

Temptations, Social Deprivation, and Punishment¹

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Abstract:

Andrew von Hirsch and Andrew Ashworth recently argued that there is generally a reason to punish a socially deprived offender less than his non-deprived counterpart (i.e. someone who is not socially deprived but is otherwise similar to the deprived offender in that he committed the same crime, caused the same harm, with the same degree of foresight, etc.), because deprived offenders generally face stronger temptations to offend than their non-deprived counterparts. In reply, I will argue that we should draw a distinction between (1) *facing* stronger temptations to offend when one offended and (2) *acting on* stronger temptations in offending. The distinction is analogous to Antony Duff's distinction between *having a reason for an action* and *acting on/for that reason*. After drawing the distinction, I will argue that while *acting on* stronger temptations in offending should be a mitigating factor, *facing* stronger temptations to offend *per se* should not be a mitigating factor. Moreover, I will argue that since it is not true that deprived offenders generally act on stronger temptations in offending, social deprivation cannot be defended as a general mitigating plea on the basis that deprived offenders generally act on stronger temptations in offending.

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0. Introduction

Should social deprivation be a mitigating factor? In other words, is there a reason to punish a socially deprived offender less than his non-deprived counterpart?² (By a deprived offender's 'non-deprived counterpart' I mean someone who is not socially deprived but is otherwise similar to the deprived offender in that he committed the same crime, caused the same harm, with the same degree of foresight, etc.)

Andrew von Hirsch and Andrew Ashworth recently advanced an argument to support the conclusion that there is generally (by 'general',³ I take von Hirsch and Ashworth to mean 'always, barring exceptional cases') a reason to punish a socially deprived offender less than his non-deprived counterpart.⁴ They wrote,

² I want to be non-committal as to whether the reason to punish the deprived offender less than his non-deprived counterpart, if it exists, derives from comparative or from non-comparative considerations (or both). For the distinction between comparative and non-comparative considerations, see, e.g., J Feinberg, 'Noncomparative justice', (1974) *Philosophical Review* 297-338; T Hurka, 'Desert: Holistic and individualistic' in S Olsaretti (ed), *Desert and Justice* (Oxford, OUP 2003). We can, in other words, frame our question this way: Suppose that a deprived offender has received an appropriate level of punishment. Is there any reason (comparative or non-comparative) to give his non-deprived counterpart a higher level of punishment?

³ A von Hirsch and A Ashworth, *Proportionate Sentencing* (Oxford, OUP 2006), 65.

⁴ Ibid, chapter 5. It should be noted that von Hirsch and Ashworth are ambivalent as to whether, *all things considered*, a contemporary Western society should adopt social deprivation as a mitigating factor in law, since they argue that there are other considerations that weigh against its legal adoption (e.g. practical obstacles in formulating guidelines). Ibid, 70-72. But it is clear that they think that there is generally *a reason* to punish a socially deprived offender less than his non-deprived counterpart. Let me also add that their focus is on offenders who are *not* in 'desperate straits', i.e. von Hirsch and Ashworth are not concerned with offenders, say, who stole a piece of bread for survival. For those offenders, they can plead necessity, and they probably do not need to rely on mitigating factors. Ibid, 62-64.

[The] deprived offender is truly in a more troubled situation, one in which the temptations to offend become harder to resist. This represents a predicament for which a degree of sympathy seems warranted; and which could become the basis for reducing the penalty.⁵

Their *argument*, which I will call the *temptations argument*, can be laid out schematically as follows:

P1: If an offender A faced stronger temptations to offend when he offended than an offender B, then there is a reason to punish A less than B. (I will call this *premise*, P1, the *temptations account of mitigating factors*.)

P2: A socially deprived offender generally faces stronger temptations to offend than his non-deprived counterpart.

