
ARTICLES

WHY ARE ONLY BAD ACTS GOOD SENTENCING FACTORS?

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Few pieces of information play a larger role in determining a criminal offender's sentence than her prior criminal history. American jurisdictions universally consider an offender's prior bad acts as an aggravating sentencing factor. In contrast, fewer jurisdictions appear to consider an offender's prior good acts – such as honorable military service or charitable works – as a mitigating sentencing factor. This Article discusses the potential relationship

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between aggravating and mitigating sentencing factors. It also explores whether, in light of the overwhelming consensus that a prior bad act is aggravating, there is a principled reason that a sentencing system could fail to treat a prior good act as mitigating.

INTRODUCTION

During trial, a criminal defendant's prior bad acts, such as previous convictions, are generally excluded from evidence.¹ The theory behind the exclusion is that a jury is likely to conclude that an individual who has committed a crime in the past is more likely to have committed the offense in question. This might lead the jury to convict the defendant for reasons other than whether she committed the offense in question.²

In contrast, evidence of a defendant's good character is almost always admissible at trial. A defendant is permitted to introduce evidence of her good character in an attempt to establish that she did not commit the crime in question.³ The prosecutor may respond by introducing evidence of bad character, but only to rebut the evidence of good character.⁴ This evidentiary bias in favor of good character evidence at trial has a long history and is well settled.⁵

But the opposite bias exists during the sentencing phase. At sentencing, prior convictions are not only considered relevant to determine the proper

¹ FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes . . ."). For a thorough discussion on the admissibility of a defendant's prior bad acts – e.g., as evidence of a distinctive past pattern or to impeach an accused who takes the stand – see MCCORMICK ON EVIDENCE § 190 (5th ed. 1999).

² See Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715, 716 (1941) [hereinafter Note, *Admissibility of Character Evidence*].

³ MCCORMICK ON EVIDENCE, *supra* note 1, § 191. McCormick states:

The prosecution . . . generally is forbidden to initiate evidence of the bad character of the defendant merely to imply that, being a bad person, he is more likely to commit a crime. . . . Yet, when the table is turned and the defendant in a criminal case seeks to offer evidence of his good character to imply that he is unlikely to have committed a crime, the general rule against propensity evidence is not applied.

Id.

⁴ *Id.*

⁵ E.g., JOHN H. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE 61-62 (1935) ("The accused, however, may offer his *good* character to evidence the improbability of his doing the act charged. This is because it has probative value Whether it should alone suffice to create reasonable doubt, has been the subject of differing judicial opinions in giving instructions to the jury."); see also CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 158 (1954); WILLIAM REYNOLDS, THE THEORY OF THE LAW OF EVIDENCE AS ESTABLISHED IN THE UNITED STATES 16-17 (2d ed. 1890); 1 PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND AND IRELAND 329-31 (8th ed. 1887).

punishment, but are treated as one of the most important pieces of sentencing information. In contrast to this uniform acceptance of prior bad acts, a conflict has arisen over the role an offender's prior good acts should play at sentencing. Few jurisdictions explicitly recognize prior good acts as a mitigating sentencing factor. Trial judges have occasionally reduced a defendant's sentence on the basis of prior good actions that are unrelated to the conviction, such as military service or charitable work. Such decisions, however, have met resistance from the U.S. Sentencing Commission and federal appellate courts, and various commentators have expressed the view that prior good acts ought not be considered at sentencing.⁶

This Article questions whether a system that increases an offender's punishment on the basis of prior bad acts – i.e., prior convictions or uncharged criminal conduct – can justifiably refuse to decrease an offender's punishment on the basis of prior good acts. It examines various theories of punishment and other arguments that justify increased punishment for prior bad acts. None of these theories or arguments provides a principled basis for distinguishing between good and bad acts as appropriate sentencing factors. The only possible exception is the correlation between prior bad acts and increased recidivism. There is insufficient evidence, however, to determine whether a similar correlation exists between prior good acts and decreased recidivism.

This Article addresses questions of a limited nature: it asks whether a system that accounts for prior bad acts *should* account for prior good acts; it does not attempt to design a system that *could* account for prior good acts. Because a consensus regarding the proper role of good acts at sentencing does not appear to exist, it seems important to first address whether good acts are an appropriate sentencing factor and, until that question is answered in the affirmative, questions of practicability may remain unanswered.⁷ The Article

⁶ E.g., ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 151 (3d ed. 2000); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1437-38 (2004); Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 608 (1980). *But see* Peter J. Henning, *Prior Good Works in the Age of Reasonableness*, 20 FED. SENT'G REP. 187, 187 (2008) (arguing that "consideration of prior good works [is] an appropriate issue in deciding sentences" for white-collar offenders). Douglas A. Berman has stated:

I often think of honorable military service and other past good deeds by a defendant as the flip side of criminal history. Criminal history, after all, is just a past record of prior bad deeds, and every sentencing system (guideline or otherwise) provides for sentence enhancements (often huge enhancements) based on such a record of prior bad deeds. Doesn't it make some logical sense for a sentencing system to similarly provide for sentence reductions based on a notable record of prior good deeds such as military service?

Douglas A. Berman, *Sentencing Law and Policy: Should Prior Military Service Reduce a Sentence?*, http://sentencing.typepad.com/sentencing_law_and_policy/2006/04/should_prior_mi.html (Apr. 14, 2006, 09:12).

⁷ Indeed, questions of practicability will turn, in large part, on the type of sentencing system employed. In a fully discretionary sentencing system, good acts would be one of many factors for a sentencing judge to consider. In systems where presumptive sentences or

also does not address the broader question – whether prior acts should be considered at all. Rather, it asks only whether, in a system that already considers prior bad acts at sentencing – which all American jurisdictions do, in some form or another – prior good acts should receive the same consistent and transparent consideration.

The Article proceeds in three Parts. Part I briefly describes the treatment of prior good and bad acts at sentencing. Part II explores the general relationship between aggravating and mitigating sentencing factors. The Supreme Court's traditional view is that, in the non-capital sentencing context, questions about appropriate sentencing factors are legislative policy decisions. Nevertheless, there are strong reasons to believe our political systems over-identify aggravating sentencing factors and under-identify mitigating factors. Because this asymmetry may result in individual sentences that are perceived as unjust, the Article attempts to construct a theory of mitigation that is not wholly dependent upon the political process. One of the mitigation theories the Article considers suggests that sentencing factors ought to be viewed on a spectrum. Where two factors fall on either end of a spectrum, sentencing symmetry supports the consideration of each factor – one as an aggravating factor and the other as a mitigating factor. A legislative presumption in favor of sentencing symmetry should result in sentencing systems that recognize not only the aggravating factors on one end of the sentencing spectrum, but also the mitigating factors on the opposite end. Part II concludes with a discussion about whether prior good acts and prior bad acts may be characterized appropriately as two ends of a spectrum so as to promote sentencing symmetry.

Part III examines whether, in light of the overwhelming legislative consensus that a prior bad act is aggravating, there is a principled reason not to treat a prior good act as mitigating. It identifies and discusses possible reasons why a punishment system might account for prior bad acts but not prior good acts: (a) prior bad acts are relatively accurate recidivism predictors; (b) accounting for prior good acts at sentencing may not conform to retributivist notions of sentencing; (c) a sentencing reduction, as opposed to a sentencing increase, might weaken the deterrent effect of punishment and result in more crime; (d) the designation of certain conduct as illegal provides a bright line for identifying prior bad acts, but no similarly clear delineation of prior good acts exists; (e) mitigating sentences for prior good acts may conflict with a victim-centered view of punishment, while aggravating sentences for prior bad acts does not pose such a problem; and (f) taking account of prior good acts may have undesirable race or class effects.

Part III concludes that, among these reasons, only the recidivism argument appears to be a plausible justification for a sentencing system that accounts for

mandatory sentencing factors restrict judicial discretion, good acts would need to be defined in greater detail and consideration would have to be given regarding how much a prior good act would be “worth” in terms of a sentencing decrease. *See infra* note 278 and accompanying text.

prior bad acts but not prior good acts. While the correlation between prior convictions and future recidivism is well documented, there is little evidence about whether criminal defendants who have committed prior good acts are less likely than other individuals to recidivate. Therefore, whether recidivism provides a meaningful distinction between good and bad acts remains an open question, and there is reason to doubt that recidivism prediction is the reason why prior bad acts are such popular aggravating factors. Thus, while the recidivism argument may provide a principled justification for treating prior bad acts and prior good acts differently, it may not accurately reflect the reason why sentencing systems have not attached the same importance to prior good acts as prior bad acts.

I. THE PRESENT STATE OF THE LAW

Prior bad acts and – to a lesser extent – prior good acts have historically been considered in sentencing decisions and continue to play a role in criminal sentencing today.⁸ The prior bad acts most commonly considered at sentencing are an offender’s previous criminal convictions and prior criminal conduct that did not result in a conviction. The prior good acts most commonly considered at sentencing are honorable military service, non-military public service (such as service as a police officer, firefighter, or elected public official), charitable or volunteer work, and charitable contributions. This Article adopts these general practices as working definitions. Thus, the term “prior bad acts” refers to prior criminal acts, not

⁸ Determining precisely how often courts consider prior acts at sentencing is a difficult task. At the trial level, most sentencing decisions are unpublished or are delivered orally. NORA V. DEMLEITNER ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 89 (2d ed. 2007). Unless a particular sentencing decision is the subject of a media account, it will become public only in the rare event that the sentencing judge elects to publish her decision or in the event that the sentence is subsequently appealed. That is not to say there is no available information about sentencing practices. Thousands of defendants are sentenced each year, so even the small percentage of those cases that result in a published opinion is a substantial number. Moreover, several jurisdictions have written sentencing criteria, and sources including the U.S. Sentencing Commission and the Bureau of Justice Statistics collect and disseminate limited statistical sentencing data. This Part draws from those sources; however, it is important to note that the information available through these sources is far from complete, and it may be subject to a number of reporting biases. For example, as the Solicitor General’s Office recently explained, there are far more federal appellate decisions reversing low sentences than high sentences because (a) upward variances from the Sentencing Guidelines occur less frequently than downward variances, and (b) the government exercises greater selectivity in the sentences it chooses to appeal. Brief for the United States at 41, *Claiborne v. United States*, 127 S. Ct. 2245 (2007) (No. 06-5618). Therefore, while these sources may be used as an indication of *whether* courts are considering prior good and bad acts at sentencing, they do not necessarily give an accurate representation of how often or under what circumstances courts will alter sentences on the basis of a defendant’s prior good and bad acts.

actions that are simply undesirable or disfavored, and the term “prior good acts” refers to prior actions that exceed ordinary standards of civic and moral duty. In keeping with prevailing practice, a person’s prior good acts must also be public in nature. Being nice to one’s mother, to choose a simple example, is not the sort of factor that is ordinarily considered at sentencing.⁹

A. *Prior Bad Acts*

The state of the law with respect to prior bad acts is straightforward: prior convictions are widely recognized as aggravating sentencing factors and are often used to increase the sentences of individual defendants. The Supreme Court has remarked that the “prior commission of a serious crime . . . is as typical a sentencing factor as one might imagine.”¹⁰ In the United States, habitual offender statutes – statutes that provide for mandatory minimum sentences or increased statutory maximum sentences for offenders who have committed previous crimes – date back to the original thirteen colonies.¹¹ Habitual offender penalties have survived many judicial challenges.¹² Further,

⁹ While some criminal laws prohibit behavior that may plausibly be described as private – such as prostitution or drug use – the criminal law generally is better described as a prohibition on public wrongs. See R.A. DUFF, *ANSWERING FOR CRIME* 140-46 (2007). Thus, this definition of good acts as public acts not only accurately reflects current sentencing practice, but also furthers sentencing symmetry. See *infra* Part II.C.

¹⁰ *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.”).

¹¹ See EDWIN POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS 1620-1692: A DOCUMENTARY HISTORY* 450 (1966) (recounting a 1644 report by Massachusetts clergy on judicial discretion, which stated that “[a] judge could take into consideration whether the crime committed was the offender’s ‘first offense’” and that “the judge should have some latitude to choose between certain minimum and maximum sentences” (quoting 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 92-95 (Nathaniel B. Shurtleff ed., 1853) (1644))); Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 511 n.1 (1982) [hereinafter Note, *Selective Incapacitation*] (noting that the “Massachusetts Bay Colony had recidivist laws for robbers and burglars at least as early as 1692” and that the Virginia legislature “sought to remedy the persistent problem of hog stealing by passing a statute that provided progressively more severe penalties for each subsequent offense” in 1705); see also *Parke v. Raley*, 506 U.S. 20, 26 (1992); *Graham v. West Virginia*, 224 U.S. 616, 623 (1912); cf. Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record in Criminal Involvement*, 78 J. CRIM. L. & CRIMINOLOGY 614, 616 (1987) (tracing the practice of increasing punishment for prior bad acts to a passage in the Book of Leviticus).

¹² See, e.g., *McDonald v. Massachusetts*, 180 U.S. 311, 312-13 (1901); *Moore v. Missouri*, 159 U.S. 673, 676-78 (1895); see also *Graham*, 224 U.S. at 623 (stating that

there appears to be a public consensus that a prior conviction ought to result in a longer sentence.¹³

All state sentencing schemes and the Federal Sentencing Guidelines take account of prior bad acts. Every state has enacted legislation that punishes recidivists more severely than first offenders,¹⁴ and several jurisdictions permit sentencing increases on the basis of criminal conduct that did not result in a conviction, either because the offender was not charged or because she was acquitted.¹⁵ In the federal system, an offender's criminal history is one of the two major factors used to arrive at a Guideline sentence – the other being the offense for which the offender was convicted.¹⁶ While the practice of increasing an offender's sentence on the basis of prior bad acts has been

habitual offender legislation “has uniformly been sustained in the state courts, and it has been held by this court not to be repugnant to the Federal Constitution” (citation omitted).

¹³ See, e.g., PETER H. ROSSI & RICHARD A. BERK, U.S. SENTENCING COMM’N, NATIONAL SAMPLE SURVEY: PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 78-81 (1997), available at http://www.ussc.gov/nss/jp_exsum.htm (suggesting that while public opinion supports longer sentences for repeat offenders, “there appears to be little evidence in sentencing behavior of much public support for a ‘three-strikes-and-you’re-out’ approach”).

¹⁴ *Parke v. Raley*, 506 U.S. 20, 26-27 (1992) (citing U.S. DEP’T OF JUSTICE, STATUTES REQUIRING THE USE OF CRIMINAL HISTORY RECORD INFORMATION 17-41 (1991)).

¹⁵ For examples of courts permitting increased sentences on the basis of uncharged conduct, see *Williams v. New York*, 337 U.S. 241, 246 (1949); *New Jersey v. Green*, 303 A.2d 312, 320 (N.J. 1973); *State v. Carico*, 968 S.W.2d 280, 287 (Tenn. 1998). For examples of courts permitting increased sentences on the basis of acquitted conduct, see *United States v. Watts*, 519 U.S. 148, 157 (1997); *People v. Dunlap*, No. 217123, 2001 WL 776752, at *3 (Mich. Ct. App. Jan. 16, 2001); *State v. Clark*, 197 S.W.3d 598, 602 (Mo. 2006); *State v. Winfield*, 23 S.W.3d 279, 282 (Tenn. 2000). See also U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 application notes (2007).

¹⁶ See KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 72 & 218 nn.218-19 (1998); Durham, *supra* note 11, at 615. Guideline sentences are presented in a grid format: “The vertical axis of the sentencing grid contains 43 ‘offense levels,’ which are designed to quantify the seriousness of the instant offense.” U.S. SENTENCING COMM’N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL GUIDELINES 1 (2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf [hereinafter MEASURING RECIDIVISM]. Offense levels are based on the facts and circumstances – such as the offense of conviction or the amount of actual or intended harm – to which the Guidelines manual assigns various values. See U.S. SENTENCING GUIDELINES MANUAL ch. 2 (Offense Conduct); *id.* ch. 3 (Adjustments); see also STITH & CABRANES, *supra*, at 67-71. The horizontal axis of the sentencing grid contains six “criminal history categories,” which are “designed to quantify the extent and recency of an offender’s past criminal behavior.” MEASURING RECIDIVISM, *supra*, at 1; see also STITH & CABRANES, *supra*, at 67-71. At sentencing, the district court judge calculates an offender’s offense level and criminal history score, and the cell on the sentencing grid in which the offense level and the criminal history level intersect displays the Guideline range of sentences. See generally STITH & CABRANES, *supra*, at 192-93.

subject to academic criticism,¹⁷ there is no reason to believe this practice will change in the foreseeable future.

B. *Prior Good Acts*

Several historical accounts suggest prior good acts have traditionally been viewed as a mitigating factor. A 1644 report by the clergy to the Massachusetts General Court noted that judges should have discretion to mitigate an offender's sentence "in the case of good public servants,"¹⁸ and the practice of showing leniency to veterans dates back to at least the Civil War.¹⁹ And military service or other previous good character evidence has also, on occasion, resulted in acquittals²⁰ or executive clemency.²¹

While some states explicitly identify good acts as a mitigating sentencing factor, such recognition is not universal.²² North Carolina has perhaps the most explicit policy regarding prior good acts: its felony sentencing statute provides for the mitigation of a defendant's sentence if she "has been honorably discharged from the United States armed services,"²³ or if she "has been a person of good character or has had a good reputation in the

¹⁷ See *infra* notes 168-169.

¹⁸ POWERS, *supra* note 11, at 451 (quoting 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 92-95 (Nathaniel B. Shurtleff ed., 1853) (1644)).

¹⁹ See Edith Abbott, *Crime and the War*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 32, 43 (1918); Dane Archer & Rosemary Gartner, *Violent Acts and Violent Times: A Comparative Approach to Postwar Homicide Rates*, 41 AM. SOC. REV. 937, 940 (1976); see also ADRIAAN LANNI, LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS 59 (2006) (mentioning that litigants in the popular courts of classical Athens presented themselves "as upstanding citizens by describing their military exploits or the public services they (and their families) have done for the state").

²⁰ See Betty B. Rosenbaum, *The Relationship Between War and Crime in the United States*, 30 J. CRIM. L. & CRIMINOLOGY 722, 733-34 (1940) (describing a 1922 study by the Wisconsin State Board of Control, which mentioned "the greater leniency that may be shown to ex-service men in court, for which there is no tangible data, which would cut down the number of convictions").

²¹ See James D. Barnett, *The Grounds of Pardon*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY 490, 523 (1927) (explaining that "military service has received abundant recognition" in pardon grants and that an offender's "meritorious services [such as serving as governor] . . . rendered before the commission of the crime are often considered" as grounds for pardon); Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 140 (2001) (observing that President Truman "[p]ardoned pre-war convicts who served in the U.S. armed forces during World War II").

