WHY ARE ONLY BAD ACTS GOOD SENTENCING FACTORS?
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ABSTRACT
Few pieces of information play a larger role in determining a criminal offender’s sentence than her prior criminal history. The notion that an offender’s prior bad acts ought to be considered an aggravating sentencing factor enjoys near-universal acceptance. But fewer jurisdictions appear to consider an offender’s prior good acts (such as honorable military service or charitable works) as a mitigating factor at sentencing. This Article discusses the potential relationship 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.

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INTRODUCTION

During trial, a criminal defendant’s prior bad acts, such as previous convictions, are generally excluded from evidence. 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.

In contrast to evidence of a defendant’s prior bad character (i.e., prior convictions), evidence of a defendant’s good character is almost always admissible at trial. A defendant is permitted to introduce this evidence in an attempt to establish that she did not commit the crime in question. Only if the defendant chooses to introduce such evidence may the prosecutor introduce evidence of bad character, and only then to rebut the evidence of good character. This evidentiary bias in favor of good character evidence at trial has a long history and is well settled.

But quite the opposite is true during the sentencing phase. At sentencing, prior convictions are not only considered relevant

1 Fed. R. Evid. 404(b). There are, of course, exceptions to this general rule, such as when a prior conviction is evidence of past pattern or practice, or when a defendant elects to testify in her own defense. 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, Admissibility of Character Evidence].
3 “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.” McCormick on Evidence, supra note 1, at § 191.
4 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 . . . And he may do this for any sort of offense charged, whether misdemeanor or felony, and no matter how strong the other evidence against him. Whether it should alone suffice to create reasonable doubt, has been the subject of differing judicial opinions in giving instructions to the jury.”) (emphasis in original); see also Charles T. McCormick, Handbook of the Law of Evidence 333 (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 (8th ed. 1887).
evidence to determine the proper 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 that 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, on occasion, 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. But such decisions have met with 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.\footnote{E.g., Andrew Ashworth, Sentencing and Criminal Justice 151 (3d ed. 2000); Dan Markel, Against Mercy, 88 Minn. L. Rev. 1421, 1437 (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. (forthcoming 2008), at 2 (arguing that “consideration of prior good works [is] an appropriate issue in deciding sentences” for white collar offenders); Douglas A. Berman, Should prior military service reduce a sentence?, Sentencing Law & Policy, Apr. 14, 2006, http://sentencing.typepad.com/sentencing_law_and_policy/2006/04/should_prior_mi.html (“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?”).}

This Article questions whether a system that increases offenders’ punishment on the basis of prior bad acts — that is prior convictions or uncharged criminal conduct — can justifiably refuse to decrease offenders’ 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. But there is insufficient evidence to determine whether there is a similar correlation between prior good acts and decreased recidivism.

The questions addressed in this Article are of a limited nature. The Article 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 address whether good acts are an appropriate sentencing factor and, only after that question is answered in the affirmative, turn to questions of practicability. Nor does the Article 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. But there are strong reasons to believe that 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 considered is a theory that assesses whether sentencing factors can be viewed on a spectrum. Where factors fall on either end of a spectrum, then sentencing symmetry supports the consideration of each factor — one as aggravating and the other as mitigating. A legislative presumption in favor of sentencing symmetry may result in sentencing systems that recognize not only the aggravating end of the sentencing spectrum, but also the mitigating features of opposite circumstances. The Section 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.

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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 judicial discretion is cabined by presumptive sentences or mandatory sentencing factors, 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 271 and accompanying text.
Part III examines whether, in light of the overwhelming legislative consensus that a prior bad act is aggravating, there is a principled reason to fail 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. Those reasons include (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, of these reasons, only the argument about recidivism appears to be a plausible justification for a sentencing system that accounts for prior bad acts but not prior good acts. However, while evidence about the correlation between prior convictions and future recidivism is well-documented, there does not appear to be sufficiently reliable 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. But there is reason to doubt that recidivism prediction is, in fact, 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. 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” is used to mean prior criminal acts, not actions that are simply undesirable or disfavored. And the term “prior good acts” is used to mean 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 own mother, to choose a simple example, is not the sort of factor that is ordinarily considered at sentencing.

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, Douglas A. Berman, Marc L. Miller & Ronald F. Wright, 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 that there is no available information about sentencing practices. Thousands of defendants are sentenced each year, and 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 limited statistical sentencing data is collected and disseminated by several sources, including the United States Sentencing Commission and the Bureau of Justice Statistics. Those are the sources from which this Section is drawn. However, 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 (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 defendants’ prior good and bad acts.

While some criminal laws prohibit behavior that may plausibly be described as private — such as prostitution or drug use — the criminal law more generally is better described as a prohibition on public wrongs. See generally Antony Duff, Answering for Crime 140-46 (2007). Thus, this definition of good acts as public
A. Prior Bad Acts

The state of the law with respect to prior bad acts is straightforward: prior convictions are widely recognized as an aggravating sentencing factor 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.” In the United States, habitual offender statutes — that is 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. Habitual offender penalties have proven resistant acts not only accurately reflects current sentencing practice, but also furthers sentencing symmetry. See infra notes 115-128 and accompanying text.

9 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.”).

10 See Note, Selective Incapacitation: Reducing Crime Through Predictions of Recidivism, 96 HARV. L. REV. 511, 511 n.1 (1982) [hereinafter 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); 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 or customary . . .’” 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 (Nathaniel B. Shurtleff, ed. 1644)); see also Parke v. Raley, 506 U.S. 20, 26 (1992) (“Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times.”); Graham v. West Virginia, 224 U.S. 616, 623 (1912) (noting that statutes providing for the increased punishment of repeat offenders “were enacted in Virginia and New York as early as 1796 and in Massachusetts in 1804”). 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).
to many judicial challenges.\textsuperscript{11} And there appears to be a public consensus that a prior conviction ought to result in a longer sentence.\textsuperscript{12}

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,\textsuperscript{13} 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.\textsuperscript{14} 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.\textsuperscript{15}

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\textsuperscript{11} See, e.g., McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895); see also Graham v. West Virginia, 224 U.S. 616, 623 (1912) (noting that 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”).
\textsuperscript{13} Parke v. Raley, 506 U.S. 20, 26-27 (1992) (citing Department of Justice, Statutes Requiring the Use of Criminal History Record Information (June 1991)).
\textsuperscript{14} For examples of courts permitting increased sentences on the basis of uncharged conduct, see Williams v. New York, 337 U.S. 241 (1949); New Jersey v. Green, 303 A.2d 312 (N.J. 1973); State v. Carico, 968 S.W.2d 280 (Tenn. 1998). For examples of courts permitting increased sentences on the basis of acquitted conduct, see United States v. Watts, 519 U.S. 148 (1997); State v. Clark, 197 S.W.3d 598 (Mo. 2006); People v. Dunlap, No. 217123, 2001 WL 776752, at *3 (Mich. App. Jan. 16, 2001); State v. Winfield, 23 S.W.3d 279, 282 (Tenn. 2000); see also USSG § 1B1.3(a).
\textsuperscript{15} See Kate Stith \& José Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 72 & 218 n.219 (1998); Durham, supra note 10, at 615. Guideline sentences are presented in a grid format: The vertical axis of the sentencing grid contains “offense levels,” which are “designed to quantify the seriousness of the instant offense.” U.S. Sentencing Commission, 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, the amount of actual or intended harm) to which the Guidelines manual assigns various values. See USSG, Ch. 2 (Offense Conduct), id. at 3 (Adjustments); see also Stith \& Cabranes, supra, at 67-71. The horizontal axis of the sentencing grid contains “criminal history
The practice of increasing an offender’s sentence on the basis of prior bad acts has occasionally been the subject of academic criticism. However, there is no reason to suspect that prior bad acts will lose their prominence in sentencing decisions any time in the near future.

B. Prior Good Acts

There are several historical accounts which indicate that prior good acts have traditionally been viewed as a mitigating factor. The practice of showing leniency to veterans dates back at least to the Civil War, and a 1644 report by 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.” There is also some evidence that military service or other previous good character categories, which are “designed to quantify the extent and recency of an offender’s past criminal behavior.” See USSG, Ch. 2 (Offense Conduct), id. at 3 (Adjustments); 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

16 See infra notes 163-164.
17 See Edith Abbott, Crime and the War, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 32, 43 (1918) (recounting a report from 1886 that “the number pardoned during the year was larger than usual and that a very large proportion of the pardons were issued to young men who were [in prison] ‘on first conviction and had just been disband[ed from the army]’”); Dane Archer & Rosemary Gartner, Violent Acts and Violent Times: A Comparative Approach to Postwar Homicide Rates, 41 AMER. SOCIO. REV. 937, 940 (1976) (noting that the practice of treating veterans arrested or convicted of certain crimes “with leniency because of their military service” “has existed for some time” and noting evidence of the practice from the Civil War and the First World War); see also ADRIAAN LANNI, LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS 59 (2006) (noting 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”).
18 “The General Court, too, should be able to mitigate the penalty in the case of good public servants, ‘out of respect to the publick [sic] good service which the delinquent hath done to the states in former times. So Solomon mitigated the punishment of Abiathar, for his service done to his father formerly (1 Kings, 2:26, 27),’” POWERS, supra note 10, at 451 (quoting 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND (Nathaniel B. Shurtleff, ed. 1644)).
evidence has, on occasion, resulted in acquittals\textsuperscript{19} or executive clemency.\textsuperscript{20}

Some states explicitly identify goods acts as a mitigating sentencing factor, but recognition of prior good acts as mitigation is not universal.\textsuperscript{21} 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,”\textsuperscript{22} or if she “has been a person of good character or has had a good reputation in the community.”\textsuperscript{23} If a defendant proves either of these mitigating factors (or other factors identified in the statute), the sentencing court must consider that factor in imposing sentence. 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.\textsuperscript{24}

\textsuperscript{19} See Betty B. Rosenbaum, \textit{The Relationship Between War and Crime in the United States}, \textit{30 J. Crim. L. & Criminology} (1931-1951) 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”).

