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## TOWARDS A THEORY OF MITIGATION

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*Criminal sentencing was once an exercise in rehabilitation—judges imposed sentences based on their estimation of how likely defendants were to reform their lawless ways and avoid committing future crime. The rehabilitative model of sentencing was largely abandoned in the late twentieth century, and it has yet to be replaced by another theory of punishment. The failure to replace rehabilitation with another theoretical approach has contributed to a dearth of mitigation in modern, non-capital sentencing. This Article seeks to restore mitigation to a prominent role in modern sentencing discourse and practice.*

*First, this Article provides an account of an existing mitigation consensus. Based on a comprehensive review of state sentencing statutes and guidelines, as well as surveys of judges and public opinion, the Article identifies eight factors that are consistently thought to justify a mitigated sentence. Second, this Article offers a theoretical approach to sentencing mitigation. Drawing on the mitigation consensus, the parsimony principle, and theories of limited government, the Article proposes that judges need not select a single punishment theory when making sentencing decisions. Instead, judges should embrace an inclusive approach to mitigation, and consequently impose less severe sentences whenever any of the prevailing punishment theories would support a reduction.*

#### INTRODUCTION

Mitigation plays a diminished role in modern sentencing. Many modern sentencing systems give overwhelmingly more attention to aggravating factors that mandate or allow an enhanced sentence. The Federal Sentencing Guidelines provide a stark example: nearly all Guideline provisions specify aggravating factors increasing the recommended sentencing range, while only a handful set forth mitigating factors reducing that range.<sup>1</sup> The federal system is not an outlier. State sentencing statutes and guidelines also tend to identify more aggravating than mitigating factors.<sup>2</sup>

This emphasis on aggravating factors at sentencing is a relatively new phenomenon. For most of the twentieth century, the predominant focus of sentencing was the consideration of offenders' rehabilitative potential, and trial judges had broad discretion to consider mitigating factors in tailoring sentences to each defendant.<sup>3</sup> But the 1970s saw the rejection of the rehabilitative theory

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<sup>1</sup> See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 67-68 (1998). See generally U.S. SENTENCING GUIDELINES MANUAL ch. 2-3 (U.S. SENTENCING COMM'N 2014) (setting forth hundreds of subsections that instruct judges to increase a federal defendant's offense level and only twenty-five subsections that instruct judges to decrease a federal defendant's offense level).

<sup>2</sup> See Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1128 nn.96-99 (2008) (identifying the aggravating and mitigating sentencing factors present in state sentencing statutes).

<sup>3</sup> See Andrew von Hirsch, *The Sentencing Commission's Functions*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 3 (Andrew von Hirsch et al. eds., 1987).

of sentencing and growing distrust of judicial sentencing discretion. As a result, many states and the federal government adopted sentencing systems that limited judicial discretion and provided more ex ante structure for sentencing decisions. These structured systems—which reflected legislative efforts to make punishments more severe, certain, and consistent—focused heavily on sentencing aggravation.<sup>4</sup> Legislatures identified numerous offense and criminal history facts that would trigger mandatory minimum prison sentences, and sentencing commissions wrote guidelines specifying an even wider variety of sentencing factors that would prompt imposition of enhanced sentences.

During the past few years, the sentencing landscape has changed again. Concerned by the rising costs of expanding prison populations, several jurisdictions have softened the severity and rigidity of their sentencing schemes, returning a healthy measure of sentencing discretion to trial judges and parole authorities.<sup>5</sup> Other jurisdictions have restored judicial sentencing discretion in response to new Supreme Court rulings imposing procedural limits on the application of aggravating sentencing factors in structured sentencing schemes.<sup>6</sup> But the reintroduction of discretion at sentencing has not resulted in a comparable resurgence in mitigation at sentencing.

One reason for this inconsistency is that no single theory of punishment has replaced the discredited theory of rehabilitation. This fact does not seem to affect the viability of aggravating sentencing factors; lawmakers and judges consistently and confidently conclude that certain facts—such as previous criminal convictions, using a firearm, harming victims in various ways, or organizing a large criminal enterprise—are always aggravating and always justify an enhanced sentence. But theoretical uncertainty about whether and how to prioritize diverse punishment purposes often leaves courts (and commentators) without a firm foundation about which factors should be deemed mitigating.

The effects of this uncertainty are especially clear with respect to certain offender-based sentencing factors, like diminished intellectual capacity. That fact could aggravate or mitigate a sentence depending on the dominant theory of punishment. To a retributivist, diminished capacity should lead to a shorter sentence because it makes the defendant less blameworthy than other defendants. But, to the utilitarian, a longer sentence will be appropriate whenever any diminished capacity makes the defendant more likely to commit crimes in the future. Consequently, whether the sentencing judge adopts a

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<sup>4</sup> See Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics*, 58 STAN. L. REV. 277, 279-80 (2005).

<sup>5</sup> See *Reform in Action: State Initiatives*, RIGHT ON CRIME, <http://www.rightoncrime.com/reform-in-action/> [<http://perma.cc/ZLR3-R7FK>] (collecting criminal justice and sentencing reforms by state).

<sup>6</sup> See, e.g., *Alleyne v. United States*, 133 S. Ct. 2151 (2013); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

theory of retributivism or utilitarianism will dictate whether the judge treats diminished intellectual capacity as an aggravating factor or as a mitigating factor.<sup>7</sup>

Faced with these types of theoretically divergent sentencing factors, some judges decline to reduce defendants' sentences. And the history of modern sentencing reform make judges especially hesitant to champion mitigating factors absent legislative guidance: using sentencing discretion to choose whether to treat a fact as mitigating or aggravating based on personal philosophies, the argument goes, risks taking the first step on a path returning us to the bad old days, when sentencing was "lawless" and outcomes were persistently unpredictable and inconsistent.<sup>8</sup> Others have objected to offender-based mitigating factors on the ground that sentencing should revolve primarily, if not exclusively, around the nature and circumstances of the crime.<sup>9</sup> Still others suggest that a fact or circumstance is an appropriate sentencing factor only if all theories of punishment support such a conclusion.<sup>10</sup>

This Article explores what we see as a mitigation deficit in modern sentencing theory and practice, and it challenges the modern reluctance to mitigate by supplying a foundation for mitigation. We contend that mitigation is appropriate when *any* of the traditional theories of punishment support mitigation. In other words, shorter sentences are justifiable when either the retributivist goal of punishing the morally culpable proportionately or the utilitarian goal of efficiently reducing future crimes would be advanced.

This inclusive approach to sentencing mitigation derives from the tenet that, in a free society, punishment should be the exception rather than the rule. The United States has a foundational commitment to personal freedom. The idea that the state requires a justification to punish flows from that commitment.<sup>11</sup>

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<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *United States v. Garthus*, 652 F.3d 715, 718, 720-21 (7th Cir. 2011). See generally Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

<sup>9</sup> E.g., Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 207-08 (1994) (arguing that the principles of culpability and crime control should eliminate disparate sentences for like crimes).

<sup>10</sup> E.g., John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 427-28 (2006) (making this point with respect to aggravation); Brian Netter, *Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program*, 97 J. CRIM. L. & CRIMINOLOGY 699, 716-18 (2007) (same).

<sup>11</sup> See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 285-86 (2005) ("[T]he American political system and its legal institutions, including the law of sentencing, is a consequence of two ideological commitments: the view that state power always needs to be justified, and the commitment to limited government rather than to no state or a total state.").

Indeed, the very idea behind the theories of punishment is the premise that punishment is illegitimate if it cannot be adequately justified. But a comparable justification is not required to support a decision not to punish. The government need not provide a compelling reason when it refrains from using public powers to intervene in private lives. The decision not to punish is essentially a decision to maintain the status quo, and maintaining the status quo requires no justification.

Moreover, punishment in practice almost never actually seeks to, and perhaps almost never truly can, exclusively serve only one of the traditional theories of punishment. In reality, governments seek to effectuate most, if not all, of the goals of punishment when they punish—states punish individuals both because those individuals deserve it *and* because the punishment will prevent future crime. Accordingly, when one of those theories does not support punishment, the state should impose less punishment. This inclusive approach to mitigation is related, though not identical to, the punishment theory often referred to as the hybrid theory.<sup>12</sup> It differs from hybrid theory, however, in that it does not prioritize retributive concerns above utilitarian concerns, nor does it exclude specific punishment values.<sup>13</sup>

Mitigating when any of the theories of punishment would support a less severe sentence also prioritizes the principle of parsimony—namely, that states should not inflict any more punishment than is necessary.<sup>14</sup> We believe that adopting an inclusive approach to punishment, in addition to being in harmony with many long-standing American criminal justice perspectives and principles, is the best way to ensure that mitigation will again play a coequal role at sentencing.

This Article proceeds in four parts. Part I gives a brief overview of how we have arrived at our current state of mitigation. It explains how the sentencing reforms of the late twentieth century not only eliminated many mitigating factors from the sentencing calculus, but also did so in a manner that claimed to be divorced from traditional punishment theories. It describes how the Supreme Court’s recent cases restored judicial discretion to consider mitigating factors at sentencing. And it demonstrates that many courts remain uncertain about how to exercise their discretion to reduce sentences without devolving to lawless sentencing. In particular, Part I highlights a number of cases involving traditional mitigating factors that could be considered mitigating according to retributivist punishment principles, but could also be considered aggravating under utilitarian principles. In those cases where prevailing punishment

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<sup>12</sup> See Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. 699, 746 (2012) (praising the hybrid theory of punishment’s “refusal to elevate any one reason for punishment to master value status, its resistance to a fully systematic methodology, and its commitment to include a broad range of values within the compass of reasons to punish”).

<sup>13</sup> See *id.* at 746.

<sup>14</sup> See *infra* Section IV.B.

theories do not unanimously support a mitigated sentence, we see glimpses of judicial anxiety that sentencing without guidelines is nothing more than sentencing by judicial fiat.

Part II helps to explain the anxiety identified in Part I. It briefly recounts the two major punishment theories—retributivism and utilitarianism—and it demonstrates how those theories often support the recognition of different sentencing factors. It further demonstrates that a judge who wished to confine herself to a single punishment theory would be unable to reduce a defendant's sentence when confronted with several traditional mitigating factors. In other words, this Part demonstrates how none of the prevailing punishment theories can fill the vacuum left by the collapse of the rehabilitative ideal.

Part III presents our positive account of mitigating factors. Drawing on surveys of sentencing judges and public opinion, as well as our own survey of state sentencing statutes and guidelines, we are able to identify a number of sentencing factors around which a consensus has formed. These factors include: (1) whether the defendant had an imperfect defense, (2) the role played by others in the defendant's crime, (3) the victim's compensation, (4) the seriousness of the defendant's criminal conduct, (5) the defendant's culpability, (6) the defendant's likelihood of recidivism, (7) the defendant's acceptance of responsibility or sincere remorse, and (8) whether the punishment will result in hardship to a defendant or her family. After identifying those factors, the Section makes a number of descriptive claims about mitigation consensus. In particular, it notes that the consensus includes factors which can be justified by only a single theory. That is to say, the mitigation consensus is not obviously retributive or utilitarian. In addition to this lack of theoretical purity, several of the consensus mitigating factors can be justified as mitigating under one punishment theory, while another theory suggests that the same factor should aggravate a defendant's sentence. Most interestingly, the sentencing consensus includes factors that are not obviously justifiable by any of the prevailing punishment theories.

Drawing on both the theories of Part II and the positive account in Part III, Part IV offers our affirmative vision for when a fact or circumstance ought to be treated as mitigating. As this Part explains, a defendant ought to receive a sentence reduction whenever *any* of the prevailing punishment theories would suggest mitigation. That is not to say no punishment should be imposed, but rather that such a defendant should not receive the same amount of punishment as the average defendant who has committed the same crime.

A number of reasons support this inclusive approach to mitigation. First, it more accurately reflects public opinion towards criminal sentences—that is, we sentence both to punish offenders and to prevent crimes. Second, it is consistent with the parsimony principle. Finally, and most importantly, it pushes back against the premise implicit in the criticism and uncertainty surrounding sentencing mitigation—namely that the decision to impose less punishment on a particular defendant should be subject to searching scrutiny. While affirmative and consistent principles may be necessary to justify the

imposition of punishment, the decision to withhold punishment does not need theoretical coherence or purity. The state regularly decreases punishments—or forgoes punishment altogether—in order to achieve diverse non-criminal law ends.

Part IV also briefly addresses some potential criticisms of an inclusive approach to mitigation, including concerns about implementation and concerns about race and class inequality.

#### I. A BRIEF HISTORY OF MITIGATION

After a defendant has been convicted of a crime, the court must decide how much punishment that defendant will receive. Early in American history, the particular sanction for many crimes was prescribed by law—that is to say, the statute set forth a fixed punishment for all defendants convicted of that crime. In those cases, a judge’s sentencing role was essentially ministerial, limited to imposing the punishment required by the crime of conviction, and it did not include consideration of any additional factors in either aggravation or mitigation.<sup>15</sup> But even in these early times, mitigating factors were central considerations in discretionary mechanisms that allowed for reduction of a fixed sentence, such as the benefit of clergy and executive clemency powers.<sup>16</sup>

Of course, even in the earliest times, some criminal statutes specified a range of potential punishments.<sup>17</sup> And that is the pattern that the vast majority of criminal statutes follow today. Whenever a statute gives a range of punishment, some sort of sentencing process is required in order to determine where a particular defendant’s punishment will fall within that range. That is to say, some sort of process is required in order to determine whether there are aggravating factors (factors suggesting the sentence should fall on the upper end of the statutory range), whether there are mitigating factors (factors suggesting the sentence should fall on the lower end of the range), and how to weigh the aggravating factors against the mitigating factors.

Prior to the advent of structured sentencing in the late twentieth century, the sentencing process focused largely on mitigation. Mitigation was the focal

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<sup>15</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 479 (2000) (commenting that English law, and thus early American “substantive criminal law[,] tended to be sanction-specific; it prescribed a particular sentence for each offense” and “[t]he judge was meant simply to impose that sentence”); see also *Alleyne v. United States*, 133 S. Ct. 2151, 2158-59 (2013) (highlighting the “intimate connection between crime and punishment” in early American laws and practices). This inherent lack of sentencing discretion may explain why the U.S. Constitution frequently mentions trials and expressly regulates criminal trial procedures, but does not mention sentencing procedures or practices. See, e.g., U.S. CONST. art. I, § 3, cl. 7 (providing that an impeached official may still be subject to a traditional criminal trial); *id.* art. III, § 2, cl. 3 (setting forth procedures for criminal trials in all cases but impeachment); *id.* amend. VI (providing accused defendants various trial rights).

<sup>16</sup> See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 3-6 (2012).

<sup>17</sup> *Alleyne*, 133 S. Ct. at 2158 (commenting that “some early American statutes provided ranges of permissible sentences”).

point of sentencing because sentencing was conceptually and functionally organized around the “rehabilitative ideal.”<sup>18</sup> Sentencing judges and parole officials looked for facts and circumstances to determine whether a defendant had been rehabilitated and could be released from custody as soon as possible. In order to allow sentences to be tailored to the rehabilitative prospects and progress of each individual offender, trial judges were afforded broad discretion in the imposition of sentencing terms, and parole officials exercised similar discretion concerning prison release dates.<sup>19</sup> And, in both theory and practice, the focal point of initial sentencing decision-making and parole review were the mitigating aspects of the defendant’s criminal activities and his (ever-evolving) character.

The central role of rehabilitation and the broad authority delegated to judges are reflected in the leading sentencing case of that time, *Williams v. New York*.<sup>20</sup> “Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence,” the *Williams* Court wrote.<sup>21</sup> It explained that this “prevalent modern philosophy of penology [dictates] that the punishment should fit the offender and not merely the crime,” and that an inquiry into “the past life and habits of a particular offender” is necessary to individualize sentences.<sup>22</sup> The Court further noted that the discretion given to judges “ha[s] not resulted in making the lot of offenders harder. On the contrary . . . many [have been] less severely punished and restored sooner to complete freedom and useful citizenship.”<sup>23</sup>

Similarly, the entire function of the parole board was to investigate and consider whether an offender had sufficiently demonstrated his rehabilitation to justify his early release from incarceration. As explained in one leading review of the parole process, “the hearing stage of parole decisionmaking was thought to provide decisionmakers with an opportunity to speak with and observe the prospective parolee, to search for such intuitive signs of

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<sup>18</sup> See, e.g., FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 5-7 (1981) (discussing the “dominance” and “almost unchallenged sway of the rehabilitative ideal” in the United States until the 1970s); STITH & CABRANES, *supra* note 1, at 14-22 (describing the “rise of the rehabilitative ideal”); Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 226, 227-28 (1959) (describing how much of the thought and activity surrounding reforms in the criminal justice system during the first half of the twentieth century centered around the “rehabilitative ideal”).

<sup>19</sup> See von Hirsch, *supra* note 3, at 3 (“[W]ide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender’s need for treatment.”).

<sup>20</sup> 337 U.S. 241 (1949).

<sup>21</sup> *Id.* at 248.

<sup>22</sup> *Id.* at 247.

<sup>23</sup> *Id.* at 249.

rehabilitation as repentance, willingness to accept responsibility, and self-understanding.”<sup>24</sup>

But, as many others have recounted, the rehabilitative ideal came under attack in the second half of the twentieth century.<sup>25</sup> In 1974, Robert Martinson published an influential article, which concluded that the various rehabilitative programs undertaken by the American criminal justice system had failed to reduce recidivism.<sup>26</sup> Confidence in the rehabilitative approach began to erode, and the broad discretion enjoyed by trial judges and parole boards began to draw significant criticism.<sup>27</sup> Driven by concerns about the disparities resulting from highly discretionary sentencing practices—which dovetailed with concerns about increasing crime rates and broad criticisms of the rehabilitative model of punishment—criminal justice experts proposed reforms to bring greater consistency and certainty to the sentencing enterprise.<sup>28</sup>

In response to these criticisms and recommendations, a number of jurisdictions adopted structured sentencing systems.<sup>29</sup> These systems took a number of different forms. Many were built to make sentences more certain and severe, and all of them limited the authority of judges and parole boards. The most visible of these systems—the Federal Sentencing Guidelines—eliminated parole and severely curtailed judicial discretion at sentencing. It created a sentencing structure devoted almost entirely to aggravating defendants’ sentences based on quantifiable considerations, such as the amount

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<sup>24</sup> Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 820 (1975).

<sup>25</sup> See, e.g., STITH & CABRANES, *supra* note 1, at 29-35 (discussing how the perception of “rampant, irrational variation in judicial sentencing” sparked sentencing reform and the “collapse of the rehabilitative ideal”).

<sup>26</sup> Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22.

<sup>27</sup> See ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 3-72 (1975); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 3-34, 59-123 (1976); JAMES Q. WILSON, THINKING ABOUT CRIME 162-82 (1975); see also Allen, *supra* note 18, at 7-20.