²² See, e.g., *State v. Kayer*, 984 P.2d 31, 46-47 (Ariz. 1999) ("We have on rare occasions found that a defendant's military record warranted consideration as a mitigating circumstance." (emphasis added)); *People v. Duncan*, 5 Cal. Rptr. 3d 413, 414 (Ct. App. 2003) (observing that the trial court rejected "defendant's claim that his military service should be treated as a factor in mitigation").

²³ N.C. GEN. STAT. § 15A-1340.16(e)(14) (2007).

community.”²⁴ If a defendant proves either of these mitigating factors (or other factors identified in the statute), the sentencing court must consider that factor during sentencing. Refusal to do so, or failure to indicate that the factor has been considered, may result in an appellate finding of error and remand for a new sentencing hearing.²⁵

Tennessee appellate courts have read a statutory catch-all provision²⁶ as permitting a sentencing court to consider an offender’s “honorable military service.”²⁷ While Tennessee trial courts are *permitted* to consider prior military service as a mitigating factor, they are under no obligation to mitigate an offender’s sentence on that basis.²⁸ Louisiana trial courts have read a similar catch-all provision²⁹ to include military service as a mitigating sentencing factor.³⁰

Several other states include a general reference to an offender’s character – which arguably includes prior good acts – as a mitigating factor in their non-capital sentencing schemes.³¹ In some of these states, namely Idaho,³²

²⁴ *Id.* § 15A-1340.16(e)(12).

²⁵ *See* *State v. Clark*, 377 S.E.2d 54, 68 (N.C. 1989); *State v. Heath*, 335 S.E.2d 350, 355-56 (N.C. Ct. App. 1985), *rev’d on other grounds*, 341 S.E.2d 565 (N.C. 1986); *State v. Hanes*, 334 S.E.2d 444, 446 (N.C. Ct. App. 1985).

²⁶ TENN. CODE ANN. § 40-35-113(13) (2007).

²⁷ *State v. Hill*, No. M2004-00597-CCA-R3-CD, 2005 WL 544710, at *9 (Tenn. Crim. App. June 27, 2005). The *Hill* Court explained:

[The military service] mitigating factor is not among the statutorily defined mitigating factors set out in Tennessee Code Annotated section 40-35-113, rather, 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.” TENN. CODE ANN. § 40-35-113(13). 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.”

Id. (quoting *State v. Vincent*, No. 02C019510-CC00303, 1997 WL 287665, at *3 (Tenn. Crim. App. June 2, 1997)).

²⁸ *E.g.*, *State v. White*, No. W2006-00655-CCA-R3CD, 2007 WL 836812, at *5 (Tenn. Crim. App. Aug. 13, 2007) (“[W]hile the trial court may consider military service as a mitigating factor, this court has held that a trial court’s refusal to mitigate a defendant’s sentence based on past military service was not error.” (citations omitted)).

²⁹ LA. CODE CRIM. PROC. ANN. art. 894.1.B(33) (2007) (allowing consideration, as sentencing factors, “[a]ny other relevant mitigating circumstance”).

³⁰ *See, e.g.*, *State v. Anderson*, 631 So. 2d 80, 83 (La. Ct. App. 1994); *State v. Arterberry*, 449 So. 2d 1179, 1181 (La. Ct. App. 1984).

³¹ *See, e.g.*, HAW. REV. STAT. ANN. § 706-621(2)(g) (LexisNexis 2007) (stating that if “[t]he character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime,” that militates against imposing imprisonment and in favor of a term of probation); IDAHO CODE ANN. § 19-2521(2)(i) (2004) (stating that if the “character and attitudes of the defendant indicate that the commission of another crime is unlikely,” the court shall accord “weight in favor of avoiding a sentence of imprisonment”); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(9) (West 2007) (listing “[t]he character and attitudes of the

Illinois,³³ Indiana,³⁴ and New Jersey,³⁵ trial courts consider a defendant's prior good acts as mitigating evidence at sentencing.

Whatever role prior good acts may play in individual state sentencing determinations,³⁶ they are not as well established as a sentencing factor as prior bad acts. States have not treated prior good acts with the same transparency as prior bad acts, and prior good acts have not received the same attention as prior bad acts in those jurisdictions that have codified sentencing factors. Thus, in direct contrast to the consensus regarding prior bad acts,³⁷ there is some disagreement regarding the appropriateness of good acts as a sentencing factor.

Such disagreement does not exist in capital cases. To ensure individualized capital sentencing, the Supreme Court has held that "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" must be admitted as mitigation evidence.³⁸ Consequently, an offender's prior good acts are often introduced as mitigating factors in capital cases.³⁹ Thus, just as in

defendant indicate that he is unlikely to commit another crime" as a factor that "shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment"); IND. CODE ANN. § 35-38-1-7.1(b)(8) (West 2004) (listing "[t]he character and attitudes of the person indicate that the person is unlikely to commit another crime" as a mitigating circumstance); ME. REV. STAT. ANN. tit. 17-A, § 1252-C(2) (2006 & Supp. 2007) (listing "the character of the offender" as a relevant sentencing factor in determining a sentence of imprisonment); N.J. STAT. ANN. § 2C:44-1(b)(9) (West 2005) (listing "[t]he character and attitude of the defendant indicate that he is unlikely to commit another offense" as a mitigating circumstance to consider in determining an appropriate sentence); N.C. GEN. STAT. § 15A-1340.16(e)(12) (2007) (listing "[t]he defendant has been a person of good character or has had a good reputation in the community in which the defendant lives" as a mitigating factor); N.D. CENT. CODE § 12.1-32-04(9) (2007) (listing "[t]he character, history, and attitudes of the defendant indicate that he is unlikely to commit another crime" as a factor that a court shall "accord[] weight in making determinations regarding the desirability of sentencing an offender to imprisonment").

³² See *State v. Stillwell*, 765 P.2d 152, 153 (Idaho Ct. App. 1988).

³³ See *People v. Anderson*, 587 N.E.2d 1050, 1062 (Ill. App. Ct. 1992).

³⁴ See *Shamp v. State*, No. 79A05-0702-CR-100, 2007 WL 2473227, at *2 (Ind. Ct. App. Sept. 4, 2007).

³⁵ See *State v. Shackelford*, No. 05-06-1602, 2006 WL 3589983, at *7 (N.J. Super. Ct. App. Div. Dec. 12, 2006).

³⁶ See DEMLEITNER ET AL., *supra* note 8, at 384 ("In unstructured sentencing systems, it is difficult to measure just how much an offender's personal background and characteristics tend to influence the sentence, although anecdotal reports suggest that the influence can be sizeable.").

³⁷ See *supra* notes 14-15 and accompanying text.

³⁸ *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1977); see also *infra* notes 83-84 and accompanying text.

³⁹ See, e.g., *Moody v. State*, 888 So. 2d 532, 596 (Ala. Crim. App. 2003); *State v. Moody*, 94 P.3d 1119, 1132 (Ariz. 2004); *DeAngelo v. State*, 616 So. 2d 440, 443 (Fla. 1993); *State v. Hand*, 840 N.E.2d 151, 194 (Ohio 2006).

any non-capital sentencing scheme that does not limit the scope of permissible mitigating evidence,⁴⁰ an offender's prior good acts *may* play a role in capital punishment decisions.⁴¹

Federal law on prior good acts is inconsistent. Prior to the enactment of the Federal Sentencing Guidelines, a defendant's prior good works were often raised and considered at sentencing.⁴² When it initially formed and directed the U.S. Sentencing Commission to develop the Guidelines, Congress made no specific mention of an offender's prior good works as a sentencing factor. Congress left it to the Commission to decide whether various defendant-related factors – including previous employment record, community ties, and criminal history – “have any relevance to . . . an appropriate sentence,” and directed the Commission to “take them into account only to the extent that they do have relevance.”⁴³ The original Federal Sentencing Guidelines classified many of

⁴⁰ *E.g.*, *People v. Myers*, 45 P.3d 756, 757 (Colo. Ct. App. 2001).

⁴¹ See Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Law*, 83 OR. L. REV. 631, 662 n.194, 663 n.196 (2004); Peggy M. Tobolowsky, *What Hath Penry Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 374 n.151 (1992). *But cf.* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 851 n.76 (1992) (noting that “no state enumerates any mitigating circumstances regarding a defendant's good acts or positive qualities (apart from a defendant's cooperation in the prosecution of other offenses)” in capital sentencing statutes (citation omitted)).

⁴² See DEMLEITNER ET AL., *supra* note 8, at 94-98 (recounting the role that Oliver North's service and good works played at his sentencing); STITH & CABRANES, *supra* note 16, at 79-80 (commenting that, prior to the enactment of the Guidelines, “the largest section of the presentence report” – which was an important document for a judge's sentencing deliberations – “dealt with the personal history and circumstances of the defendant,” including “military service” and “activities (good and bad) in the community”); Christina Chiafolo Montgomery, *Social and Schematic Injustice: The Treatment of Offender Personal Characteristics Under the Federal Sentencing Guidelines*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 37-38 (1993); see also WHEELER ET AL., *supra* note 10, at 103-05 (recounting how “[s]ome combination of family, work, and community contribution are thought by most judges to be relevant to the assessment of the defendant, though these factors are rarely dispositive”).

⁴³ 28 U.S.C. § 994(d) (2000). Congress directed the Commission to consider the following factors:

- (1) age;
- (2) education;
- (3) vocational skills;
- (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
- (5) physical condition, including drug dependence;
- (6) previous employment record;
- (7) family ties and responsibilities;
- (8) community ties;

these factors as not ordinarily relevant in determining a defendant's level of offense but made no mention of a defendant's prior good works.

Relying on these original Guidelines, the district court in *United States v. Pipich*⁴⁴ gave a defendant a below-Guidelines sentence on the theory that:

An exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence. This American tradition is itself the descendant of the far more ancient tradition of the noble Romans, as exemplified by Cincinnatus.⁴⁵

In response to *Pipich* and other similar decisions,⁴⁶ the Sentencing Commission subsequently adopted a Guideline stating that "[m]ilitary, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining" whether to impose a sentence outside the Guideline range.⁴⁷ Although the Commission never provided an official explanation for this new Guideline,⁴⁸ the Commission Chairman and General Counsel later published a law review article stating that the Guideline was promulgated because courts were granting such departures

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

Id.

⁴⁴ 688 F. Supp. 191 (D. Md. 1988).

⁴⁵ *Id.* at 193. Although the district court was bound by the Federal Sentencing Guidelines, the judge departed from the Guidelines on the theory that "the Commission did not at all take into account a defendant's military record as a factor in formulating the Guidelines, and that it is one that could result in a sentence different from the Guidelines." *Id.* at 192-93. Under the mandatory Guideline regime, district courts had authority to sentence outside the Guideline range when they found that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (2000).

⁴⁶ See William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 84 n.107 (1993) ("District court decisions involving departures for a defendant's good works and positive contributions played a prominent role in the issuance of this policy statement."); see also Montgomery, *supra* note 42, at 38; Jean H. Shuttleworth, *Childhood Abuse as a Mitigating Factor in Federal Sentencing: The Ninth Circuit Versus the United States Sentencing Commission*, 46 VAND. L. REV. 1333, 1344 (1993).

⁴⁷ U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (2007).

⁴⁸ See Amendments to the Sentencing Guidelines for United States Courts, 56 Fed. Reg. 22,762, 22,779-80 (May 16, 1991).

despite the “Commission[’s] intent that departures based on offender ‘good citizen’ characteristics rarely would be appropriate.”⁴⁹

By characterizing prior good acts as “not ordinarily relevant,” the Commission restricted the role of such acts in sentencing. While a district court may consider a defendant’s good works in selecting a sentence within the applicable Guideline range, it is permitted to sentence a defendant below that range only when a defendant’s prior military service, charitable acts, or other good works are “exceptional.”⁵⁰ After this Guideline was adopted, significant disagreement ensued in the federal courts over whether a defendant’s actions met that standard.⁵¹ Some courts, in determining whether the defendants’ good works were “exceptional,” compared those defendants only to those who had committed similar crimes.⁵² Other federal courts held that defendants should be compared to all offenders with histories of good works.⁵³ Still others suggested the proper comparison was between persons of similar employment and socio-economic backgrounds.⁵⁴ Some courts did not simply analyze the

⁴⁹ Wilkins & Steer, *supra* note 46, at 84 n.107.

⁵⁰ *Koon v. United States*, 518 U.S. 81, 95-96 (1996) (explaining that the Sentencing Commission identified “[d]iscouraged factors,” which are “not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range,” that those factors “should be relied upon only ‘in exceptional cases,’” and thus, a sentencing court may rely on a discouraged factor “only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present” (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt.)).

⁵¹ See Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 391 (2003) (“[R]esulting sentencing decisions have been disparate; courts have arrived at different and potentially inconsistent conclusions regarding consideration of, for example, the charitable works of defendants, family ties, and employment responsibilities in granting or denying departures.”).

⁵² See, e.g., *United States v. Kohlbach*, 38 F.3d 832, 838 (6th Cir. 1994) (“[I]t is *usual* and *ordinary*, in the prosecution of similar white-collar crimes involving high-ranking corporate executives . . . to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts.”); *United States v. Haversat*, 22 F.3d 790, 796 (8th Cir. 1994) (“We conclude that Haversat’s charitable and volunteer activities, while considerable, do not make him an *atypical* defendant in antitrust price-fixing cases.”).

⁵³ *United States v. DeMasi*, 40 F.3d 1306, 1324 (1st Cir. 1994) (“A court should survey those cases where the discouraged [good act] factor is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant’s record stands out from the crowd.”); see also *United States v. Nava-Sotelo*, 232 F. Supp. 2d 1269, 1286 (D.N.M. 2002), *rev’d on other grounds*, 354 F.3d 1202 (10th Cir. 2003). But see *United States v. Thompson*, 190 F. Supp. 2d 138, 144-46 (D. Mass. 2002) (Gertner, J.) (citing *United States v. Thompson*, 234 F.3d 74, 77-78 (1st Cir. 2000)) (criticizing the First Circuit’s holding that “family circumstances must be measured against the population of all federal defendants regardless of offense” as inconsistent with “the express language of the Sentence Reform Act, the Guidelines, and scholarly commentary”).

⁵⁴ *United States v. Serafini*, 233 F.3d 758, 775 (3d Cir. 2000) (“Here, the District Court was careful to view Mr. Serafini’s activities in light of his career and resources, and . . .

number or quality of a defendant's good works, but also weighed the defendant's good acts against the harm caused by his offense.⁵⁵ Several courts provided little analysis beyond a conclusory statement that a defendant's works were not exceptional,⁵⁶ and others did little more than rely on previous decisions denying a sentence reduction for prior good works.⁵⁷

In addition to serving as an independent basis for sentence reductions, a defendant's prior good acts have been used as evidence that the offense constituted an incident of "aberrant behavior." Initially fashioned by the courts out of little more than a passing reference in the Federal Sentencing Guideline Manual,⁵⁸ aberrant behavior has since become a recognized reason for departure under the Federal Guidelines.⁵⁹ The Commission's efforts to resolve disagreement among the circuits regarding the appropriate definition of aberrant behavior explicitly acknowledged that in determining whether to

found that his charitable activities were in fact sufficiently beyond the norm for a wealthy politician, and were sufficiently exceptional so as to warrant a departure under the Guidelines."); *see also* *United States v. Morken*, 133 F.3d 628, 630 (8th Cir. 1998); *United States v. Mehta*, 307 F. Supp. 2d 270, 277 (D. Mass. 2004); *United States v. Greene*, 249 F. Supp. 2d 262, 264 (S.D.N.Y. 2003); *cf. Thompson*, 190 F. Supp. 2d at 144-46 (addressing this issue in the context of family ties departures).

⁵⁵ *United States v. Ilges*, 207 F. App'x 678, 680-81 (7th Cir. 2006) (affirming the district court's refusal to depart downward where the judge "recognized that Ilges was generally an upstanding citizen and noted the evidence in support of his character, but he also weighed these considerations against Ilges's guilt of defrauding the government"); *United States v. Thurston*, 358 F.3d 51, 81 (1st Cir. 2004) ("[T]he nature of Thurston's offense mitigates against concluding that his good works are 'exceptional.' Health care fraud is a serious crime and the federal interest in combating it is powerful."), *cert. granted and judgment vacated*, 543 U.S. 1097 (2005) (mem.); *United States v. Kuhn*, 351 F. Supp. 2d 696, 707 (E.D. Mich. 2005); *United States v. Scheiner*, 873 F. Supp. 927, 934-35 (E.D. Pa. 1995); *see also* *United States v. Medina*, 221 F. App'x 231, 233 (4th Cir. 2007), *cert. granted and judgment vacated*, 128 S. Ct. 863 (2008) (mem.).

⁵⁶ In reversing district courts, some circuit courts are quick to say that substantial good works are not "exceptional" without much analysis other than disagreeing with the district court's conclusion. *See, e.g.,* *United States v. Repking*, 467 F.3d 1091, 1096 (7th Cir. 2006); *United States v. Serrata*, 425 F.3d 886, 914 (10th Cir. 2005); *United States v. Rybicki*, 96 F.3d 754, 759 (4th Cir. 1996). Of course, district courts can be similarly conclusory. *See, e.g.,* *United States v. Jordan*, 130 F. Supp. 2d 665, 673 (E.D. Pa. 2001).

⁵⁷ *See, e.g.,* *United States v. Lawrence*, Nos. 97-4006, 97-4007, 1997 WL 563134, at *2 (4th Cir. Sept. 11, 1997); *United States v. Winters*, 105 F.3d 200, 208-09 (5th Cir. 1997).

⁵⁸ *See* Rachel A. Hill, *Character, Choice, and "Aberrant Behavior": Aligning Criminal Sentencing with Concepts of Moral Blame*, 65 U. CHI. L. REV. 975, 977 (1998) (observing that "courts have created several distinct categories" of unusual cases that call for a sentencing departure, including aberrant behavior).

⁵⁹ U.S. SENTENCING GUIDELINES MANUAL § 5K2.20 (2007); *see also* *United States v. Mikutowicz*, 365 F.3d 65, 79 (1st Cir. 2004).

depart from the Guidelines, a court may consider, inter alia, the defendant's "record of prior good works."⁶⁰

It is difficult to determine the number of federal defendants who have received reduced sentences for their prior good acts. The United States Sentencing Commission's annual reports of sentencing data do not always report district court departures on the basis of a defendant's prior good acts.⁶¹ The Commission's annual reports appear to include statistical information about reasons for downward departures only when a particular reason is cited a minimum number of times in a given year.⁶² Thus, there may be instances where courts awarded downward departures for prior good acts, but those departures are not designated as such in the Commission's reports. For example, the district court in *United States v. Greene*⁶³ held that a defendant was "entitled to a downward departure for his charitable works,"⁶⁴ yet the Commission Sourcebook for that period reports no downward departures for that reason.⁶⁵

A traditional case law search is a poor vehicle for determining the number of sentence reductions on the basis of prior good acts because sentencing decisions are rarely reported or published.⁶⁶ In any event, it is clear that defendants regularly move for reduced sentences on the basis of prior good

⁶⁰ U.S. SENTENCING GUIDELINES MANUAL § 5K2.20, cmt. n.3. For examples of courts that previously considered a defendant's prior good works in determining whether to grant an aberrant behavior downward departure, see *United States v. Benally*, 215 F.3d 1068, 1074 (10th Cir. 2000); *United States v. Grandmaison*, 77 F.3d 555, 563 (1st Cir. 1996); *United States v. Takai*, 941 F.2d 738, 742-44 (9th Cir. 1991); *United States v. Delvalle*, 967 F. Supp. 781, 784 (E.D.N.Y. 1997). See also Hill, *supra* note 58, at 979.