C: Therefore, there is generally a reason to punish a deprived offender less than his non-deprived counterpart.⁶

⁵ Ibid, 68. See also *ibid*, 66: '[We] might well think that we ought to feel more sympathy for [the offender whose "incentives for offending [are] stronger"]': that because bad social conditions have rendered his situation more than normally difficult, this could supply a possible reason for extending a special degree of compassion.' As the readers may observe, von Hirsch and Ashworth sometimes talk about 'incentives', and sometimes of 'temptations'. I do not think the distinction, if any, between the two concepts will have any impact on the discussion below, and I will talk throughout of temptations.

⁶ For a similar argument, see A Ashworth, *Principles of Criminal Law*: third edition (Oxford, OUP 1999), 255-256.

The structure of this paper is as follows. I will first clarify the temptations argument and illustrate its *prima facie* plausibility (section 1). I will then locate the temptations argument in the current literature, by distinguishing it from two other arguments that try to establish social deprivation as a valid mitigating factor (section 2). I will then attack P1 (section 3). I will then argue that one alternative argument for the same conclusion as the temptations argument, which emerged from my discussion in section 3, does not work (section 4).

1. Clarification of the Temptations Argument and Illustration of its *Prima Facie*

Plausibility

Let me begin by making two brief clarifications about what von Hirsch and Ashworth meant by ‘temptations’ (and I will follow their usage for the rest of this paper).⁷ First, the idea of temptations seems to have something to do with the agent’s *reasons* for and against action.⁸ Second, the strength of temptations to do X that a person faces depends both on his reasons for doing X *and* his reasons *against* doing X. Suppose Helen and Henry equally love sweet food. But Henry, unlike Helen, is a diabetic, and

⁷ These clarifications are intended to be brief, since I believe that, up to a point, disputes about the concept of temptations will not substantively affect my discussion below. For two quite different analyses of the idea of temptations (which is not surprising given differences in purpose), see JP Day, ‘Temptation’, (1993) 30 *American Philosophical Quarterly* 175-180; D Lyons, ‘Coercion as Temptation’, (1986) 17 *Journal of Social Philosophy* 35-41, 40-41.

⁸ Von Hirsch and Ashworth, *Proportionate Sentencing*, 63. Some proponents of the temptations account of mitigating factors may insist that for reasons to count as temptations, the agent must, in addition to having those reasons, desire to comply with such reasons. For the distinction between desiring X and having a reason to do X, see G Watson, ‘Free Agency’, in G Watson (ed) *Free Will*: second edition (Oxford, OUP 2003). I do not think granting this will affect any of my discussion below.

he knows that, so he has strong reasons against eating sweet food. In such a case, I think we can say Helen faces stronger temptations to eat sweet food.⁹

After clarifying the idea of ‘temptations’, let me now go on to illustrate the *prima facie* plausibility of the temptations argument, starting with P2. Von Hirsch and Ashworth have provided three main considerations to support the claim that socially deprived people generally face stronger temptations to offend.¹⁰ First, the goods achieved by committing a crime will generally be less valuable to a non-deprived offender than to his deprived counterpart. A non-deprived person may easily afford a car; not so for the poor person; so the car is more valuable to the poor person.¹¹ Second, criminal punishment generally affects the career of a non-deprived person more than a deprived person. A street-cleaner’s career may not be greatly affected by a term of imprisonment; not so for a lawyer. Therefore, non-deprived people generally have stronger reasons to stay away from crime.¹² Third, criminal punishment generally affects the social life of a non-deprived person more than a socially deprived person. Criminal conviction generally carries a great stigma in the middle and upper classes. For a socially deprived person it may not be a big deal to be convicted, since many people around them have had that experience; for some of them, it may even be

⁹ Von Hirsch and Ashworth, *Proportionate Sentencing*, 66-68.

¹⁰ *Ibid.*

¹¹ *Ibid.*, 67.

