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JUSTICE, SERIOUSNESS AND RELATIONSHIPS

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I. Introduction

'Relational Justice' is the interface between 'law' and 'relationism.' It holds that justice is not simply a matter of applying rules, but of rightly satisfying the claims of parties in a trial, brought forward from the relationships of their lives. You can no more separate relationships from justice than you can separate two blades of a pair of scissors and still have a sharp cutting edge.

The theory and practice of 'Relational Justice' is set out in *Relational Justice: Repairing the Breach* and *Relational Justice: A Reform Dynamic.*[1] Policy implications include: tackling the aetiology of crime in dysfunctional families and communities; addressing the needs of the victim and encouraging, where appropriate, negotiation, mediation and reparation between the parties. It places the pursuit of justice in the hands of the people to a greater degree than at present. It advocates a locally-based vision of justice that is able to respond to local concerns and it favours the development of more relational forms of punishment, including social shaming and punishment in the community. Notably, relational thinking does not exclude, in principle, the use of corporal punishment.

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[1] J. Burnside and N. Baker (eds.) [1994a] *Relational Justice: Repairing the Breach*. Winchester: Waterside Press; N. Baker and J. Burnside [1994b] *Relational Justice:A Reform dynamic for criminal justice.* Cambridge: Jubilee Centre.

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Relational punishment focuses on those factors that are most closely related to the criminal's offending behaviour. It aims to communicate a sense of the seriousness of the offence to both the offender and the wider community. This means that it is proportional, but also that it reflects, where possible, the nature of the offence (for example, triple restitution is a more appropriate punishment for shoplifting than prison). It adopts strategies that correspond, so far as possible, to the learning styles of most offenders and it supports the use of a range of techniques to help offenders acquire the social and cognitive skills they need for solving real-life problems. To sum up, Relational Justice spells: less imprisonment for less serious offences and, for higher-risk offenders, more constructive prison regimes in the form of work and education.

Several elements of New Labour's approach to criminal justice are broadly supportive of Relational Justice,[2] notably in the field of crime prevention. Proposals,[3] at the time of writing, to extend the role of health visitors and to set up a National Family and Parenting Institute, together with a 'mentoring' scheme, in which older members of the local community spend time with families with difficult children, are all relational policies.

The complaint with 'Relational Justice', in some quarters, is that it is tautologous. Marshall writes: "it is difficult to imagine what kind of justice might *not* be concerned with relationships"(emphasis original).[4] But I would answer: what is the evidence for saying that criminal justice *is*, at present, much "concerned with relationships"? (New Labour initiatives apart). Marshall assumes the very point at issue. As long as victims are being sidelined by the criminal justice process and offenders are given anti-relational forms of punishment, there will always be a case for thinking relationally about justice.

But there is a sense in which Marshall is quite correct. Justice is manifestly concerned with relationships. After all, the need for justice arises because there has been a breakdown in relationships of one kind or another. But to say: 'Of course justice is about relationships. So what?', makes it seem as though 'Relational Justice' is about relationships 'in general.' It

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[2] E.g. a revival of interest in the use of shame as a penal sanction and a new determination to cut the time between arrest and conviction.

[3] Green Paper, *Title to be announced.*

[4] T. F. Marshall [1997]. *Seeking the Whole Justice.* London: Home Office Research and Planning Unit.

assumes that one relationship is very much like another. But all relationships are not the same. There are different types of relationships. It goes without saying that the relationship between parent and child is different to that between employer and employee. Even within the same type of relationship, the rights and obligations on each side are different. We shall argue, in this chapter, that the type of relationship that is involved in a given case is relevant to how justice is done. Our point is not simply that justice is "concerned with relationships." Our point is that 'doing justice' means taking account of different types of relationship.

We propose to investigate this issue by reference to the contemporary problem of 'seriousness of offence.' Since it is by no means clear exactly what content should be given to 'seriousness of offence' in modern criminal law, it may be that this is one area that could benefit from a more relational approach. A relational approach might suggest that the type of relationship involved in a dispute ought to influence our perceptions of the seriousness of the offence. Testing the merits of this idea is one way of exploring the limits of 'law' and 'relationism.'

We begin by presenting the current problem of seriousness of offence in English law (Part II). We shall then consider the extent to which ordinary people think that 'type of relationship' is a factor in evaluating 'seriousness of offence' (Part III). We conclude that modern seriousness studies are equivocal about the importance of the relational dimension but that this is partly a product of how 'seriousness' is measured. We shall then turn from this sociological exploration of the current role of relationships in the modern understanding of seriousness to the philosophical need to locate the question of justice, seriousness and relationships within a particular 'tradition of enquiry' (Part IV). The remainder of our discussion is located in the tradition of enquiry represented by Biblical law. This is because of the natural affinity between Biblical justice and 'Relational Justice' (Part IV). We then consider the extent to which 'type of relationship' functions as an element of seriousness of offence in Biblical law (Part V). In contrast to the mixed findings of modern seriousness studies, the Biblical tradition clearly sees 'type of relationship' as relevant to overall evaluations of seriousness. We conclude by considering briefly some of the practical implications of adopting a more relational approach to 'seriousness of offence' (Part VI).

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II. The problem of 'seriousness.'

The modern definition of the problem of 'seriousness of offence' in English law[5] is provided by s.1(2) (a) of the Criminal Justice Act (CJA) 1991. This makes 'seriousness of offence' one of only three grounds on which the court is justified in giving an offender a custodial sentence.[6] In practice, it is the most important.

The reason why a relational approach may be helpful is because the CJA 1991 nowhere defines what is meant by 'so serious an offence that only a custodial sentence is justified.' This is despite the centrality of 'seriousness of offence' to the CJA 1991. The guideline judgements of the Court of Appeal in *Baverstock*[7] and *Cox*[8] offer only partial assistance. The Court fell back on a formula of Lord Justice Lawton that originated in response to the phrase "so serious that a non-custodial sentence cannot be justified" in s. 1(4) of the CJA 1982.[9] It held that 'seriousness' in s. 1(2)(a) of the CJA 1991 referred to:

"the kind of offence which when committed… would make all right thinking members of the public, knowing all the facts, feel that justice had not been done by the passing of any sentence other than a custodial one."[10]

In fact, the only part of the Act to give clear content to the meaning of 'seriousness' was s. 29(1) which held that:

"An offence shall not be regarded as more serious… by reason of any previous convictions of the offender or any failure of his to respond to previous sentences."

Ironically, this part of the Act was widely perceived to be unjust and had to be subsequently amended by s.66(6) of the Criminal Justice Act 1993:

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[5] Scottish judges have a far wider discretion in this regard than their English counterparts. Whilst seriousness is undoubtedly a factor in sentencing in Scotland, there is no statutory requirement. Sections 204 and 207 of the Criminal Procedure (Scotland) Act 1995 as amended allow the court to impose a sentence of imprisonment if "no other method of dealing with him [the offender] is appropriate…." In the case of probation orders, s. 228(1) allows the court to make a probation order "if … it is expedient to do so…." The grounds are expediency, not seriousness. Likewise, the use of community service as a direct alternative to prison in s. 238 makes no reference to seriousness.

[6] The other grounds are 'dangerousness' (where the offence is sexual or violent in nature; s. 1(2)(b)) and where the offender has refused to agree to a community service order (s. 1(3)).

[7] (1993) 14 Cr. App. R. (S.), 477.

[8] (1993) 14 Cr. App. R. (S.), 481.

[9] *Bradbourn* (1985) Cr. App R. (S.) 180, 182-3.

[10] (1993) 14 Cr. App. R. (S.), 477, 481.

"For section 29 of the Act of 1991 (effect of previous convictions) there shall be substituted-
29 - (1) In considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his to respond to previous sentences."

This legislative 'U-turn', together with the public debate that greeted the implementation of the CJA 1991 in autumn 1992, reflects uncertainty as to what should be the key elements of 'seriousness of offence' in contemporary English law.

This uncertainty was further underscored by the Magistrates' Association's attempt to provide more concrete guidance for its members. They awarded a number of positive and negative 'seriousness indicators' (typically three or four) for each of the most common criminal offences that come before magistrates' courts.[11] However, this served only to highlight the difficulties.'[12]

Part of the difficulty in articulating the meaning of 'seriousness of offence' lies in the fact that seriousness assumes, by definition, that some acts have greater significance than others. It requires that we make choices and judge some matters more important than others.[13] 'Seriousness' tells us what society sees as most threatening to its survival. It holds up a mirror to the criminal justice process by challenging it to identify its underlying values, whether relational or anti-relational.[14]

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[11] Magistrates' Association *Sentencing Guidelines 1992*. The Guideline for 'theft from shop,' for example, lists as 'positive seriousness indicators'; 'Adult involving children; High value; Organised teams; Planned' and as 'negative seriousness indicators'; 'Impulsive action; Low value.' Interestingly, the Guidelines do not assign relative weight to the seriousness indicators. The order in which the factors appear in the list is alphabetical and has no other significance.

[12] For example, 'Impulsive action' is a negative seriousness indicator in nearly half of the non-motoring offences. Unfortunately, this assumes that impulsive behaviour is always less serious than premeditated law-breaking. And, how, exactly, does one 'impulsively' handle stolen goods? The Guidelines also identify the role of the victim as a possible seriousness factor. In the Guideline for 'theft from a vehicle', a negative seriousness indicator is 'Car unlocked' whilst the Guideline for 'taking [a vehicle] without consent' indicates that 'Keys left in car' makes the offence less serious. This violates the conviction that the victim's carelessness is merely additional to the offender's fault; M. Wasik and A. Turner, 'Sentencing guidelines for the Magistrates' Courts' [1993] *Criminal Law Review* 345-356; 353. Finally, the Guidelines make no mention of intoxication as affecting the seriousness of an offence, possibly because some magistrates feel that drink aggravates an offence whilst others infer a lesser degree of culpability than would be present in a sober decision to commit the offence; Wasik and Turner *op. cit.*, 353.

[13] As Montaigne wrote: "Les vices sont tous pareils en ce qu'ils sont tous vices… Mais, encore qu'ils soient également vices, ils ne sont pas égaux vices" ("Vices are all alike as they are vices… but though they are equally vices, yet they are not equal vices…"); M. de Montaigne 1931 [1613] *Essais: Livre Second Chapitres I à II* (Chapitre II, 2). Paris: Fernand Rockes.