⁶¹ Compare U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 70-71 tbls.25, 25A (2006) [hereinafter SOURCEBOOK 2006] (indicating that military record/charitable works/good deeds were cited as the reason for downward departures in fifty-seven cases), U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 282, 285 tbls.25, 25C (2005) (thirty-eight cases), and U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 71 tbl.25 (2004) (sixteen cases) with U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 tbl.25A (2003) [hereinafter SOURCEBOOK 2003] (recounting downward departure statistics without mentioning military record/charitable works/good deeds as a reason for departure), U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 52 tbl.25 (2002) (same), and U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.25 (2001) (same).

⁶² See, e.g., SOURCEBOOK 2006, *supra* note 61, at 71 tbl.25A n.1 (noting that "all reasons cited fewer than twenty eight times" are identified only as "other").

⁶³ 249 F. Supp. 2d 262 (S.D.N.Y. 2003).

⁶⁴ *Id.* at 265.

⁶⁵ See SOURCEBOOK 2003, *supra* note 61, at 56 tbl.25A.

⁶⁶ See *supra* note 8.

acts⁶⁷ and at least some of those motions are granted.⁶⁸ While the precise number of federal defendants who have received reduced sentences for their prior good acts is unknown, such reductions appear to be infrequent.⁶⁹

The Supreme Court's 2005 decision in *United States v. Booker*⁷⁰ ended the mandatory nature of the Federal Sentencing Guidelines. While some courts have used their post-*Booker* discretionary authority to reduce sentences for prior good acts,⁷¹ others continue to require a defendant to demonstrate that her good acts were "extraordinary" in order to obtain a sentence reduction.⁷² Since its decision in *Booker*, the Supreme Court has repeatedly addressed the scope of judicial discretion, including the weight that must be accorded to the policy judgments embodied in the Guidelines. In *Rita v. United States*,⁷³ the Supreme Court suggested that district courts have the power to independently evaluate the policy judgments underlying the Guidelines⁷⁴ – including whether a

⁶⁷ See, e.g., Greg Farrell & Jayne O'Donnell, *Judges Often Deaf to Good Deeds*, USA TODAY, July 13, 2005, at 1B (discussing such claims in several high-profile criminal prosecutions).

⁶⁸ See, e.g., *United States v. Nowak*, No. 05-CR-205, 2007 WL 528194, at *3 (E.D. Wis. Feb. 15, 2007); *United States v. Arthur*, No. 04-CR-122, 2006 WL 3857491, at *10 (E.D. Wis. Dec. 22, 2006); *United States v. Nellum*, No. 2:04-CR-30-PS, 2005 WL 300073, at *4 (N.D. Ind. Feb. 3, 2005); *United States v. Kuhn*, 351 F. Supp. 2d 696, 699 (E.D. Mich. 2005); *United States v. Mehta*, 307 F. Supp. 2d 270, 280-82 (D. Mass. 2004); *United States v. Bruder*, 103 F. Supp. 2d 155, 184 (E.D.N.Y. 2000), *rev'd on other grounds sub nom. United States v. Schwarz*, 283 F.3d 96 (2d Cir. 2002); *United States v. Somerstein*, 20 F. Supp. 2d 454, 463 (E.D.N.Y. 1998); *United States v. Bennett*, 9 F. Supp. 2d 513, 525 (E.D. Pa. 1998); see also WHEELER ET AL., *supra* note 10, at 103-05.

⁶⁹ E.g., SOURCEBOOK 2006, *supra* note 61, at 70-71 tbls.25, 25A (reporting that out of 72,585 federal sentencings, only fifty-seven sentences were reduced on the basis of military records, charitable works, and/or good deeds); see also THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE 1628 (2008 ed.); Alan Ellis et al., *Baker's Dozen, Part II Advice for the Advocate*, 16 CRIM. JUST. 56, 56-57 (2001) (observing that downward departures "for a defendant's charitable and civic good works or public service . . . are usually denied"); Montgomery, *supra* note 42, at 39.

⁷⁰ 543 U.S. 220 (2005).

⁷¹ See, e.g., *Nowak*, 2007 WL 528194, at *3; *Arthur*, 2006 WL 3857491, at *10; *Nellum*, 2005 WL 300073, at *5.

⁷² See, e.g., *United States v. Repking*, 467 F.3d 1091, 1095-96 (7th Cir. 2006); *United States v. Serrata*, 425 F.3d 886, 915 (10th Cir. 2005); *United States v. Barbera*, No. 02-1268, 2005 WL 2709112, at *13 (S.D.N.Y. Oct. 21, 2005); *United States v. Strange*, 370 F. Supp. 2d 644, 649 n.6 (N.D. Ohio 2005).

⁷³ 127 S. Ct. 2456 (2007).

⁷⁴ *Id.* at 2461 (stating that a district court may sentence outside the Guideline range if the court finds that "circumstances present an 'atypical case' that falls outside the 'heartland' to which the United States Sentencing Commission intends each individual Guideline to apply," or that "independent of the Guidelines, application of the sentencing factors set forth in 18 U.S.C. § 3553(a) warrants a lower sentence" (citing U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(2) (2007))).

defendant's prior good works should result in a sentence reduction.⁷⁵ Indeed, Justice Stevens, in a separate concurring opinion, expressed the view that a sentencing court made a "serious omission" in failing to expressly mention a defendant's military service in the explanation of the sentence the defendant received.⁷⁶ More recently, in *Kimbrough v. United States*,⁷⁷ the United States government conceded that "as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'" ⁷⁸ How this new concession will affect the treatment of good acts as a mitigating factor in federal cases is still an open question.⁷⁹

II. UNDERSTANDING AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. *The Present State of Aggravation and Mitigation*

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 punishment;⁸⁰ a mitigating factor is any fact or circumstance that warrants a reduction in the defendant's punishment.⁸¹ These

⁷⁵ Because the petitioner had not raised the arguments below, the Court specifically declined to decide (a) whether "military service should ordinarily lead to a sentence more lenient than the sentence the Guidelines impose," and (b) whether the Guidelines are unreasonable under § 3553(a) where they "expressly decline to consider various personal characteristics of the defendant, such as . . . military service, under the view that these factors are 'not ordinarily relevant.'" *Id.* at 2470 (quoting U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.4, 5H1.5, 5H1.11).

⁷⁶ *Id.* at 2474 (Stevens, J., concurring).

⁷⁷ 128 S. Ct. 558 (2007).

⁷⁸ *Id.* at 570 (quoting Brief of the United States at 16, *Kimbrough*, 128 S. Ct. 558 (No. 06-6330)).

⁷⁹ *Cf.* Henning, *supra* note 6, at 189 ("In the *Booker* age of reasonableness, at least some of the institutional constraint on sentencing discretion imposed by the Guidelines is gone. Although many judges continue to adhere to the Guidelines, I think it will be only a matter of time before more of them start putting their restored discretion to work.")

⁸⁰ Black's Dictionary defines aggravation as: "The fact of being increased in gravity or seriousness." BLACK'S LAW DICTIONARY 71 (8th ed. 2004); *see also* *People v. Webber*, 228 Cal. App. 3d 1146, 1169 (Ct. App. 1991) ("The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (quoting *People v. Harvey*, 163 Cal App. 3d 90, 117 (Ct. App. 1984))). Black's Dictionary also defines an aggravating circumstance as either "[a] fact or situation that increases the degree of liability or culpability for a criminal act," or "[a] fact or situation that relates to a criminal offense or defendant and that is considered by the court in imposing punishment (esp. a death sentence)." BLACK'S LAW DICTIONARY, *supra*, at 259-60.

⁸¹ Black's Dictionary defines mitigation of punishment as: "A reduction in punishment due to mitigating circumstances that reduce the criminal's level of culpability, such as the existence of no prior convictions." BLACK'S LAW DICTIONARY, *supra* note 80, at 1024. It

definitions simply define aggravation and mitigation in terms of their consequences; they give little guidance as to what types of circumstances are aggravating or mitigating.

The Supreme Court defined a mitigating factor for capital sentencing as “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”⁸² The Court’s definition of mitigating factors is unhelpful because it places virtually no substantive limitations on the concept of mitigation. Moreover, the definition is relevant only for questions of admissibility in the sentencing phase of capital cases – it does not provide any guidance about the relevance or relative weight of such evidence,⁸³ nor does it require that the sentencing jury impose a more lenient sentence (life rather than death) in response to such evidence.⁸⁴ Perhaps as a result of this lack of guidance, studies suggest that capital jurors tend to disregard mitigating factors that do not excuse the offense.⁸⁵ Of course, the concept of mitigation cannot be

defines mitigating circumstance as either “[a] fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce the damages (in a civil case) or the punishment (in a criminal case),” or “[a] fact or situation that does not bear on the question of a defendant’s guilt but that is considered by the court in imposing punishment and esp. in lessening the severity of a sentence.” *Id.* at 260.

⁸² *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). While this definition is also quite broad, it appears to limit mitigating circumstances to evidence of a “defendant’s character, prior record, or the circumstances of his offense.” *Id.* at 605 n.12. As such, the definition potentially excludes some factors that might reduce the defendant’s punishment, but are not related to either the defendant or her offense, such as residual doubt regarding the defendant’s guilt. *See, e.g., Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (O’Connor, J., concurring) (explaining that “‘residual doubt’ about guilt is not a mitigating circumstance” because it “is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between ‘beyond a reasonable doubt’ and ‘absolute certainty.’” (citation omitted)).

⁸³ *See, e.g., Charles Barzun, Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1981-86 (2008) (distinguishing evidentiary “rules of weight” from “admissibility rules”).

⁸⁴ There are, however, a small number of mitigating circumstances that, if present, will constitutionally prohibit the death penalty. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the Eighth Amendment prohibits the execution of individuals who were under eighteen years of age at the time of their capital crimes); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits the execution of mentally-retarded offenders); *see also Steiker & Steiker, supra* note 41, at 839 (“The presence of a particular mitigating circumstance . . . precludes the imposition of the death penalty only in situations of overwhelming societal consensus, the existence of which the Court has been reluctant to find.”).

⁸⁵ *E.g., Ursula Bentele & William J. Bowers, How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation is no Excuse*, 66 BROOK. L. REV. 1011, 1042 (2001); *see also Peter Meijes Tiersma, Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 13-19 (discussing cases in

limited to facts or circumstances that excuse an offender's illegal conduct; whether a defendant has an excuse is a question of liability, not a question of the appropriate amount of punishment.⁸⁶

In any event, the Supreme Court's definition of capital mitigation is of limited use in assessing how to identify aggravating and mitigating factors in non-capital sentencing. The Court's broad definition of mitigation is a direct result of its holding that the Eighth Amendment requires "individualized" sentencing in capital cases.⁸⁷ The Court has specifically refused to extend the individualized sentencing requirement to non-capital sentencing,⁸⁸ affirming the constitutionality of mandatory sentences that do not permit the consideration of mitigating evidence⁸⁹ and leaving the identification and relative weight of sentencing factors to legislatures.⁹⁰

Legislatures ordinarily do not enact statutes that define the concepts of aggravation and mitigation. Rather, they enact pieces of legislation – either directly aimed at sentencing or defining various offenses – that identify certain factors as aggravating and others as mitigating. These legislatures'

which capital jurors did not understand the meaning of the terms "aggravating" and "mitigating").

⁸⁶ Bentele & Bowers, *supra* note 85, at 1016; *see also* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 132 (2006) (reasoning that "the sentencing process allows for finer distinctions of culpability than determinations of liability," because while "[c]riminal liability is essentially binary," criminal sentences can be adjusted by percentage or a set amount of time); Paul Litton, *The "Abuse Excuse" in Capital Sentencing Trials: Is It Relevant to Responsibility, Punishment, or Neither?*, 42 AM. CRIM. L. REV. 1027, 1032 (2005) (observing that in the capital context "it is quite typical for courts to define mitigating circumstances as 'extenuating' or as making the defendant 'less deserving' of death, while not providing an excuse or justification").

⁸⁷ *See* Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

⁸⁸ Harmelin v. Michigan, 501 U.S. 957, 995 (1991) ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties."). The Court's Eighth Amendment analysis does include a "'narrow proportionality principle' that 'applies to noncapital sentences.'" *Ewing v. California*, 538 U.S. 11, 20 (2003) (O'Connor, J., plurality opinion) (quoting Harmelin v. Michigan, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). Nevertheless, that principle is far from robust. *See id.* at 31-32 (Scalia, J., concurring in judgment) (criticizing the plurality for failing to acknowledge its retreat from this proportionality principle).

⁸⁹ Harmelin, 501 U.S. at 994-95.

⁹⁰ *See Ewing*, 538 U.S. at 28 (O'Connor, J., plurality opinion) ("[T]he legislature . . . has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme. We do not sit as a 'superlegislature' to second-guess these policy choices."); *id.* at 25 ("Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.").

unsystematic approaches have created sentencing schemes that identify far more aggravating sentencing factors than mitigating sentencing factors.⁹¹

For example, the Federal Sentencing Guidelines provide for more increases than decreases in an offender's punishment from the "Base Offense Level."⁹² Similarly, the Federal Sentencing Guidelines identify fourteen circumstances warranting an upward departure⁹³ and eight circumstances warranting a downward departure.⁹⁴ Furthermore, four of the grounds for downward departures – victim's conduct, lesser harms, coercion and duress, and diminished capacity – are no more than imperfect defenses.⁹⁵ Thus, in effect, the Guidelines identify fourteen aggravating factors and only four mitigating factors that warrant departures.

Like the Federal Sentencing Guidelines, state non-capital sentencing schemes tend to identify more aggravating sentencing factors than mitigating factors. Of the seventeen systems that identify both aggravating and mitigating factors, twelve states identify more aggravating than mitigating factors;⁹⁶ three

⁹¹ This observation does not extend to fully discretionary sentencing systems, which are difficult to assess because of a lack of information about which sentencing factors those systems regularly consider.

⁹² STITH & CABRANES, *supra* note 16, at 68 ("For each category of crime, the Commission specifies a numerical Base Offense Level If a listed 'specific offense characteristic' is present in a particular case, the assigned Base Offense Level must be increased (or, occasionally, decreased) by the number of points specified for that characteristic.").

⁹³ See U.S. SENTENCING GUIDELINES MANUAL § 5K2.1 (2007) (death); *id.* § 5K2.2 (physical injury); *id.* § 5K2.3 (extreme psychological injury); *id.* § 5K2.4 (abduction or unlawful restraint); *id.* § 5K2.5 (property damage or loss); *id.* § 5K2.6 (weapons and dangerous instrumentalities); *id.* § 5K2.7 (disruption of governmental function); *id.* § 5K2.8 (extreme conduct); *id.* § 5K2.9 (criminal purpose); *id.* § 5K2.14 (public welfare); *id.* § 5K2.17 (high-capacity, semi-automatic firearms); *id.* § 5K2.18 (violent street gangs); *id.* § 5K2.21 (dismissed and uncharged conduct); *id.* § 5K2.24 (commission of offense while wearing or displaying unauthorized or counterfeit insignia or uniform).

⁹⁴ See *id.* § 5K1.1 (substantial assistance to authorities); *id.* § 5K2.10 (victim's conduct); *id.* § 5K2.11 (lesser harms); *id.* § 5K2.12 (coercion and duress); *id.* § 5K2.13 (diminished capacity); *id.* § 5K2.16 (voluntary disclosure of offense); *id.* § 5K2.20 (aberrant behavior); *id.* § 5K2.23 (discharged terms of imprisonment).

⁹⁵ See DEMLEITNER ET AL., *supra* note 8, at 295 (characterizing such sentencing factors as "'partial' or 'near-miss' defenses"); STITH & CABRANES, *supra* note 16, at 99 ("Some of these Commission-identified grounds for departure are closely analogous to concepts that have long played an important role in determining substantive criminal liability, including mens rea, self-defense, duress, justification, and diminished capacity.").

⁹⁶ Alaska identifies thirty-three aggravating factors and eighteen mitigating factors. ALASKA STAT. § 12.55.155(c)-(d) (2006). Arizona identifies twenty-three aggravating factors and five mitigating factors; it also includes catchall provisions for both aggravation and mitigation. ARIZ. REV. STAT. ANN. § 13-702(C)-(D) (2001 & Supp. 2007). California identifies seventeen aggravating factors (plus a catchall) and fifteen mitigating factors. CAL. R. CT. 4.421, 4.423. Florida identifies twenty aggravating factors and twelve mitigating

states identify more mitigating than aggravating factors;⁹⁷ and two states identify an equal number aggravating and mitigating factors.⁹⁸ Of course, not all states have general sentencing provisions that include both aggravating and mitigating factors. There are six states that identify only aggravating sentencing factors.⁹⁹

factors. FLA. STAT. ANN. § 921.0016(3)-(4) (West 2006). Illinois identifies thirty-six aggravating factors and thirteen mitigating factors. 730 ILL. COMP. STAT. ANN. §§ 5/5-5-3.1 to -3.2 (West 2007). Kansas identifies eight aggravating factors and five mitigating factors. KAN. STAT. ANN. § 21-4716(c)(1)-(2) (2007). Louisiana identifies twenty aggravating factors and eleven mitigating factors; it also includes catchall provisions for both aggravation and mitigation. LA. CODE CRIM. PROC. ANN. art. 894.1(B) (1997 & Supp. 2008). Minnesota identifies twenty-two aggravating factors and six mitigating factors; one of the mitigating factors merely provides for alternative placement for offenders with mental illness. MINN. SENTENCING GUIDELINES II.D(2) (2006). North Carolina identifies twenty-four aggravating factors and twenty mitigating factors; it also includes catchall provisions for both aggravation and mitigation. N.C. GEN. STAT. § 15A-1340.16 (2007). Ohio identifies nine aggravating factors and three mitigating factors (plus a catchall); the statute also identifies five factors suggesting the offender is likely to commit future crimes as well as five factors suggesting the offender is not likely to commit future crimes. OHIO REV. CODE ANN. § 2929.12(B)-(E) (LexisNexis 2002). Tennessee identifies twenty-three aggravating factors and twelve mitigating factors (plus a catchall). TENN. CODE ANN. §§ 40-35-113 to -114 (2007). Washington identifies twenty-six aggravating factors and eight mitigating factors; it also notes that the list of mitigating factors is “not intended to be exclusive.” WASH. REV. CODE ANN. § 9.94A.535 (West 2003).

