance and absence of remorse, for otherwise it could not be considered a reciprocal dialogue. However, there is a limit to how reciprocal such a dialogue can be on a state-centred account of criminal justice; the judge will and should always retain the final say about the punishment. But this does not mean that he cannot meaningfully engage with the offender's message of defiance or absence of remorse and explain why punishment is nonetheless justified.

Once it is established that an agentic sentencing model requires that the judge is open to hearing messages of unrepentance and defiance, a consequent question is how this may shift the court in terms of the disposition. While the main risk is that such accounts may cause the judge to impose a more severe punishment than he had in mind prior to the dialogue, this need not always be the case. An offender may have well-founded, rational reasons not to be remorseful. For instance, a mother who steals nappies or food for her baby, who would otherwise go without, may inform the judge that she would commit the offence again, thereby signalling her lack of remorse while simultaneously pointing towards the adverse socio-economic circumstances that led her to commit the offence. Consistent with the view that socio-economic deprivation should constitute a criminal defence⁸⁰⁵ or grounds for mitigation, the judge may not necessarily be inclined to impose a more severe punishment than he had in mind prior to the dialogue, nor should he be.

Yet the question remains whether the offender's account of defiance and absence of remorse should on occasion lead to a more severe punishment and what the implications are for an agentic sentencing model. In principle, narratives of lack of remorse or civil disobedience should not lead to harsher punishment. As Maslen suggests in her defence of the

⁸⁰⁵ See e.g. Delgado (n 666); Robinson (n 666).

relevance of expressions of remorse to sentence on a responsive censure account, the absence of remorse merely shows that full punishment is deserved.⁸⁰⁶ Nonetheless, even though full punishment is deserved, this may still be more severe than what the judge had in mind prior to the sentencing dialogue. This relative increase in sentence severity is unavoidable if the content of the sentencing dialogue should be taken into account and influence the sentence where appropriate. From the perspective of the state and a just sentencing system, this is not an issue. If the defining criterion to determine to what extent the sentencing dialogue should shift the court's disposition is the public interest, imposing the full punishment on the unrepentant offender may be justified. Additionally, in the proposed agentic sentencing model sentence severity will always be constrained by the limits of negative proportionality.⁸⁰⁷ Thus, even if the offender's sentence is relatively more severe than what the judge would have initially imposed, it would not be an undeserved sentence.

From the offender's perspective, however, the risk of an increased sentence is to be avoided. It is vital that, prior to the sentencing dialogue, the offender discusses with his defence lawyer what he will communicate to the judge, and whether it is in his interest to engage in a dialogue at all. This is where the agentic sentencing model encounters one of its drawbacks. If defence lawyers expect their clients to say something unwittingly or deliberately to their own detriment in the sentencing dialogue, they may instruct them not to speak. Consequently, while in theory the agentic sentencing model should apply to all offenders, since all should be treated as responsible moral agents, in practice offenders who are likely to say something that will prejudice the judge against them, may lose the opportunity to exercise agency. The aim of the agentic sentencing model may thus not be achieved, but the same issue exists to an extent in current sentencing practice. It is known that some defence lawyers actively discourage their

⁸⁰⁶ Maslen (n 365), 104.

⁸⁰⁷ Section 5.4.

clients from speaking for themselves in court, fearing that their client will say something that damages their case,⁸⁰⁸ or because they simply consider it their job to speak for their client.⁸⁰⁹ Nonetheless, the crucial difference is that in the proposed agentic sentencing model, even though some offenders may decide not to engage in a dialogue, it remains justified to offer offenders at least the *opportunity* to do so.

In sum, in theory the judge in an agentic sentencing system should be open to hearing all sorts of accounts from the offender, which should in principle not lead to a more severe sentence. In practice, however, it is questionable whether the offender is truly at liberty to articulate anything in the sentencing dialogue that diverts from the script of remorse, apology, and commitment to rehabilitate, without risking being forced to discontinue talking or being disregarded at best, or facing a relatively harsher sentence than the judge had in mind prior to engaging in the dialogue at worst. In cases where it is likely that the offender will say something that may prejudice the judge against them, it could be expected that defence lawyers would instruct their clients not to engage in a dialogue, and those offenders would effectively be denied the opportunity to exercise agency. This demonstrates that there is an imperfect fit between what an agentic sentencing model aims to achieve in theory and how it may play out in practice.

6.4 The offender's communicative capacity and the risk of exacerbating inequality

The direct dialogue between the judge and offender requires that the offender is able to communicate with the court. Vulnerable offenders with limited oral language skills may have

⁸⁰⁸ King, 'The Therapeutic Dimension of Judging' (n 10), 94.

⁸⁰⁹ Kirby, Jacobson and Hunter (n 4), 9.

a reduced capacity to engage in a dialogue with the judge, such that they cannot meaningfully exercise agency in court. This issue is exacerbated by the fact that communicative abilities are not distributed equally in society. Communicative capacity and how communication is perceived by the interlocutor are influenced by factors such as race and ethnicity, gender, and class. There is an emerging literature on the need to try to ‘do justice’ to difference in criminal justice and criminology.⁸¹⁰ In respect of the agentic sentencing model proposed in Chapter 5, the issue of doing justice to difference has a particular dimension, namely how ‘difference’ manifests itself in communication in the formalised setting of the courtroom. Articulate and well-educated offenders may be comparatively more powerful than other offenders in the sentencing dialogue. To the extent that the offender’s communication may influence the disposition, agentic sentencing may risk distributive unfairness among offenders and exacerbate existing societal inequalities. This section will explore this possible objection and how it can be accommodated.

6.4.1 The offender’s communicative capacity and inability to exercise agency

Defendants and offenders who appear in front of criminal courts disproportionately include those who are vulnerable and disadvantaged in various ways. Many of them have experienced socioeconomic deprivation, are not well educated, have a history of unemployment, learning and other disabilities, cognitive or language impairments, and suffer with mental illness, drug

⁸¹⁰ See e.g. Hudson, ‘Punishing the Poor’ (n 87); K Daly, ‘Different Ways of Conceptualizing Sex/Gender in Feminist Theory and their implications for Criminology’ (1997) 1 *Theoretical Criminology* 25; Hudson, ‘Doing Justice to Difference’ (n 87); B Hudson, ‘Beyond White Man’s justice: Race, Gender and Justice in Late Modernity’ (2006) 10 *Theoretical Criminology* 29; A von Hirsch, A Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009), ch 8; M Bosworth and E Kaufmann, ‘Gender and Punishment’ in J Simon and R Sparks (eds), *Handbook of Punishment and Society* (Sage 2012); A Parmar, ‘Racism and Ethnicity in the Criminal Justice Process’ in A Hucklesby and A Wahidin (eds), *Criminal Justice* (2nd edn, Oxford University Press 2013); Tonry, ‘Can Deserts be Just in an Unjust World?’ (n 87); M Burman and L Gelsthorpe, ‘Feminist Criminology: Inequalities, Powerlessness, and Justice’ in A Liebling, S Maruna and L McAra (eds), *The Oxford Handbook of Criminology* (6th edn, Oxford University Press 2017); C Phillips and B Bowling, ‘Ethnicities, Racism, Crime and Criminal Justice’ in A Liebling, S Maruna and L McAra (eds), *The Oxford Handbook of Criminology* (6th edn, Oxford University Press 2017).

and alcohol abuse.⁸¹¹ These elements of an offender's background and identity may have an impact on how articulate or confident offenders may be to engage in a dialogue with the judge, and consequently how effectively they will be able to exercise agency. These issues are likely to be aggravated when the offender does not have sufficient competence in the language in which the court operates, especially if translators are not available.⁸¹²

A sentencing dialogue requires a level of awareness on the offender's part, not only of his offending behaviour but also of what constitutes an appropriate punishment for his offence. In turn, this requires an understanding of the offender's needs in terms of rehabilitation and reform, how he can make amends, and how his punishment may relate to those elements. The mere fact of being involved in criminal proceedings will already be a source of great stress on many defendants, bar perhaps repeat offenders who have previous experience with the criminal process.⁸¹³ Engaging in a sentencing dialogue with the judge will likely be challenging and stressful, not only for well-educated and articulate offenders, but especially for those with limited oral language skills. The latter may also be more concerned that they will inadvertently say something to their detriment. A first issue is thus that vulnerable offenders may lack the capacity to engage in such a dialogue with the judge, and are consequently unable to communicate effectively and exercise agency in respect of their sentence.

⁸¹¹ Delgado (n 666); Ministry of Justice, *The Pre-Custody Employment, Training and Education Status of Newly Sentenced Prisoners* (2012), 7-17; C Sirdifield, 'The Prevalence of Mental Health Disorders Amongst Offenders on Probation: A Literature Review' (2012) 21 *Journal of Mental Health* 485; Prison Reform Trust, *Bromley Briefings Prison Factfile* (Autumn 2017), 22, 30-31, 42-46; J Peay, 'Mental Health, Mental Disabilities and Crime' in A Liebling, S Maruna and L McAra (eds), *The Oxford Handbook of Criminology* (6th edn, Oxford University Press 2017).

⁸¹² A Aliverti, 'Researching the Global Criminal Court' in M Bosworth, C Hoyle and L Zedner (eds), *The Changing Contours of Criminal Justice* (Oxford University Press 2016); A Aliverti and R Seoighe, 'Lost in Translation? Examining the Role of Court Interpreters in Cases Involving Foreign National Defendants in England and Wales' (2017) 20 *New Criminal Law Review* 130.

⁸¹³ Trechsel and Summers (n 24), 246.

6.4.2 The risk of exacerbating inequality

This first issue is intertwined with a second, structural issue, namely that agentic sentencing might reinforce social privilege and disadvantage. Dialogue in an agentic sentencing system may require certain linguistic skills and abilities which are not distributed equally in society.⁸¹⁴ Communication style and ability are influenced by class, gender, ethnicity, disability, and other factors.⁸¹⁵ Existing alternative criminal justice approaches that are heavily based on dialogue and let participants speak freely, such as restorative justice (RJ) conferences and problem-solving courts (PSCs), can offer insights into some of the difficulties that may arise when adopting an agentic sentencing model. Research reveals that ‘class, gender, and ethnicity are prisms of scrutiny within RJ conferences...[F]or the most part, the socially constructed categories of difference are not eliminated but instead are used as subtle devices of domination.’⁸¹⁶ It is well established that particular ethnicities are overrepresented in the criminal justice system,⁸¹⁷ and it has been shown that ethnicity can affect communication style.⁸¹⁸ In American PCSs, the dialogue between the judge and offender requires offenders to

⁸¹⁴ R Willis, ‘“Let’s Talk About It”: Why Social Class Matters to Restorative Justice’ [2018] *Criminology and Criminal Justice* 1, 2.

⁸¹⁵ On the use of intersectionality theory in criminology and criminal justice research see H Potter, *Intersectionality and Criminology: Disrupting and Revolutionizing Studies of Crime* (Routledge 2015).

⁸¹⁶ K Cook, ‘Doing Difference and Accountability in Restorative Justice Conferences’ (2006) 10 *Theoretical Criminology* 107, 121.

⁸¹⁷ R Hood, *Race and Sentencing: a Study in the Crown Court: a Report for the Commission for Racial Equality* (Clarendon Press 1992); R Kennedy, *Race, Crime and the Law* (Pantheon 1997); S Shute, R Hood and F Seemungal, *A Fair Hearing? Ethnic Minorities in the Criminal Court* (Willan 2005); K Hopkins and others, *Associations Between Ethnic Background and Being Sentenced to Prison in the Crown Court in England and Wales in 2015* (Ministry of Justice, 2016) <<https://www.gov.uk/government/statistics/associations-between-ethnic-background-and-being-sentenced-to-prison-in-the-crown-court-in-england-and-wales-in-2015>> accessed 20 March 2018; N Uhrig, *Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales* (Ministry of Justice, 2016) <<https://www.gov.uk/government/publications/black-asian-and-minority-ethnic-disproportionality-in-the-criminal-justice-system-in-england-and-wales>> accessed 4 February 2019; D Lammy, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (Ministry of Justice, 2017) <<https://www.gov.uk/government/publications/lammy-review-final-report>> accessed 4 February 2019.

⁸¹⁸ M Davidheiser, ‘Race, Worldviews, and Conflict Mediation: Black and White Styles of Conflict Revisited’ (2008) 33 *Peace and Change* 60; B Albrecht, ‘Multicultural Challenges for Restorative Justice: Mediators’ Experiences from Norway and Finland’ (2010) 11 *Journal of Scandinavian Studies in Criminology and Crime*

adopt the appropriate therapeutic language and express themselves according to 'therapeutically defined categories'.⁸¹⁹ Native American offenders experience more difficulty using this therapeutic language: having to share things about the problems that may underlie their offending behaviour is said to be 'contrary to a lot of cultural taboos'.⁸²⁰

Equally, social class can influence communication style and ability.⁸²¹ Willis demonstrates how middle-class forms of communication are adopted in RJ settings. Working-class victims tended to give one-word answers to RJ questions and sometimes struggled to find the words to express themselves. By contrast, middle-class victims were better able to express themselves verbally and gave a more elaborate account of the level and nature of harm caused by the crime.⁸²² These different communicative styles and skills create power imbalances between people with a language-based disadvantage and those from middle-class backgrounds who are better able to communicate in a way that is required in semi-formal or formal RJ settings.⁸²³

Gender dynamics might not only influence communication style and ability, but also influence how communication is perceived by the interlocutor. Young women offenders in informal processes such as RJ conferences are often judged according to 'limited visions of what is appropriate behaviour for girls'.⁸²⁴ Community understandings of gender-appropriate conduct are likely to influence not only the decision-making process in RJ conferences, but

Prevention 3; T Gavrielides, 'Bringing Race Relations into the Restorative Justice Debate: An Alternative and Personalized Vision of "The Other"' (2014) 45 *Journal of Black Studies* 216.

⁸¹⁹ Nolan, *Reinventing Justice* (n 40), 124.

⁸²⁰ *Ibid*, 124.

⁸²¹ SJ Charlesworth, *A Phenomenology of Working Class Experience* (Cambridge University Press 2000), ch 7, 203-274.

⁸²² Willis (n 814).

⁸²³ Cook (n 816); Willis (n 814).

⁸²⁴ C Alder, 'Young Women Offenders and the Challenge for Restorative Justice' in H Strang and J Braithwaite (eds), *Restorative Justice: Philosophy in Practice* (Ashgate 2000), 108.

also the outcomes of the decision-making.⁸²⁵ This evidence demonstrates not only that the majority of offenders might have difficulties communicating in the required way in semi-formal or formal processes, but equally that certain offenders or groups of offenders are comparatively better equipped than others to communicate in such a way.

How do these findings translate to agentic sentencing? While empirical research is required to demonstrate this conclusively, it is likely that many of these issues would be relevant in an agentic sentencing system. Where bias persists, there is a risk that courts might not regard communication from all offenders equally. People who have suffered structural inequality, exacerbated by factors such as race and ethnicity, gender, and class, may be compromised in their ability to process what is said to them, to convey their views, and lack the skills to choose the appropriate vocabulary and organise their thoughts in the required way to speak in court. In an RJ context, some participants who struggled to speak were described as only paying lip service to the aims of the victim-offender mediation, such as delivering an apology, in comparison to more articulate offenders who were better able to participate.⁸²⁶ Judges were liable to interpret a person's discomfort with speaking in the formal process of a sentencing dialogue as being lazy, rude, unrepentant, or disingenuous,⁸²⁷ rather than acknowledging that the speech limitations may be a result of socio-economic disadvantage.⁸²⁸

⁸²⁵ Ibid, 108.

⁸²⁶ JJ Choi and M Severson, "What! What Kind of Apology is this?": The Nature of Apology in Victim Offender Mediation' (2009) 31 Children and Youth Services Review 813, 818.

⁸²⁷ In RJ see DD Sanger, B Moore-Brown and E Alt, 'Advancing the Discussion on Communication and Violence' (2000) 22 Communication Disorders Quarterly 43, 43-48; PC Snow and DD Sanger, 'Restorative Justice Conferencing and the Youth Offender: Exploring the Role of Oral Language Competence' (2011) 46 International Journal of Language and Communication Disorders 324; P Snow, 'Restorative Justice Conferencing, Oral Language Competence, and Young Offenders: Are These High-Risk Conversations?' (2013) 20 The Prevention Researcher 18.

⁸²⁸ In RJ see Willis (n 814), 13-15.

In RJ victim-offender mediation conferences, it is said that ‘offenders who are more educated, better dressed, and more skilled verbally will negotiate more favourable sanctions’.⁸²⁹ This is associated with the fact that RJ mediators tend to be white, male, and better educated, which are traits that converge with the more affluent offenders.⁸³⁰ These traits are equally present in the British judiciary, which still predominantly consists of those from privileged backgrounds,⁸³¹ and in the judiciary in Western jurisdictions more generally.⁸³² In an agentic sentencing model, articulate, affluent, educated, and white offenders may be more confident and better able to express themselves. They might appear more genuine and more persuasive in respect of their expressions of remorse or their insight into reform. Consequently, these offenders may be comparatively more powerful and more likely to exert influence over the sentencing outcome. Hudson pertinently asks:

[S]hould an articulate criminal, alert to the importance of appearing remorseful and wise to the sorts of motivational stories that are likely to ‘play well’, achieve a more lenient outcome than a tongue-tied miscreant whose body-language may come from embarrassment but is interpreted as defiance or heartlessness?⁸³³

Bias against certain offenders may lead to distributive unfairness and result in comparatively more severe sentences for certain groups of offenders, thus exacerbating existing societal inequality. Systemic bias and resulting differential treatment of certain groups of offenders are problems in existing criminal justice systems. They are not unique to agentic models of sentencing, and agentic sentencing does not purport to resolve them. Nonetheless, because the

⁸²⁹ S Levrant and others, ‘Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?’ (1999) 45 *Crime and Delinquency* 3, 16.

⁸³⁰ *Ibid*, 16.

⁸³¹ JAG Griffith, *The Politics of the Judiciary* (5th edn, Fontana 1997).

⁸³² Pakes (n 3), 134.

⁸³³ Hudson, ‘Victims and Offenders’ (n 5), 180.

model proposed here is so heavily based on a direct dialogue between the judge and offender, it is all the more important to illuminate these issues of inequity in the criminal justice system.

6.4.3 A response to the objection

6.4.3.1 Awareness of systemic bias and adjusting to the communicative abilities of the offender

To reject an agentic sentencing model only on the basis that some offenders have a reduced capacity to engage in a direct dialogue with the judge would be to throw the baby out with the bathwater. The reasons why we might consider an agentic sentencing model preferable to the existing top-down imposition of punishment are clear: it serves to acknowledge the offender as a moral agent and may induce a process of reform. If we accept these rationales, it would seem justified to apply agentic sentencing models in principle for all offenders and all offences. It would be incorrect to deny offenders the opportunity to engage in a dialogue, and thus to deny their agency, on the basis that some offenders may not be able, or less able, to engage in such dialogue. As Maslen argues in her defence of a dialogical model of censure:

[O]ur inability to engage with certain offenders as rational agents (because those offenders lack certain capacities required for such engagement) does not alter our ability to engage with other offenders as rational agents. Accordingly, it could equally be claimed that it would be unfair to deny those who have the relevant capacities the opportunity for engagement.⁸³⁴

Drawing a sharp distinction between offenders who have the capacity to communicate directly with the judge and those who do not would be over-simplified. Even though some offenders may not be very articulate, they may still have a view on their own sentence, may want to express that view in a manner that is possible for them, and be acknowledged as a responsible

⁸³⁴ Maslen (n 365), 103.

moral agent. The opportunity for exercising agency over the sentence should not only be offered to those who are educated and verbally competent.

Judges should try to find ways to converse with the offenders who appear before them, in spite of the language and communication barriers. This requires judges to be aware of the high possibility that offenders have language impairments, whether detected or not. Judges should have some understanding of what these communicative barriers are, and of how communicative capacity is affected by factors such as class, ethnicity, and gender. Judges should be alert to the fact that when offenders may appear disengaged or uninterested, this need not necessarily reflect an attitude of defiance, apathy, or lack of remorse, but may rather stem from a lack of understanding and familiarity with the process,⁸³⁵ and/or limited communicative skills.

Additionally, the judge would need to modify the dialogue and his approach in response to the offender's communicative capacities. It is known that the formal, complex, and sometimes archaic language of the law courts can be an impediment to offenders' effective participation at trial.⁸³⁶ One obvious way of adjusting communication to the offender's capacities would be to limit any unnecessary jargon and legalistic speak and use plain language as much as possible.⁸³⁷ How judges might go about this process is likely to be highly dependent on every individual offender's capacities and needs. However, PSCs, centred on engaging the offender in a direct dialogue with the judge,⁸³⁸ can constitute an example of how judges can

⁸³⁵ Kirby, Jacobson and Hunter (n 4), 11.

⁸³⁶ Ibid, 9.

⁸³⁷ In TJ and PSCs: King, 'The Therapeutic Dimension of Judging' (n 10), 97.

⁸³⁸ Nolan, *Reinventing Justice* (n 40), ch 4; Bean (n 496), 236; Cabinet Office (n 19), 27; Nolan, *Legal Accents* (n 441), 16; McIvor, 'Beyond Supervision' (n 445), 233; Nolan, 'Problem-Solving Courts: An International Comparison' (n 451), 152; Donoghue (n 449), 16-17.

adjust their communication to the offender under consideration,⁸³⁹ as illustrated in the following interaction between Judge Duncan-Peters and the offender Mr. Stevens in an American drug court:

Duncan-Peters:	Where is Mr. Stevens? Mr. Stevens is moving right along too. Right?
Stevens:	Yep.
Duncan-Peters:	How come? How come it is going great?
Stevens:	I made a choice.
Duncan-Peters:	You made a choice. Why did you do that? Why did you make that choice? What helped you to make up your mind?
Stevens:	There had to be a better way than the way I was doing it.
Duncan-Peters:	What was wrong with the way you were living? What didn't you like about it?
Stevens:	It was wild.
Duncan-Peters:	It was wild, like too dangerous? Is that what you mean by wild?
Stevens:	Dangerous.
Duncan-Peters:	Too dangerous, for you personally, like a bad roller coaster ride. So, what do you think? Is this new life boring?
Stevens:	No, not at all.
Duncan-Peters:	Not at all. What do you like about the new life?
Stevens:	I like it better than the old. ⁸⁴⁰

The excerpt illustrates how the offender gives short answers, which may indicate his reduced capacity to communicate. The judge responds by using the same language as the offender, which is likely to enhance the offender's understanding of what is being said and avoid further alienation that might follow if the offender had the impression that he was not capable of engaging in the dialogue. It is common for drug court judges to use more informal terminology than is usually expected of judges in traditional courts, and to use language 'more familiar to

⁸³⁹ On how TJ can inform the role of courts see e.g. Wexler, 'Relapse Prevention Planning Principles for Criminal Law Practice' (n 673); N Des Rosiers, 'From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts' (2000) 37 Court Review 54; AD Ronner and BJ Winnick, 'Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance' (2000) 24 Seattle University Law Review 499; DB Wexler, 'Therapeutic Jurisprudence in the Appellate Arena' (2000) 24 Seattle University Law Review 217; Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (n 45); Winick and Wexler, *Judging in a Therapeutic Key* (n 424), Introduction and Part I, 3-102; King, 'The Therapeutic Dimension of Judging' (n 10).