¹² *Ibid.*

a symbol of status.¹³ So again, since the consequences of punishment are more serious for the non-deprived person than the deprived person, a deprived person faces stronger temptations to commit crimes than his non-deprived counterpart.¹⁴ I will grant P2 for the sake of argument in this paper.¹⁵

Let me now move on to illustrate the *prima facie* plausibility of P1, the temptations account of mitigating factors. Von Hirsch and Ashworth have not, to my knowledge, given any explicit defence of P1.¹⁶ But I guess the appeal of P1 is not hard to find. I believe that many people who believe in P1 do so because they think P1 is supported by our intuition concerning thought experiments similar with the one provided by the following two cases.

First case, tempted killer (Derek): Derek was told by a gangster that if Derek did not kill a person the gangster will cut off Derek's toe. Derek would not have killed if his toe was not at stake. However, caring (too much) about his toe, he finally gave in and killed.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ While I will not challenge P2 in this paper, the audiences at the Oxford Graduate Political Theory Workshop persuaded me that the truth of P2 is not that obvious. The same amount of fine may affect the life of a rich person less than a poor person, and a rich person's crime may be less likely to be detected and convicted (since they can get better lawyers) in most criminal justice systems. Perhaps it all depends on the kind of penalty and the kind of criminal justice system we are talking about.

¹⁶ Von Hirsch and Ashworth, *Proportionate Sentencing*, 66-69.

Second case, untempted killer (Devil): Devil killed someone. Unlike Derek, Devil did not receive any threats and his toe was not at stake. Derek and Devil were identical in all morally relevant aspects unless otherwise specified.¹⁷

Devil and Derek did not act reasonably in the circumstances, and thus should be punished.¹⁸ But I think most people would believe that, while it may be said that Derek displayed insufficient concern for others, Devil displayed an even greater lack of concern for others, so there is a reason to punish Derek less than Devil. The consideration of these two cases seems to lend some support to the temptations account of mitigating factors. Derek indeed faced stronger temptations to offend than Devil. It may thus be natural to think that Derek deserves our sympathy *because* he faced stronger temptations to offend, and to generalise from this case and think that the fact that an offender faced stronger temptations to offend would generate stronger reasons against punishing him, other things being equal.¹⁹

¹⁷ Similar cases can be found in D Husak, 'Partial Defences', (1998) 11 Can J L & Juris 167-192, 183-184; H Frankfurt, *The Importance of What We Care About* (Cambridge, CUP 1988), 37.

¹⁸ This is to rule out the possibility that Derek has a justification or an excuse.

¹⁹ The temptations account of mitigating factors is not without its defenders. For example, HLA Hart holds the temptations account of mitigating factors. He writes, in *Punishment and Responsibility* (Oxford, Clarendon 1968), 15, that

[A] good reason for administering a less severe penalty is made out if *the situation* or mental state of the convicted criminal is such that he was exposed to an unusual or specially great *temptations*,...so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed. (My emphasis. It should be noted that Hart briefly discusses the problem of socially deprived offenders in 50-51.)

The temptations argument is advanced by a number of writers other than von Hirsch and Ashworth. See,

2. Locating the Temptations Argument in the Current Literature

Before going on to assess the temptations argument, let me distinguish the temptations argument from two other arguments that try to establish social deprivation as a valid mitigating factor, in an attempt to locate clearly the temptations argument in the growing literature on the relationship between poverty and punishment/sentencing.²⁰

First of all, just as the focus of the necessity/duress defence in the common law is on the duress by circumstances/persons *at the time of offence*, the focus of the temptations argument is on *present deprivation* (i.e. deprivation at the time of offence), not on *deprivation in the past/childhood/formative years*.²¹ The temptations argument is supposed to support the mitigation of an offender who has had a happy childhood and grew up in good educational and economic background, but nonetheless is socially deprived *at the time of offence* (since by being poor at the time of offence he