⁹⁷ Hawaii identifies ten mitigating factors which militate in favor of imposing a term of probation and six aggravating factors which subject an offender to an extended term of imprisonment. HAW. REV. STAT. ANN. §§ 706-621, -662 (LexisNexis 2007). Idaho identifies nine mitigating factors and six aggravating factors. IDAHO CODE ANN. § 19-2521(1)-(2) (2004). North Dakota identifies fourteen mitigating factors and five aggravating factors. N.D. CENT. CODE §§ 12.1-32-04, -09 (1997 & Supp. 2007).

⁹⁸ Indiana identifies eleven aggravating factors and eleven mitigating factors. IND. CODE ANN. § 35-38-1-7.1 (West 2004 & Supp. 2008). New Jersey identifies thirteen aggravating factors and thirteen mitigating factors. N.J. STAT. ANN. § 2C:44-1 (West 2005).

⁹⁹ Michigan, for example, has created a sentencing scheme that is built entirely around the concept of aggravation. MICH. COMP. LAWS ANN. §§ 777.21-.61 (West 2006). In determining sentence ranges, Michigan uses a point system in which the offender accumulates a certain number of points for various aggravating circumstances. For example, an offender who operates a motor vehicle while intoxicated receives twenty points if the body alcohol content is .2 grams or more; fifteen points if it was less than .2 grams but equal or more than .15 grams; ten points if less than .15 grams but equal or more than .08 grams; and zero points if ability was not affected by alcohol. *Id.* § 777.48. Five additional states – Alabama, Colorado, Mississippi, Nevada, and Utah – have enacted statutes that provide for enhanced penalties under certain circumstances, and they do not appear to have enacted similar provisions that provide for reduced penalties. See ALA. CODE § 13A-5-6 (LexisNexis 2005) (providing for an increased sentence for various sexual offenders); COLO. REV. STAT. § 18-1.3-401(6), (8) (2007) (listing six aggravating sentencing factors, while expressly allowing judges to make findings of aggravating and mitigating factors); MISS.

The tendency of sentencing systems to identify more aggravating than mitigating factors may be attributable to political pressure.¹⁰⁰ As Rachel Barkow and Kathleen O’Neill have explained, there are many powerful groups who favor harsher sentencing laws,¹⁰¹ and those who support more lenient sentences do not tend to possess much political power.¹⁰² This political asymmetry allows legislators to “reap political rewards by increasing penalties without worrying about angering any powerful interest group or alienating the public.”¹⁰³ Any legislator who identifies a factor that will lengthen criminal

CODE ANN. §§ 99-19-301, -351 (West 2006) (allowing for enhanced sentences for crimes committed because of the actual or perceived race, color, ancestry, ethnicity, religion, national origin, or gender of the victim, or if the victim is either disabled or sixty-five years or older); NEV. REV. STAT. §§ 193.161-.1685 (2007) (listing nine aggravating sentencing factors); UTAH CODE ANN. §§ 76-3-203.1 to -.9 (2003) (same).

¹⁰⁰ Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1977 (2006); see also Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE. L.J. 1775, 1779 (1999); cf. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 242, 267 (2007) (challenging the conventional wisdom that the political process leads to a “one-way ratchet” of overcriminalization, but recognizing that “new punishment policies” reflect “decisions to punish long-standing crimes more harshly”). *But cf. id.* at 267 n.214 (“Recent years have seen a modest sentencing countertrend: more than half the states have reformed sentences in the direction of leniency They did so by various means – often by eliminating mandatory minimums, increasing judicial discretion in sentencing, or replacing incarceration with treatment for some drug offenders.”).

¹⁰¹ Barkow & O’Neill, *supra* note 100, at 1981-82 (suggesting that voters, prosecutors, victims’ rights groups, private prison companies, corrections officers unions, rural communities, and the National Rifle Association all support longer sentences); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529 (2001) (“[F]or most of criminal law, the effect of private interest groups is small: the most important interest groups are usually other government actors, chiefly police and prosecutors.”).

¹⁰² Barkow & O’Neill, *supra* note 100, at 1980-81. The authors explain:

Very few groups and individuals care about the sentences for violent, street, and drug crimes. Those who do – for instance, family members of individuals serving long sentences and the criminal defense bar – have little political pull because they lack financial resources and do not speak for a large number of voters. As for the offenders themselves, they often lack the right to vote, lack organization, and, because they typically come from disadvantaged backgrounds, lack funding to engage in education or lobbying campaigns.

Id.

¹⁰³ *Id.* at 1982-83; see also Luna, *supra* note 100, at 720. Bill Stuntz has discussed another, institutionally-based reason for the increasing expansion of criminal law and the increasing severity of criminal penalties:

In this system of separated powers, each branch is supposed to check the others. That does not happen. Instead, the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and

sentences can portray herself as “tough on crime,”¹⁰⁴ while a legislator who wishes to identify a mitigating factor runs the risk of appearing “soft on crime.”¹⁰⁵

Social science research suggests that current sentencing practices are more punitive than public opinion supports.¹⁰⁶ A system that over-identifies aggravating factors and under-identifies mitigating factors is likely to result in individual sentences that, when viewed in isolation, appear unfair.¹⁰⁷ To avoid unfair sentences, criminal justice actors may use their discretion to mitigate the effects of harsh sentencing laws in individual cases: prosecutors may elect to charge defendants with lesser offenses; judges may impose lighter sentences; and executives may commute sentences. Unfortunately, there is evidence suggesting that such discretion is more likely to benefit white, wealthy, or well-connected defendants, leaving minority, poor, or unconnected defendants to serve longer (and thus inequitable) sentences for similar offenses.¹⁰⁸ A

broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones. . . . Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off. The potential for alliance is strong, and obvious. And given legislative supremacy – meaning legislatures control crime definition – and prosecutorial discretion – meaning prosecutors decide whom to charge, and for what – judges cannot separate these natural allies.

Stuntz, *supra* note 101, at 510. Stuntz notes that these “politics of institutional competition and cooperation, *always* pushes toward broader liability rules, and toward harsher sentences as well.” *Id.*

¹⁰⁴ Stuntz, *supra* note 101, at 509. Stuntz explains:

Voters demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions. This dynamic has been particularly powerful the past two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label “tough on crime.”

Id.

¹⁰⁵ Barkow & O’Neill, *supra* note 100, at 1982 (“It remains true that appearing soft on crime is politically dangerous.”).

¹⁰⁶ See, e.g., ROSSI & BERK, *supra* note 13, at 78-81.

¹⁰⁷ Lanni, *supra* note 100, at 1780 (describing this phenomenon as “a worrying disjuncture between the public’s general call for harsher penalties, to which politicians respond with increasingly severe sentencing provisions, and the public’s more lenient response when confronted with specific cases”); see also *id.* at 1780-82 (describing social science research which reveals that “citizens report a desire for harsher penalties” in the abstract, but “often suggest more lenient penalties than those meted out by judges” when presented with individual cases); *The Supreme Court, 2006 Term – Leading Cases*, 121 HARV. L. REV. 225, 234 & n.64 (2007) (“[E]ven if sentencing statutes accurately reflect the public’s view on the proper punishment for a crime *in general*, they may overstate the punishment it is willing to impose *in a particular case*.”).

¹⁰⁸ See ASHWORTH, *supra* note 6, at 200 (“[T]he existence of some discretion as to [sentencing] rationale leaves room for an element of racial discrimination to creep into sentencing, whether consciously or unconsciously.”); Sanford H. Kadish, *Legal Norm and*

system that attempts to account for many sentencing factors *ex ante* can help ensure sentences that better reflect public opinion of just punishment,¹⁰⁹ and may help avoid the disparity – in the sentencing of similar defendants – that may be introduced through the exercise of discretion.¹¹⁰

B. *Constructing a Theory of Mitigation*

Although the Supreme Court has said that non-capital questions of aggravation and mitigation are properly the domain of the legislature – and thus it is of no *constitutional* consequence if a legislature elects to increase sentences on the basis of prior bad acts but refuses to reduce sentences on the basis of prior good acts – important questions of prudence and legitimacy remain. As noted above, there is reason to believe that modern American sentencing systems over-identify aggravating sentencing factors and under-identify mitigating factors, and that individual sentences are harsher than public opinion would allow.

One way to correct for the over-identification of aggravating factors and the under-identification of mitigating factors would be to identify what offense or offender characteristics ought to be considered mitigating, and then to press for legislative or judicial change. Some legal commentators have taken this approach.¹¹¹ Other commentators have attempted to identify theories of mitigation. For example, Carol and Jordan Steiker have sought to find a theory of mitigation in the capital context by identifying a “societal consensus” – which they locate in capital sentencing statutes and common law – that evidence of an offender’s reduced culpability must be considered as mitigating.¹¹² Steiker and Steiker selected culpability as their theory of

Discretion in the Police and Sentencing Processes, 75 HARV. L. REV. 904, 913 (1962) (reasoning that police discretion in the arrest function has led to the accusation that police “are harder on” black suspects than white suspects); Morris B. Hoffman, *Free Market Justice*, N.Y. TIMES, Jan. 8, 2007, at A19 (reporting study findings that the “average sentence for clients of public defenders was almost three years longer than the average for clients of private lawyers”).

¹⁰⁹ See, e.g., Hessick, *supra* note 86, at 111, 117.

¹¹⁰ See, e.g., PIERCE O’DONNELL ET AL., TOWARDS A JUST AND EFFECTIVE SENTENCING SYSTEM 1-14 (1977).

¹¹¹ See, e.g., Litton, *supra* note 86, at 1028; James E. Robertson, *Closing the Circle: When Prior Imprisonment Ought to Mitigate Capital Murder*, 11 KAN. J.L. & PUB. POL’Y 415, 415-16 (2002); Shuttleworth, *supra* note 46, at 1335; Joseph M. Spivey, III, *Partial Responsibility – A Mitigating Factor*, 18 WASH. & LEE L. REV. 118, 121-23 (1961); Jennifer R. Treadway, *‘Residual Doubt’ in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor*, 43 CASE W. RES. L. REV. 215, 217 (1992); John J. Hopkins, Note, *Illegal Arrest as Sufficient Provocation to Mitigate a Homicide*, 37 KY. L.J. 318, 318 (1948); Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1698-99 (2001).

¹¹² Steiker & Steiker, *supra* note 41, at 840.

mitigation, but not because they oppose considering factors other than reduced culpability, such as “lack of future dangerousness or general good character.”¹¹³ Rather, they contend that reduced culpability is a widely accepted mitigating factor in capital sentencing schemes.¹¹⁴ Thus, under the Supreme Court’s “evolving standards of decency” doctrine, a strong case can be made that culpability is at the “constitutional core” of capital mitigation and *must* be considered as mitigating evidence at sentencing.¹¹⁵

Dan Markel has offered another account of when punishment leniency is appropriate.¹¹⁶ Unlike the descriptive account of mitigation offered by Steiker and Steiker, Markel seeks to provide a normative defense of his account. Markel identifies “reasons that are tied to the offender’s choice to commit the crime, or the severity of the crime itself” as appropriate mitigating sentencing factors.¹¹⁷ He rejects as inappropriate mitigating factors all “reasons unrelated to the offender’s competence or autonomy, or the severity of the offense,” including facts or circumstances that may “evoke compassion or sympathy.”¹¹⁸

An offender’s prior good acts would not be considered an appropriate sentencing factor under the theories advanced by Steiker and Steiker or by Markel: prior good acts do not relate to individual culpability at the time of the offense, nor do they relate to an offender’s choice to commit a crime or the gravity of the crime itself. But these two theories attempt to provide an account of mitigation only in the abstract, and thus these theories can only answer whether prior good acts, *standing alone*, should be treated as mitigating.¹¹⁹ My contention is that prior good acts should be treated as mitigating *given that prior bad acts are already treated as aggravating*. This more limited claim does not require me to articulate an independent theory of mitigation, nor does it require me to show that prior bad acts should be treated as aggravating. Rather, I need only demonstrate that the reason or reasons a sentencing system has for treating prior bad acts as an aggravating factor would also support treating good acts as a mitigating factor. My approach thus

¹¹³ *Id.*

¹¹⁴ *Id.* at 848-57.

¹¹⁵ Steiker and Steiker sought to identify the “constitutional core” of capital mitigation “to give greater and more defensible content to the Court’s requirement of ‘individualized’ sentencing. . . . [F]or the individualization requirement to have any force as a constitutional principle, it must rest on a substantive theory that specifies which aspects of the individual are constitutionally relevant.” *Id.* at 839. Steiker and Steiker believe the Supreme Court has already recognized and will eventually confront the need for a more limited definition of relevant mitigating evidence in the factual context, and they offer their theory for that eventuality. *Id.* at 843-44, 858-59.

¹¹⁶ See Markel, *supra* note 6, at 1435-36, 1438.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1436, 1438.

¹¹⁹ Steiker and Steiker acknowledge that they seek only to locate a constitutional “floor” for mitigation evidence rather than a theory that explains both aggravating and mitigating factors. Steiker & Steiker, *supra* note 41, at 854, 859.

leaves legislatures free to identify appropriate sentencing factors in the first instance, but requires symmetry – and thus consistency – between aggravating and mitigating factors.

A starting point for this symmetry proposal is Andrew Ashworth's suggestion of a "practical relationship between aggravating and mitigating factors"¹²⁰ that, if employed by legislatures, could help ensure a more balanced identification of aggravating and mitigating sentencing factors. Ashworth explains that if two sentencing factors "can be represented as extreme points on a spectrum," then the opposite of an aggravating sentencing factor should be treated as a mitigating factor.¹²¹ There are examples in the Federal Sentencing Guidelines that conform to this formula, such as increasing sentences for some crimes committed with a bad motive and decreasing sentences for some crimes committed with a good motive.¹²²

This symmetrical relationship between aggravating and mitigating factors may be more apparent if we view sentencing practices in terms of the "ordinary" criminal defendant. An ordinary or typical sentence ought to be imposed on offenders whose offense and offender characteristics are generally similar to most other offenders.¹²³ Lengthier sentences ought to be imposed on offenders when aggravating factors – factors that appear to make the offender or her offense "worse" than ordinary – are present. Similarly, shorter sentences ought to be imposed on offenders when mitigating factors – factors that appear to make the offender or her offense "better" than ordinary – are present.¹²⁴

Ashworth's theory that the opposite of an aggravating sentencing factor should be recognized as a mitigating factor is a good starting point. But the term "opposite" may result in some confusion. Consider a sentence enhancement if an offender committed a crime with a firearm.¹²⁵ What is the "opposite" of possessing a firearm? The answer would seem to be not possessing a firearm. Under this proposed sentencing framework, however,

¹²⁰ ASHWORTH, *supra* note 6, at 134.

¹²¹ *Id.* ("It is often right to suppose that the opposite of a mitigating factor will count as aggravating ([e.g.,] impulsive reactions may justify mitigation and premeditation may be aggravating).").

¹²² See Hessick, *supra* note 86, at 102-09.

¹²³ See, e.g., *United States v. Carpenter*, 252 F.3d 230, 235 (2d Cir. 2001).

¹²⁴ 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, -702 (2001 & Supp. 2007); CAL. R. CT. 4.420; WASH. REV. CODE ANN. § 9.94A.535 (West 2003); see also *Cunningham v. California*, 127 S. Ct. 856, 861-62 (2007) (describing the California system); cf. Hessick, *supra* note 86, at 136-37 (proposing a sentencing system with "sentencing adjustments if a defendant's motive is 'better' or 'worse' than the motive that is ordinarily associated with the defendant's particular offense").

¹²⁵ For example, the Guidelines provide for various firearm-related enhancements in robbery offenses. U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2) (2007).

not possessing a firearm is simply *the absence of* the aggravating factor. Thus, a defendant who commits a robbery with a gun should receive an increased sentence, but if she commits a robbery without a gun, she should simply receive the ordinary, unincreased sentence – *not* a sentence reduction. As Ashworth explains, “where the factor relates to the presence or absence of a single element,” such as an aggravated sentence if a gun is present, then the absence of the gun “is simply a neutral factor.”¹²⁶

The Federal Sentencing Guidelines and at least one state sentencing scheme appear to draw a distinction between the presence or absence of a factor, and the opposite of a factor. The Guidelines provide for increased sentences when a defendant obstructs justice,¹²⁷ an aggravating factor. The Guidelines also provide for sentence reductions when a defendant cooperates with the government,¹²⁸ a mitigating factor that is arguably the opposite of obstructing a government investigation. And the Guidelines explicitly prohibit any sentence increase on the basis of a failure to cooperate,¹²⁹ reinforcing the notion that the failure to cooperate is not the opposite of cooperating with the government but is simply the absence of that mitigating factor. Similarly, the North Carolina courts have stated that, in order to prove the defendant “has been a person of good character” – one of the mitigating factors listed in the state’s felony sentencing statute¹³⁰ – a defendant must show “more than the absence of bad character.”¹³¹

C. *Good Acts and Bad Acts as Sentencing Symmetry*

Ashworth’s formula provides a framework for evaluating prior good and bad acts as sentencing factors. A bad act, such as a prior conviction or uncharged criminal conduct, is an aggravating factor that ought to result in a sentence increase. The absence of prior bad acts is a neutral factor – a defendant with no prior criminal history is entitled only to the ordinary sentence without the increase; she is not entitled to a reduced sentence.¹³² But

¹²⁶ ASHWORTH, *supra* note 6, at 134.

¹²⁷ U.S. SENTENCING GUIDELINES MANUAL § 3C1.1.

¹²⁸ *Id.* § 5K1.1.

¹²⁹ *Id.* § 5K1.2.

¹³⁰ N.C. GEN. STAT. § 15A-1340.16(e)(12) (2007).

¹³¹ *State v. Benbow*, 308 S.E.2d 647, 653 (N.C. 1983) (quoting *In re Rogers*, 253 S.E.2d 912, 918 (1976)) (internal quotation marks omitted); *see also State v. Blackwelder*, 306 S.E.2d 783, 789 (N.C. 1983); 8 STRONG’S N.C. INDEX 4TH *Criminal Law* § 1295 (4th ed. 2007).

¹³² It may be important to note that some commentators who have supported the practice of punishing recidivists more harshly than first-time offenders have not conformed to this model of aggravated sentences for repeat offenders and ordinary sentences for first-time offenders. Rather, they have argued that a first-time offender should receive mitigation, while the repeat offender should receive no mitigation. *E.g.*, von Hirsch, *supra* note 6, at 613.

a prior good act is more than the absence of criminal history – it is the opposite of a prior bad act and thus should be considered a mitigating factor.