\textsuperscript{20} See Charles Shanor & Marc Miller, \textit{Pardon Us: Systematic Presidential Pardons}, 13 \textit{Fed. Sent’g Rep.} 139, 140 (2001) (noting that President Truman “[p]ardoned pre-war convicts who served in the U.S. armed forces during World War II”); James D. Barnett, \textit{The Grounds of Pardon}, 17 \textit{J. Amer. Institute Crim. L. & Criminology} 490, 523 (1927) (noting 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 has been committed are often considered” as grounds for pardon); see also id. at 502 (listing “the convict’s previous good character” as a mitigating circumstance which, if not considered or not sufficiently considered by the sentencing court, had resulted in executive pardons). For more modern evidence, see Cathleen Burnett, \textit{Petitions for Life: Executive Clemency in Missouri Death Penalty Cases}, \textit{Richmond J. of L. & Pub. Interest} (2001), available at http://law.richmond.edu/RJOLPI/Issues_Archived/2001_Spring_Issue/Burnett.html

\textsuperscript{21} See People v. Duncan, 5 Cal. Rptr. 3d 413, 414 (Cal. App. 3 Dist. 2003) (noting that trial court rejected “defendant’s claim that his military service should be treated as a factor in mitigation”); see also 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).

\textsuperscript{22} N.C. GEN. STAT. § 15A-1340.16(e)(14) (West 2007).

\textsuperscript{23} N.C. GEN. STAT. § 15A-1340.16(e)(12) (West 2007).

Tennessee appellate courts have read a statutory catch-all provision as permitting a sentencing court to consider an offender’s “honorable military service.” But 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. Louisiana trial courts appear to have read a similar catch-all provision as including military service as a mitigating sentencing factor.

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. Indeed, it

25 See State v. Hill, No. M2004-00597-CCA-R3-CD, 2005 WL 544710, at *9 (Tenn. Crim. App. June 27, 2005) (noting that while a defendant’s military service record “factor is not among the statutorily defined mitigating factors set out in Tennessee Code Annotated section 40-35-113, rather, it is 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.’ T. CODE. § 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.’”).

26 E.g., State v. White, No. W2006-00655-CCA-R3CD, 2007 WL 836812, at *5 (Tenn. Crim. App. Aug. 13, 2007) (“While 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. Thus, the trial court was within its discretion in refusing to consider the defendant’s military service as a mitigating factor.”) (internal citations omitted).


29 See, e.g., HAW. REV. STAT. §706-621(2)(g) (West 2007) (noting that if “[t]he character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime,” that mitigates against imposing imprisonment and in favor of a term of probation); IDAHO CODE § 19-2521(b)(2)(i) (West 2007) (noting that if the “character and attitudes of the defendant indicate that the commission of another crime is unlikely” that grounds “shall be accorded weight in favor of avoiding a sentence of imprisonment”); ILL. COM. STAT. 5/5-5-3.1(a)(9) (West 2007) (listing “[t]he character and attitudes of the 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 § 35-38-1-7.1(b)(8) (West 2007) (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) (West 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 2007) listing “[t]he character and attitude of the defendant indicate that he is unlikely to commit another offense” as a mitigating
appears that in some of these states, namely Idaho, Indiana, Illinois, and New Jersey, trial courts consider a defendant’s prior good acts as mitigating evidence at sentencing.

Whatever role prior good acts may play in practice in individual state sentencing determinations, prior good acts are not as well established as a sentencing factor as prior bad acts generally and prior convictions in particular. 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 systems that have codified sentencing factors. And unlike the consensus surrounding prior bad acts, there appears to be some disagreement surrounding the appropriateness of good acts as a sentencing factor.

An offender’s prior good acts are often introduced as mitigating evidence 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. Thus, just as in any
circumstance to consider in determining an appropriate sentence); N.C. GEN. STATS. § 15A-1340.16(e)(12) (West 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) (West 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”).

34 See DEMLEITNER, ET AL., supra note 7, at 384 (noting that “[i]n 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”).
35 See supra notes 13-14 and accompanying text.
36 See supra note 21.
38 Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); see also infra text accompanying notes 80-81.
non-capital sentencing scheme which does not limit the scope of permissible mitigating evidence, an offender’s prior good acts may play a role in capital punishment decisions.

Federal law on prior good acts is somewhat inconsistent. It appears that, prior to the enactment of the Federal Sentencing Guidelines, a defendant’s prior good works were often raised and considered at sentencing. When it initially formed the U.S. Sentencing Commission and directed it to develop 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.” The original Federal Sentencing Guidelines

41 See DEMLEITNER, ET AL., supra note 7, at 94-98 (recounting the role that Oliver North’s service and good works played at this sentencing); Christina Chiafalo Montgomery, Social and Schematic Injustice: The Treatment of Offender Personal Characteristics Under the Federal Sentencing Guidelines, 20 NEW ENG. J. ON CRIM. & CTY. CONFINEMENT 27, 37-38 (1993) (“In the pre-guideline sentencing scheme, judicial discretion made room for punishments tailored to the needs and characteristics of the individual offender. This focus on the impact and purpose of sentences in individual cases led many judges to take into account an offender’s role in, and value to, the community.”) (internal citations omitted); STITH & CABRANES, supra note 15, at 79-80 (noting 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”); see also WHEELER, ET AL., supra note 9, at 103-05.
42 28 U.S.C. § 994(d). The list of factors Congress directed the Commission to consider were:

(1) age;
(2) education;
(3) vocational skills;
classified many of these defendant-related factors as not ordinarily relevant in setting the offense level in a particular case. But the Guidelines made no mention of a defendant’s prior good works.

Relying on these original guidelines, a 1988 District of Maryland opinion, United States v. Pipich, gave a defendant a below-Guideline 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. 43

(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;
(9) role in the offense;
(10) criminal history; and
(11) degree of dependence upon criminal activity for a livelihood.

43 United States v. Pipich, 688 F. Supp. 191, 193 (D. Md. 1988). Although the district court was bound by the Federal Sentencing Guidelines, he 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, that was 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).
In response to Pipich and other similar decisions,\textsuperscript{44} 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.\textsuperscript{45} Although the Commission never provided an official explanation for this new Guideline,\textsuperscript{46} the Commission Chairman and General Counsel later published a law review article in which they stated that the Guideline was promulgated because courts were granting such departures despite the “Commission[’s] intent that departures based on offender ‘good citizen’ characteristics rarely would be appropriate.”\textsuperscript{47}

By characterizing prior good acts as “not ordinarily relevant,” the Commission permitted district courts to consider a defendant’s good works only in selecting a sentence within the guideline range. The Commission limited district courts’ authority to sentence a defendant below the applicable Guideline range to situations where a defendant’s prior military service, charitable acts, or other good works were “exceptional.”\textsuperscript{48} But there was significant disagreement in the federal

\textsuperscript{44} See Jean H. Shuttleworth, \textit{Childhood Abuse as a Mitigating Factor in Federal Sentencing: The Ninth Circuit Versus the United States Sentencing Commission}, 46 \textsc{Vand. L. Rev.} 1333, 1344 (1993) (“[T]he Commission added Section 5H1.11 in response to two cases: \textit{United States v. Big Crow}, in which the Eighth Circuit affirmed a downward departure based on the defendant’s impeccable employment history and his continuous efforts to overcome the adverse conditions of an American Indian reservation, and \textit{United States v. Pipich}, a District of Maryland case in which the court based a downward departure on the defendant's military service.”); Montgomery, \textit{supra} note 41, at 38 (“Reacting to \textit{United States v. Turner} and its progeny, the Commission enacted section 5H1.11”); see also William W. Wilkins, Jr. & John R. Steer, \textit{The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity}, 50 \textsc{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.”).

\textsuperscript{45} \textsc{U.S. Sentencing Guidelines} § 5H1.11

\textsuperscript{46} \textit{See} 56 Fed. Reg. 22762, 22779-80 (May 16, 1991) (stating only that “this amendment . . . sets forth the Commission’s position that military, civic, charitable, or public service, employment-related contributions, and record of prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range”).

\textsuperscript{47} Wilkins & Steer, \textit{supra} note 44, at 84 n.107.

\textsuperscript{48} \textit{Koon v. United States}, 518 U.S. 81, 95-96 (1996) (noting that the Sentencing Commission identified “[d]iscouraged factors,” which are “not ordinarily relevant to
courts over how to determine whether a defendant’s actions met that standard.49 Some courts compared defendants to those who had committed similar crimes.50 Others held that defendants should be compared to all offenders with histories of good works.51 Still others suggested that the proper comparison is between persons of similar employment and socio-economic backgrounds.52 In some cases,
courts did not simply analyze the number or quality of a defendant’s good works, but also weighed the defendant’s good acts against the harm caused by his offense. Several cases provided little analysis beyond a conclusory statement that a defendant’s works were not exceptional, and other courts did little more than rely on previous decisions where a court did not allow a sentence reduction despite substantial good works.

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, aberrant employee, he is at the lowest end of the scale. He is a salaried employee in a law firm where he works as a file clerk. He is not a wealthy man.”); United States v. Mehta, 307 F. Supp. 2d 270 (D. Mass 2004) (“the focus [of 5H1.11 analysis] should be on the defendant’s activities, understood in the light of his career and resources”). Cf. United States v. Thompson, 190 F. Supp. 2d 138, 144-46 (D. Mass 2002) (addressing this issue in the context of family ties departures).

53 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.”); United States v. Scheiner, 873 F. Supp. 927, 934-35 (E.D. Pa. 1995); United States v. Kuhn, 351 F. Supp. 2d 696, 707 (E.D. Mich. 2005); United States v. Ilges, No. 06-1393, 2006 WL 3455101 (7th Cir. Dec 1, 2006) (affirming district court’s refusal to depart downward which “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”); see also United States v. Medina, No. 05-5165, 2007 WL 869152 (4th Cir. Mar. 21, 2007) (recounting that district court awarded defendant a reduced sentence after telling the defendant “Your service to your country,... indicates that you are a person who certainly has more good than bad”).

54 In reversing district courts, some appeals courts are quick to say that substantial good works are not “exceptional” without much analysis other than disagreement with district court’s conclusion. See, e.g., United States v. Rybicki, 96 F.3d 754 (4th Cir. 1996); United States v. Serrata, 425 F.3d 886 (10th Cir. 2005); United States v. Repking, 467 F.3d 1091 (7th Cir. 2006). Of course, district courts can be similarly conclusory. See, e.g., United States v. Jordan, 130 F. Supp. 2d 665 (E.D. Pa. 2001) (“[T]he court finds that Mr. Jordan’s civic, charitable, and public service and other good works, while commendable, are not so exceptional or extraordinary for a person in Mr. Jordan’s circumstances as to warrant a downward departure.”).