⁸⁴⁰ Nolan, *Reinventing Justice* (n 40), 8-9.

those of the streets than the courtroom’.⁸⁴¹ In the excerpt, the judge also asks the offender further questions, presumably intended to help the offender clarify his answers and think about the implications of his answer.

The interaction between a judge and defendants in a Californian domestic violence court displays similar elements. The domestic violence court judge speaks loudly and clearly to the defendants during their court appearances, at a sufficiently slow pace so that defendants can understand what is being said, and refers to defendants by their name as opposed to using the term ‘defendant’.⁸⁴² The judge’s tone of voice conveys concern for the defendant rather than pity or condescension, and the judge regularly asks if the defendant has any questions.⁸⁴³ This style of communication is characteristic of PSCs. It reflects the courts’ therapeutic idiom and the altered role that judges play in accordance with the demands of ‘therapeutic theatre’.⁸⁴⁴ Drug court judges typically see it as an important aspect of their role to ‘effectively convey the message of judicial care and concern’,⁸⁴⁵ and this simplified, direct way of speaking with the offender may well contribute to achieving that aim. While the problem-solving and therapeutic approach has problematic aspects,⁸⁴⁶ the excerpt does demonstrate how judges can adjust the way they communicate with the offenders depending on their verbal skills and help them express themselves.

Despite this evidence that some judges are able to adjust their communication to the abilities and needs of the individual offender, there is equally the risk that the sentencing dialogue might turn into an opportunity to belittle or humiliate the offender. For example, one

⁸⁴¹ Bean (n 496), 236.

⁸⁴² Petrucci (n 709), 285.

⁸⁴³ Ibid, 285-286.

⁸⁴⁴ Nolan, *Reinventing Justice* (n 40), ch 3, especially 51, 70-75.

⁸⁴⁵ Ibid, 73.

⁸⁴⁶ See n 563. See discussion in Section 4.4.

PSC judge reported that he praises some people, and others he tries to insult, as an attempt to try anything that might work.⁸⁴⁷ He calls some offenders ‘little baby’ when confronting them with their relapse in their treatment and failure in the programmes.⁸⁴⁸ There is evidence to suggest that American PSC judges sometimes probe into the offender’s personal life in an inappropriate manner.⁸⁴⁹ This further supports the argument made in Chapter 4 that, notwithstanding therapeutic jurisprudence (TJ) scholars’ professed rejection of paternalism and coercion and theoretical emphasis on respect for the individual,⁸⁵⁰ in practice PSCs and mainstream courts taking a therapeutic approach are not devoid of coercion, and may have the effect of reinforcing bias(es), existing power dynamics between judge and offender, and endangering individual liberties and status in the legal process.⁸⁵¹ Cynicism, sarcasm, and ‘point scoring’ at the expense of the offender should have no place in the sentencing dialogue.⁸⁵² The type of language used and the style and tone of the communication impacts the chances of establishing a connection with the offender.⁸⁵³ Disrespectful and condescending communication by the judge can hardly facilitate offender agency. If the offender not only feels their agency is not respected, but indeed feels further alienated, the sentencing dialogue would become counterproductive.

⁸⁴⁷ Nolan, *Reinventing Justice* (n 40), 10-11.

⁸⁴⁸ *Ibid*, 10-11.

⁸⁴⁹ C McCoy, ‘The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts’ (2003) 40 *American Criminal Law Review* 1513.

⁸⁵⁰ Wexler, ‘Justice, Mental Health, and Therapeutic Jurisprudence’ (n 40), 518; Winick, ‘On Autonomy’ (n 482), 1765-1768; Wexler, ‘New Directions in Therapeutic Jurisprudence’ (n 40), 762; Wexler and Winick, *Law in a Therapeutic Key* (n 40), xvii; Winick and Wexler, ‘Drug Treatment Court: Therapeutic Jurisprudence Applied’ (n 40), 484; King, ‘The Therapeutic Dimension of Judging’ (n 10), 94.

⁸⁵¹ Hora, Schma and Rosenthal (n 425), 522-523; Miller, ‘Drugs, Courts, and the New Penology’ (n 585), 432-433; Donoghue (n 449), 38, 65-67.

⁸⁵² King and Wagner (n 529), 33.

⁸⁵³ Kirby, Jacobson and Hunter (n 4), 11.

6.4.3.2 *The role of the defence lawyer*

The reduced adversarial role of the defence lawyer, which is the norm in PSCs,⁸⁵⁴ is likely to impact most significantly upon those who are disproportionately represented in the criminal justice system, notably offenders from racial and ethnic minorities and lower socio-economic backgrounds.⁸⁵⁵ Similarly, if the defence lawyer were absent from the sentencing dialogue, this would have adverse effects on offender agency for these offenders. Vulnerable offenders, who are unable to speak for themselves in the formal sentencing dialogue, may simply decide it is better not to engage in the dialogue. While it was argued above that an agentic sentencing system should respect negative expressions of agency such as refusal to engage,⁸⁵⁶ this choice is not a truly voluntary one, but one that stems from the compounding effect of societal and other disadvantage.

A safeguard against the risk that vulnerable offenders may feel unable to engage in a sentencing dialogue is the presence of the defence lawyer. The defence lawyer plays an important role in limiting the arbitrary exercise of coercive state power by safeguarding the offender's entitlement to basic procedural rights and redressing the power imbalance that usually exists between state and offender,⁸⁵⁷ particularly for vulnerable and less articulate offenders. This is not to suggest that defence lawyers should take over the sentencing dialogue completely. Lawyers can help vulnerable clients by ensuring that, by the time they speak to the judge, their client understands the nature and purpose of the sentencing dialogue. The defence lawyer should ordinarily allow their client to start speaking for themselves, but could complete

⁸⁵⁴ Nolan, *Reinventing Justice* (n 40), 75-81; Nolan, 'Problem-Solving Courts: An International Comparison' (n 451), 152; Donoghue (n 449), 38-40. See also Boldt, 'Rehabilitative Punishment and the Drug Treatment Court Movement' (n 450); Quinn, 'Whose Team Am I on Anyway?' (n 536); Quinn, 'An RSVP' (n 557).

⁸⁵⁵ Donoghue (n 449), 40.

⁸⁵⁶ Section 6.1.

⁸⁵⁷ Boldt, 'Rehabilitative Punishment and the Drug Treatment Court Movement' (n 450), 1264; Blake and Ashworth (n 93), 169; Assy (n 88), 48.

their statements if necessary, and be present in case their client feels unable to proceed. To facilitate adequate support during the sentencing dialogue, the offender should sit next to his defence lawyer rather than in the dock.⁸⁵⁸ In this way, the defence lawyer's role could help facilitate vulnerable offenders' agency.

6.4.3.3 Procedural fairness safeguards

It is recalled that anything the offender communicates to the judge during the sentencing dialogue that may materially influence the disposition should be subject to prosecutorial scrutiny to ensure the right to an adversarial process.⁸⁵⁹ This may help mitigate the risk that an articulate, affluent, and white offender, wise to the importance of appearing remorseful and committed to rehabilitation, receives a comparatively more lenient sentence than a Black, Asian and Minority Ethnic (BAME) offender who has suffered systemic socio-economic disadvantage and may be less able to communicate directly with the judge in the way required.

6.4.3.4 Benefits of agentic sentencing in terms of accommodating diversity

While the safeguards set out in the previous sections are vital to ensure that vulnerable offenders can exercise agency and to mitigate the risk that agentic sentencing could lead to more favourable sentences for some offenders, it can also be argued that giving offenders a voice at sentencing could serve to break down prejudice and challenge stereotypes. Hudson argues that '[i]f justice is conceived as something dispensed top-down by judges who are presumed to embody impartiality it is difficult to see how it could move beyond the ambition of distributive fairness conceived as treating everyone the same.'⁸⁶⁰ The sentencing dialogue

⁸⁵⁸ See JUSTICE, *In the Dock* (n 15), 32.

⁸⁵⁹ Section 5.3.

⁸⁶⁰ Hudson, 'Victims and Offenders' (n 5), 192.

offers a discursive space to hear the offender's perspective as a correction to the existing model premised on the top-down imposition of punishment, and this may serve to promote equality of impact over formal equality.⁸⁶¹ The sentencing dialogue may allow offenders to draw the court's attention to the social injustices they have suffered. It may be an occasion for the court to be presented with a female standpoint, or that of different minority ethnic groups.⁸⁶² Experience with problem-solving approaches in magistrates' courts in Western Australia suggests that judicial officers were able to adjust the communication to the particular cultural norms of Aboriginal people, and that Aboriginal people responded positively to the opportunity for dialogue with the judicial officer.⁸⁶³ Findings from research into participants' experiences of an American community court demonstrate that the participants' perception of the court's fairness varied less by race and socioeconomic status than in traditional courts.⁸⁶⁴ A drug court study reveals that women participants experienced more positive interactions with drug court judges than male participants, as women participants felt the judge was fair and respected them, they placed more importance on their interactions with the judge, and valued the judge's praise and ability to listen.⁸⁶⁵ Saum and Gray argue that women, more so than men, can benefit from the TJ model, for instance by using the opportunity to communicate their needs to the judge and the other members of the drug court team.⁸⁶⁶

These findings cannot simply be generalised across the proposed agentic sentencing model, not least because TJ and problem-solving approaches encompass more than just a direct

⁸⁶¹ Ashworth draws this distinction, albeit in respect of fines for offenders with different financial resources (Ashworth, *Sentencing and Criminal Justice* (n 26), 105, 264-266) and imprisonment for offenders with special mental or medical conditions or of very young or old age (ibid, 105, 194-195).

⁸⁶² Hudson, 'Doing Justice to Difference' (n 87), 248.

⁸⁶³ King and Wagner (n 529), 32, 35.

⁸⁶⁴ MS Frazer, *The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study at the Red Hook Community Justice Center* (Center for Court Innovation 2006), iv.

⁸⁶⁵ Saum and Gray (n 489), 113-114.

⁸⁶⁶ Ibid, 115.

dialogue between the judge and offender. Nonetheless, these findings suggest that a sentencing dialogue need not necessarily exacerbate inequality but can indeed be sensitive and responsive to it. Rather than having the communication filtered through the defence lawyer, the court can attend to the perspective of ‘a real, flesh and blood individual, an individual whose scope for action, whose perception of choices, whose life experiences, may be very different from those sitting in judgment’.⁸⁶⁷

While it is clear that affording offenders the opportunity to have a voice may increase the judge’s sensitivity to difference in deciding the appropriate sentence,⁸⁶⁸ this presupposes that offenders have the requisite capacities to communicate about the sentence in court, which, as argued above, are not distributed equally in society. An offender’s ability to alert the court to the offender’s individuality and difference from others, is in itself impacted by the very characteristics that make him different. There is no easy answer to this conundrum. This challenge serves to re-emphasise the importance of courts being sensitive to offenders’ communicative capacities and adjusting their approach to the individual offender.

In sum, agentic sentencing does not aim to exacerbate societal inequalities, on the contrary. The very *raison d’être* of such a system is to give the offender a voice in proceedings that directly concern them and the result of which will have a direct impact upon them. To that extent, it may be possible that giving the offender a voice could break down prejudice and challenge stereotypes. However, to the extent that bias is pervasive in sentencing practice, there is a risk that this is perpetuated in agentic sentencing models. It is, however, not a sufficient objection to discard agentic sentencing altogether. This section has argued that this objection can be accommodated to an extent by introducing sufficient safeguards. These include the

⁸⁶⁷ Hudson, ‘Doing Justice to Difference’ (n 87), 248.

⁸⁶⁸ Ibid, 249.

assistance of a defence lawyer, especially for vulnerable offenders, and the guarantee that anything the offender says that may affect the disposition is subject to prosecutorial scrutiny. Additionally, judges should be made aware of the communicative difficulties that some offenders face and how these are affected by structural factors such as race and ethnicity, gender, and class. Judges should seek to adjust their communication in accordance with the individual offender's abilities to ensure equal opportunity to participate and exercise agency as much as possible. The risk otherwise is that the agentic sentencing process inadvertently discriminates against vulnerable people who are already at the margins of society.

6.5 Conclusion

This chapter has highlighted some of the complexities surrounding agentic sentencing. Some objections can be accommodated, such as the offender's unwillingness to exercise agency. Others can be rebutted, such as the assumption that offender agency will lead to disempowerment, may be used as a 'sweetener', or would be a futile waste of court resources.

There is a range of objections that demonstrate that, while agentic sentencing may be a theoretical ideal, it has its limitations in practice. For instance, depending on the individual judge, offender agency risks becoming tokenistic, which cannot be substantially mitigated. An obvious objection to agentic sentencing is the risk that the majority of offenders would use the agency afforded to them, not to take responsibility for the wrong they have committed and seek to reform, but rather as an opportunity to secure the least onerous sentence possible. This chapter has suggested steps to mitigate this risk, such as ensuring that agency is in principle non-dispositive and subject to constraints including negative proportionality, and argued that this risk is not sufficient to reject offering offenders the opportunity for dialogue. Another risk that highlights the disjuncture between agentic sentencing in theory and in practice is that offenders may say something during the sentencing dialogue that prejudices the judge against

them and may lead to a more severe sentence than the judge previously intended. While in theory the judge should be open to hearing the offender's perspective, the risk of a comparatively more severe sentence in practice cannot be eliminated altogether.

Since the proposed model is so reliant upon dialogue, there is a danger that particular offenders or groups of offenders will be comparatively less well positioned to engage than others, which may exacerbate societal inequality. It was argued that this issue is systemic in existing criminal justice systems and that agentic sentencing does not purport to resolve it. The chapter argued that certain safeguards can mitigate this risk, and highlighted the evidence suggesting that a direct dialogue may help respond appropriately to diverse groups of offenders and accommodate difference.

It is anticipated that issues beyond the ones explored in this thesis may arise when attempting to implement this model in practice or seeking to verify empirically the normative claims made. For instance, while in theory all offenders should be offered the opportunity to engage in a sentencing dialogue, practice may require exceptions in respect of certain offenders, particularly persistent and dangerous offenders. Additionally, if a sentencing dialogue were to become an established part of the sentencing hearing, it is likely that the duration of court hearings would increase. In turn, this may put pressure in delays and costs on the criminal justice system, which in England and Wales already has to cope with unmanageable caseloads and severe budget-cuts.⁸⁶⁹ Judges who are expected to engage in a sentencing dialogue with the offender of the kind proposed would also need specialised training to equip them with interpersonal and other skills to engage in discussions with offenders, sensitivity to offenders' predicaments, and awareness of the communicative competences and

⁸⁶⁹ House of Commons Justice Committee, *Criminal Legal Aid: Twelfth Report of Session 2017-19* (HC 1069, 2018), 33-36; M Chalkley and Bar Council of England and Wales, *Funding for Justice 2008 to 2018: Justice in the Age of Austerity* (2018).

limitations of the people before them. Part II has established the basis for a normative framework for offender agency at sentencing, yet it is clear that a need remains for more research about the justifications for offender agency, agentic sentencing systems, and the problems they may pose.

**PART III: OFFENDER AGENCY IN CURRENT
SENTENCING PRACTICE**

7 PROCEDURAL FORMS OF OFFENDER AGENCY

Parts I and II addressed the question ‘On what grounds and to what extent should offenders exercise agency in the process of determining their sentence?’ Part I undertook a legal theoretical enquiry into possible arguments for respecting the offender’s agency at sentencing, and Part II developed a normative framework for offender agency at sentencing. Part III addresses the question ‘To what extent can offenders exercise agency in current English sentencing practice?’ Across two chapters, Part III analyses six instances of offender agency in England and Wales and assesses them by the normative standards established in Part II. It explores pre-sentence reports, the defence speech in mitigation, the *Newton* hearing, the right to appeal against sentence, the sentence discount for guilty plea, and consent to sentence, since these six instances are the most salient existing opportunities for offenders to exercise agency in respect of their sentence. Part III undertakes a doctrinal enquiry, analysing these instances of offender agency as enshrined in statutes and case law and interpreted in the legal doctrine.⁸⁷⁰ While Part III explores offender agency in England and Wales, many of the questions addressed in the thesis may also be relevant to other criminal justice systems with similar characteristics.

Some of the instances of offender agency at sentencing are situated at the second stage of the bifurcated criminal trial, i.e. the phase between conviction and sentence. For instance, the pre-sentence report, the defence speech in mitigation, the *Newton* hearing, and the decision to pass a sentence that requires the offender’s consent are situated in this phase. However, there are several instances of offender agency pertaining to sentence that cut across the various stages of the criminal process. For instance, the guilty plea is most often situated at the prosecution

⁸⁷⁰ Any possibilities to exercise agency that are rooted in legal praxis rather than statutes and case law, and could be unveiled through empirical research in courtrooms, are beyond the scope of this thesis.

stage. The possibility to appeal against a sentence does not occur until after the sentence has been passed. Yet all are relevant for the sentencing decision.

Chapter 7 explores the offender's agency in respect of the pre-sentence report (Section 7.1), the defence speech in mitigation (Section 7.2), *Newton* hearings (Section 7.3), and the right to appeal against sentence (Section 7.4). These instances of offender agency are discussed together under the heading 'procedural forms of offender agency' as they are principally underpinned by the commitment to uphold the offender's fair trial rights and ensuring procedural fairness in respect of sentence. They generally allow the offender to make an effective contribution to the proceedings. They tend to be non-dispositive, in the sense that the offender can assert his position in the procedure, but this may not have a direct influence on the outcome of the proceedings. These instances of offender agency encompass only procedural guarantees, 'designed to secure "procedural justice" rather than "result-orientated justice", i.e. a decision or judgment based on the true facts and the correct application of the law'.⁸⁷¹ By contrast, Chapter 8 analyses dispositive forms of agency, i.e. forms of offender agency that allow the offender to have direct and determinative influence on the sentencing decision to an extent. The sentence discount for guilty pleas and consent to sentence are characterised by consent and/or negotiation on the part of the offender, and they allow the offender to exercise direct influence on the disposition, albeit to varying degrees.

7.1 Pre-sentence report

Courts must obtain a pre-sentence report (PSR) and take it into account in determining the sentence unless the court is of the opinion that a PSR is unnecessary.⁸⁷² The report is intended

⁸⁷¹ Trechsel and Summers (n 24), 83.

⁸⁷² CJA 2003, ss 156(3)-(4).

to assist the court in determining the most suitable method of dealing with the offender,⁸⁷³ by providing information about the seriousness of the offence, the personal and social circumstances of the offender, and the offender's suitability to carry out particular types of sentences.⁸⁷⁴ The precise form and content of the reports are set out in the National Standards for the Management of Offenders in England and Wales (2015).⁸⁷⁵ A standard PSR generally contains at least the following elements: an offence analysis and a pattern of offending beyond merely restating the facts of the case, relevant offender circumstances, an assessment of the risk of harm to the public and the likelihood of re-offending, and a sentencing proposal.⁸⁷⁶ The court is not bound to follow the sentence recommendation made in the report.⁸⁷⁷ PSRs are based on interviews with a probation officer or other appropriate officer.⁸⁷⁸

The PSR can constitute a medium through which offenders can exercise agency in relation to the sentencing decision. When PSRs were first introduced in the Criminal Justice Act 1991,⁸⁷⁹ commentators were optimistic: '[d]efendants can welcome this opportunity to speak because they can feel listened to, understood and respected in a way that may be missing from their other encounters with criminal justice professionals.'⁸⁸⁰ If the offender is consulted in the drafting of the report, it can give him a voice in the sentencing process.

⁸⁷³ Ibid, s 158(1).

⁸⁷⁴ Doak and Taylor (n 4), 35. See also C Tata and others, 'Assisting and Advising The Sentencing Decision Process: The Pursuit of 'Quality' in Pre-Sentence Reports' (2008) 48 *British Journal of Criminology* 835, 836.

⁸⁷⁵ Ministry of Justice and National Offender Management Service, *National Standards for the Management of Offenders in England and Wales* (2015).

⁸⁷⁶ Ministry of Justice and National Offender Management Service, *Determining Pre-Sentence Reports: Sentencing Within the New Framework* (PI 04/2016, 2016), para 2.4.

⁸⁷⁷ CJA 2003, s 156(4).

⁸⁷⁸ In case of youth offenders, the appropriate officer is a social worker or a member of a Youth Offending Team (Doak and Taylor (n 4), 35, footnote 83).

⁸⁷⁹ Criminal Justice Act 1991 (CJA 1991), s 3.

⁸⁸⁰ N Stone, 'Pre-sentence Reports, Culpability and the 1991 Act' [1992] *Criminal Law Review* 558, 565-566.

However, certain characteristics of the PSR can preclude it from being a true vehicle of offender agency. Whether a PSR can paint a complete picture of the offender may depend on its format. A ‘standard delivery report’ is a comprehensively written report, structured by the computerised Offender Assessment System (OASys)⁸⁸¹ and the National Standards for the Management of Offenders for England and Wales (2015). The PSR is normally prepared within an adjournment period of 15 working days, which enables the probation officer to conduct interviews with the offender, make relevant investigations, and verify information. These reports tend to be detailed and include the following OASys headings: offending information, analysis of the offences, ‘offending-related needs’ such as accommodation, education, training and employability, financial management and income, relationships, lifestyle and associates, drug and alcohol issues, emotional wellbeing, thinking and behaviour including the offender’s attitudes towards the victim and the offence. Additionally, the report writer has to consider the risk of re-offending and harm.⁸⁸² ‘Fast delivery reports’, on the other hand, are intended to be completed on the day requested by the court. Hence, the interview and report need to be completed within a couple of hours. The fast delivery report takes the form of a series of tick boxes to enable the easy and rapid presentation of collected data. There is, however, still the possibility to include explanatory written text.⁸⁸³ Standard delivery reports are usually reserved for more complex cases, in which the fast delivery report format would not provide the court

⁸⁸¹ The OASys was introduced in 2001. It is a tool used by prison and probation services that provides standardised assessments of offenders in terms of their likelihood of reconviction, risk of serious harm to themselves or others, and offending-related needs. The assessment aims to help criminal justice practitioners make decisions, both at sentencing and at various points during the sentence, as well as manage and reduce risks (HM Prison Service, *Offender Assessment and Sentence Management – OASys* (PSO 2205, 2005)). See P Howard, *The Offender Assessment System: An Evaluation of the Second Pilot* (Home Office Research Development and Statistics Directorate, 2006); R Moore, *A Compendium of Research and Analysis on the Offender Assessment System (OASys): 2009-2013* (Ministry of Justice and National Offender Management Service, 2015).

⁸⁸² P Whitehead, ‘The Probation Service Reporting for Duty: Court Reports and Social Justice’ (2008) 6 *British Journal of Community Justice* 86, 88.

⁸⁸³ *Ibid*, 88.

with sufficient information.⁸⁸⁴ Finally, the report can also be delivered verbally by the probation officer to make the sentencing decision even speedier.⁸⁸⁵ Obviously, the extent to which offenders can communicate their side of the story and this can accurately be conveyed to the court is significantly compromised if the time available to write the report is very limited.⁸⁸⁶ If the type of report is not conducive to relaying the offender's story comprehensively, the offender may become little more than a commodity processed by the probation system.