<sup>28</sup> For examples of such proposed reforms see DAVID FOGEL, “. . . WE ARE THE LIVING PROOF. . .”: THE JUSTICE MODEL FOR CORRECTIONS 179-271 (1975); VON HIRSCH, *supra* note 27, at 98-140; NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT *passim* (1979); PIERCE O’DONNELL, MICHAEL J. CHURGIN & DENNIS E. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 33-75 (1977); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 15-34 (1976). See also NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 28-57 (1974) (stressing the need to reform sentencing practices as a prerequisite to making imprisonment a rational and humane means of punishment).

<sup>29</sup> RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 5 (2013) (enumerating the states that adopted legally-binding, structured sentencing guidelines).

of loss a defendant caused or the number of a defendant's prior criminal convictions.<sup>30</sup>

Notably, the Federal Sentencing Guidelines did not embody a particular theory of punishment. The Guidelines were a product of the Sentencing Reform Act ("SRA"), which Congress passed in 1984.<sup>31</sup> The SRA included a clear directive that "the purposes of sentencing" play a central role both in the drafting of the Guidelines and the imposition of a sentence in individual cases.<sup>32</sup> But the SRA did not adopt a particular punishment philosophy; rather, its statutory statement of sentencing purposes listed all of the traditional justifications of punishment.<sup>33</sup> Except to state that a term of imprisonment is not an appropriate means to achieve rehabilitation,<sup>34</sup> Congress provided no express instructions concerning the specific application of sentencing purposes throughout the federal guidelines system.<sup>35</sup> In turn, the U.S. Sentencing

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<sup>30</sup> *E.g.*, STITH & CABRANES, *supra* note 1, at 68-70 (explaining how the Guidelines' excessive reliance on quantification led to severity).

<sup>31</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

<sup>32</sup> See Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 97 (1999) ("Congress' fundamental concern with principled sentencing was highlighted by the SRA's repeated references to its basic statement of purposes, as well as by the Senate Report's emphasis on the requirement that 'each Federal offender be sentenced . . . in order to achieve the general purposes of sentencing.'" (footnotes omitted)); Daniel J. Freed & Marc Miller, *Taking "Purposes" Seriously: The Neglected Requirement of Guideline Sentencing*, 3 FED. SENT'G REP. 295, 295 (1991) ("In its 1984 charter for Federal sentencing, Congress made one principle clear: the 'purposes of sentencing' were to play a central role in formulating individual sentences and in drafting Commission guidelines . . .").

<sup>33</sup> The SRA's accompanying Senate Report explained that the SRA calls for the federal sentencing system to serve "the basic purposes of sentencing—deterrence, incapacitation, just punishment, and rehabilitation." S. REP. NO. 98-225, at 67 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3250 (footnote omitted). The full text of the statute provides that federal sentences should be crafted:

"(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . ."

18 U.S.C. § 3553(a)(2) (2012).

<sup>34</sup> See 18 U.S.C. § 3582(a) (instructing courts to recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation"); 28 U.S.C. § 994(k) (2012) (instructing the Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant").

<sup>35</sup> See Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 3 FED. SENT'G REP. 326, 326-27 (1991) (discussing how Congress was "ambivalent" about clearly defining the role and priority of sentencing purposes and thus "largely fudged the issue in drafting the [SRA]"). Some courts and commentators have

Commission, though making an initial effort to formulate guidelines premised on one particular theory of punishment,<sup>36</sup> also ultimately dodged these fundamental issues. Instead, the Commission relied primarily on the results of past judicial sentencing practices as the foundation for the initial Federal Sentencing Guidelines.<sup>37</sup> And much to the chagrin of many commentators,<sup>38</sup> through more than two decades of federal sentencing reform, neither Congress nor the U.S. Sentencing Commission has expressly defined or fully articulated the central purpose of federal sentencing.<sup>39</sup>

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inaccurately asserted that the SRA rejected rehabilitation and adopted “just deserts” and/or deterrence in its prescription of sentencing purposes. *See* Marc Miller, *Purposes At Sentencing*, 66 S. CAL. L. REV. 413, 420-26 (1992) (reviewing, and seeking to correct, many erroneous statements made by judges, probation officers, lawyers, and scholars concerning the SRA’s treatment of sentencing purposes).

<sup>36</sup> *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15-18 (1988) (discussing how the United States Sentencing Commission considered adopting, but ultimately chose not to adopt, one specific philosophical approach in formulating the initial Guidelines); *see also* STITH & CABRANES, *supra* note 1, at 53-55 (detailing how the United States Sentencing Guidelines do not reflect a single philosophy of punishment because the Commission found it difficult to choose one philosophical approach over another).

<sup>37</sup> *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A (U.S. SENTENCING COMM’N 1987) (“In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each category.”); Breyer, *supra* note 36, at 17-18 (“The numbers used and the punishments imposed [by the Guidelines] would come fairly close to replicating the average pre-Guidelines sentence handed down to particular categories of criminals. Where the Commission did not follow past practice, it would consciously articulate its reasons for not doing so.”). *But see* STITH & CABRANES, *supra* note 1, at 60-65 (explaining the many ways in which the Guidelines deviated from past practice, requiring sentences that were more severe).

<sup>38</sup> *See, e.g.,* Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 389-90 (1989) (comparing the Canadian Sentencing Commission’s and the U.S. Sentencing Commission’s respective guidelines); Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission’s Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1044-47 (2003) (arguing that the U.S. Sentencing Commission neglected its “philosophical mandate” to ensure that the criminal sentencing guidelines adhere to traditional “purposes of punishment”); Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 4 (1987) (criticizing the Commission’s 1987 guidelines for failing to be principled, binding, comprehensive, and workable).

<sup>39</sup> *E.g.,* Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 279 (2005). In two recent articles, commentators tried to “rationally reconstruct” the functional purposes of the Federal Sentencing Guidelines and reached conflicting conclusions. *Compare* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 51-54 (2003) (concluding that the philosophy underlying the Guidelines is one of “modified just deserts”), *with* Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 561 (2003) (concluding that rational

The Federal Sentencing Guidelines not only failed to replace rehabilitation with another punishment theory, but they also significantly restricted the role of mitigation at sentencing. There are several reasons why mitigating factors played such a small role under the Guidelines. First, the Commission incorporated far more aggravating factors into the Guidelines than mitigating factors.<sup>40</sup> The SRA had directed the Commission to consider a number of specific aggravating and mitigating factors when formulating the Guidelines.<sup>41</sup> But the Commission included only “one of the mitigating factors Congress directed it to consider and issued policy statements prohibiting or discouraging” judges from decreasing sentences based on the rest of the SRA factors, as well as other mitigating factors.<sup>42</sup> Second, the Commission elected to focus on facts about a defendant’s criminal history and the crime she committed, and it disregarded most facts about the defendant and her background, which had formed the basis of many traditional mitigating factors.<sup>43</sup> And third, in the years since the Guidelines were first implemented, amendments to the Guidelines have consistently driven sentences “up instead of down.”<sup>44</sup>

The federal system was not the only structured sentencing system to severely limit mitigation. A number of states that adopted structured

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reconstruction of the Guidelines suggests that underlying the Guidelines is “either a pure utilitarian theory of punishment or, less plausibly, a hybrid theory in which just deserts governs the offense seriousness rules and utilitarianism governs [rules relating to the defendant’s criminal history, family circumstances, and substantial assistance]”).

<sup>40</sup> U.S. SENTENCING GUIDELINES MANUAL chs. 2-3 (U.S. SENTENCING COMM’N 2014) (identifying hundreds of factors that alter a defendant’s sentence, only a fraction of which are mitigating factors).

<sup>41</sup> See 28 U.S.C. § 994(c)-(d) (2012).

<sup>42</sup> Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1657-58 (2012) (footnote omitted). As Amy Baron-Evans and Kate Stith have noted, the Commission has since claimed that some of these restrictions on mitigating factors were required by a provision in the SRA. *Id.* at 1658 & n.146. “That provision, however, directed only that the Commission was not to recommend imprisonment instead of probation or a longer prison term based on the defendant’s lack of education, employment, or stabilizing ties. But the SRA made clear that those and other factors were appropriate considerations in mitigation of a sentence.” *Id.* at 1658-59 (footnote omitted).

<sup>43</sup> See STITH & CABRANES, *supra* note 1, at 61-62 (“[T]he Guidelines . . . rely primarily on factors relating to the offense and . . . specifically provide that most background or personal information on defendants . . . are ‘not ordinarily relevant’ to determining the defendant’s Guidelines sentencing range.” (footnote omitted)); Berman, *supra* note 4, at 280-85.

<sup>44</sup> Carissa Byrne Hessick & F. Andrew Hessick, *Federal Sentencing Changes Since the Change Election*, 23 FED. SENT’G REP. 143, 143 & n.10 (2010) (collecting past amendments to the sentencing guidelines and noting which amendments increase, rather than decrease, sentence lengths).

sentencing systems also allowed judges to mitigate sentences in only a small number of circumstances.<sup>45</sup>

Structured sentencing has suffered some recent setbacks in the United States. In a series of decisions beginning in 2000, the Supreme Court has pushed back on many of the sentencing practices adopted in the wake of the collapse of the rehabilitative ideal. In *Apprendi v. New Jersey*,<sup>46</sup> the Supreme Court placed constitutional restrictions on statutory sentencing enhancements. The *Apprendi* Court held that if a statute increased the maximum sentence for a crime based on a factual finding (other than a prior conviction), then that factual finding must be submitted to a jury and proven beyond a reasonable doubt.<sup>47</sup> The Court extended this holding to structured sentencing regimes in *Blakely v. Washington*.<sup>48</sup> The *Blakely* Court explained that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”<sup>49</sup> Thus, if a mandatory guideline sentencing regime limits a sentencing judge’s discretion to a particular range, and if a sentencing court may sentence above that range only if the judge makes a particular finding, then the finding must be submitted to a jury and proven beyond a reasonable doubt. To do otherwise, the Court stated, would violate the Sixth Amendment.<sup>50</sup>

One term after its decision in *Blakely*, the Court addressed the constitutionality of the Federal Sentencing Guidelines in *United States v. Booker*.<sup>51</sup> After finding that the federal guidelines suffered from the same constitutional infirmity as the state guidelines in *Blakely*, the *Booker* Court

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<sup>45</sup> For example, the structured sentencing systems in Arizona, Florida, and Washington identified far more aggravating than mitigating factors. See ARIZ. REV. STAT. ANN. § 13-701(D)-(E) (2010) (identifying twenty-five aggravating factors and six mitigating factors); FLA. STAT. ANN. § 921.0016(3)-(4) (West 2005) (repealed 2009) (identifying twenty aggravating factors and twelve mitigating factors); WASH. REV. CODE ANN. § 9.94A.535 (West 2005) (amended 2007) (identifying twenty-five aggravating factors and eight mitigating factors). Although some of these states included a catchall provision, which permits mitigation in other circumstances, the under-identification of mitigating factors relative to aggravating factors sends a signal to judges that they ought to be increasing sentences more often than decreasing them. *E.g.*, WASH. REV. CODE ANN. § 9.94A.535 (allowing the court to “impose a sentence outside the standard sentence range for an offense if [the court] finds . . . that there are substantial and compelling reasons justifying an exceptional sentence”).

<sup>46</sup> 530 U.S. 466 (2000).

<sup>47</sup> *Id.* at 490.

<sup>48</sup> 542 U.S. 296, 303-05 (2004).

<sup>49</sup> *Id.* at 303.

<sup>50</sup> *Id.* at 308 (“[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.”).

<sup>51</sup> 543 U.S. 220, 243 (2005) (concluding that the Sixth Amendment as applied in *Blakely* is applicable to the Federal Sentencing Guidelines).

offered a remedy other than jury factfinding. In particular, the *Booker* Court said that jury factfinding is not necessary if sentencing judges have discretion not to follow the Guidelines.<sup>52</sup> According to the remedial majority in *Booker*, making the Guidelines advisory, rather than mandatory, avoids the constitutional problem identified in *Apprendi* and *Blakely* because a factual finding is no longer *required* to sentence above the Guideline range.<sup>53</sup>

In essence, the *Booker* Court held that, to the extent legislatures wish to curtail the discretionary sentencing authority of judges, that authority must be redistributed to juries. In subsequent cases, the Court has doubled-down on the constitutionalization of sentencing, stating that the jury requirement extends to any increase of a mandatory minimum sentence.<sup>54</sup> It has also further entrenched the sentencing discretion of federal judges. In *Kimbrough v. United States*, the Court held that while federal judges are required to calculate a sentencing range under the Federal Sentencing Guidelines, they are free to disregard that range and impose a different sentence based on nothing more than a policy disagreement with the Guidelines.<sup>55</sup>

Although federal judges have used their newfound discretion to impose lower sentences in some cases, they continue to impose Guidelines sentences in most cases.<sup>56</sup> Some judges may continue to impose Guidelines sentences because they believe that those sentences are appropriate. Others may continue to sentence according to the Guidelines because they believe that uniformity and certainty are the most important sentencing goals. But at least some judges

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<sup>52</sup> *Id.* at 233.

<sup>53</sup> *Id.* at 233, 245-46, 259 (explaining that by making the Guidelines advisory, a sentencing court must consider the Guidelines' ranges, but "permits the court to tailor the sentence in light of other statutory concerns as well").

<sup>54</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2163-64 (2013) (holding that because the court's finding "increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt").

<sup>55</sup> *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

<sup>56</sup> See generally Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227 (2014). The U.S. Sentencing Commission recently issued a report, which documented this trend. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING pt. A, at 3 (2012), <http://www.ussc.gov/news/congressional-testimony-and-reports/booker-reports/report-continuing-impact-united-states-v-booker-federal-sentencing> [<http://perma.cc/CX4Z-ZWFM>] (finding that while "the role of the guidelines has become less pronounced," "federal sentences have shown general stability, as seen in the Commission's analysis of sentence lengths and their relation to the minimum of the guideline range over time"). Although many federal judges have used their new discretion to impose lower sentences in certain fraud and child pornography cases, deviation from the Guidelines in other categories of cases were largely attributable to government charging and sentencing practices, rather than judicial decisions. *Id.* pt. A, at 3-8 (2012); see also Baron-Evans & Stith, *supra* note 42, at 1673 (providing additional information about recent judicial sentencing patterns).

appear to be sentencing within the Guidelines' ranges because they are uncertain about how to impose non-guideline sentences without returning to the bad old days, when sentencing was "lawless."<sup>57</sup>

There are a number of examples of this uncertainty.<sup>58</sup> We focus here on uncertainty surrounding mitigation. For example, there is uncertainty about whether diminished capacity ought to be treated as a mitigating factor. Diminished capacity is a cognitive or psychological defect that limits a person's ability to appreciate the wrongfulness of her crimes or her ability to avoid committing them. On the one hand, diminished capacity should be treated as a mitigating factor because it lessens a defendant's culpability. On the other hand, it should be treated as an aggravating factor because diminished capacity makes the defendant more likely to commit crimes in the future. Whether the sentencing judge ought to consider diminished capacity an aggravating factor or a mitigating factor depends on whether the judge decides to sentence based on a philosophy of retributivism or based on the utilitarian concern of preventing recidivism. Because no other theory has emerged as the obvious touchstone for sentencing since the collapse of the rehabilitative idea, a judge's choice among competing punishment theories is sometimes viewed as nothing more than a question of personal preference.<sup>59</sup>

The uncertainty surrounding diminished capacity is especially visible in the Seventh Circuit. In *United States v. Portman*,<sup>60</sup> one panel of judges stated that it would be inappropriate to treat diminished capacity as an aggravating factor, but explained that judges could elect not to mitigate on that basis if they are concerned that defendants who suffer from diminished capacity pose a

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<sup>57</sup> See generally MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

<sup>58</sup> In some cases, judges express uncertainty about whether they have the authority to mitigate a defendant's sentence based on a policy disagreement with the Guidelines. See e.g., *United States v. Johnson*, 765 F. Supp. 2d 779, 782 (E.D. Tex. 2010), *appeal dismissed* 447 F. App'x 633 (5th Cir. 2011). The uncertainty in these cases is attributable to conflicting language in various Supreme Court cases. There are a number of cases in which the Court has indicated that federal courts may categorically disagree with the Guidelines and impose sentences based on their own weighing of various policy considerations. See *Spears v. United States*, 555 U.S. 261, 265-66 (2009); *Kimbrough*, 552 U.S. at 109-110. But language from those same cases suggests that, if district court judges impose sentences based on their own policy determinations, then their decisions will be subject to more searching appellate review. See *Kimbrough*, 552 U.S. at 109. This has led several courts of appeals to conclude that, at least for some categories of cases, sentencing courts may not impose sentences based on their own policy preferences. See Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After Kimbrough*, 93 MARQ. L. REV. 717, 733-39 (2009) (collecting cases and describing the different approaches taken in various circuits).

<sup>59</sup> See *United States v. Garthus*, 652 F.3d 715, 718 (7th Cir. 2011) ("[U]nder the *Booker* regime a sentencing judge can adopt his own penal philosophy.").

<sup>60</sup> 599 F.3d 633 (7th Cir. 2010).

recidivism risk.<sup>61</sup> A year later, in *United States v. Garthus*, a different panel stated that a district judge could regard diminished capacity as an aggravating factor, as a mitigating factor, or as a wash.<sup>62</sup> The court's opinion in *Garthus* makes clear that the uncertain status of diminished capacity is attributable to the fact that "a sentencing judge can adopt his own penal philosophy."<sup>63</sup> A number of other opinions, both from the Seventh Circuit and from other courts, have expressed the same concern about diminished capacity as a mitigating factor.<sup>64</sup>

Diminished capacity is not the only sentencing factor that has caused uncertainty. Courts have also expressed concern about whether a defendant's youth ought to operate as a mitigating factor or as an aggravating factor.<sup>65</sup> A

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<sup>61</sup> *Id.*, 637-38; see also *United States v. Durham*, 645 F.3d 883, 898 (7th Cir. 2011) ("[T]he distinction between diminished capacity and personal characteristics that either increase or decrease the risk of recidivism (*i.e.*, aggravating or mitigating factors) is an important one. A finding of diminished capacity should never be treated as an aggravating factor for sentencing purposes." (citing *Portman*, 599 F.3d at 638)).

<sup>62</sup> *Garthus*, 652 F.3d at 718 (indicating that the sentencing judge "can disregard the guidelines' classification of diminished capacity as a mitigating factor, regard it as an aggravating factor, or regard it as a wash"). Interestingly, there was a judge who sat on both the *Portman* and *Garthus* panels.

<sup>63</sup> *Id.*

<sup>64</sup> See, *e.g.*, *United States v. Maxwell*, 483 F. App'x 233, 237 n.2 (6th Cir. 2012) ("[A] defendant's history of mental health problems and bizarre behavior may be viewed as aggravating, not mitigating, factors in cases such as these."); *United States v. Lucas*, 670 F.3d 784, 794 & n.4 (7th Cir. 2012) ("Even if the district court had treated Lucas's diminished capacity as an aggravating factor, it is not clear that this necessarily would have been impermissible.").