55 See, e.g., United States v. Lawrence, 122 F.3d 1064, 1997 WL 563134 (4th Cir. 1997); United States v. Winters, 105 F.3d 200 (5th Cir. 1997).

behavior has since become a recognized reason for departure under the Federal Guidelines.\textsuperscript{57} The Commission’s efforts to resolve disagreement among the circuits regarding the appropriate definition of aberrant behavior explicitly acknowledged that in determining whether to depart, a court may consider, \textit{inter alia}, the defendant’s “record of prior good works.”\textsuperscript{58}

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 have sometimes noted district court departures on the basis of a defendant’s prior good acts,\textsuperscript{59} but many reports do not.\textsuperscript{60} The Commission reports appear to include information only about reasons for downward departures that are cited a minimum number of times in

\begin{itemize}
\item \textsuperscript{57} USSG § 5K2.20; \textit{see also} United States v. Mikutowicz, 365 F.3d 65, 79 (1st Cir. 2004) (“Under the 1998 Guidelines, every circuit court of appeals accepted ‘aberrant behavior’ as a legitimate basis for a downward departure. In November 2000, the Sentencing Commission confirmed the correctness of this view by adopting a guideline explicitly recognizing ‘aberrant behavior’ as a legitimate basis for a departure.”).
\item \textsuperscript{58} USSG § 5K2.20 (Application Notes). 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, 741-42 (9th Cir. 1991); United States v. Delvalle, 967 F. Supp. 781, 784 (E.D.N.Y. 1997); \textit{see also} Hill, \textit{supra} note 56, at 979.
\item \textsuperscript{59} \textit{See, e.g.}, United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics tbls. 25, 25A (2006) [hereinafter, Sourcebook 2006] (noting that military record/charitable works/good deeds were cited as the reason for downward departures in 57 cases); United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics (Pre-Booker) tbls. 25, 25C (2005) (noting that military record/charitable works/good deeds were cited as the reason for downward departures in 38 cases); United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics (Pre-Blakeley) tbl. 25 (2004) (noting that military record/charitable works/good deeds were cited as the reason for downward departures in 16 cases).
\end{itemize}
a year, and thus reported cases awarding a downward departure for prior good acts can sometimes be identified in years where the Commission report does not include information about such cases. However, sentencing decisions are rarely reported or published, rendering a traditional case law search a poor vehicle for determining the number of sentence reductions on the basis of prior good acts. In any event, it is clear that defendants regularly move for reduced sentences on the basis of prior good acts and that at least some of those motions are granted. But 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.

The Supreme Court’s 2005 decision in *United States v. Booker,* ended the mandatory nature of the Federal Sentencing Guidelines, and

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61 See, e.g., SOURCEBOOK 2006, supra note 59, at tbl. 25A n.1 (noting that “all reasons cited fewer than twenty eight times” are identified only as “other”).

62 For example, the district court in *United States v. Greene,* 249 F. Supp. 2d 262 (S.D.N.Y. 2003), held that a defendant was “entitled to a downward departure for his charitable works.” Yet the Commission Sourcebook for that period reports no downward departures for that reason. See SOURCEBOOK 2003, supra note 60, at tbl. 25A.

63 See supra note 7.

64 See, e.g., Greg Farrell & Jayne O’Donnell, Judges Often Deaf to Good Deeds, USA TODAY (July 14, 2005) (noting such claims in several high-profile criminal prosecutions).


66 See, e.g., SOURCEBOOK 2006, supra note 59, at tbs. 25, 25A (reporting that out of 72,585 federal sentencings, only 57 sentences were reduced for military record/charitable works/good deeds); see also Alan Ellis, et al., Baker’s Dozen, Part II Advice for the Advocate, 16 CRIM. JUST. 56, 56-57 (Spring 2001) (noting that downward departures “for a defendant’s charitable and civic good works or public service . . . are usually denied”); THOMAS W. HUTCHISON, PETER B. HOFFMAN, DEBORAH YOUNG & SIGMUND G. POPOKO, FEDERAL SENTENCING LAW AND PRACTICE 1596 (2007 ed.) (“Courts have generally viewed with disfavor departures based on the factors covered by” § 5H1.11); Montgomery, supra note 41, at 39 (“Because of the judiciary’s unwillingness to consider declaring a defendant’s charitable or military actions ‘extraordinary,’ departures have been virtually foreclosed by section 5H1.11.”).

several district courts used their new discretionary authority to award sentence reductions for prior good acts. But other courts continued to require a defendant to demonstrate that her good acts were “extraordinary” in order to obtain a sentence reduction. The scope of judicial discretion and the weight that must be accorded to the policy judgments of the Guidelines is a question that has arisen repeatedly before the Supreme Court since its decision in Booker. The Supreme Court recently suggested, in Rita v. United States, that district courts have the power to independently evaluate the policy judgments underlying the Guidelines, including whether a defendant’s prior good works should result in a sentence reduction. 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.


69 See United States v. Serrata, 425 F.3d 886 (10th Cir. 2005) (post-Booker appellate decision reversing pre-Booker decision) (“While the defendants’ community activities are certainly commendable, it is difficult to conclude that their community involvement is ‘present to an unusual degree.’ USSG § 5K2.0.”); United States v. Repking, 467 F.3d 1091 (7th Cir. 2006) (“Although consideration of Repking’s charitable works is reliance on a factor that is permitted, though discouraged, by the policy statements, we do not share the district court’s view that Repking’s charitable works were so extraordinary that they should be given weight despite the contrary view of the Sentencing Commission . . .”).; United States v. Strange, 370 F. Supp. 2d 644 (N.D. Ohio 2005) (“[T]he Sixth Circuit permits consideration of ‘exceptional’ civil involvement and community service as ground for departing downward. Mr. Strange is not that exceptional case.”); United States v. Barbera, No. 02-1268, 2005 WL 2709112 (S.D.N.Y. Oct 21, 2005) (defendant’s “demonstrated commitment to charitable endeavors, while exemplary, is not extraordinary or otherwise present to the exceptional degree required to justify a downward departure.”).

70 Rita v. United States, 127 S. Ct. 2456, 2461 (2007), stated that a district court could sentence outside the Guideline range if the court finds that (a) “the case at hand falls outside the ‘heartland’ to which the Commission intends individual Guidelines to apply,” or (b) “independent of the Guidelines, application of the [statutory] sentencing factors . . . warrants a lower sentence.”

71 The Court specifically declined to decide whether “military service should ordinarily lead to a sentence more lenient than the sentence the Guidelines impose” or whether the Guidelines are unreasonable under § 3553(a) because 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,’” because the petitioner had not raised the argument below. Id. at 2470.
sentence the defendant received. More recently, in *Kimbrough v. United States*, 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.’” How this new concession will affect the treatment of good acts as a mitigating factor in federal cases is still an open question.

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; a mitigating factor is any fact or circumstance that warrants a reduction in the defendant’s punishment. But these definitions simply define aggravation and mitigation in terms of their

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74 Id. at 570 (quoting Brief of the United States).
75 Cf. Henning, supra note 5, at 8 (“In the post-Booker age of reasonableness, at least some of the institutional constraint on sentencing discretion imposed by the Guidelines is gone. While 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.”).
76 Black’s Dictionary defines aggravation as: “The fact of being increased in gravity or seriousness.” BLACK’S LAW DICTIONARY 71 (8th ed. 2004). It defines aggravating circumstance as: “1. A fact or situation that increases the degree of liability or culpability for a criminal act. 2. 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; see also People v. Webber, 228 Cal. App. 3d 1146, 1169 (Cal. Ct. Appeal 1991) (“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary.”).
77 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 76, at 1024. It defines mitigating circumstance as: “1. 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). 2. 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.
consequences; they do not give any guidance about what types of circumstances are aggravating or mitigating.\textsuperscript{78}

The Supreme Court defined mitigation 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.”\textsuperscript{79} But this definition is also unhelpful. The Court’s definition of mitigating evidence places virtually no substantive limitations on the concept of mitigation. Moreover, the definition is relevant only for questions of admissibility; it does not provide any guidance about the relevance or relative weight\textsuperscript{80} of such evidence. Nor does it require that the sentencing jury impose a more

\textsuperscript{78} Nigel Walker notes that, in the English criminal justice system:

Mitigation, like aggravation, is usually though not always based on retributive reasoning; that is, on reasoning which concludes either (a) that the offender’s culpability is enhanced or diminished or (b) that he will suffer more (or, rarely, less) than most offenders would from the usual penalty. Occasionally a court mitigates sentence for a third retributive reason: (c) that the offender have behaved in a meritorious way which, though strictly speaking it does not alter his culpability, should be taken into account in his favour. Yet even sentencers who try not to reason retributively may mitigate for other reasons. They may for example be persuaded that the offender’s personality or circumstances are such that a mild or nominal measure will be sufficient to discourage him from repetition.

\textit{Walker, supra} note 9, at 47-48.

\textsuperscript{79} 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,” \textit{id.} at 605 n.12 (“Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.”), thus potentially excluding 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. \textit{See} Franklin v. Lynaugh, 487 U.S. 164, 188 (1988) (O’Connor, J., concurring in the judgment) (“‘[R]esidual doubt’ about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant’s character or background, or the circumstances of the particular offense, that may call for a penalty less than death. ‘Residual doubt’ 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.’”) (internal citations omitted); \textit{see also} Skipper v. South Carolina, 476 U.S. 1, 11-14 (1986) (Powell, J., concurring).

lenient sentence (life rather than death) in response to such evidence.\(^{81}\) Perhaps as a result of this lack of guidance, there is evidence that capital jurors tend to disregard mitigation evidence if it does not excuse the offense.\(^{82}\) Of course, the concept of mitigation cannot be 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.\(^{83}\)

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.\(^{84}\)

The Court has specifically refused to extend the individualized

\(^{81}\) That is not to say that some mitigating circumstances never require a life sentence. See, e.g., Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits the execution of individuals who were under 18 years of age at time of their capital crimes); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibits the execution of mentally retarded offenders); see also Steiker & Steiker, supra note 40, 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.”)

\(^{82}\) 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 (collecting evidence that capital jurors do not understand the meaning of the terms “aggravating” and “mitigating”).