[14] The depth of the challenge is indicated by a former Principal Establishments Officer in the Home Office who warned "… there is now a serious void at the centre of the criminal justice system. There is no clearly understood set of purposes which it is meant to achieve or principles which it is meant to observe;" David Faulkner, 'All flaws and disorder,' *The Guardian* 11 November 1993.

To this extent, the problem of determining seriousness of offence may in part reflect the difficulty of securing moral agreement in a pluralist culture. This, arguably, makes the choice of 'seriousness' as the primary legal justification for a custodial sentence a surprising one. It is certainly not the only option. But rightly or wrongly, 'seriousness of offence' is the current legal justification and as such it demands an articulation. 'Crime-seriousness' has gained importance in recent years, due to the rise of 'just-desert' orientated conceptions of sentencing.[15] These demand that the punishment should be 'proportionate' to the gravity of the offence. In the light of this, it is surprising that "the jurisprudence of crime seriousness is a topic that has scarcely been touched."[16]

III. The *R-Factor* in modern seriousness studies

To what extent are relationships a relevant factor in determining seriousness today? How do people perceive seriousness and what role do relationships play in modern evaluations of seriousness? We can examine this by reference to the many studies on public perceptions of 'seriousness of offence.' Initially, such studies appear to show that people do not think relationally about seriousness. However, more recent studies cast doubt on this conclusion.

Studies evaluating public perceptions of 'seriousness' have been popular among criminologists since the development of the Sellin-Wolfgang 'seriousness' scale in the 1960s.[17] The Sellin-Wolfgang scale assumes that each individual offence can be defined in terms of personal injury, threat, intimidation and the amount of property stolen, damaged or destroyed. Each harm-producing element is designated by a measured amount of 'seriousness.' The total component scores for the harm to each victim of the crime is the resulting 'seriousness' tally.[18]

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[15] See A. von Hirsch, 'Proportionality in the Philosophy of Punishment: From 'Why Punish?' to 'How Much?', [1990] 1 *Criminal Law Forum* (2), 259-290 and A. von Hirsch, 'The politics of 'just deserts', [1990] 32 *Canadian Journal of Criminology* 397-413.

[16] A. von Hirsch and N. Jareborg, 'Gauging criminal harm: a living-standard analysis', [1991] 11 *Oxford Journal of Legal Studies* 1-38, p.2. Von Hirsch, the leading desert theorist, and Jareborg write: "The gravity of the crime has such obvious relevance to the sanction … [one] would think, that judges and legal scholars surely must have been theorizing about it for years. Yet that has not been the case."

[17] T. Sellin and M. E. Wolfgang, *The Measurement of Delinquency.* (New York, John Wiley, 1964).

[18] The main drawback with the Sellin-Wolfgang scale is that it largely equates 'seriousness' with 'harmfulness.' Recent research has criticised the failure of the Sellin-Wolfgang scale to consider other variables, notably culpability (e.g. P. B. Hoffman and P. L. Hardyman, 'Crime seriousness scales: public perception and feedback to criminal justice policymakers.' [1986] 14 *Journal of Criminal Justice* 413-431; 416). Other relevant factors include; the vulnerability of the victim, the power of the

Respondents are invited to rank a mixture of crimes according to their perceived order of 'seriousness.'[19] In the US, such research enables punishment to be scaled according to public judgements about the seriousness of an offence. The results suggest a high degree of consensus as to the relative seriousness of crimes.[20]

Broadly speaking, there are two types of judgement that may be made when evaluating the 'seriousness' of a crime: namely, the 'factual' and the 'normative.' A 'factual' response evaluates the degree of damage ('how much harm was done by the offence?'). Here, 'seriousness' equals 'harmfulness.' A 'normative' response evaluates the degree of moral culpability or blameworthiness involved ('how culpable is the offender?'). This involves a number of factors including intent and premeditation. Here, 'seriousness' equals 'wrongfulness.' 'Type of relationship' may thus be a factor in assessing either 'factual' or 'normative' seriousness. The question is whether respondents determine seriousness entirely by 'harmfulness,' entirely by 'wrongfulness' or by some combination of the two. It is also possible that respondents alternate between wrongfulness and harmfulness, depending on which of the two attributes is greater for any particular crime (see further, below).

Unfortunately, no seriousness studies have explicitly tested for the role of relationships. It is an area that requires further research. However, in some of the existing studies, respondents are asked to make judgements of relative seriousness between cases that are similar, except for the type of relationship involved. By examining these cases, we can form some idea as to whether type of relationship is a relevant factor in determining public perceptions of seriousness.

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offender and whether it is a first-time or a repeat offence (L. F. Travis *et al*, 'The impact of instructions on seriousness ratings', 14 *Journal of Criminal Justice*, 433-440; 437).

[19] Offences usually include crimes against the person, crimes involving property, selling illegal drugs, white-collar crimes, so-called 'victimless' crimes, crimes against the State, crimes involving action against policemen and various public order offences.

[20] That said, 'seriousness' investigators are divided over whether this consensus has an underlying 'normative' structure or whether it is the product of methodological artefact. (e.g. T. D. Miethe, 'Public consensus on crime seriousness', 20 *Criminology*, [1982] 515-526; 517-8). P. H. Rossi and J. P. Henry, 'Seriousness: A measure for all purposes?' In Malcolm W. Klein *et al.* (eds.) *Handbook of Criminal Justice Evaluation* (Berverly Hills, Sage, 1980) 489-505; 494 draw a helpful distinction between 'global consensus' (agreement on the *overall* order of a range of offences from murder to traffic violations) and 'local' consensus (agreement on the order of crimes that are close together in seriousness). There is high agreement regarding 'global' consensus, but low agreement regarding 'local' consensus. Everyone agrees that murder is heinous and 'double-parking' is trivial, but it is far less clear whether stealing from a large corporation is more or less reprehensible than stealing from a private dwelling.

The results, as we shall see, are mixed. Our starting-point is the National Survey of Crime Severity (NSCS),[21] chosen because it is the largest survey ever conducted of how the public ranks the seriousness of a variety of crimes. Like many of the best research designs in this area, it was carried out in the United States. Table 1, overleaf, shows some of the results of the NSCS survey, arranged in declining order of seriousness. The higher the NSCS score, the more seriously the offence was seen by respondents. These are compared with the offence severity index used by the U.S. Parole Commission (USPC).[22]

The offences are chosen because they involve different types of relationship. Each of the offences in cases #1-3 involve the same offence (stabbing) with the same consequences (death). Only the relationships are different. Likewise, cases #4-12 all involve assault and the outcome in each case is hospitalisation. Cases #10-11 introduce the additional variable of the number of people involved in the attack, but apart from that, the only variable in each of the cases is the nature of the relationship. Identities of the parties are given in italics to signal the type of relationship involved.

Table 1 shows that respondents discriminated between the seriousness of the offence, on the basis of 'type of relationship', as follows:

[21] This survey combined responses from 60,000 respondents to produce rankings of 204 offence items, each containing a brief description of an offence. Average scores ranged from 72.1 (for bombing a public building, resulting in twenty deaths) to 0.2 (for playing truant from school); P. B. Hoffman and P. L. Hardyman, *op. cit.*, 414-415.

[22] This index is used by the USPC as one component of its decision-making guidelines. The most serious offences are assigned to Category 8 and the least serious are assigned to Category 1. Note that this index does not include all possible aggravating/mitigating factors.

Offence	Description	NSCS score	USPC Index
#1	A *man* stabs his *wife*. As a result she dies.	39.2	8
#2	A *person* stabs a *victim* to death.	35.7	8
#3	A *woman* stabs her *husband*. As a result, he dies.	27.9	8
#4	A *parent* beats his *young child* with his fists. The child requires hospitalisation.	22.9	7
#5	A *high school boy* beats a *middle-aged woman* with his fists. She requires hospitalisation.	19.5	7
#6	A *man* beats his *wife* with his fists. She requires hospitalisation.	18.3	7
#7	A *high school boy* beats an *elderly woman* with his fists. She requires hospitalisation.	17.5	7
#8	A *teenage boy* beats his *mother* with his fists. The mother requires hospitalisation.	15.9	7
#9	A *man* beats a *stranger* with his fists. He requires hospitalisation.	11.8	5
#10	Ten *high school boys* beat a male *classmate* with their fists. He requires hospitalisation.	11.7	7
#11	Three *high school boys* beat a male *classmate* with their fists. He requires hospitalisation.	11.3	7
#12	A *teenage boy* beats his *father* with his fists. The father requires hospitalisation.	7.9	7

Table 1: 'Seriousness' and 'type of relationship' in the NSCS (my italics). Source, Hoffman and Hardyman, *op. cit.*, 418-425.

What pattern, if any, underlies these results? Taking #1-3, it is notable that whilst the USPC Index rates each of these offences as 'equally serious', respondents clearly think that a man stabbing his wife is more serious than a wife stabbing her husband. Oddly, #2, a fatal wounding that takes place in a non-marital context (impliedly between strangers) is rated as less serious than the former but more serious than the latter. What logic, if any, underlies this?

It may be that the key idea underlying the pattern in Table 1 is the victim's vulnerability. Case #1 may be regarded as the most serious because it consists of an attack of a man upon a woman; whereas Case #2 is less serious because it summons up the typical case of one man stabbing another man. Here, the parties are more evenly matched (a man stabbing a man). Case #3 may be the least serious because the offender in this case (a woman) is commonly thought of as being more vulnerable than the victim (her husband). If this is correct, 'type of relationship' may be less relevant than respondents' preconceptions about the relative vulnerability of the parties.

'Vulnerability', rather than 'type of relationship', may also help to explain the order of cases #4-12. The most serious case is #4 (a father beating his young child). True, this evaluation may be influenced by feelings about the responsibilities of parents toward their children. However, it is probably nearer the mark to suggest that this case is another example of the salience of 'victim vulnerability' rather than type of relationship. This is probably because, of all the examples, it involves the biggest power disparity between the parties (a father and a young child).