e.g., WB Frank and N Groves, 'Punishment, Privilege, and Structured Choice', in WB Groves and G Newman (eds), *Punishment and Privilege* (New York, Harrow and Heston 1986); O Odudu, 'Retributivist Justice in an Unjust Society', (2003) 16 *Ratio Juris* 416-431, 427; S Mann and M Al-Khadha, 'Freedom of the Will and Criminal Culpability', (2004) 8 *UNSW L Rev* 98-125; B Hudson, 'Beyond Proportionate Punishment', (1994) 22 *Crime, Law, and Social Change* 59-78, 65-71; B Hudson, 'Punishment, Poverty, and Responsibility' (1999) 8 *Social Legal Studies* 583-591, 588-560; B Hudson, 'Doing Justice to Difference' in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory* (Oxford, OUP 1998), 242-248; B Hudson, 'Punishing the Poor' in W Heffernan and J Kleinig (eds), *From Social Justice to Criminal Justice* (Oxford, OUP 2000), 203-204; R Lippke, *Rethinking Imprisonment* (Oxford, OUP 2007), 84-88, 99-100.

²⁰ For a good overview of many different types of arguments for mitigating or excusing socially deprived offenders, see S Morse, 'Deprivation and Desert', in W Heffernan and J Kleinig (eds), *From Social Justice to Criminal Justice* (Oxford, OUP 2000).

²¹ For the distinction between these two types of arguments, see, e.g., G Vuoso, 'Background, Responsibility, and Excuse', (1987) 96 *Yale LJ* 1661-1686, 1684-1685; A Ashworth, 'Justifying the Grounds of Mitigation', (1984) 13(1) *Criminal Justice Ethics*, 5-10, text next to n22-n24.

would face stronger temptations to offend, regardless of his background/past), and is thus different from arguments that focus on the *history* of deprivation.

Second, the temptations argument is also different from arguments similar to the one made by Jeffrie Murphy in 'Marxism and Retribution'.²² Murphy argues that the only defensible justification of punishment is a kind of fair-play theory as follows: When there is a scheme of rules going on, everyone who voluntarily accepts benefits from the scheme owes obedience to the scheme, as a matter of fairness. Punishment for a violator is justified, as the violator failed to pay the debt to the scheme in the first instance (by obeying), so the state is entitled to make sure that the violator pays the debt (by being punished).²³ Murphy then argues that the poor people receive little benefit from the society, so it is hard to say they owe anything to the society.²⁴ While Murphy's argument is supposed to reach the radical conclusion that we are not justified in punishing the deprived offenders *at all*,²⁵ one can modify his argument slightly, by saying that while all people receive *some* benefits from the society, poor people have received a lot less benefits than the non-deprived people, so while we are justified in punishing deprived offenders we cannot punish them as much as their non-deprived counterparts.

²² J Murphy, 'Marxism and Retribution', in RA Duff and D Garland (eds), *A Reader on Punishment* (Oxford, OUP 1994), 54-55.

²³ *Ibid.*

²⁴ *Ibid.*, 64.

²⁵ *Ibid.*, 65.

Whether or not we accept Murphy's point that punishment has something to do with fair play, his argument, in its original or modified form, is different from the temptations argument on two counts. First, strictly speaking, the concept of (present) social deprivation is a concept distinct from the concept of debt to society and the focus of Murphy's argument is on the latter but not the former. Since it is possible that a socially deprived offender may owe great debt to society (imagine an offender who had benefited greatly from the society but he gambled his wealth away, so that he was socially deprived at the time of offence), and it is also possible that a non-deprived offender may owe no debt to the society, the two arguments cover different offenders. Second, the temptations argument does not seem to presuppose any particular justification of punishment. While punishing tempted offenders less may not help to achieve the goal of some justifications of punishment, say, deterrence (as it is hard to see so how punishing the tempted less can help to achieve deterrence),²⁶ someone who believes that deterrence forms the only *justification* of punishment can still accept consistently that we should punish tempted offenders less, since he can argue that the fact that the offender faced stronger temptations forms a *constraint* on punishment.²⁷ On the other hand, Murphy's argument presupposes a particular

²⁶ Deterrence probably requires the degree of punishment to increase with the strength of the temptations to offend an offender faces. See, J Bentham, Introduction to the Principles of Morals and Legislation (Oxford, Clarendon 1907), 179-180 (chapter XIV, section VIII-IX).