<sup>65</sup> *Portman*, 599 F.3d at 637-38 ("A young defendant might argue that his age is a mitigating factor if the defendant has strong ties to a supportive family, but age could also be used as an aggravating factor if the young defendant already has an extensive criminal history."). This disagreement has also appeared in the Supreme Court's Eighth Amendment cases. Compare *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (Kagan, J.) (opining that mandatory sentences for juveniles "precludes consideration of [one's] chronological age and its hallmark features"), and *Graham v. Florida*, 560 U.S. 48, 78 (2010) (Kennedy, J.) ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive a sentence of life without parole for a nonhomicide crime . . . ." (quoting *Roper v. Simmons*, 543 U.S. 551, 572-73 (2005)), with *Miller*, 132 S. Ct. at 2482 (Roberts, C.J., dissenting) (asserting that even if "science and policy suggest society should show greater mercy to young killers, [and] giv[e] them a greater chance to reform themselves at the risk that they will kill again," it is not the Court's decision to make), and *Graham*, 560 U.S. at 117-18 (Thomas, J., dissenting) ("The Court equates the propensity of a fairly substantial number of youths to engage in 'risky' or antisocial behaviors with the propensity of a much smaller group to commit violent crimes.")).

defendant's reduced cognitive ability, such as mental retardation, has raised similar concerns.<sup>66</sup> A defendant's intoxication also raises the same issues.<sup>67</sup>

## II. MITIGATION IN THEORY

The theories of punishment justify the imposition of punishment on individuals.<sup>68</sup> Although commentators have proposed many different theories of punishment, these theories largely fall into two overarching categories—retributivism and utilitarianism. Roughly speaking, retributivists impose punishment because an offender deserves it; utilitarians impose punishment to prevent future crime.

In addition to legitimizing the imposition of punishment, the theories of punishment provide a way to distinguish between defendants who are convicted of the same crime. They each provide a framework for identifying which facts and circumstances should result in longer or shorter sentences. In other words, the theories of punishment provide a means for identifying aggravating and mitigating factors at sentencing.<sup>69</sup>

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<sup>66</sup> See *United States v. Durham*, 645 F.3d 883, 898 (7th Cir. 2011) (“[A] defendant must show why a particular personal characteristic, such as a low IQ, acts as a mitigating factor, as opposed to an aggravating one.”); *id.* at 899 (observing “that the government did argue that [the defendant’s] mental capacity should be treated as an aggravating factor”); *United States v. Beier*, 490 F.3d 572, 574 (7th Cir. 2007) (“Even if . . . characteristics [like a low-normal IQ or learning disabilities] do make it more difficult for a person to comply with the law, the question, unaddressed by the defendant, would remain whether they require a shorter sentence or a longer sentence than would be appropriate for a defendant who lacked those characteristics.”); *Illinois v. Heider*, 896 N.E.2d 239, 245, 250 (Ill. 2008) (condemning the fact that the sentencing judge increased the defendant’s sentence based on his perception that the defendant’s mental impairment made him more likely to commit future crimes, even though state legislature had identified mental retardation as a mitigating factor); see also *TEX. APPLESEED & HOUS. ENDOWMENT, OPENING THE DOOR: JUSTICE FOR DEFENDANTS WITH MENTAL RETARDATION, A HANDBOOK FOR ATTORNEYS PRACTICING IN TEXAS* 54 (2005) (cautioning defense attorneys against raising a defendant’s intellectual disability because jurors might “believe the myth that persons with mental retardation are more likely to commit crimes”); Paul Marcus, *Does Atkins Make A Difference in Non-Capital Cases? Should It?*, 23 WM. & MARY BILL RTS. J. 431, 456-65 (2014) (discussing the disparity in treatment of mental retardation in sentencing and the impact of *Atkins*, in which the court found “that mentally retarded defendants were less culpable than others”). This disagreement has also appeared in the Supreme Court’s Eighth Amendment cases. *Compare Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (Stevens, J.) (opining that mentally retarded individuals “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct”), *with id.* at 350-51 (Scalia, J., dissenting) (asserting that the Court should focus on the crime committed by, and not the mental capacity of, the criminal).

<sup>67</sup> See Nicola Padfield, *Intoxication as a Sentencing Factor: Mitigation or Aggravation*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 81, 81-99 (Julian V. Roberts ed., 2011).

<sup>68</sup> *E.g.*, Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1037 (2014).

<sup>69</sup> “In the abstract, aggravation and mitigation are quite broad concepts. An aggravating sentencing factor is any fact or circumstance that warrants an increase in the defendant’s

Because retributivists and utilitarians have different aims, the selection of a particular theory of punishment can drastically affect what facts count as mitigating.<sup>70</sup> Retributivists and utilitarians may agree that some factors should be mitigating, but they may disagree on others. Retributivists may classify as mitigating some facts that a utilitarian would say should be aggravating, and vice versa.

This Part describes the two major categories of punishment theory—retributivism and utilitarianism—and illustrates how the selection of one or the other theory informs the identification of mitigating sentencing factors. In doing so, it does not purport to give an exhaustive account of punishment theories. Although punishment theories generally fall into the camps of

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punishment; a mitigating factor is any fact or circumstance that warrants a reduction in the defendant's punishment." Hessick, *supra* note 2, at 1125 & nn.80-81. How mitigation operates in practice is slightly more complicated. When a legislature passes a law establishing a new crime, that law will ordinarily identify a range of possible punishments. After a defendant has been convicted of that crime, some sort of sentencing process must occur in order to determine where in that range a particular defendant's punishment will fall. The concepts of aggravation and mitigation loom large in this process. In a typical case, a judge conducts a sentencing hearing during which evidence about the offender's background and the circumstances under which the crime was committed are introduced. The judge then weighs the aggravating sentencing factors against mitigating sentencing factors in order to arrive at a sentence.

Different systems perform this process differently. In most jurisdictions, sentencing is conducted by judges; but a minority of jurisdictions provide for sentencing by jury. *See* Jenia Iontcheva, *Jury Sentencing As Democratic Practice*, 89 VA. L. REV. 311, 314 (2003). So-called discretionary sentencing systems leave the identification of relevant aggravating and mitigating factors, as well as the weight of each factor, to the discretion of the sentencing judge (or jury) in each individual case. So-called mandatory sentencing systems identify relevant sentencing factors *ex ante*, and they sometimes specify the weight a particular factor ought to receive. Despite these differences, both discretionary and mandatory sentencing systems rely heavily on the concepts of aggravation and mitigation: only by identifying certain facts and circumstances as either aggravating or mitigating, and then engaging in factfinding to determine which of those facts and circumstances are present in a particular case, does the sentencing process result in the selection of a specific sentence for an individual defendant. For a more detailed description of the differences and similarities between discretionary and mandatory sentencing processes, see Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 198-202 (2014).

<sup>70</sup> *United States v. Blarek*, 7 F. Supp. 2d 192, 203-04 (E.D.N.Y. 1998) ("In practice, [sentencing] results may vary widely depending upon theory. A penalty imposed based upon pure utilitarian considerations would hardly ever be identical to one that was imposed in a pristine retributive system. While it cannot be said that one is always harsher than the other, seldom would their unrestrained application produce the same sentence."); *see also* Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1438, 1441 (2001) ("Dangerousness and desert are distinct criteria that commonly diverge. . . . [T]hey inevitably distribute liability and punishment differently. To advance one, the system must sacrifice the other.").

retributivism and utilitarianism, commentators have developed a wide range of nuanced variations of these theories. Exploring each variation is unnecessary to demonstrate that choosing a theory can affect mitigation. Instead, this Part provides a straightforward description of the prevailing theories—that is, the theories that are recounted in criminal law classes across the country and most often discussed in the academic literature.<sup>71</sup>

Our description is necessarily superficial. Not only do space constraints prevent us from presenting a full and nuanced account, but we also believe that a more superficial description will best allow us to understand how the differences between the two theories have contributed to the uncertainty surrounding mitigation in modern sentencing. More nuanced accounts of the theories would reveal some striking convergence between them.<sup>72</sup> And including more detail and nuance about punishment theory may also make the judicial uncertainty surrounding mitigating factors more difficult to understand. That is because judges ordinarily couch their sentencing decisions in terms of whether basic retributivist or utilitarian principles would support mitigation, rather than engaging with the nuances of those theories as discussed in the academic literature.

#### A. *Retributivism*

Under the theory of retributivism (also sometimes called the theory of “just deserts”), a defendant is punished because she deserves it.<sup>73</sup> Put another way, the goal of punishment for a retributivist is the punishment itself.<sup>74</sup>

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<sup>71</sup> See, e.g., VON HIRSCH, *supra* note 27, at xxviii–xxix (describing restraint of the criminal, deterrence, rehabilitation, and desert as traditional “aims to be served in deciding how the law should respond to law breakers”); see also SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES* 79-105 (8th ed. 2007).

<sup>72</sup> For example, judges tend to speak about proportionality as a principle that is required only by retributivism. *E.g.*, *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (observing that proportionality “is inherently a concept tied to the penological goal of retribution”). But sophisticated accounts of utilitarian theories also include a proportionality principle. See Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 335-59 (2010); Ristroph, *supra* note 11, at 272-79.

<sup>73</sup> Michael S. Moore, *The Moral Worth of Retribution*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 150, 150 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) (“Retributivism is a very straightforward theory of punishment: we are justified in punishing because and only because offenders deserve it.”); Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1240 (2005) (“[F]or retributivists, a just punishment is one that is morally appropriate, or proportionate, for this offender for that offense.”).

<sup>74</sup> See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1,

A retributivist distinguishes between offenders by evaluating the seriousness of a defendant's crime.<sup>75</sup> Punishment is then imposed proportionately based on offense seriousness.<sup>76</sup> A retributivist does not merely rely on the crime of conviction when assessing offense seriousness. She also distinguishes between defendants convicted of the same crime by analyzing the relative gravity of the crime that each defendant committed. She analyzes the gravity of a crime by focusing on two considerations: (1) the loss or harm caused by the offense and (2) the blameworthiness of the individual defendant.<sup>77</sup>

Although seemingly straightforward, these considerations have been the subject of considerable dispute. For example, different retributivists use the term "blameworthiness" in different ways.<sup>78</sup> Some use it narrowly to refer to an individual defendant's mens rea with respect to his or her criminal conduct; others use it more broadly to refer to the idea that an individual acted with a

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15 (2003) ("A retributivist believes that the imposition of deserved punishment is an intrinsic good.").

<sup>75</sup> See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 72 (3d ed. 2000) (stating that the touchstone of retributivism is proportionality concerning "the relative seriousness of offences among themselves").

<sup>76</sup> See *id.*

<sup>77</sup> GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 6.6, at 461 (1978); Andrew Ashworth, *Desert*, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 73, at 141-43.

<sup>78</sup> How to assess loss or harm caused by an offense is also controversial. It is, of course, uncontroversial to state that a defendant who steals \$100 has caused a smaller loss than a defendant who steals \$100,000. It is similarly uncontroversial to state that a defendant who breaks a victim's leg has caused more harm than a defendant who merely bruises a victim. But how can we compare the loss caused by the white-collar offender who swindles hundreds of individuals out of their life savings and the offender who breaks a victim's leg? Which defendant is responsible for more harm?

Recently, a group of academics led by Paul Robinson have sought to answer these questions by seeking public opinion regarding the relative seriousness of different offenses. See Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007) [hereinafter Robinson & Darley, *Intuitions*]; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) [hereinafter Robinson & Darley, *Utility of Desert*]; Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010). Calling their findings "empirical desert," Robinson and his co-authors have offered a plausible basis for cardinal proportionality—that is, an account of how serious particular crimes are as compared to one another. But as empirical desert has gained popularity, it has also come under attack. See, e.g., Mary Sigler, *The Methodology of Desert*, 42 ARIZ. ST. L.J. 1173 (2011); Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77 (2013). Although we rely on many of Robinson's findings about lay intuition and sentencing *infra* in Part III, and though we believe that those findings provide important information about public opinion regarding sentencing factors, we do not take a position on the desirability or feasibility of empirical desert as a theory of punishment.

morally culpable state of mind.<sup>79</sup> And some use it to refer to a number of other considerations, such as a defendant's motive, that affect how we assess the reprehensibility of a particular individual's actions.<sup>80</sup>

Despite these disagreements, there are a number of traditional mitigating sentencing factors that most—though not all—retributivists would agree should decrease a defendant's sentence. For example, retributivists agree that, all else being equal, a defendant who causes less harm should receive less punishment.<sup>81</sup> To illustrate, imagine a defendant who embezzles \$5,000 and is convicted under a statute that criminalizes embezzlement up to \$1 million. Given that the statute punishes embezzlements up to \$1 million, the defendant who embezzled only \$5,000 likely caused less harm than most of the defendants convicted under this statute.<sup>82</sup> Because many retributivists believe that the loss a defendant causes is an important consideration in setting levels of punishment, a retributivist would likely impose a mitigated sentence on this defendant.

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<sup>79</sup> See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.02, at 118-19 (5th ed. 2009) (discussing the broad and narrow meanings of mens rea); Douglas Husak, "Broad" Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449, 456-57 (2012) (referring to Dressler's *Understanding Criminal Law* and acknowledging the ambiguity in culpability, which can be defined in both a broad and narrow sense).

<sup>80</sup> See Husak, *supra* note 79, at 472-77 (explaining how motive affects assessments of blameworthiness); see also Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 113-15 (2006) (collecting sources with respect to motive).

<sup>81</sup> See, e.g., Hofer & Allenbaugh, *supra* note 39, at 66 ("In all cases the goal [of retributivism] is to achieve proportionate punishment, where more harm means greater punishment.").

<sup>82</sup> The amount embezzled by most defendants convicted under the statute would, of course, be an empirical question. One might collect data on the facts and circumstances of criminal convictions to determine the typical loss caused by these defendants. See Douglas N. Husak, *Partial Defenses*, 11 CAN. J.L. & JURIS. 167, 171 (1998) ("[P]aradigm or standard cases should be derived largely from empirical studies of offenders and their offenses."). So, for example, we could determine how much property the ordinary defendant embezzled by examining the records of all sentencing proceedings for embezzlement in a jurisdiction. While this historical data is helpful (and perhaps necessary) to inform our understanding of the ordinary defendant, it may not be sufficient, standing alone, to determine an appropriate sentence. That is because the legislature likely set the sentencing ranges for offenses without this information. To return to the embezzlement example, the legislature may have mistakenly believed that a typical embezzlement offender stole between \$300,000 and \$500,000, and it may have calibrated its sentencing range accordingly. But if an empirical investigation revealed that the typical embezzlement defendant convicted in that jurisdiction stole only \$5,000, it would be inappropriate to sentence a defendant who stole \$5,000 in the middle of the sentencing range. To do so would impose more punishment than the legislature intended; the legislature chose its sentencing range based on the assumption that the typical offender embezzles far more. Presumably, had the legislature known that the typical embezzlement amount was lower, than it would have altered the sentencing range.

The loss that a defendant caused is not the only factor that retributivists consider mitigating. Retributivists agree that, all else being equal, defendants should receive less punishment if they are less blameworthy than other defendants. For this reason, retributivists say that diminished capacity should reduce a defendant's sentence.<sup>83</sup> A defendant who suffers from a mental or physical defect that impairs her ability to appreciate the consequences of her actions is less culpable than a defendant who commits the same crime, knowing full well that the conduct is likely to harm another.<sup>84</sup>

Similarly, many retributivists believe that young defendants ought to receive mitigated sentences. There is substantial scientific evidence that the cognitive functions of people under the age of eighteen are qualitatively different than the cognitive functions of adults.<sup>85</sup> As a group, minors are less mature, have an underdeveloped sense of responsibility, and are more susceptible to negative external pressures.<sup>86</sup> These traits combine to make minors less able to appreciate the wrongfulness of their conduct and less able to conform their conduct to the law. In other words, minors are less culpable than adults.

Other facts or circumstances of a crime may likewise suggest limited culpability. A defendant who attempts to avoid harming others when she committed her crime may be less culpable than those defendants who do not attempt to avoid harming others. So too, a defendant who did not foresee that her crime would cause harm to others is less culpable than defendants who appreciated and disregarded the risk of harm. Both of these defendants should receive mitigated sentences under a retributivist theory.

As the preceding paragraphs indicate, there are a number of facts and circumstances that, according to retributivist principles, ought to result in the imposition of mitigated sentences. The unifying theory behind those facts and circumstances is whether they indicate that a defendant either caused less harm than other defendants or was less culpable than other defendants. In situations of relatively less harm or culpability, retributivists believe mitigation is appropriate.

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<sup>83</sup> See, e.g., Joshua Dressler, Commentary, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953, 959-60 (1984) (arguing that "explanations for behavior that indicate . . . the actors' personal blameworthiness for the events," such as diminished mental capacity, should be considered in sentencing).

<sup>84</sup> See *United States v. Portman*, 599 F.3d 633, 638 (7th Cir. 2010) ("A person who cannot understand the wrongfulness of his actions or control his actions due to a reduced mental capacity is less culpable . . . than a person who is not mentally ill.").

<sup>85</sup> See, e.g., *Graham v. Florida*, 560 U.S. 48, 68 (2010).

<sup>86</sup> See, e.g., *id.* at 68 ("As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005))); *Roper*, 543 U.S. at 569-70.

B. *Utilitarianism*

The basic principle underlying utilitarian theories of punishment is that the goal of punishment is to reduce crime.<sup>87</sup> Commentators have identified more specific punishment theories that seek to accomplish this crime-reduction goal in particular ways. The most widely discussed of these theories are deterrence, incapacitation, and rehabilitation.<sup>88</sup>

Deterrence theory seeks to decrease crime by using the threat of punishment to produce law-abiding behavior.<sup>89</sup> If we set the punishment high enough, then it will discourage individuals from committing crimes; they will conclude that the benefits of their crimes will not outweigh the costs of their punishment. The theory focuses on two forms of deterrence: specific deterrence, which aspires to discourage individual defendants from reoffending,<sup>90</sup> and general deterrence, which aims to discourage others from committing the same offense.<sup>91</sup>

Incapacitation theory seeks to reduce crime by making offenders incapable of offending again.<sup>92</sup> Of course, any individual who has ever committed a crime has the potential to commit a future crime, and so one might think that incapacitation suggests indefinite detention for all defendants. But because indefinite detention would be expensive, impractical, and undesirable for other reasons, most incapacitation theorists have rejected indefinite incapacitation.<sup>93</sup> Instead, they have adopted the so-called “selective incapacitation” theory, which seeks to reduce crime without increasing the overall prison population. Selective incapacitation attempts to identify particular offenders who are more likely to recidivate, and it imposes longer sentences on those individuals and shorter sentences on those who are unlikely to reoffend.<sup>94</sup>

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<sup>87</sup> See, e.g., DRESSLER, *supra* note 79, § 6.02, at 50.

<sup>88</sup> See, e.g., Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005); see also KADISH ET AL., *supra* note 71 (collecting sources).

<sup>89</sup> ASHWORTH, *supra* note 75, at 64.