Table 1 suggests that the dominant idea is that, the more evenly matched the parties, the less serious the offence. This does not explain why #5 (beating a middle-aged woman) is ranked higher than #7 (beating an elderly woman) but it holds good for ranking #10 above #11 (a boy has a better chance against three opponents than against ten). It may also explain why #8 (a son beating his mother) is ranked well above #9 (a son beating his father). There is a difference of eight points, even though both, from a relational view, are his parents and both deserve his respect.

An aspect of 'type of relationship' is whether the victim and the offender are strangers to each other or whether they are already known to each other at the time of the offence. Tragically, many crimes of violence (especially homicide) are examples of 'acquaintance violence.' Very often they occur within the context of a close personal relationship. The results of the NSCS survey strongly suggest that 'offending by strangers' is regarded more seriously than 'offending by acquaintances.' Case #5, the attack of a high school boy on a middle-aged woman (invoking the paradigm of strangers) is rated as more serious than case #8, attack of a teenage boy upon his mother. The relative age of the parties are the same, but there is a four-point difference between the two cases. 'Stranger' violence is regarded more seriously than that within the family. Similarly, the stranger attack in case #9 is seen as more serious than case #10 and case #11, cases that involve a pre-existing relationship. In the eyes of most respondents, 'acquaintance violence' seems to *mitigate* the offence rather than to make it more serious. One can perhaps understand why. A pre-existing relationship may suggest that the victim has some (however small) culpability for the breakdown in the relationship that has led to the crime. By contrast, a stranger can have no culpability. The neighbour who is assaulted in a dispute could perhaps have resolved the dispute: the stranger who is mugged has no such opportunity.

Similarly, the results of Cullen *et al*'s survey of 200 residents from Macomb, Illinois, consistently show that a crime committed against a stranger is regarded more seriously than the same crime committed against someone who is known to the offender. 'Planned killing of a person [impliedly, a stranger] for a fee' is placed 1st, ahead of 'Planned killing of a spouse' (ranked 2nd) and 'Planned killing of an acquaintance' (ranked 5th).[23] 'Impulsive killing of a stranger' is placed sixth, ahead of 'impulsive killing of a spouse' (placed seventh). 'Assault with a gun on a stranger' is rated 16th, above 'Assault with a gun on a policeman' (rated 23rd) and 'Assault with a gun on a spouse' (rated joint 27th). 'Forcible rape of a stranger in a park' is ranked 22nd whilst 'Forcible rape of a former spouse' is ranked joint 58th (although 'forcible rape of a neighbour' (14th) is thought to be more serious than both). 'Beating up a stranger' is ranked 63rd ahead of 'Beating up a spouse' (67th) and 'Beating up an acquaintance' (91st).[24]

'Seriousness' surveys also indicate that 'materialist' values are often more important than relational ones in evaluating seriousness. In Cullen *et al*'s study, 'Burglary of a factory, stealing machine tools' (at no. 75) is ranked two places ahead of 'Burglary of a home, stealing a colour TV set (at no. 77), even though, in relational terms, the invasion of a personal dwelling is more serious than that of a factory.[25]

Clear evidence that 'materialist' values are more important than relational ones is found in the NSCS survey.[26] The offence 'A person robs a victim of $1,000 at gunpoint. No physical harm occurs' is rated as exactly the same level of seriousness (9.7) as the offence 'A person walks into a public museum and steals a painting worth $1,000.' It appears that these are rated the same because they involve the same amount of money. In relational terms, the personal contact involved in the former makes this offence considerably more serious than the latter. But respondents see financial harm as more salient than relationships.[27] Even more disturbing

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[23] F. T. Cullen *et al.* 'The seriousness of crime revisited.' [1982] 20 *Criminology.* 83-102; 88.

[24] Ideas of 'victim vulnerability' also recur. F. T. Cullen *et al*'s study found relational variations with regard to certain kinds of sexual offences. 'Father-daughter incest' is rated 38th, considerably higher than mother-son incest (equal 61st) and higher than brother-sister incest (placed 72nd). This may reflect ideas of vulnerability, as in the NSCS survey; F. T. Cullen *et al, op. cit.,* 89.

[25] And strangely, the offence of 'Pouring paint over someone's car' (ranked 117) was thought to be 'more serious' than 'Killing a suspected burglar in [one's] home' (122nd); F. T. Cullen *et al, op. cit.,* 91.

[26] P. B. Hoffman and P. L. Hardyman, *op. cit.*, 422.

[27] This is not surprising. P. B. Hoffman and P. L. Hardyman *op. cit.*, 424 found that 'A person, using force, robs a victim of $10. No physical harm occurs' is rated more serious (5.1) than 'A person robs a victim. The victim is injured but not hospitalised' (4.4). Financial harm seen as more salient than even physical harm.

is the finding that the offence, 'A person steals property worth $100 from *outside* a building' (my italics) is regarded more seriously (3.6) than the offence 'A person *breaks into a home* and steals $100' (my italics) (3.1).[28] The degree of financial harm is exactly the same but, as with Cullen *et al*'s finding, above, the relational impact of a domestic burglary is discounted.

Some of the strange results of seriousness studies may reflect the fact that respondents are given very little background information about the offence. Garrett and Rossi attempted to obviate this problem in their study of the seriousness of child abuse. They constructed detailed vignettes that differed in terms of certain key variables; one of which was the 'type of guardianship.' Vignettes were created involving different guardian relationships (natural mother/father; foster mother/father; adoptive mother/father and a male/female relative with guardianship of the child).[29] They found that respondents did not make distinctions between different types of guardianship when considering the seriousness of an incident.[30] However, they did find some suggestion that incidents are regarded as more serious when adults who are 'positively evaluated' abuse their children. They recommend further investigation in this area.[31] It may therefore be the case that it is not the *type* of relationship that respondents find salient, but how the persons in that relationship are perceived to be. In other words, the interplay between 'seriousness' and 'type of relationship' may turn, for modern respondents, on the question of character.

Garret and Rossi's research points to the benefit of a more sophisticated approach to seriousness studies. Their, more nuanced, findings suggest that a different approach to seriousness studies is needed to test for the importance of relationships.

The conventional mould of seriousness studies has recently been broken by several studies that do indeed have interesting relational implications. First, O'Connell and Whelan's 1996 study of approximately 600 Dublin voters found that 'individual impact' is a key criterion in

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[28] *Ibid.*

[29] K. A. Garrett and P. H. Rossi, 'Judging the seriousness of child abuse', [1978] 2 *Medical Anthropology* 1-48; 46.

[30] *Ibid.*, 13-14. Though the researchers suggest that further research should take into account the distinctions that respondents might make between 'guardians' and 'other adults' who come into contact with children; *ibid.*, 13.

[31] *Ibid.*, 14-15. 'Positive adult descriptions' include such characteristics as: "Appears to be a kind person"; "Is respected by friends" and "Seems easy to communicate with." Examples of 'negative adult descriptions' include: "Appears emotionally immature", "Sees a psychiatrist regularly" and "Has spent some time in prison for petty theft"; *ibid.*, 39.

determining public perceptions of seriousness. They identified five 'clusters' of offences that they argue correlate with 'individual impact,' in ascending order of seriousness.[32] The least serious offences are classically 'victimless' crimes that have little 'individual impact' (such as consensual underage sex and dealing in soft drugs). The next cluster consists of crimes in which there is a victim, but where the impact on any particular individual is diluted, either because the victim is 'diffused' or is an impersonal institution (such as business and dole fraud). The third cluster is seemingly more concentrated and individualised, consisting of police corruption and fraud on the public. The final two clusters (burglary, assault on a policeman; and murder, respectively) show an increasingly individualised violation either of a person or of his or her property.

O'Connell and Whelan's 'individual impact' construct is, in spite of its language, markedly relational. Increasing seriousness is correlated with a general movement away from crimes that have comparatively little relational impact on society (such as underage fornication) toward those that do (burglary, murder), as well as a movement away from crimes that are diffuse and impersonal to those that are immediate and that are experienced personally. Their findings suggest that the type of harm that respondents find most salient is conceived in relational terms. This is confirmed by the finding that a case of burglary ('The offender breaks into a person's house and steals property worth £30') was seen by respondents as more serious than one of dole fraud ('The offender dishonestly obtains social welfare benefits to the value of £30).[33] The former case has a personal dimension which the latter does not and this makes the burglary more serious.

Second, recent research has tried to distinguish between the elements of 'harmfulness' and 'wrongfulness.' Warr's survey of 336 Dallas residents found that these elements were indeed distinct dimensions, but that they were given different weight by different people in different circumstances. Whether 'harmfulness' or 'wrongfulness' prevails in making a final deliberation of seriousness depends on what the most striking feature of the crime is commonly perceived to be. The relative seriousness (distinguished in terms of 'harmfulness' and 'wrongfulness') for several 'relational' offences are set out in Table 2, below. (Note that the offences in Table 2,

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[32] M. O'Connell and A. Whelan, 'Taking wrongs seriously', [1996] 36 *British Journal of Criminology* 299-318; 308-9.

[33] *Ibid.*, 306ff.

unlike those for Table 1, are *not* set out in declining order of seriousness. Instead, they are presented to allow easy comparison of case #1 with cases #2, #3 and #4).

Offence	Description	Mean Seriousness	Mean Harmfulness	Mean Wrongfulness
#1	Secretly stealing $15 from a close friend	6.0	5.7	7.8
#2	Picking someone's pocket of $20	5.6	4.8	6.9
#3	Writing a bad cheque of $350 to a store	5.8	5.4	7.2
#4	Shoplifting merchandise worth $600 from a store	6.6	6.2	7.7

Table 2: The relative seriousness, harmfulness and wrongfulness of selected offences. Source: Warr 1989, 801.