Because prior bad acts are criminal in nature and good acts are not, one might argue that prior good acts are different in kind from prior bad acts and thus do not create sentencing symmetry. This argument presupposes a particular view of the purposes of punishment – retributivism. Punishment systems based on the utilitarian concerns of incapacitation or rehabilitation often consider factors that are not obviously criminal in nature, such as a defendant’s employment history.¹³³ And even in a sentencing system based on the theory of retributivism – at least a system that takes a broader view of what is relevant to just deserts than simply the particular mental state and action that constitute the offense in question¹³⁴ – a person’s prior non-criminal actions *may* play a role in how much punishment we perceive that a person deserves.¹³⁵

Because any definition of the appropriate sphere of the criminal justice system arguably requires a general theory of punishment, the question of what falls within that sphere does not have a simple answer – or perhaps even a correct one.¹³⁶ For the criminal status of prior bad acts to provide a distinction between good and bad acts as sentencing factors, one would have to articulate a theory of punishment that would permit the consideration of prior illegal acts, but not prior acts that achieved a social good. Such a theory does not spring readily to mind.¹³⁷ Indeed, as noted below, criminal law theorists have had

¹³³ Cf. Andrew Ashworth, *Deterrence*, in *PRINCIPLED SENTENCING* 53, 54 (Andrew von Hirsch & Andrew Ashworth eds., 1992) (“A sentencing system based on individual deterrence would need to ensure that courts had detailed information on the character, circumstances, and prior record of the offender, and would then require courts to calculate what sentence would be necessary to deter the particular offender.”); Andrew von Hirsch, *Incapacitation*, in *PRINCIPLED SENTENCING* 101 (Andrew von Hirsch & Andrew Ashworth eds., 1992) (“Certain facts about offenders – principally, their previous criminal records, drug habits, and histories of unemployment – are . . . indicative of increased likelihood of recidivism.”).

¹³⁴ Under a narrower theory of retributivism, it would also be inappropriate to consider a person’s prior bad acts. See *infra* notes 164-169 and accompanying text.

¹³⁵ Cf. Alan H. Goldman, *Toward a New Theory of Punishment*, 1 *LAW & PHIL.* 57, 61 (1982) (“[I]f the purpose of the state were to proportion reward and suffering to moral merit, to be fair it would have to do so over entire lifetimes, and not in reaction to specific criminal acts.”). Examples of this change in the perceived desert of an offender can be seen in judicial opinions involving prior good acts. See, e.g., *United States v. Nellum*, No. 2:04-CR-30-PS, 2005 WL 300073, at *4-5 (N.D. Ind. Feb. 3, 2005). Thus, while a person might argue that a person’s prior good acts are not the business of the criminal justice system, the criminal justice system appears, at least on occasion, to disagree. For similar examples from the United Kingdom, see D.A. THOMAS, *PRINCIPLES OF SENTENCING: THE SENTENCING POLICY OF THE COURT OF APPEAL CRIMINAL DIVISION* 200 (2d ed. 1979).

¹³⁶ See *infra* text accompanying notes 241-252.

¹³⁷ A social contract theory, for example, might suggest that both good acts and bad acts are appropriately considered at sentencing. We would punish a habitual offender more for

difficulty articulating a justification for habitual offender legislation where the offender has already been punished for her past crimes.¹³⁸

Of course, most modern American sentencing systems are not based on a single theory of punishment.¹³⁹ Therefore, it is necessary to examine each of the justifications for treating prior bad acts as an aggravating sentencing factor. If any of those arguments support prior bad acts as an aggravating factor but do not similarly support prior good acts as a mitigating factor, then the two factors may not fit within Ashworth's formula, and it may not be necessary for a sentencing system to consider good acts in order to achieve sentencing symmetry. That task is taken up in the next Part.

III. GOOD VERSUS BAD ACTS

Even though good and bad acts appear to fit comfortably within Ashworth's spectrum framework, there may be other reasons to permit the consideration of prior bad acts but not prior good acts at sentencing. This Part considers several specific arguments that might provide a distinction between prior good and bad acts. It begins by identifying several punishment rationales – selective incapacitation, retributivism, and deterrence – that arguably justify increasing an offender's sentence on the basis of her prior bad acts. Each of these punishment rationales is then examined to see whether it provides a principled distinction between good and bad acts as sentencing factors. This Part then considers three additional objections to accounting for good acts at sentencing – line drawing, victim-centered concerns, and race and class effects – and examines whether any of those objections provides a principled distinction between good and bad acts.

A principled distinction between good and bad acts is necessary in order to avoid the perception that sentencing factors are no more than arbitrary decisions, but are explainable – and thus legitimate – legislative policy choices. Of these rationales, only the ability to accurately predict recidivism appears to

her repeated violations of the social contract. *See* Goldman, *supra* note 135, at 74 (“While we cannot use criminals in any way we wish in order to deter other potential criminals, we can perhaps demand that they not repeat their crimes.”). A person who has performed acts that accrue to the benefit of society (e.g., military or other public service) would receive less punishment. *See, e.g.*, *United States v. Henley*, No. 94-50138, 1995 WL 136116, at *2 (5th Cir. Mar. 7, 1995) (“Such an extended, exemplary military record reflects a positive contribution to society.”); *United States v. Pipich*, 688 F. Supp. 191, 193 (D. Md. 1988) (“[A] person's military record . . . reflects the nature and extent of that person's performance of one of the highest duties of citizenship.”).

¹³⁸ *See* discussion *infra* Part III.B.

¹³⁹ *See, e.g.*, 18 U.S.C. § 3553(a)(2) (2000) (stating multiple purposes of punishment); MONT. CODE ANN. § 46-18-101 (2007) (same); N.Y. PENAL LAW § 1.05 (McKinney 2004) (same); TENN. CODE ANN. § 40-35-102 (2007) (same); ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING § 18-2.1 (3d ed. 1994) (same); MODEL PENAL CODE § 1.02 (1985) (same). *But see, e.g.*, CAL. PENAL CODE § 1170 (West 2004) (listing “punishment” as the single “purpose of imprisonment for crime”).

provide a potential basis to distinguish between good and bad acts.¹⁴⁰ As discussed in detail below, however, while the predictive power of prior bad acts is relatively well established, the predictive power of good acts is still largely unknown. Thus, while recidivism prediction *may* provide a meaningful basis to distinguish between good and bad acts, whether it does in fact provide such a basis for distinction is still an open question.

A. *Selective Incapacitation and Predicting Recidivism*

One of the main justifications for treating prior bad acts as an aggravating factor is that they are good predictors of future recidivism. Under a theory of selective incapacitation, factors that predict recidivism should result in longer sentences.¹⁴¹ Selective incapacitation seeks to reduce crime without increasing the overall prison population by attempting to identify those offenders who are more likely to recidivate and those who are less likely to recidivate; once those identifications have been made, likely recidivists are incarcerated for longer periods of time, while unlikely recidivists are given shorter sentences.¹⁴² Because an individual's criminal history "has statistically significant power in distinguishing between recidivists and non-recidivists,"¹⁴³ lengthening the amount of time an offender spends in prison according to her previous convictions should reduce future crimes.¹⁴⁴

While offenders' prior arrests and convictions have been the subject of many recidivism studies, the relationship between prior good acts and recidivism has received significantly less attention. There appear to be no

¹⁴⁰ While deterrence distinguishes between good and bad acts, it does so for reasons that seem untenable in our present systems of sentencing. See *infra* text accompanying notes 217-225.

¹⁴¹ See Durham, *supra* note 11, at 618; Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 129 (1996).

¹⁴² See James Q. Wilson, *Selective Incapacitation*, in PRINCIPLED SENTENCING 146, 156 (Andrew von Hirsch & Andrew Ashworth eds., 1992); Note, *Selective Incapacitation*, *supra* note 11, at 512.

¹⁴³ MEASURING RECIDIVISM, *supra* note 16, at 15; see also ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 7 (1989) [hereinafter RECIDIVISM 1983], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf>; Martin Wasik, *Desert and the Role of Previous Convictions*, in PRINCIPLED SENTENCING 233, 235 (Andrew von Hirsch & Andrew Ashworth eds., 1992) ("The research evidence is that the more convictions recorded against a defendant, the greater the likelihood that he will be reconvicted.").

¹⁴⁴ But see Bernard E. Harcourt, *Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age 20-25* (Chicago Pub. Law & Legal Theory, Working Paper No. 94, 2005), available at <http://ssrn.com/abstract=756945> (arguing that, even assuming rational actors, a known rate of offending for high-risk recidivists, and the number of high-risk recidivists, under certain circumstances overall crime rates will actually increase in a system of selective incapacitation).

studies about the effect of volunteer work or charitable giving on recidivism.¹⁴⁵ While there have been studies conducted regarding military service, those studies are limited and the data is sparse.¹⁴⁶ Nevertheless, those studies do suggest that military veterans pose a significantly lower recidivism risk than other offenders.¹⁴⁷ A 1993 study by the New York Department of Correctional Services indicates that “veterans . . . return to the [state’s correctional] system at less than 80 percent of the rate at which similarly situated non-veterans return.”¹⁴⁸ A 2000 report from the Bureau of Justice Statistics, a component of the Office of Justice Programs within the U.S. Department of Justice, concluded that, taken as a whole, incarcerated veterans were less likely to recidivate than incarcerated non-veterans.¹⁴⁹

¹⁴⁵ Nonetheless, there may be reason to believe that such activities might be correlated with decreased levels of recidivism because individuals who engage in those activities may experience higher levels of socialization skills and self-esteem, which some research suggests are correlated with lower recidivism rates. Wendy G. Turner, *The Experiences of Offenders in a Prison Canine Program*, 71 *FED. PROBATION* 38, 42 (2007); see also Heather Rowlison, “*Sin No More*”: *Recidivism and Non-Traditional Punishments in Wyoming*, 58 *BAYLOR L. REV.* 289, 314-15 (2006).

¹⁴⁶ For example, the 2000 Bureau of Justice Statistics study – which is the best source of veteran recidivism rates – was based on “personal interviews conducted through the 1997 Survey of Inmates in State and Federal Correctional Facilities and the 1996 Survey of Inmates in Local Jails.” The study authors noted that the accuracy of the report may suffer from sampling errors (the study used a sample rather than “a complete enumeration of the population”), as well as nonsampling errors (e.g., the study relied on inmates to provide their own personal information which resulted in non-responses, different interpretations of the questions, and recall difficulties). CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, *VETERANS IN PRISON OR JAIL* 14 (2000) [hereinafter *VETERANS IN PRISON*], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vpj.pdf>; cf. Archer & Gartner, *supra* note 19, at 956 (“Direct evidence of whether veterans are overrepresented in the commission of homicide is difficult to obtain . . .”).

¹⁴⁷ Brief for National Veterans Legal Services Program & Veterans for America as Amici Curiae Supporting Petitioner at 8 n.5, *Rita v. United States*, 127 S. Ct. 2456 (2007) (No. 06-5754) [hereinafter *Brief for National Veterans*]. But see Archer & Gartner, *supra* note 19, at 943 (discussing the historical recurrence of the “violent veteran model,” i.e., the presumption that “the experience of war may have resocialized soldiers to be more accepting of violence and more proficient at it”).

¹⁴⁸ See *Brief for National Veterans*, *supra* note 147, at 8 n.5 (citing STATE OF N.Y. DEP’T OF CORR. SERVS., *VETERANS’ PROGRAM FOLLOW-UP JULY 1993* (1993), abstract available at <http://www.ncjrs.gov/app/publications/Abstract.aspx?id=149419>).

¹⁴⁹ As the report explains, the rates differ for veteran and non-veteran state prisoners, but the rates are comparable for federal prisoners and local jail inmates. *VETERANS IN PRISON*, *supra* note 146, at 7; accord U.S. SENTENCING COMM’N, *RECIDIVISM AND THE FIRST OFFENDER* 23 exhibit 3 (2004) [hereinafter *FIRST OFFENDER*], available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf (indicating that offenders with prior military service make up a higher proportion of federal offenders with little or no prior criminal history than of federal offenders with lengthier criminal records).

Absent better information, it is possible to claim that prior bad acts indicate an increased likelihood of recidivism, but prior good acts – other than military service – do not uniformly indicate a decreased likelihood of recidivism. Under a theory of selective incapacitation, this would constitute a principled distinction between bad acts and good acts other than military service. But even assuming, contrary to the limited available data, that prior good acts do not correlate with decreased recidivism, there are still reasons to question whether recidivism prediction provides the sort of principled distinction necessary to justify a punishment system that increases sentences based on prior bad acts but does not decrease sentences based on prior good acts. That is because selective incapacitation does not seem to be a widely accepted theory in modern sentencing systems. There are many other reliable recidivism predictors in addition to prior convictions that modern sentencing systems, including the federal system, do not currently consider as appropriate sentencing factors. These reliable recidivism predictors include gender,¹⁵⁰ age,¹⁵¹ race and ethnicity,¹⁵² employment status,¹⁵³ education level achieved,¹⁵⁴

¹⁵⁰ MEASURING RECIDIVISM, *supra* note 16, at 11 (reporting the results of a study which found that women recidivate at a lower rate than men, with a rate of 24.3% for men and 13.7% for women); *see also* PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 7 (2002) [hereinafter RECIDIVISM 1994], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>; RECIDIVISM 1983, *supra* note 143, at 5. *But see* MILES D. HARER, FEDERAL BUREAU OF PRISONS, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987, at 3 (1994) [hereinafter RECIDIVISM 1987], available at http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprecid87.pdf (“Recidivism rates were almost the same for males and females; 40.9 percent of the males recidivated compared to 39.7 percent of the females.”).

¹⁵¹ MEASURING RECIDIVISM, *supra* note 16, at 12 (“Recidivism rates decline relatively consistently as age increases. Generally, the younger the offender, the more likely the offender recidivates. . . . Among all offenders under age 21, the recidivism rate is 35.5 percent, while offenders over age 50 have a recidivism rate of 9.5 percent.”); *see also* RECIDIVISM 1983, *supra* note 143, at 5; RECIDIVISM 1987, *supra* note 150, at 3; RECIDIVISM 1994, *supra* note 150, at 7.

¹⁵² MEASURING RECIDIVISM, *supra* note 16, at 12 (“[T]he race of the offender is associated with recidivism rates. Overall, Black offenders are more likely to recidivate (32.8%) than are Hispanic offenders (24.3%). White offenders are the least likely to recidivate (16.0%).”); *see also* RECIDIVISM 1983, *supra* note 143, at 5; RECIDIVISM 1987, *supra* note 150, at 2; RECIDIVISM 1994, *supra* note 150, at 7.

¹⁵³ MEASURING RECIDIVISM, *supra* note 16, at 12 (“[T]hose with stable employment in the year prior to their instant offense are less likely to recidivate (19.6%) than are those who are unemployed (32.4%).”); *see also* RECIDIVISM 1987, *supra* note 150, at 3.

¹⁵⁴ MEASURING RECIDIVISM, *supra* note 16, at 12 (“Overall, offenders with less than a high school education are most likely to recidivate (31.4%), followed by offenders with a high school education (19.3%), offenders with some college education (18.0%), and offenders with college degrees (8.8%).”); *see also* RECIDIVISM 1983, *supra* note 143, at 5; RECIDIVISM 1987, *supra* note 150, at 3.

and marital status.¹⁵⁵

Of course, some factors, such as race, cannot be considered under the Constitution, regardless of the predictive power of such information. That same objection does not readily apply, however, to other factors, such as marital status, employment, and education level. Yet, the U.S. Sentencing Commission has resisted allowing judges to use these factors in sentencing.¹⁵⁶ Indeed, at least one study suggested that an offender's age may be a better predictor of recidivism than his criminal history,¹⁵⁷ though age is also a discouraged factor in the federal system.¹⁵⁸

The decision not to use these factors in sentencing suggests recidivism prediction and selective incapacitation are not the primary sentencing goals, at least in the federal system. It also suggests that prior bad acts are an accepted aggravating factor, not because they provide predictive information about an offender's likelihood of committing future crimes, but because they are perceived as providing information about an offender's moral blameworthiness.¹⁵⁹ Indeed, the U.S. Sentencing Commission has conceded that "empirical research has shown that other factors are correlated highly with the likelihood of recidivism, e.g., age and drug abuse."¹⁶⁰ The Commission explained that it elected not to include these other recidivism predictors in its sentencing calculations "for policy reasons."¹⁶¹

¹⁵⁵ MEASURING RECIDIVISM, *supra* note 16, at 12 ("Offenders who have never been married are most likely to recidivate (32.3%) Those who are married are slightly less likely to recidivate (13.8%) than are those who are divorced (19.5%)."); *see also* RECIDIVISM 1987, *supra* note 150, at 5-6.

¹⁵⁶ *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.2 (2007) (discouraging consideration of "education and vocational skills"); *id.* § 5H1.5 (discouraging consideration of employment record); *id.* § 5H1.6 (discouraging consideration of "family ties and responsibilities").

¹⁵⁷ RECIDIVISM 1983, *supra* note 143, at 11 ("[A]ge when released is found to have the largest impact [on rearrest odds], followed by the number of prior arrests.").

¹⁵⁸ U.S. SENTENCING GUIDELINES MANUAL § 5H1.1.

¹⁵⁹ *See* Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 FED. SENT'G. REP. 192, 193 (1997) (citing U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 42 (1987), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf) (reporting that both age and drug abuse have "demonstrated power in predicting recidivism," but "the Sentencing Commission determined that it would only include factors that could be supported by both a just desert and predictive rationale As a result, the Sentencing Commission did not include age and drug abuse . . . since they were found not to conform to a just desert rationale.").

¹⁶⁰ U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt.

¹⁶¹ *Id.*

B. *Retributivism: Assessing Offenders and Their Actions*

One could argue that increasing an offender's sentence on the basis of her prior convictions¹⁶² is appropriate because the repeat offender is more deserving of punishment than a first-time offender.¹⁶³ While this seems like a simple argument, those who espouse a desert-based system of punishment have not always agreed on the proposition, and those who believe the proposition to be correct have had a difficult time reconciling it with the basic principles of retributivism.¹⁶⁴ That is because retributivists believe the amount of an offender's punishment must be in proportion to the gravity of the offense she has committed.¹⁶⁵ Gravity depends on two considerations: (1) the culpability of an individual defendant¹⁶⁶ and (2) the loss or harm caused by the offense.¹⁶⁷ Previous offenses do not fit neatly within either category.

¹⁶² Those who have articulated a desert-based rationale for increasing sentences for prior bad acts have generally confined their arguments to prior convictions, as opposed to prior uncharged conduct. *E.g.*, von Hirsch, *supra* note 6, at 612 ("Unproven prior conduct should not be considered in the current sentencing decision."). Nevertheless, the Guidelines increase sentences both for prior convictions *and* for prior uncharged or acquitted conduct. U.S. SENTENCING GUIDELINES MANUAL ch. 4; *id.* § 1B1.3(a). The Guidelines claim to base these decisions, at least in part, on retributive principles. *Id.* ch. 1, pt. A.