At best, the PSR constitutes an indirect exertion of agency. Even if the offender can speak freely to the probation officer in the interview, the ultimate report remains an analysis *about* the offender, not *by* the offender. The scope for the offender to engage actively with the sentencing process through the PSR is limited by the fact that it is the writer of the report who communicates to the court through a “narrative” about the offender that situates the particular offence within the individual's social background and environment’.⁸⁸⁷ The probation officer does not represent the offender and has no official obligation to act in the offender's interest. Consequently, much may depend on the officer who writes the report and their ability to convey what was said in the interview in a truthful manner without bias against the offender. Inevitably, what the offender says is ultimately filtered through the judgement of the individual reporter.⁸⁸⁸ The written product of the encounter between the officer and offender is difficult to challenge.⁸⁸⁹

⁸⁸⁴ House of Commons Justice Committee, *The Role of the Probation Service: Eighth Report of Session 2010-12* (HC 519-I, 2011), 16.

⁸⁸⁵ Whitehead (n 882), 89.

⁸⁸⁶ Doak and Taylor (n 4), 35-36.

⁸⁸⁷ Tata and others (n 874), 842.

⁸⁸⁸ N Stone, ‘Proportionality and Pre-Sentence Reports’ (1991) 155 *Justice of the Peace and Local Government Law* 439, 455.

⁸⁸⁹ Stone, ‘Pre-sentence Reports, Culpability and the 1991 Act’ (n 880), 566.

It is uncertain whether the offender can decline to be interviewed. As a consequence, it is questionable whether the PSR is based on voluntary self-disclosure by the offender. Neither the Criminal Justice Act 2003, nor the National Standards document says anything about the need for the offender's consent to be interviewed. It appears that if the offender declines, the probation officer will prepare a written statement of explanation. However, this hardly serves the purposes of a PSR aimed at assisting the court in determining the most suitable way of dealing with the offender.⁸⁹⁰ Stone notes that it is 'a regrettable omission that a defendant's participation is taken so much for granted, while the scope to question or challenge PSR writers is likely to remain so limited.'⁸⁹¹

Agency exercised through the PSR is rightly non-dispositive, in the sense that there is no guarantee that the information contained in the report will influence the sentence outcome. This is consistent with an account of the court as the final arbiter of the appropriate sentence.⁸⁹² In practice, it is questionable to what extent PSRs actually have an impact the sentence. Scottish research suggests that courts afford less weight to PSRs than to pleas in mitigation, because judges may view the reports as interfering with their judicial 'ownership' of sentencing.⁸⁹³ Judges are reluctant to accept suggestions regarding the sentence made by probation officers, who are considered as 'outsiders',⁸⁹⁴ and discredit their work as 'less objective, less realistic and less rigorous than their own'.⁸⁹⁵ As long as the sentencing process is thought of as the

⁸⁹⁰ Ibid, 566.

⁸⁹¹ Ibid, 566.

⁸⁹² See Chapter 2.

⁸⁹³ Tata and others (n 874), 850-852.

⁸⁹⁴ Doak and Taylor (n 4), 36.

⁸⁹⁵ Tata and others (n 874), 850.

exclusive jurisdiction of the court, it is unlikely that PSRs will have a significant impact on the determination of the sentence.⁸⁹⁶

Indeed, questions arise to what extent a PSR should influence the sentence. As already noted, the OASys categories encompass various elements, related to offence seriousness, previous convictions, and aggravating and mitigating factors, and so PSRs can convey a comprehensive picture related to both offence and offender. The PSR can bring relevant information to the attention of the court that can reduce the sentence, such as the offender's personal history and wider social circumstances that may have contributed to their offending behaviour. It is up to the courts to look beyond the offence, notions of individual responsibility and rational choice, and consider the fact that offending behaviour may be a response to adverse socio-economic factors.⁸⁹⁷ Scottish research suggests, however, that there is a discrepancy between the emphasis sentencers place on the sections of the report related to the offence and the offending behaviour, and the lack of weight they attach to the role of personal and social circumstances.⁸⁹⁸ There is a tension between a more rationalistic legal model of behaviour predicated on individual responsibility and choice on the one hand, and more social conceptions of justice, which for instance acknowledge the offender's social disadvantage, on the other.⁸⁹⁹ Evaluating the implications of this tension stretches beyond the discussion on PSRs as a vehicle for offender agency, and will therefore not be elaborated upon further here.⁹⁰⁰

⁸⁹⁶ Ashworth, *Sentencing and Criminal Justice* (n 26), 433.

⁸⁹⁷ Whitehead (n 882), 92.

⁸⁹⁸ Tata and others (n 874), 851.

⁸⁹⁹ Ashworth, *Sentencing and Criminal Justice* (n 26), 433.

⁹⁰⁰ On the connection between legal and social conceptions of justice in PSRs, see this comparative issue on PSRs: S Field and C Tata, 'Connecting Legal and Social Justice in the Neo-Liberal World? The Construction, Interpretation and Use of Pre-Sentence Reports' (2010) 12 *Punishment and Society* 235.

In short, in its current form the PSR is an imperfect vehicle for offender agency. In an agentic sentencing model, as elaborated in Chapter 5, the judge engages directly with the offender. By contrast, the PSR only provides an opportunity for dialogue between the offender and the probation officer, and even that is not guaranteed if the report is drafted summarily. PSRs' primary function is to provide the court with relevant factual information and to guide the sentence decision making process, if and when the court requests such a report. It is thus justified that there are restrictions on the type of information that can be included in the report. The exercise of the offender's agency through the report, regarding what the appropriate sentence might be for him, is at best incidental to the primary aim of information-gathering. Scope remains to introduce a direct dialogue between the judge and offender with the distinct aim of upholding the offender's agency as suggested in Chapter 5, in addition to and alongside the function the PSR fulfils.

Nonetheless, even though an agentic sentencing model would require giving the offender the opportunity to express himself more freely and engage in a direct dialogue with the judge, which the PSR is not set up to do, this does not entail that the PSR offers no scope for offender agency whatsoever. If the offender is consulted by the probation officer in the writing of the PSR, it can provide him with an opportunity to give his view on offence and possibly sentence, and can thus constitute an instance of indirect, non-dispositive agency. Rightly, it remains up to the judge whether or not to take the offender's views into account and let them influence the sentence. The fact that, in practice, PSRs rarely impact the sentencing outcome does not necessarily suggest that judges do not value the offender's perspective. It may rather reflect conflicting perceptions of state officials' proper role and function at sentencing and professional boundaries, resulting in sentencers' reluctance to accept sentencing recommendations from probation officers.

7.2 Defence speech in mitigation

The defence speech in mitigation is the final part of the process between conviction and sentence before the sentence is pronounced.⁹⁰¹ The speech in mitigation allows the offender to exercise agency – albeit through his defence lawyer – by giving his view on the facts of the offence, his background and characteristics, and the suitability of possible sentences.⁹⁰² The range of mitigating factors includes the offender's role in the offence, the immediate circumstances of the offence, the offender's wider circumstances at the time of the offence, the offender's response to the offence and the prosecution, the offender's past, his subsequent conduct, and his present and future prospects.⁹⁰³

7.2.1 The rationale for the defence speech in mitigation

The defence speech in mitigation is one of the few instances of offender agency that comes closest to a commitment to give the offender a voice in the proceedings. When determining the sentence, the court may validate the defendant's perspective by referring to matters presented by the defence and in particular to mitigating factors.⁹⁰⁴ The primary rationale for the defence plea in mitigation is the accommodation of the defence's due process rights. The ECtHR held that there is a clear interrelation between the right of contradictory argument and the right to fair trial under Article 6 ECHR.⁹⁰⁵ The right of contradictory argument encompasses the possibility for each party to state his arguments before the courts and refute the other parties'

⁹⁰¹ Shapland (n 25), 90.

⁹⁰² Ashworth, *Sentencing and Criminal Justice* (n 26), 434.

⁹⁰³ See J Jacobson and M Hough, 'Personal Mitigation: An Empirical Analysis in England and Wales' in JV Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011), 146-167, especially at 147-148.

⁹⁰⁴ King, 'The Therapeutic Dimension of Judging' (n 10), 101.

⁹⁰⁵ *Edwards v UK* (1993) 15 EHRR 417 [36]; *Garcia Ruiz v Spain* (2001) 31 EHRR 22 [29]; *Ziegler v Switzerland* App no 33499/96 (ECtHR, 21 February 2002) [38]. In general on Article 6 ECHR in criminal proceedings see e.g. Trechsel and Summers (n 24); Goss (n 146).

arguments, either by himself or with the assistance of his legal representative.⁹⁰⁶ Article 6 ECHR extends to the proceedings whereby a sentence is determined and imposed.⁹⁰⁷ Together with the *Newton* hearing,⁹⁰⁸ the defence speech in mitigation is the most notable manifestation of the right of contradictory argument and the defence's fair trial rights at sentencing, as it offers the offender an opportunity to inform the court of factors that may lower the sentence.

It is not entirely clear what weight, if any, English courts at sentencing attach to the offender's emotions.⁹⁰⁹ One exception is remorse, which features in a range of sentencing guidelines. The UK Sentencing Guideline on Seriousness directs:

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.⁹¹⁰

Besides this general guideline, remorse as a sentencing factor also features in specific guidelines. The manner in which remorse is to be taken into account differs for each guideline.⁹¹¹

From a therapeutic perspective, the offender's expression of remorse and apology can have therapeutic benefits, for both the victim and offender.⁹¹² Remorse in particular is said to be linked to rehabilitation, in the sense that an offender who realises that his actions were wrong and is willing to repent for them may be less likely to re-offend in the future.⁹¹³ It is thought

⁹⁰⁶ Chiavario, 'Private Parties: the Rights of the Defendant and the Victim' (n 142), 568.

⁹⁰⁷ *X v UK* (1972) 40 CD 64; *X v UK* (1973) 45 CD 1 [11]-[12]; *X v UK* (1975) 3 DR 10; *Findlay v UK* (1997) 24 EHRR 221 [69]; *Phillips v UK* App no 41087/98 (ECtHR, 5 July 2001) [39].

⁹⁰⁸ Section 7.3.

⁹⁰⁹ Doak and Taylor (n 4), 36.

⁹¹⁰ Sentencing Guidelines Council, *Seriousness: Overarching Principles* (2004), para 1.27.

⁹¹¹ Maslen and Roberts (n 749), 127-132.

⁹¹² See e.g. Bibas and Bierschbacht (n 795).

⁹¹³ Doak and Taylor (n 4), 26.

that verbalising feelings can help offenders to accept responsibility for their actions, identify reasons for their offending behaviour, and help them to desist.⁹¹⁴ Allowing offenders to express their emotions in court may also contribute to the offender's perception of fairness and procedural justice.⁹¹⁵ While allowing offenders and victims to express and process their emotions is important in dealing with the aftermath of crime and can reap therapeutic benefits, it is questionable whether a courtroom is the most the suitable or legitimate forum for this task, and whether this aim might not be better achieved in a therapeutic and caring setting outside the criminal justice system. Regarding the defence speech in mitigation, it is likely that any therapeutic benefits remain secondary to the main function of informing the court about a factor relevant in determining the sentence.

The expression of remorse at sentencing could be justified as an instance of offender agency on a communicative conception of punishment. A retributivist objection against translating remorse into a sentence reduction might be that the offender's current state of mind cannot retrospectively diminish their culpability at the time of the offence.⁹¹⁶ However, as Maslen and Roberts argue, on a communicative conception of punishment, the offender's feelings of remorse – and arguably by extension also their acknowledgment of the wrongfulness of their actions and desire to make amends – is a 'relevant contribution to the "dialogue" about the offence'.⁹¹⁷ If the offender has already responded in a manner that we would expect of a moral agent prior to the censure of punishment, the punishment should also

⁹¹⁴ Ibid, 29.

⁹¹⁵ Ibid, 31.

⁹¹⁶ Maslen and Roberts (n 749), 125.

⁹¹⁷ Ibid, 126.

be qualitatively different. Since censure is conveyed through hard treatment, its severity should be decreased.⁹¹⁸

In sum, the offender's agency in the defence plea in mitigation has a principled basis: it allows the effective exercise of fair trial rights, and particularly the communication of remorse can have incidental therapeutic benefits and is a valuable contribution to the dialogue between the court and offender on a communicative account of punishment. Nonetheless, in practice the defence speech in mitigation serves a rather instrumental aim, namely trying to secure a more lenient sentence.⁹¹⁹

7.2.2 Non-dispositive, indirect agency

The plea in mitigation can be considered an indirect exercise of offender agency, since the offender nearly always acts through the defence lawyer. While it is not uncommon in the US that offenders speak for themselves during the trial, this is rather exceptional in England and Wales.⁹²⁰ It is more common that the plea is delivered by the defence as an oral statement read to the court. The defence counsel knows what an appropriate version is to present to the court. At best, he will interweave this version with the original account given by the offender in an interview with the lawyer and perhaps lift certain phrases from the offender's account.⁹²¹ In other cases, the defence lawyer will decide unilaterally what to say to secure the lowest sentence possible. The defence speech in mitigation delivered by the defence counsel can amount to a professional legal replacement of the offender's own narrative. If both solicitor and barrister are involved in the defence, the mitigation speech in court will be a third-hand

⁹¹⁸ Ibid. See also Maslen (n 365), ch 5.

⁹¹⁹ Shapland (n 25), 52, 79, 82.

⁹²⁰ Doak and Taylor (n 4), 36.

⁹²¹ Shapland (n 25), 89.

account,⁹²² which confirms that the defence plea is, at most, an indirect exercise of agency on behalf of the offender.

The common reference to the defence plea as a ‘speech’ in mitigation is apt, given that mitigation takes the form of the defence lawyer’s monologue rather than a dialogue with the judge in the literal sense. The accepted practice is that the defence lawyer reads out the mitigation statement in court, with very little feedback or direct engagement from any of the other parties or court officials present.⁹²³ Additionally, the defence speech in mitigation is an example of non-dispositive agency, which is consistent with one of the fundamental principles of an agentic sentencing model elaborated in Chapter 5. The defence lawyer may try to persuade the court to impose a lower sentence, but it rightly remains up to the judge to what extent he takes this plea into account in determining the sentence.

Recall that, in an agentic sentencing model, offenders should be encouraged to engage in a direct dialogue with the judge. The defence lawyer should not take the lead at this stage but may intervene when he deems this appropriate and in his client’s interests.⁹²⁴ This normative argument does not apply straightforwardly to current practice; the current sentencing system is not set up to let offenders engage in a direct dialogue with the judge. Offenders should not be asked to speak for themselves in the defence plea in mitigation and effectively represent themselves. Absence of legal representation at the plea in mitigation would have a range of undesirable effects. The unrepresented defendant may well find himself in a situation with which he is entirely unfamiliar and where he ends up breaking further rules. Consequently, his account of mitigation would be drowned out by the mistakes made or not even relayed to the

⁹²² Ibid, 51.

⁹²³ Ibid, 51.

⁹²⁴ Section 5.5.

court at all.⁹²⁵ There are good reasons why the defence speech in mitigation is delivered by counsel. The right to have legal representation is a fundamental right.⁹²⁶ It provides the defendant with a lawyer with technical skills to enable him to make full use of the rights afforded by criminal procedure and thus make an effective contribution to the proceedings.⁹²⁷ If anything, ‘the risk of abuse of state power against vulnerable defendants is exacerbated rather than reduced by allowing self-representation; defendants are better protected against the power of the state by legal representation than self-representation.’⁹²⁸ In light of the specific power imbalance between the defendant and state-representatives in criminal proceedings, professional legal assistance is vital to respect the principle of equality of arms.⁹²⁹

Moreover, the way the defence speech in mitigation is currently structured entails other barriers to offenders engaging directly with the judge. The criminal process is governed by complex language and jargon. The judiciary controls what appropriate courtroom language is:

It appears to be a language striving towards that ‘good, plain English’, uncorrupted by the shifting uses of slang in everyday life or the argot of offenders, overlaid with the professional phrases of the law, and with convenient phrases denoting particular sentences or mitigating factors (a form of argot themselves) and imbued with courtesy and deference to the bench.⁹³⁰

Despite this notional reference to ‘plain English’, in practice the specialised language employed by judges and legal practitioners is far removed from everyday language.⁹³¹

Considering that the majority of offenders have a history of socioeconomic deprivation, lack

⁹²⁵ Shapland (n 25), 51.

⁹²⁶ Article 6(3)(c) ECHR; Article 14(3)(d) ICCPR.

⁹²⁷ *Pakelli v Germany* (1984) 6 EHRR 1 [38]; *Granger v UK* (1990) 12 EHRR 469 [47]; Trechsel and Summers (n 24), 245.

⁹²⁸ Assy (n 88), 48.

⁹²⁹ Trechsel and Summers (n 24), 94-102, 245.

⁹³⁰ Shapland (n 25), 88.

⁹³¹ *Ibid*, 87-88.

of education and employment, learning disabilities, mental illness, and substance abuse,⁹³² and may thus have reduced communicative capacities, it is certainly in their interest to be represented by a lawyer familiar with the courtroom and the formalised language employed.

Even if the language issue could be overcome – for instance by disposing of jargon, using plain English, and adjusting to the communicative capacities of the offender – this would not be sufficient to remove the barrier the offender faces to engage with the judge and speak for himself. Effective exercise of the law involves more than an understanding of the language in which the court operates and the rules are couched. In general, it requires ‘specialized skills, including the ability to recognize the relevant facts and classify them into pertinent legal categories, to identify the relevant legal principles and doctrines, and to engage in a particular type of interpretation and reasoning.’⁹³³ This is equally true at sentencing. Sentencing is a technical and complicated process structured by statutes, case law, and sentencing guidelines,⁹³⁴ which can seem incomprehensible to the layperson. Being able to suggest a realistic sentence requires detailed knowledge of the powers of the court, the rules that govern sentencing, and current sentencing practice.⁹³⁵ Since sentencing as a whole and mitigation in particular are complex and specialised processes, the job of representing an offender by presenting the court with the relevant arguments and information is ever more important.⁹³⁶ In short, the right to defend oneself and have the assistance of counsel is agency-enhancing, since it enables the offender to participate fully in the sentencing process.⁹³⁷ Inevitably, in the highly

⁹³² See Section 6.4, n 811.

⁹³³ Assy (n 88), 73.

⁹³⁴ Ashworth, *Sentencing and Criminal Justice* (n 26), 19-42.

⁹³⁵ Shapland (n 25), 82-83.

⁹³⁶ Ibid, 94-95.

⁹³⁷ Dubber, ‘The Criminal Trial and the Legitimation of Punishment’ (n 35), 95.

technical, lawyer-dominated adversarial process that currently exists, such participation can only be indirect.

While this demonstrates why it is entirely justified and necessary that, under the status quo, the defence speech is conducted by the defence counsel, it does not undermine the argument for a more direct role for the offender in an agentic sentencing system. It is recalled that, even in an agentic sentencing system, existing instances aimed at information-provision, such as the *Newton* hearing, the defence plea in mitigation, and the PSR, should remain in place.⁹³⁸ On those occasions, characterised by their legal-technical complexity and jargon, the defence lawyer should assume his normal adversarial role. This does not preclude the scope to introduce a sentencing dialogue, underpinned by the distinct aim of facilitating the offender's agency, as a limited part of the sentencing hearing.

7.3 *Newton* hearing

At present, approximately 67 per cent of all Crown Court cases result in a guilty plea.⁹³⁹ On these occasions, the court may not have the opportunity to hear all the evidence relevant to sentencing. The court may only have access to case papers, the prosecution's statement of fact, and possibly a defence 'basis of plea'.⁹⁴⁰ The procedure the court should follow is summarised in the Criminal Practice Direction.⁹⁴¹ Even where the prosecution accepts the defendant's written basis of plea and the two parties conclude a plea agreement, the judge is not bound by

⁹³⁸ Section 5.3.

⁹³⁹ Ministry of Justice, *Criminal Court Statistics Quarterly, England and Wales, January to March 2018 (annual 2017)* (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720026/ccsq-bulletin-jan-mar-2018.pdf> accessed 8 March 2019. The overall guilty plea rate in the Crown Courts in England and Wales was 66.49 per cent in 2017, and 67.09 per cent in 2018, 66.60 per cent in 2019 ('Crown Court Information' (*Courts and Tribunals Judiciary*) <<https://www.judiciary.uk/crown-court-information/>> accessed 22 August 2019).

⁹⁴⁰ Ashworth, *Sentencing and Criminal Justice* (n 26), 425.

⁹⁴¹ CPD 2015 (n 213), VII Sentencing, B, 151-158.

such agreement. But if the judge considers not accepting the basis of plea where that may affect the sentence, he should say so.⁹⁴² Once the court approves the plea agreement, it is bound by it for sentencing purposes.⁹⁴³ If the prosecution does not accept the defence's basis of plea and there is a sharp divergence of fact between the prosecution's and the defendant's version of what took place, which would have a material effect on the sentence imposed, the court will resolve the conflict in accordance with the rules laid down in *R v Newton*.⁹⁴⁴ The judge or magistrate has three options. First, it is possible to obtain an answer regarding the facts from the jury where the difference in accounts amounts to an allegation that the defendant committed an additional offence.⁹⁴⁵ Secondly, the judge can hear evidence from both the Crown and the defence and come to his own conclusion, without the involvement of a jury. Thirdly, the judge can opt not to hear any evidence but invite submissions from counsels and come to a decision on that basis. If the counsels' submissions differ substantially, the judge must accept the defence version.⁹⁴⁶ The second approach is now favoured in these cases.⁹⁴⁷

In terms of offender agency, the *Newton* hearing has much in common with the defence plea in mitigation. The *Newton* hearing upholds the offender's right to fair trial, specifically the right to defend oneself.⁹⁴⁸ In its standard definition of the right to a fair trial the ECtHR discerns two aspects: the principle of equality of arms and the right to adversarial proceedings.⁹⁴⁹ The right to an adversarial process in a criminal case entails that 'both

⁹⁴² *R v Underwood* [2005] 1 Cr App R (S) 90 [6]; *R v Cairns* [2013] EWCA Crim 467 [5], where Leveson LJ summarised the Attorney-General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise; CPD 2015 (n 213), VII Sentencing, B.9, 154.

⁹⁴³ *Underwood* (n 942) [10].

⁹⁴⁴ *Newton* (n 678).

⁹⁴⁵ See e.g. *R v Eubank* [2001] EWCA Crim 891 [9].

⁹⁴⁶ *Newton* (n 678) 390-391.

⁹⁴⁷ Ashworth, *Sentencing and Criminal Justice* (n 26), 427.

⁹⁴⁸ Article 6(3)(c) ECHR; Article 14(3)(d) ICCPR.

⁹⁴⁹ See ECtHR cases n 130.

prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.⁹⁵⁰ The *Newton* hearing is thus essential to the basic premise of an adversarial system that the parties have the freedom and responsibility to present their respective evidence and arguments to a neutral judge.⁹⁵¹ To the extent that defence rights ensure that the offender can take up an active role and make an effective contribution to the criminal proceedings that concern him, these rights facilitate the offender's agency. Defence rights safeguard the accused's position in the proceedings as the subject rather than the object.⁹⁵² Like the defence speech, the *Newton* hearing is a non-dispositive form of offender agency. The defence is given the opportunity to present the court with information it deems relevant but there is no guarantee that this information will impact the type and quantum of punishment imposed. Finally, it is also an indirect form of agency since the offender presents the court with information through the defence lawyer. Conducting this process through the defence lawyer is justified for the same reasons that the defence plea in mitigation is left to counsel: in the current system, with its complex legal-technical rules and formalised language, the absence of legal representation would undermine agency and the overall fairness of the proceedings.⁹⁵³

The *Newton* hearing fulfils a crucial function in terms of upholding the offender's fair trial rights and enhancing procedural fairness, and in that sense facilitates the offender's agency in respect of sentence. However, it does not fill a gap in the present sentencing system: it does not engage the offender in any sort of dialogue aimed at determining the appropriate sentence in light of principled justifications of punishment suggested in Chapter 5. At most, the *Newton*

⁹⁵⁰ See ECtHR cases n 131.