Offences #1 and #2 both involve secret theft, but although the amount stolen is greater in #2 than in #1, 'Secretly stealing $15 from a close friend' is regarded as more serious, more harmful and more wrongful than 'Picking someone's pocket of $20.' The difference lies in the 'type of relationship' (violating the trust of a close friend). This remains the case in #3 where 'Writing a bad cheque of $350 to a store' is still seen as less serious, less harmful and less wrongful than #1. Although the sum involved is far higher than in #1, the relationship is less immediate and more diffuse. Although 'Shoplifting merchandise worth $600 from a store' (Case #4) is seen as more serious and more harmful than 'Secretly stealing $15 from a close friend' (Case #1), it is still seen as less wrongful and 'not as bad.' Although, of the four kinds of theft in Table 2, #1 involves the least amount of money, it is regarded as the most wrongful because it violates the closest relationship. It may therefore be the case that 'type of relationship' has a greater bearing on respondents' convictions of wrongfulness than harmfulness. If this is correct, it follows that the impact of relationships on seriousness will depend on whether respondents evaluate the crime primarily in terms of 'harmfulness' or 'wrongfulness.' Since this in turn depends on the most striking feature of the crime in question, it follows that 'type of relationship' will be more important in evaluating some crimes than others.

But whilst Warr's findings hold true in regard to offences of theft it does not, from the same study, appear to be true in the case of offences against the person. Warr identified a subgroup of 'offences against the person' where the victim and the offender had a prior social

relationship.[34] These relationships took the form of a wife, a classmate, a girlfriend and a child.[35] He found that the existence of a prior relationship appears to mitigate the 'wrongfulness' (but not the harmfulness) of an offence.[36] This is consistent with the findings presented earlier in which 'acquaintance violence' was seen to mitigate an offence, rather than to make it more serious.

Lastly, we note that much may depend on whether the respondents are victims themselves or whether they are people with no first-hand experience of crime. One might expect that a variable such as 'relationships' that is by its nature emotional, is more likely to be prominent in the responses of those who have been emotionally involved as victims of crime, rather than those for whom evaluations of seriousness are a cerebral exercise. Certainly, victims' responses to the 1992 British Crime Survey (BCS) suggest that they, at least, regard relationships as important to the seriousness of the offence. The authors of the BCS note, with some surprise, that "Victims were, if anything, more upset by attacks from those they knew than by strangers."[37]

We can conclude as follows. Early 'seriousness' studies appear to show that people tend not to think relationally about seriousness. 'Type of relationship' appears to be submerged beneath wider concerns, such as 'victims' vulnerability,' whilst 'stranger violence' appears to be regarded more seriously than 'acquaintance violence.' This may reflect a general failure on the part of respondents to think relationally. Certainly, we have seen that 'materialist' values figure more prominently in people's responses than 'relational' values. On the other hand, it may reflect the rudimentary method used by early studies. Recent, more sophisticated, attempts to measure seriousness have shown that 'type of relationship' can be an important factor in determining seriousness. Moreover, it appears to be especially prominent when attention is focused on the impact of the crime and on the wrongfulness of the offence, and where the responses are given by victims.

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[34] M. Warr, 'What is the perceived seriousness of crimes?' [1989] 27 *Criminology*. 795-821; 805-6.

[35] The offences included: a man hitting his wife during an argument, ten high school boys beating up a classmate, a teenager forcing his girlfriend into sex and a parent beating his or her child with fists.

[36] Warr *op. cit.*, 806.

IV. 'Relational Justice' and Biblical justice

A problem with talking about 'seriousness of offence' within the usual framework of liberal jurisprudence is that 'seriousness' assumes, by definition, that offences vary in their degree of moral turpitude.[38] Judgements must be made that deem some behaviour more morally repugnant than others. These decisions are reached on the basis of a set of values; a value being "an idea which serves as a ground for choosing between possibilities."[39]

This is a problem because a formative influence upon modern liberalism was the Enlightenment contention that truth could be attained by rational method, which could in turn appeal to principles undeniable by any fully reflective, rational person.[40] Today, however, there is much less confidence in this belief, especially among post-Enlightenment relativists and perspectivists. One modern philosopher, Alasdair MacIntyre, traces the shortcomings of liberal thought back to its abandonment of a conception of rational enquiry as embodied in a tradition; what he terms a 'tradition of enquiry.'[41] For MacIntyre, the post-modern task is to engage in debate within the context of a tradition of enquiry: an approach that, needless to say, runs counter to the liberal assumption that it is possible to assess and justify a particular moral tradition from a neutral vantage-point. But in fact, as MacIntyre argues, it is only from within traditions that anyone is able to acquire the standing-ground or the vocabulary from which to reject or defend particular ethical practices. The one who stands outside all traditions is a mute.[42]

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[37] P. Mayhew *et al*, *The 1992 British Crime Survey*, Home Office Research Study 132, (London: HMSO, 1992), 94. Certainly, the victim's perspective is of crucial importance in a relational approach to seriousness. The victim is the only person who is qualified to give an opinion on the significance of a given relationship.

[38] Of course, attempts have been made to define 'seriousness' without recourse to morality. Political statements to the effect that 'prison works' effectively redefined the meaning of 'seriousness' following the introduction of the CJA 1991. 'Seriousness' became a matter of how many people the Prison Service can, or ought, to hold. Another 'pragmatic' definition of seriousness is found in the Home Office's decision, in the early 1980s, to develop a blueprint on 'seriousness' based on a statistical analysis of current court practice. 'Seriousness' was defined descriptively, not prescriptively, in terms of the *status quo*. Seriousness was simply a matter of 'what the courts do.' Needless to say, neither of these definitions satisfy because they do not provide the criminal justice process with a 'general justifying aim' in regard to punishment.

[39] P. J. Allott, *Eunomia*,. (Oxford, OUP, 1990), 48.

[40] See generally H. J. Laski, *The Rise of European Liberalism.* (London, Unwin Books, 1962).

[41] A. MacIntyre, *Whose Justice? Which Rationality?* (Trowbridge, Duckworth, 1988), 7.

[42] The completely 'impartial' person has no possible basis on which to make a valuative judgement. Cf. M. Moore, *Foundations of Liberalism.* (Oxford, Clarendon Press, 1993), 171; "It is an illusion to suppose that there is some neutral vantage-point from which to assess and justify a particular moral tradition… The person who stands outside all practices is, as Aristotle said, rendered speechless with no grounds for rejecting or defending any particular ethical conception."

There is, therefore, a need to locate our exploration of 'seriousness of offence' within an identifiable 'tradition of enquiry.' There are of course any amount of 'traditions of enquiry' to choose from, many made up of communities with distinctive ideas about what constitutes a 'serious offence.' Take the Heaven's Gate cult, for example, some of whose members tragically committed mass suicide last year. They regarded as a serious offence: "trusting my own judgement, or using my own mind." Within which tradition, then, should we locate our search for the values of 'seriousness of offence'?

Michael Schluter locates relational thinking loosely within the Judaeo-Christian tradition (see *Chapter One*). 'Relational Justice', likewise, has a close affinity with this tradition.[43] At the end of the day, there is nothing new about 'Relational Justice.' It merely sums up "a long standing and valuable approach to social justice"[44] that has its roots in Biblical ideas. Biblical law has been of great and abiding importance through Christianity to Western civilisation and the English criminal justice system has been significantly influenced by Biblical law.[45] Law itself is an organic structure that takes society from the past to the future, preferably with some continuity between the two.[46] It is a means of transforming society in accordance with its values and it tends to make the future of that society into what society has determined in the past that its future should be.[47] To the extent, therefore, that Judaeo-Christian thought has had a major influence upon individual and social consciousness, we can fairly claim that this tradition is an integral part of law's dynamism.

Consequently, it is appropriate to explore 'Relational Justice' and the question of seriousness in the context of the Biblical tradition presented by the Old and New Testaments. This is authentic to post-modern discourse concerning justice, the roots of relationism and our legal tradition.

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[43] See C. Townsend. 1994. 'Believing in Justice' in J. Burnside and N. Baker, 1994a *op. cit.*, 133-146.

[44] Sir Stephen Tumim. In J. Burnside and N. Baker, *op. cit.*.

[45] G. Sivan, *The Bible and Civilisation,* (Jerusalem, Keter, 1973), 161ff.

[46] Cf. J. G. Frazer, *Folk-lore in the Old Testament: Studies in Comparative religion, Legend and Law* (London, Macmillan, 1923), 351; "Only a law which in some measure answers to a people's past has any power to mould that people's future."

[47] P. J. Allott, *op. cit.*

We have already seen, in *Chapter One*, that the Hebrew Bible principally uses two terms (*mishpat* and *tsedekah*) when dealing with what we call 'justice.' There is something to be gained, on this occasion, in relating these terms not simply to 'relationism' in general, as in *Chapter One*, but to 'Relational Justice' in particular.

Mishpat, we saw, is based on the verb *shaphat* which means 'to judge.' *Mishpat* is commonly used in a forensic context to denote the decision or action that results when a person 'judges.' It can mean a 'judgement' when a person judges, or 'justice' when someone intervenes to bring a situation to an appropriate resolution. *Mishpat* gives each opponent in a case their deserved right or punishment. It has an actively relational component because, in its ideal form, it involves restoring a relationship to a state of wholeness before God.[48] When God executes *mishpat*, parties are put in their proper relationship in His sight (e.g. Psalm 75:6-7: "For not from the east or from the west and not from the wilderness comes lifting up; but it is God who executes judgment (*mishpat*) putting down one and lifting up another"). Zechariah 7:9, notably, locates 'true judgements' in a relational context: "Thus says the LORD of hosts, Render true judgments (*mishpat emet*), show kindness and mercy each to his brother." Later, Zechariah 8:16 commands, "These are the things that you shall do: Speak the truth to one another, render (*v'mishpat*) in your gates judgments (*mishpatu*) that are true and make for peace (*shalom*)." True judgements promote right relationships. When parties are 'given their due', the result is a situation or environment that promotes equity and harmony in the community.