¹⁶³ As the Supreme Court has stated the issue: "[T]he repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted." *Graham v. West Virginia*, 224 U.S. 616, 623 (1912); *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."); James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 *McGEORGE L. REV.* 1, 13 (2000).

¹⁶⁴ *See* Durham, *supra* note 11, at 620 (observing that enhancing penalties for recidivists "poses a potential predicament for the justice model").

¹⁶⁵ Proportionality is a main concern of desert theory, which is a "modern form of retributive philosophy." ASHWORTH, *supra* note 6, at 72-73.

¹⁶⁶ *Id.* at 127. Ashworth elaborates:

[T]he assessment of culpability has various dimensions. At the level of legal liability it usually turns on intention, recklessness and a limited group of excusing defences. Where the offender's case has elements of an excusing condition but falls outside the narrow legal definition for a defence, this should be a good ground for reduced culpability.

Id.

¹⁶⁷ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 461 (1978) ("It is . . . common ground that a greater degree of wrongdoing justifies greater punishment."); Andrew Ashworth, *Desert*, in *PRINCIPLED SENTENCING* 181, 182 (Andrew von Hirsch & Andrew Ashworth eds., 1992) ("Crimes must be ranked according to their relative seriousness, as determined by the harm done or risked by the offense and by the culpability of the offender.").

This poor fit has led some retributivists to conclude that prior convictions are an inappropriate sentencing factor.¹⁶⁸ Some have said that increasing an offender's sentence for prior bad acts is tantamount to punishment based on character rather than choice.¹⁶⁹ A similar objection has been raised against considering good acts at sentencing. That argument is ordinarily framed in terms of requiring a court to engage in a holistic evaluation of the defendant's character.¹⁷⁰ For example, Andrew Ashworth has said that recognizing an offender's prior "good deeds" as mitigating evidence "implies that passing sentence is a form of social accounting, and that courts should draw up a kind of balance sheet when sentencing. The offence(s) committed would be the major factor on the minus side; and any creditable social acts would be major factors on the plus side."¹⁷¹ Ashworth argues that this "social accounting" model of sentencing is outside the appropriate judicial function, and that the court "should not be interested in inquiring either into any bad social deeds the offender has been involved in, except previous offences, or into any good social deeds."¹⁷²

¹⁶⁸ E.g., FLETCHER, *supra* note 167, at 460-66; RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 67-74 (1979).

¹⁶⁹ See, e.g., SINGER, *supra* note 168, at 70; Durham, *supra* note 11, at 620; 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 (2004); see also FLETCHER, *supra* note 167, 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? . . . This is the critical question that renders the assessment of liability just.").

¹⁷⁰ See Kirchmeier, *supra* note 41, at 664 ("[Good Character Factors] are mitigating . . . because they show that the defendant is not completely evil . . . [and] consideration of these factors recognizes, for retributive purposes, that a defendant consists of something more than the murder that took place on one day of the defendant's life."); Steiker & Steiker, *supra* note 41, at 847 ("Evidence of . . . past good works may reveal a defendant's 'general desert' and contribute to a moral assessment of the defendant's entire life that includes, but is not limited to, the defendant's culpability for the crime.").

¹⁷¹ ASHWORTH, *supra* note 6, at 151; see also WALKER, *supra* note 10, at 50. Indeed, this "social accounting" or "balance sheet" description of good acts at sentencing is not without parallel in federal sentencing decisions. For examples of courts that weigh the defendant's good acts against the harm of his offense, see *supra* note 55. See also Sendor, *supra* note 141, at 130-31 (endorsing a view of sentencing that permits a sentencer to weigh the harm of an offense against the offender's prior good deeds).

¹⁷² ASHWORTH, *supra* note 6, at 151; accord von Hirsch, *supra* note 6, at 595. Dan Markel takes a similar position, suggesting that a system of punishment may not function in a manner similar to a "debtor-creditor relationship, a relation in which sovereign prerogative permits the 'creditor' to waive responsibility for collecting the debt in certain ex post situations." Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2214 (2001). The reasons against such a debtor-creditor model of sentencing – as Markel frames them – are (a) there is an obligation to avoid criminal debts (i.e., crime); (b) unlike monetary debts, the "debt" owed for a rape or other violent assault cannot really be calculated; and (c)

Ashworth's comment seems to suggest that a sentencing court should concern itself only with the offense, rather than with issues related to the offender,¹⁷³ but he does not elaborate why prior convictions should receive special treatment.¹⁷⁴ An offender's prior criminal history provides no more information about her present offense than do her prior good deeds. An offender's prior acts – good or bad – provide information only about the offender herself.¹⁷⁵

Andrew von Hirsch has attempted to distinguish, on retributive grounds, between the appropriateness of inquiring about prior convictions at sentencing and other inquiries about a defendant's character:

When someone faces censure or reproof for a wrong he has committed and he pleads that this is the "first time," that is not an invitation to consider his generalized merit or demerit. The judgment, I have tried to suggest, remains focused primarily on his current act – with limited modification in the degree of disapprobation he faces to reflect the fact that he has previously maintained his inhibitions against such misconduct.¹⁷⁶

that although the "debtor" in the analogy is the state, the interests of the victim and the public must be considered as well, and while the state may have gained some benefit from an offender's good acts, the victim has not. *See id.* at 2214 n.255. Whatever the normative merit of Markel's arguments may be, there are certainly other situations in American criminal justice systems – such as sentencing reductions for cooperation with law enforcement – where "discounts" for certain ex post behavior are calculated and where a benefit to the state is rewarded even where the victim has gained no benefit.

¹⁷³ ASHWORTH, *supra* note 6, at 151 ("Is it truly a court's function to concern itself with these matters? The court is passing sentence for one distinct incident . . ."). Many retributivists may reject the consideration of offender characteristics at sentencing. *See* von Hirsch, *supra* note 6, at 608. They do so because such considerations are ordinarily associated with a rehabilitative punishment system. *See* *Williams v. New York*, 337 U.S. 241, 247-48 (1949) (indicating that reformation and rehabilitation are important goals of criminal jurisprudence and should involve individualized sentences which consider an offender's history); Note, *Admissibility of Character Evidence*, *supra* note 2, at 717 (suggesting that if the purpose of confinement is rehabilitation, then it is necessary to consider character evidence).

¹⁷⁴ However, Ashworth does state that "sentencers would not know where to stop if they purported to draw up a balance sheet of the offender's social contributions." ASHWORTH, *supra* note 6, at 158. That concern is addressed below. *See infra* Part III.D.

¹⁷⁵ Distinctions are sometimes drawn between the consideration of offense characteristics and offender characteristics at sentencing. *E.g.*, *Cunningham v. California*, 127 S. Ct. 856, 872-73 (2007) (Kennedy, J., dissenting); WHEELER ET AL., *supra* note 10, at 122; Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 56-57 (2006). *But see* *Cunningham*, 127 S. Ct. at 869 n.14 (rejecting the distinction for Sixth Amendment purposes).

¹⁷⁶ Von Hirsch, *supra* note 6, at 609-10.

There are reasons to discount von Hirsch's argument. First, von Hirsch's objection to an inquiry of an offender's background beyond her prior convictions appears, at least in part, to be an objection to the invasion of an offender's privacy that such an inquiry would entail.¹⁷⁷ As von Hirsch put it, there is a difference between an inquiry into an offender's prior convictions and a "limitless inquiry" into an offender's "past noncriminal acts, his school, employment, social and family history, his personal habits, attitudes and preferences."¹⁷⁸ But allowing a sentencing court to consider an offender's prior good acts as mitigating evidence would not entail such an intrusion or loss of privacy. The inquiry is limited to good acts such as military service and volunteer work. Moreover, the defendant is the party who determines whether to raise her prior good acts as a mitigating factor at sentencing;¹⁷⁹ if she believed an inquiry into her prior good acts would be too intrusive or would otherwise compromise her privacy, she could simply elect not to present those acts at sentencing.

There is a second reason to discount von Hirsch's argument as a sufficient basis for considering prior bad acts but not prior good acts at sentencing. Von Hirsch maintains that an inquiry into prior convictions does not entail an examination of the defendant's character and that it is not undertaken in order to determine whether a given defendant has a "bad character." Instead, the purpose of the inquiry is to inform the court simply whether the defendant had "previously maintained his inhibitions against such misconduct."¹⁸⁰ Nevertheless, whether a defendant previously avoided criminal conduct, and thus whether such conduct is "uncharacteristic," is still a question about the defendant's character – it may not tell us whether, in all respects, this defendant is a good or bad person, but it does tell us whether she is the type of person who ordinarily commits crimes.¹⁸¹ Indeed, von Hirsch himself has framed the issue in terms of character by stating that repeat offenders ought to

¹⁷⁷ See *id.* at 608, 610-11.

¹⁷⁸ *Id.* at 608.

¹⁷⁹ See, e.g., *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990) ("[T]he party seeking an adjustment in the sentence level must establish the factual predicate justifying the adjustment.").

¹⁸⁰ Von Hirsch, *supra* note 6, at 609-10; see also Wasik, *supra* note 143, at 239 (commenting that "von Hirsch's use of the words 'typical' and 'characteristic' to describe the assessment to be made of the defendant's record in light of the current offense" does not mean to indicate that "an assessment being made of the overall moral standing of the person").

¹⁸¹ See Durham, *supra* note 11, at 621 ("[T]he extent to which a behavior is characteristic is important because it conveys something about the moral nature of the individual and ultimately the blameworthiness of the offender. Thus, to know that criminal activity is characteristic is to know something about the offender's moral character."); see also SINGER, *supra* note 168, at 70 n.9 ("Von Hirsch says that he really means to ask whether the defendant's crime was 'in character' rather than whether his character is good or bad. I find the difference not persuasive.").

receive longer sentences than first-time offenders; a first-time offender “does not deserve the full measure of condemnation because the particular act was *uncharacteristic* of the way he has conducted himself in the past.”¹⁸² Undoubtedly, most people consider defendants who ordinarily commit crimes as having worse characters than those defendants who have committed no crimes in the past.¹⁸³ Von Hirsch appeals to this shared intuition of justice when he states that “[w]e feel ourselves more entitled . . . to disapprove of the person when his current misdeed follows previous misconduct.”¹⁸⁴ Von Hirsch has thus limited the scope of the inquiry into an offender’s character, not its nature.

Once von Hirsch’s argument is recognized as one of scope, rather than as an absolute objection to considering an offender’s character at sentencing, the only remaining question is whether an offender’s prior good acts affect shared intuitions of justice regarding how much punishment that offender deserves.¹⁸⁵ While there are undoubtedly cases in which an offender’s prior good acts do not affect the amount of punishment she appears to deserve – consider, for example, the serial killer who occasionally volunteered in a soup kitchen – there are also cases where an offender’s prior good acts *are* likely to affect the perception of deserved punishment. To borrow an example from a Ninth Circuit opinion: “[I]f Mother Teresa were accused of illegally attempting to buy a green card for one of her sisters, it would be proper for a court to consider her saintly deeds in mitigation of her sentence.”¹⁸⁶ As these two examples indicate, while an offender’s prior good acts may suggest that she deserves less punishment, issues such as the gravity of the instant offense and the nature and extent of the prior good acts are likely to play a significant role in this shared intuition of justice.

A related concern some have raised about considering good acts at sentencing is whether a specific defendant’s prior good acts demonstrate good character or whether she performed those acts for less than selfless reasons. For example, some who oppose the use of military service as a mitigating

¹⁸² Von Hirsch, *supra* note 6, at 604 (emphasis added); *see also id.* at 597.

¹⁸³ *See* Yankah, *supra* note 169, at 1021 n.1 (“The image of bad guys also creates a distinction between criminals and other members of society. Many see criminals as possessing the sum of all moral faults we condemn.”).

¹⁸⁴ Von Hirsch, *supra* note 6, at 597; *see also id.* at 593 (“[I]t is difficult to escape the feeling that, for whatever reason, first offenders do deserve less punishment.”).

¹⁸⁵ Von Hirsch explains that “[t]he strength of this feeling alone justifies a closer look at the issue of desert and prior criminality.” *Id.* at 593. Indeed, the value of shared intuitions of justice – or, as it is sometimes called “empirical desert” – has gained increasing recognition in recent years. *See, e.g.*, Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1830 (2007) (“[R]ecent writings . . . have urged that there might be good reason to rely upon a more empirical notion of justice: one reflected in the shared intuitions of justice of the community to be governed by the criminal justice system whose rules and practices are being formulated.”).

¹⁸⁶ *United States v. Takai*, 941 F.2d 738, 744 (9th Cir. 1991).

factor have noted that many people join the military for the salary, job training, or tuition assistance, rather than out of a sense of patriotic duty.¹⁸⁷ Similarly, several courts have refused to consider charitable or volunteer work for white-collar defendants on the theory that the corporate executive performs these activities “in exchange for recognition or some other rewards,” rather than out of a sense of charitable duty or simply “as a way of conducting one’s life.”¹⁸⁸

Requiring a defendant to show that her prior good acts demonstrate her own good character would be inconsistent with the present sentencing systems’ use of prior bad acts to increase a defendant’s sentence. A prosecutor need not show that a habitual offender is, in fact, a bad person. Nor can a defendant with prior convictions escape the effect of habitual offender laws and other criminal history aggravators by showing she committed her previous offenses for laudable motives.¹⁸⁹

The objection that good works do not evidence good character presumes that mitigation is justified only for good works performed by “good” people. But that is not the case. A defendant’s motives need not be pure in order for society to determine that her actions are deserving of a sentence reduction. Consider sentence reductions for assisting law enforcement¹⁹⁰ or the acceptance of responsibility (i.e., pleading guilty).¹⁹¹ A defendant may provide information to law enforcement simply to settle a score with a criminal associate rather than out of a desire to help the authorities prevent crime. Or, a defendant may plead guilty, not because she wishes to take responsibility for

¹⁸⁷ See Posting of logicnazi to The Volokh Conspiracy, <http://volokh.com/posts/1161895859.shtml> (Oct. 26, 2006, 7:24) (“In an all volunteer military people aren’t joining the military because they are making a noble sacrifice but because we have set the pay level high enough and the benefits good enough to attract soldiers.”).

¹⁸⁸ *United States v. Nava-Sotelo*, 232 F. Supp. 2d 1269, 1285-87 (D.N.M. 2002), *rev’d on other grounds*, 354 F.3d 1202 (10th Cir. 2003); see also *United States v. Thurston*, 358 F.3d 51, 80 (1st Cir. 2004) (“[B]usiness leaders are often expected, by virtue of their positions, to engage in civic and charitable activities.” (citation omitted)), *cert. granted and judgment vacated*, 543 U.S. 1097 (2005) (mem.); Henning, *supra* note 6, at 190.

¹⁸⁹ This is not to say an offender who committed a previous crime for an unusually sympathetic motive will never receive leniency. Several systems have established mechanisms through which both judges and prosecutors can reduce the aggravating effect of such convictions. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(b) (2007) (permitting downward departures where “the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history”); *Ewing v. California* 538 U.S. 11, 17 (2003) (describing discretion afforded to prosecutors and judges under California’s Three Strikes Law, which allows them to reduce charges “to avoid imposing a three strikes sentence”). Under these systems, while an offender’s sympathetic motives in committing a prior crime *may* result in leniency under habitual offender provisions, such leniency does not appear to be *required*.

¹⁹⁰ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

¹⁹¹ *Id.* § 3E1.1.

the crime, but because the evidence against her is overwhelming. In both instances defendants are given sentence reductions regardless of *why* they make those choices.¹⁹² The benefits of having persons cooperate with authorities or waive their trial rights are deemed significant enough to warrant a small reward to criminal defendants who make those benefits possible.¹⁹³

Similarly, there is evidence that society places a relatively high value on military service and charitable works. Military veterans receive “special consideration in a variety of contexts,”¹⁹⁴ including employment,¹⁹⁵ education,¹⁹⁶ naturalization,¹⁹⁷ voting rights,¹⁹⁸ medical care,¹⁹⁹ housing loans,²⁰⁰ and small business loans.²⁰¹ That special consideration is “given to

¹⁹² This is not to say motive is irrelevant to criminal punishment. To the contrary, it often plays an important role in determinations of liability and sentencing. *See* Hessick, *supra* note 86, at 93-109. I raise these examples simply to show the criminal justice system already rewards defendants with sentence reductions when those defendants are doubtlessly pursuing their own agendas.

¹⁹³ Reductions for charitable work and military service more resemble reductions for guilty pleas and substantial assistance, which likely benefit society as a whole, than reductions for family responsibilities, which likely only benefit the offender’s family. *See supra* note 172. One might argue, as Dan Markel has, that cooperation and guilty pleas are relevant to punishment decisions (and prior good works are not) because they bear directly on the social costs of the offender’s conduct. Markel, *supra* note 6, at 1455 n.104. This argument is persuasive with respect to guilty pleas, but less so with respect to cooperation. If we view the social costs of an offender’s crime as including both the harm to her victim (or society as a whole) as well as the costs associated with investigating and prosecuting the offender’s crime, then an offender’s decision to plead guilty spares the state the costs of prosecution and reduces the overall costs of her crime.

But providing substantial assistance to authorities does not reduce the costs of an *offender’s* crime; rather, it reduces the costs associated with investigating and prosecuting the crimes of *other individuals*. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (limiting the availability of sentence reductions to defendants who have “provided substantial assistance in the investigation or prosecution of *another person* who has committed an offense” (emphasis added)). Once we start to look at the costs of prosecuting other individuals, the punishment calculus begins to resemble the social accounting analysis that is discussed above. *See supra* note 172.

¹⁹⁴ Brief for National Veterans, *supra* note 147, at 10; *see also* MONT. CONST. art. II, § 35 (“The people declare that Montana servicemen, servicewomen, and veterans may be given special considerations determined by the legislature.”).

¹⁹⁵ *See* 5 U.S.C. §§ 2108, 3309 (2000); 38 U.S.C. § 4214 (2000).

¹⁹⁶ *See* 38 U.S.C. §§ 3001-3036.

¹⁹⁷ *See* 8 U.S.C. §§ 1439-1440 (2000).

¹⁹⁸ MISS. CODE ANN. § 99-19-37 (West 2006) (restoring the right of suffrage to persons who lost such right by reason of criminal conviction, but who thereafter honorably served in the military during World War I or World War II).

¹⁹⁹ *See* 38 U.S.C. §§ 1701-1774.

²⁰⁰ *See id.* §§ 3701-3775.

²⁰¹ *See id.* §§ 3117(b), 3701-3775; 15 U.S.C. § 633(b)(1) (2000).

veterans in large measure as recognition for the service they provided to our country.”²⁰² And public officials consistently commend members of the armed forces for the service they render to the country.²⁰³

Charitable works are similarly lauded. Public officials encourage individuals to undertake public service.²⁰⁴ Federally funded programs, such as the Peace Corps and AmeriCorps, have been created to facilitate such service.²⁰⁵ Participants in these programs receive special consideration, such as the cancellation of educational loans.²⁰⁶ In addition, individuals and organizations receive tax benefits to acknowledge, and to encourage, charitable donations.²⁰⁷ This public recognition and encouragement of military and charitable service suggests that the public places a high value on the service rendered by these individuals. Just as the government may encourage guilty pleas and cooperation with law enforcement through sentence mitigation, so too could military service and charitable works be encouraged through mitigating sentences based on prior good acts.