\(^{83}\) Bentele & Bowers, supra note 82, at 1016; see also 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) (noting 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”). Cf. Carissa Byrne Hessick, Motive’s Role in Criminal Punishment, 80 S. CAL. L. REV. 89, 132 (2006) (“[T]he sentencing process allows for finer distinctions of culpability than determinations of liability. Criminal liability is essentially binary: a defendant is either guilty or not guilty of an offense. By contrast, because criminal sentences are measured chronologically, a court can adjust a defendant’s sentence by a percentage of the overall sentence or by different set amounts of time.”)

sentencing requirement to non-capital sentencing, affirming the constitutionality of mandatory sentences that do not permit the consideration of mitigating evidence and leaving the identification and relative weight of sentencing factors to legislatures.

Legislatures have not enacted definitions of aggravating and mitigating factors. 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. But this unsystematic approach has led sentencing systems to identify far more aggravating sentencing factors than mitigating sentencing factors. For example, the Federal Sentencing Guidelines provide for more increases in an offender’s punishment from the “base offense level” than decreases. Similarly for departures, the Federal Sentencing Guidelines identify thirteen circumstances as warranting an upward departure and eight circumstances as warranting a

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85 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.”); see also Steiker & Steiker, supra note 40, at 838. The Court’s non-death penalty Eighth Amendment analysis does include a “narrow proportionality principle,” Ewing v. California, 538 U.S. 11, 20 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in judgment)); however, that principle is far from robust, see Ewing, 538 U.S. at 31-32 (Scalia, J., concurring in the judgment).

86 Harmelin, 501 U.S. at 994-95.

87 See Ewing, 538 U.S. at 28 (“[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. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons ‘advance[s] the goals of [its] criminal justice system in any substantial way.’”) (quoting Solem v. Helm, 463 U.S. 277, 297 n.22 (1983)); see also id. at 25 (“Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”).

88 This observation does not extend to fully discretionary sentencing systems, which because of a lack of information about which sentencing factors are regularly considered in such systems, are difficult to assess.

89 E.g., STITH & CABRANES, supra note 15, 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.”)

90 See USSG §§ 5K2.1 (death); 5K2.2 (physical injury); 5K2.3 (extreme psychological injury); 5K2.4 (abduction or unlawful restraint); 5K2.5 (property
downward departure.\textsuperscript{91} 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.\textsuperscript{92} Thus, in effect, the Guidelines identify thirteen 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,\textsuperscript{93} three states identify more

\begin{enumerate}
\item damage or loss; 
\item 5K2.6 (weapons and dangerous instrumentalities); 
\item 5K2.7 (disruption of governmental function); 
\item 5K2.8 (extreme conduct); 
\item 5K2.9 (criminal purpose); 
\item 5K2.14 (public welfare); 
\item 5K2.17 (high-capacity, semi-automatic firearms); 
\item 5K2.18 (violent street gangs); 
\item 5K2.21 (dismissed and uncharged conduct).
\end{enumerate}

\textsuperscript{91} See USSG §§ 5K1.1 (substantial assistance to authorities); 5K2.10 (victim’s conduct); 5K2.11 (lesser harms); 5K2.12 (coercion and duress); 5K2.13 (diminished capacity); 5K2.16 (voluntary disclosure of offense); 5K2.20 (aberrant behavior); 5K2.23 (discharged terms of imprisonment).

\textsuperscript{92} Cf. DEMLEITNER, ET AL., supra note 7, at 295 (characterizing such sentencing factors as “‘partial’ or ‘near-miss’ defenses”); STITH & CABRANES, supra note 15, 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.”).

\textsuperscript{93} Alaska identifies 33 aggravating factors and 18 mitigating factors. ALASKA STAT. §§12.55.155(c), (d). Arizona identifies 23 aggravating factors and 5 mitigating factors; it also includes catchall provisions for both aggravation and mitigation. ARIZONA REV. STAT. §§ 13-720(c), (d). The California Criminal Rules of Court identify 17 aggravating factors (plus a catchall) and 13 mitigating factors. CAL. CRIM. RULES OF COURT 4.421, 4.423. Florida identifies 20 aggravating factors and 12 mitigating factors. FLORIDA STAT. §§ 921.0016(3), (4). Illinois identifies 35 factors in aggravation and 13 factors in mitigation. ILLINOIS COMP. STAT. §§ 5-5-3.1, § 5-5-3.2. Kansas identifies 8 aggravating factors and 5 mitigating factors. KAN. CRIM. CODE §§ 21-4716(c)(1), (2). Louisiana identifies 20 aggravating factors and 11 mitigating factors; it also includes catchall provisions for both aggravation and mitigation. LA. REV. STAT. § 894.1(B). The Minnesota Sentencing Guidelines identify 20 aggravating factors and 6 mitigating factors; one of the mitigating factors merely provides for alternative placement for offenders with mental illness. MINNESOTA SENTENCING GUIDELINES II.D(2) (2006). North Carolina identifies 26 aggravating factors and 20 mitigating factors; it also includes catchall provisions for both aggravation and mitigation. N.C. GEN. STAT. § 15A-1340.16. Ohio lists 9 aggravating factors and 3 mitigating factors (plus a catchall); the statutes also identifies 5 factors suggesting that the offender is likely to commit future crimes as well as 5 factors suggesting that the offender is not likely to commit future crimes.
mitigating than aggravating factors;\textsuperscript{94} and two states identify an equal number aggravating and mitigating factors.\textsuperscript{95} 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,\textsuperscript{96} and a single state that identifies only mitigating factors.\textsuperscript{97}

\textsuperscript{94} Hawaii identifies 10 mitigating factors as factors to consider in imposing a term of probation, HAW. REV. STAT. § 706-621, and 6 aggravating factors as criteria for imposing extended terms of imprisonment, HAW. REV. STAT. § 706-662. Idaho identifies 9 mitigating factors and 6 aggravating factors as criteria for either placing defendant on probation or imposing imprisonment. IDAHO CODE ANN. §§ 19-2521(1), (2). North Dakota lists 14 mitigating factors that a court is to consider in determining whether to impose imprisonment, N.D. CENT. CODE §12.1-32-04; it also lists 5 aggravating factors that allow a court to sentence an offender to an extended sentence. N.D. CENT. CODE §12.1-32-09.


\textsuperscript{96} Michigan, for example, has created a sentencing scheme that is built entirely around the concept of aggravation. See MICH. COMP. LAWS §§ 777.31, et. seq. In determining sentence ranges, the state 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 20 pts if the body alcohol content is .2 grams or more; 15 points if it was less than .2 grams but equal or more than .15 grams; 10 points if less than .15 grams but equal or more than 0.08; and 0 points if ability was not affected by alcohol. MICH. COMP. LAWS § 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 § 13-A-5-6; COLO. REV. STAT. § 18-1.3-401(6) (expressly allowing judges to make findings of aggravating and mitigating factors); id. at § 18-1.3-401(8) (listing only 5 sentencing factors, all aggravating); MISS. CODE ANN. §§ 99-19-301, 99-19-351; NEV. REV. STAT. §§ 193.161-193.1685 (providing for “additional penalties” in 9 circumstances); UTAH CODE ANN. §§ 76-3-203.1, 76-3-203.2, 76-3-203.3-4, 76-3-203.5, 76-3-203.6, 76-3-203.7, 76-3-203.8, 76-3-203.9.

\textsuperscript{97} GA. CODE ANN. §17-10-1(c).
This tendency of sentencing systems to identify more aggravating than mitigating factors may be attributable to political pressure. As Rachel Barkow and Kathleen O’Neill have explained, there are many powerful groups who favor harsher sentencing laws, and those who support more lenient sentences do not tend to possess much political power. This political asymmetry allows legislators to “reap political rewards by increasing penalties without worrying about angering any powerful interest group or alienating the public.” Any legislator

98 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 Adriaan Lanni, Note, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 YALE L.J. 1775, 1779 (1999); Erik Luna, The Overcriminalization Phenomenon, 54 AM. U. L. REV. 703, 719 (2005). Cf. Darryl K. Brown, Democracy and Decriminalization, 86 TEX. L. REV. 223, 227, 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 counterrtrend: more than half the states have reformed sentences in the direction of leniency in the last several years. 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.”).

99 Barkow & O’Neill, supra note 98, at 1981-82; see also William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 529 (2001) (noting that “for 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”).

100 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. Barkow & O’Neill, supra note 98, at 1980-81; see also Luna, supra note 98, at 720 (“[I]ndividuals and organizations who oppose further augmentation of the penal code, including members of the criminal defense bar and civil liberties groups, can usually be ignored at virtually no political cost to those seeking elected office.”).

101 Barkow & O’Neill, supra note 98, at 1982-83. Bill Stuntz has noted 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 broader crimes, and growing
who identifies a factor that will lengthen criminal sentences can portray herself as “tough on crime,” while a legislator who wishes to identify a mitigating factor runs the risk of appearing “soft on crime.”

There is social science data suggesting that current sentencing practices are more punitive than public opinion supports. 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.

To avoid unfair sentences, criminal justice actors may use the discretion afforded them in individual cases to mitigate the effects of harsh sentencing laws: Prosecutors may elect to 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 99, 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.

As Bill Stuntz has noted:

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.”

Stuntz, supra note 99, at 509.

Adriaan Lanni has explained this phenomenon as “a worrying disjunction 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.” Lanni, supra note 98, at 1780; see also id. at 1780-82 (describing social science research which reveals the following paradox: “When asked about sentencing in the abstract, citizens report a desire for harsher penalties, but when presented with detailed descriptions of cases, these same citizens often suggest more lenient penalties than those meted out by judges and, in many cases, than the mandatory minimum sanctions currently in force in their jurisdictions.”); The Supreme Court, 2006 Term — Leading Cases, 121 HARV. L. REV. 225, 234 & n.64 (“[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.”) (emphases in original) (collecting sources).
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 overly long (and thus inequitable) sentences. A system that attempts to account for many sentencing factors \textit{ex ante} can help ensure sentences that better reflect public opinion of just punishment, and it may help avoid the disparity between similar defendants that is introduced through the exercise of discretion.

\textbf{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 \textit{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. Other

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105 See Morris B. Hoffman, \textit{Free Market Justice}, N.Y. Times, Jan. 8, 2007 (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); \textit{Ashworth, supra} note 5, at 200 (“the existence of some discretion as to [sentencing] rationale leaves room for an element of racial discrimination to creep into sentencing, whether consciously or unconsciously”). \textit{See generally Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 913 (1962)} (noting that police discretion in the arrest function has led to the accusation that police “are harder on” black suspects than white suspects).