²⁷ For the distinction between justifications of punishment and constraints on punishment, see, e.g. Hart, Punishment and Responsibility, 9-10; RA Duff, Punishment, Communication, and Community (Oxford, OUP 2001), 11-14.

justification of punishment, and therefore, it cannot be accepted by people who believe that deterrence forms the only justification of punishment.

3. The Temptations Account of Mitigating Factors and the Motivating Strength

Account of Mitigating Factors

Should we accept the temptations account of mitigating factors? In other words, should the fact that the offender faced stronger temptations to offend at the time of offence be a mitigating consideration? In this section I will argue that we should reject the temptations account of mitigating factors.

I wish to start by drawing a distinction between the *temptations account of mitigating factors* and the *motivating strength account of mitigating factors*. The motivating strength account of mitigating factors is the following principle: If *A acted on (or was motivated by) stronger temptations than B in offending,*²⁸ then there is a reason to punish A less than B. The strength of temptations that the offender acted on in offending, or motivated the offence,²⁹ is the strength of temptations *without which the offender would not have offended.*³⁰ To say ‘A acted on stronger temptations than

²⁸ Throughout this paper, I will use the phrase ‘A acts on X’ synonymously with ‘X motivates A’.

²⁹ I should warn the readers that I am using the word ‘motivate’ (and accordingly related words like ‘motivating’, ‘motivation’, and ‘motive’) differently from some writers. Gary Watson, for example, uses the word ‘motivation’ to refer to the domain of desires, as distinguished from the domain of reasons/values. See Watson, ‘Free Agency’. My usage is different. I do not use the word ‘motivation’ to mark off desires from reasons. Rather, I use the word ‘motivation’ to mark off a subset of reasons within the domain of reasons, namely, the subset of reasons without which one would not have so acted, no matter what the relationship between reasons and desires is.

³⁰ I have defined ‘the strength of temptations that one acted on’ roughly as ‘the strength of temptations

B in offending', it means that the strength of temptations that A acted on in offending is higher than that of B.

The distinction between the temptations account of mitigating factors and the motivating strength account of mitigating factors will be understood once we notice that 'the strength of temptations one *faced* when one offended' and 'the strength of temptations one *acted on* in offending' need not be the same, and accordingly, the related point that 'A *faced* stronger temptations to offend than B when they offended' does not entail that 'A *acted on* stronger temptations in offending than B'.³¹ Let's say a person faced temptations of strength m for him to offend when he offended. But it may be possible that he would have offended anyway as long as he faced temptations of strength n ,³² where $m > n$. If this is the case, then n , *not* m , is the strength of temptations that motivated his offence. The strength of temptations represented by

without which one would not have so acted'. To be strictly correct, this definition, of course, needs to be suitably amended to accommodate for the 'Frankfurt Cases' ('Jones4' in Frankfurt, *The Importance of What We Care About*, 6-8) in which it makes sense to talk about the strength of temptations one acted on even if one could not have done otherwise, and to accommodate for other problems related to deviant (i.e. non-rational) causal chain cases. For one illustration of 'deviant causal chain', see D Davidson, *Essays on Actions and Events* (Oxford, OUP 1980), 79. The amendment can be carried out in various ways, but I will not undertake the task of spelling out the detailed amendment here. Suffice to say that my present preference is to follow generally the proposal offered in JM Fischer and M Ravizza, *Responsibility and Control* (Cambridge, CUP 1998), chapters 2 and 3.