C. *Deterring Crime*

Using prior bad acts as an aggravating sentencing factor is consistent with a deterrence-based sentencing rationale, particularly specific deterrence.²⁰⁸ As one commentator explained:

If a review of the defendant’s record shows that he is an inveterate recidivist – that he has a strong and enduring inclination to break the law – then that fact shows that previous intervention by the state has not

²⁰² Janet Eriv, *Persistent Misconceptions: A Response to Robert Hammel*, 23 *FORDHAM URB. L.J.* 1219, 1231 (1996).

²⁰³ See, e.g., President George W. Bush, President Commemorates Veterans Day, Discusses War on Terror (Nov. 11, 2005), available at <http://www.whitehouse.gov/news/releases/2005/11/20051111-1.html>; Senator James Webb, Remarks of James Webb at the Confederate Memorial (June 3, 1990), available at <http://www.jameswebb.com/speeches/6-3-90-confedmemorial.htm>.

²⁰⁴ See, e.g., Brian Burnes, *A Lasting Legacy: More Than 30 Years After Kennedy Established It, Peace Corps Still Performing Valuable Service*, *DALLAS MORNING NEWS*, Nov. 28, 1993, at 40A; Wayne Washington, *Bush Tour Touts Volunteerism in N.C. Stop, Touts His Freedom Corps*, *BOSTON GLOBE*, Jan. 31, 2002, at A2.

²⁰⁵ See Peace Corps Act, 22 U.S.C. §§ 2501-2523 (2000); National and Community Service Act of 1990, 42 U.S.C. §§ 12571-12595 (2000) (creating AmeriCorps); Domestic Volunteer Service Act of 1973, 42 U.S.C. §§ 4950-5091 (2000); see also 10 U.S.C. § 510 (2006) (creating an incentive program for military and other national service).

²⁰⁶ See 20 U.S.C. § 1087ee(2)(D)-(E) (2000) (canceling loans for qualifying members of the armed services serving in “an area of hostilities” and for volunteers under the Peace Corps Act or the Domestic Volunteer Service Act of 1973).

²⁰⁷ See I.R.C. § 170 (2000).

²⁰⁸ MICHAEL D. MALTZ, *RECIDIVISM* 11 (1984) (“*Specific* (or individual) *deterrence* is the reduction in criminal activity by specific offenders, as a direct consequence of their fear of incarceration or some other sanction.”).

deterred him from criminal activity and that more severe punishment is warranted in order to deter him from future criminal conduct.²⁰⁹

While this specific deterrence argument seems quite convincing at first blush, there are reasons to discount the assumption that deterrence is augmented by increasing sentences based on prior convictions. First, there is substantial evidence suggesting that incremental deterrence – the idea that an individual will be more dissuaded from committing a crime as the expected punishment increases – is not as effective as it might seem.²¹⁰ As Paul Robinson and John Darley have explained, although lawmakers generally believe they can create optimal deterrence by altering the severity of criminal sentences, “studies suggest that this aspect of the cost-benefit balance is neither simple nor predictable.”²¹¹

Second, the data that has been used to justify longer sentences for recidivists fails to demonstrate conclusively that increasing penalties for habitual offenders actually deters the offenders from committing future crimes. Repeat offenders continue to offend at higher levels despite the increased penalties imposed by habitual offender legislation.²¹² Of course, it is possible that these

²⁰⁹ Sendor, *supra* note 141, at 127.

²¹⁰ See 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, 61-62 (2003) (describing one study of white-collar offenders which showed no difference in the recidivism rates between similar offenders who received prison terms and those who received probation, and commenting that “if a deterrent effect could not be found with this group of offenders, who are generally considered the most rational and calculating, finding such an effect for other types of crime is unlikely”); Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2387-88 (1997) (examining the failure of traditional deterrence analysis to account for substitution effects); see also STITH & CABRANES, *supra* note 16, at 54 (“[N]either existing social science research nor the [U.S. Sentencing] Commission’s own research efforts . . . provide[] an empirical basis for the elaboration of provably ‘efficient’ sentencing rules.”).

²¹¹ Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954 (2003). Robinson and Darley point to studies suggesting that, as a prison term continues, its incremental effect is felt less by the offender over time while its cost to the state remains constant. *Id.* at 954-55, 994-95. They also note other difficulties with the deterrence rationale, including a lack of knowledge of specific rules by potential offenders, as well as the disproportionately high occurrence of conditions that interfere with rational decision-making (e.g., drug use and poor impulse control) in populations most at risk for criminal conduct. *Id.* at 954-56.

²¹² For example, the U.S. Sentencing Commission report of recidivism rates demonstrated that an offender’s criminal history was correlated with likelihood of future offenses. MEASURING RECIDIVISM, *supra* note 16, at 6-8. As discussed above, the Federal Sentencing Guidelines impose significant additional penalties on repeat offenders – which, according to the increased specific deterrence theory, should reduce their future criminality – yet various reports and scholarship demonstrated that these offenders continue to reoffend at high levels. See *supra* notes 15-16, 143 and accompanying text.

repeat offenders would offend at *even higher* levels if their criminal history did not increase their expected penalties.²¹³ Unfortunately, the evidence on this topic is far from clear. For example, in the wake of California's adoption of the "three-strikes" legislation – which doubles the penalties for offenders with a prior "strike" and subjects third-time felons to life sentences²¹⁴ – conflicting accounts emerged regarding whether the law had resulted in lower crime rates for repeat offenders. Some studies concluded that the legislation deters recidivism,²¹⁵ while others concluded that the deterrence has been negligible.²¹⁶

Deterrence, as a sentencing rationale, provides a possible distinction between prior good and bad acts – a sentence reduction, as opposed to a sentence increase, might weaken the deterrent effect of the punishment and result in more crime.²¹⁷ Several courts have suggested that their denials of sentence reductions for prior good acts were, at least in part, based on concern that a reduction would send the wrong message – i.e., encourage lawbreaking or undermine deterrence.²¹⁸ We need not worry about undermining the deterrent effect of punishment when we articulate aggravating sentencing factors *ex ante* because aggravating factors lengthen sentences and thus arguably increase deterrence.²¹⁹ But, the argument goes, if we tell people we will punish them less for committing a crime if they have performed prior good acts, then we weaken the deterrent effects of the law for those who have already performed good acts.²²⁰

²¹³ Cf. Franklin E. Zimring & Sam Kamin, *Facts, Fallacies, and California's Three Strikes*, 40 DUQ. L. REV. 605, 606 (2002).

²¹⁴ *Ewing v. California*, 538 U.S. 11, 15-16 (2003) (O'Connor, J., plurality opinion).

²¹⁵ See, e.g., Naomi Harlin Goodno, *Career Criminals Targeted: The Verdict Is In, California's Three Strikes Law Proves Effective*, 37 GOLDEN GATE U. L. REV. 461, 469-71 (2007).

²¹⁶ One study of the legislation found that "the share of arrests attributable to the second strike group did not change" after the adoption of the legislation and that "those eligible for the most serious sentences, the third strike group, declined from only 3.3% of all arrests to 2.7% of all arrests." Zimring & Kamin, *supra* note 213, at 606 (citing ZIMRING ET AL., *CRIME AND PUNISHMENT IN CALIFORNIA: THE IMPACT OF THREE STRIKES AND YOU'RE OUT* (1999)).

²¹⁷ This potential distinction draws on ideas articulated in Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

²¹⁸ See *United States v. Medina*, 221 F. App'x 231, 234 (4th Cir. 2007), *cert. granted and judgment vacated*, 128 S. Ct. 863 (2008) (mem.); *United States v. Scheiner*, 873 F. Supp. 927, 934 (E.D. Pa. 1995).

²¹⁹ This statement assumes we are confident that the ordinary (non-aggravated) sentence length will sufficiently deter most actors.

²²⁰ Cf. Dan-Cohen, *supra* note 217, at 630-35 (exploring this idea in the context of duress).

Two responses to this argument leap to mind. First, the argument rests on the assumption that our current sentences are at the level of optimal deterrence – i.e., present punishments are at a level where the benefits of deterrence are perfectly balanced against the costs of imprisonment.²²¹ The validity of this assumption is dubious, as it is widely recognized that our present state of knowledge regarding deterrence is not sufficient to make fine distinctions between offenses and offenders.²²²

Second, even if we accept this argument, it would place significant limits on determinate sentencing systems. Specifically, the ability to craft individualized sentences that reflect the retributive value of various mitigating factors would be trumped by deterrent concerns. Even those commentators who have championed deterrence's role in punishment appear unwilling to increase sentences much beyond what a retributive or desert theory of punishment would permit in order to maximize deterrence.²²³ Furthermore, some commentators have suggested that a punishment system that deviates too far from public sentiment regarding appropriate sentences may in fact decrease the overall deterrent effect of the criminal law.²²⁴ Thus, a sentencing system that continuously increases punishment levels in the attempt to increase deterrence

²²¹ See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF THE LAW* 500 (2004).

²²² See, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 *HOFSTRA L. REV.* 1, 17 (1988) (“The empirical work with respect to deterrence, however, could not provide the Commission with the specific information necessary to draft detailed sentences with respect to most forms of criminal behavior.” (citing Henry Braun, *Statistical Estimation of the Probability of Detection of Certain Crimes* (July 14, 1988) (draft paper prepared for U.S. Sentencing Commission, on file with *Hofstra Law Review*))).

²²³ See, e.g., SHAVELL, *supra* note 221, at 483 (proposing that “sanctions should be scaled upward to reflect the likelihood of escaping liability,” but recognizing “the notion that the magnitude of sanctions should be proportional to the gravity of a bad act is a widely held notion of fairness, and this notion does not accord weight to the likelihood of escape from sanctions.”); *id.* at 539 (“From the deterrence perspective, for example, we may want to impose a ten-year prison sentence on a car thief because the odds of finding him are quite low, but the demand for retribution against him may well limit the sentence to a lesser level.”); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 *STAN. L. REV.* 703, 748 (2005) (making a deterrence-based argument for capital punishment, but conceding that there may be “constraints of proportionality” that would prevent their argument from applying to unintentional killings).

²²⁴ Robinson & Darley, *supra* note 211, at 985-89 (contending that sentences that exceed a community's shared sense of justice have the potential to cause additional crime due to perceptions of injustice); see also Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 *U. CHI. L. REV.* 607, 644-45 (2000) (describing the reluctance of agents of the criminal justice system to discharge their duties when it would overturn a prevalent social norm).

may have the ultimate effect of decreasing the overall effectiveness of the criminal law at deterring crime.²²⁵

In addition to the concern about weakened deterrence, one might argue that individuals may perform military service or charitable works in anticipation of reducing their punishment for future criminal activity.²²⁶ For example, an organized crime boss may volunteer at a soup kitchen in order to decrease any future sentence in the event she is convicted for her criminal activities. Of course, such scenarios are likely only if the number or quality of good acts required is low and the sentence reduction is high. Even assuming, however, that an explicit sentence reduction for prior good acts would encourage such behavior, that concern is not a reason to withhold mitigation. If the sentence reduction for prior good works is appropriately calibrated to reflect the benefit that society obtains from military service or charitable works, then the offender should receive a sentence reduction even if the prior good acts were performed solely in anticipation of a reduction in sentence.²²⁷

This utilitarian balancing position may seem counter-intuitive – treating good acts as a mitigating factor has traditionally been justified in terms of a reward for previous actions or as a moral reckoning for an individual.²²⁸ But this traditional account of good acts is too thin. The relevance of charitable work and military service to the criminal justice system is not limited to sentence mitigation; they also sometimes appear as forms of punishment. “Community service” is often imposed as a sentence, normally framed in terms of hours that low-level offenders must perform.²²⁹ The practice is well known, and the sentence itself is viewed as punishment.²³⁰ Perhaps less well-known is

²²⁵ See Hessick, *supra* note 86, at 117-18; Leslie Sebba, *Mitigation of Sentence in Order to Deter?*, 6 *MONASH U. L. REV.* 268, 293 (1980).

²²⁶ See Posting of nn489 to Volokh Conspiracy, <http://volokh.com/posts/1161895859.shtml> (Oct. 26, 2006, 7:59) (“[G]ood deeds’ [may] start to look like the more corrupt kind of medieval indulgences, allowing people to reduce their punishment for crimes they haven’t even committed yet.”).

²²⁷ For concerns about whether an individual’s motives in performing good acts should matter, see *supra* notes 187-193 and accompanying text.

²²⁸ See authorities cited *supra* note 55.

²²⁹ See Robert M. Carter et al., *Community Service: A Review of the Basic Issues*, 51 *FED. PROBATION* 4, 4 (1987); see also N.H. *REV. STAT. ANN.* § 651:36-a (2007) (authorizing the superintendents of county correctional facilities to have prisoners perform “uncompensated public service at municipality-owned grounds or property”); VA. *CODE ANN.* § 19.2-305.1(A) (2008) (requiring the performance of community service or restitution prior to probation and/or sentence suspension following a conviction for a crime which resulted in property loss or damage).

²³⁰ See Carter et al., *supra* note 229, at 4. But see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591, 625-30 (1996) (arguing that community service as punishment creates a form of dissonance because we ordinarily admire persons who engage in such activities, and thus it is difficult for members of society to believe that law genuinely

the practice of permitting convicted offenders to join the military rather than serve a term in prison.²³¹ (Although those who have seen *The Dirty Dozen*²³² may be familiar with the practice.) Other examples of military service in place of incarceration can be found in colonial Virginia,²³³ and during the Civil War.²³⁴ If community work or military service can serve as punishment *after* a defendant is convicted of a crime,²³⁵ then – just as a convicted defendant can receive credit for the time she spends incarcerated pending trial²³⁶ – it would be consistent to give a defendant credit for the time she has spent performing charitable work or military service before her conviction. It would arguably be *inconsistent* to say that decreasing an offender’s sentence for her prior good acts would weaken the deterrent effect of the criminal law in light of the fact that military service and community service *can serve as substitutes for* traditional punishment.

means to condemn persons when it orders them to perform such services as criminal punishments).

²³¹ See STEVE DiLELLA, CONN. GEN. ASSEMBLY, FIRST-TIME NONVIOLENT OFFENDERS RECEIVING MILITARY SERVICE INSTEAD OF PRISON TIME I (2005), <http://www.cga.ct.gov/2005/rpt/2005-R-0200.htm> (reporting that there appear to be no state laws which “allow judges to sentence first-time nonviolent offenders to military service instead of imprisonment,” but that the practice may have occurred “during the World War II and Vietnam eras”); see also *supra* note 198; cf. David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 258-59 (2004) (proposing such a program for federal drug offenders).

²³² THE DIRTY DOZEN (MGM 1967). In the movie, the U.S. Army assigns a maverick officer to train a dozen GI convicts to undertake a near-suicidal mission. The convicts are told that if they succeed in this mission, they will receive pardons for their crimes. See Kevin Thomas, ‘Dirty Dozen’ at Paramount, L.A. TIMES, June 28, 1967, at E9.

²³³ HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 110, 171 (1965).

²³⁴ See Abbott, *supra* note 19, at 42.

²³⁵ Current regulations for several of the armed forces indicate that they do not accept recruits as an alternative to criminal prosecution, but anecdotal evidence suggests that the practice continues. Compare Rod Powers, *Join the Military or Go to Jail?*, ABOUT.COM, <http://usmilitary.about.com/od/joiningthemilitary/a/joinprison.htm> (last visited Oct. 16, 2008) (quoting relevant regulations), and Jeff Schogol, *Judge Said Army or Jail, But Military Doesn’t Want Him*, STARS & STRIPES, Feb. 3, 2006, <http://stripes.com/article.asp?section=104&article=33904&archive=true>, with DiLELLA, *supra* note 231, at 1, and Man With Pot Given Choice: Jail or Military, KRON.COM, Nov. 14, 2004, <http://www.kron.com/Global/story.asp?S=2579902> (recounting a California judge’s decision to allow a convicted offender the choice between enlistment and jail as punishment for marijuana possession).

²³⁶ See 18 U.S.C. § 3585(b) (2000) (“A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . that has not been credited against another sentence.”).

D. *Line-Drawing Concerns*

One could object to the consideration of good acts at sentencing by making a line-drawing argument: while the designation of certain conduct as illegal provides a bright line for identifying prior bad acts, no similarly clear delineation of prior good acts exists.²³⁷ There is a basic kernel of truth in this argument – in aggravating sentences only for conduct that has previously been identified as unlawful, bad acts do not require many of the quantitative and qualitative judgments that would inevitably follow the recognition of prior good acts at sentencing. There are, however, two reasons to discount the line-drawing argument.

First, there are some categories of activities that most citizens can largely agree constitute undeniably “good acts.” Heroic military service and regular charitable work are activities that our society otherwise celebrates and rewards.²³⁸ Whatever line-drawing concerns might arise in the context of quantity or quality, there are some acts that would undoubtedly qualify as good acts – the serviceman who has been awarded a medal for bravery, the citizen who places her own life at risk to save a drowning child, or the doctor who travels to a war-torn country to provide medical care for refugees. It makes little sense to refuse to mitigate the sentences of these offenders on the theory that other cases might prove difficult. Moreover, in order to retain symmetry between good acts and bad acts as sentencing factors,²³⁹ only those good acts which materially distinguish one offender from another should qualify, thus limiting the scope of the line drawing inquiry.²⁴⁰

Second, there are similar line-drawing concerns involving prior bad acts; for example: whether to “count” uncharged criminal conduct²⁴¹ or acquitted conduct;²⁴² or whether to “count” prior convictions that are very old,²⁴³ not very serious,²⁴⁴ have been pardoned,²⁴⁵ were obtained without some procedural

²³⁷ See Henning, *supra* note 6, at 190 (“Anything can be a ‘good work,’ so it is impossible to define that term as a shortcut to figuring out what counts, much less how it should be counted.”).

²³⁸ See *supra* notes 194-207 and accompanying text; see also Kahan, *supra* note 230, at 629.

²³⁹ See *supra* text accompanying notes 119-131.

²⁴⁰ See *supra* text accompanying notes 123-124. Admittedly, sentencing systems have sometimes struggled with the question of which offenders are appropriately compared for purposes of sentencing adjustments. See *supra* notes 52-54 and accompanying text.

²⁴¹ See *supra* note 15.

²⁴² See *supra* note 15.

²⁴³ See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(e) (2007).

²⁴⁴ See, e.g., *id.* § 4A1.2(c); *United States v. Williams*, 462 F. Supp. 2d 342, 343-44 (E.D.N.Y. 2006).