⁹⁵¹ Assy (n 88), 11.

⁹⁵² Trechsel and Summers (n 24), 247.

⁹⁵³ See for instance Dubber, 'The Criminal Trial and the Legitimation of Punishment' (n 35), 95; Trechsel and Summers (n 24), 94-102, 245; Assy (n 88), 48. See Section 7.2.

hearing can be said to be indirectly related to the communication of censure through sanction,⁹⁵⁴ or at least to the principle of proportionality more generally. The sanction can only be proportionate in its severity to the gravity of the offence if the harm and culpability are determined accurately, and this is the function of the *Newton* hearing. This does not preclude that, once a *Newton* hearing has taken place, there is scope to have a more direct dialogue with the offender that focusses on the appropriate type and quantum of sentence.

Under certain circumstances, the *Newton* hearing can be considered agency-undermining. If a *Newton* hearing is held and the judge rules against the offender and instead accepts the prosecution's version, the court is entitled to reduce the sentence discount the offender would otherwise have received for pleading guilty.⁹⁵⁵ According to the court in *Underwood*, it is justified to reduce the offender's credit for guilty plea for the following reasons:

If for example [...] the defendant is disbelieved, or obliges the prosecution to call evidence from the victim, who is then subjected to cross-examination, which, because it is entirely unfounded, causes unnecessary and inappropriate distress, or if the defendant conveys to the judge that he has no insight into the consequences of his offence and no genuine remorse for it, these are all matters which may lead the judge to reduce the discount which the defendant would otherwise have received for his guilty plea, particularly if that plea is tendered at a very late stage.⁹⁵⁶

The rationale for the reduction of sentencing credit is the same as awarding the sentence discount in the first place. The sentence discount is awarded because the guilty plea avoids the need for trial and thus saves public time and money on investigations and trials, saves the victims and witness from having to give evidence, and may reduce the impact of the crime

⁹⁵⁴ See Chapter 3, n 295 (Duff), n 296 (von Hirsch), n 297 (Bennett).

⁹⁵⁵ *Underwood* (n 942) [11]; *R v Caley* [2012] EWCA Crim 2821 [26]-[27]; Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2017), F.2, 7.

⁹⁵⁶ *Underwood* (n 942) [11].

upon victims.⁹⁵⁷ If witnesses need to be called and evidence heard in the *Newton* hearing, the initial benefits of not having a full trial are counteracted.

The practice of reducing the sentence discount creates a disincentive for the offender to opt for a *Newton* hearing. While it is in the interest of the efficient administration of justice to strike out completely unrealistic or false bases of plea, if the offender has a legitimate point against the CPS he should not be dissuaded from exercising fair trial rights for fear of losing the sentence discount.⁹⁵⁸ The prosecution, by contrast, is not penalised for losing a *Newton* hearing, which makes the entire practice questionable in light of the principle of equality of arms. Making the right to defend oneself subject to sanction, in the form of withdrawal of sentence discount, has the potential to undermine the offender's agency.

7.4 Right to appeal

A person sentenced in the magistrates' court may appeal against sentence to the Crown Court.⁹⁵⁹ This appeal involves a complete rehearing of the case before a specially constituted panel of two judges and a magistrate. Witnesses are heard again, the court hears arguments from the parties, and re-assesses the evidence.⁹⁶⁰ The Crown Court forms an independent view as to the correct sentence.⁹⁶¹ The Crown Court has the power to impose any sentence which the magistrates' court could have imposed, whether more or less severe than the one the magistrates' court did in fact impose.⁹⁶²

⁹⁵⁷ Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2017), B, 4.

⁹⁵⁸ L Harris, 'Newton Hearings: A Procedure Stacked Against the Defence' (2013) 177 *Criminal Law and Justice Weekly* 423, 424.

⁹⁵⁹ Magistrates' Court Act 1980, s 108.

⁹⁶⁰ Campbell, Ashworth and Redmayne (n 91), 384.

⁹⁶¹ P Hungerford-Welch, *Criminal Procedure and Sentencing* (8th edn, Routledge 2014), 140.

⁹⁶² Senior Courts Act 1981 (SCA 1981), s 48(4).

A person who has been sentenced in the first instance by the Crown Court may appeal against sentence to the Court of Appeal.⁹⁶³ If there is no point of law involved, the appeal requires leave from the Court of Appeal if it is to be heard.⁹⁶⁴ If the offender appeals, the sentence imposed in the first instance cannot be increased,⁹⁶⁵ but as will be discussed below, the Court of Appeal can achieve something quite similar. The Attorney General also has the power to appeal against an unduly lenient sentence.⁹⁶⁶ In those cases, the Court of Appeal has the power to increase the sentence if it concludes this is appropriate.⁹⁶⁷ Both the prosecution and the defence then still have the possibility to appeal a case to the UK Supreme Court on points of sentencing law of general public importance.⁹⁶⁸

The right to appeal is motivated principally by two aims. From the perspective of the litigant, appeals function as a mechanism whereby parties can challenge a result that they consider inappropriate and possibly obtain a more appropriate sentence, which is why the right to appeal can be considered an instance of offender agency. Additionally, in jurisdictions where courts are bound by precedent, and to a lesser extent also in continental systems where there is no principle of *stare decisis*, appeal courts can provide guidance for future cases, thereby facilitating certainty, uniform interpretation of the law, consistency, and fairness.⁹⁶⁹

Like the defence speech in mitigation and the *Newton* hearing, the right to appeal allows the offender to participate effectively in the criminal process and in that sense it is an instance

⁹⁶³ Criminal Appeal Act 1968 (CAA 1968), ss 9-10.

⁹⁶⁴ Ibid, ss 11(1) and 11(1A).

⁹⁶⁵ Ibid, s 11(3).

⁹⁶⁶ Criminal Justice Act 1988 (CJA 1988), ss 35 and 36.

⁹⁶⁷ However, the Court of Appeal's powers are not confined to increasing the sentence (*Attorney General's Reference (No 4 of 1989)* [1990] 1 WLR 41, 46) and in theory the sentence could also be reduced (*Hungerford-Welch* (n 961), 231).

⁹⁶⁸ CAA 1968, s 33; Ashworth, *Sentencing and Criminal Justice* (n 26), 36.

⁹⁶⁹ Trechsel and Summers (n 24), 362; Campbell, Ashworth and Redmayne (n 91), 383.

of offender agency.⁹⁷⁰ The right to appeal against conviction and sentence in criminal matters is a fundamental human right.⁹⁷¹ This right has a binary nature: the offender can exercise his right to appeal, thus refusing to accept the imposed sentence, or refrain from exercising this right, thereby accepting the sentence. Similar to the other instances of offender agency discussed in this chapter, the right to appeal against sentence is rightly a non-dispositive form of offender agency: it remains entirely up to the appeals court to determine the appropriate sentence. If the offender has been sentenced in the first instance by the Crown Court and appeals against sentence to the Court of Appeal, the court is marginally restricted in its sentencing powers, in the sense that it cannot increase the sentence.⁹⁷² But other than that, the offender has no control over the type and quantum of the sentence through exercising his appeal right.

As with the *Newton* hearing, there are disincentives for the offender to exercise his right to appeal to the effect that it could be considered agency-undermining. If an offender appeals against a sentence imposed by the magistrates' court, the Crown Court has the power to increase the sentence.⁹⁷³ While in theory the Court of Appeal does not have the same power when hearing appeals against sentence from the Crown Court,⁹⁷⁴ a disincentive operates in a different form. It may take several months before the Court of Appeal can hear the offender's appeal and many offenders spend this time in custody. Normally, any time spent in custody awaiting the appeal is counted as part of the total sentence. However, the Court of Appeal has the power to rule that the time served will not be subtracted from the total sentence and will

⁹⁷⁰ Dubber, 'The Criminal Trial and the Legitimation of Punishment' (n 35), 92.

⁹⁷¹ Article 2, Protocol No 7 ECHR; Article 14(5) ICCPR. In contrast to the ICCPR, Article 2.2 Protocol No 7 ECHR sets out three exceptions to the right to appeal. The UK has ratified the ICCPR, but not Protocol No 7 ECHR.

⁹⁷² CAA 1968, s 11(3).

⁹⁷³ SCA 1981, s 48(4); Campbell, Ashworth and Redmayne (n 91), 385.

⁹⁷⁴ CAA 1968, s 11(3).

effectively be added to it as a ‘loss of time’ order.⁹⁷⁵ The order thus serves as an additional punishment for offenders deemed to be wasting the court’s time.⁹⁷⁶

Both the power to increase sentence in the Crown Court and the loss of time rule have problematic implications.⁹⁷⁷ Their effect is similar to that of the sentence discount for a guilty plea⁹⁷⁸ and the reduction of such a discount when the defendant requests a *Newton* hearing that is ultimately decided in the prosecution’s favour,⁹⁷⁹ namely that it dissuades the offender from exercising his fair trial rights. The rationale underpinning these rules is that they are allegedly necessary to prevent courts from being overwhelmed by unmeritorious cases.⁹⁸⁰ Campbell, Ashworth, and Redmayne note, however, that it would be difficult to assess whether such court powers actually make a demonstrable difference in terms of the caseload and how many unmeritorious, and indeed meritorious, appeals are deterred.⁹⁸¹ Regardless, the existence of the power to increase sentence upon appeal by the offender and the loss of time rule is perhaps evidence that the balance is tilted too far towards the efficient administration of justice at the cost of fair trial rights. It is worth exploring different avenues to pursue efficient administration of justice and manage a flood of contested cases and appeals, other than creating disincentives for the exercise of the defendant/offender’s fair trial rights. Arguably, increasing sentence severity to deter offenders from exercising their right of appeal cannot be considered a legitimate restriction on offender agency, but rather undermines it.

⁹⁷⁵ Ibid, s 29.

⁹⁷⁶ Campbell, Ashworth and Redmayne (n 91), 386.

⁹⁷⁷ Ibid, 387.

⁹⁷⁸ Section 8.1.

⁹⁷⁹ Section 7.3.

⁹⁸⁰ Campbell, Ashworth and Redmayne (n 91), 387.

⁹⁸¹ Ibid, 387.

7.5 Conclusion

Underpinning many of the instances of offender agency discussed in this chapter is the commitment to uphold the offender's fair trial rights in respect of sentence. This is the case for the defence plea in mitigation, the *Newton* hearing, and the right to appeal against sentence. A second rationale is information-gathering and provision in the phase between conviction and sentencing.⁹⁸² The need for information goes hand in hand with an increased individualisation of sentences.⁹⁸³ Sentences no longer only have to fit the offence but also the offender. In adversarial systems the work of individualisation is mostly conducted between conviction – typically via a guilty plea – and sentence through the PSR and the defence speech in mitigation.⁹⁸⁴ The *Newton* hearing is also a source of information with relevance to sentencing. Information-gathering and provision are two-sided. On the one hand, there is the court's need for information, which underpins the *Newton* hearing and the PSR. The PSR is motivated by the court's need for information rather than the offender's willingness to supply the court with it, which is evidenced by the fact that if the court is of the opinion that there is no need for further information about the offender's background or suitability for a particular sentence, the court is at liberty not to request such a report.⁹⁸⁵ On the other hand, there is the offender's right to present the court with information he deems relevant to sentence. This ties in with the first rationale underpinning some instances of offender agency, namely the offender's right to fair trial. It is an essential aspect of the right to adversarial proceedings in criminal cases that the defendant should be given the opportunity to present the court with information to support his

⁹⁸² Shapland (n 25), 152.

⁹⁸³ Ibid, 143. On individualisation of sentences see n 677.

⁹⁸⁴ C Tata, '“Ritual Individualization”: Creative Genius at Sentencing, Mitigation, and Conviction' (2019) 46 *Journal of Law and Society* 112, 115. See also Shapland (n 25).

⁹⁸⁵ CJA 2003, s 156(4).

case and evidence in his favour. The offender is given said opportunity in the form of the defence speech in mitigation and the *Newton* hearing.

It is justifiable to restrict offender agency in various ways. First, the non-dispositive nature of these instances of offender agency preserves the fundamental role of the court in sentencing. Secondly, the system is set up in such a way that it is desirable for offenders to address the court through their defence lawyer. While this entails that agency is indirect, in the sense that it is mediated through the lawyer, absence of legal representation in the current system has a tendency to undermine agency rather than enhance it. Thirdly, it is entirely reasonable that there are restrictions on the type of information that the court can be supplied with in the *Newton* hearing, the speech in mitigation, and the PSR, since principled and consistent sentencing inevitably requires limits on which factors can be considered relevant to sentencing.

The argument is not that these existing instances of offender agency need to be altered to enhance the role of the offender. If anything, they need to retain their present form as they are vital to respecting due process rights and ensuring factually correct sentencing decisions within the confines of the current sentencing system. But it remains an odd paradox that punishment is one of the gravest intrusions into individual liberty and yet those who suffer this intrusion play no direct part in determining the sentence imposed on them. Nonetheless, this is how current sentencing practice is organised. This chapter has demonstrated that existing instances of offender agency do not correspond with the model of agentic sentencing set out in Chapter 5. None truly offer the offender the opportunity to engage in a discussion with the state – through the judge – about the kind of sentence that would be appropriate in his case with the aim of respecting the offender as a responsible moral agent and increasing the likelihood of

reparation and reform. Indeed, the current system is not set up to facilitate offender agency in respect of sentence in this principled manner.

8 DISPOSITIVE FORMS OF OFFENDER AGENCY

This chapter analyses the sentence discount for guilty pleas (Section 8.1) and consent to sentence (Section 8.2) as dispositive forms of offender agency. In contrast to the non-dispositive procedural instances of offender agency discussed in Chapter 7, dispositive forms of agency are characterised by the fact that the offender has a certain degree of direct influence on the sentencing decision. Each section sets out the main characteristics of a particular instance of offender agency, explores the rationale, and to what extent it is a desirable vehicle for offender agency.

8.1 Sentence discount for guilty plea

The choice of terminology to refer to the person making the guilty plea is not a straightforward matter. Section 144 Criminal Justice Act 2003 (CJA 2003) uses the term ‘offender’ in this context. A guilty plea essentially entails an admission of guilt, which abridges the criminal proceedings as the case no longer needs to be adjudicated on its merits. Consequently, a person making a guilty plea becomes an ‘offender’ and ceases to be a ‘defendant’ at that point. By contrast, it would be wrong to refer to the person contemplating a guilty plea as ‘offender’, as guilt has not yet been admitted or established at that point, and to use the term ‘offender’ would fail to respect the presumption of innocence at the pre-trial stage.⁹⁸⁶ Thus, the terms ‘defendant’ and ‘defendant agency’ will be used in the following discussion of the guilty plea in England, except where explicit reference is made to texts which use the term ‘offender’.

Section 144 CJA 2003 states that a guilty plea should be met with a reduction of sentence. In deciding the sentence to pass on an offender who has pleaded guilty, the court

⁹⁸⁶ Article 6(2) ECHR; Article 14(2) ICCPR; Trechsel and Summers (n 24), ch 7, 153-191.

must take into account both the stage of the proceedings at which the offender has indicated his intention to plead guilty and the circumstances in which this indication was given.⁹⁸⁷ When a court imposes a punishment, following a guilty plea, that is less severe than the punishment it would otherwise have imposed, the court should always indicate that it has taken the plea into account.⁹⁸⁸

While in principle the extent of the reduction is a matter at the discretion of the court, the Sentencing Council has issued a definitive Guideline on the reduction in sentence for a guilty plea.⁹⁸⁹ The introduction of the Guideline in 2007 formalised and institutionalised the principle of sentence reductions for guilty pleas, making sentence reduction a matter of law and legal duty rather than one of discretion.⁹⁹⁰ The definitive 2017 Guideline suggests that the sentence reduction sits on a sliding scale. The sentence reduction ranges from 1/3 discount when the guilty plea is made at the first stage of the proceedings, to 1/4 discount when the plea is made after the first stage of the proceedings, to 1/10 discount when the defendant pleads guilty on the first day of trial. The sentence reduction should normally be decreased even further, possibly to zero, if the guilty plea is entered during the course of the trial.⁹⁹¹ The discount applies to all courts, including magistrates' courts, and to all forms of sentence, ranging from imprisonment to community sentences and fines.⁹⁹² Apart from just affecting the quantum of the sentence, the sentence discount can also affect the type of sentence, in the sense

⁹⁸⁷ CJA 2003, s 144(1).

⁹⁸⁸ Ibid, s 174(7).

⁹⁸⁹ Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2017) replacing Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Revised Guideline* (2007).

⁹⁹⁰ Bridges (n 93), 83-85.

⁹⁹¹ Sentencing Council, *Reduction in Sentence for a Guilty Plea* (2017), D, 5.

⁹⁹² Ashworth, *Sentencing and Criminal Justice* (n 26), 180; Campbell, Ashworth and Redmayne (n 91), 327.

that it can, for instance, make the difference between a custodial and a non-custodial sentence, and between a community sentence and a fine.⁹⁹³

In what follows, Section 8.1.1 theorises the characteristics of the sentence discount for guilty plea as a form of defendant agency. Section 8.1.2 discusses the rationale for the guilty plea, and Section 8.1.3 explores to what extent the sentence discount for guilty plea is a desirable vehicle for defendant agency.

8.1.1 The characteristics of the guilty plea as form of defendant agency

The English guilty plea mechanism seemingly allows the defendant to exercise agency through consent and negotiation, which will be analysed in turn. The guilty plea requires the defendant's consent. In his framework on the types of consent to a penal measure,⁹⁹⁴ Pin distinguishes '*le consentement abdicatif*'⁹⁹⁵ from '*le consentement substitutif*'⁹⁹⁶. The first type of consent, translated here as abdicative consent, entails that an individual accepts a penal measure and thereby waives a legal right, a legal prerogative, or the judicial protection of his interests, without receiving anything in return.⁹⁹⁷ The second type of consent, referred to here as substitutive consent, follows from a choice between two types of rules, each of which comes with their own constraints and privileges. Substitutive consent entails that the individual accepts the proposal by the criminal authorities to substitute rules that are normally applicable with rules that depart from the norm.⁹⁹⁸ This type of consent also entails a waiver of rights, but the waiver comes with an alternative. The guilty plea entails a form of substitutive consent.

⁹⁹³ Sentencing Council, *Reduction in Sentence for a Guilty Plea* (2017), E, 6; Peay and Player (n 23), 937.

⁹⁹⁴ Pin (n 98), 325-647.

⁹⁹⁵ See *ibid*, 337-515.

⁹⁹⁶ See *ibid*, 517-647 .

⁹⁹⁷ *Ibid*, 335, 343.

⁹⁹⁸ *Ibid*, 335, 523.

When a defendant enters into a guilty plea, he effectively consents to substituting the normally applicable rules – i.e. a public hearing, to be presumed innocent until proven guilty according to law, the possibility to adduce evidence, to have witnesses summoned (mostly in adversarial jurisdictions), and have the criminal case adjudicated on its merits – with rules that depart from the norm – i.e. an abridged form of the full trial. In return, the defendant receives the benefit of a lesser charge and/or substantially reduced sentence. In effect, the defendant trades a chance of acquittal for a lower sentence than he would have received had he been found guilty after a trial.⁹⁹⁹

The ECtHR has endorsed the practice of guilty pleas in the context of Article 6 ECHR. It has explicitly stated that there ‘cannot be anything improper in the process of charge or sentence bargaining in itself’.¹⁰⁰⁰ This is a problematic statement, or at the very least it lacks nuance. As will be argued below, charge or sentence bargaining compromise various fundamental criminal justice principles. For instance, the promise of a lesser charge or substantial sentence discount might induce the defendant to plead guilty when he is not, thus compromising the presumption of innocence. The ECtHR has also repeatedly insisted, however, that where the guilty plea process entails a waiver of procedural rights contained in Article 6 ECHR, several requirements must be fulfilled: the waiver has to be established in an unequivocal manner; it has to be attended by minimum safeguards which are commensurate with the importance of the procedural right waived; it must not run counter to any important public interest; and the waiver must be of the defendant’s own free will, communicated either expressly or tacitly.¹⁰⁰¹ This last requirement of voluntariness is particularly important in terms

⁹⁹⁹ Campbell, Ashworth and Redmayne (n 91), 326.

¹⁰⁰⁰ *Natsvlishvili and Togonidze v Georgia* (n 146) [87]. A comparative study on plea bargaining practices in the Council of Europe member states used in this case revealed that of all member states only Azerbaijan, Greece, and Turkey have no equivalent mechanisms: *ibid* [59].

¹⁰⁰¹ *Scoppola v Italy (No 2)* (n 146) [135]; *Natsvlishvili and Togonidze v Georgia* (n 146) [91]. The same requirements need to be fulfilled for a waiver of different procedural rights to be valid: *Håkansson and Sturesson v Sweden* (n 143) [66] (waiver of the right to a public hearing); *Poitrimol v France* (n 144) [31] (waiver of the

of defendant agency. It entails that consent should be free and informed. It will be discussed below to what extent consent can ever be truly freely given in the context of the English guilty plea.¹⁰⁰²

The negotiated element of a guilty plea is most evident in the form of charge and fact bargaining, and to a lesser extent sentence bargaining.¹⁰⁰³ In charge bargaining, the prosecutor and the defendant discuss the content of the charges and reach an agreement in which the prosecutor is prepared to lower the charges in exchange for a guilty plea from the defendant.¹⁰⁰⁴ Charge bargains can take two forms. The first is where the defendant faces two or more charges and intends not to plead guilty to any of them. The prosecution can then drop one or more charges in exchange for a guilty plea to one charge. Either the prosecution or the defendant can suggest this way forward. The second kind of charge bargain is where the defendant faces a serious charge and signifies the intent not to plead guilty to it. The prosecution can then decide to lower the charges in exchange for a guilty plea to the less serious charge.¹⁰⁰⁵

Fact bargaining entails negotiation between the prosecution and the defendant about how the facts of the case should be stated. This negotiation is often an informal process, whereby the defendant submits a written basis of plea, or the prosecution and defence come to an agreed basis of plea. The idea behind fact bargaining is that stating the facts in a manner that reduces the charge or sentence, for instance by minimising a particular aggravating feature

right to attend the appeal hearing and to defend oneself in person); *Sejdovic v Italy* (n 145) [86] (waiver of the right to appear at the trial); *Hermi v Italy* (n 145) [73] (waiver of the right to appear).

¹⁰⁰² Section 8.1.3.2.

¹⁰⁰³ Darbyshire (n 93), 897.

¹⁰⁰⁴ JUSTICE, *Negotiated Justice: A Closer Look at the Implications of Plea Bargains* (JUSTICE 1993), 2; Tulkens (n 35).