<sup>90</sup> E.g., ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2:2, at 25 (2d ed. 1991).

<sup>91</sup> E.g., ASHWORTH, *supra* note 75, at 64.

<sup>92</sup> CAMPBELL, *supra* note 90, § 2:3, at 27-28.

<sup>93</sup> See e.g., Ristroph, *supra* note 11, at 278 (observing that “almost no one” advocates capital punishment for all crimes, despite death being the “surest form of incapacitation”).

<sup>94</sup> James Q. Wilson, *Selective Incapacitation*, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 73, at 113, 119 (“[A]n advantage of selective incapacitation is that it can be accomplished without great increases (or perhaps any increases) in the use of prisons.”); Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 512 (1982) (explaining that selective incapacitation uses prediction tables to distinguish between high-rate and low-rate offenders so that “the amount of crime on the streets could . . . be reduced without any increase in the current prison population”).

Rehabilitation theory argues that punishment should be used to modify an offender's behavior, thus decreasing her likelihood of reoffending.<sup>95</sup> Rehabilitative punishment requires an individualized assessment of each offender in order to determine how punishment may be used to alter the offender's propensity to commit crime.<sup>96</sup> In addition to focusing on the modification of an offender's attitude and behavior, rehabilitation may include providing education or skills, "in the belief that these might enable offenders to find occupations other than crime."<sup>97</sup>

Because all utilitarians seek to use punishment to reduce crime, one might expect that every utilitarian would agree about when sentencing mitigation is appropriate: less punishment should be imposed when a longer sentence is unnecessary to reduce crime. But matters are not so simple. Take, for example, a defendant who kills under circumstances that are unlikely to reoccur, such as a defendant who killed in response to the victim's threat to hurt her and who is contrite about the killing. The defendant would have been justified in using less than deadly force—indeed, she would have been acquitted for having acted in self-defense—but her use of disproportionate force made self-defense unavailable to her, and so she has been convicted of homicide. Most utilitarians would argue for mitigation in this case because punishment is unnecessary to keep the defendant from acting with disproportionate force again in the future. Not only is the situation that led to the violence unlikely to recur, but the defendant is also extremely remorseful about what she has done. Therefore, punishment is unnecessary to deter her from committing future crime, to incapacitate her, or to rehabilitate her. But utilitarians concerned with general deterrence might think that some punishment is necessary to discourage *other* people in similar situations from using excessive defensive force. They, accordingly, may be less inclined to mitigate.

It turns out that in many instances, specific deterrence, incapacitation, and rehabilitation theories will coincide with respect to whether a defendant ought to receive less punishment. That is because those theories will dictate decreased sentences whenever a fact or circumstance suggests that an individual defendant is less likely to reoffend. There are a number of traditional mitigating factors that indicate a defendant is less likely to reoffend in the future. Of particular note, lack of criminal history, social achievement, and advanced age of an offender are all correlated with decreased recidivism rates.<sup>98</sup>

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<sup>95</sup> See, e.g., 1 WHARTON'S CRIMINAL LAW § 3, at 18 (Charles E. Torcia ed., 15th ed. 1993).

<sup>96</sup> See Berman, *supra* note 4, at 278.

<sup>97</sup> ASHWORTH, *supra* note 91, at 70.

<sup>98</sup> J.C. Oleson's recent article on evidence-based sentencing provides a helpful overview of the social science literature on recidivism. J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1348-66 (2011). There are a number of factors that are correlated with recidivism. Highly

In sum, if a fact or circumstance suggests that an individual defendant is less likely to reoffend, then most utilitarian theories will support mitigation of the defendant's punishment.

### III. MITIGATION AND CONSENSUS

As Part I noted, mitigation was a central feature of the rehabilitative theory of sentencing. But the collapse of the rehabilitative theory in the late twentieth century left mitigation no longer obviously tied to one of the prevailing punishment theories. That mitigation is no longer organized around a single punishment theory does not mean that mitigation has no role in modern society. To the contrary, there is an identifiable set of mitigating facts and circumstances around which a consensus has formed. This Section identifies these consensus mitigators and explains how they map on to the prevailing theories of punishment.

#### A. *Consensus Factors*

In identifying those mitigating sentencing factors for which there is a consensus, we looked to three major sources: (a) our own survey of general sentencing statutes in every state and the District of Columbia;<sup>99</sup> (b) a survey of federal district court judges conducted by the U.S. Sentencing Commission in 2010;<sup>100</sup> and (c) a number of "empirical desert" studies documenting lay intuitions about appropriate punishment.<sup>101</sup> Each of these sources provides

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predictive factors are having criminal companions, antisocial personality, criminogenic needs, adult criminal history, and race. *Id.* at 1350. Mid-range predictors include pre-adult antisocial behavior, family rearing practices, social achievement, interpersonal conflict, and current age. *Id.* at 1350-51. Weak-but-significant predictors of recidivism are substance abuse, family structure, intellectual functioning, family criminality, gender, socio-economic status of origin, and personal distress. *Id.* at 1351.

However, whether a fact or circumstance would be treated as mitigating under these utilitarian theories is not necessarily an empirical question. That is because there are a number of sentencing factors that have traditionally been thought to give judges information about a defendant's likely recidivism, but there is no reliable social science evidence that confirms that conventional wisdom. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CAL. L. REV. 47, 91 (2011) ("[T]here are no comprehensive studies on whether [a number of traditional] sentencing factors are accurate indicators of future crime.").

<sup>99</sup> We conducted a fifty-state survey to identify sentencing statutes and guidelines that establish generally applicable aggravating and mitigating sentencing factors.

<sup>100</sup> U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 (2010) [hereinafter U.S. SENTENCING COMM'N, JUDGES SURVEY].

<sup>101</sup> In particular, we draw on PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995), and Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary*

revealing insights into what factors society believes should be mitigating. The state survey identifies judgments about mitigation that are the product of a democratically accountable process. The survey of federal judges documents judgments about mitigation by a group of individuals whom society tasks with imposing punishment on individual defendants.<sup>102</sup> And the empirical desert studies give us insight into public opinion about which factors ought to decrease criminal sentences. The nature of these sources allows us to present a consensus that does not privilege a particular institution or a particular version of when decreased punishment is justified.<sup>103</sup>

We developed our list of consensus mitigators by examining these three sources. Each source identified a number of potential mitigators. We then assessed each potential mitigator and decided whether the particular source endorsed it as an appropriate source of mitigation. For example, when examining state sentencing statutes, we concluded that the statutes, as a whole, endorsed a particular mitigator if it appeared in more than half of the sentencing statutes that we studied. When examining judicial opinion, we concluded that judges, as a whole, endorsed a particular mitigator if at least 60% of federal judges surveyed expressed support for it. Our examination of lay intuitions surrounding punishment was both more complex and more straightforward. Unlike our survey of state sentencing statutes and the U.S. Sentencing Commission's judicial opinion survey, the empirical desert studies were conducted over a period of time, and the results have been reported in different formats. We concluded that public opinion endorsed a particular mitigator if a majority of respondents indicated that they believed the fact or circumstance ought to reduce a defendant's sentence for at least some crimes.

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*Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737 (2012). Robinson and his coauthors collected public opinion data on sentencing factors through a series of studies that required respondents to read vignettes describing criminal conduct and assign the amount of punishment they believed to be appropriate for the defendant in the vignette. *E.g.*, Robinson, Jackowitz & Bartels, *supra*, at 774-75. Respondents were first presented with "baseline scenarios," which described the circumstances of a hypothetical criminal offense, and respondents were asked to assign a punishment for that particular offense. *Id.* at 774. After assigning a sentence for the baseline scenario, respondents were given additional facts and asked whether those facts should affect the amount of punishment imposed. *Id.* at 775. When subjects answered "yes," they were asked to assign a new punishment. *Id.* Whether respondents believed punishment should change based on these facts, and the difference in the punishment they imposed, provides information about whether and to what extent those respondents believed a fact or circumstance ought to be treated as mitigating.

<sup>102</sup> U.S. SENTENCING COMM'N, JUDGES SURVEY, *supra* note 100, at 3 (observing that the 639 judges who responded to the survey imposed sentences on 79% of all federal defendants sentenced in 2008 and 2009).

<sup>103</sup> *Cf.* Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 406 (2013) (concluding that recent Supreme Court sentencing decisions "look[] to evidence of community consensus to help give content to punishment norms, giving great weight to state legislative judgments, on-the-ground sentencing practices, and other indicia of popular views of moral appropriateness").

If that information was not available, then we determined that public opinion endorsed a particular mitigator if the study authors reported a significant reduction in the amount of punishment that survey respondents assigned on average when that mitigator was present, as compared to the punishment that they assigned when the mitigator was not present.

After conducting this assessment, we concluded that a national consensus exists for six mitigating factors that are supported by all three of our sources. We also concluded that a national consensus exists for two additional mitigators—expression of remorse and hardship to a defendant or a defendant’s family—even though these mitigating factors appear in less than half of the state sentencing statutes. We elected to include these mitigators in our national consensus even though they are supported by only the judicial and public opinion surveys because, as we explain in more detail below, the support from these sources was quite strong. By ensuring that each of the consensus factors we identify is supported by at least two of these sources, there is a heterogeneous basis for our conclusions about mitigation consensus.

It should be noted, however, that each of these sources has limitations. The state sentencing survey examined only those mitigating sentencing factors that appear in generally applicable sentencing laws; it did not examine statutory mitigating factors that are associated with only specific crimes. By limiting its scope to only generally applicable mitigating factors, the survey does not include a significant number of codified mitigating factors for specific crimes, and it does not include codified factors from all states. Leaving aside Oregon, which identifies only a single generally applicable mitigating factor, nineteen states have enacted general sentencing statutes or guidelines that include mitigating factors.<sup>104</sup> What is more, the state sentencing survey captures only those mitigating factors which have been codified. Mitigating factors that have developed as a matter of judicial interpretation<sup>105</sup> or common practice<sup>106</sup> are not included.

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<sup>104</sup> See *infra* notes 106, 109-113. Oregon appears to expect judges to consider a number of aggravating and mitigating factors at sentencing, but it explicitly identifies only two aggravating factors and one mitigating factor. OR. REV. STAT. ANN. §§ 137.085, 137.090 (West 2015) (identifying the age and disability of a victim as the only aggravating factors and the defendant’s service member status as the only mitigating factor).

<sup>105</sup> See, e.g., *State v. Hill*, No. M2004-00597-CCA-R3-CD, 2005 WL 544710, at \*9 (Tenn. Crim. App. June 27, 2005) (noting that while a defendant’s military service record “is not among the statutorily defined mitigating factors set out in Tennessee Code Annotated section 40-35-113 . . . it is [a] mitigating factor that has been recognized in other cases under a catchall subsection which includes ‘[a]ny other factor consistent with the purposes of this chapter.’ This Court has previously stated, ‘With respect to [a defendant’s] military service, honorable military service may always be considered as a mitigating factor consistent with the purposes of the 1989 Sentencing Act’” (citations omitted)).

<sup>106</sup> One such factor is whether a defendant pleaded guilty. 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 18 (Alfred Blumstein et al. eds., 1983) (“The strongest and most consistently found effect of case-processing variables is the role of guilty pleas in producing

The U.S. Sentencing Commission's survey of federal district judges asked judges to opine about only a narrow subset of mitigating factors. In particular, it asked them about only those mitigating factors that the U.S. Sentencing Commission implicitly or explicitly considered as potential grounds for imposing lower than ordinary sentences.<sup>107</sup> As a result, our assessment of judicial opinion may be too narrow. It is possible that a majority of judges would have agreed that mitigation was appropriate for other potential mitigating factors, which the Sentencing Commission did not include in its survey.

The empirical desert studies have been conducted over the course of several years, using many different pools of respondents, and we do not attempt to assess the viability of the methodology of those studies. With those limitations in mind, our analysis of those sources reveals at least eight consensus factors.

### 1. Imperfect Defense

The first consensus factor is whether the defendant had an imperfect defense. Eighteen states mitigate on this basis.<sup>108</sup> Several state sentencing statutes generally provide for mitigation based on *any* imperfect excuse or justification defense.<sup>109</sup> Other states specify particular defenses that warrant

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less severe sentences.”). Although judges often consider pleading guilty as a mitigating factor in individual cases, *id.*, only a few state statutes identify acceptance of responsibility or expression of remorse as mitigating factors. North Carolina, Ohio, and Rhode Island identify either acceptance of responsibility or remorse as a mitigating factor. N.C. GEN. STAT. § 15A-1340.16(e)(15) (2013) (“The defendant has accepted responsibility for the defendant’s criminal conduct.”); OHIO REV. CODE ANN. § 2929.12(E)(5) (LexisNexis 2014) (“The offender shows genuine remorse for the offense.”); R.I. R. SUPER. CT. SENT. BENCHMARKS § 1(i) (“[D]efendant’s attitude and feeling about the crime (i.e., remorse, repentance, hostility).”). California limits mitigation to defendants who “voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process.” CAL. R. CT. 4.423(b)(3) (West Supp. 2015).

<sup>107</sup> U.S. SENTENCING COMM’N, JUDGES SURVEY, *supra* note 100, tbl.13 (listing twenty-six specific characteristics). The survey revealed that the vast majority of judges believe that the Guidelines are too restrictive in identifying reasons that would permit a non-Guidelines sentence. *Id.* tbl.14 (reporting that 76% of the judges who responded felt that “[t]he *Guidelines Manual* does not contain a departure provision that adequately reflects the reason for a sentence outside of the guideline range”).

<sup>108</sup> *See infra* notes 109-113. The Federal Sentencing Guidelines also provide for mitigation for the imperfect defenses of victim’s conduct (such as provocation), lesser harms, coercion and duress, and diminished capacity. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.10 to .13 (U.S. SENTENCING COMM’N 2014).

<sup>109</sup> HAW. REV. STAT. ANN. § 706-621(2)(c) (LexisNexis 2007) (“There were substantial grounds tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense . . . .”); IDAHO CODE § 19-2521(2)(d) (2004) (“There were substantial grounds tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense . . . .”); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(4) (West Supp. 2015) (“There were substantial grounds tending to excuse or justify the defendant’s criminal

mitigation when they are imperfect.<sup>110</sup> These imperfect defenses include duress,<sup>111</sup> diminished capacity,<sup>112</sup> and provocation.<sup>113</sup>

conduct, though failing to establish a defense.”); IND. CODE ANN. § 35-38-1-7.1(b)(4) (West Supp. 2015) (“There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense.”); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(25) (Supp. 2015) (“There were substantial grounds tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense.”); N.J. STAT. ANN. § 2C:44-1b.(4) (West Supp. 2015) (“There were substantial grounds tending to excuse or justify the defendant’s conduct, though failing to establish a defense . . . .”); N.D. CENT. CODE § 12.1-32-04(4) (2012) (“There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant’s conduct.”); OHIO REV. CODE ANN. § 2929.12(C)(4) (“There are substantial grounds to mitigate the offender’s conduct, although the grounds are not enough to constitute a defense.”); TENN. CODE ANN. § 40-35-113(3) (2014) (“Substantial grounds exist tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense . . . .”); MINN. SENTENCING GUIDELINES AND COMMENTARY § 2.D.3.a.(5) (MINN. SENTENCING GUIDELINES COMM’N 2015) (“Other substantial grounds exist that tend to excuse or mitigate the offender’s culpability, although not amounting to a defense.”). California includes only excuses. CAL. R. CT. 4.423(a)(4) (“The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense . . . .”).

<sup>110</sup> *E.g.*, ALASKA STAT. § 12.55.155(d)(20) (2014) (“[T]he defendant committed the offense while suffering from a condition diagnosed (A) as a fetal alcohol spectrum disorder, . . . and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant’s conduct . . . (B) as combat-related post-traumatic stress disorder or combat-related traumatic brain injury . . . .”); N.C. GEN. STAT. § 15A-1340.16(e)(10) (“The defendant reasonably believed that the defendant’s conduct was legal.”); CAL. R. CT. 4.423(a)(7) (“The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal . . . .”). Some states that include a mitigating factor that covers all imperfect defenses also identify specific imperfect defenses in their statutory scheme. *Compare* TENN. CODE ANN. § 40-35-113(3) (“Substantial grounds exist tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense . . . .”), *with id.* § 40-35-113(12) (“The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person is not sufficient to constitute a defense to the crime . . . .”).

<sup>111</sup> ALASKA STAT. § 12.55.155(d)(3) (“[D]efendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but that significantly affected the defendant’s conduct . . . .”); ARIZ. REV. STAT. ANN. § 13-701(E)(3) (2010) (“The defendant was under unusual or substantial duress . . . .”); FLA. STAT. ANN. § 921.0026(2)(g) (West 2015) (“The defendant acted under extreme duress or under the domination of another person.”); KAN. STAT. ANN. § 21-6815(c)(1)(B) (Supp. 2014) (“The offender . . . participated under circumstances of duress or compulsion.”); N.C. GEN. STAT. § 15A-1340.16(e)(1) (“The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant’s culpability.”); TENN. CODE ANN. § 40-35-113(12) (“The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person is not sufficient to constitute a

defense to the crime . . . ."); WASH. REV. CODE ANN. § 9.94A.535(1)(c) (West Supp. 2015) ("The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct."); CAL. R. CT. 4.423(a)(4) ("The defendant participated in the crime under circumstances of coercion or duress . . . ."); MINN. SENTENCING GUIDELINES AND COMMENTARY § 2.D.3.a.(2) ("The offender . . . participated under circumstances of coercion or duress.").

<sup>112</sup> ARIZ. REV. STAT. ANN. § 13-701(E)(2) ("The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."); FLA. STAT. ANN. § 921.0026(2)(c) ("The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired."); KAN. STAT. ANN. § 21-6815(c)(1)(C) ("The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed."); N.C. GEN. STAT. § 15A-1340.16(e)(3) ("The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense."); TENN. CODE ANN. § 40-35-113(8) ("The defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense; however, the voluntary use of intoxicants does not fall within the purview of this factor . . . ."); WASH. REV. CODE ANN. § 9.94A.535(1)(e) ("The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded."); CAL. R. CT. 4.423(b)(2) ("The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime . . . ."); MINN. SENTENCING GUIDELINES AND COMMENTARY § 2.D.3.a.(3) ("The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.").