This relational outlook on justice may reflect the fact that, in the Bible, true justice can only be pursued in the context of a close relationship or walk with God. As the Book of Proverbs says; "Evil men do not understand justice (*mishpat*), but those who seek the LORD understand it completely" (Proverbs 28:5). It is telling that Jehoshaphat, in the context of his judicial reforms, instructs his judges as follows; "Consider what you do, for you judge not for man but for the LORD; *he is with you* in giving judgment" (2 Chronicles 19:6; my italics). This is not hyperbole. It reflects the belief that God is the only source of justice and that being in a

[48] Cf. Isaiah 2:4 ("He (the LORD) shall judge (*shaphat*) between the nations, and shall decide for many peoples; and they shall beat their swords into ploughshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more"); cf. Mic. 4:3. The emphasis falls on the state of *shalom* ('peace') that is established by doing *mishpat*. The word *shalom* includes the idea of peace in human relationships.

relationship with God is prerequisite to doing justice. Naturally, this contrasts with modern ideas of justice that see justice as a general 'norm', external to all relationships.[49]

In addition, *mishpat* is a comprehensive term for YHWH's[50] revelation in the context of YHWH and Israel. This revelation is grounded primarily on the relationship of YHWH to his chosen people, Israel.[51] Other nations have different laws or customs (*mishpatim*).[52] This is because they worship other (false) gods. But Israel's judges are to judge according to YHWH's *mishpatim*. They are to judge according to the laws of the God *to whom they belong*. Biblical law is thus markedly and inevitably relational because it is law given in the context of a relationship between a personal God and his chosen people.

The word *mishpat* frequently occurs in the same context as another word that is closely related to Biblical ideas of justice; namely, *tsedekah*. In fact, the two words *mishpat* and *tsedekah* go together like 'peaches and cream.'[53] Hence it is important to consider briefly what *tsedekah* means.

Tsedekah is usually translated 'righteousness' or 'justice' and, like *mishpat*, it is a term that expresses relationship. *Tsedekah* is the fulfilment of the demands that arise from a relationship,

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[49] Of course, Biblical law is also normative in the sense that it defines 'right' and 'wrong.' The difference is that in Biblical law, normative judgements are expressed in the setting of relationships, whereas modern law expresses norms more abstractly.

[50] The word 'YHWH' refers to the 'Name' of God (the 'tetragrammaton'). It is usually translated in English Bibles as "the LORD."

[51] Nowhere, outside of Israel, do we find a closer relationship between law and covenant; R. Sonsino, 'Characteristics of Biblical Law', [1984] 33 *Judaism* 202-209; p. 204). S. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (Leiden, E. J. Brill, 1970), 31 writes; "only in Israel does a legal collection embody the basis for the covenantal agreement between a deity and his elect."

[52] See e.g. Ezekiel 23:24 "And they [the Babylonians] shall come against you from the north with chariots and wagons and a host of peoples; they shall set themselves against you on every side with buckler, shield, and helmet, and I will commit the judgment to them, and they shall judge you according to their judgments (*b'mishpatehem*)." All Biblical references are to the Revised Standard Version (RSV) [1952], unless otherwise noted.

[53] The words "justice and rightouesness" (*mishpat v'tsedekah*) often appear together; e.g. "… Do justice and righteousness (*mishpat v'tsedekah*)…" (Jer. 22:3); Psalm 99:4, Isaiah 33:5 whilst at other times they simply occur in the same sentence; e.g. "Blessed are they who observe justice (*mishpat*), who do righteousness (*tsedekah*) at all times!" (Psalm 106:3) and "… For when thy judgments (*mishpatekah*) are in the earth, the inhabitants of the world learn righteousness (*tsedek*)" (Isaiah 26:9). The phrase *mishpat v'tsedekah* frequently occurs in Ezekiel, where the RSV translates it as "lawful and right" (e.g. Ezekiel 33:14; 33:16, 19). Frequent reference is made to God's "righteous ordinances" (*mishpat tsedekah*) in Psalm 119 (see verses 7, 62, 106, 164) whilst, elsewhere, reference is made to "righteous judgement" (*mishpat tsedek*); Deuteronomy 16:18; Psalm 9:4. Sometimes the words occur in a parallelism; e.g. Proverbs 8:20; "I walk in the way of righteousness (*tsedekah*), in the paths of justice (*mishpat*)"; Isaiah 28:17 "And I will make justice (*mishpat*) the line, and righteousness (*tsedekah*) the plummet…." (cf. also Isaiah 56:1; 59:9, 14 and Amos 6:12).

whether with YHWH or another person.[54] People who fulfil the conditions imposed upon them by relationships are called 'righteous.'[55] This means that, as with *mishpat*, there is no general norm of righteousness outside of that personal involvement, since every relationship has specific obligations.[56] The relational aspects of *tsedekah* can be seen in Psalm 85:10: "Steadfast love and faithfulness will meet; righteousness (*tsedek*) and peace (*shalom*) will kiss each other" and Isaiah 32:17, which declares: "And the effect of righteousness (*tsedekah*) will be peace (*shalom*) and the result of righteousness, quietness and trust for ever." *Tsedekah*, like *mishpat*, leads to right relationships.

Tsedekah is a prescribed quality for an Israelite judge. In Deuteronomy 16:18, Moses commands the people: "You shall appoint judges and officers in all your towns which the LORD your God gives you, according to your tribes; and they shall judge the people with righteous judgment (*mishpat-tsedek*)." More generally, in Leviticus 19:15, God commands all the Israelite people, through Moses: "You shall do no injustice in judgment; you shall not be partial to the poor or defer to the great, but in righteousness (*betsedek*) shall you judge your neighbour."

This brief summary does not, of course, exhaust the highly nuanced use of *mishpat* and *tsedekah* in the Hebrew Bible. Nor does it address the particular connotations of the phrase *mishpat v'tsedekah* ('justice and righteousness').[57] Suffice it to say that *mishpat* and *tsedekah* are relational terms that demonstrate an affinity between Biblical ideas of justice and Relational Justice.

Unlike modern liberal theory, which commonly sees justice as an abstraction and just behaviour as that which conforms to an abstract ethical or a legal norm, 'Relational Justice' insists that justice takes on meaning within the context of a relationship. Just behaviour *is* the fulfilment of the demands of a given relationship. There is no norm called 'justice' that exists outside this personal involvement.

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[54] B. V. Malchow, *Social Justice in the Hebrew Bible,* (Minnesota, The Liturgical Press, 1996), 16.

[55] *Ibid.*

[56] *Ibid.*

[57] For which see M. Weinfeld, *Social Justice in Ancient Israel and in the Ancient Near East*, (Jerusalem, The Magnes Press, 1995).

Moreover, as in Biblical law, a relational approach sees justice not simply as a matter of applying fair procedures, but as an intervention that is designed to bring a situation to an appropriate resolution. And what qualifies as a satisfactory outcome naturally depends on the relationship of the parties concerned.

To sum up: justice is not simply about the application of legal rules. Rather, it is an attempt to bring about a situation in which all the rights and obligations that are due to every individual in the community are upheld. Justice is not conceived primarily in terms of rules, but of relationships.

V. Relationships and seriousness in the Bible

Having located the quest for a relational approach to seriousness in the Biblical tradition and having demonstrated the affinity between 'Relational Justice' and Biblical ideas of justice, we are now in a position to consider whether the Bible itself correlates 'type of relationship' with 'seriousness of offence.'

Space forbids an exhaustive treatment. However, by way of illustration, we shall examine several 'horizontal' relationships (*viz.* those between one person and another, such as family and marital relationships) in **(a) - (c)** below before turning to consider the 'vertical' relationship between God and man in **(d) - (e)**. Our examples straddle both the Old and the New Testaments. The bottom line is that justice is seen through the lens of relationships and that type of relationship is important in determining questions of seriousness.

(a) Cain and Abel

The relevance of 'type of relationship' is seen, for example, in the story of Cain and Abel (*Genesis* 4:1-16). The seriousness of the offence - the world's first murder - derives in part from the fact that Cain and Abel are brothers. "It is not a foe, a stranger, or even a friend that Cain will kill, but his own flesh and blood."[58] This is clear from the literary presentation of *Genesis* 4:1-11. Cain's act is particularly heinous because the victim is his *brother*.

Genesis 4:1-2, 8-11

[58] A. J. Hauser, 'Linguistic and thematic links between Genesis 4:1-16 and Genesis 2-3', [1980] 23 *Journal of the Evangelical Theological Society* (4), 297-305; 300.

"(1) Now Adam knew Eve his wife, and she conceived and bore Cain, saying, "I have gotten a man with the help of the LORD." (2) And again, she bore *his brother* Abel… (8) Cain said to Abel *his brother*, "Let us go out to the field." And when they were in the field, Cain rose up against *his brother* Abel, and killed him. (9) Then the LORD said to Cain, "Where is Abel *your brother*?" He said, "I do not know; am I *my brother's* keeper?" (10) And the LORD said, "What have you done? The voice of *your brother's* blood is crying to me from the ground. (11) And now you are cursed from the ground, which has opened its mouth to receive *your brother's* blood from your hand…." (italics mine).

The passage reminds us throughout that Cain and Abel are brothers. The phrase "his brother" appears for the first time, in verse 2, to stress their intimacy. But the next time it occurs, in verse 8, that intimacy is destroyed by murder. The repeated use of "his brother" in this verse is poignant. It underlines the closeness of Cain to Abel, of the murderer to his victim. Hauser notes that, after verse 7, Abel's name is never used without the accompanying phrase, "his brother" (vv. 8-9). Indeed, in the last three references to the victim, Abel's name drops out completely and we are left with only "his brother" (vv.9b-11).[59]

The long and the short of it is that the writer places great stress on the fact that Abel is Cain's 'brother' because he wants to emphasise the seriousness of the offence. The repetition of "his brother" builds up like a crescendo. It burns the deed's heinousness into the mind of Cain and the reader.

Interestingly, when the apostle John returns to this theme, several millennia later, he does so in precisely the same terms:

"(10) By this it may be seen who are the children of God, and who are the children of the devil: whoever does not do right is not of God, nor he who does not love *his brother*. (11) For this is the message which you have heard from the beginning, that we should love one another, (12) and not be like Cain who was of the evil one and murdered *his brother*. And why did he murder him? Because his own deeds were evil and *his brother's* righteous (1 John 3:11-12; my italics)."

The context (v.10-11) emphasises the duty of siblings[60] whilst verse 12 evokes the relational seriousness of Gen. 4:1-8 by, again, describing the victim as 'his brother.'

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[59] Significantly, the phrase "his brother" is never applied to Cain but always to Abel. The implication is that whilst Abel was a brother to Cain; Cain, by his behaviour, was never a brother to Abel.