¹⁰⁰⁵ JR Spencer, 'Criminal Procedure in England: A Summary of its Merits and Defects: The Outlines of the System' in M Delmas-Marty and MA Summers (eds), *The Criminal Process and Human Rights: Toward a European Consciousness* (Martinus Nijhoff Publishers 1995), 75; Campbell, Ashworth and Redmayne (n 91), 321-322.

or not mentioning the part played by another, may persuade the defendant to plead guilty. This benefits the prosecution in the sense that it can secure a conviction.¹⁰⁰⁶ However, the practice of fact bargaining is questionable in light of the public interest and the value of truth finding, if the facts recorded in the plea agreement do not reflect what actually occurred and if a lower sentence is passed on that basis.¹⁰⁰⁷ The advantage of fact bargaining for the defendant is that he will not only get the benefit of a reduced sentence for pleading guilty, but also the additional benefit of the more favourable statement of facts which will lower the sentence further. As Campbell, Ashworth, and Redmayne point out, however, this can only be considered an advantage if the defendant is actually guilty of a more serious version of the offence than the one put to the court.¹⁰⁰⁸ An agreed basis of plea is always subject to approval of the court, which will consider whether it adequately and appropriately reflects the evidence, whether it is fair and whether it is in the interests of justice.¹⁰⁰⁹ The court is not bound to accept the basis of plea.¹⁰¹⁰ If the court refuses to accept it, it should hold a *Newton* hearing.¹⁰¹¹

Finally, there may be limited scope to negotiate the sentence. Since the Sentencing Guideline was first introduced in 2007,¹⁰¹² the sentence after guilty plea is not as uncertain as before and therefore there is now less scope to negotiate. Nevertheless, the judge can depart from the Guideline and, because the sentence reduction sits on a sliding scale, there is still some scope for negotiation. Previously, following *R v Turner*, the judge was not permitted to be involved in sentence bargaining and should never indicate what sentence he might impose

¹⁰⁰⁶ Campbell, Ashworth and Redmayne (n 91), 325.

¹⁰⁰⁷ Section 8.1.3.1.

¹⁰⁰⁸ Campbell, Ashworth and Redmayne (n 91), 325-326.

¹⁰⁰⁹ CPD 2015 (n 213), VII Sentencing, B.7, 153.

¹⁰¹⁰ Ibid, VII Sentencing, B.9, 154, applying *Underwood* (n 942).

¹⁰¹¹ CPD 2015 (n 213), VII Sentencing, B.6-14, 152-155. See Section 7.3.

¹⁰¹² Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Revised Guideline* (2007), replaced by Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2017).

upon a guilty plea with the sole exception that he may indicate that the sentence will or will not take a particular form regardless of any plea.¹⁰¹³ This principle was overturned in *R v Goodyear*, in which the Court of Appeal held that the defence lawyer can approach the judge to secure an indication of sentence if the defendant were to plead guilty.¹⁰¹⁴ The court stated that this would not constitute inappropriate judicial pressure on the defendant.¹⁰¹⁵ However, Campbell, Ashworth, and Redmayne suggest that the authoritativeness of the judge's indication as to the precise sentence discount may be a source of pressure on the defendant, particularly where the judge's indication of sentence in the event of a guilty plea entails a change from imprisonment to a non-custodial sentence.¹⁰¹⁶ The court in *Goodyear* also stated that once the judge had given an indication of sentence, it remained binding on the judge who had given it and on any other judge who later became responsible for the case. The indication would cease to have effect if the defendant did not plead guilty within a reasonable period of time following the indication.¹⁰¹⁷ The risk of losing the indicated sentence discount could be another source of pressure on defendants to plead guilty.

Following *Goodyear*, the judge can promise a sentence discount in return for a guilty plea by the defendant to the charges laid by the prosecutor. In contrast to fact and charge bargaining, which occur between the defendant and the prosecution, sentence bargaining takes place between the defendant and the judge, and the prosecutor is not necessarily involved. Because bargaining is difficult to reconcile with the neutrality of the judge in the accusatory model, sentence bargaining is more controversial than fact and charge bargaining.¹⁰¹⁸ It seems

¹⁰¹³ *R v Turner* [1970] 2 QB 321, [1970] 2 WLR 1093.

¹⁰¹⁴ *R v Goodyear* [2005] EWCA Crim 888, [2005] 1 WLR 2532 [29]-[52], especially [50]-[52].

¹⁰¹⁵ *Ibid* [50].

¹⁰¹⁶ Ashworth, *Sentencing and Criminal Justice* (n 26), 182-183; Campbell, Ashworth and Redmayne (n 91), 328.

¹⁰¹⁷ *Goodyear* (n 1014) [61].

¹⁰¹⁸ JUSTICE, *Negotiated Justice: A Closer Look at the Implications of Plea Bargains* (n 1004), 14; Tulkens (n 35), 665.

that there is more scope for negotiation in respect of fact and charge bargaining than sentence bargaining. The judge has to take the recommended sentence discount stated in the Sentencing Guideline into account. Even if the judge were to decide to depart from the Sentencing Guideline, he would still have to decide on the amount of the discount, and it would be up to the defendant to decide whether or not to accept. As will be argued below, this is by no means a free choice on the part of the defendant.¹⁰¹⁹

It is clear how, *prima facie*, the English guilty plea constitutes an instance of dispositive defendant agency: if the defendant decides to enter a guilty plea and he does so before the start of, or at least sufficiently early in, the proceedings, this will have a direct influence on the type and/or quantum of sentence. The material effect of charge and fact bargaining is that the sentence will be reduced further, in addition to the reduction granted for pleading guilty.

8.1.2 The rationale for the guilty plea

The agency afforded to the defendant in the guilty plea is instrumental in serving two aims. First, the defendant can receive a lower charge and/or sentence in return for waiving his right to a full trial, which is primarily in the interest of the efficient administration of justice and use of public resources. It saves the cost and time for the police, prosecution, and court of having to carry out a full investigation and go through a complete trial. That this is the predominant policy objective of the guilty plea is evident from the fact that the Sentencing Guideline is designed to ensure that defendants who intend to plead guilty do so as early in the court process

¹⁰¹⁹ Section 8.1.3.2.

as possible.¹⁰²⁰ Secondly, an early guilty plea saves victims and witnesses from having to give evidence at trial and the related stress and anxiety of cross-examination.¹⁰²¹

From a pragmatic perspective, it seems sensible to have a mechanism in place that allows a cost and time efficient way of dealing with criminal cases by giving defendants the opportunity to admit guilt and thereby skip the investigation and part of the judicial examination stage altogether. As early as 1987, the Council of Europe encouraged member states to introduce guilty pleas and out-of-court settlements as alternatives to full prosecution to simplify criminal justice proceedings.¹⁰²² If all defendants decided to take their case to trial in the absence of a mechanism to accelerate and abbreviate proceedings, the criminal process would grind to a halt.¹⁰²³ Equally from a normative perspective, efficient administration of justice is crucial to uphold the right to be tried within a reasonable time.¹⁰²⁴ This right ensures that ‘accused persons do not have to lie under a charge for too long and that the charge is determined’.¹⁰²⁵ Prolonged proceedings can put a considerable strain on the accused and exacerbate concerns such as uncertainty about the future, fear of conviction, and the threat of a sanction of an unknown severity.¹⁰²⁶ Also, the right to be tried by a court can only be enforced effectively if a decision is reached within a reasonable time,¹⁰²⁷ as encapsulated in the aphorism ‘justice delayed is justice denied’. An inefficient system that prevents courts from reaching a decision in a timely fashion impedes justice. Yet, speedy proceedings at all cost are not always

¹⁰²⁰ Sentencing Council, *Reduction in Sentence for a Guilty Plea* (2017), B, 4; Peay and Player (n 23), 929, 932-935.

¹⁰²¹ Sentencing Council, *Reduction in Sentence for a Guilty Plea* (2017), B, 4, para 2; Tulkens (n 35), 664; Ashworth, *Sentencing and Criminal Justice* (n 26), 180-181.

¹⁰²² Council of Europe, Recommendation No R (87) 18 concerning the Simplification of Criminal Justice, adopted by the Committee of Ministers on 17 September 1987.

¹⁰²³ Peay and Player (n 23), 952.

¹⁰²⁴ Article 6(1) ECHR; Article 14(3) ICCPR.

¹⁰²⁵ *Wemhoff v Germany* (1979-80) 1 EHHR 55 [18].

¹⁰²⁶ Trechsel and Summers (n 24), 135.

¹⁰²⁷ *Ibid*, 136.

in the defendant's interests. While the instrumental rationale for the guilty plea is defensible, the institutional incentives to achieve efficiency, at the cost of individual rights and fundamental criminal justice principles, make the English guilty plea often an imperfect vehicle for defendant agency, as the next section will argue.

8.1.3 A desirable vehicle for defendant agency?

8.1.3.1 *Incompatibility with fundamental rights and principles*

The mechanism of sentence discount for guilty plea may be incompatible with a range of defence fundamental rights and freedoms. While a sentence discount may create an incentive to plead guilty which is in the interest of the efficient administration of justice, awarding too high a sentence discount can raise the risk that defendants are pressured into pleading guilty, contrary to the facts, thereby compromising the presumption of innocence (Article 6(2) ECHR).¹⁰²⁸ Closely related to this presumption is the right of silence and privilege against self-incrimination, which are implied rights that form part of Article 6 ECHR.¹⁰²⁹ Since a substantial sentence discount may have the effect of inducing innocent people into pleading guilty, the English guilty plea could be considered at odds with the aforementioned rights.¹⁰³⁰ Furthermore, empirical evidence shows that defendants from Black, Asian and Minority Ethnic (BAME) backgrounds tend to plead guilty less often, or do so later in the process.¹⁰³¹ Sentence reduction for guilty pleas thus increases the risk that minorities will be sentenced more harshly,

¹⁰²⁸ Baldwin and McConville (n 93); JUSTICE, *Negotiated Justice: A Closer Look at the Implications of Plea Bargains* (n 1004), 3; Spencer, 'Criminal Procedure in England' (n 1005), 75; Darbyshire (n 93), 901-903; Bridges (n 93), 85; Ashworth, *Sentencing and Criminal Justice* (n 26), 182, 186-188; Campbell, Ashworth and Redmayne (n 91), 335-337.

¹⁰²⁹ See e.g. *Murray v UK* (1996) 22 EHRR 29; *Saunders v UK* (n 149).

¹⁰³⁰ Campbell, Ashworth and Redmayne (n 91), 337-338.

¹⁰³¹ Hood (n 817); Uhrig (n 817); Lammy (n 817), 24-29.

which contravenes the principle of non-discrimination (Article 14 ECHR).¹⁰³² The guilty plea could also interfere with the right to a public hearing (Article 6(1) ECHR). In cases of sentence bargaining, the negotiation takes place in a private meeting between the judge and counsel. Not only is the public absent in these negotiations, but so is the defendant himself. There will always be some form of public hearing where the defendant pleads guilty, prosecution and defence speeches are made, and the judge imposes a sentence. However, the right to a public hearing is eroded if the defendant's fate was determined behind closed doors in a meeting where neither he nor the public were present.¹⁰³³

Additionally, the sentence discount for guilty plea may be unjustified depending on the theory of punishment one adopts. If one adopts the view that punishment is justified on preventative grounds, for instance to achieve deterrence or incapacitation, then the sentence discount undermines those primary aims.¹⁰³⁴ From a retributive perspective the problem arises when the sentence reduction for guilty plea is too substantial and a less than proportionate sentence is imposed.¹⁰³⁵

Finally, fact and charge bargaining may call into question fundamental values the criminal justice system ought to respect, in particular the quest for the 'truth'. It is generally said that inquisitorial criminal justice systems emphasise the search for the substantive truth, whereas adversarial systems are more focussed on ensuring procedural fairness for the

¹⁰³² Darbyshire (n 93), 901; M Tonry, 'Abandoning Sentence Discounts for Guilty Pleas' in A von Hirsch, A Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009); Campbell, Ashworth and Redmayne (n 91), 338-340.

¹⁰³³ Campbell, Ashworth and Redmayne (n 91), 340.

¹⁰³⁴ *Ibid*, 331.

¹⁰³⁵ JUSTICE, *Negotiated Justice: A Closer Look at the Implications of Plea Bargains* (n 1004), 3 and 15-16; Tulkens (n 35), 664.

parties.¹⁰³⁶ However, the value of truth is also important in adversarial systems.¹⁰³⁷ It is the conception of truth and the means of finding it that differ.¹⁰³⁸ While the inquisitorial system entrusts a neutral officer of justice with collecting relevant evidence both in favour of and against the suspect, the adversarial system traditionally relies on opposing parties presenting their competing versions of the truth and equality of arms in order to challenge each other's accuracy.¹⁰³⁹ Yet, the high number of cases processed through a guilty plea¹⁰⁴⁰ may suggest a lesser regard for establishing the truth in adversarial systems than for the smooth running of the criminal justice system. Fact and charge bargaining in the context of a guilty plea are institutionalised legal procedures which are not only ill-suited to discover the truth about crimes, but can indeed directly undermine that value.¹⁰⁴¹ The negotiated resolution of facts and charges may result in a conviction which corresponds with what the prosecutor, defendant (or his lawyer), and sometimes the judge are willing to agree on, rather than with an inquisitorial conception of the 'factual truth'.¹⁰⁴² The truth is determined by mutual consent, which is not a suitable mechanism for truth-seeking.¹⁰⁴³ From the perspective of an inquisitorial system, it would seem odd not only that a criminal justice system would allow for negotiated and consensual ways of resolving criminal cases that divert from the truth, but that such a system

¹⁰³⁶ See e.g. HW Ehrmann, *Comparative Legal Cultures* (Prentice-Hall 1976); K Zweigert, H Kötz and T Weir, *Introduction to Comparative Law* (Clarendon Press 1998); T Weigend, 'Is the Criminal Process about Truth?: A German Perspective' (2003) 26 *Harvard Journal of Law and Public Policy* 157; JH Merryman and R Pérez-Perdomo, *The Civil Law Tradition: an Introduction to the Legal systems of Europe and Latin America* (3rd edn, Stanford University Press 2007).

¹⁰³⁷ Y Ma, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12 *International Criminal Justice Review* 22, 43; Lippke (n 783), 220-221.

¹⁰³⁸ Zedner, *Criminal Justice* (n 41), 115.

¹⁰³⁹ Weigend, 'Is the Criminal Process about Truth?: A German Perspective' (n 1036), 158; Zedner, *Criminal Justice* (n 41), 169. Lippke argues that adversary trials in England and Wales incorporate certain features that make it better suited to uncover the truth than trials in the United States (Lippke (n 783), 229).

¹⁰⁴⁰ See n 939.

¹⁰⁴¹ Lippke (n 783), 219; Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35), 21.

¹⁰⁴² Lippke (n 783), 218.

¹⁰⁴³ *Ibid.*, 218.

would continue to enjoy public credibility.¹⁰⁴⁴ That being said, traditionally inquisitorial systems increasingly seem to incorporate summary proceedings for those who do not contest their guilt.¹⁰⁴⁵

8.1.3.2 Defendant agency in a coercive framework

In theory, it is conceivable that the guilty plea enhances defendant agency. The availability of the guilty plea allows defendants to opt out of the full-fledged process,¹⁰⁴⁶ and they may have reasons for doing so that are not motivated by the sentence discount. A defendant may want to plead guilty because he feels genuinely remorseful, or because he is in fact guilty and wants to avoid the adverse consequences of having to go through a lengthy trial. Provided that the decision whether or not to plead guilty is rational, informed, and free, a guilty plea mechanism may empower the defendant to participate in the resolution of his case. However, it is highly doubtful that the English guilty plea in its current form can enhance defendant agency. The English guilty plea mechanism, as it operates following the 2017 Sentencing Guideline, exerts considerable pressure on defendants, guilty and innocent alike, to plead guilty.¹⁰⁴⁷ The defendant's decisions are constrained by the fact they are made in the knowledge that refusal might lead to a harsher outcome. Consequently, in many cases defendant agency in negotiating and consenting to a guilty plea agreement is illusory.

¹⁰⁴⁴ Weigend, 'Is the Criminal Process about Truth?: A German Perspective' (n 1036), 172.

¹⁰⁴⁵ On plea bargaining in France, Germany and Italy see Ma (n 1037); in Germany and Italy see M Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 *Harvard International Law Journal* 1, 39-53; in Italy see S Maffei, 'Negotiations on Evidence and Negotiations on Sentence' (2004) 2 *Journal of International Criminal Justice* 1050; in Belgium see R Verstraeten and others, 'Stevige Verbouwingen in het Strafprocesrecht: de Procedure met Voorafgaande Erkenning van Schuld, de Invoering van Conclusietermijnen in Strafzaken en een Vernieuwd Stelsel van Rechtsmiddelen' in F Verbruggen (ed), *Themis 97 - Straf- en Strafprocesrecht* (Die Keure 2016), 123-153.

¹⁰⁴⁶ In the American context see Dubber, 'The Criminal Trial and the Legitimation of Punishment' (n 35), 94.

¹⁰⁴⁷ Campbell, Ashworth and Redmayne (n 91), 328.

The most important impediment to the voluntary nature of the guilty plea is the sentence discount, as formalised by the Sentencing Guideline.¹⁰⁴⁸ The defendant may feel immense pressure when faced with the choice of pleading guilty and receiving a non-custodial sentence or a reduced custodial sentence in return, or not accepting the plea and facing the risk of imprisonment or an extended prison sentence.¹⁰⁴⁹ As Blake and Ashworth argue: ‘[i]n reality the English system, with its large discount for pleading guilty, militates against the “free choice” of the defendant.’¹⁰⁵⁰ A sentence discount entails that a defendant who wishes to exercise his right to a full trial and is subsequently found guilty is effectively penalised for exercising his procedural right in the form of a harsher sentence.¹⁰⁵¹ While it may seem irrational that anyone who knows they are innocent would nonetheless plead guilty, there is great attraction to defendants in pleading guilty and ‘cutting their losses’, compared to the uncertainty of going to trial and risking a harsher sentence.¹⁰⁵²

In addition to the sentence discount itself, the defendant may feel pressure from the judge’s *Goodyear* indication as to the precise sentence discount in the event of a guilty plea.¹⁰⁵³ In contrast to the defence counsel’s mere prediction of the likely sentence reduction, the authoritativeness of the judge’s indication could impose pressure on the defendant, especially where the judge’s indication entails a change from imprisonment to a non-custodial sentence.¹⁰⁵⁴ Nonetheless, if it is accepted that there are pragmatic and normative reasons to

¹⁰⁴⁸ Sentencing Council, *Reduction in Sentence for a Guilty Plea* (2017); Baldwin and McConville (n 93), 45, 107; Blake and Ashworth (n 93), 182; Bridges (n 93), 85; Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35), 43-45.

¹⁰⁴⁹ Blake and Ashworth (n 93), 180.

¹⁰⁵⁰ *Ibid*, 182.

¹⁰⁵¹ Darbyshire (n 93), 901; Owusu-Bempah, *Defendant Participation in the Criminal Process* (n 35), 43.

¹⁰⁵² Peay and Player (n 23), 938; Campbell, Ashworth and Redmayne (n 91), 332-333.

¹⁰⁵³ *Goodyear* (n 1014).

¹⁰⁵⁴ Ashworth, *Sentencing and Criminal Justice* (n 26), 182-183; Campbell, Ashworth and Redmayne (n 91), 328.

adopt a guilty plea mechanism that awards sentence discounts,¹⁰⁵⁵ defendants need to have the requisite information to make the decision whether or not to plead guilty. The judge's *Goodyear* indication of the likely sentence reduces uncertainty and ensures that the defendant is sufficiently informed about his choice. In that sense, it is not the judge's *Goodyear* indication as such that puts pressure on the defendant, but rather the mechanism itself of offering a sentence discount for guilty plea against a diminishing time frame.

In his discussion of settlement in civil cases, Fiss draws a parallel with plea bargaining in criminal cases, arguing that consent in both instances is problematic:

Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.¹⁰⁵⁶

Inducing defendants to plead guilty by offering a sentence discount, against a diminishing time frame, is even more coercive to vulnerable individuals, such as those with a learning disability, mental illness, personality disorder, BAME individuals, and women, particularly those with caring responsibilities.¹⁰⁵⁷ Pressures on vulnerable individuals play out in different ways. For instance, BAME defendants are consistently more likely to plead not guilty than white defendants, and thus experience harsher sentences when found guilty.¹⁰⁵⁸ The main reason for this difference is the lack of trust in the fairness and integrity of the criminal justice system amongst BAME communities.¹⁰⁵⁹ There is a particular concern that the sentence discount may

¹⁰⁵⁵ Section 8.1.2.

¹⁰⁵⁶ Fiss (n 740), 1075.

¹⁰⁵⁷ Peay and Player (n 23).

¹⁰⁵⁸ Uhrig (n 817), table A2.1.

¹⁰⁵⁹ Lammy (n 817), 24-29.

lead vulnerable defendants to make false confessions.¹⁰⁶⁰ For instance, attention deficit hyperactivity disorder (ADHD) and personality disorders are disproportionately associated with the reporting of false confessions.¹⁰⁶¹ One of the reasons that women are more likely than men to make false confessions may be their heightened suggestibility, i.e. the tendency for an individual to respond and conform to the suggestions of others.¹⁰⁶² Women demonstrate higher levels of compliance and acquiescence in an attempt to avoid conflict¹⁰⁶³ or stemming from low self-esteem, which is a trait more common amongst women.¹⁰⁶⁴ Women may also make a false confession to protect another person.¹⁰⁶⁵ Additionally, women with childcare responsibilities who are at the cusp of custody are more likely to make a false confession to avoid the risk of going to prison and no longer being able to care for their children.¹⁰⁶⁶ The Sentencing Guideline does, however, contain a limited exception to the rules, intended to protect vulnerable defendants. It states that if the sentencing court is satisfied that particular circumstances significantly reduced the defendant's ability to understand the charges, or made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done, a

¹⁰⁶⁰ Peay and Player (n 23).

¹⁰⁶¹ GH Gudjonsson and others, 'Confessions and Denials and the Relationship with Personality' (2004) 9 *Legal and Criminological Psychology* 121; GH Gudjonsson and others, 'Interrogative Suggestibility, Compliance and False Confessions among Prisoners and their Relationship with Attention Deficit Hyperactivity Disorder (ADHD) Symptoms' (2008) 38 *Psychological Medicine* 1037.

¹⁰⁶² See GH Gudjonsson, *The Psychology of Interrogations and Confessions* (Wiley 2003). See also the Gudjonsson Suggestibility Scale (GSS) in GH Gudjonsson, 'A Parallel Form of the Gudjonsson Suggestibility Scale' (1987) 26 *British Journal of Clinical Psychology* 215.

¹⁰⁶³ LL Carli, 'Gender, Interpersonal Power, and Social Influence' (1999) 55 *Journal of Social Issues* 81; KD Forrest, TA Wadkins and BA Larson, 'Suspect Personality, Police Interrogations, and False Confessions: Maybe it is Not Just the Situation' (2006) 40 *Personality and Individual Differences* 621.

¹⁰⁶⁴ See e.g. GH Gudjonsson and JF Sigurdsson, 'The Relationship of Compliance with Coping Strategies and Self-Esteem' (2003) 19 *European Journal of Psychological Assessment* 117.

¹⁰⁶⁵ JF Sigurdsson and GH Gudjonsson, 'The Relationship between Types of Claimed False Confession Made and the Reasons why Suspects Confess to the Police according to the Gudjonsson Confession Questionnaire (GCQ)' (1996) 1 *Legal and Criminological Psychology* 259.

¹⁰⁶⁶ S Jones, 'Under Pressure: Women who Plead Guilty to Crimes they have Not Committed' (2011) 11 *Criminology and Criminal Justice* 77.

reduction of one third should still be made.¹⁰⁶⁷ While this exception may give vulnerable offenders more time to seek information or legal advice and come to a decision, it is questionable whether the exception addresses the real issue affecting vulnerable defendants, namely the compounding effect of vulnerabilities making certain groups of defendants more likely to succumb to pressure and make false confessions.