<sup>113</sup> ALASKA STAT. § 12.55.155(d)(7) ("[T]he victim provoked the crime to a significant degree . . . ."); ARK. CODE ANN. § 16-90-804(c)(1)(A) (2006) ("[T]he victim played an aggressive role in the incident or provoked . . . it . . . ."); FLA. STAT. ANN. § 921.0026(2)(f) ("The victim was an initiator, willing participant, aggressor, or provoker of the incident."); HAW. REV. STAT. ANN. § 706-621(2)(b) ("The defendant acted under a strong provocation . . . ."); IDAHO CODE § 19-2521(2)(c) ("The defendant acted under a strong provocation . . . ."); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(3) ("The defendant acted under a strong provocation."); IND. CODE ANN. § 35-38-1-7.1(b)(5) ("The person acted under strong provocation."); KAN. STAT. ANN. § 21-6815(c)(1)(A) ("The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction."); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(24) ("The defendant acted under strong provocation."); N.J. STAT. ANN. § 2C:44-1b.(3) ("The defendant acted under a strong provocation . . . ."); N.C. GEN. STAT. § 15A-1340.16(e)(8) ("The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating."); N.D. CENT. CODE § 12.1-32-04(3) ("The defendant acted under strong provocation."); OHIO REV. CODE ANN. § 2929.12(C)(2) ("In committing the offense, the offender acted under strong provocation."); TENN. CODE ANN. § 40-35-113(2) ("The defendant acted under strong provocation."); WASH. REV. CODE ANN. § 9.94A.535(1)(a) ("To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident."); CAL. R. CT. 4.423(a)(2) ("The victim was an initiator of, willing participant in, or aggressor or

The 2010 survey of judges likewise suggests that imperfect defenses may justify mitigation. Although the only imperfect defense included in the survey was diminished capacity, 80% of the surveyed judges indicated that diminished capacity potentially warranted mitigation.<sup>114</sup>

The empirical desert studies also support imperfect defenses as mitigating factors. These studies have demonstrated that members of the general public believe sentences should be decreased in situations where a defendant has an imperfect claim of self-defense, an imperfect claim of protection of property, an imperfect law enforcement defense, an imperfect insanity or diminished capacity defense, and an imperfect duress defense.<sup>115</sup> In other words, there is broad support in the studies of public opinion that both imperfect excuse defenses and imperfect justification defenses ought to decrease punishment.

## 2. Role of Others in the Defendant's Crime

The second consensus factor involves the conduct of victims and others in the commission of the defendant's crime. Eighteen states identify some form of victim wrongdoing as a mitigating factor.<sup>116</sup> It is also identified as a mitigating factor in the federal system.<sup>117</sup> In addition to victim provocation, which is discussed above as an imperfect defense, states mitigate when the victim was a willing participant in the crime,<sup>118</sup> when the victim consented to the criminal conduct,<sup>119</sup> when the victim induced or facilitated the crime,<sup>120</sup> or

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provoker of the incident . . . ."); MINN. SENTENCING GUIDELINES AND COMMENTARY § 2.D.3.a.(1) ("The victim was an aggressor in the incident.").

<sup>114</sup> U.S. SENTENCING COMM'N, JUDGES SURVEY, *supra* note 100, tbl.13.

<sup>115</sup> See ROBINSON & DARLEY, *supra* note 101, at 53-81, 127-55.

<sup>116</sup> See *infra* notes 118-39.

<sup>117</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (U.S. SENTENCING COMM'N 2014) ("If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense.").

<sup>118</sup> ARK. CODE ANN. § 16-90-804(c)(1)(A) ("[T]he victim played an aggressive role in the incident or . . . willingly participated in it . . . ."); FLA. STAT. ANN. § 921.0026(2)(f) ("The victim was an initiator, willing participant, aggressor, or provoker of the incident."); N.C. GEN. STAT. § 15A-1340.16(e)(6) ("The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct . . . ."); WASH. REV. CODE ANN. § 9.94A.535(1)(a) ("To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident."); CAL. R. CT. 4.423(a)(2) ("The victim was an initiator of, willing participant in, or aggressor or provoker of the incident . . . .").

<sup>119</sup> N.C. GEN. STAT. § 15A-1340.16(e)(6) ("The victim was more than 16 years of age and . . . consented to [defendant's conduct].").

<sup>120</sup> FLA. STAT. ANN. § 921.0026(2)(f) ("The victim was an initiator, willing participant, aggressor, or provoker of the incident."); HAW. REV. STAT. ANN. § 706-621(2)(d) (LexisNexis 2007) ("The victim of the defendant's criminal conduct induced or facilitated its commission . . . ."); IDAHO CODE § 19-2521(2)(e) (2004) ("The victim of the defendant's criminal conduct induced or facilitated the commission of the crime . . . ."); IND. CODE ANN.

when the victim had previously subjected the defendant or the defendant's family to physical or sexual abuse.<sup>121</sup>

Wrongdoing by the victim is not the only way in which states account for the conduct of others in their mitigation schemes. Several jurisdictions mitigate defendants' sentences when the defendants' role in the offense is less significant or less culpable than others involved—for example, when the defendant is an accomplice, a minor participant, or induced to commit the crime by another.<sup>122</sup> The Federal Sentencing Guidelines likewise treat the relative role of a defendant as mitigating in some circumstances.<sup>123</sup>

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§ 35-38-1-7.1(b)(3) (West Supp. 2015) (“The victim of the crime induced or facilitated the offense.”); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(26) (Supp. 2015) (“The victim of the defendant’s criminal conduct induced or facilitated its commission.”); N.J. STAT. ANN. § 2C:44-1b.(5) (West Supp. 2015) (“The victim of the defendant’s conduct induced or facilitated its commission . . . .”); N.D. CENT. CODE § 12.1-32-04(5) (2012) (“The victim of the defendant’s conduct induced or facilitated its commission.”); OHIO REV. CODE ANN. § 2929.12(C)(1) (LexisNexis 2014) (“The victim induced or facilitated the offense.”); WASH. REV. CODE ANN. § 9.94A.535(1)(a) (“To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.”); CAL. R. CT. 4.423(a)(2) (“The victim was an initiator of, willing participant in, or aggressor or provoker of the incident . . . .”).

<sup>121</sup> ALASKA STAT. § 12.55.155(d)(16) (2014) (“[I]n a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior . . . .”); ARK. CODE ANN. § 16-90-804(c)(1)(F) (“The offender or the offender’s children suffered a continuing pattern of physical or sexual abuse by the victim of the offense, and the offense is a response to that abuse . . . .”); IND. CODE ANN. § 35-38-1-7.1(b)(11) (“The person was convicted of a crime involving the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the convicted person and evidence shows that the convicted person suffered from the effects of battery as a result of the past course of conduct of the individual who is the victim of the crime for which the person was convicted.”); KAN. STAT. ANN. § 21-6815(c)(1)(D) (Supp. 2014) (“The defendant, or the defendant’s children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.”); WASH. REV. CODE ANN. § 9.94A.535(1)(h) (“The defendant or the defendant’s children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.”); *id.* § 9.94A.535(1)(j) (“The current offense involved domestic violence . . . and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.”); CAL. R. CT. 4.423(a)(9) (“The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant’s spouse, intimate cohabitant, or parent of the defendant’s child . . . .”).

<sup>122</sup> ALASKA STAT. § 12.55.155(d)(2) (“[D]efendant, although an accomplice, played only a minor role in the commission of the offense . . . .”); ARIZ. REV. STAT. ANN. § 13-701(E)(4) (2010) (“The degree of the defendant’s participation in the crime was minor, although not so minor as to constitute a defense to prosecution.”); FLA. STAT. ANN. § 921.0026(2)(b) (“The defendant was an accomplice to the offense and was a relatively minor participant in the

The judicial survey similarly revealed a consensus among judges that the role of others may warrant mitigation. Sixty-eight percent of judges identified whether the defendant was influenced by other offenders as a reason that they would reduce a sentence.<sup>124</sup>

Empirical desert studies on the role of a defendant in a felony murder also support the role of others in a defendant's crime as a mitigating factor. On average, respondents assigned less punishment in those situations where a defendant was an accomplice, rather than the perpetrator.<sup>125</sup>

### 3. Victim Compensation

The third consensus factor is victim compensation. Eight states provide for mitigation if the defendant has already compensated the victim or will do so in the future.<sup>126</sup> Five other states also treat victim compensation as mitigating, but

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criminal conduct."); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(5) (West Supp. 2015) ("The defendant's criminal conduct was induced . . . by someone other than the defendant."); KAN. STAT. ANN. § 21-6815(c)(1)(B) ("The offender played a minor or passive role in the crime . . ."); N.J. STAT. ANN. § 2C:44-1b.(13) ("The conduct of a youthful defendant was substantially influenced by another person more mature than the defendant."); N.C. GEN. STAT. § 15A-1340.16(e)(2) ("The defendant was a passive participant or played a minor role in the commission of the offense."); TENN. CODE ANN. § 40-35-113(4) (2014) ("The defendant played a minor role in the commission of the offense . . ."); WASH. REV. CODE ANN. § 9.94A.535(1)(d) ("The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime."); CAL. R. CT. 4.423(a)(1) ("The defendant was a passive participant or played a minor role in the crime . . ."); MINN. SENTENCING GUIDELINES AND COMMENTARY § 2.D.3.a.(2) (MINN. SENTENCING GUIDELINES COMM'N 2015) ("The offender played a minor or passive role in the crime . . ."). Some states place additional restrictions on this mitigating factor, such as whether the defendant also exercised caution with respect to the victim. ARK. CODE ANN. § 16-90-804(c)(1)(E) ("The offense was principally accomplished by another person, and the offender manifested extreme caution or sincere concern for the safety or well-being of the victim . . ."); WASH. REV. CODE ANN. § 9.94A.535(1)(f) ("The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.").

<sup>123</sup> U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (U.S. SENTENCING COMM'N 2014) (stating that the sentence should be adjusted downward if defendant played a minor or minimal role).

<sup>124</sup> U.S. SENTENCING COMM'N, JUDGES SURVEY, *supra* note 100, tbl.13 (reporting that 68% of judges responded that "undue influence related to affection, relationship, or fear of other offender(s)" is a factor relevant to considering departures or variances from normal sentencing guidelines).

<sup>125</sup> ROBINSON & DARLEY, *supra* note 101, at 169-81, 175 fig.6.4 (reporting a study of community views on sentencing for felony murder and graphing the relative differences in liability assigned to defendants in the roles of perpetrator and accomplice).

<sup>126</sup> IDAHO CODE § 19-2521(2)(f) (2004) ("The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that was sustained . . ."); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(6) ("The defendant has

limit it to situations where the compensation occurred prior to detection of the defendant's crime,<sup>127</sup> or where imprisonment would interfere with the defendant's ability to compensate the victim.<sup>128</sup>

The judicial survey likewise revealed strong agreement among judges that victim compensation could be mitigating. Seventy-five percent of judges stated that they might mitigate if the defendant has made exceptional efforts to fulfill her restitution obligations.<sup>129</sup>

A recent empirical desert study of sentencing factors also identified victim compensation as a consensus factor. Depending on the crime of conviction, almost two-thirds of respondents would mitigate a defendant's sentence if she has already paid civil compensation to the victim.<sup>130</sup>

#### 4. Harm Caused by the Defendant

The fourth consensus factor is whether the defendant caused less harm than others who committed the same crime. More than half of the states with

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compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained."); IND. CODE ANN. § 35-38-1-7.1(b)(9) ("The person has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained."); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(27) (Supp. 2015) ("The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained."); N.J. STAT. ANN. § 2C:44-1b.(6) ("The defendant has compensated or will compensate the victim of his conduct for the damage or injury that he sustained . . ."); N.C. GEN. STAT. § 15A-1340.16(e)(5) ("The defendant has made substantial or full restitution to the victim."); N.D. CENT. CODE § 12.1-32-04(6) (2012) ("The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained."); CAL. R. CT. 4.423(b)(5) ("The defendant made restitution to the victim . . .").

<sup>127</sup> ALASKA STAT. § 12.55.155(d)(8) ("[B]efore the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained . . ."); ARK. CODE ANN. § 16-90-804(c)(1)(D) ("Before detection, the offender compensated or made a good faith effort to compensate the victim for any damage or injury sustained . . ."); FLA. STAT. ANN. § 921.0026(2)(h) ("Before the identity of the defendant was determined, the victim was substantially compensated."); TENN. CODE ANN. § 40-35-113(5) ("Before detection, the defendant compensated or made a good faith attempt to compensate the victim of criminal conduct for the damage or injury the victim sustained . . ."); WASH. REV. CODE ANN. § 9.94A.535(1)(b) ("Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.").

<sup>128</sup> FLA. STAT. ANN. § 921.0026(2)(e) ("The need for payment of restitution to the victim outweighs the need for a prison sentence.").

<sup>129</sup> U.S. SENTENCING COMM'N, JUDGES SURVEY, *supra* note 100, tbl.13.

<sup>130</sup> Robinson, Jackowitz & Bartels, *supra* note 101, at 782 tbl.5. Respondents' willingness to mitigate depended on the crime of conviction; on average, respondents decreased an offender's sentence 65% if the crime of conviction was a theft, but only 14% for an intentional killing. *Id.*

general mitigating statutes mitigate on this basis.<sup>131</sup> The Federal Sentencing Guidelines also call for lower sentences for defendants that cause relatively less harm or loss.<sup>132</sup> The judicial survey strongly suggested that federal judges tend to agree that defendants ought to be sentenced on this basis.<sup>133</sup> And empirical desert studies confirm that public opinion supports adjusting sentences based on the amount of harm that a defendant causes.<sup>134</sup>

### 5. Defendant's Culpability

The fifth consensus factor is whether the defendant's culpability was less than ordinary. Many states provide for mitigation whenever a defendant has

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<sup>131</sup> *E.g.*, ALASKA STAT. § 12.55.155(d)(9) (“[T]he conduct constituting the offense was among the least serious conduct included in the definition of the offense . . . .”). This mitigating factor is sometimes framed more narrowly in terms of the amount of harm that a defendant caused. HAW. REV. STAT. ANN. § 706-621(2)(a) (LexisNexis 2007) (“The defendant’s criminal conduct neither caused nor threatened serious harm . . . .”); IDAHO CODE § 19-2521(2)(a) (“The defendant’s criminal conduct neither caused nor threatened harm . . . .”); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(1) (“The defendant’s conduct neither caused nor threatened serious physical harm to another.”); IND. CODE ANN. § 35-38-1-7.1(b)(1) (“The crime neither caused nor threatened serious harm to persons or property . . . .”); KAN. STAT. ANN. § 21-6815(c)(1)(E) (Supp. 2014) (“The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.”); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(22) (“The defendant’s criminal conduct neither caused nor threatened serious harm.”); N.J. STAT. ANN. § 2C:44-1b.(1) (“The defendant’s conduct neither caused nor threatened serious harm . . . .”); N.D. CENT. CODE § 12.1-32-04(1) (“The defendant’s criminal conduct neither caused nor threatened serious harm to another person or his property.”); TENN. CODE ANN. § 40-35-113(1) (“The defendant’s criminal conduct neither caused nor threatened serious bodily injury . . . .”); CAL. R. CT. 4.423(a)(6) (“No harm was done or threatened against the victim . . . .”).

<sup>132</sup> *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (U.S. SENTENCING COMM’N 2014) (adjusting sentences for theft and similar offenses based on amount of loss); *id.* § 2B1.1(b)(2) (adjusting sentences for theft and similar offenses based on number of victims); *id.* § 2D1.1(c) (adjusting sentences based on drug quantities).

<sup>133</sup> Some judges indicated that certain Guidelines contain distinctions based on loss that are too fine-grained—particularly the distinctions made in § 2B1.1 for amount of loss and in § 2D1.1 for drug quantities. U.S. SENTENCING COMM’N, JUDGES SURVEY, *supra* note 100, tbl.3 (reporting that 14% of judges strongly agreed and 23% somewhat agreed that “[t]he number of categories in the loss table in USSG §2B1.1 should be decreased by broadening the monetary ranges,” and that 14% strongly agreed and 21% somewhat agreed that “[t]he number of drug quantity ranges in the Drug Quantity Table in USSG §2D1.1 should be decreased by broadening the quantity ranges”). However, the vast majority of judges indicated that they did not think that the overall structure of offense levels, in which amount of loss and drug quantities play a role, should be altered. *See id.* (reporting that only 16% of judges surveyed strongly or somewhat agreed that the number of offense levels in the Sentencing Table should be decreased).

<sup>134</sup> *See* Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1845-46, 1845 n.73 (2007).

reduced culpability.<sup>135</sup> Some states limit mitigation to when a defendant is young<sup>136</sup> or suffers from a physical or mental defect that affects culpability.<sup>137</sup> Others frame this mitigating factor as a question of mens rea, such as whether the defendant did not plan, expect, or foresee the harm that occurred.<sup>138</sup>

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<sup>135</sup> This mitigating factor sometimes appears as a provision to correct for some technical rule that overstates culpability. *E.g.*, CAL. R. CT. 4.423(b)(4) (“The defendant is ineligible for probation and but for that ineligibility would have been granted probation . . . .”); MINN. SENTENCING GUIDELINES AND COMMENTARY § 2.D.3.a.(4) (MINN. SENTENCING GUIDELINES COMM’N 2015) (providing for mitigation if “(a) [t]he current conviction offense is at Severity Level 1 or Severity Level 2 and the offender received all of his or her prior felony sentences during fewer than three separate court appearances; or (b) [t]he current conviction offense is at Severity Level 3 or Severity Level 4 and the offender received all of his or her prior felony sentences during one court appearance”).

<sup>136</sup> ALASKA STAT. § 12.55.155(d)(4) (“[T]he conduct of a youthful defendant was substantially influenced by another person more mature than the defendant . . . .”); FLA. STAT. ANN. § 921.0026(2)(k) (West 2015) (“At the time of the offense the defendant was too young to appreciate the consequences of the offense.”); N.C. GEN. STAT. § 15A-1340.16(e)(4) (2013) (“The defendant’s age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant’s culpability for the offense.”); TENN. CODE ANN. § 40-35-113(6) (“The defendant, because of youth or old age, lacked substantial judgment in committing the offense . . . .”).

<sup>137</sup> ALASKA STAT. § 12.55.155(d)(18) (“[E]xcept in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, the defendant committed the offense while suffering from a mental disease or defect . . . that was insufficient to constitute a complete defense but that significantly affected the defendant’s conduct . . . .”); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(13) (West Supp. 2015) (“The defendant was intellectually disabled . . . .”); N.C. GEN. STAT. § 15A-1340.16(e)(4) (“The defendant’s age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant’s culpability for the offense.”); CAL. R. CT. 4.423(b)(2) (“The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime . . . .”); MINN. SENTENCING GUIDELINES AND COMMENTARY § 2.D.3.a.(6) (“The court is ordering an alternative placement . . . for an offender with a serious and persistent mental illness.”).