106 \textit{See, e.g.}, Hessick, \textit{supra} note 83, at 111, 117.


108 \textit{See, e.g.}, John J. Hopkins, Note, \textit{Illegal Arrest as Sufficient Provocation to Mitigate a Homicide, 37 Ky. L.J. 318} (1948); Litton, \textit{supra} note 83; James E.
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 statues and common law — that evidence of an offender’s reduced culpability must be considered as mitigating.  

Steiker and Steiker selected culpability as their theory of mitigation not because they are opposed to consideration of factors other than reduced culpability, such as “lack of future dangerousness or general good character.” Rather they contend that reduced culpability is a widely accepted mitigating factor in capital sentencing schemes; 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 thus must be considered as mitigating evidence at sentencing.

Dan Markel has offered another account of when punishment leniency is appropriate. 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. He rejects as inappropriate mitigating factors all “reasons unrelated to the offender’s


109 Steiker & Steiker, supra note 40, at 840.
110 Steiker & Steiker, supra note 40, at 840.
111 Id. at 848-57.
112 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 that 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.
113 Markel, supra note 5, at 1435-36, 1438.
competence or autonomy, or the severity of the offense,” including facts or circumstances that may “evoke compassion or sympathy.”

An offender’s prior good acts would not be considered an appropriate sentencing factor under the theories advances by Carol and Jordan Steiker or by Dan Markel. Prior good acts are not tied 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 in the abstract, and thus these theories can only answer whether prior good acts, standing alone, should be treated as mitigating. 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 show that the reason or reasons that 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 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” that, if employed by legislatures, could help ensure that the identification of aggravating and mitigating sentencing factors is more balanced. 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. There are examples in the Federal Sentencing

114 Markel, supra note 5, at 1435-36.
115 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 40, at 854 (noting that the “overwhelming majority of aggravating circumstances direct the sentencer’s attention to the harm caused by the defendant or to general deterrence concerns” but note that this does not affect their analysis because aggravating circumstances “serve a proportionality function rather than an individualizing function” in capital sentencing doctrine).
116 ASHWORTH, supra note 5, at 134.
117 ASHWORTH, supra note 5, at 134 (“it is often right to suppose that the opposite of a mitigating factor will count as aggravating”). Ashworth gives the example that
Guidelines that conform to this formula, such as the Guidelines increasing sentences for some crimes committed with a bad motive and decreasing sentences for some crimes committed with a good motive.\textsuperscript{118}

This symmetrical relationship between aggravating and mitigating factors may be more apparent if we view sentencing practices in terms of the “ordinary” criminal defendant.\textsuperscript{119} An ordinary or typical sentence ought to be imposed on offenders whose offense and offender characteristics are generally similar to most other offenders.\textsuperscript{120} Lengthier sentences ought to be imposed on offenders when aggravating factors — that is, factors that appear to make the offender or her offense “worse” than ordinary — are present. And shorter sentences ought to be imposed on offenders when mitigating factors — that is, factors that appear to make the offender or her offense “better” than ordinary — are present.\textsuperscript{121}

Ashworth’s theory that the opposite of an aggravating sentencing factor should be treated 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.\textsuperscript{122} What is the “opposite” of possessing a firearm? The answer would seem to be not possessing a firearm. But under the sentencing scheme, 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 sentence without the gun increase; she should *not* receive 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.”

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 federal guidelines provide for increased sentences when a defendant obstructs justice, an aggravating factor. The Guidelines also provide for sentence reductions when a defendant cooperates with the government, a mitigating factor that is arguably the opposite of obstructing a government investigation. However, the Guidelines explicitly prohibit any sentence increase on the basis of a failure to cooperate, as failure to cooperate is not the opposite of cooperating with the government, rather it is simply the absence of that mitigating factor. Similarly, the North Carolina courts have stated that, in order to prove that the defendant “has been a person of good character” — one of the mitigating factors listed in the state’s felony sentencing statute — a defendant must show “more than the absence of bad character.”

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

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123 **ASHWORTH, supra** note 5, at 134.
124 U.S. SENTENCING GUIDELINES § 3C1.1.
125 U.S. SENTENCING GUIDELINES § 5K1.1.
126 U.S. SENTENCING GUIDELINES § 5K1.2.
127 N.C. GEN. STAT. § 15A-1340.16(e)(12) (West 2007).
128 “Good moral character ‘is something more than the absence of bad character. . . . Such character expresses itself, not in negative nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong.’” State v. Benbow, 308 S.E.2d 647, 653 (N.C. 1983) (quoting In re Rogers, 253 S.E.2d 912, 918 (1976)); see also State v. Blackwelder, 306 S.E.2d 783, 789 (N.C. 1983); 8 STRONG’S NORTH CAROLINA INDEX CRIMINAL LAW § 1295 (4th ed. 2007).
ought to result in a sentence increase. The absence of prior bad acts is a neutral factor — that is, 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. ¹²⁹ But a prior good act is more than the absence of criminal history, it is the opposite of a prior bad act, and it thus should be considered a mitigating factor.

One might argue that prior good acts are different in kind from prior bad acts, and thus do not create sentencing symmetry, because prior bad acts are criminal in nature and good acts are not. This argument pre-supposes a particular view of the purposes of punishment — retributivism. There is no doubt that punishment systems based on the utilitarian concerns of incapacitation or rehabilitation often consider information that does not seem obviously criminal in nature, such as a defendant’s employment history and educational background, that is likely to help further those goals. 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 question¹³⁰ — a person’s prior non-criminal actions may play a role in how much punishment we perceive that a person deserves.¹³¹

¹²⁹ It may be important to note that some commentators who have supported the practice of punishing recidivists more harshly that 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’s sentence should be mitigated, while the repeat offender should receive no mitigation. E.g., von Hirsch, supra note 5, at 613.

¹³⁰ Under a more narrow theory of retributivism, it would also be inappropriate to consider a person’s prior bad acts. See infra notes 159-164 and accompanying text.

¹³¹ Cf. Alan H. Goldman, Toward a New Theory of Punishment, 1 LAW & Phil. 57, 61 (1982) (“if 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. E.g., Unites States v. Nellum, No. 04-30, 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) (“An offender may show that he has behaved in a commendable way in relation to matters wholly unrelated to the offence and receive credit for this conduct — sometimes described as ‘positive good
More important, the question of what falls within the sphere of the criminal justice system does not have a simple (or perhaps even a correct) answer.\(^{132}\) That is because any definition of the appropriate sphere of the criminal justice system arguably requires a general theory of punishment. For the “business of the criminal law” argument 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 system does not spring readily to mind.\(^{133}\) Indeed, as noted below, criminal law theorists have had difficulty articulating a justification for habitual offender legislation where the offender has already been punished for her past crimes.\(^{134}\)

Of course, most modern American sentencing systems are not based on a single theory of punishment.\(^{135}\) Therefore, it is necessary to examine each of the justifications that have been given in support of treating prior bad acts as an aggravating sentencing factor. If any of those arguments supports prior bad acts as an aggravating factor but does 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

\(^{132}\) See infra text accompanying notes 235-246.

\(^{133}\) 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 her repeated violations of the social contract. See Goldman, supra note 131, at 74 (“[W]e seemed forced, at a certain point to balance the rights of the criminal against those of the potential victim. While we cannot use criminals in any way we wish in order to deter other potential criminal, 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, 50 F.3d 1032 (5th Cir. 1995) (“Such an extended, exemplary military record reflects a positive contribution to society.”); United States v. Pipich, 688 F. Supp. 191 (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.”).

\(^{134}\) See infra Section III.B

achieve sentencing symmetry. That task is taken up in the next Section.

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 Section 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. The Section 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 is necessary in order to avoid the perception that sentencing factors are no more than arbitrary decisions, rather than explainable (and thus legitimate) legislative policy choices. Of these rationales, only the ability to accurately predict recidivism appears to provide a potential basis to distinguish between good and bad acts. However, as discussed in detail below, 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

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136 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 217-219.
Recidivism should result in longer sentences. 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. Because an individual’s criminal history “has statistically significant power in distinguishing between recidivists and non-recidivists,” lengthening the amount of time an offender spends in prison according to her previous convictions should reduce future crimes. But 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.

See Durham, supra note 10, at 618 (“Recidivist statutes appear to fit comfortably within the forward-looking approach of policies most concerned with utilitarian strategies for crime control. Their justification is tied to preservation of public safety, rather than to enhancement of the justice of criminal justice systems.”); Benjamin B. Sendor, The Relevance of Conduct and Character to Guilt and Punishment, 10 Notre Dame J.L. Ethics & Pub. Policy 99, 129 (1996) (“[U]nder the theory of incapacitation, the question of whether the offender . . . has a settled disposition to engage in conduct that is prohibited by the criminal law certainly is an appropriate criterion in determining the sentence.”).

Selective Incapacitation, supra note 10, at 512; James Q. Wilson, Selective Incapacitation 148, 156, in Principled Sentencing (Andrew von Hirsch & Andrew Ashworth eds., 1992) (“an advantage of selective incapacitation is that it can be accomplished without great increases (or perhaps any increases) in the use of prisons”); Measuring Recidivism, supra note 15, at 10; see also Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983 at 7 (1989), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf [hereinafter, Recidivism 1983] (“The percents of those rearrested among released prisoners were systematically related to the extensiveness of the prior records.”); Martin Wasik, Desert and the Role of Previous Convictions, in Principled Sentencing 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.”).

Unfortunately, there is little evidence about the relationship between recidivism and prior good acts. There appear to be no studies about the effect of volunteer work or charitable giving on recidivism. While there have been studies conducted regarding military service, those studies are limited and the data is sparse. However, these studies do suggest that military veterans pose a significantly lower recidivism risk than other offenders. 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 nonveterans return. A 2000 report from the Bureau of Justice Statistics, a component of the

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141 Nonetheless, there may be reason to believe that such activities might be correlated with decreased levels of recidivism because individuals who engage in such activities may experience higher levels of socialization skills and self esteem, which some research suggests are correlated with lower recidivism rates. See Wendy G. Turner, The Experiences of Offenders in a Prison Canine Program, 71 FED. PROBATION 38, 42 (2007) (“Research indicates that programs that improve social skills have lower recidivism rates.”); see also Heather Rowlison, “Sin No More”: Recidivism and Non-Traditional Punishments in Wyoming, 58 BAYLOR L. REV. 289, 314-15 (2006) (recounting press release from Wyoming Department of Corrections justifying work and training programs for inmates, which stated in part “[w]hen a man leaves prison feeling better about himself than when he entered the prison system, he is less likely to commit another criminal act”).