Paradoxically, one of the obstructions to free choice could be the defendant's own counsel. Baldwin and McConville's empirical study carried out in the Birmingham Crown Court in 1977 demonstrated that lawyers sometimes exerted pressure on their clients to plead guilty, often against the clients' will, thinking this was in their best interest.¹⁰⁶⁸ Out of their sample of 48 cases, in 20 cases the defence counsel acted within the confines of the professional code of ethics,¹⁰⁶⁹ but in the remaining 28 cases 'there was evidence that the advice counsel gave was of such a nature that no reasonable person could say that it was fair or proper or that the final decision to plead guilty was made voluntarily.'¹⁰⁷⁰ The pressure could take various forms. The defendant could receive (often well-intentioned) advice to plead guilty as an order to do so.¹⁰⁷¹ Defendants also reported that their defence lawyers had put them under pressure on the grounds that if they proceeded to trial their sentence would be increased for 'wasting the court's time',¹⁰⁷² or for infuriating the trial judge by running a particular defence.¹⁰⁷³ The defence lawyer could even ignore or dismiss the client's assertions of innocence.¹⁰⁷⁴ On

¹⁰⁶⁷ Sentencing Council, *Reduction in Sentence for a Guilty Plea* (2017), F.1, 7. See also Sentencing Council, *Reduction in Sentence for a Guilty Plea: Response to Consultation* (2017), 11-14 on how the exception was drafted in the consultation version of the guideline and how it was intended to be a safeguard.

¹⁰⁶⁸ Baldwin and McConville (n 93), ch 3, 39-58.

¹⁰⁶⁹ *Ibid*, 42-45.

¹⁰⁷⁰ *Ibid*, 45.

¹⁰⁷¹ *Ibid*, 45, 56.

¹⁰⁷² *Ibid*, 44-45.

¹⁰⁷³ *Ibid*, 47-48.

¹⁰⁷⁴ *Ibid*, 53-55.

occasion defendants were given insufficient time to consider their plea, the defence lawyer was unfamiliar with the brief and not interested in the case unless the defendant was prepared to plead guilty.¹⁰⁷⁵ Such practice is at odds with ethical standards of behaviour.

While pressure from the defence counsel is not the same as forcing the defendant to plead guilty, the defendant can experience it as such and may feel that he is left with no alternative than to plead guilty. Such pressure can have the effect of undermining the defendant's agency in making the decision whether or not to enter a plea. Blake and Ashworth have criticised these practices and advocated robust ethical standards for defence lawyers. They emphasise the principle of client autonomy and suggest that the lawyer should 'maximise client choice within the structure of the legal system as it exists.'¹⁰⁷⁶ It is the defence lawyer's duty to acknowledge the pressures on his client inherent in the guilty plea, and to strive 'to further the client's (informed) wishes and to attempt to reduce the pressure on the defendant whose original wish is to plead not guilty, rather than to succumb to the easier approach ... of steering the client towards some bargain involving a guilty plea.'¹⁰⁷⁷ To the extent that this ethical code is not respected by all defence lawyers and that some may put considerable pressure on their clients, this calls into question whether the defendant's decision to plead guilty is a true exercise of his agency.

Yet, the research on the extent to which defence lawyers influence their clients' decision making and exert pressure on them to plead guilty is equivocal. While Baldwin and McConville demonstrated in 1977 that the single biggest reason for defendants to change their

¹⁰⁷⁵ Ibid, 55-56.

¹⁰⁷⁶ Blake and Ashworth (n 93), 181-182. By contrast, Bridges suggests that in the changed context of guilty pleas, with the systematisation and formalisation of sentence discount, the emphasis on the principle of individual autonomy and client autonomy in pleas is no longer tenable. He argues that in situations where a client privately maintains innocence but still wishes to plead guilty, it may be proper and necessary for the lawyer to withdraw from representation (Bridges (n 93)).

¹⁰⁷⁷ Blake and Ashworth (n 93), 182.

plea from not guilty to guilty at the last minute was the advice given by their defence counsel (39.7 per cent),¹⁰⁷⁸ in Bottoms and McClean's 1976 study only 7 per cent of defendants mentioned their lawyer's advice as the predominant reason to plead guilty.¹⁰⁷⁹ The study did not elaborate upon whether the advice might have amounted to undue pressure. The main reason cited for why defendants pleaded guilty was because they regarded themselves as guilty (41 per cent) or because they recognised that the police had a good case (27 per cent).¹⁰⁸⁰ More recent research carried out for the Sentencing Council confirms Bottoms and McClean's findings in part, suggesting that the main factor in defendants' decision making whether or not to plead guilty is their perception of the likelihood of conviction at trial, the 'tipping point' being the realisation that they are more likely than not to be found guilty.¹⁰⁸¹ However, the Sentencing Council research equally confirms that the weight of the evidence and the advice received from their defence counsel are crucial in defendants' assessments of whether they are likely to be found guilty and are thus integral to their decision making if and when to enter a guilty plea:

Solicitors and barristers were identified by many offenders as being the definitive source on the likely outcome of their case, and as such, high premium was bestowed upon their advice. For many offenders, there was a clear sense that their actions over guilty pleas were largely determined by this advice.¹⁰⁸²

In sum, the defence lawyer's advice is not the single determining factor in defendants' decision making whether and when to enter a plea, but it is an important contributing factor. The defence lawyer's advice will not necessarily amount to improper pressure, but at the very least some

¹⁰⁷⁸ Baldwin and McConville (n 93), 28.

¹⁰⁷⁹ A Bottoms and JD McClean, *Defendants in the Criminal Process* (Routledge & Kegan Paul 1976), 112, table 5.7.

¹⁰⁸⁰ Ibid, 112, table 5.7.

¹⁰⁸¹ W Dawes and others, *Attitudes to Guilty Plea Sentence Reductions* (Sentencing Council, 2011), 32; Sentencing Council, *Reduction in Sentence for a Guilty Plea: Research Report* (2017), 8.

¹⁰⁸² Dawes and others (n 1081), 33.

defendants may *perceive* well-intentioned advice as such.¹⁰⁸³ In those cases the defence lawyer's advice could constitute another element adding to the pressure when viewed in combination with the Sentencing Guideline on Reduction of Sentence for a Guilty Plea.

While negotiation and consent give the appearance of defendant agency, the guilty plea only nominally upholds the defendant's agency. Even if it could be argued that defendants do have some agency in plea bargaining, in the sense that it allows them to participate in the resolution of their own case, it would remain an undesirable form of agency at present. The promotion of defendant agency is not meant to encourage a cost/benefit analysis to ensure the defendant achieves the most lenient sentence possible at the expense of fundamental principles of criminal justice. The guilty plea in its current form creates a perverse incentive for defendants to act against their own interest. The promotion of agency should not be a tactic to co-opt the defendant into a system that places more importance on the efficient administration of justice than on due process of law.

Nonetheless, a guilty plea mechanism need not invariably impede defendant agency, provided that sufficient safeguards are put in place to protect defendants from acting against their own best interest. For example, a meaningful review could ensure the defendant pleaded guilty voluntarily.¹⁰⁸⁴ The prosecutor's power to reduce the charges and alter the facts should be constrained to preserve the 'truth' value. The magnitude of the sentence discount should be reduced. Research carried out for the Sentencing Council demonstrates that the main factor in defendants' decision making whether or not to plead guilty is their perception of the likelihood of conviction at trial.¹⁰⁸⁵ The sentence reduction as such only acts as an incentive to enter a guilty plea at the point when it becomes clear that conviction is likely and defendants' attention

¹⁰⁸³ Baldwin and McConville (n 93), 46.

¹⁰⁸⁴ In the American context see Dubber, 'The Criminal Trial and the Legitimation of Punishment' (n 35), 94-95.

¹⁰⁸⁵ Dawes and others (n 1081), 32.

is thus turned to the severity of sentence.¹⁰⁸⁶ Other considerations when defendants decide to enter a guilty plea include preferring to be sentenced rather than serving part of their sentence on remand, and a desire to get swift justice.¹⁰⁸⁷ But it is questionable whether any of the latter motivations, absent a sentence reduction, would be enough of an incentive for defendants to admit guilt. Based on interviews with 15 defendants, Dawes et al conclude that without the prospect of a sentence reduction offenders would have no incentive not to take a case to trial.¹⁰⁸⁸ A sentence discount is problematic in principle, but may need to be preserved if the guilty plea is to fulfil its primary function as a mechanism to relieve police, prosecution, and courts of the burden of having to deal with all cases in full. Short of doing a large scale empirical enquiry, it is not possible within the confines of this thesis to argue conclusively at what point the magnitude of the sentence discount subverts justice. It can be argued tentatively that, assuming a sentence discount should be retained, a fairer system might entail awarding a sentence reduction of no more than 10 per cent.¹⁰⁸⁹ These safeguards could make the guilty plea mechanism more consistent with the value of respecting defendant agency. They could help avoid undue pressure on defendants to plead guilty and thus preserve the presumption of innocence, preserve the value of ‘truth finding’, and ensure sentence proportionality. Simultaneously, a sentence reduction of 10 per cent would still provide a modest incentive to guilty defendants to opt for an abridged version of the proceedings and allow them to participate effectively in the resolution of their case. While more extensive safeguards might hamper the efficient administration of justice, this may be the price to pay. It seems better to

¹⁰⁸⁶ Ibid, 34; Sentencing Council, *Reduction in Sentence for a Guilty Plea: Research Report* (n 1081), 8.

¹⁰⁸⁷ Dawes and others (n 1081), 35.

¹⁰⁸⁸ Ibid, 21, 34.

¹⁰⁸⁹ Campbell, Ashworth and Redmayne (n 91), 341.

err on the side of extensive safeguards rather than on the side of efficiency at the cost of fundamental values as is currently the case in England.

8.2 Consent to sentence

Certain sentences can only be pronounced if the offender consents to their imposition or indicates his willingness to comply with the requirements. Since the offender's consent is a necessary precondition, these sentences are a prime example of offender agency. Section 8.2.1 gives a brief overview of the types of sentences that require the offender's consent in England and Wales. Section 8.2.2 sets out the defining characteristics of consent to sentence as a form of offender agency, followed by an analysis of the rationale for consent in Section 8.2.3. Section 8.2.4 explores to what extent consent to sentence is a desirable vehicle for offender agency.

8.2.1 Overview of sentences requiring offender consent

The law of many countries requires consent to most, if not all, community sanctions and measures,¹⁰⁹⁰ typically community service, electronic monitoring, and medical, psychiatric, or addiction treatment.¹⁰⁹¹ England and Wales is somewhat of an anomaly in this respect, in the sense that it currently only requires consent for a very distinct group of sanctions, namely community orders comprising a requirement involving some form of treatment (alcohol

¹⁰⁹⁰ The national legislative fact sheets are contained in D Flore and others (eds), *Probation Measures and Alternative Sanctions in the European Union* (Intersentia 2012), and are also available at 'Probation Measures and Alternative Sanctions in the EU: National Fact Sheets' <<https://www.euprobationproject.eu/national.php>> accessed 28 March 2019.

¹⁰⁹¹ C Morgenstern and E Larrauri, 'European Norms, Policy and Practice' in F McNeill and K Beyens (eds), *Offender Supervision in Europe* (Palgrave Macmillan 2013), 147.

treatment, mental health treatment, and drug treatment), and an electronic monitoring requirement.¹⁰⁹²

Previously, formal consent was required for probation¹⁰⁹³ and community service.¹⁰⁹⁴ While the nature of probation as a measure or sanction varies across time and jurisdiction, probation generally entails that an offender is placed under supervision of a probation officer in the community, subject to specified conditions.¹⁰⁹⁵ The notion of ‘service’ in community service connoted that unpaid work had to be undertaken as part of the sentence.¹⁰⁹⁶ The requirement of consent to both sentences was abolished in 1997.¹⁰⁹⁷ The enactment of the CJA 2003 brought together the former probation sentence and community service under the generic ‘community order’. The community order can contain one or more of several requirements which vary in content.¹⁰⁹⁸ The purpose of community orders in England and Wales is mixed. Depending on the requirement imposed, they can serve a rehabilitative, reparative, and/or retributive purpose.¹⁰⁹⁹ The unpaid work requirement mirrors the former ‘community service’ sentence.¹¹⁰⁰ Certain requirements under the community order partly reflect the former

¹⁰⁹² CJA 2003, ss 207(1), 207(3)(c), 209(2)(d), 215(2).

¹⁰⁹³ The requirement of consent to probation was introduced by the Criminal Justice Act 1948 (CJA 1948), s 3[5]. Probation was initially an alternative to punishment (Probation of Offenders Act 1907, ss 1(1) and 1(2)) and later transformed to a sentence in its own right by the CJA 1991 (M Wasik and R Taylor, *Blackstone's Guide to the Criminal Justice Act 1991* (Blackstone 1991), 48; Home Office, *Strengthening Punishment in the Community* (Cmd 2780, 1995), 15-16, para 4.19; R Burnett, ‘Probation’ in R Canton and D Hancock (eds), *Dictionary of Probation and Offender Management* (Willan 2007), 221.

¹⁰⁹⁴ The Criminal Justice Act 1972 introduced the sentence of community service in England and Wales and made it contingent on the offender’s consent (CJA 1972, s 15(2)).

¹⁰⁹⁵ Burnett (n 1093), 220.

¹⁰⁹⁶ CJA 1991, s 10.

¹⁰⁹⁷ Crime (Sentences) Act 1997 (C(S)A 1997), ss 38(2)(a)-(b).

¹⁰⁹⁸ CJA 2003, s 177.

¹⁰⁹⁹ Sentencing Council, *Imposition of Community and Custodial Sentences Definitive Guideline* (2017), 3; Ashworth, *Sentencing and Criminal Justice* (n 26), 357-358, 367-370. See also I Durnescu, C Enengl and C Grafl, ‘Experiencing Supervision’ in F McNeill and K Beyens (eds), *Offender Supervision in Europe* (Palgrave Macmillan 2013), 21.

¹¹⁰⁰ CJA 2003, ss 199-200.

probation sentence, such as the rehabilitation activity requirement,¹¹⁰¹ programme requirement,¹¹⁰² alcohol treatment,¹¹⁰³ drug rehabilitation,¹¹⁰⁴ and mental health treatment requirement.¹¹⁰⁵ There is no requirement for the offender to consent to, or express willingness to comply with, community orders in general. This is uniquely required for the alcohol treatment,¹¹⁰⁶ mental health treatment,¹¹⁰⁷ and drug rehabilitation requirements.¹¹⁰⁸ The three requirements entail that the offender must submit, during a period specified in the order, to some form of treatment with a view to reduce or eliminate the offender's dependency on alcohol,¹¹⁰⁹ or drugs,¹¹¹⁰ or to improve the offender's mental condition.¹¹¹¹

An electronic monitoring requirement may also only be imposed if a person whose cooperation is necessary consents.¹¹¹² Electronic monitoring in England and Wales is not an autonomous sentence. It can be imposed as part of a community order to ensure compliance with other community order requirements.¹¹¹³ It can also be employed pre-trial as a condition of bail¹¹¹⁴ and as a tool in the implementation of a prison sentence, namely where a prisoner is released early and part of the custodial sentence is served under electronic monitoring and

¹¹⁰¹ Ibid, s 200A; Ashworth, *Sentencing and Criminal Justice* (n 26), 367.

¹¹⁰² CJA 2003, s 202.

¹¹⁰³ Ibid, s 212.

¹¹⁰⁴ Ibid, s 209-210.

¹¹⁰⁵ Ibid, s 207-208.

¹¹⁰⁶ Ibid, s 212(3).

¹¹⁰⁷ Ibid, s 207(3)(c).

¹¹⁰⁸ Ibid, s 209(2)(d).

¹¹⁰⁹ Ibid, s 212(1).

¹¹¹⁰ Ibid, s 209(1).

¹¹¹¹ Ibid, s 207(1).

¹¹¹² Ibid, s 215(2).

¹¹¹³ Ibid, s 215(1).

¹¹¹⁴ National Offender Management Service, *Electronic Monitoring on Bail for Adults: Procedures* (Home Office Circular 25/2006, 2006) (the Circular was last updated in 2016, and no longer reflects current practice. An updated version is not yet available); A Hucklesby and E Holdsworth, *Electronic Monitoring in England and Wales* (Centre for Criminal Justice Studies University of Leeds, 2016), 13-14.

supervision in the community.¹¹¹⁵ As this thesis is concerned with offender agency in the determination of the sentence rather than pre-trial or in the implementation of a sentence, the focus will be on electronic monitoring requirements as part of a community order. Depending on the type of community order requirement, the court will either be under the obligation or have the possibility to impose the additional electronic monitoring requirement. Where the court imposes a curfew requirement or an exclusion requirement, the court *must* also impose an electronic monitoring requirement.¹¹¹⁶ For various kinds of community order requirements the court *may* impose an electronic monitoring requirement, namely in addition to an unpaid work requirement, a rehabilitation activity requirement, a programme requirement, a prohibited activity requirement, a residence requirement, a foreign travel prohibition requirement, a mental health treatment requirement, a drug rehabilitation requirement, an alcohol treatment requirement, or an attendance centre requirement.¹¹¹⁷

8.2.2 The characteristics of consent to sentence as a form of offender agency

Several features characterise the requirement of consent to sentence as a form of offender agency. First, consent to a sanction has distinct legal consequences. Once the formal requirement of consent has been met, it allows the court to impose a sentence which would otherwise be illegal. Pin argues that the legal value of consent to community sentences can be explained as a form of substitutive consent, as is the case for consent in the context of the guilty plea.¹¹¹⁸ By consenting, the offender substitutes the prison sentence for a community order

¹¹¹⁵ This is also known as Home Detention Curfew, introduced by the Crime and Disorder Act 1998. See also HM Prison Service, *Home Detention Curfew* (PSO 6700, 2013).

¹¹¹⁶ CJA 2003, s 177(3) referring to s 215(2)(b). Subject to exceptions: *ibid*, ss 215(2), 218(4), 177(3)(b).

¹¹¹⁷ *Ibid*, s 177(4).

¹¹¹⁸ See above Section 8.1.1. On the notion of ‘substitutive consent’ in Pin’s work see Pin (n 98), 517-647. Pin’s analysis of sentences whose imposition is made contingent on the offender’s consent pertains to French law, where consent is required to impose a sentence of ‘*travail d’intérêt général*’, a community sentence under which the convicted person has to perform unpaid work. While consent is not required under English law to a community

with certain requirements.¹¹¹⁹ According to Pin, the required consent is considered substitutive because consent allows and legitimises the judge's option to substitute the rules governing the prison sentence with the rules governing the 'alternative' sentence.¹¹²⁰ Pin's framework may be helpful descriptively and as an analytical tool but is less helpful normatively. On the one hand, the notion that the offender's consent is required to substitute the prison sentence with certain community order requirements fits with the established idea that a community sentence is an alternative sentence, whereas imprisonment is the norm. This is apparent in the labelling of community sentences (and fines) as 'alternatives to custody' or 'non-custodial penalties'.¹¹²¹ On the other hand, from a normative point of view, treating consent to a community order requirement as a type of substitutive consent, as described by Pin, is somewhat problematic. The idea that imprisonment is the norm and that community sentences are considered a lenient alternative is outdated. Instead, it is more helpful to see the whole range of sentences on a spectrum ranging from maximum to minimum interference with the offender's 'living standard'.¹¹²² This may indicate that in certain cases prison sentences will be more severe than community sentences. But it may equally indicate that short terms of imprisonment can be less severe than particularly burdensome community order requirements, and that they can be

order in general or a community order requirement for unpaid work in particular, Pin's study is nonetheless relevant and applicable to English community order requirements for which the offender's consent is required.

¹¹¹⁹ Ibid, 603-604.

¹¹²⁰ Ibid, 613-614.

¹¹²¹ Zedner, *Criminal Justice* (n 41), 199.

¹¹²² The concept of the 'Standard of Living' was first developed by Nobel Prize winning economist Amartya Sen (A Sen and others, *The Standard of Living* (Cambridge University Press 1987), 20-38). Von Hirsch and Jareborg built further on this notion and used it to create an objective metric for gauging crime seriousness (A von Hirsch and N Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1; von Hirsch and Ashworth (n 43), 186-219). Schiff used the idea of a 'Living Standard' to gauge the severity of sentences and develop the Criminal Punishment Severity Scale (M Schiff, 'Gauging the Intensity of Criminal Sanctions: Developing the Criminal Punishment Severity Scale (CPSS)' (1997) 22 *Criminal Justice Review* 175).

experienced as such.¹¹²³ A community sentence should therefore not always be considered a more lenient alternative.

Secondly, in comparison to the procedural forms of offender agency discussed in the previous chapter, consent is a more direct form of offender agency. The pre-sentence report (PSR), the defence plea in mitigation, and the *Newton* hearing facilitate the offender's agency to some extent but through the defence lawyer.¹¹²⁴ It was argued that this is principally defensible, since the current sentencing system is not set up to let offenders engage directly with the court. But it remains a paradox that punishment is a grave intrusion into individual liberty and yet in the current system those who suffer this intrusion are discouraged from playing a direct part in determining the sentence imposed on them. In theory, asking the offender's consent to a particular sentence is more consistent with the idea that it is the offender – not his defence lawyer or the State – who will have to undertake the punishment. It follows logically that the offender is the one who needs to give explicit consent. Nonetheless, it is likely that in practice the offender's consent or willingness to comply with the requirements of the sentence is communicated by someone else, namely by the probation officer through the PSR,¹¹²⁵ and by the defence lawyer verbally in court.

The third and fourth characteristic of consent are interrelated: consent is both a binary and dispositive form of offender agency. Consent is binary in the sense that the offender's agency is limited to either accepting or refusing the sentence proposed by the court. Consent is dispositive in the sense that the offender has a direct influence on the type of punishment that

¹¹²³ See Roberts, *The Virtual Prison* (n 784), ch 5: Roberts shows that lengthy community sentences can be experienced as more burdensome than short prison terms.

¹¹²⁴ Chapter 7.

¹¹²⁵ Council of Europe, Recommendation CM/Rec (2017) 3 on the European Rules on Community Sanctions and Measures, adopted by the Committee of Ministers on 22 March 2017 (ERCSM), commentary to Rule 56. See n 1132.

is imposed. Giving consent enables the imposition of a particular community order. A refusal to consent allows for the imposition of custody at the outset, assuming the offence is punishable with imprisonment. In those instances where the offender's effective choice is between a community sentence and a lengthy term of imprisonment, it is questionable to what extent consent can ever be freely given and can constitute a meaningful expression of agency.¹¹²⁶ However, the fact that refusing consent can immediately warrant a custodial sentence does not mean that the court cannot consider other forms of community sentence to which the offender might consent or for which consent is not required.¹¹²⁷ When consent was still a requirement for the probation order in England and Wales, absence of consent would also sometimes lead to the imposition of a fine rather than a prison sentence.¹¹²⁸

The binary and dispositive nature of consent set it apart from the procedural forms of offender agency discussed in the previous chapter, such as the PSR and the defence speech in mitigation. Procedural forms of offender agency offer more freedom in terms of what the offender can communicate to the court, although the content of the communication remains restricted to what is legally determined as relevant content of the PSR and what constitute mitigating factors. They allow the offender to exercise his fair trial rights in the sentencing process but do not necessarily guarantee any impact on the quantum or mode of punishment.

¹¹²⁶ See below Section 8.2.4.

¹¹²⁷ M Watkins, *The Sentence of the Court: An Outline of the Law and Practice of Sentencing in Magistrates' Courts* (4th edn, Waterside Press 2003), 57.