<sup>138</sup> IDAHO CODE § 19-2521(2)(b) (2004) (“The defendant did not contemplate that his criminal conduct would cause or threaten harm . . . .”); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(2) (“The defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another.”); IND. CODE ANN. § 35-38-1-7.1(b)(1) (West Supp. 2015) (“The crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so.”); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(23) (Supp. 2015) (“The defendant did not contemplate that his criminal conduct would cause or threaten serious harm.”); N.J. STAT. ANN. § 2C:44-1b.(2) (West Supp. 2015) (“The defendant did not contemplate that his conduct would cause or threaten serious harm . . . .”); N.C. GEN. STAT. § 15A-1340.16(e)(9) (“The defendant could not reasonably foresee that the defendant’s conduct would cause or threaten serious bodily harm or fear . . . .”); N.D. CENT. CODE § 12.1-32-04(2) (2012) (“The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property.”); OHIO REV. CODE ANN. § 2929.12(C)(3) (LexisNexis 2014) (“In committing

The judicial survey also supports mitigation based on reduced culpability. At least sixty percent of judges identified a defendant's age, mental condition, emotional condition, and physical condition as appropriate mitigating factors.<sup>139</sup>

Several empirical desert studies confirm the importance of lesser culpability as a mitigating factor. In particular, the studies indicate that a defendant's mens rea, youthful age, and involuntary intoxication all ought to result in less punishment.<sup>140</sup>

## 6. Recidivism

The sixth consensus factor is a reduced likelihood of recidivism. Most of the nineteen states with general sentencing statutes reduce sentences for defendants with a lower likelihood of offending again.<sup>141</sup> Moreover, many

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the offense, the offender did not cause or expect to cause physical harm to any person or property.”).

<sup>139</sup> U.S. SENTENCING COMMISSION, JUDGES SURVEY, *supra* note 100, tbl.13 (reporting that 67% of surveyed judges found age relevant to sentencing, 79% found mental condition relevant, 60% found emotional condition relevant, and 64% found physical condition relevant).

<sup>140</sup> See ROBINSON & DARLEY, *supra* note 101, at 84-96, 139-47.

<sup>141</sup> Some states frame this mitigating question as whether there are facts or circumstances suggesting that a defendant is unlikely to reoffend. HAW. REV. STAT. § 706-621(2)(f) (LexisNexis 2007) (“The defendant’s criminal conduct was the result of circumstances unlikely to recur . . . .”); IDAHO CODE § 19-2521(2)(h) (2004) (“The defendant’s criminal conduct was the result of circumstances unlikely to recur . . . .”); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(8) (“The defendant’s criminal conduct was the result of circumstances unlikely to recur.”); IND. CODE ANN. § 35-38-1-7.1(b)(2) (“The crime was the result of circumstances unlikely to recur.”); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(29) (“The defendant’s criminal conduct was the result of circumstances unlikely to recur.”); N.J. STAT. ANN. § 2C:44-1b.(8) (“The defendant’s conduct was the result of circumstances unlikely to recur . . . .”); N.D. CENT. CODE § 12.1-32-04(8) (“The defendant’s conduct was the result of circumstances unlikely to recur.”); OHIO REV. CODE ANN. § 2929.12(E)(4) (“The offense was committed under circumstances not likely to recur.”); TENN. CODE ANN. § 40-35-113(11) (2014) (“The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct . . . .”); CAL. R. CT. 4.423(a)(3) (“The crime was committed because of an unusual circumstance . . . that is unlikely to recur . . . .”). A number of states frame this question as whether “[t]he character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime . . . .” HAW. REV. STAT. ANN. § 706-621(2)(g); IDAHO CODE § 19-2521(2)(i); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(9); IND. CODE ANN. § 35-38-1-7.1(b)(8); N.J. STAT. ANN. § 2C:44-1b.(9); N.D. CENT. CODE § 12.1-32-04(9). Others frame it in terms of whether the defendant is likely to succeed on probation, likely to successfully complete a treatment program, or has already completed such a program. ALASKA STAT. § 12.55.155(d)(17) (“[T]he defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program . . . that was begun after the offense was committed . . . .”);

sentencing systems—including the federal system—that do not appear to explicitly mitigate sentences based on a low likelihood of recidivism, nevertheless somewhat account for a defendant’s likelihood of recidivism through lower sentences for a defendant who has not offended before.<sup>142</sup>

HAW. REV. STAT. ANN. § 706-621(2)(h) (“The defendant is particularly likely to respond affirmatively to a program of restitution or a probationary program or both . . . .”); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(10) (“The defendant is particularly likely to comply with the terms of a period of probation.”); IND. CODE ANN. § 35-38-1-7.1(b)(7) (“The person is likely to respond affirmatively to probation or short term imprisonment.”); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(30) (“The defendant is particularly likely to respond affirmatively to probationary treatment.”); N.J. STAT. ANN. § 2C:44-1(b)(10) (“The defendant is particularly likely to respond affirmatively to probationary treatment . . . .”); N.C. GEN. STAT. § 15A-1340.16(e)(20) (2013) (“The defendant has a good treatment prognosis, and a workable treatment plan is available.”); N.D. CENT. CODE § 12.1-32-04(10) (“The defendant is particularly likely to respond affirmatively to probationary treatment . . . .”); CAL. R. CT. 4.423(b)(6) (“The defendant’s prior performance on probation or parole was satisfactory.”). This mitigating factor is sometimes limited to defendants who have committed certain types of offenses or completed certain types of treatment. *E.g.*, ARK. CODE ANN. § 16-90-804(c)(1)(H) (2006) (“Before detection in sexual offenses, the offender has voluntarily admitted the nature and extent of the sexual offense and has sought and participated in professional treatment or counseling for such offenses . . . .”); FLA. STAT. ANN. § 921.0026(2)(d) (“The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment.”); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(32) (“The defendant has voluntarily participated in a pretrial drug testing program.”); N.C. GEN. STAT. § 15A-1340.16(e)(16) (“The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.”).

<sup>142</sup> U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING COMM’N 2014) (“A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.”); HAW. REV. STAT. ANN. § 706-621(2)(e) (“The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime . . . .”); IDAHO CODE § 19-2521(2)(g) (“The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime . . . .”); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(7) (“The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.”); IND. CODE ANN. § 35-38-1-7.1(b)(6) (“The person has no history of delinquency or criminal activity, or the person has led a law-abiding life for a substantial period before commission of the crime.”); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(28) (“The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the instant crime.”); N.J. STAT. ANN. § 2C:44-1b.(7) (“The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense . . . .”); N.D. CENT. CODE § 12.1-32-04(7) (“The defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense.”); OHIO REV. CODE ANN.

The survey of federal judges also suggests that a reduced chance of recidivism should be a mitigating factor. A large percentage of federal judges indicated that mitigation is appropriate if the defendant has taken rehabilitative efforts<sup>143</sup> or if the facts and circumstances suggest that a defendant's criminal conduct was the result of aberrant behavior that is unlikely to recur.<sup>144</sup>

A recent empirical desert survey also identified the defendant's rehabilitation as an important mitigating factor. The survey tested respondents' attitudes about a defendant's participation in a rehabilitative program that made him appreciate the harms he caused, changed his views about the appropriateness of criminal conduct, and made him unlikely to commit a similar offense in the future.<sup>145</sup> For crimes involving theft and personal injury, more than half of respondents mitigated the sentences of those defendants who had been rehabilitated.<sup>146</sup>

#### 7. Acceptance of Responsibility or Remorse

The seventh consensus factor is a defendant's acceptance of responsibility or sincere remorse. Although this factor appears only in five state sentencing statutes,<sup>147</sup> it is firmly supported by both the survey of federal judges and the

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§ 2929.12(E)(1) ("Prior to committing the offense, the offender had not been adjudicated a delinquent child."); *id.* § 2929.12(E)(2) ("Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense."); *id.* § 2929.12(E)(3) ("Prior to committing the offense, the offender had led a law-abiding life for a significant number of years."); TENN. CODE ANN. § 40-35-109(a)(1) ("The court may find the defendant is an especially mitigated offender, if: The defendant has no prior felony convictions . . ."); CAL. R. CT. 4.423(b)(1) ("The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes . . ."); *see also* ALASKA STAT. § 12.55.155(d)(12) ("[T]he facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment . . .").

<sup>143</sup> U.S. SENTENCING COMMISSION, JUDGES SURVEY, *supra* note 100, tbl.13 (reporting that 70% of judges found post-offense rehabilitative efforts relevant to departure and/or variance considerations, while 57% of judges found post-sentencing rehabilitative efforts relevant to departure and/or variance considerations).

<sup>144</sup> *Id.* (reporting that 74% of surveyed judges found "aberrant behavior" relevant to departure and/or variance considerations).

<sup>145</sup> Robinson, Jackowitz & Bartels, *supra* note 101, at 777 tbl.3.

<sup>146</sup> *Id.* at 782 tbl.5 (showing majority support for defendants who were convicted of theft and personal injury, but not for those convicted of corruption, manslaughter, or kidnapping and murder).

<sup>147</sup> N.C. GEN. STAT. § 15A-1340.16(e)(11), (15) (2013) ("Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. . . . [T]he defendant has accepted responsibility for the defendant's criminal conduct."); OHIO REV. CODE ANN. § 2929.12(E)(5) ("The offender shows genuine remorse for the offense."); CAL. R. CT. 4.423(b)(3) ("The defendant voluntarily acknowledged wrongdoing before arrest or at an

public opinion survey. Nearly three-quarters of judges in the judicial survey identified a defendant's voluntary disclosure of her offense as a mitigating factor.<sup>148</sup> And whether a defendant expressed sincere remorse, acknowledged her guilt, and apologized immediately after committing her offense was the most popular mitigating scenario identified by an empirical desert study of non-retributive sentencing factors.<sup>149</sup> Depending on the crime, up to three-quarters of respondents awarded significant sentencing reductions on this basis.<sup>150</sup>

#### 8. Hardship

The eighth consensus factor is whether punishment would result in hardship to a defendant or her family. As with mitigation based on remorse and acceptance of responsibility, fewer than half of states with general mitigation statutes provide for mitigation if punishment will cause such hardship.<sup>151</sup> But the judicial and public opinion surveys show substantial support for mitigation based on hardship. Almost two-thirds of federal judges stated that a defendant's family ties and responsibilities should be considered a mitigating

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early stage of the criminal process . . . ."); R.I. R. SUPER. CT. SENT. BENCHMARKS § 1(i) (listing "defendant's attitude and feeling about the crime (i.e., remorse, repentance, hostility)" as a substantial and compelling circumstance for departing from existing sentencing benchmarks). A fifth state identifies whether the defendant pleaded guilty as a mitigating factor. FLA. STAT. ANN. § 921.0026(2)(a) (West 2015) (listing as a mitigating circumstance "a legitimate, uncoerced plea bargain").

<sup>148</sup> U.S. SENTENCING COMMISSION, JUDGES SURVEY, *supra* note 100, tbl.13 (reporting that 74% of judges surveyed found "voluntary disclosure of offense" relevant to mitigating a sentence).

<sup>149</sup> Robinson, Jackowitz & Bartels, *supra* note 101, at 782 tbl.5.

<sup>150</sup> *Id.* (showing that remorse and acknowledgement of guilt was a mitigating factor for ~77% of respondents with regard to theft, for ~71% of respondents with regard to corruption, and for ~66% of respondents with regard to personal injury).

<sup>151</sup> Only six of the nineteen states include this mitigating factor. HAW. REV. STAT. ANN. § 706-621(2)(i) (LexisNexis 2007) ("The imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents . . . ."); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(11), (12) (West Supp. 2015) ("The imprisonment of the defendant would entail excessive hardship to his dependents. . . . The imprisonment of the defendant would endanger his or her medical condition."); IND. CODE ANN. § 35-38-1-7.1(b)(10) (West Supp. 2015) ("Imprisonment of the person will result in undue hardship to the person or the dependents of the person."); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(31) (Supp. 2015) ("The imprisonment of the defendant would entail excessive hardship to himself or his dependents."); N.J. STAT. ANN. § 2C:44-1b.(11) (West Supp. 2015) ("The imprisonment of the defendant would entail excessive hardship to himself or his dependents . . . ."); N.D. CENT. CODE § 12.1-32-04(11) (2012) ("The imprisonment of the defendant would entail undue hardship to himself or his dependents.").

factor,<sup>152</sup> and the recent empirical desert study also shows widespread support for treating hardship for a defendant's family as a mitigating factor.<sup>153</sup>

B. *A Positive Account of Modern Mitigation*

That there is a consensus about various mitigation factors leads to several important insights about how mitigation operates in modern sentencing. The first is that mitigation does not turn on a single punishment theory. Some of the eight consensus factors appear to be based on retributivism because they tailor punishment based on the harm caused by the defendant or the defendant's culpability. The consensus that defendants who cause less harm or who are less culpable should receive lower sentences are obviously retributive in nature.<sup>154</sup> Mitigation based on imperfect defenses is also entirely consistent with retributivist principles.<sup>155</sup> Other consensus factors are clearly based on the utilitarian concern of reducing crime. A clear example is whether a defendant has a low likelihood of recidivism.<sup>156</sup> If a defendant is unlikely to commit a future crime, then punishment is not necessary to deter, rehabilitate, or incapacitate that individual.

That mitigation is not tied to a single punishment theory is also reflected in the sentencing factors that have been adopted by particular states. Illinois provides a useful example. The Illinois sentencing statute identifies several retributive mitigating factors, including that "[t]he defendant's criminal conduct neither caused nor threatened serious physical harm to another" and that "[t]he defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another."<sup>157</sup> It also contains mitigating factors that are utilitarian in nature, including that "[t]he defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime," that "[t]he defendant's criminal conduct was the result of circumstances unlikely to recur," that "[t]he character and attitudes of the defendant indicate that he is unlikely to commit another crime," and that "[t]he defendant is particularly likely to comply with the terms of a period of

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<sup>152</sup> U.S. SENTENCING COMMISSION, JUDGES SURVEY, *supra* note 100, tbl.13 (reporting that 62% of judges surveyed believed that "family ties and responsibilities" should be mitigating factors in sentencing).

<sup>153</sup> Survey respondents decreased the amount of punishment by an average of ~36% when this factor was present. Robinson, Jackowitz & Bartels, *supra* note 101, at 782 tbl.5. But the force of this mitigating factor depended on the crime of conviction: respondents decreased sentences by only 8% if the underlying crime was an intentional homicide. *Id.*

<sup>154</sup> See *supra* Sections III.A.4-A.5.

<sup>155</sup> For a full account of how partial or imperfect defenses are consistent with retributivism, see Husak, *supra* note 82, at 169-72.

<sup>156</sup> See *supra* Section III.A.6.

<sup>157</sup> 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(1)-(2) (West Supp. 2015); see also *id.* at 5/5-5-3.1(13).

probation.”<sup>158</sup> More striking, Illinois calls for mitigation for some facts—such as that “the defendant was intellectually disabled”<sup>159</sup>—based on a retributivist theory, even though those facts would support aggravation under a utilitarian theory. But Illinois has not based its mitigating sentencing factors on *either* retributive theory *or* utilitarian theory. Rather, Illinois has selected mitigating factors based on multiple theories.

In short, society has not adopted a single theory of punishment in formulating the modern approach to mitigation.<sup>160</sup> Some mitigating factors are based on retributivism, and others on utilitarianism. Moreover, society supports mitigation for some facts even when certain theories of punishment would actually support aggravation for those same facts.

The second important insight from the mitigation consensus identified above is that some consensus factors are completely unrelated to the prevailing punishment theories.<sup>161</sup> Victim compensation provides a useful example. As noted above, there is a strong consensus that victim compensation should be mitigating.<sup>162</sup> But victim compensation has nothing to do with retributivism or utilitarianism. Whether a defendant compensates her victim does not bear on the harm the defendant caused or on the culpability of the defendant when she committed the crime.<sup>163</sup> Nor does a defendant’s decision to compensate her

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<sup>158</sup> *Id.* at 5/5-5-3.1(7)-(10).

<sup>159</sup> *E.g., id.* at 5/5-5-3.1(13).

<sup>160</sup> *See* FRASE, *supra* note 29, at 10 (explaining that “all modern legal systems appear to take a hybrid approach” to sentencing rather than adopting a single punishment theory).

<sup>161</sup> *See* Andrew Ashworth, *Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING*, *supra* note 67, at 21, 37 (acknowledging “the difficulty of locating respectable principles in support of many longstanding mitigating factors”).

<sup>162</sup> *See supra* Section III.A.3.

<sup>163</sup> *Cf.* Ashworth, *supra* note 161, at 34 (characterizing victim compensation as only “quasi-retributive”). Many—though not all—retributivists care about a defendant’s culpability only at the time she is committing her crime. *See, e.g.,* RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 70 (1979); Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 *J. CRIM. L. & CRIMINOLOGY* 614, 620 (1987); Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 *CARDOZO L. REV.* 1019, 1026-37, 1029 n.35 (2004); *see also* FLETCHER, *supra* note 77, at 510 (framing the issue of culpability solely in terms of choice theory: “[C]ould the actor have been fairly expected to avoid the act of wrongdoing? Did he or she have fair opportunity to perceive the risk, to avoid the mistake, to resist the external pressure, or to counteract the effects of mental illness? This is the critical question that renders the assessment of liability just.”). *But see* Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 *OR. L. REV.* 631, 664 (2004) (recognizing, “for retributive purposes, that a defendant consists of something more than the murder that took place on one day of the defendant’s life”); Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 *YALE L.J.* 835, 847 (1992)

victim tell us anything about her likelihood of reoffending. There does not seem to be a logical connection between the two, and the empirical research on recidivism does not show a correlation.<sup>164</sup>

Victim compensation is not the only mitigating factor that does not fall neatly into one of the prevailing punishment theories. The hardship that punishment may cause a defendant or her family is not obviously related to culpability, the harm a defendant caused, or recidivism prospects.<sup>165</sup> Yet a consensus has also formed around that factor.<sup>166</sup>

That prevailing punishment theories do not justify two widely accepted mitigating factors suggests that punishment theory is not the only motivation for mitigation. Instead, decisions to mitigate may turn on other goals beyond the imposition of punishment and prevention of crime, such as making victims whole or minimizing the effects of punishment on third parties. Those goals are not unrelated to the criminal justice system. But using sentencing mitigation to achieve those goals suggests that those who are responsible for enacting sentencing statutes and guidelines are driven not only by theory, but also by very pragmatic concerns.

#### IV. AN INCLUSIVE APPROACH TO MITIGATION

We now turn from the positive to the normative. Our positive account provides a certain amount of guidance and authority about mitigation in modern sentencing. Judges who reduce defendants' sentences because one or more consensus factors are present should not be criticized for imposing sentences based on personal policy choices, even if those judges sit in jurisdictions that have not adopted all of the consensus factors. That there is a consensus surrounding these factors provides an independent and objective basis for the imposition of sentences.

But we seek to do more in this Article than simply identify a mitigation consensus. The current consensus, though a good starting point for revitalizing mitigation in modern sentencing, does not go far enough. There are political and structural forces at play that have doubtlessly contributed to states under-identifying mitigating sentencing factors,<sup>167</sup> which, in turn, results in a smaller

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(indicating that "a defendant's 'general desert'" includes "a moral assessment of the defendant's entire life that includes, but is not limited to, the defendant's culpability for the crime").

<sup>164</sup> See Oleson, *supra* note 98, at 1353-68 (discussing the major factors correlated with recidivism, but not mentioning victim compensation).

<sup>165</sup> See Ashworth, *supra* note 161, at 21, 31-32 (explaining that hardship to the defendant or third parties is not a consideration obviously justified by the purposes of punishment).