³¹ The distinction is quite similar to the distinction between 'having a reason to do X when one did X' and 'acting on that reason in doing X'. The distinction between 'the reason one acted on' and 'the reason one had' can be found in Davidson, *Essays on Actions and Events*, 9, 232, but the idea of analysing motivational propositions, like 'the reason one acted on', or 'the reason that motivated one's action', in counterfactual terms, is taken mainly from the work of Duff. See RA Duff, *Intention, Agency, and Criminal Liability* (Oxford, OUP 1990), 58-60. While I disagree with Richard Brandt's ideas that a motivation needs to be 'standing' (235) to be relevant for punishment and that excuses in law and morality can be explained by utilitarianism, I find his 'A Utilitarian Theory of Excuses', 'A Motivational Theory of Excuses in the Criminal Law', 'Traits of Character', and 'The Structure of Virtue' (all in R Brandt, *Morality, Utilitarianism, and Rights* (Cambridge, CUP 1992)) very influential to my thinking about the issue.

³² i.e. n is the necessary strength of temptations required for him to commit that offence at that time.

(*m-n*), while being faced by the offender at the time of offence, did not motivate his offence. We can call such strength of temptations the *surplus* strength, since that strength of temptations is unnecessary for the offence – the agent did not offend *because of* the surplus strength of temptations.

After drawing the distinction between the motivating strength account of mitigating factors and the temptations account of mitigating factors, let us revisit the thought experiment involving Derek and Devil (i.e. the killer cases). Our intuition concerning that thought experiment is that there is a reason to punish Derek less than Devil. Many people believe that if we accept that intuition, then we are compelled to accept the temptations account of mitigating factors, since they think that the temptations account of mitigating factors is the only explanation for that intuition. But once we grasp the distinction between the temptations account of mitigating factors and the motivating strength account of mitigating factors, it is clear that that intuition does not compel us to accept the temptations account of mitigating factors, as the motivating strength account of mitigating factors can also explain that intuition. Derek not only *faced* stronger temptations to kill than Devil when they killed. Derek also *acted on* stronger temptations in killing. As stated in the scenario above, Derek would not have acted but for the fact that killing could save his toe – Derek acted because he wanted to save his toe. Devil, on the other hand, was not motivated by the temptations

to rescue his toe in acting (since his toe was not at stake at all).

I believe it is not hard to construct a thought experiment that will lend strong support to the idea that we should accept the motivating strength account of mitigating factors and reject the temptations account of mitigating factors. Consider the *overdetermined killer case*, which is a modified version of a case originally given by Harry Frankfurt:

Third case, overdetermined killer (Daisy): Daisy is the same as Derek in all morally relevant aspects, except that while the gangster threatened Daisy that he would cut off Daisy's toe if Daisy did not kill, *Daisy would have killed anyway even if she did not receive the threat*. Knowing that killing could happen to save her toe, she did what she would have done anyway, i.e. killing the victim.³³

I believe most of my readers will share my intuition that there is no reason to punish Daisy less than Devil. This piece of intuition is consistent with the motivating strength

³³ Frankfurt, *The Importance of What we Care About*, 4. (The example I modified on is Jones3 in Frankfurt's article. The only difference between Jones3 and Daisy is that the threat faced by Daisy was not so serious such that a reasonable person might have done the same as Daisy did, but the threat faced by Jones3 was one such that a reasonable person would give in.) See also *ibid*, 41. For discussion of similar issues, see HLA Hart and AM Honore, *Causation in the Law: second edition* (Oxford, OUP 1985), 125-126, 193-194; DC Ormerod, Smith and Hogan *Criminal Law: tenth edition* (Oxford, OUP 2009), 391-392. Examples similar to the overdetermined killer case can be found in, e.g., N Richards, 'Acting under Duress', (1987) 37 *The Philosophical Quarterly* 21-36, 32-35.

account of mitigating factors but inconsistent with the temptations account of mitigating factors. Daisy indeed faced stronger temptations to kill than Devil – so if the temptations account of mitigating factors is true then there should be a reason to punish her less than Devil. On the other hand, the strength of temptations that motivated the act by Daisy was the same as that motivated the act by Devil. Daisy did not act *because of* the extra temptations – the extra strength of temptations provided by her toe was only surplus strength. Therefore, the motivating strength account of mitigating factors is consistent with saying that there is no reason for punishing Daisy less than Devil.