¹¹²⁸ Raynor (n 98), 299.

8.2.3 The rationale for consent

8.2.3.1 *Specific rationale*

There are differences in both the origin and significance of consent among different community sanctions.¹¹²⁹ As treatment-focused community order requirements entail referral to an institution for treatment purposes, consent can be explained on grounds of medical ethics.¹¹³⁰

The principle of autonomy in medical ethics requires that treatment shall only take place if the individual consents to it.¹¹³¹ Rule 5 of the European Rules on Community Sanctions and Measures (ERCSM) states that a community sanction or measure shall never involve medical or psychological treatment which is not in conformity with internationally adopted ethical standards.¹¹³² The accompanying commentary to this Rule suggests that informed consent to treatment is essential, though it may not always be sufficient to guarantee the ethical justifiability of an intervention.¹¹³³

With respect to community service, part of the rationale for consent may have been that the community service was to be implemented by probation services, which were also responsible for implementing probation orders for which consent was a familiar requirement.¹¹³⁴ However, the predominant justification for the requirement of consent was the prohibition on forced labour enshrined in international conventions and national

¹¹²⁹ Canton, 'Yes, No, Possibly, Maybe' (n 98), 213.

¹¹³⁰ Ibid, 213-214.

¹¹³¹ Ibid, 211.

¹¹³² Council of Europe, Recommendation CM/Rec (2017) 3 on the European Rules on Community Sanctions and Measures, adopted by the Committee of Ministers on 22 March 2017 (ERCSM). This Recommendation replaces the previous Council of Europe, Recommendation No R (92) 16 on the European Rules on Community Sanctions and Measures, adopted by the Committee of Ministers on 19 October 1992 (R (92) 16 on ERCSM). The main aims of the European Rules are to safeguard the rights of offenders and supply guidelines for good practice. They are not a Treaty and therefore not legally binding. However, they may have indirect legal impact in the Council of Europe member states (Morgenstern and Larrauri (n 1091), 128-129).

¹¹³³ ERCSM, commentary to Rule 5.

¹¹³⁴ Canton, 'Yes, No, Possibly, Maybe' (n 98), 212.

constitutions.¹¹³⁵ Under Article 4(2) ECHR ‘no-one shall be required to perform forced or compulsory labour’. In 1972, when the community service order was first introduced in England,¹¹³⁶ it was thought necessary to insert a requirement of the offender’s consent as a way of avoiding infringement of Article 4(2) ECHR.¹¹³⁷ England abolished the requirement of consent to community service in 1997,¹¹³⁸ the year before the Human Rights Act 1998 came into force which enacted the ECHR into domestic law. In the wake of the adoption of the Human Rights Act 1998, the question arose as to whether it had re-introduced the requirement of consent in relation to sentences involving work in the community, though this view is now not widely held.¹¹³⁹ A re-examination of the requirements set by Article 4 ECHR in light of the subsequent European case law suggested that the earlier legislators may have been too cautious.¹¹⁴⁰ The ECtHR held in *Van der Mussele v Belgium* that compulsory labour would only violate Article 4(2) ECHR if it was performed by a person against his will, and if the obligation to carry out the work was ‘unjust’ or ‘oppressive’.¹¹⁴¹ Additionally, it was thought that true consent is often illusory, since the probable alternative sentence would be imprisonment.¹¹⁴² In that sense, the abolition of the requirement was said to give statutory effect to the existing reality.¹¹⁴³ However, in practice it remains recommended that the court seeks an assurance from the offender that he is prepared to comply with the order and abide by

¹¹³⁵ Van Zyl Smit (n 92), 325; Home Office (n 1093), 16, para 4.20.

¹¹³⁶ CJA 1972, s 15(2).

¹¹³⁷ B Wootton, *Crime and Penal Policy: Reflections on Fifty Years' Experience* (Allen and Unwin 1978), 123; Emmerson and others (n 717), 863.

¹¹³⁸ C(S)A 1997, s 38.

¹¹³⁹ Watkins (n 1127), 57.

¹¹⁴⁰ Home Office (n 1093), 16, para 4.20.

¹¹⁴¹ *Van der Mussele v Belgium* (1984) 6 EHRR 163 [37].

¹¹⁴² Home Office (n 1093), 17, para 4.23.

¹¹⁴³ Emmerson and others (n 717), 864.

its terms.¹¹⁴⁴ This is effectively what English courts do, by seeking ‘de facto consent’ and thus inviting the offender to exercise agency informally, as Section 8.2.3.2 argues.¹¹⁴⁵

The requirement of consent to electronic monitoring could be explained as in accordance with Article 8 ECHR right to privacy of the offender and his family. When electronic monitoring programmes were first introduced around the world, it was suggested that electronic monitoring could turn a person’s home into a prison, and that it was a slippery slope from allowing widespread use of electronic monitoring to endorsing a surveillance state like the one described in George Orwell’s novel ‘1984’ in which the government strictly monitors citizens’ communication and movements.¹¹⁴⁶ However, a commitment to comply with Article 8 ECHR is not frequently mentioned nowadays as a rationale for the requirement of consent to electronic monitoring in England. Instead, at present the requirement of consent to electronic monitoring is most often explained as a means of gauging the offender’s willingness to comply with the order,¹¹⁴⁷ as the next section explains.

8.2.3.2 *General rationale*

The one common theme that emerges for almost all community sentences that require consent is that consent is considered an indication of the offender’s willingness to comply or even cooperate actively in the implementation of the sentence.¹¹⁴⁸ Rule 56 ERCSM stipulates: ‘[a] community sanction or measure shall only be imposed when the appropriate conditions or obligations have been decided upon and it is known that the suspect or the offender is likely to

¹¹⁴⁴ Watkins (n 1127), 57.

¹¹⁴⁵ Canton, ‘Yes, No, Possibly, Maybe’ (n 98), 218-219.

¹¹⁴⁶ John Howard Society of Alberta, *Electronic Monitoring* (2000) <<https://www.johnhoward.ab.ca/document/electronic-monitoring-2000/>> accessed 17 April 2019, 9.

¹¹⁴⁷ Council of Europe, Recommendation CM/Rec (2014) 4 on Electronic Monitoring, adopted by the Committee of Ministers on 19 February 2014 (CM/Rec (2014) 4 on EM), Rule 15 and accompanying commentary.

¹¹⁴⁸ Canton, ‘Yes, No, Possibly, Maybe’ (n 98), 220.

co-operate and comply with them.’ The official commentary to Rule 56 gives some further indication as to why consent is required for community sanctions:

Unlike the punishments of imprisonment and fines, which can be coercively enforced regardless of the will of the individuals concerned, ideally community sanctions and measures require the co-operation of the individual if they are to achieve their aims. If someone is manifestly not prepared to co-operate and comply with appropriate conditions there would seem to be little point in a court deciding on a community sanction or measure.

The reason for asking an offender’s consent is thus mainly a pragmatic one: if the offender indicates from the outset that he will not comply with the requirements, imposing the sanction nonetheless would be a waste of public resources from which a more willing offender might have benefited. Rule 56 and the accompanying commentary indicate that member states of the Council of Europe retain the freedom to impose a community sanction even if the offender does not consent, although they suggest that it would be undesirable for a court to operate in this manner.¹¹⁴⁹ It is considered prudent for courts to seek an assurance or at least indication of commitment to comply.

This rationale underpinned at least partly the requirement of consent to the former community service sentence, in addition to the commitment to respect the prohibition of compulsory labour enshrined in Article 4 ECHR. This finds support in the autobiography of Baroness Wootton, who was Chair of the Government Advisory Council on the Penal System whose report proposed the introduction of community service: ‘... anyone who does not accept an obligation to perform community service would almost certainly be a most unsatisfactory worker and could make a farce of the sentence...’¹¹⁵⁰ The government wanted to make efficient

¹¹⁴⁹ Van Zyl Smit (n 92), 325. Van Zyl Smit’s analysis pertains to the previous version of the ERCSM (R (92) 16 on ERCSM). Since the content of the Rule on consent and the accompanying commentary have remained largely the same in the most recent 2017 version of the ERCSM, Van Zyl Smit’s analysis is relevant for the current situation.

¹¹⁵⁰ Wootton (n 1137), 123.

use of court and probation service resources in the implementation of community service and thus expected an indication of the offender's willingness to comply with the conditions of his punishment.

The requirement of consent to electronic monitoring in English law is arguably underpinned by the same rationale, in line with Rule 15 of the European Rules on Electronic Monitoring:

In order to ensure compliance [with an electronic monitoring order], different measures can be implemented in accordance with national law. In particular, the suspect's or offender's consent and co-operation may be sought, or dissuasive sanctions may be established.¹¹⁵¹

It makes little sense to use public resources to fit a tag if the individual has declared that he will cut the tag off at the earliest opportunity, that he has no intention of remaining indoors during required periods of curfew or home detention,¹¹⁵² or that he will not refrain from committing offences within the home while wearing the tag.

The Council of Europe suggests that it makes sense that consent is uniquely required for community sentences and not for imprisonment or fines,¹¹⁵³ even though it provides no explanation for this statement. Arguably, the lack of consent to prison is explicable because we rely on the institution to restrain the individual; physical compulsion is inherent in imprisonment. Fines can in theory be paid by anyone, whereas a community sentence can only physically be executed by the offender himself. The contrary view is that a community sanction is a sanction like any other and that a court may impose it whenever it deems it appropriate. If the offender then refuses to cooperate in the implementation, the law dealing with failure to

¹¹⁵¹ CM/Rec (2014) 4 on EM, Rule 15.

¹¹⁵² Ibid, commentary to Rule 15.

¹¹⁵³ ERC SM, commentary to Rule 56.

comply must simply take its course.¹¹⁵⁴ This view was clearly expressed in the Home Office statement on the abolition of consent to probation and community service.¹¹⁵⁵ Since probation and community service were sentences, it made sense to treat them in the same way as imprisonment and fines which do not require consent. The government stated that once a sentence was passed, as with a fine, it is up to the offender whether to comply with the order or not. In the same way that failure to pay a fine will lead to imprisonment for default payment, failure to comply with a community sentence should carry the risk that a custodial sentence will be substituted.¹¹⁵⁶

In comparison to some other countries where consent applies to all or most community sanctions and measures,¹¹⁵⁷ England and Wales stand out because formal consent is not normally required. Even though formal consent is only required for a handful of community order requirements, English courts have a practice of seeking ‘de facto consent’.¹¹⁵⁸ This entails that, despite the absence of a formal requirement of consent, courts will nonetheless explore whether an offender would be willing to comply with a community order. De facto consent is sought through PSRs,¹¹⁵⁹ which is in line with the ERCSM suggestion that PSRs can be useful to determine and inform the court about the kind of conditions that would be appropriate and whether an offender would be willing to co-operate.¹¹⁶⁰ English courts only rarely impose a community order without requesting a PSR,¹¹⁶¹ and community orders are unlikely to be

¹¹⁵⁴ Van Zyl Smit (n 92), 325.

¹¹⁵⁵ Home Office (n 1093).

¹¹⁵⁶ Ibid, 43-44, para 11.2 and 11.4.

¹¹⁵⁷ See n 1090.

¹¹⁵⁸ Canton, ‘Yes, No, Possibly, Maybe’ (n 98), 218.

¹¹⁵⁹ Home Office (n 1093), 43, para 11.2.

¹¹⁶⁰ ERCSM, commentary to Rule 56.

¹¹⁶¹ A court is required to consider a PSR before forming its opinions about a defendant’s suitability for a community order (CJA 2003, s 156(3)), unless the court deems it unnecessary to obtain such a report (CJA 2003, s 156(4)).

suggested in the PSR unless the offender has indicated his willingness to cooperate.¹¹⁶² If the offender indicates clearly that he will not cooperate, courts will be less inclined to impose an order, despite the fact that consent is not required and that courts have the power to impose a community order against the offender's will. This ties back to what was argued in the previous chapter, namely that when PSRs are based on a discussion with the probation officer, they can constitute a vehicle – albeit an imperfect one – for indirect offender agency.¹¹⁶³ The approach of seeking de facto consent helps to make good use of finite resources, and lowers the risk of having to bring enforcement proceedings¹¹⁶⁴ or resort to a custodial sentence in case of breach.¹¹⁶⁵ It thus seems that, in practice, although there is no formal requirement of consent, in respect of community orders the offender can exercise agency informally.

Despite the widespread acceptance that consent indicates willingness to comply with the requirements of a sentence, it is questionable whether the two should be equated. The binary nature of consent may make it ill-suited to reflect the offender's actual motivation to cooperate. The offender may also feel he does not have much choice but to consent if the alternative is imprisonment. These elements are integral to the question of to what extent consent is a desirable vehicle for offender agency, as the next section explores.

¹¹⁶² Canton, 'Yes, No, Possibly, Maybe' (n 98), 218-219.

¹¹⁶³ Section 7.1.

¹¹⁶⁴ Watkins (n 1127), 57.

¹¹⁶⁵ On court powers in case of breach of an order: CJA 2003, s 179 and sch 8.

8.2.4 A desirable vehicle for offender agency?

8.2.4.1 *The theoretical value of consent*

Consent could be considered a formal expression of self-determination. The value of consent relates to the principle of autonomy, choice, and an individual's ability and liberty to act.¹¹⁶⁶

Morgenstern claims that, although asking the offender's consent to a community order if the alternative is imprisonment is effectively to ask him to make a choice between two evils, 'it remains a choice and thus accepts the convict as autonomous person'.¹¹⁶⁷ Nellis argues that asking formal consent could be 'a way of showing respect to an offender, a preliminary gesture of trust in him, insofar as he is being asked to promise to abide by the rules being imposed on him and to make a choice about the way he will behave in the future.'¹¹⁶⁸ This would suggest that asking the offender's consent, at least in theory, can be a way of engaging the offender in the process of determining his sentence.

Furthermore, recent research supports the view that when people are under supervision in the community as a result of offending, their views and choices matter. Therapeutic jurisprudence scholars argue that if individuals are coerced to participate in a treatment programme, for instance by court order, this will impede genuine change.¹¹⁶⁹ It has been said that offenders may consent to a community sentence because the alternative sentence is more onerous, but that giving the offender the opportunity to make this choice for a less severe

¹¹⁶⁶ Canton, 'Yes, No, Possibly, Maybe' (n 98), 210.

¹¹⁶⁷ C Morgenstern, 'The Requirement of the Offender's Consent to Community Service' in M Groenhuijsen, T Kooijmans and T de Roos (eds), *Fervet Opus: Liber Amicorum Anton van Kalmthout* (Maklu 2010), 160.

¹¹⁶⁸ M Nellis, *Standards and Ethics in Electronic Monitoring: Handbook for Professionals Responsible for the Establishment and the Use of Electronic Monitoring* (Council of Europe, 2015), 28. See also Morgenstern and Larrauri (n 1091), 148.

¹¹⁶⁹ Winick, 'Competency to Consent to Treatment' (n 532), 73.

penalty can still make the offender feel trusted and help motivate him to change.¹¹⁷⁰ A fundamental principle of procedural justice is that people are more likely to comply with requirements that they regard as fair and legitimate and where their rights and interests are respected,¹¹⁷¹ which is also emphasised in the ERCSM.¹¹⁷² Raynor suggests that, if we accept the procedural justice argument that legitimacy enhances compliance, then ‘there would appear to be greater potential for perceived legitimacy in a system that takes defendants’ choices seriously in Court than in one that appears not to be interested in them.’¹¹⁷³ Consistent with these views, the value in asking the offender’s consent and thus allowing them to exercise agency in respect of their sentence is that doing so may foster compliance with the order and help offenders reform.

It is questionable, however, whether in practice offenders regard their sentence as fair and legitimate because they have been asked to consent to it, and whether a requirement of consent entails that offenders are not being coerced into a community order. As the following sections argue, in practice the coercion surrounding consent and its binary and dispositive nature not only make consent a poor indicator of likely compliance but may also prevent it from being an optimal vehicle for offender agency.

8.2.4.2 Consent in a coercive framework

Any form of offender agency needs to be understood in the inevitably coercive framework of the criminal justice system. The issue is not whether offenders can *ever* exercise agency in the criminal justice system, but rather when the coercive confines are such that they undermine

¹¹⁷⁰ Nellis (n 1168), 29.

¹¹⁷¹ See e.g. Tyler, *Why People Obey The Law* (n 502).

¹¹⁷² ERCSM, commentary to Rule 29.

¹¹⁷³ Raynor (n 98), 302.

agency altogether and whether that is justified. One could argue that consent is inconsistent with state punishment and that any obligation that is voluntarily accepted cannot constitute punishment, but this view is rather simplistic.¹¹⁷⁴ Arguably, the relation between consent and state punishment is more nuanced. Any notion of voluntariness in the criminal justice system is likely to be constrained by the (real or perceived) consequences of a particular choice. If the refusal of consent would result in a sentence that is only marginally more onerous, consent is somewhat bounded, but this does not necessarily mean that consent as an expression of offender agency is entirely meaningless.

Yet, there are occasions where it is doubtful whether the offender's expression of consent to undertake a community sentence is voluntary considering the coercive constraints of the criminal justice system.¹¹⁷⁵ The offender is not in a good position to withhold consent if the alternative to a community order is likely to be a much harsher, such as a long-term prison sentence.¹¹⁷⁶ Nellis' argument that asking the offender's consent conveys respect towards him¹¹⁷⁷ is less convincing if this occurs in the shadow of considerably harsher punishment. In those instances where accepting the community order is the only way to avoid a considerably more onerous sentence, any purported exercise of agency by giving consent is merely perfunctory. Courts may simply ask the offender's consent to comply with a legal requirement. Consent creates the illusion of an agreement between the offender and the state but disguises the power balance between those two parties which precludes a veritable agreement. A better approach might be for the state to gauge the offender's willingness to comply with a sentence

¹¹⁷⁴ Campbell, Ashworth and Redmayne (n 91), 189.

¹¹⁷⁵ See e.g. Van Zyl Smit (n 92), 324; Dubber, 'The Criminal Trial and the Legitimation of Punishment' (n 35), 96-97.

¹¹⁷⁶ Home Office (n 1093), 17, para 4.23.

¹¹⁷⁷ Nellis (n 1168), 28.

in a dialogue in court, supported by the PSR, without necessarily attaching formal legal consequences to this.

8.2.4.3 *The binary nature of consent*

Consent's binary nature oversimplifies a more complex reality in which offenders may be rather ambivalent about the possible sentences they are facing and about their motivation to comply with the order and change their behaviour.¹¹⁷⁸ More sophisticated understandings of motivation, which account for the fact that motivation can change over time, call into question the notion of 'an exclusive categorisation between those who are motivated to change and those who are not.'¹¹⁷⁹ There will be many circumstances in which the offender's attitude towards his sentence cannot be expressed in a binary fashion, but is instead situated on a spectrum 'somewhere between active enthusiasm and blunt refusal, with many points of *maybe* and *possibly* in between'.¹¹⁸⁰ At one end of the spectrum is the scenario envisaged by the European Rules on Electronic Monitoring, of the offender stating from the outset he has no intention to comply and will do anything to sabotage the order.¹¹⁸¹ At the other end is the rare occasion where an offender is wholly convinced that a particular community order will allow him to address the problems underlying his offending behaviour. But it is more common that any consent or lack thereof is hedged with uncertainties along the lines of '*I would like to change but don't think I can, I don't have any confidence that probation can change me, I'll do this if I must.*'¹¹⁸² What is expressed in court as a refusal to consent may actually reflect the offender's

¹¹⁷⁸ Canton, 'Yes, No, Possibily, Maybe' (n 98), 215.

¹¹⁷⁹ Ibid, 220.

¹¹⁸⁰ Ibid, 215.

¹¹⁸¹ CM/Rec (2014) 4 on EM, commentary to Rule 15.

¹¹⁸² Canton, 'Yes, No, Possibily, Maybe' (n 98), 215 (emphasis part of the quote).

doubt about his ability to cooperate or a fear of being unable to change and desist.¹¹⁸³ To the extent that motivation to reform fluctuates and is not fixed at any point in time, it would be naïve to think that a one-time dialogue between the judge and offender at the sentencing hearing of the kind suggested in Chapter 5 could gauge the full extent of the offender's motivation. However, such a dialogue may still be better suited to uncover the nuances in motivation than a requirement of purely formal consent.

There is a difference between formal consent – which is expressed in court, at a single moment in time, and is binary – and substantive consent – which involves continuing active engagement with the requirements of the sentence and is best seen on a spectrum.¹¹⁸⁴ While the two concepts may be related, they should not be equated. Cooperation in the implementation of the sentence does not actually depend on the offender giving consent. Consent is not *required* in order for the offender to comply with the sentence. At most, consent can be considered an indication of willingness to comply, but it cannot be evidence of such willingness. Canton therefore argues that, while formal consent has a value as a significant public declaration in court of the individual's intent, it is not sufficient to depend on this as a guarantee of future active cooperation.¹¹⁸⁵ Raynor, who emphasises the potential value of consent as a way of enhancing legitimacy and taking offenders' agency seriously, concedes that consent can only truly be meaningful '[i]f it is backed up with careful discussion of options, requirements and the purpose of probation'.¹¹⁸⁶ It may be the case that in practice some judges not only ask the offender's consent but use this as an opportunity to consider the offender's reasons for consenting or refusing consent, or probe the offender's willingness to abide by the

¹¹⁸³ ERCSM, commentary to Rule 56.

¹¹⁸⁴ Canton, 'Yes, No, Possibly, Maybe' (n 98), 221.

¹¹⁸⁵ Ibid, 221.

¹¹⁸⁶ Raynor (n 98), 302.

order, and explore alternatives accordingly. Only empirical research would be able to demonstrate or rebut this conclusively, which is beyond the scope of this thesis. It suffices to conclude that the requirement of formal consent leaves little scope for a dialogue between the judge and offender, in which the judge can gauge the offender's true motivation and the offender is offered the opportunity to work constructively with the judge to decide on the appropriate sentence, as an agentic sentencing model would require.

8.2.4.4 The dispositive nature of consent

Finally, consent is a dispositive form of offender agency, which entails certain risks. There is a danger that sentencing becomes too transactional. While offering the offender the opportunity to exercise agency should invite him to reflect on what would be the most appropriate sentence in his case, dispositive forms may rather encourage a cost/benefit analysis about what the most favourable outcome of the sentencing process would be for him. This is true regarding the two dispositive forms of offender agency explored in this chapter. The sentence discount for guilty plea invites the offender to weigh up waiving his fair trial rights and receiving a lower sentence against exercising his right to trial and risking a considerably higher sentence. Even if consent to sentence would be underpinned by a principled commitment to uphold the offender's agency to acknowledge him as a moral agent and induce reform, there would be nothing stopping the offender from consenting for extraneous reasons. An offender may consent to a community order, not because he is willing to repair the harm done to the community by way of a community sentence or because he is committed to addressing the problem underlying his offending behaviour, but rather because he wants to avoid prison.¹¹⁸⁷ Similarly, for some offenders a short period in prison may seem more attractive than a lengthy community order

¹¹⁸⁷ Canton, 'Yes, No, Possibly, Maybe' (n 98), 219.

which requires self-discipline and prolonged effort.¹¹⁸⁸ Consent in court can be unthinking and reflect only ‘token compliance’.¹¹⁸⁹ What is principally objectionable to these transactional aspects of sentencing is that the scope for exchange of viewpoints and deliberation about the appropriate sentence is significantly reduced in favour of a narrow focus on getting the best outcome, which often means the least onerous sentence. This is why the thesis has argued that a dialogical paradigm is preferable to a negotiated paradigm for agentic sentencing.¹¹⁹⁰ It is true, however, that a dialogical paradigm in which agency is non-dispositive does not eliminate the risk that the offender may approach the sentencing dialogue with the aim of maximising his self-interest.¹¹⁹¹ But at least it allows more scope for gauging the offender’s true motivation over the course of a dialogue, and it does not encompass the guarantee that the offender’s actions will have a direct impact on the sentence, regardless of the offender’s actual motivation.