142 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,” and the study authors note 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 (the study relied on inmates to provide their own personal information). BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON OR JAIL 14 (2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/vpj.pdf [hereinafter, VETERANS IN PRISON]. Cf. Archer & Gartner, supra note 17, at 956 (noting that “[d]irect evidence of whether veterans are overrepresented in the commission of homicide is difficult to obtain”).

143 Brief for Amicus Curiae, National Veterans Legal Services Program & Veterans for America at 8 n.5 (in Rita v. United States, 06-5754), filed Dec. 2006 [hereinafter Veterans Amicus Brief in Rita]. But cf. Archer & Gartner, supra note 17, at 943 (noting 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”).

144 See Veterans Amicus Brief in Rita, supra note 143, at 8 n.5 (citing State of New York, Dept. of Correctional Servs., Veterans. Program Follow-up (July 1993), abstract available at http://www.ncjrs.gov/app/publications/Abstract.aspx?id=149419 (study on file at NYDCS)).
Office of Justice Programs in the U.S. Department of Justice, concluded that, taken as a whole, incarcerated veterans were less likely to recidivate than incarcerated nonveterans. And a 2004 Report from the U.S. Sentencing Commission indicates 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.

In the absence of 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. This would constitute a principled distinction between bad acts and good acts other than military service under a theory of selective incapacitation. But even assuming, contrary to the limited available data, that good acts are not correlated 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 based on prior good acts.

145 As the report explains, the rates differ for veteran and nonveteran state prisoners, but the rates are comparable for federal prisoners and local jail inmates:
Veterans in State prison were less likely than nonveterans to be recidivists (those inmates with a history of probation or incarceration sentences prior to their current confinement). Nearly a third of veterans were first-time offenders, while about a quarter of other prisoners did not report a prior sentence. Veterans in State prison were also less likely to have lengthy criminal records. Offenders with at least three prior probation or incarceration sentences accounted for 37% of veterans, and 44% of nonveterans in State prison.
In both local jails and Federal prisons, the criminal histories of veterans and nonveterans were more similar. An equal percentage (27%) of both veterans and other local jail inmates were first-time offenders, without prior sentences. Veterans (45%) were also as likely as other jail inmates (44%) to report three or more prior sentences.
In Federal prison veterans (60%) were as likely as nonveterans (61%) to report a prior sentence. About 30% of both veterans and other Federal prisoners reported three or more prior probation or incarceration sentences.

146 U.S. SENTENCING COMMISSION, RECIDIVISM AND THE FIRST OFFENDER 23, exh. 3 (2004), available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf [hereinafter, FIRST OFFENDER] (noting that 17.0% of offenders with no criminal history points and 17.5% of offenders with a single criminal history point report prior military service, as compared to 13.9% of offenders with two or more criminal history points).
That is because there are many recidivism predictors in addition to prior convictions that are not currently considered appropriate sentencing factors, at least in the federal system. Other reliable recidivism predictors include gender,\textsuperscript{147} age,\textsuperscript{148} race and ethnicity,\textsuperscript{149} employment status,\textsuperscript{150} education level achieved,\textsuperscript{151} and marital status.\textsuperscript{152}

\textsuperscript{147} “Overall, women recidivate at a lower rate than men. . . . Of the males in the study sample, 24.3 percent recidivate, 75.7 percent do not. Of the females in the study sample, 13.7 percent recidivate, 86.3 percent do not. Again, the rates for males and females increase in the higher [criminal history categories]. The difference between male and female rates, however, is not constant. In [criminal history category] I through [criminal history category] IV, there is never greater than approximately a five percentage point difference between male and female rates. However, in [criminal history category] V and [criminal history category] VI, the difference between the rates jumps to approximately 15 percentage points.” MEASURING RECIDIVISM, supra note 15, at 11; see also BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 at 7 (2002), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf [hereinafter, RECIDIVISM 1994]; RECIDIVISM 1983, supra note 139, at 5. But see FEDERAL BUREAU OF PRISONS, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987 at 3 (1994), available at http://www.bop.gov/news/research_projects/published_reports/re cidivism/oreprrecid87.pdf [hereinafter, RECIDIVISM 1987] (“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.”)

\textsuperscript{148} “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.” MEASURING RECIDIVISM, supra note 15, at 12; see also RECIDIVISM 1994, supra note 147, at 7; RECIDIVISM 1983, supra note 139, at 5; RECIDIVISM 1987, supra note 147, at 3.

\textsuperscript{149} “[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%).” MEASURING RECIDIVISM, supra note 15, at 12; see also RECIDIVISM 1994, supra note 147, at 7; RECIDIVISM 1983, supra note 139, at 5; RECIDIVISM 1987, supra note 147, at 2.

\textsuperscript{150} “[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%). The difference between the employed and unemployed recidivating declines in the higher [criminal history categories], until offenders in [criminal history category] VI have virtually the same recidivism rate regardless of their employment status in the year prior to their instant offense.” MEASURING RECIDIVISM, supra note 15, at 12; see also RECIDIVISM 1987, supra note 147, at 3.

\textsuperscript{151} “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%). One exception is seen in [criminal history category] V where recidivism
Some factors, such as race, cannot be considered under the Constitution, regardless of the predictive power of such information. But that same objection does not readily apply to other factors, such as marital status, employment, and education level. Yet the U.S. Sentencing Commission has resisted allowing judges to use these facts as sentencing factors. Indeed, at least one study suggested that an offender’s age may be a better predictor of recidivism than his criminal history.

The decision not to use these facts in sentencing suggests that recidivism prediction and selective incapacitation are not 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. 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.” The Commission explained

rates for offenders with a college education (73.3%) are higher than rates for offenders with less than a high school education (50.6%).” MEASURING RECIDIVISM, supra note 15, at 12; see also RECIDIVISM 1983, supra note 139, at 5; RECIDIVISM 1987, supra note 147, at 3.

152 “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%). MEASURING RECIDIVISM, supra note 15, at 12; see also RECIDIVISM 1987, supra note 147, at 5-6.

153 See USSG § 5H1.1 (discouraging consideration of age); USSG § 5H1.6 (discouraging consideration of “family ties and responsibilities); USSG § 5H1.5 (discouraging consideration of employment record); USSG § 5H1.2 (discouraging consideration of education and vocational skills).

154 RECIDIVISM 1983, supra note 139, at 11-12 (“[A]ge when released is found to have the largest impact [on rearrest odds], followed by the number of prior arrests . . . The contribution to the predicted log odds of rearrest by prisoners who were age 24 or younger (.721) is larger than that by those with 7 or more prior arrests (.694)").

155 See Peter B. Hoffman & James L. Beck, The Origin of the Federal Criminal History Score, 9 Fed. Sent. Rep. 192, 193 (1997) (noting that both age and drug abuse have “demonstrated power in predicting recidivism,” but “the Sentencing Commission determined that it would include only factors that could be supported by both a just desert and predictive rationale [in the criminal history score]. As a result, the Sentencing Commission did not include age and drug abuse in the [criminal history score], since they were found not to conform to a just desert rationale”) (emphasis in original) (citing U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 42 (1987)).
that it elected not to include these other recidivism predictors in its sentencing calculations “for policy reasons.”

B. Retributivism: Assessing Offenders and Their Actions

One could argue that it is appropriate to increase an offender’s sentence on the basis of her prior convictions because the repeat offender is more deserving of punishment than a first-time offender. 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. That is because retributivists believe that the amount of an offender’s punishment must be in proportion to the gravity of the offense she has committed. Gravity depends on two considerations: (1) the culpability of an individual defendant and (2) the loss or

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156 USSG Ch. 4, Pt. A, intro. comment.
157 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 uncharged conduct. E.g., von Hirsch, supra note 5, at 612 (“Unproven conduct should not be considered in the current sentencing system.”). However, the U.S. Sentencing Guidelines increase sentences both for prior convictions, USSG, Ch. 4, and for prior uncharged or acquitted conduct, USSG § 1B1.3(a), and they also claim to based these decision, at least in part, on retributive principles. USSG, Intro., Part A.
158 As the Supreme Court has stated the issue: “the repetition of criminal conduct aggravates the guilt and justifies heavier penalties when they are again convicted.” Graham v. West Virginia, 224 U.S. 616,623 (1912). See also USSG, Ch. 4 Intro. (“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) (“[P]unishment always considers the offender in terms of his or her record measured against the crime for which the offender is presently before the court. Clearly, one who has a past pattern of antisocial behavior is a worse offender than one who has no past antisocial behavior.”).
159 See Durham, supra note 10, at 620 (noting that enhancing penalties for recidivists “poses a potential predicament for the justice model”).
160 Proportionality is a main concern of desert theory, which is a “modern form of retributive philosophy.” ASHWORTH, supra note 5, at 72-73.
161 “[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 [sic]. Where the offender’s case has elements of an excusing condition but falls outside the narrow legal definition for a defence [sic], this should be a good ground for reduced culpability.” ASHWORTH, supra note 5, at 127.
harm caused by the offense. Previous offenses do not fit neatly within either category.

This poor fit has led some retributivists to conclude that prior convictions are an inappropriate sentencing factor. Some have said that increasing an offender’s sentence for prior bad acts is tantamount to punishment based on character rather than choice. 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. 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 sort of balance sheet when sentencing. The offence(s) committed would be a major factor on the minus side; and any creditable social acts would be major factors on the plus side.”

163 E.g., FLETCHER, supra note 162, at 460-66; RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 67-74 (1979).
164 See, e.g., Durham, supra note 10, at 620; SINGER, supra note 163, at 70; 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 162, at 510 (framing the issue of culpability solely in terms of choice theory: “could the actor have been fairly expected to avoid the act of wrongdoing? Did he or she have fair opportunity to perceive the risk, to avoid the mistake, to resist the external pressure, or to counteract the effects of mental illness? This is the critical question that renders the assessment of liability just.”)
165 See Kirchmeier, supra note 40, at 664 (noting that consideration of “good character 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 40, 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.”).
166 ASHWORTH, supra note 5, at 151; see also WALKER, supra note 9, at 50 (categorizing prior good acts as “moral credit” and stating that such cases “seem to result from two assumptions: (i) that offenders are being sentenced not for the offense but for their moral worth; and (ii) that moral worth can be calculated by some sort of moral book-keeping, in which spectacular actions count for more than does negative decency”) (citing English cases).