[60] Duty toward blood relatives is a common theme in the New Testament. Discharging this responsibility is seen as fundamental to the Christian faith. Cf. Paul's "command" (1 Timothy 5:7) to Timothy: "If any one does not provide for his

(b) Judah and Tamar

An implication of the relational approach to seriousness is that the gravity of the offence depends, to some degree, on the nature of the relationship between the parties at the time of the offence. The narrative of Judah and Tamar in *Genesis* 38:1-26 is instructive. The story trades heavily on the fact that what Tamar is allowed to do in one relational context, she is not allowed to do in another. The relational context is important because, as we shall see, it is the difference between life and death.

The story is simple. The sons of Israel have just sold their brother Joseph into slavery, having heeded their brother Judah's advice not to kill him themselves ("let not our hand be upon him, for he is our brother, our own flesh"; Gen. 37:27; cf. **(a)** above). 'About that time', the narrator tells us, Judah leaves his brothers and marries a foreign, Canaanite, woman who bears him three sons; Er, Onan and Shelah. Judah selects for his eldest, Er, a wife named Tamar. However Er, we are told, was "wicked in the sight of the LORD; and the LORD slew him" (Genesis. 38:7). Under the existing custom, it was the father-in-law's duty to see that a surviving son gave the wife of the deceased brother a son to carry on the family name and to inherit his share of the father's property. Accordingly, Judah commands his second-eldest son, Onan, to have relations with Tamar. "But Onan, knowing that the seed would not count as his, let it go to waste… so as not to provide offspring for his brother" (Genesis 38:9, JPS). It appears that Onan, the eldest surviving son, did not want to share his father's inheritance with a son credited to the deceased. His deception is a tragedy for Tamar because it gives her no opportunity to complain openly that she has been wronged, or to maintain her reputation as a (potentially) fertile woman.[61] What Onan does is "displeasing in the sight of the LORD, and he slew him also" (Gen. 38:10).

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relatives, and especially for his own family, he has disowned the faith and is worse than an unbeliever"; 1 Timothy 5:8. 'Brotherly' duty is also expanded in the New Testament to include those to whom one is related, not biologically, but spiritually, namely, the family of believers. Jesus makes this a badge of discipleship (John 13:35; "By this all men will know that you are my disciples**,** if you have love for one another"). Jesus also makes this a basis of judgement in Matthew 25:31-40; "(37)…'Lord, when did we see thee hungry and feed thee, or thirsty and give thee drink? (38) And when did we see thee a stranger and welcome thee, or naked and clothe thee? (39) And when did we see thee sick or in prison and visit thee?' (40) And the King will answer them, 'Truly, I say to you, as you did it to one of the least of these *my brethren*, (New Revised Standard Version [1989] "members of my family"; The Bible in Basic English [1949/1964] "my brothers") you did it to me'; cf. 1 John 3:17.

[61] A. Wildavsky, 'Survival must not be gained through sin', [1994] 62 *Journal for the Study of the Old Testament*, 37-48; 39.

Judah, of course, knows nothing of the facts. From his point of view, it seems that he has lost not one, but *two* of his sons to Tamar's clutches (what *does* she do in the bedroom?). He is thus reluctant to give her his youngest - and only remaining son - as the custom requires. He promises Tamar that he will give her his youngest son, Shelah, when he is grown up. However, he has no intention of doing so, fearing, "He too might die like his brothers" (Genesis 38:11). Like Onan, he appears to be 'doing the right thing' to Tamar when the reality is otherwise. Time passes, Shelah grows up, and he is not given to impregnate Tamar.

Tamar therefore hits upon a desperate expedient. Dressing herself up as a prostitute, and disguising herself with a veil to cover her face, Tamar lies in wait for Judah who is on a journey. The plan works. "When Judah saw her, he took her for a harlot; for she had covered her face. So he turned aside to her by the road and said, 'Here, let me sleep with you' - for he did not know that she was his daughter-in-law…." (Genesis 38:15-16). Judah, acting on impulse, has no suitable means of payment and so Tamar, as a surety, asks for his signet ring, his cord[62] and his staff.

Three months later, word reaches Judah, as head of his family, that Tamar is pregnant; "Your daughter-in-law Tamar has played the harlot; in fact, she is with child by harlotry" (Genesis 38:24). Judah orders that she be burned. But as she is brought out for execution, she sends Judah the message "I am with child by the man to whom these belong" (Genesis 38:25). Judah recognises the surety and confesses that "She [Tamar] is more in the right than I, inasmuch as I did not give her to my son Shelah" (Genesis 38:26).

The irony of the story - that Judah, who embraced the harlot, would put to death the woman who 'played the harlot' - informs our understanding of justice, relationships and seriousness in the following way. Tamar can get away with 'extra-marital' sexual relations in one context, but not in another. As a 'harlot' her behaviour is perfectly licit. But as the widowed daughter-in-law of a prominent tribal chief, she deserves to be burnt for exactly the same behaviour. There is a contrast between the situations described in verses 15 and 24. In verse 15, Judah sees that the woman is a 'harlot' and his response is a proposition. In verse 24, Judah hears that Tamar has

[62] On which was a cylindrical object that could be rolled across soft clay as a signature.

'played the harlot' and his response is to issue the death penalty. But "the two acts and the two women are one."[63]

The story trades heavily on the irony that what Tamar is allowed to do in one context (as an anonymous cult prostitute), she is not allowed to do in another (as Judah's daughter-in-law). The relational status of the woman is thus a crucial factor in determining 'seriousness of offence' in Genesis 38.

(c) Behaviour during betrothal

The same idea, that a woman's relational status in part determines the 'seriousness' of a sexual offence, is also present in Biblical law. We can see this by comparing the law of Ex. 22:16-17 ([Heb] 22:15-16) with those of Deut. 22:13-29, especially Deut. 22:23-24.

Ex. 22:16-17 ([Heb] 22:15-16) states:

"(16) If a man seduces [i.e. engages in consensual relations with] a virgin who is not betrothed, and lies with her, he shall give the marriage present for her, and make her his wife. (17) If her father utterly refuses to give her to him, he shall pay money equivalent to the marriage present for virgins."

Here, the seducer or rapist who has relations with an unbetrothed girl is punished, but neither he nor the woman are executed. This is in contrast to the law of Deut. 22:23-24, which states:

"(23) If there is a betrothed virgin, and a man meets her in the city and lies with her [i.e. engages in consensual relations], (24) then you shall bring them both out to the gate of that city, and you shall stone them to death with stones, the young woman because she did not cry for help though she was in the city, and the man because he violated his neighbour's wife; so you shall purge the evil from the midst of you."

Like Ex. 22:16-17 ([Heb] 22:15-16), Deut. 22:23-24 also deals with a case of consensual sex. In Deut. 22:23-24, the woman's consent is presumed from the setting. The difference is that, unlike Ex. 22:16-17 ([Heb] 22:15-16), she is betrothed. The result is that both parties (the seducer and the betrothed woman) are executed.

[63] P. A. Bird, 'The harlot as heroine', [1989] 46 *Semeia* 119-139, 124. The irony is strengthened by the fact that the root of the noun 'harlot' in verse 15 and the verb 'to play the harlot' in verse 24 is the same in Hebrew.

The reason for this is because sexual intercourse with an unbetrothed girl is not adultery. By contrast, intercourse with a betrothed woman is a case of adultery, or quasi-adultery, and as such deserves the death penalty. The relational status of the woman, whether she is unbetrothed or betrothed, is a matter of life and death.

A similar idea underlines the law in Deut. 22:13-21. This consists of a main case (Deut. 22:13-19) and a subsidiary case (Deut. 22:20-21). The main case deals with a married woman who is subsequently slandered by her new husband who goes about claiming that he did not find the anticipated "tokens" in his wife on their wedding-night (Deut. 22:14). The traditional view of this text is that the law is to do with premarital virginity and that the 'tokens' refer to an intact hymen.

The major problem with this view, however, is that the husband risks a severe punishment if the parents can prove his charges false (Deut. 22:17). They can do this by producing material evidence (Deut. 22:15-17). The traditional view is that this evidence takes the form of blood-stained bridal sheets. But how do the parents come to possess them and why does the husband gamble on a matter of which he can be certain? He is in the best position to know whether the 'evidence' exists or not!

A more plausible view is to see the "tokens" as evidence of menstruation and the husband's slander as a claim that she was not menstruating at the time of the marriage.[64] In other words, he claims that she was already pregnant when he married her. No doubt he will be anxious to express his doubts early on if he suspects that the first-born child will not be his. The physical evidence of which the parents are in possession probably consists of a special garment that the engaged woman wore during the short period of her betrothal and which was given to her parents on the day of the wedding. The husband, of course, would not know whether it contained menstrual stains or not.

This reconstruction of the case is important because it means that we must characterise the seriousness of the offence slightly differently to the traditional view. The law in Deut. 22:13-21

[64] G. J. Wenham, '*Betulah*: a girl of marriageable age', [1972] 22 *Vetus Testamentum* 326-348.

is not primarily interested in whether the woman is a virgin or not. Rather, it is concerned with how she conducted herself *during the period of betrothal*.[65]

To sum up, Biblical law appears to punish the sexual behaviour of betrothed women, but not the sexual behaviour of unbetrothed women. Although the behaviour (fornication) is the same in both cases, what defines it as a crime is the relational context in which the offence takes place (betrothal) and the nature of the relationship affected (her future husband). The husband's complaint in Deut. 22:13-21 is upheld, not simply because she had relations with someone else, but because she did so whilst she was betrothed. Again, 'type of relationship' determines seriousness.

(d) Idolatry

The worst offence in the whole of Biblical law is idolatry. Idolatry is putting anything (literally, *anything*) in the place that only God should have (Exodus 20:3-6). The seriousness of idolatry is insisted upon in both Rabbinic tradition (e.g. *Mishnah Sanhedrin* 90a where idolatry is the only command the 'prophet-like-Moses' is not allowed even to suspend) and the New Testament (e.g. "But as for the cowardly, the faithless, the polluted, as for murderers, fornicators, sorcerers, *idolaters*, and all liars, their lot shall be in the lake that burns with fire and sulphur, which is the second death"; Revelation 21:8, my italics).