Some people may find piecemeal appeals to intuition in moral debates unsatisfying. As such, they would be reluctant to give up the temptations account of mitigating factors just because of one single thought experiment. I think the point, that we should accept the motivating strength account of mitigating factors but reject the temptations account of mitigating factors, can be defended on grounds independent of the thought experiment involving Daisy. The fact that A was motivated by stronger temptations in violating a moral norm (say ‘do not kill’) than B is constitutive of the fact that A would only be willing to give up the compliance with the norm for stronger reasons than B, i.e. A had more concern for the norm (or the values underlying the

norm) than B.³⁴ Other things being equal, A's motive in offending is therefore better, or less worse, than that of B. And since it is plausible to believe that motive should be relevant in sentencing, it follows that the strength of temptations that motivated an offence should be a relevant consideration in sentencing. On the other hand, it is unclear why facing stronger temptations should *per se* mitigate. We seem to believe that mitigation must be based on some facts about the offender himself; but the strength of temptations one faced can be varied depending on external circumstances which have nothing to do with the offender himself.³⁵

My diagnosis as to why the temptations account of mitigating factors is so alluring, despite being false, is similar to Frankfurt's diagnosis as to why many people find the 'principle of alternative possibilities' convincing.³⁶ It is true that in ordinary transactions, we would often excuse or mitigate a wrongdoer as long as he utters 'I

³⁴ Here I draw on ideas from Brandt, *Morality, Utilitarianism and Rights*, 242-245; Paul Hoffman, 'Aquinas on Threats and Temptations' (2005) 86 *Pacific Philosophical Quarterly* 225-242, 228 and 238.

³⁵ The point that it is motive, not the strength of temptations, that matters is noticed by Husak in a brief passage in Husak, 'Partial Defences', 189-190. See also Richards, 'Acting under Duress', 32-35. For writings expressing similar points in the context of justifications for wrongs, see e.g., AP Simester, 'Why Distinguish Intention from Foresight', in AP Simester and ATH Smith (eds), *Crime and Culpability* (Oxford, OUP 1996), 91-98; R Cryer and AP Simester, 'Iraq and the Use of Force: Do the Side-effects Justify the Means' (2006) 7 *Theoretical Inquiries in Law* 9-41, 38-41.

While I disagree with Maitland's idea that the relevance of motive can be accounted for in consequentialist grounds, he also seems to notice the essential point that temptations to offend are relevant only if we assume that the offender would not have offended but for the temptations (because only in those cases can we infer a less bad motive) when he writes: '[We] infer that the dearly bought man *might not have done the crime for a smaller bribe*, and this being so, we hold that he is less mischievous *character* of the two.' (my emphasis), in FW Maitland, 'The Relation of Punishment to Temptations', (1880) 5 *Mind* 259-264, 262. The point that it is the strength of temptations an offender *acted on*, not the strength of temptations he *faced*, that reveals his motive in offending, is clearly noted by Bentham in Bentham, *An Introduction to the Principles of Morals and Legislation*, 149-150 (chapter XI, section XLII, rule 3).

³⁶ In addition to borrowing ideas from Frankfurt, I model the structure of this paragraph closely on a paragraph by Frankfurt. See, Frankfurt, *The Importance of What we Care About*, 9.

faced strong temptations to do that'. But, to borrow Frankfurt's point in a similar context, the reason for us accepting such utterances as valid mitigating factors is only because we assume that most wrongdoers, in making such an utterance, are not 'being disingenuous'.³⁷ In other words, we assume that a wrongdoer would not utter, as a plea of mitigation, 'I faced strong temptations to do that', unless he also believed that he would have refrained if he did not face so strong temptations. In cases where the assumption holds, the strength of temptations one faced in offending affects his motive in offending. The fact that we make that assumption in ordinary cases may account for why many people find the temptations account of mitigating factors initially attractive. But we should not lose sight of the fact that what ultimately does the mitigating work is the strength of temptations *that motivated the offence*, not the strength of temptations *one faced to offend per se*.³⁸

4. Do Socially Deprived Offenders Generally Act on Stronger Temptations in

³⁷ Frankfurt, *The Importance of What we Care About*, 9.