Indeed, this “social accounting” or “balance sheet” description of good acts at sentencing is not without parallel in federal sentencing decisions. For examples of
Ashworth, this “social accounting” model of sentencing is outside the appropriate judicial function; the court “should not be interested in inquiring either into any bad social deeds the offender has been involved in, except previous offenses, or into any good social deeds.”

This comment seems to suggest that a sentencing court should concern itself only with the offense, rather than with issues related to the offender. But Ashworth does not elaborate why prior courts that weigh the defendant’s good acts against the harm of his offense, see United States v. Scheiner, 873 F. Supp. 927, 934-35 (E.D. Pa. 1995); United States v. Kuhn, 351 F. Supp. 2d 696, 707 (E.D. Mich. 2005); United States v. Ilges, No. 06-1393, 2006 WL 3455101 (7th Cir. Dec 1, 2006) (affirming district court’s refusal to depart downward which “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”); see also United States v. Medina, No. 05-5165, 2007 WL 869152 (4th Cir. Mar. 21, 2007) (recounting that district court awarded defendant a reduced sentence after telling the defendant “Your service to your country,... indicates that you are a person who certainly has more good than bad”). Cf. Sendor, supra note 137, at 130-31 (apparently endorsing a view of sentencing that permits a sentencer to weigh the harm of an offense against the offender’s prior good deeds).

167 ASHWORTH, supra note 5, at 151; see also von Hirsch, supra note 5, at 595 (“Once the sentencer is permitted to look into the defendant’s criminal record, how can the inquiry be limited there? What is to prevent a far wider examination of the defendant’s past — the kind of scrutiny we may not, in a free society, wish to entrust to agents of the criminal law?”). 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) 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.

168 ASHWORTH, supra note 5, 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, as such consideration is ordinarily associated with a rehabilitative
convictions should receive special treatment. 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.

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.

There are reasons to discount von Hirsch’s argument. 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. 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 punishment system. See Williams v. New York, 337 U.S. 241, 247-48 (1949); Admissibility of Character Evidence, supra note 2, at 717; see also von Hirsch, supra note 5, at 608.

However, he 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 5, at 158. That concern is addressed supra in Section III.B.1.

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, 872 (Kennedy, J., dissenting); WHEELER, ET AL., supra note 9, at 122; Douglas A. Berman & Stephanos Bibas, Making Sentencing Sensible, 4 OHIO STATE J. CRIM. L. 37, 56-57 (2006). But see Cunningham v. California, 127 S. Ct. 856, 869 n.14 (rejecting distinction for 6th Amendment purposes).

See von Hirsch, supra note 5, at 608 (“One of the attractions of the desert model [over the rehabilitative-predictive model], to many of its proponents, has been that it promises to restrict the reach of inquiry in sentencing: only the defendant’s criminal conduct would determine the choice of the penalty; the defendant’s non-criminal conduct, work habits, and personal preferences and predilections would remain his own business.”); see also id. at 610-11.
family history, his personal habits, attitudes and preferences.” 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. It is limited to an offender’s prior 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.\footnote{von Hirsch, supra note 5, at 608.} if she believed that an inquiry into her prior good acts would be too intrusive or otherwise compromise her privacy, she could simply elect not to present such evidence 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, its purpose is to inform the court simply whether the defendant had “previously maintained his inhibitions against such misconduct.”\footnote{See, e.g., United States v. Alfaro, 919 F.2d 962, 965 (5th Cir.1990) (noting the general rule that “the party seeking an adjustment in the sentence level must establish the factual predicate justifying the adjustment”).} But 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.\footnote{von Hirsch, supra note 5, at 609-10; see also Wasik, supra note 139, at 239 (“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 is unfortunate in tending to suggest an assessment being made of the overall moral standing of the person. It is quite clear from the context of the discussion that this is not what is meant.”). But see SINGER, supra note 163, 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.”).} Indeed, von Hirsh himself has framed the issue in terms of character by stating that repeat offenders ought to receive longer sentences than first-time offenders.

\footnote{von Hirsch, supra note 5, at 609-10; see also Wasik, supra note 139, at 239 (“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 is unfortunate in tending to suggest an assessment being made of the overall moral standing of the person. It is quite clear from the context of the discussion that this is not what is meant.”). But see SINGER, supra note 163, 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.”).}
because 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.”176 And there can be no real doubt that most people consider defendants who ordinarily commit crimes as having worse characters than those defendants who have committed no crimes in the past.177 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.”178 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.179 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: “if 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

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176 von Hirsch, supra note 5, at 604 (emphasis added); see also id. at 597 (“When a person commits some misdeed in everyday life . . ., he may plead that the misconduct was uncharacteristic of his previous behavior. . . . To the colleague who commits an act of dishonesty after having repeatedly committed and been censured for other such acts in the past, . . . the individual will have forfeited the right to plead that his act was uncharacteristic for him.”) (emphases added).

177 See Yankah, supra note 164, 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.”).

178 von Hirsch, supra note 5, at 597; see also id. at 593 (“it is difficult to escape the feeling that, for whatever reason, first offenders do deserve less punishment”).

179 Von Hirsch explains that “[t]he strength of this feeling alone justifies a closer look at the issue of desert and prior criminality.” von Hirsch, supra note 5, 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, Concordance and Conflict in Intuitions of Justice, 91 MINN. L. REV. 1829, 1830 (2007) (“recent 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”).
sentence.” 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 factor have noted that many people join the military for the salary, job training, or for tuition assistance, rather than out of a sense of patriotic duty. And 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.”

Requiring a defendant to show that her prior good acts demonstrate her own good character would be inconsistent with the present system of using 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.

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180 United States v. Takai, 930 F.2d 1427, 1433 (9th Cir. 1991) (“The government conceded at oral argument that if 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. With the principle established, it is only a matter of degree, and it seems entirely appropriate for outstanding good deeds by Takai to be considered as a relevant factor in determining whether there are mitigating circumstances.”)

181 See Volokh Conspiracy, *Sentencing and Military Service* (Oct. 26, 2006 at 5:50 pm), at http://volokh.com/posts/1161895859.shtml (“[I]s signing up for the military in time of peace a good deed? . . . Presumably people join the military because they find the benefits (pay, type of service, self confidence, whatever) to be worth the labor. 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.”).

182 E.g., United States v. Nava-Sotelo, 232 F. Supp. 2d 1269 (D.N.M. 2002); see also United States v. Thurston, 358 F.3d 51 (1st Cir. 2004) (noting that “business leaders are often expected, by virtue of their positions, to engage in civic and charitable activities”); see also Henning, *supra* note 5, at 12 (“It is often impossible to separate the business purpose from the concept of selfless giving that underlies the notion that good works should be a basis for imposing a lower sentence.”).
aggravators by showing that he committed his previous offenses for laudable motives.\textsuperscript{183} 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 enforcement\textsuperscript{184} or the acceptance of responsibility (i.e., pleading guilty).\textsuperscript{185} 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. And a defendant may plead guilty, not because she wishes to take responsibility for the crime, but because the evidence against her is overwhelming. In both instances defendants are given sentence reductions regardless why they make those choices.\textsuperscript{186} The benefits of having persons cooperate with authority and waive their trial rights are deemed significant enough to warrant a small reward to criminal defendants who make those benefits possible.\textsuperscript{187}

\textsuperscript{183} This is not to say that 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., USSG § 4A1.3(b) (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 statute). However, 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.

\textsuperscript{184} USSG § 5K1.1.

\textsuperscript{185} USSG § 3E1.1.

\textsuperscript{186} 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 83, at 93-109. I raise these examples simply to show that the criminal justice system already rewards defendants for sentence reductions under circumstances where those defendants are doubtlessly pursuing their own agendas.

\textsuperscript{187} Some commentators have claimed that “exogenous” utilitarian sentencing factors, which are irrelevant to issues of offense seriousness and offender culpability — such as the effect of a parent’s incarceration on her children — are “are rarely sufficiently important to outweigh either culpability or crime control considerations in the allocation of sentences.” Ilene H. Nagel & Barry L. Johnson, The Role of Gender in a Structured Sentencing System, 85 J. CRIM. L. & CRIMINOLOGY 181, 207 (1994). But these commentators have acknowledged that utilitarian concerns may sometimes warrant sentencing reductions — such as in the case of infirm or elderly offenders for whom “the relative costs of imprisonment of such offenders, including medical
Similarly, there is evidence that society places relatively high value on military service and charitable works. Military veterans receive “special consideration in a variety of contexts,” including employment, education, naturalization, voting rights, medical care, housing loans, and small business loans. That consideration is “given to veterans in large measure as recognition for expenses, outweighs the benefits of incarceration.” Id. Interestingly, Nagel and Johnson fail to mention either guilty pleas or substantial assistance to law enforcement. In any event, charitable work and military service more resemble reductions for guilty pleas and substantial assistance, where benefits more obviously accrue to society as a whole, than reductions for family responsibilities, which seem more likely to benefit only the offender’s family. See also supra note 167.

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 5, at 1455. 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 USSG § 5K1.1 (limiting availability of sentence reduction 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, then the punishment calculus begins to resemble the social accounting analysis that is discussed above. See supra note 167.

188 Veterans Amicus Brief in Rita, supra note 143, at 10; see also MONTANA CONSTITUTION, art. II, sec. 35 (“The people declare that Montana servicemen, servicewomen, and veterans may be given special considerations determined by the legislature.”).


190 See 38 U.S.C. §§ 3001, et seq.


192 Mississippi provides that “[a]ny person who has lost the right of suffrage by reason of conviction of crime and has not been pardoned therefrom, who thereafter served honorably in any branch of the armed forces of the United States during the periods of World War I or World War II . . . and shall have received an honorable discharge, or release therefrom, shall by reason of such honorable service, have the full right of suffrage restored . . .” MISSISSIPPI CODE ANN. § 99-19-37.


And public officials consistently commend members of the armed forces for the service they render to the country.  

Charitable works are similarly lauded. Public officials encourage individuals to undertake public service. Federally funded programs, such as the Peace Corps and AmeriCorps, have been created to facilitate such service. Participants in such programs receive special consideration, such as the cancellation of educational loans. And individuals and organizations receive tax benefits to acknowledge, and to encourage, charitable donations. This public recognition and encouragement of military service 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.