<sup>166</sup> See *supra* Section III.A.8.

<sup>167</sup> See Hessick, *supra* note 2, at 1130-31 ("The tendency of sentencing systems to identify more aggravating than mitigating factors may be attributable to political pressure. . . . Any legislator who identifies a factor that will lengthen criminal sentences can portray herself as "tough on crime," while a legislator who wishes to identify a mitigating

than optimal number of consensus factors. There are a number of other worthy mitigation factors—such as motive<sup>168</sup> and prior good deeds<sup>169</sup>—that do not enjoy the same consensus as the eight factors identified above.<sup>170</sup> Thus, rather than simply relying on consensus as a foundation for modern mitigation, we also offer an affirmative account of when mitigation is appropriate.

We call this an “inclusive” approach to mitigation. Under this approach, judges should reduce sentences whenever *any* of the punishment theories would support treating a fact or circumstance as mitigating.<sup>171</sup> This inclusive approach to mitigation better reflects general intuitions about punishment. It is also consistent with the parsimony principle,<sup>172</sup> which has long played a role in debates about punishment.

Because it does not adopt a singular theory of mitigation, one might object that this inclusive approach to mitigation is unprincipled. Developing a single theory to justify punishment has long occupied the legal academy, and our declaration that any of the theories will suffice for mitigation runs directly counter to that long tradition. Thus, before presenting inclusive mitigation in any detail, we first question whether mitigation decisions—that is, decisions to

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factor runs the risk of appearing “soft on crime.” (footnote omitted)); *see also* Carissa Byrne Hessick, *Mandatory Minimums and Popular Punitiveness*, 2011 CARDOZO L. REV. DE NOVO 23, 24-28 (explaining that “public information deficits” create incentives for legislators to enact sentence minimums that effectively lengthen sentences).

<sup>168</sup> *See* Hessick, *supra* note 80, at 100-02 (explaining why certain motives ought to mitigate sentences).

<sup>169</sup> *See* Hessick, *supra* note 2, at 1133 (explaining why prior good deeds are appropriate mitigating factors).

<sup>170</sup> There are only a few state systems that account for motive at sentencing. *See* ALASKA STAT. § 12.55.155(d)(10) (2014) (“[T]he defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant’s immediate family . . . .”); TENN. CODE ANN. § 40-35-113(7) (2014) (“The defendant was motivated by a desire to provide necessities for the defendant’s family or the defendant’s self . . . .”); CAL. R. CT. 4.423(a)(8) (West Supp. 2015) (“The defendant was motivated by a desire to provide necessities for his or her family or self . . . .”); R.I. R. SUPER. CT. SENT. BENCHMARKS § 1(d) (listing “defendant’s motivation (money, provocation, sudden or unexplained impulse or drugs)” as a substantial and compelling reason for departing from the benchmarks). Similarly, only two jurisdictions account for prior good deeds. *See* N.C. GEN. STAT. § 15A-1340.16(e)(14) (2013) (“The defendant has been honorably discharged from the Armed Forces of the United States.”); OR. REV. STAT. ANN. § 137.090(2) (West 2015) (“In determining mitigation, the court may consider evidence regarding the defendant’s status as a servicemember . . . .”).

<sup>171</sup> *Cf.* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 401 (1958) (arguing that because criminal justice pursues a wide array of competing values and objectives, none of which wholly exclude the others, criminal law choices demand “multivalued rather than . . . single-valued thinking”).

<sup>172</sup> *See* Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 49 (“The parsimony principle . . . calls for the imposition of the least punitive or burdensome punishment that will achieve valid social purposes.”).

impose *less* punishment—must be supported by the same coherent, theoretical framework as decisions to impose punishment. We then develop the inclusive approach to mitigation and address some potential objections to that approach.

A. *Questioning the Need for an Affirmative Theory*

Most theoretical accounts of when we should mitigate are conceptually indistinguishable from theoretical accounts that justify punishment.<sup>173</sup> That is to say, when explaining whether mitigation is appropriate under particular circumstances, many commentators are really just explaining whether a particular punishment theory supports imposing a lower sentence.<sup>174</sup> But it is unclear why one should approach the decision not to punish (or to punish less) the same way as the decision to impose punishment (or to punish more). The two decisions are fundamentally different, and thus different analytical frameworks arguably should apply.

There is some support for the idea that different analytical frameworks should apply in the punishment theory literature. Specifically, several commenters have argued that retributive limits on punishment ought to be asymmetric. That is to say, while retributive principles should set the upper limits on punishment, the lower limits should be flexible or perhaps there should be no lower limits at all.<sup>175</sup> In other words, if retributive principles tell us that a particular defendant should receive between three and five years imprisonment for her crime, asymmetric desert would prohibit a sentence above five years, but it may allow a sentence below three years. The normative justification for asymmetric desert is that the upper limits on punishment “raise

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<sup>173</sup> See Ristroph, *supra* note 11, at 266, 268 (acknowledging that most arguments against imposing proportionality restraints on punishment “depend on the assumption that proportionality is inextricably linked to a theory of penal purpose” and further recognizing that advocates of proportionality review have also “link[ed] proportionality to particular penological theories”).

<sup>174</sup> E.g., Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1453-55 (2004); Monahan, *supra* note 10, at 427-28; Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 316-22 (1993). There are some important exceptions to this general trend. Alice Ristroph, in particular, has written thoughtfully about locating limitations on punishment outside the context of penal theory. See Ristroph, *supra* note 68, at 1056 (describing “independent limiting principles,” which are “principles to limit the violence of punishment that . . . are independent of efforts to justify violence”). See generally Ristroph, *supra* note 11 (“[A] constitutional proportionality requirement is better understood as an external limitation on the state’s penal power that is independent of the goals of punishment.”).

<sup>175</sup> See, e.g., K.G. Armstrong, *The Retributivist Hits Back*, in THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS 138, 155 (H.B. Acton ed., 1969) (“For a variety of reasons (amongst them the hope of reforming the criminal) the appropriate authority may choose to punish a man less than it is entitled to, but it is never just to punish a man more than he deserves.”); see also FRASE, *supra* note 29, at 25-31 (collecting additional sources advocating asymmetric desert and advocating for the approach).

fundamentally different moral questions than lower limits”; punishing an individual more than she deserves raises human rights concerns, while punishing someone less than she deserves implicates only questions of fairness.<sup>176</sup>

Our argument goes further than asymmetric desert. Asymmetric desert contemplates that upper limits of punishment must be more strictly enforced than lower limits. We question whether the modern criminal justice system requires any justification for the mitigation of sentences. Put differently, our question about the need to justify mitigation is not a question of theory, but rather a question about structure and consistency within the criminal justice system. If decisions not to punish ordinarily require no justification, then why should judicial decisions about mitigation be subject to searching scrutiny?

It is a basic premise of our legal system that state interference with personal liberty should be kept to a minimum.<sup>177</sup> When the state seeks to interfere with the lives of individuals, it needs a reason.<sup>178</sup> The imposition of criminal punishment is one example of state interference in the lives of individuals, and the theories of punishment exist to justify that interference. But mitigation does not involve the imposition of punishment. It involves a choice not to punish. The state accordingly does not have the same obligation to justify its decision to mitigate.

The distinction between imposing punishment and withholding punishment can be seen in many areas of the law. Most visibly, the state must afford individuals significant procedural rights before it may impose punishment, including the right to counsel, the right to confront witnesses, and the right to a jury trial.<sup>179</sup> None of those procedures are necessary if the state does not intend to punish.<sup>180</sup>

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<sup>176</sup> FRASE, *supra* note 29, at 26-27.

<sup>177</sup> This is a cornerstone of both liberal and libertarian theories. *See, e.g.*, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2014); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

<sup>178</sup> *See* Ristroph, *supra* note 11, at 285-86 (“The kind of proportionality requirement that underwrites the American political system and its legal institutions, including the law of sentencing, is a consequence of two ideological commitments: the view that state power always needs to be justified, and the commitment to limited government rather than to no state or a total state.”).

<sup>179</sup> U.S. CONST. amend. VI.

<sup>180</sup> Indeed, there are a series of cases in which the Supreme Court has reviewed state sanctions to determine whether those sanctions are criminal sanctions. If the Court decides that the sanction is criminal (rather than civil) in nature, then the state must afford certain constitutional protections. *See, e.g.*, *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777, 784 (1994) (holding that tax imposed under state statute had to be characterized as “punishment” for purposes of double jeopardy analysis). *See generally* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 *GEO. L.J.* 775 (1997). Those protections are not necessary if the Court decides the sanction is civil.

The Constitution also imposes different substantive law requirements on decisions to punish or withhold punishment. Under the Due Process Clause, as well as the void for vagueness doctrine implementing that Clause, a state cannot punish an individual unless it has given notice of the illegality of the behavior and of the penalty attached to that behavior.<sup>181</sup> It also requires the state to provide ascertainable standards for law enforcement and others who are responsible for enforcing the laws.<sup>182</sup>

In contrast, when executive officials decide not to arrest or not to prosecute individuals, no advanced notice is required and the decision need not be based on an ascertainable standard.<sup>183</sup> Because no official action is taken, there is often no record that a decision was even made, let alone a justification for the decision.<sup>184</sup> Thus, not only are decisions not to punish difficult to review as a practical matter, but various doctrines also suggest that those decisions ought to be unreviewable as a legal matter. For example, courts regularly refuse to review an administrative agency's refusal to pursue an enforcement action. The Supreme Court has offered two major justifications for its refusal to review

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<sup>181</sup> See, e.g., *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 503 (1982) (“In reviewing a . . . regulation for facial vagueness . . . the principal inquiry is whether the law affords fair warning of what is proscribed.”); *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (“[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . .”).

<sup>182</sup> See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (clarifying that the “more important aspect of the vagueness doctrine ‘is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement’” (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974))); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (“Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.”).

<sup>183</sup> Indeed, in the latest debate over the executive's authority not to enforce the law—namely, the debate over the Obama administration's decision not to deport every removable alien—some commentators have taken the view that decisions not to prosecute are least defensible when based on a particular policy, rather than simply being made on an ad hoc basis. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 705 (2014).

<sup>184</sup> Thus, the public is often unaware when decisions not to arrest or not to prosecute occur. Occasionally, decisions not to punish receive some attention, such as when prosecutors decline to bring charges in the wake of well publicized incidents, or when an executive elects to make a public statement clarifying that it will not pursue charges in certain types of cases. E.g., Veronica Rocha & Richard Winton, *Caitlyn Jenner Won't Be Charged in Deadly PCH Crash*, L.A. TIMES (Sept. 30, 2015, 1:50 PM), <http://www.latimes.com/local/lanow/la-me-ln-charges-declined-caitlyn-jenner-20150930-story.html> [<http://perma.cc/X8EF-RANX>]. But the decisions not to punish that receive attention are the exceptions rather than the rule.

agency inaction: First, the executive is in a better position to weigh the various considerations, including resource allocation concerns, that factor into enforcement decisions.<sup>185</sup> Second, unlike decisions to bring enforcement actions, a failure to enforce does not involve the state's "coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect."<sup>186</sup>

Of course, decisions not to arrest and decisions not to prosecute are both decisions not to punish at all. Decisions to mitigate are decisions to reduce punishment, but they are still decisions to punish. And so one might argue that even if decisions not to punish do not require justification, decisions to punish less still do.

We do not agree. Although mitigation decisions involve the imposition of punishment, a decision to mitigate is a decision *not* to impose *some portion* of the punishment that would otherwise be imposed. The withholding of that portion of punishment is a decision not to punish.

Other decisions to punish less have been treated similarly to decisions not to punish at all. Consider decisions about offering plea bargains to defendants. When prosecutors offer criminal defendants a plea bargain, they usually include some sort of incentive, such as a promise to drop certain charges or to advocate for the imposition of a lower sentence. Those are decisions to punish less, and they are not ordinarily accompanied by any sort of explanation.

Like decisions not to punish at all, decisions to offer favorable plea bargains are not perceived as requiring the same justifications as decisions to impose punishment.<sup>187</sup> Nonetheless, sometimes plea decisions are driven by retributive concerns, such as when a prosecutor is willing to forgo the death penalty, but—due to the heinous nature of the defendant's crime—will only accept a plea of life in prison. Similarly, plea decisions can be driven by utilitarian

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<sup>185</sup> Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (explaining that in deciding whether to enforce, "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities").

<sup>186</sup> *Id.* Further support for the idea that prosecutorial decisions not to punish are unreviewable comes from selective prosecution cases, in which the Court has been essentially unwilling to allow defendants to obtain discovery about why a prosecutor elected to pursue criminal charges against some defendants and not others. *See* United States v. Armstrong, 517 U.S. 456, 463-71 (1996).

<sup>187</sup> To the contrary, as a matter of doctrine, the only limit on the reason for offering a plea bargain is that it cannot have been motivated by "race, religion, or other arbitrary classification." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). As for theory, commentators often note that sentence reductions for guilty pleas are not justified by the prevailing punishment theories. *E.g.*, Ashworth, *supra* note 161, at 33 ("The principled response is that the sentence reduction [for pleading guilty] runs counter to whatever purpose of sentencing is uppermost—it detracts from the proportionate sentence, undermines the calculations on which a deterrent sentence is based, reduces the amount of public protection and so forth.").

concerns, such as when a prosecutor offers a very favorable plea deal to a first time offender on the theory that the defendant is unlikely to offend again.

But plea bargains are often driven by concerns that do not comfortably fit within the prevailing punishment theories. Consider, for example, the common practice of offering plea deals when the prosecution is concerned about losing at trial. A prosecutor is likely to offer a particularly favorable plea deal if a jury is unlikely to think a witness for the prosecution is credible, or if a key piece of inculpatory evidence has been suppressed. Indeed, in those situations, the practical problems with the prosecution's case are likely to be primary considerations in what sort of plea bargain a prosecutor offers a defendant. Yet, these prosecutorial concerns do not lessen the seriousness of a defendant's crime and they do not suggest that the defendant is less likely commit crimes in the future. In other words, the defendant will receive less punishment even though neither retributive nor utilitarian theories suggest that a lighter sentence is warranted.<sup>188</sup>

In sum, a decision to decrease a defendant's sentence is a decision to withhold punishment. Although decisions to *impose* punishment require serious explanation, decisions to withhold punishment are regularly understood to require little or no justification, and they have often been shielded from judicial review. Reconceptualizing mitigation as a decision not to punish, and distinguishing decisions not to punish from decisions to impose punishment, should help to alleviate some of the judicial anxiety over mitigation that we see in modern sentencing decisions.

#### B. *An Inclusive Approach to Mitigation*

Modern sentencing does not follow a single punishment theory. States regularly identify mitigating sentencing factors that are justified by conflicting punishment theories.<sup>189</sup> This lack of punishment theory purity appears intentional. When speaking about their criminal justice goals, American legislatures often invoke multiple punishment theories. The relevant federal statute is illustrative; when instructing judges what to consider at sentencing, it references all of the major theories of punishment.<sup>190</sup> State statutes include similarly inclusive statements of punishment purposes.<sup>191</sup>

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<sup>188</sup> As others have noted, the overall practice of plea bargaining may serve utilitarian ends. See Bierschbach & Bibas, *supra* note 103, at 403 (stating that when prosecutors move cases through the system quickly and maximize convictions, they promote deterrence and incapacitation). But the particular considerations that affect the nature of the plea bargain offered (and thus the amount of punishment imposed) often do not—at least, they do not accord with the superficial account of utilitarianism that has formed the basis of judicial sentencing decisions. See *supra* Section II.B.

<sup>189</sup> See *supra* Section III.B.

<sup>190</sup> 18 U.S.C. § 3553(a)(2) (2012) (instructing judges to consider “the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to

It should come as no surprise that lawmakers consider all of the prevailing punishment theories to be relevant to sentencing. This view is consistent with widely shared intuitions about punishment. Although criminal law theorists sometimes speak about punishment in terms of only a single theory,<sup>192</sup> that is not how non-academics think about criminal punishment. Most people believe that we impose criminal sentences on defendants *both* to punish them for their crimes *and* to prevent future crimes from occurring.<sup>193</sup> In other words, members of the general public are simultaneously retributivists and utilitarians.

To be clear, though judges often speak about the theories of punishment as single, isolated theories, not all punishment theorists are mono-theorists. To the contrary, many academics endorse a hybrid theory of punishment that incorporates aspects from multiple theories.<sup>194</sup> Indeed, Richard Frase recently claimed that the hybrid theory of punishment is “the de facto consensus theoretical model of criminal punishment.”<sup>195</sup>

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criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

<sup>191</sup> *E.g.*, MONT. CODE ANN. § 46-18-101(2) (2013) (“The correctional and sentencing policy of the state of Montana is to: (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable; (b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders . . . .”); N.C. GEN. STAT. § 15A-1340.12 (2013) (“The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender’s culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.”); TENN. CODE ANN. § 40-35-102(3) (2014) (“Punishment shall be imposed to prevent crime and promote respect for the law . . . .”).

<sup>192</sup> *But see infra* note 194.

<sup>193</sup> As Michael Tonry states quite succinctly, “[t]he fundamental purposes and primary functions of sentencing are clear, and are the same: to punish criminals and prevent crimes.” Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 10 (2006); *see also* John Bronsteen, *Retribution’s Role*, 84 IND. L.J. 1129, 1135 (2009) (offering a theory of punishment that accounts for both retributive and utilitarian concerns in part because “it tracks our intuitions and considered judgments regarding the roles that retribution and utilitarianism play in justifying criminal punishment”).

<sup>194</sup> *E.g.*, Bronsteen, *supra* note 193; Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059, 1062 (1992); Frase, *supra* note 88, at 68; Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 22 (1987); *see also* Norval Morris, *Desert as a Limiting Principle*, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 73, at 180, 183 (describing “appropriately deserved punishments” as influenced by both retributivist and utilitarian concerns).

<sup>195</sup> FRASE, *supra* note 29, at 4. Frase refers specifically to a particular hybrid theory called limiting retributivism. Limiting retributivism is “a hybrid approach in which

Although hybrid theories of punishment are quite popular at the moment, our inclusive approach to punishment is not simply another hybrid theory. That is because hybrid theories often seek to exclude consideration of certain facts or factors from the punishment calculus.<sup>196</sup> Our inclusive approach is—to put it in the most obvious terms—more inclusive. It does not prioritize one theory above others. A reason for less punishment under any of the theories of punishment, as well as under any widely recognized grounds for mitigation that may not fit comfortably within any of the prevailing theories, is a sufficient basis for mitigation.

There is ample evidence of this inclusive approach to punishment in the empirical desert survey results we reference in Part III. The respondents to those surveys indicated that a defendant's sentence should be decreased based on retributive considerations—such as situations involving diminished capacity—utilitarian considerations—such as whether the defendant had been rehabilitated—and considerations that do not fall under either prevailing theory of punishment—such as hardship to a defendant or her family.<sup>197</sup> Further evidence of non-academic support for an inclusive approach to punishment can be found in any number of public discussions about punishment policy,<sup>198</sup> and cases discussing punishment purposes.<sup>199</sup>

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retributive principles set upper and sometimes lower limits on punishment severity, thus providing a range of permissible penalties within which sentencing judges may apply other (nonretributive) principles.” *Id.* at 11. See also Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 621 (2009) (“A typical hybrid approach holds that moral desert specifies a range of permissible penalties, and utilitarian considerations should drive the selection of the appropriate penalty within that range.”).