³⁸ The fact that an offender faced stronger temptations to offend *may* matter to punishment (I want to be non-committal to this point), if the extra temptations were *offered by the punisher* (i.e. the state). (If so, does it matter whether this was caused by the punisher as an intended effect, as merely foreseen side-effect, or even without (reasonable) foresight on behalf of the punisher? And does it matter whether the punisher was justified/excused in causing that?) But even if we accept that point, it does not show that the fact that an offender faced stronger temptations to offend, *per se*, is relevant to punishment, and thus, acceptance of that point should not lead us to accept the temptations account of mitigating factors. (A similar point is made in Morse, 'Deprivation and Desert', 159 at n 59 of his article.) The issue of the relationship between the punisher's conduct and justified punishment, and related issues concerning standing to blame, have recently received great attention. Interested readers may want to consult, e.g., Von Hirsch and Ashworth, *Proportionate Sentencing*, 69-70; RA Duff, *Answering for Crime* (Oxford, Hart 2007), chapter 8; V Tadros, 'Poverty and Criminal Punishment', (2009) 43 *The Journal of Value Inquiry* 391-413.

Offending?

The fact that the motivating strength account of mitigating factors is true may suggest to some that while the temptations argument is unsound (as one of its premises, the temptations account of mitigating factors, is false) an alternative argument for the same conclusion is readily available. It may be alleged by them that deprived offenders generally *act on*, in addition to *face*, stronger temptations in offending than their non-deprived counterparts; thus, there should be a general mitigating plea for the deprived offenders based on the motivating strength account of mitigating factors.³⁹

I think this chain of reasoning is unsound. The issue now is: Do deprived offenders generally act on stronger temptations in offending than their non-deprived counterparts? This is an empirical question about the motives of offenders, so without data to back one up, any answer here must be tentative. But I have grave doubts about an affirmative answer, especially since the concept of the strength of temptations one acted on, and the concept of social deprivation, are totally distinct concepts. Roughly speaking, the concept of the strength of temptations one acted on is a *motive* concept, but the concept of social deprivation is a *socio-economic* concept. Why should we believe that offenders who are of a particular socio-economic class generally had a different motive in offending from offenders who are of a different socio-economic

³⁹ This point is hinted in Odudu, 'Retributivist Justice in an Unjust Society', 426-427.

class? To believe so seems to be inferring virtue or vice from social class, and without good empirical evidence for that we ought to be sceptical of that claim.

Our common-sense belief seems to support a negative answer to the empirical question as well. Our common-sense belief seems to be that a substantial portion of deprived offenders would have offended all the same even if they were not deprived at the time of offence. This belief is especially plausible when we consider offences that are not a result of a high level of deliberation. If, for example, some rapes are not committed after careful deliberations which take into account incentives for and against offending, then why should we believe that the non-deliberative deprived rapists would refrain from raping had they been non-deprived such that they would have stronger incentives against offending? But if we believe that a substantial portion of deprived offenders would have offended, even if they were, counterfactually, non-deprived, then there is no ground to believe that deprived offenders generally act on stronger temptations in offending. Therefore, until data is adduced to the contrary I think we are justified in believing that it is *false* that deprived offenders generally act on stronger temptations in offending.

5. Concluding Remarks

In this paper, I have tried to expose two blind alleys to reach the conclusion that there

is generally a reason to punish a deprived offender less than his non-deprived counterpart. The first is the attempt to defend such a conclusion by using the temptations account of mitigating factors. This attempt is doomed to failure since the temptations account of mitigating factors is false. The second is the attempt to defend such a conclusion by using the motivating strength account of mitigating factors. This attempt also does not work since it is not generally true that a deprived offender acts on stronger temptations in offending than his non-deprived counterpart.