Part of the reason why idolatry is serious is nature of the relationship at stake. We saw, above, that different relationships involve different obligations. All people, whether they are aware of it or not, stand in relationship to their Creator by dint of the fact that they are created beings. The claims of this relationship surpass all others, including relationships between a parent and a child and between husband and wife. The reason is logical: for a man to exist as a son, father or husband, he must first exist as God's creature. Within this relationship, men have a duty to render honour and obedience to their Creator. Idolatry strikes at the root of this relationship. It turns everything on its head.[66]

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[65] If the law was concerned with virginity *per se*, one might have expected a penalty for the unbetrothed girl who engages in consensual relations. But there is no reference to this anywhere in Deut. 22:13-29. The only case in Deut. 22:13-29 that deals with unbetrothed girls is Deut. 22:28-29, but the issue in Deut. 22:28-29 is *lack* of consent (an unbetrothed girl who is raped).

[66] It is, as Barton points out, "a 'cosmic nonsense', a reversal of the sane way of looking at the world which, according to Isaiah [e.g. 44:9-20], would lead men to bow in humility before the true God"; J. Barton, 'Natural law and poetic justice in the Old Testament', [1979] 30 *Journal of Theological Studies*,1-14; 7.

The Ten Commandments make it clear beyond doubt that idolatry is a 'relational' offence. The ban on idolatry in Ex. 20:3-6 follows the declaration; "I am the LORD your God who brought you out of Egypt, out of the house of bondage" (Ex. 20:2). It is the specific history of relations between YHWH and Israel, enshrined in the Exodus, that makes idolatry serious. It is because of this pre-existing 'relationship' that idolatry is often described as 'walking after other gods that *you have not known*' (my italics).[67] What is lacking between Israel and another deity is 'knowledge,' *viz.* a personal and intimate relationship. Idolatry heads the Decalogue because it is a radical disruption of this relationship. It is also typified in strongly affective and emotional terms (Ex. 20:3-6).[68]

Because it is a relational offence, idolatry is persistently compared to flawed human relationships. Indeed, it is so tightly bound to the paradigm of close personal relationships, especially marriage, that idolatry is frequently described as adultery.[69]

To sum up; the worst sin in the world is the violation of the most significant relationship, that between man and God. Biblical law is at pains to stress its relational and emotive aspects. Like a terrible family quarrel, it is the relationships violated and the feelings that are aroused that make idolatry serious.

(e) The Last Judgement

Divine judgement is not merely an "inevitable process of cause and effect in a moral universe"[70] (as Dodd would have it). It is personal. This is seen both in the Old and the New Testament.

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[67] E.g. Deut. 11:28; 13:2, 13.

[68] Ex. 20:2, which precedes the ban on idolatry, is designed to evoke the feeling of loyalty; B. S. Jackson, 'The literary presentation of multiculturalism in early Biblical law', [1995] 23 *International Journal for the Semiotics of Law* 181-206; 190. In Ex. 20:3-6, idolatry makes YHWH 'feel' jealous. It causes him to requite the active hatred shown by idolatry with hatred, even as he requites love with love. YHWH's jealousy is the reason for the ban on idolatry (e.g. Ex. 34:14; "For you must not worship any other god, *because* the LORD, whose name is jealous, is a jealous god" (my italics)). 'Jealousy' in Hebrew describes the passionate resentment one feels at seeing what is his being given to another. It underscores the relational character of idolatry because only an exclusive and valued relationship arouses jealousy when threatened; cf. Ezekiel 8:5.

[69] E.g. Ezekiel 23:37; "For they have committed adultery, and blood is upon their hands; with their idols they have committed adultery; and they have even offered up to them for food the sons whom they had borne to me."

[70] C. H. Dodd. *The Epistle of Paul to the Romans* (London, Collins, 1963 [1932]), 50.

The Old Testament typically presents judgement as a process in which God is involved. God is involved either directly[71] or indirectly. In the latter case, God's judgement works through human agency.[72] The New Testament refers to Christ as God's agent in executing judgement (e.g. "… [God] has fixed a day on which he will judge the world in righteousness by a man whom he has appointed, and of this he has given assurance to all men by raising him from the dead" (Acts 17:31)).[73] Divine justice is not an impersonal matter of 'cause and effect'. It is personal, as Fison writes:

"The importance of realising that Jesus Christ is the judge cannot be overemphasised. At the end we shall not approach a distant doomsday, but we shall be confronted by an immediate presence. If only we realised it, it is the presence of a living and loving person…. with whom we have to deal here and now, and with whom we are to bound to deal hereafter."[74]

The Last Judgement is starkly relational because the outcome is entirely defined in terms of relationship to Jesus. The only issue is 'knowing' Jesus and being, in turn, 'known' by him:[75]

"(32) So every one who acknowledges me before men, I also will acknowledge [as my own] before my Father who is in heaven; (33) but whoever denies me before men, I also will deny [*viz.* declare that I have no dealings with them] before my Father who is in heaven"; (Matthew 10:32-33).[76]

'Knowing Jesus' is not, of course, a purely subjective matter. It is also susceptible to an ethical test.[77] But, ultimately, the Last Judgement is a moment of division between those who belong, truly, to Christ and those who do not.

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[71] E.g. Gen. 3:9-19; 4:9-16.

[72] Variously, Moses (e.g. Num. 15:32-36), the King (1 Kgs. 3:28), the judges (2 Chronicles 19:9-10) and the Levites, priests and heads of the clans of Israel (2 Chronicles 19:9-10).

[73] "[Jesus] is the one ordained by God to be judge of the living and the dead" (Acts 5:42) because he is the Son of man (John 5:27). Paul writes, "… we must all appear before the judgment seat of Christ" (2 Corinthians 5:10) and again, in Romans 2:16, declares "God judges the secrets of men by Christ Jesus."

[74] Cited in S. H. Travis, 'The problem of judgment', [1986] 11 *Themelios* (2), 52-57; 53.

[75] The criterion by which men's eternal destiny is determined is their attitude to Christ; *viz.* their relationship to him. This is implied in the word 'faith'; commitment to someone in relationship; Travis, *op. cit.*, 54. On the negative side, Paul speaks of the vengeance that will be inflicted upon "those who do not know God and upon those who do not obey the gospel of our Lord Jesus" (2 Thessalonians 1:8). They are not in relationship to him and so will come under his wrath; Travis, *ibid.*

[76] Translation, with parentheses, S. H. Travis, *op. cit.* 54.

[77] E.g. "(21) Not every one who says to me, 'Lord, Lord,' shall enter the kingdom of heaven, but *he who does the will of my Father who is in heaven.* (22) On that day many will say to me, 'Lord, Lord, did we not prophesy in your name, and cast out demons in your name, and do many mighty works in your name?' (23) And then will I declare to them, '*I never knew you*; depart from me, you evildoers'"; (Matthew 7: 21-23, my italics).

Moreover, just as the *criterion* of judgement is expressed in terms of relationship to God through Christ, so also the *result* of the judgement is expressed in similar terms.[78] Heaven and hell are portrayed, not simply as places[79] but as conditions. They are conditions of either knowing and serving God or of not knowing and serving God. 'Salvation' and 'condemnation' are viewed in terms of relationship or non-relationship. Heaven and hell are not best spoken of as a 'reward' or a 'punishment' for the kind of life that we have lived. Rather, they are the logical outcome of our relationship to God in this life. As Travis writes, "Heaven is not a reward for being a Christian any more than marriage is a reward for being engaged."[80] Nor is hell best seen as a punishment for spurning Christ. It is simply, logically, frighteningly, where the road ends.

The contrast between Heaven and Hell is thus a relational one. Heaven means to be in the presence of God or of Christ. Hell means to be shut out from God's presence. It is the contrast between marriage and consummation on the one hand[81] and what C. S. Lewis called 'the Great Divorce'[82] on the other. The destiny of believers is to "always be with the Lord" (1 Thessalonians 4:17), where the word 'with' suggests "a settled permanent mutual fellowship."[83] The final state of believers is simply described as "follow[ing] the Lamb wherever he goes" (Rev. 14:4; cf. 7:17). Jesus promises the dying brigand, when both are on the cross, "Truly, I say to you, today you will be with me in Paradise" (Luke 23:43). In this, writes Harris, "he was not promising a king's welcome when the gates of paradise were opened at the end of the age but his personal companionship immediately after death: 'today, with me.'"[84] The destiny of unbelievers, by contrast, is described as "… the punishment of eternal destruction and exclusion from the presence of the Lord and from the glory of his might" (2 Thessalonians 1:9).

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[78] S. H. Travis, *op. cit.*, 1984, 54.

[79] Although they *are* still places, in the sense that they are localities where God's presence is perfectly expressed and felt - or not; M. J. Harris, 'The New Testament view of life after death', [1986] 11 *Themelios* (2), 47-52; 50.

[80] S. H. Travis, *op. cit.*, 54.

[81] Revelation 19:7-9; "(7) 'Let us rejoice and exult and give him the glory, for the marriage of the Lamb has come, and his Bride has made herself ready; (8) it was granted her to be clothed with fine linen, bright and pure' -- for the fine linen is the righteous deeds of the saints. (9) And the angel said to me, 'Write this: Blessed are those who are invited to the marriage supper of the Lamb.' And he said to me, 'These are true words of God.'"

[82] In an ironic reversal of Blake's *Marriage of Heaven and Hell;* C. S. Lewis. *The Great Divorce.* (Glasgow, Collins,1980 [1946]).

[83] M. J. Harris, *op. cit.*, 48.

To sum up, the Last Judgement is relational in the sense that it means God's final "underlining and ratification of the relationship towards him that we have chosen in this life."[85] "If we have fellowship with God now, we shall enter into a fuller experience of his presence then. If we do not know him now, we shall not know him then."[86]

VI. The *R Factor* and seriousness

We have seen, in Part II, the need to think relationally about justice and seriousness. We looked, in Part III, at the extent to which this relational perspective is intuitively shared by ordinary people. We have examined, in Part IV, the Biblical roots of justice and considered, in Part V, some of the Biblical material that points towards 'type of relationship' as an element of seriousness. This brings us, finally, to consider briefly some of the practical implications of a Relational approach to 'seriousness.'