<sup>196</sup> See, e.g., DeGirolami, *supra* note 13 (“[M]any hybrid theorists are no less intent on excluding specific values of punishment . . . than are, say, positive retributivists or pure deterrence theorists.”).

<sup>197</sup> See *supra* Section III.A.

<sup>198</sup> E.g. Richard A. Posner, *We Need a Strong Prison System*, NEW REPUBLIC (May 24, 2014), <http://www.newrepublic.com/article/117803/inferno-anatomy-american-punishment-robert-ferguson-reviewed> [<http://perma.cc/68DX-Z8LT>] (“We punish not only to deter or to incapacitate, but also to express our indignation.”); George F. Will, *The Value of Punishment*, NEWSWEEK, May 24, 1982, at 92 (“We should use the criminal justice system to isolate and punish—that is, to protect society from physical danger—and to strengthen society by administering condign punishments that express and nourish, through controlled indignation, the vigor of our values.”).

<sup>199</sup> E.g., *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) (“The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”); *United States v. Giraldo*, 822 F.2d 205, 210 (2d Cir. 1987) (“The proper purposes of the sentencing of criminal offenders are generally thought to encompass punishment, prevention, restraint, rehabilitation, deterrence, education, and retribution.”); *United States v. Angiulo*, 852 F. Supp. 54, 58 (D. Mass. 1994) (“In attempting to discharge the duties [to impose sentences], like many judges I try to take into account four basic criteria: condign punishment or retribution, specific deterrence, general deterrence, and rehabilitation. While

If legislatures and the general public assume they are accomplishing both retributivist and utilitarian goals with criminal sentences, then it is logical to reduce a defendant's sentence whenever additional punishment does not further one of those goals. Imagine, for example, that the public supports harsh sentences for bank robbery because they believe people who rob banks deserve to be punished for the harm that they have caused *and* because they are likely to commit more robberies if they are not punished. Now imagine that a particular defendant robbed a bank using a toy gun. There is no reason to think that he will stop robbing banks with his toy gun if he is not punished. But his crime seems far less serious than the typical bank robber. This particular bank robber never posed a serious risk to the people inside the bank, given that he was using a toy gun. In other words, though there are retributivist reasons to decrease the defendant's sentence, there are not particularly obvious utilitarian reasons to do so.

One might argue that the toy gun defendant should receive a full sentence because a lesser sentence would not sufficiently fulfill the utilitarian purposes of punishment. We cannot be certain, but we suspect that most people would agree that the toy gun defendant should receive a shorter sentence than a bank robber who robs a bank using a real gun. That is not because most people are retributivists rather than utilitarians, but instead because most people do not think about the retributive and utilitarian aspects of punishment as distinct goals that must both be achieved in every case. They do not, for instance, conceptualize sentences in terms of how long they must be to serve each of the sentencing purposes, and then impose a sentence that is long enough to accomplish all of those purposes. In this case, for example, people would not determine an appropriate sentence length for the bank robber based on retributivist goals, and then add that to an appropriate sentence length based on utilitarian goals. If one of the goals can be accomplished with less punishment, then most people would probably support a mitigated sentence.

A second reason that we endorse an inclusive approach to mitigation is because it furthers the parsimony principle. The parsimony principle is the idea that a court should impose a sentence that is no greater than necessary to achieve its punishment purposes. As Norval Morris stated the principle, "[t]he least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed."<sup>200</sup> We are hardly the first academics to advocate for the parsimony principle.<sup>201</sup> What is more, versions of the principle can be

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every case necessitates an evaluation of all four principles, I am quick to concede that my judicial experience leads me to the view that rehabilitation is rarely, if ever, furthered by prison.").

<sup>200</sup> MORRIS, *supra* note 28, at 59.

<sup>201</sup> In addition to Morris's many writings on the topic, a number of other academics have endorsed the parsimony approach to punishment. *E.g.*, Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 48-50; Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 400-01, 409

found in federal criminal law,<sup>202</sup> some state sentencing systems,<sup>203</sup> and other authoritative texts.<sup>204</sup>

Although oft-repeated, the parsimony principle has played an inconsistent role in shaping modern sentencing policy and influencing sentencing decisions.<sup>205</sup> But our vision of inclusive mitigation would allow parsimony to play a central role in punishment. Indeed, our inclusive approach is arguably a variation on the parsimony principle.<sup>206</sup> While parsimony tells us that we should impose the least severe sentence possible to accomplish our goals, inclusive mitigation tells us that, whenever a particular punishment theory or consensus factor would support a sentence reduction, then the sentence ought to be reduced. In other words, the inclusive approach to mitigation is one way to operationalize the parsimony principle.<sup>207</sup>

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(2004); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 515-18 (2005); Frase, *supra* note 88, at 80-81.

<sup>202</sup> “The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.” 18 U.S.C. § 3553(a) (2012).

<sup>203</sup> *E.g.*, ALA. CODE § 12-25-2(b)(5) (LexisNexis 2012) (stating that the purposes of sentencing include “[i]mposing sanctions which are least restrictive while consistent with the protection of the public and the gravity of the crime”); MINN. SENTENCING GUIDELINES AND COMMENTARY § I.A.4 (MINN. SENTENCING GUIDELINES COMM’N 2015) (“Because state and local correctional facility capacity is finite, confinement should be imposed only for offenders who are convicted of more serious offenses or who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.”).

<sup>204</sup> *E.g.*, STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, Standard 18-2.4 (AM. BAR ASS’N 1993) (“Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.”); *id.* Standard 18-6.1(a) (“The sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized.”); MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(iii) (AM. LAW INST., Tentative Draft No. 1, 2007) (stating that the general purposes of sentencing include “to render sentences no more severe than necessary to achieve the applicable purposes”).

<sup>205</sup> *See, e.g.*, *United States v. Wilson*, 350 F. Supp. 2d 910, 922-24 (D. Utah) (discussing the limited effect of the parsimony provision); *see also* Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heart(Land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 745-47 (1999) (explaining that the federal parsimony provision “has played almost no role in caselaw to this point—judges have essentially ignored . . . the parsimony language”).

<sup>206</sup> It is a variation on what some call “opportunistic parsimony”—that is, an approach to punishment which “maintains that opportunities for parsimony should be taken as and when they arise.” Ashworth, *supra* note 161, at 37.

<sup>207</sup> Not everyone will agree that this is the proper way to interpret the parsimony principle. In defining the principle, Morris said “[t]he least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed.” MORRIS, *supra* note 28, at 59. If a retributivist believed that a five-year sentence was necessary for desert, then she

As the mitigation consensus demonstrates, modern sentencing already reflects inclusive tendencies. Our inclusive approach would make those tendencies explicit. An inclusive approach to mitigation will hopefully prompt legislatures and sentencing commissions to expand their sentencing laws to identify more mitigating factors. And it will hopefully encourage judges to prioritize parsimony as an objective at sentencing.

C. *Anticipating Objections*

There are, of course, objections one might raise to our inclusive approach to mitigation. In particular, one might question how inclusive mitigation could operate in practice. Or one might argue that our approach to mitigation is likely to disproportionately benefit wealthy white defendants. We address those objections here.

As with any theory of punishment, there will always be questions about how to translate theory into practice. It is not our purpose to sketch out a full-fledged system of sentencing mitigation in this Article. Our goal is to lay the foundational framework for further recommendations about particular mitigating sentencing factors. That said, we have two brief observations about how mitigation ought to work in practice.

First, any sentencing system that attempts to aggravate or mitigate sentences in a coherent fashion will necessarily rely on the concept of an “ordinary” criminal defendant. An ordinary or average length sentence ought to be imposed on offenders whose offense and offender characteristics are generally similar to most other offenders convicted of the same crime. Lengthier sentences ought to be imposed on offenders when aggravating factors—that is, factors that appear to make the offender or her offense “worse” than ordinary—are present. And shorter sentences ought to be imposed on offenders when mitigating factors—that is, factors that appear to make the offender or her offense “better” than ordinary—are present.<sup>208</sup>

Second, questions of mitigation in non-capital sentencing will always be questions of degree. Non-capital sentencing decisions require the sentencer to select a specific sentence from within a range of available sentences set by

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would conclude that a five-year sentence was the least restrictive penal sanction necessary. She would not care that a less severe sentence would be enough to rehabilitate an offender. But an inclusive approach to mitigation would not privilege the retributive reasons for punishment; it would mitigate the sentence because the goal of at least one punishment theory could be achieved through mitigation.

<sup>208</sup> We are hardly the first to recommend such an approach. Indeed, states such as Arizona, California, and Washington, which have presumptive, mitigated, and aggravated sentences, follow this model precisely. See ARIZ. REV. STAT. ANN. §§ 13-604, 13-702 (2010); WASH. REV. CODE ANN. § 9.94A.535 (West Supp. 2015); CAL. R. CT. 4.420 (West Supp. 2015). See generally *Cunningham v. California*, 549 U.S. 270, 276-78 (2007) (describing the California system). For an example of this approach in the academic literature, see Husak, *supra* note 82, at 171-73.

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statute.<sup>209</sup> Because non-capital sentences are measured chronologically, the sentencing judge can adjust a defendant's sentence up or down by varying amounts to account for various aggravating or mitigating factors. Given this flexibility, a judge could (in theory) decrease a defendant's sentence not only by months or years to account for mitigating factors, but also by days, hours, or minutes to account for de minimis amounts of mitigation.

While we generally agree that more individualized sentencing is the best way to operationalize mitigation, we do not think that a judge is required to fractionally reduce a defendant's sentence to account for nominal mitigation. For example, it would be silly for a judge to sentence a defendant to two years, four months, eight days, three hours, and eleven minutes in prison. The administrability costs associated with such fine gradations of sentencing, standing alone, suggest that de minimis differences between defendants need not result in marginal sentence reductions.

Finally, we note that courts, academics, and other criminal justice actors have occasionally raised a second objection about traditional mitigating factors—namely, that many of those factors disproportionately benefit white and wealthy defendants.<sup>210</sup> For example, a number of courts and commentators have suggested that a defendant's prior charitable acts ought not mitigate a criminal sentence because that factor tends to advantage more middle class or wealthy defendants.<sup>211</sup>

Although we think there is some legitimacy to this inequality critique of mitigation, we do not believe that sentencing factors must be limited so as to exclude all mitigating factors that correlate with race or socioeconomic status. While it is certainly important to guard against inequality in the criminal justice system, there are a number of reasons not to exclude a sentencing factor merely because it tends to benefit those of higher socioeconomic status. For one thing, excluding such factors places an asymmetrical restriction on sentencing mitigation. Many common aggravating factors are correlated with low socioeconomic status. Notably, using a defendant's criminal history to

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<sup>209</sup> In contrast, capital sentencing is essentially a binary inquiry: should the defendant receive the death penalty or not?

<sup>210</sup> See, e.g., Joan Petersilia & Susan Turner, *Guideline-Based Justice: Prediction and Racial Minorities*, in 9 CRIME AND JUSTICE: A REVIEW OF RESEARCH 151, 153-54, 160 (Don M. Gottfredson & Michael Tonry eds., 1987); Deborah Young, *Federal Sentencing: Looking Back to Move Forward*, 60 U. CIN. L. REV. 135, 139-42 (1991) (book review); Editorial, *The Roadblock to Sentencing Reform*, N.Y. TIMES, Feb. 17, 2015, at A22. This criticism sometimes appears as a critique of how mitigation operates in practice. E.g., Bowman, *supra* note 56, at 1255-56 ("This begs the question of why economic crime should be different. It is difficult to avoid the suspicion that what we are witnessing is a slow resurgence of the 'just like me' class bias in fraud cases—the reluctance of judges to impose serious punishment on people who look like themselves, who come from middle class backgrounds, who are educated and work in professional settings, and who steal with briefcases (now computers) rather than guns.").

<sup>211</sup> See Hessick, *supra* note 2, at 1159 n.265 (collecting sources).

aggravate a sentence will have disproportionately harsh effects on racial minorities because “race is significantly correlated with recorded criminality.”<sup>212</sup> Despite the overwhelming social science evidence that recidivism laws and law enforcement practices disproportionately affect and unfairly punish racial minorities,<sup>213</sup> it is almost unthinkable that the American criminal justice system will stop using prior criminal history as an aggravating sentencing factor.<sup>214</sup>

What is more, that certain mitigating factors are correlated with high socioeconomic status does not mean that only those defendants will benefit from the consideration of those factors. For example, while white, well-educated, and employed individuals appear to be more likely to engage in certain charitable work (such as volunteering), significant percentages of non-white, less-educated, and unemployed individuals do as well.<sup>215</sup> Thus, while considering volunteer work and other charitable acts as mitigation may ultimately benefit a large number of white or wealthy defendants, refusing to consider those acts would likely disadvantage a substantial number of non-white, non-wealthy defendants.

Although we do not think that a correlation between a mitigating factor and race or high socioeconomic status is enough to render that mitigating factor an inappropriate sentencing consideration, that does not mean the inequality criticism has no place in constructing a theory of mitigation. When identifying

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<sup>212</sup> Michael Tonry, *Selective Incapacitation: The Debate over Its Ethics*, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 73, at 176; *see also* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 195-214 (2007) (explaining how law enforcement tactics, such as racial profiling, result in racial minorities having more prior convictions).

<sup>213</sup> Bernard Harcourt and Mona Lynch, among others, have documented how policing practices and punishments associated with recidivism result in disproportionately harsh treatment for African Americans. HARCOURT, *supra* note 212; Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 115-21 (2013).

<sup>214</sup> Not only is the use of prior criminal history as an aggravating factor supported by significant historical practice, but also there exists widespread support for the practice in the legal community, presumably because criminal history “is as typical a sentencing factor as one might imagine.” *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998); *see also* NIGEL WALKER, SENTENCING: THEORY, LAW AND PRACTICE 44 (1985) (characterizing previous convictions as the “most obvious example” of an aggravating sentencing factor); STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 88 (1988) (“It is well established in criminal law that the prior record of an offender is a crucial, some would say *the* crucial, attribute of the defendant’s background that should be considered at the time of sentencing.”).

<sup>215</sup> *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, at 368 tbl.572 (2006), <https://www.census.gov/prod/2006pubs/07statab/socinsur.pdf> [<https://perma.cc/N9YX-5C7B>] (reporting that 56,170,000 white people, 5,879,000 black people, and 4,511,000 hispanic or latino people “performed unpaid volunteer activities for an organization from September 1, 2004, through September 2005”).

and defending particular sentencing factors, we should always critically evaluate those factors to ensure that they are not the product of implicit class or race bias.<sup>216</sup> In particular, decisions about appropriate aggravating and mitigating factors should be subject to careful study, and those decisions ought to be revisited on a regular basis. Such an approach may avoid—or at least minimize—the pernicious effects of implicit bias while allowing mitigation to flourish.

#### CONCLUSION

When the American criminal justice system rejected rehabilitation as the touchstone of sentencing, mitigation suffered a serious blow. The structured sentencing systems that arose in the late twentieth century tended to give short shrift to mitigating factors, and they failed to supply a new theoretical basis for mitigation. The failure to reconceptualize mitigation since the collapse of the rehabilitative ideal has become more salient in recent years. As sentencing discretion has been restored to judges—most visibly in the federal system—many have struggled with how to use their new authority to decrease punishment. Decreasing punishment without a shared theoretical basis resembles, at first glance, the standardless sentencing of the twentieth century, during which sentencing inequality appeared to reinforce pernicious racial and class inequalities.

This Article shifts the conversation about mitigation away from an exclusive focus on the prevailing punishment theories. None of the prevailing theories accurately captures the current practice of mitigation in the states, the opinions of judges who regularly sentence defendants, or lay intuitions about when defendants should receive less punishment. In order to develop a modern theory of mitigation, we must look beyond the traditional theories that have been used to justify punishment.

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<sup>216</sup> Many decisions about punishment in the United States have been the product of implicit racial bias. The treatment of crack cocaine compared to powder cocaine under federal drug laws is one visible example of such bias. In setting punishment levels for various drug offenses, Congress elected to treat crimes involving crack cocaine the same as crimes involving one hundred times as much powder cocaine. *See Lynch, supra* note 213, at 115-16. As others have documented, the disproportionately harsh treatment of crack cocaine was attributable to the fact that the drug was associated with low-income neighborhoods and racial minorities, while powder cocaine was associated with wealthy white users. *E.g.,* DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 103-19 (2007). And subsequent decisions to concentrate policing efforts in low-income neighborhoods have exacerbated unfair racial impacts. *See Lynch, supra* note 213, at 115-18 ; William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998). At the time the relevant federal drug laws were passed, it is unlikely that legislators understood their decision to be influenced by implicit bias. But even after research consistently demonstrated that the race-neutral reasons for the drug laws were deeply flawed, it took many years for Congress to change its approach to crack cocaine offenses (and the new laws continue to treat crack cocaine far more harshly than powder cocaine). 21 U.S.C. § 841(b)(1)(A)(ii)-(iii) (2012).

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Rather than conceptualizing punishment theories as necessary conditions that must be met to justify the reduction of punishment, we should acknowledge that decisions to withhold punishment are ordinarily made without searching scrutiny. The state regularly withholds punishment in order to conserve resources or to achieve other ends. While we may believe that decisions to affirmatively impose punishment ought to require theoretically coherent justifications, the decision to impose less (or no) punishment should not.

That is not to say that sentencing should revert to a standardless exercise, in which the amount of punishment is determined by nothing more than the gut feeling of the judge imposing the sentence. Instead, sentencing mitigation should occur whenever a consensus factor is present or whenever any of the prevailing punishment theories suggest that less punishment is appropriate. This approach is more consistent with legislative intentions and lay intuitions about punishment.

Since more sentencing discretion has been restored to judges, the national conversation around sentencing mitigation has been one tinged by anxiety. Judges, policymakers, and commentators have all lamented that restoring judicial discretion will return us to the bad old days of “lawless” sentencing. Sentencing authority need not be a binary choice between rigid rules and personal predilections of judges. As Sir James Fitzjames Stephen explained more than a century ago, judicial sentencing discretion need not be “wholly personal and subject to no regulation at all.”<sup>217</sup> Rather, judges can enjoy discretion that is regulated “by custom and the pervading tone of public feeling.”<sup>218</sup> Basing sentencing decisions on a mitigation consensus and an inclusive approach to mitigation could result in sentencing that is discretionary, but not lawless.

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<sup>217</sup> James Fitzjames Stephen, *Variations in the Punishment of Crime*, 17 NINETEENTH CENTURY 755, 766 (1885).

<sup>218</sup> *Id.* at 767.