Some of the risks inherent in dispositive forms of offender agency were implicit in the government’s decision to abolish the requirement of consent to the former probation sentence and community service.¹¹⁹² The Home Office gave the following reason given for its abolition:

[The requirement of consent] appears anomalous to many sentencers, and a derogation from the authority of the court. Consent given in such circumstances may not, in any event, be a good guide to a defendant’s likely compliance with an order, and the whole procedure can give the impression of a court being hesitant in its decisions or, worse, subject to the whims of an offender.¹¹⁹³

The government’s assertion that the requirement of consent would undermine the court’s authority, is exaggerated. The offender’s consent only has consequences for the *type* of

¹¹⁸⁸ Home Office (n 1093), 44, para 11.5.

¹¹⁸⁹ Raynor (n 98), 301-302.

¹¹⁹⁰ Section 5.6.

¹¹⁹¹ Section 6.3.1.

¹¹⁹² C(S)A 1997, s 38(2)(a); Home Office (n 1093).

¹¹⁹³ Home Office (n 1093), 43, para 11.1.

sanction that is imposed, not for the quantum of the sentence or for the rules that are subsequently applicable when carrying out the sentence. The state remains the authority that presents the offender with a binary option between a community sentence and a different type of sanction, and that imposes the sanction. The imposition of punishment remains a matter of public order.¹¹⁹⁴ Additionally, the notion of consent to a criminal sanction does not imply that the criminal sanction has become optional or that its imposition has become a matter of choice for the offender. In other words, the punishment is imposed, not because the offender consented, but because he was convicted.¹¹⁹⁵

Nonetheless, the Home Office's statement indicates that one of the perceived risks of asking the offender's consent is that offenders would be allowed to choose their own punishment.¹¹⁹⁶ This is clear from the assertion that making a sentence contingent on consent creates the impression that the court is 'subject to the whims of an offender'. Despite the somewhat populist nature of the expression, it is true that consent is dispositive and in that sense the offender does have some influence on his sentence which binds the court. In that sense, government was right to emphasise that it is a matter for the court, not the offender, to decide on the appropriate sentence.¹¹⁹⁷

Another argument that partly justified the abolition of consent is the paternalistic (though sometimes justified) argument that offenders might not always consent to something

¹¹⁹⁴ Pin (n 98), 603-605.

¹¹⁹⁵ Ibid, 612.

¹¹⁹⁶ See Nellis (n 1168), 24. Although Nellis' report concerns electronic monitoring, the explanation for the absence of a consent requirement is relevant to community sanctions more generally.

¹¹⁹⁷ Home Office (n 1093), 43, para 11.2 and 44, para 11.5.

that would benefit them and would only later realise its merits after it has already been imposed on them.¹¹⁹⁸

An offender who appears not to be well motivated to abide by the terms of an order when it is only a possibility, may take a different view once such a sentence is passed; or a probation officer may succeed in convincing the offender of the value of a proposed treatment programme.¹¹⁹⁹

The paternalism argument regarding consent has its merits. If we accept that state punishment can have a welfare-oriented dimension, the state may legitimately take a paternalistic stance in determining the sentence, as long as it remains responsive to how a particular punishment will impact upon the person and life of the offender.¹²⁰⁰ There may be occasions where an offender prefers a short term in prison over a longer community order which requires more effort,¹²⁰¹ even though he would benefit from it as it might allow him to address structural issues fuelling his offending behaviour. A requirement of purely formal consent does not invite the court to engage in a dialogue with the offender about why he might be refusing consent and explain why a community sentence might nonetheless be appropriate. Conversely, the danger of the paternalism argument is that it may perpetuate the idea that the state knows best and should not even engage the person who will serve the sentence in this discussion. Raynor argues that the abolition of consent to probation was partly driven by politicians who ‘do not find it unusual to decide what is best for others without asking them’.¹²⁰² Paternalism in sentencing could turn into an attitude of belittling and disregarding convicted offenders,¹²⁰³ which is in tension with

¹¹⁹⁸ Nellis (n 1168), 24.

¹¹⁹⁹ Home Office (n 1093), 43, para 11.2

¹²⁰⁰ See du Bois-Pedain (n 129), 218-221. For a counterview see Thorburn, ‘Proportionate Sentencing and the Rule of Law’ (n 260), 283-284. Thorburn emphasises the divergence between parental punishment and state punishment. While parents are legitimately concerned with their children’s welfare, the ‘liberal state’s legitimate coercive power is different in kind and much narrower in scope than parental power to discipline children’ (ibid, 283.)

¹²⁰¹ Home Office (n 1093), 44, para 11.5.

¹²⁰² Raynor (n 98), 302.

¹²⁰³ Ibid, 302.

the main argument of this thesis that there is value in respecting the offender's agency at sentencing. Yet, a requirement of formal consent seems ill-suited to respect the offender's agency. There is a middle ground between letting the offender dictate the terms of his sentence and regarding his views on the sentence as irrelevant. As this thesis has argued, a dialogue between the court and offender without the guarantee that the offender's viewpoint will influence the sentence might be the most optimal way of occupying that middle ground.

8.3 Conclusion

This chapter has explored dispositive instances of offender agency that allow the offender to have some influence over the type and/or quantum of his sentence. These dispositive forms of agency are characterised by the offender's ability to negotiate and/or consent. *Prima facie*, negotiation and consent would seem to be most conducive to facilitating the offender's agency, since they give the offender some control over the sentence. However, this assumption may be misguided, as is evidenced by the sentence discount for guilty plea. Without any power to negotiate the charges and receive a reduced sentence, defendants would plead guilty less often and this would run counter to the objective of relieving the courts of the costly and time-consuming trial process. But despite the appearance of agency through negotiation and consent, in practice the various sources of coercion inherent in the current guilty plea mechanism undermine defendant agency. The English guilty plea mechanism may effectively use the defendant's own decision-making power against him. However, provided sufficient safeguards are put in place, in theory a guilty plea mechanism could facilitate the defendant's agency in the resolution of his case to some extent.

The requirement of consent to particular sentences facilitates offender agency to some degree. Giving or refusing consent is in principle an expression of self-determination and thus of agency. This agency is justifiably constrained to preserve court's authority to decide the

final sentence. The thesis does not dispute that valuing offenders' choice and viewpoints and engaging them in decision-making can be a sign of respect and can help motivate offenders to reform and induce compliance.¹²⁰⁴ However, formal consent seems ill-suited to achieve these aims. If the alternative to a community sentence is a lengthy prison sentence, consent as an expression of offender agency is an illusion. The binary and dispositive nature of consent mean the offender may use it to secure a more favourable sentence, without much scope to gauge the offender's true motivation. While the agentic sentencing model proposed in Chapter 5 does not avoid this risk entirely either, it allows greater scope for a constructive dialogue between the court and offender about which sentence would be most appropriate. There may be reasons to preserve the requirement of formal consent, but as a means to facilitate the offender's agency it is not wholly adequate.

Part III has demonstrated that there are few instances of offender agency in the sentencing system in England and Wales. Most of them facilitate the offender's agency at least to some extent. However, these instances remain imperfect vehicles for offender agency. The sentencing system is not set up to facilitate the offender's agency in a principled manner. It is not conducive to offering the offender the opportunity to interact directly with the judge. Neither is it designed to encourage the offender to reflect on what might be an appropriate sentence in light of a principled justification of punishment. This is partly because the criminal process is complex and technical, characterised by formal courtroom language, and hence dominated by professionals. Consequently, in the current system the offender's agency is most often conveyed indirectly through their counsel or the probation officer. It is also partly because some aspects of the criminal process that seemingly allow the offender to exercise agency, notably the guilty plea, belie the reality that the emphasis is on efficient administration of

¹²⁰⁴ See e.g. ERC SM, commentary to Rule 29; Winick, 'Competency to Consent to Treatment' (n 532), 73; Tyler, *Why People Obey The Law* (n 502); Raynor (n 98), 302.

justice, which can come at the cost of offender agency. Another factor is that the current sentencing system fails to articulate a clear overarching or dominant sentencing principle, but which in section 142 CJA 2003 lists a range of sentencing aims in no particular order, and has been described by Ashworth as ‘the worst of “pick-and-mix” sentencing’.¹²⁰⁵ Absent clearly articulated principles of sentencing and justification of punishment, it is difficult to determine on what grounds and in what ways the offender should be engaged in the process of determining his sentence. While offender agency is not inexistent, current practice is still far removed from a conception of sentencing as something done with offenders, rather than to offenders. The absence of a sentencing dialogue, which aims to facilitate the offender’s agency to respect the offender as a moral agent and increase the likelihood of reparation and reform, demonstrates the gap between the normative ideal of offender agency developed in Part II and current practice analysed in Part III.

¹²⁰⁵ Ashworth, *Sentencing and Criminal Justice* (n 26), 82.

CONCLUSION

This thesis has asked on what grounds and to what extent offenders should exercise agency at sentencing. To that end, the thesis conducted a theoretical enquiry into the arguments and scope for offender agency in a state-centred criminal justice system, deriving from existing theories of punishment and criminal justice. It then developed a normative framework for offender agency at sentencing by setting out the justifications for offender agency, exploring the scope of and possible objections to an agentic sentencing model. Finally, the thesis analysed the status quo on offender agency in sentencing in England and Wales, thus addressing the question of to what extent offenders can exercise agency in current practice.

By offering a conceptual and normative framework for offender agency, as well analysing current English sentencing practice based on that framework, the thesis has sought to make a lasting contribution to the fields of sentencing, penal theory, and criminal justice. The thesis' main arguments are that there is both value in and scope for allowing offenders to exercise agency at sentencing in a state-centred criminal justice system, but that current sentencing practice does not respect offender agency in a principled manner. This concluding chapter sets out the thesis' contribution and its limitations, and suggests further areas for research.

The thesis' contribution and limitations

The thesis defined offender agency as the offender's capacity to exercise choice and play an active part in the sentencing process. This particular use of the term agency is integral to the thesis' central argument. To argue that there is value in allowing offenders to exercise agency at sentencing is to make the larger claim that the offender's agency is and should be a central concept at various stages of the criminal process. First, the commitment of a liberal constitutional democracy to engage with offenders as responsible moral agents is reflected in

the legal notion of responsibility for the commission of the offence, in the justification of punishment in desert theory, and in forgiveness-based conceptions of punishment. Secondly, instances of defendant agency can be found in the phase of crime investigation, prosecution, not least plea bargaining, and the contested criminal trial. Thirdly, offender agency is equally important in the implementation of a sentence on a responsive censure-based account and in certain conceptions of rehabilitation and desistance. Yet in comparison to these other stages of the criminal process, the question of whether offender agency is and should be a central concept *at sentencing* was hitherto underexplored.

Insofar as the issue of offender agency has been studied before in criminal justice, scholars have mainly explored the scope for a more engaged role of the offender in the context of restorative justice (RJ). This is not surprising, considering the emphasis RJ places on the active role of the victim and offender in the resolution of the ‘conflict’. However, by encouraging the victim and the offender to resolve ‘their’ conflict, RJ significantly limits, or even undermines, state authority to punish. By contrast, the thesis challenged the assumption that offender agency is inconsistent with state punishment. It defended a public interest account of the criminal law and the institution of punishment and argued that there is scope – albeit limited – for offender agency even in a state-centred sentencing process.

The thesis explored the arguments and scope for offender agency in respect of communicative variations of desert theory, Lacey and Pickard’s theory of punishing with forgiveness, and therapeutic jurisprudence. There are important differences between the three theories that offer scope for offender agency, not least in their conception and justification of punishment, and their respective emphases on censure, forgiveness, and therapeutic aims. Yet, the thesis has demonstrated that jurisprudential arguments for offender agency could derive from more than one state-centred theory of punishment, and indeed that seemingly dissimilar

accounts of punishment converge to an extent in respect of offender agency. All three theories are particularly suited as theoretical bases for offender agency at sentencing owing to their pluralistic nature.

This pluralism is evident on Duff's account, since the aims of the communicative process are more varied than just the communication of deserved censure. Censure is integral to inducing repentance, reform, and reconciliation. By contrast to von Hirsch's and Bennett's expressive theories of punishment, Duff's responsive censure-based account of punishment allows more scope for offender agency. Consistent with Duff's dialogical conception of punishment, it was argued that allowing the offender to engage in sentencing may better serve the aims of the communicative process of censure. It emerged that responsible moral agency is not only a central precept in Duff's communicative censure-based theory but also in Lacey and Pickard's model of punishing with forgiveness. While Lacey and Pickard reject the strong association between punishment and blame that characterises the retributivist tradition of punishment, their account reconciles a concept frequently associated with just deserts – that is they emphasise the offender's moral agency and corresponding responsibility for their crime – with a rehabilitative ideal. Even though there are important differences between their respective theories, both Lacey and Pickard's and Duff's accounts offer arguments and scope for a more active role for the offender at sentencing, based on the value they attribute to responsible moral agency, as well as reparation and reform.

While therapeutic jurisprudence (TJ) is consequentialist in its normative focus on enhancing the therapeutic benefits of the law and reducing its anti-therapeutic effects, arguably in its application to sentencing and punishment it should also be considered a pluralistic theory. In theory, TJ presents a conception of punishment where the punitive and therapeutic aims work in a complementary fashion. The thesis argued that in theory in a therapeutic framework

the scope for offender agency is underpinned by a commitment to rehabilitation with respect for the individual, and that offender agency can be conceptualised both as expression and self-determination. However, the practical application of therapeutic principles in problem-solving courts suggests a more singular focus on treatment, not void of paternalism and coercion.

While these accounts of punishment provide scope and arguments for engaging the offender more actively at sentencing, none of them are theories of offender agency themselves. In Part II, the thesis addressed questions beyond those raised by these accounts of punishment, in order to develop a fuller normative account of offender agency at sentencing. Drawing on Part I, it set out the theoretical justifications for offender agency in a state-centred criminal justice system. The intrinsic ethical justification is that allowing offenders to exercise agency at sentencing is more respectful of the offender as a responsible moral agent. The consequentialist justification is that doing so may increase the likelihood that reparation and rehabilitation are achieved. The thesis argued that this consequentialist justification for offender agency is secondary to the ethical justification. Offender agency at sentencing should not be primarily outcome-oriented. Even if there is no added benefit in terms of reparation and rehabilitation, offering the offender the opportunity to be engaged at sentencing is first and foremost justified on the grounds that it is more respectful of the offender as a moral agent.

The thesis explored what a sentencing system built more consistently around offender agency might look like and set out the defining principles of this agentic sentencing model. The thesis demonstrated that there is scope in a state-centred sentencing process for discursive engagement between the court and the offender. The very fact of offering the opportunity to engage in a dialogue about the sentence respects the offender as a responsible moral agent, in the sense that the offender's capacity to act and make choices is acknowledged, and allows him to play an active part in a process that directly concerns him.

In order to maintain the role of the state, constraints should be placed on the exercise of agency, including the principle that the offender's agency should be non-dispositive. While the offender should be offered the opportunity to express himself about the sentence and engage in a dialogue with the judge, it is paramount that the judge has the final say as to sentence. The offender may, however, communicate something that may materially affect the disposition, provided this is aligned with the public interest. Other constraints include that anything the offender says in the sentencing dialogue that may influence the disposition should be subject to prosecutorial scrutiny to preserve the adversarial process, and that the sentence should adhere to the principle of negative proportionality. To allow offenders to exercise agency without constraints would have problematic implications. At best, sentencing would become akin to a negotiation, which would give powerful offenders undue influence over their sentence or create the illusion for powerless offenders that they can have such influence while state coercion is disguised. At worst, sentencing and punishment would become privatised, thus eroding their public dimension and undermining the role of the state.

Since the role of the offender in the proposed agentic sentencing model is constrained by these limitations, one might ask whether the offender's role in the sentencing dialogue can still truly be considered an exercise of agency. The thesis has argued that to give offenders the opportunity to convey their views regarding the sentence, be consulted, and give information, is in itself a meaningful exercise of agency. It is conceded, however, that this conception of offender agency is more akin to expression than to power or influence on the disposition. Only for a minority of offenders would exercising agency at sentencing make a demonstrable *practical* difference by altering the type or quantum of punishment they receive. However, there is inherent value in offering offenders the opportunity to be engaged in the sentencing process, thereby respecting their agency at sentencing without detracting from the fundamental role of the state, which makes a *moral* difference in all cases.

The thesis considered some of the limitations and objections that could be levelled against agentic sentencing. The thesis rebutted the objections that offender agency is incompatible with state punishment, that sentencing cannot be viewed in dialogical terms, and that the offender's unwillingness to exercise agency could be an obstacle to agentic sentencing. Most of the objections pertain to the principle that offender agency should be non-dispositive and thus the offender should not have a *right* to influence the disposition, but that he *may* influence the sentence to the extent that his view is aligned with the public interest. The thesis refuted the possible objections that, if the offender says something on his own behalf but it is against the public interest to take this into account in determining the sentence, this may leave the offender feeling disempowered, offender agency may be used as a 'sweetener', or the sentencing dialogue may be considered a waste of court resources. There remains the risk, however, that offender agency could become tokenistic and little can be done to mitigate this without eroding the fundamental role of the state.

Some risks of agentic sentencing cannot be eradicated altogether but the thesis suggested ways in which they could be mitigated. If what the offender communicates *could* influence the disposition, there is the risk that offenders will seek to maximise their self-interest and secure the most lenient sentence possible, or that they may say something that may prejudice the judge against them, leading to a more severe sentence. The latter risk is exacerbated in respect of particular groups of offenders, whose communicative capacities are limited, which can be compounded by factors such as race and ethnicity, gender, and socio-economic status and class. Since there are both principled and practical objections to offender agency, some compromises may have to be made in deciding whether and how to implement the proposed agentic sentencing model in practice. However, none of these objections are such that they completely undermine the validity of the proposed agentic sentencing model.

Finally, the thesis explored instances of offender agency in current English sentencing practice and analysed them on the basis of the normative standards developed earlier in the thesis. It conceptualised the pre-sentence report, the defence plea in mitigation, the *Newton* hearing, and the right to appeal as procedural forms of offender agency, which are non-dispositive, since these instances generally do not allow the offender to have a direct influence on the outcome of the proceedings. It conceptualised the sentence discount for guilty plea and consent to sentence as dispositive instances of offender agency, which allow the offender to influence their sentence to some degree. The thesis has demonstrated that there is a gap between the normative ideal of offender agency established in Part II and current practice set out in Part III. The aforementioned instances allow the offender to exercise agency in respect of their sentence to some extent, but arguably not in the most optimal way possible suggested in Chapter 5. None of the instances discussed truly allow the offender to engage with the question of which response might be most appropriate to the offence he has committed and how the sentence may help facilitate reform and reparation. The current system is not set up to respect offender agency in a principled manner.

This does not entail, however, that sentencing practice could never be reformed to adopt more of the suggested principles of agentic sentencing. Exactly how practice could be more respectful of the offender's agency at sentencing requires further research, some of which will be suggested in the next section. While current practice may not be underpinned by a principled commitment to respect the offender's agency at sentencing and while agentic sentencing presents its own set of issues and complexities, the thesis has demonstrated that there is, at least in theory, value in and scope for allowing offenders to exercise agency at sentencing.

Future research

There is certainly scope and need for further research on offender agency. Empirical research, including observations in courtrooms and interviews with sentencers and offenders, could test the normative claims made in the thesis, and offer illustrative examples of a more agentic approach, or, perhaps, reveal additional grounds for objections. Further theoretical research could address the implications of agentic sentencing for the role of the victim. Furthermore, questions remain regarding whether and how an agentic sentencing model could and should be implemented in practice. More thought would need to be given to how such a model could fit with mandatory minimum sentences, sentencing guidelines, and how agentic sentencing would interact with the possibility for victims to make a victim personal statement. There is also scope for research that assesses what might be required in terms of additional court time to engage in the proposed dialogue and extra financial resources to give judges and lawyers the requisite training.

Concluding statement

It is conceivable that some of the thesis' conclusions could be met with resistance, both politically and from the wider public. In the public discourse about crime there is a concern that society's capacity to hold offenders responsible and accountable for misconduct is somehow threatened by an attitude of concern, respect, and compassion.¹²⁰⁶ Consistent with this discourse, the idea that those who have perpetrated a wrong should be allowed to express their view on the response to said wrong may seem counterintuitive at best, and morally objectionable at worst. Although these opinions on offender agency may be common and widespread, the thesis has sought to dispel such prejudices. While it is important to take public

¹²⁰⁶ Lacey and Pickard, 'From the Consulting Room' (n 34), 10.

opinion seriously if the idea that crimes are public wrongs and the public legitimacy of the criminal justice system are to be preserved, these views reflect a rather exclusionary approach to sentencing. The thesis has challenged this approach, by making a normative claim for why and how offenders should be more engaged in determining their punishment. Additionally, in a society where there is an increased tendency towards more automated decision-making and quantitative assessments in criminal justice,¹²⁰⁷ including in sentencing,¹²⁰⁸ the thesis has made the case for the importance of human dialogue as a vital element in responding to crime. By suggesting a conception of sentencing as a decision-making process to be done *with* offenders, rather than *to* offenders, the thesis has sought to contribute towards a more humane and inclusionary approach to sentencing.

¹²⁰⁷ See e.g. R Simmons, 'Quantifying Criminal Procedure: How to Unlock the Potential of Big Data in Our Criminal Justice System' [2016] *Michigan State Law Review* 947; R Brownsword and A Harel, 'Law, Liberty and Technology: Criminal Justice in the Context of Smart Machines' (2019) 15 *International Journal of Law in Context* 107; RM Re and A Solow-Niederman, 'Developing Artificially Intelligent Justice' (2019) 22 *Stanford Technology Law Review* 242.

¹²⁰⁸ See e.g. D Kehl, P Guo and S Kessler, *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing* (Responsive Communities Initiative, Berkman Klein Center for Internet & Society at Harvard Law School, 2017) <<https://dash.harvard.edu/handle/1/33746041>> accessed 2 August 2019; N Stoobs, D Hunter and M Begaric, 'Can Sentencing Be Enhanced by the Use of Artificial Intelligence?' (2017) 41 *Criminal Law Journal* 261; G Van Eijk, 'Socioeconomic Marginality in Sentencing': The Built-in Bias in Risk Assessment Tools and the Reproduction of Social Inequality' (2017) 19 *Punishment and Society* 463; K Hannah-Moffat, 'Algorithmic Risk Governance: Big Data Analytics, Race and Information Activism in Criminal Justice Debates' (2018) *Theoretical Criminology* 1; K Hannah-Moffat, 'Actuarial Sentencing: An "Unsettled" Proposition' (2018) 30 *Justice Quarterly* 270; K Hannah-Moffat and K Struthers Montford, 'Unpacking Sentencing Algorithms: Risk, Racial Accountability and Data Harms' in J W de Keijser, JV Roberts and J Ryberg (eds), *Predictive Sentencing: Normative and Empirical Perspectives* (Hart 2019).

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