First, a relational approach highlights the need to take a contextual approach to 'seriousness.' There is always the danger that the rather analytical approach to seriousness, adopted by the Magistrates' Association's *Sentencing Guidelines*, for example, reduces the question of the gravity of an offence to a quasi-scientific formula. From there, it is only a short step to regarding elements of seriousness as 'necessary conditions' that must be taken into account in every assessment of seriousness, irrespective of the type of crime or its context.

For this reason, a relational approach to seriousness would begin by wholeheartedly endorsing the contextualism of sections 3(3)[87] and 28(1)[88] of the CJA 1991. These specific statutory

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[84] *Ibid.*.

[85] S. H. Travis *op. cit.*, 54.

[86] *Ibid.,* 54.

[87] Section 3(3) states that:

"In forming any such opinion as is mentioned in subsection (2) of section 1 or 2 above a court - (a) shall take into account all such information about the circumstances of the offence (including any aggravating or mitigating factors) as is available to it; and (b) in the case of any such opinion as is mentioned in paragraph (b) of that subsection, may take into account any information about the offender which is before it."

[88] Section 28(1) of the Act provides:

"Nothing in this Part shall prevent a Court from mitigating an offender's sentence by taking into account any such matters as, in the opinion of the Court, are relevant in mitigation of sentence."

The fact that an offence is so serious that only a custodial sentence can be justified for the purposes of s.1(2)(a) of the CJA 1991 does not mean that the court must pass a custodial sentence. The Court must still consider whether such a sentence is

requirements are necessary and valuable correctives to a general tendency to abstract the seriousness of the offence from the relational context or the moral situation of the criminal.[89] This tendency has its roots in a form of legal reasoning that has so modelled itself on the nineteenth-century scientific tradition of enquiry that it has tended to underplay the importance of interpersonal relations in doing justice. At its worst, this approach favours mandatory sentences for certain offences, regardless of the circumstances in which the offence was committed. A recent example is the introduction of a mandatory sentence for third-time burglary (irrespective of the seriousness of the third burglary). A fully contextual, and relational, approach to seriousness recognises that each offence involves a different set of relationships, trust and responsibility. This context in turn affects evaluations of 'seriousness of offence.' It should be noted that a relational approach, which formally recognises that offences committed by certain people are more serious than those committed by others, to some extent contradicts the claim (made by the European Court of Human Rights and in the Human Rights Act 1998) that 'all people should be treated equally before the law.' The sexual indiscretion of a bishop in Westminster Abbey (or of a President in the Oval Office) is more serious than that of a prostitute in King's Cross. There are always cases where it is appropriate to ask: what are the implications of this particular person committing this particular offence in this particular way? We might well, as a matter of principle, think that 'all people should be treated equally.' But the fact remains that it is quite proper for a judge who is convicted of his third drink-driving offence to be sentenced more severely than a commoner, simply because he is a judge. We expect magistrates and judges to take a contextual, or relational, approach to seriousness as opposed to an abstract one. This is because questions of seriousness are in practice understood contextually and less as a matter of abstract propositions.

The case law on 'seriousness' is certainly familiar with the importance of context in determining the gravity of an offence. The Court of Appeal in *Cunningham*[90], for example, held

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appropriate, having regard to the mitigating factors available and relevant to the offender, as opposed to such factors as are relevant to the offence.

[89] An example of an 'abstract' approach to 'seriousness of offence' is found in New Zealand criminal justice, where offenders sentenced to more than two years' imprisonment for one of a list of serious violent or sexual offences are awarded a seriousness 'score.' The magnitude of the seriousness score represents the average number of imprisonment days given in sentence for each offence. Thus conspiracy to murder has a score of 3650 compared to 1512 for attempted murder; sexual violation (at 1534) is rated more serious than manslaughter (1276). Robbery is awarded a score of 177. Evaluations of 'seriousness' are abstracted from the specific context of the offence and are reduced to a scientific formula.

[90] (1993) 14 Cr. App. R. (S.), 444-448.

that the prevalence of an offence is a relevant factor in determining seriousness.[91] But there is certainly room for a more contextual approach to seriousness that takes into account the relational significance of each crime in the light of each particular area. As Lord Justice Lawton pointed out; stealing a lobster out of the frozen food section of Sainsbury's is not the same crime as stealing it out of a fisherman's lobster-pot in the south of Cornwall. To this we may add the numerous occasions when justice does in fact view as 'more serious' those crimes that involve closer relationships. We think of cases involving breach of trust (a male nurse raping a client in his care); theft by professionals (bankers, accountants, treasurers) from their clients; domestic violence and child abuse cases. The list is endless.

Second, it should be frankly recognised that 'seriousness of offence' raises deep philosophical and anthropological questions concerning the link between a person's deeds and his reputation. A relational approach takes account of the fact that 'relationships' are one of the mediating constructs between 'character' and 'seriousness.'[92] Character is not simply a matter of conduct. It is also a reflection of a person's relationships. After all, morality is not concerned simply with our interrelationships, externally conceived, but with what we are *in* those interrelationships.[93]

This means that, when an offender is punished for his conduct, the offence in question is taken to express some character defect: whether weakness of will, moral obtuseness or some particular vice, such as greed. This does not, however, mean that the moral judgement involved in sentencing represents a whole 'life assessment.' Punishment is generally directed to particular conduct, even conduct that is 'out of character.' The 'punishment-moral dereliction'

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[91] Lord Taylor C.J. held, p. 448, "The seriousness of an offence is clearly affected by how many people it harms and to what extent." He gives the example of a violent sexual attack on a woman in a public place that, clearly, gravely harms her. "But if such attacks are prevalent in a neighbourhood, each offence affects not only the immediate victim but women generally in that area… in such circumstances, the sentence commensurate with the seriousness of the offence may need to be higher there than elsewhere."

[92] The others are 'conduct' and 'repeat offending.' Deeds are the required evidence of character (ensuring that an offender is not punished for his character alone), whilst repeat offending justifies making the inference from an 'act' to a 'disposition.'

[93] J. Kleinig, 'Punishment and moral seriousness', [1991] 25 *Israel Law Review* 401-421;406.

nexus has been recently reasserted by penal philosophers and criminologists who have argued that 'character' should play an increased role in the criminal law.[94]

This relational approach to seriousness is consistent with the goal of 'person-oriented' punishment embodied in 'Relational Justice.' It contrasts with the 'act-oriented' punishment of modern law, according to which the deed alone is criminalised and character is simply a matter of mitigation.[95] True, s. 66(6) of the CJA 1993 allows judges to take into account an offender's previous offending history in determining seriousness.[96] However, this 'previous history' may or may not involve behaviour that is similar to the charge on which he is convicted. In any case, s.66(6) is, conceptually at least, 'act-oriented' rather than 'person-oriented.' The interest is in his previous record and not his character as such.

Finally, a relational approach to seriousness also takes into account the relational seriousness of the *punishment*, as well as the seriousness of the offence. In relational terms, is a short period of custody a more serious penalty than, say, corporal punishment? Is a fine 'worse' than probation? Criminologists have expended great effort in measuring public perceptions of seriousness of offence. However, they have put very little effort into assessing the seriousness of the *penalties* that express these convictions about 'seriousness.' Yet evaluations of penal severity reflect underlying values no less than evaluations of the seriousness of an offence.[97]

'Seriousness of punishment' is an important issue from a relational point of view. The choice of penalties available to a court vary not just in kind (imprisonment, probation, fine etc.) and in magnitude (duration of imprisonment or probation, amount of fine) but also in their relational impact. Imprisonment acts like a sledgehammer upon relationships in a way that non-custodial

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[94] M. D. Bayles, 'Character, Purpose, and Criminal Responsibility', [1982] 1 *Law and Philosophy* 5-20. Kleinig *op. cit.*, 402ff argues that, in punishing, there is an implicit or explicit denunciation or condemnation of the punishee who is deemed to have acted in a morally discreditable manner. Some aspect of his character is called into question. Kleinig argues all punishment makes intimations concerning a person's character.

[95] E.g. *Attorney-General's References Nos. 3, 4 and 5 of 1992 (Stephen Boyd and others)* (1993) 14 Cr. App. R. (S.), 191-5.

[96] See p. 4, above.

[97] Initial research in this area has found that a life sentence without parole is perceived as being 40.14 times more severe than a two-year prison sentence, whilst the death penalty was 55.43 times more severe; Hamilton and Rotkin 1976, cited in L. Sebba and G. Nathan, 'Further explorations in the scaling of penalties', [1984] 23 *British Journal of Criminology* 221-247. Sebba, cited in Sebba and Nathan, *op. cit.*, found that the largest fine ($50,000) was ranked between seven and five years' imprisonment, whilst the longest period of probation (ten years) was ranked between three years' and 18 months' imprisonment.

penalties seldom do. It is not unusual to see relationships acknowledged in this area too; for example, where the imposition of a fine is restricted in domestic assault cases if the family is intact, because high penalties would bring only further harm to the victim.

A relational approach to the seriousness of penalties, therefore, raises the possibility of scaling judicial sanctions according to their relational severity (either by ranking the sanctions in order of relative severity or by indicating the magnitude of the differences between each item). The relational impact of imprisonment would be an additional factor that the sentencer would have to bear in mind in determining whether the offence is so serious that only a custodial sentence is justified.

VII. Conclusion

Justice is defined and executed in terms of relationship. Different relationships give rise to different obligations and the relational context in which a crime is committed should influence, to some extent, the seriousness of an offence. The Biblical tradition pays some attention to type of relationship in evaluating seriousness. Modern seriousness studies are equivocal about the importance of this dimension, but this is partly the result of how 'seriousness' is measured. A fair assessment indicates a possible role for type of relationship in assessing seriousness. However, it is likely that relationships will figure more prominently in some evaluations of seriousness than others, depending on the nature of the offence and whether 'harmfulness' or 'wrongfulness' is the primary feature. Indeed, to the extent that 'type of relationship' succeeds in capturing how the public intuitively feels about questions of justice, seriousness and relationships, a more relational approach could be an effective way of tackling public cynicism about sentencers and sentencing. A relational approach to seriousness means that questions of context, character and type of relationship are all important in fixing the overall tariff and that the seriousness of the punishment, seen in relational terms, is a factor in determining the proper penalty.

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