²⁴⁵ See U.S. SENTENCING GUIDELINES MANUAL § 4A1.2, cmt. nn.6 & 10.

protection,²⁴⁶ or involved statutes that have since been repealed or held unconstitutional.²⁴⁷ Just as lines have been drawn in the context of bad acts, so too can they be drawn in the context of good acts. Indeed, courts have already confronted and decided some line-drawing issues relating to good acts, such as the quality and quantity of good acts an individual must have performed,²⁴⁸ how far in the past the acts may have occurred,²⁴⁹ and whether to allow repeated mitigation for the same good act.²⁵⁰ Thus, although identification and quantification will undoubtedly entail more work with respect to good acts than to bad, line-drawing raises questions about administrability issues rather than the normative issue of whether prior good acts should be considered at sentencing.²⁵¹

The line-drawing argument is most persuasive if we think that consensus regarding good acts will be difficult – if not impossible – to achieve. Certainly, there are at least some people who do not think that heroic military service should receive any further reward than it already does. But, on the other hand, there are undoubtedly people who think that some of our criminal prohibitions are inappropriate. We punish repeat drug offenders, for example, more harshly than first time offenders, even though we do not have a complete public consensus that the use or abuse of certain substances should be illegal. And while some members of society believe that our criminal laws are over-inclusive, others undoubtedly believe that the criminal laws are under-inclusive. But this lack of consensus does not prevent any American jurisdiction from increasing sentences based on prior criminal conduct. It is enough, under our current system, that our political process has identified certain action as illegal and that a particular offender has committed such an action on a prior occasion – that “line” is sufficient to aggravate an offender’s sentence. A system committed to sentencing symmetry could simply submit the identification of good acts to the same political process,²⁵² so that the line-

²⁴⁶ See, e.g., *Custis v. United States*, 511 U.S. 485, 485 (1994); *People v. Nguyen*, 62 Cal. Rptr. 3d 255, 281 (Ct. App. 2007), review granted, *depublished by* 169 P.3d 882 (Cal. 2007).

²⁴⁷ See, e.g., *United States v. Akers*, 409 F.3d 904, 905-06 (8th Cir. 2005) (per curiam); *United States v. Cox*, 245 F.3d 126, 130-32 (2d Cir. 2001).

²⁴⁸ See authorities cited *supra* note 131; see also *State v. Kayer*, 984 P.2d 31, 47 (Ariz. 1999) (discussing the length of military service needed for that service to qualify as a mitigating factor during sentencing).

²⁴⁹ See, e.g., *United States v. Canova*, 412 F.3d 331, 359 (2d Cir. 2005); *United States v. Jared*, 50 F. App’x 259, 261 (6th Cir. 2002); *United States v. Given*, 164 F.3d 389, 395 (7th Cir. 1999).

²⁵⁰ *Allen v. State*, 453 N.E.2d 1011, 1013 (Ind. 1983).

²⁵¹ For a brief discussion about administrability issues, see *infra* text accompanying notes 277-278.

²⁵² Of course, political systems currently have the ability to submit the identification of good acts to the political process. Indeed, as discussed above, the state of North Carolina appears to have done precisely this and concluded that an honorable discharge from the

drawing objection would not present a principled justification for treating prior bad acts as aggravating while not treating prior good acts as mitigating.

E. *Victim-Centered Punishment*

Another retribution-based objection that could be raised against considering good acts centers on the victim of an offender's crime.²⁵³ Put simply, this objection notes that victims may be very unhappy if a person who caused them harm is given less punishment on the basis of other, unrelated laudable acts.

At first glance, a victim-centered objection may provide a meaningful distinction between good and bad acts, because some victims of violent crimes appear more outraged when they have been victimized by a recidivist.²⁵⁴ But the objection begins to unravel under closer inspection.

Determining the merits of the victim-centered objection requires a definition of punishment that centers on the victim. One possible version of the victim-centered objection refers solely to the wishes of the victim. Such a theory presumes the victim would wish to aggravate an offender's sentence based on bad acts but not to mitigate based on good acts. One problem with this version of the victim-centered objection is that it suggests sentencing systems should only aggravate and not mitigate sentences because the victim would likely be outraged no matter the reason for the sentence reduction.²⁵⁵ Such a system would be unable to reduce sentences for offenders who plead guilty or provide assistance to law enforcement – practices which are quite common in modern sentencing systems.²⁵⁶ Another problem with this version is that it grossly over-generalizes what victims want. While some victims appear to favor harsher sanctions for offenders, others seem to embrace notions of forgiveness and mercy.²⁵⁷ If the objection is based solely on a victim's wishes and does

military is the appropriate line to draw regarding good act mitigation. *See supra* notes 23-25 and accompanying text. That other political systems have not chosen to draw such lines should not be interpreted as a general consensus that good acts ought not mitigate punishment. As discussed in Part II.A, the political process seems to be much more adept at identifying aggravating than mitigating circumstances. To the extent a system has failed to identify good acts as a potential *category* of mitigation, we cannot plausibly say a consensus has been reached to exclude specific types of good acts as worthy of mitigation.

²⁵³ This objection may not apply to so-called "victimless crimes."

²⁵⁴ California's Three Strikes Law and various sex offender registry laws can be traced to efforts by victim families who were outraged that their children were not only victimized, but also specifically victimized by recidivists. *See* Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 *IND. L.J.* 315, 315-16 (2001); Michael Vitiello, "Three Strikes" and the Romero Case: *The Supreme Court Restores Democracy*, 30 *LOY. L.A. L. REV.* 1643, 1653-61 (1997).

²⁵⁵ This is not unlike the flaw with the deterrence argument discussed above in Part III.C. *See supra* text accompanying notes 223-225.

²⁵⁶ *See, e.g., supra* notes 190-191.

²⁵⁷ *See, e.g.,* Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 *OHIO ST. J. CRIM. L.* 329, 336 (2007); *see also* Susan Bandes, *When Victims Seek Closure: Forgiveness*,

not inquire into the wisdom or validity of those wishes, then some offenders would receive aggravated sentences and others would receive mitigated sentences; only the wishes of the individual victims would distinguish between them.²⁵⁸

A second possible version of the victim-centered objection would rely on the harm the victim has suffered.²⁵⁹ An offender who has committed prior good acts has visited the same amount of harm on her victim as the offender who has committed no prior good acts, and thus mitigation would be inappropriate. But this version of the objection should apply equally to prior bad acts; an offender who has committed prior bad acts visits no additional harm on her victim than the offender who has committed no prior bad acts. Thus, victim harm does not appear to provide a meaningful distinction between prior good acts and prior bad acts as appropriate sentencing factors. In response, one might say that a victim of a recidivist has suffered more because society failed to protect her against an offender who had already been identified as posing a threat to others. However, this response focuses on how *society* has wronged the victim, rather than how the offender did.

A more sophisticated version of the victim-centered objection would recast concern about victims' wishes as concern about what messages society expresses through punishment decisions. This "expressive" theory of retribution, most famously championed by Jean Hampton, views punishment of an offender as vindication of the victim.²⁶⁰ Under this theory, an offender is believed to have wronged the victim not simply by causing her harm, but also by conveying a message to the victim that she is worth less than the offender.²⁶¹ An expressivist punishes an offender in order to "vindicate the value of the victim denied by the [offender's] action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their

Vengeance, and the Role of the Government, 27 *FORDHAM URB. L.J.* 1599, 1599-1601 (2000); Vitiello, *supra* note 254, at 1659-61.

²⁵⁸ This different treatment based on victim wishes may arguably run afoul of "the modern criminal law's preference for punishment equality." Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 *WASH. U. L. REV.* 343, 389 (2007). *But see* Bibas, *supra* note 257, at 347 (acknowledging this concern, but responding that victim forgiveness is a "neutral metric[]" that may be appropriately used "to structure and guide discretion").

²⁵⁹ Criminal law ordinarily evaluates the seriousness of a crime according to two factors: the harm done by the offense and the offender's culpability. *See* Ashworth, *supra* 167, at 182. For a brief discussion on the importance of victim harm in punishment decisions, see Hessick, *supra* note 258, at 391-92.

²⁶⁰ Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1686 (1992).

²⁶¹ *Id.* at 1671-78; *see also* Jeffrie G. Murphy, *Forgiveness and Resentment*, in *FORGIVENESS AND MERCY* 14, 14-34 (Jeffrie G. Murphy & Jean Hampton eds., 1988).

humanity.”²⁶² In other words, an offender’s crime suggests that the offender is more important than the victim; and society punishes the offender in order to demonstrate to the offender, the victim, and the general public that the victim is just as important as the offender.

Under this theory of punishment, any mitigation for prior good acts may arguably convey the message that society values an offender’s good acts more than it reviles her message of worthlessness to the victim.²⁶³ This theory – like the wishes of the victim theory – potentially denies consideration of many, if not all, mitigating factors. Jean Hampton, however, has emphasized that the expressive theory still permits mitigation when society has treated the offender “in a way that has lowered [her] (rather dramatically) in value relative to others in society.”²⁶⁴

Because expressionists have recognized that issues external to the offender’s conduct towards the victim may be relevant to punishment decisions, treating prior good acts as mitigating may be consistent with this view of victim-centered punishment. If an offender has previously performed laudable tasks that others do not wish to perform and that have benefited society as a whole, then the offender has arguably softened her crime’s message that she is superior to her victim or to anyone else in society. Like all other members of society, the victim has benefited – at least indirectly – from the offender’s prior good acts. Thus, while the harm of the crime is the same, society could plausibly reduce punishment for the offender who has committed these prior good acts on the theory that the prior good acts diminish the overall message of superiority from the offender.

F. *Race and Class Effects*

One might also argue that taking account of prior good acts may have undesirable class or race effects. This concern appears to motivate many courts’ reluctance to mitigate sentences based on charitable works of white-collar defendants.²⁶⁵ Especially in the case of charitable works, it seems

²⁶² Hampton, *supra* note 260, at 1686.

²⁶³ *Id.* at 1691. Hampton explains:

From a retributive point of view, punishments that are too lenient are as bad as (and sometimes worse than) punishments that are too severe. When a serious wrongdoer gets a mere slap on the wrist after performing an act that diminished her victim, the punisher ratifies the view that the victim is indeed the sort of being who is low relative to the wrongdoer.

Id.

²⁶⁴ *Id.* at 1698-99. Hampton’s discussion of mitigation is limited to “the appropriateness of punishment for people who commit crimes who are from impoverished backgrounds, and whose crimes are largely explained by those backgrounds.” *Id.* at 1698.

²⁶⁵ See *United States v. Thurston*, 358 F.3d 51, 80 (1st Cir. 2004) (“Those who donate large sums because they can should not gain an advantage over those who do not make such donations because they cannot.”), *cert. granted and judgment vacated*, 543 U.S. 1097 (2005) (mem.). Other courts have expressed similar concerns that allowing sentencing

intuitive that persons who need not worry about their own welfare or the welfare of their immediate family may be more likely to devote their time and efforts to helping others.²⁶⁶ Also, good works in poorer communities may occur more informally and thus may be more difficult to prove at sentencing.²⁶⁷

The race and class effects argument does not appear to apply to military service, at least not uniformly. African Americans enlist in the military at disproportionately high rates,²⁶⁸ while Hispanics are under-represented in the armed forces.²⁶⁹ Lower socioeconomic status is also highly correlated with military enlistment, as “studies show that those with lower family incomes, larger family sizes (more sharing of scarce resources), and less-educated parents are more likely to join the military.”²⁷⁰

Although military enlistment data undercuts the race and class effect argument, statistics on volunteer work in the United States during 2006 confirm different volunteer rates based on race and class that support the argument. Approximately 28.3% of all white Americans performed “unpaid volunteer activities for an organization at any point from September 1, 2005, through September 2006,” as compared to 19.2% of African Americans, 18.5% of Asian Americans, and 13.9% of Hispanic or Latino Americans.²⁷¹ More

reductions for good works of white-collar defendants may be tantamount to considering a defendant’s socioeconomic status. *See, e.g.*, *United States v. Haversat*, 22 F.3d 790, 796 (8th Cir. 1994); *United States v. McHan*, 920 F.2d 244, 247-48 (4th Cir. 1990); *United States v. Nava-Sotelo*, 232 F. Supp. 2d 1269, 1285 (D.N.M. 2002), *rev’d on other grounds*, 354 F.3d 1202 (10th Cir. 2003); *United States v. Scheiner*, 873 F. Supp. 927, 934-35 (E.D. Pa. 1995); *see also United States v. Serafini*, 233 F.3d 758, 778 (3d Cir. 2000) (Rosenn, J., dissenting); WHEELER, ET AL., *supra* note 10, at 105-08; Henning, *supra* note 6, at 189 (“One impetus for adoption of the Sentencing Reform Act was the perception that certain types of defendants, mostly of the white-collar variety, were the beneficiaries of lenient sentencing, whereas those charged with other types of crimes, many of them minority group members, received much more drastic punishments.”).

²⁶⁶ Henning, *supra* note 6, at 190 (“In looking at a defendant’s works . . . it is important to consider the pressure a middle-class person faces in earning a sufficient living and, in many instances, supporting a family, while still performing good works in the community.”).

²⁶⁷ It may be possible to alleviate this concern by creating a definition of prior good acts that is sufficiently flexible to account for informal good works; however a definition that is too flexible will undoubtedly create line-drawing problems. *See supra* Part III.D.

²⁶⁸ Meredith A. Kleykamp, *College, Jobs, or the Military? Enlistment During a Time of War*, 87 SOC. SCI. Q. 272, 276 (2006).

²⁶⁹ *Id.* at 277.

²⁷⁰ *Id.*

²⁷¹ BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008, at 368 tbl.568 (2007), available at <http://www.census.gov/prod/2007pubs/08statab/socins.pdf>.

educated individuals also tended to volunteer at higher rates,²⁷² as did employed persons as compared to unemployed persons.²⁷³

Even if secondary race and class effects cut against accounting for prior good acts at sentencing, they do not provide a meaningful distinction that would justify a system that increases sentences for prior bad acts but does not decrease sentences for prior good acts. That is because “race is significantly correlated with recorded criminality,”²⁷⁴ and both employment status and education level achieved are also predictive of recidivism.²⁷⁵

Because accounting for prior bad acts at sentencing almost certainly results in undesirable race or class effects as well, secondary race and class effects are not a principled way to distinguish between good and bad acts as sentencing factors. Of course, one could argue that accounting for prior good acts would only exacerbate the undesirable race and class effects that are already present in a system that accounts for bad acts. But that is not a distinction between good and bad acts. If a system is willing to tolerate a certain amount of race and class effects, there is no reason to think those effects should be permitted for aggravating sentencing factors but not for mitigating sentencing factors. To the contrary, because our system over-identifies aggravating punishment factors,²⁷⁶ it might make sense to counterbalance that over-identification by incorporating any tolerance of secondary race and class effects into mitigating rather than aggravating sentencing factors.

CONCLUSION

There may be good reasons not to reduce an offender’s sentence on the basis of her prior good acts. For example, such a practice entails an inquiry into events unconnected with the offense of conviction and may have secondary race and class effects. Convincing as these arguments may be, they apply with equal force to the practice of increasing an offender’s sentence on the basis of her prior bad acts – i.e., convictions and uncharged conduct. All U.S. jurisdictions increase an offender’s sentence for prior bad acts. Increasing an offender’s sentence for bad acts, while refusing to decrease her sentence for good acts, creates an imbalance in sentencing policy. Such an imbalance is

²⁷² *Id.* 43.3% of college graduates performed volunteer work, as compared to 30.9% of persons who had completed some college but not obtained a bachelor’s degree, 19.2% of persons who graduated high school but did not attend college, and 9.3% of persons with less than a high school diploma. *Id.*

²⁷³ *Id.* 28.7% of persons employed in the civilian work force performed volunteer work, as compared to 23.8% of persons unemployed. *Id.*

²⁷⁴ Michael Tonry, *Selective Incapacitation: The Debate over Its Ethics*, in *PRINCIPLED SENTENCING* 165, 176 (Andrew von Hirsch & Andrew Ashworth eds., 1992); *see also* *FIRST OFFENDER*, *supra* note 149, at 21 exhibit 1; sources cited *supra* note 152.

²⁷⁵ *See supra* notes 153-154.

²⁷⁶ *See supra* text accompanying notes 91-99.

cause for concern in light of the asymmetrical political balance inherent in sentencing and other criminal justice issues.

It is *possible* to distinguish between good and bad acts as sentencing factors – as is explained in the Sections on recidivism rates and deterrence – but each potential distinction suffers its own shortcomings. Either the distinction is insufficiently supported by empirical data, or there are reasons to doubt the distinction is based on principles and arguments that are consistent with modern sentencing systems.

Assuming that the normative question posed by this Article can be answered in the affirmative – i.e., a punishment system that increases an offender's sentence on the basis of her prior bad acts should also decrease an offender's sentence on the basis of her prior good acts – then the next question is one of practical implementation and administrability. While this Article does not purport to answer the questions associated with administrability, a few brief remarks on the issue are appropriate.

How a system ought to account for an offender's prior good acts depends largely on the type of sentencing system already in place. A sentencing system may be discretionary, determinate, or any number of gradations between the two.²⁷⁷ In a discretionary system, the practical hurdles to accounting for good acts are minimal; good acts need only be identified as an appropriate mitigating sentencing factor, and the decision maker is free either to accept or reject evidence of prior good acts as relevant to a defendant's sentence.

Determinate sentencing systems pose greater administrative challenges. A determinate system that allows little discretion for its decision makers will have to specify the precise nature of good acts that will be considered mitigating, as well as the appropriate reduction that such good acts will entail. For example, the Federal Sentencing Guidelines, which leave little discretion for individual sentencing judges, would presumably provide great detail about the types of good acts that qualify – e.g., an honorable military discharge, at least two years of volunteer work in excess of the national average – and they would likely set an inflexible reduction – e.g., decrease the offense level by two levels for all qualifying offenders.²⁷⁸ The precise quantity and quality of prior good works necessary to qualify for mitigation, as well as the precise amount of the resulting sentence decrease, could be determined in the same manner as other sentencing adjustments currently in place.

There is a legislative consensus in this country that an offender's sentence should be increased if she has previously committed crimes. As explained

²⁷⁷ See Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 156-60 (2005) (discussing the “continuum of possibilities for the design of sentencing systems”).

²⁷⁸ Such a detailed description and inflexible reduction would mirror other mitigating sentencing provisions in the Federal Guidelines. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2007) (allowing mitigation for a defendant's minor or minimal role in an offense involving multiple participants).

above, it is difficult to identify a similar consensus to decrease an offender's sentence on the basis of her prior good acts. Unless further data can demonstrate that there is no meaningful correlation between good acts and recidivism, this lack of symmetry in the treatment of good and bad acts at sentencing is difficult to justify. That difficulty suggests sentencing schemes which account only for prior bad acts and not prior good acts have failed to give adequate consideration to mitigating sentencing factors.