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196 Janet Eriv, Persistent Misconceptions: A Response to Robert Hammel, 23 Fordham Urb. L.J. 1219, 1231 (1996) (“Preferences, such as special consideration in appointments and promotions, are given to veterans in large measure as recognition for the service they provided to the country and the corresponding time spent away from the workforce.”).


198 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); Wayne Washington, Bush Tour Touts Volunteerism in N.C. Stop, Touts his Freedom Corps, BOSTON GLOBE (Jan. 31, 2002); Cf. 10 U.S.C.A. § 510 (creating an incentive program for military and other national service).


200 See 20 U.S.C.A. § 1087ee(2)(E); see also id. at § 1087ee(2)(D) (canceling loans for qualifying members of the armed services serving in “an area of hostilities”).

C. Deterring Crime

Using prior bad acts as an aggravating sentencing factor is consistent with a deterrence-based sentencing rationale, in particular with specific deterrence. 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 deterred him from criminal activity and that more severe punishment is warranted in order to deter him from future criminal conduct.

While this specific deterrence argument seems, at first blush, quite convincing, 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 — that is, 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. As Paul Robinson

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202 As Michael Maltz has explained, specific deterrence:

is the reduction in criminal activity by specific offenders, as a direct consequence of their fear of incarceration or some other sanction. It implies that these offenders have been convinced that the risk of additional penalties is not worth the potential rewards from continued criminal behavior. Measurement of the extent of special deterrence is relatively straightforward. One need only trace the future criminal careers of the specific offenders . . . .


203 Sendor, supra note 137, at 127.

204 See, e.g., Neal Kumar Katyal, Deterrence’s Difficulty, 95 MICH. L. REV. 2835 (1997) (noting the failure of traditional deterrence analysis to account for substitution effects); 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) (“Research on specific deterrence—the effect of a sanction on the person who receives it—suggests that even offenders who receive harsher penalties are not appreciably deterred.”) One study of white collar offenders showed no difference in the recidivism rates between similar offenders who received prison terms and those who received probation, and “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.”); see also STITH & CABRANES, supra note 15, at 54 (noting that a deterrence-based sentencing system would be “required to consult or conduct social science research concerning the efficacy of various criminal sanctions in deterring different crimes,

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and John Darley have explained, although lawmakers generally believe that 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.”

Second, the data that has been used to justify longer sentences for recidivists fails to demonstrate conclusively that increasing penalties for habitual offenders does, in fact, deter them from committing future crimes. Repeat offenders continue to offend at higher levels despite the increased penalties imposed by habitual offender legislation. Of course, it is possible that these repeat offenders would offend at even higher levels if their criminal history did not increase their expected penalties. 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 sentences — and then impose punishments that minimized the total social cost of crime”; also noting that “neither 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”).

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, id. at 954, as well as the disproportionately high occurrence of conditions that interfere with rational decisionmaking (e.g., drug use, poor impulse control) in populations most at risk for criminal conduct, id. at 955-56.

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 15, at 6-8. As noted 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 the Commission’s report demonstrated that these offenders continue to reoffend at high levels.

Cf. Franklin E. Zimring & Sam Kamin, Facts, Fallacies, and California’s Three Strikes, 40 DUQ. L. REV. 605, 606 (2002) (noting that California Three Strikes law changed the penalties for defendants with one or two “strikes,” and “[t]hus, it can be expected that the deterrent effect of the new legislation will be greatest on those defendants with prior strikes on their record. If this were true, we should expect to find fewer repeat offenders in the offending population after the law went into effect than we did before the law went into effect.”)

“If the defendant has one prior ‘serious’ or ‘violent’ felony conviction, he must be sentenced to ‘twice the term otherwise provided as punishment for the current felony
conflicting accounts emerged regarding whether the law had resulted in lower crime rates for repeat offenders. Some studies concluded that the legislation deters recidivism, while others concluded that the deterrence has been negligible.

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. 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. 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. But, the argument goes, if we tell people that we will punish them less for committing a crime if they have performed prior good acts, then we are weakening the deterrent effects of the law for those who have already performed prior good acts.

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 — that is to say, present punishments are at a level where the benefits of deterrence are perfectly balanced against the

209 E.g., Naomi Harlin Goodno, Career Criminals Targeted: The Verdict is in, California’s Three Strike Law Proves Effective, 37 Golden Gate U. L. Rev. 461, 469-471 (2007).

210 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 207, at 606 (summarizing Zimring et al., Crime and Punishment in California: The Impact of Three Strikes and You’re Out (1999)).


213 This statement is based on the assumption that we are confident that the ordinary (non-aggravated) sentence length will sufficiently deter most actors.

214 Cf. Dan-Cohen, supra note 211, at 630-35.
costs of imprisonment. 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.

Second, if we accept this argument, then 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. 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. Thus, a sentencing system that continuously increases punishment levels in the attempt to

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216 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 Braun, Statistical Estimation of the Probability of Detection of Certain Crimes (July 14, 1988) (draft paper prepared for U.S. Sentencing Comm’n)).

217 E.g., Cass R. Sunstein & Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 STAN. L. REV. 703, 748 (2005) (making deterrence-based argument for capital punishment, but conceding that there may be “constraints of proportionality” that would prevent their argument form applying to unintentional killings). Cf. SHAVELL, supra note 215, at 483 (“[S]anctions should be scaled upward to reflect the likelihood of escaping liability. There are several problems, however, that may be faced in actually imposing such sanctions on grounds of fairness; 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 may well limit the sentence to a lesser level.”).

218 Robinson & Darley, supra note 205, at 985-89 (noting that sentences that exceed a community’s shared sense of justice has 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 (2000).
increase deterrence may have the ultimate effect of decreasing the overall effectiveness of the criminal law at deterring crime.\textsuperscript{219}

Related to the concern about deterrence, is the concern that individuals may perform military service or charitable works in anticipation of reducing their punishment for future criminal activity.\textsuperscript{220} 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. But even assuming that an explicit sentence reduction for prior good acts were to encourage such behavior, that 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.\textsuperscript{221}

This position may seem counter-intuitive — treating good acts as mitigation has often been justified in terms of a reward for previous actions or as a moral reckoning for an individual, rather than as a utilitarian balancing.\textsuperscript{222} But this 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.\textsuperscript{223} The practice is well-known, and

\textsuperscript{219} See Leslie Sebba, *Mitigation of Sentence in Order to Deter?*, 6 MONASH U. L. REV. 268 (1980) (describing empirical literature on deterrence and noting that “it seems possible that in some situations deterrence is more likely to be achieved by reducing penalties than by increasing them”). Cf. Hessick, supra note 83, at 117-18.

\textsuperscript{220} See Volokh Conspiracy, *Sentencing and Military Service* (Oct. 26, 2006 at 5:50 pm), at http://volokh.com/posts/1161895859.shtml (“‘good 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.”)

\textsuperscript{221} For concerns about whether an individual’s motives in performing good acts should matter, see supra notes 181-187 and accompanying text.

\textsuperscript{222} See supra note 53.

\textsuperscript{223} See Robert M. Carter, et al., *Community Service: A Review of the Basic Issues*, 51 FED. PROBATION 4, 4 (1987) (defining “community service” as “a court order that an offender perform a specified number of hours of uncompensated work or service within a given time period for a nonprofit community organization or tax-supported...
the sentence itself is viewed as punishment.\textsuperscript{224} Perhaps less well-known is the practice of permitting convicted offenders to join the military rather than serve a term in prison.\textsuperscript{225} (Those who have seen \textit{The Dirty Dozen}\textsuperscript{226} may be familiar with the practice.) Evidence of that practice can be found during the Civil War,\textsuperscript{227} as well as in colonial Virginia.\textsuperscript{228} If community work or military service can serve
as punishment after a defendant is convicted of a crime, then — just as a convicted defendant can receive credit for the time she spends incarcerated pending trial — it would be philosophically consistent to give a defendant credit for the time she has spent performing charitable work or military service before her conviction. Indeed, 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.

D. Line Drawing Concerns

One could object to the consideration of good acts at sentencing by making an argument about line drawing: 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. 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 actions that are undeniably “good acts.”


230 See 18 U.S.C. § 3585(b) (“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.”).

231 See Henning, supra note 5, at 9 (“Anything can be a ‘good work,’ so it is impossible to define that term as a short-cut to figuring out what counts, much less how it should be counted.”).
Heroic military service and regular charitable work are activities that our society otherwise celebrates and rewards.\textsuperscript{232} Whatever line drawing concerns might arise in the context of quantity or quality, there are some good acts that would undoubtedly qualify, such as a serviceman who has been awarded a medal for bravery, a 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 sentence of such 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,\textsuperscript{233} only those good acts which materially distinguish one offender from another should qualify, thus limiting the scope of the line drawing inquiry.\textsuperscript{234} 

Second, line drawing concerns have also arisen in situations involving prior bad acts, e.g., whether to “count” uncharged criminal conduct,\textsuperscript{235} acquitted conduct,\textsuperscript{236} prior convictions that are very old,\textsuperscript{237} not very serious,\textsuperscript{238} have been pardoned,\textsuperscript{239} were obtained without some procedural protection,\textsuperscript{240} or involved statutes that have since

\begin{footnotesize}
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\item See supra notes 188-201 and accompanying text; see also Kahan, supra note 224, at 629 (“The significations associated with community service are valued because they enable us to occupy a particular role--that of good citizen--that entitles us to respect ourselves and to be respected by others.”)
\item See supra text accompanying notes 115-128.
\item See supra text accompanying notes 119-121. Admittedly, sentencing systems have sometimes struggled with the question of which offenders are appropriately compared for purposes of sentencing adjustments. See supra notes 50-52 and accompanying text.
\item See supra note 14.
\item See supra note 14.
\item See, e.g., USSG § 4A1.2(e).
\item See, e.g., USSG § 4A1.2(c); United States v. Williams, 462 F. Supp. 2d 342 (E.D.N.Y. 2006) (addressing whether prior conviction for attempted criminal sale of a controlled substance constituted a conviction for a “serious drug offense” such that it subjected defendant to higher penalties under the Armed Career Criminal Act, a federal habitual offender statute).
\item See USSG § 4A1.2 (Application Notes (6) & (10)).
\item See, e.g., Custis v. United States, 511 U.S. 485 (1994) (holding that in a sentencing under the Armed Career Criminal Act, a defendant had no right to collaterally attack a prior state conviction used for sentencing enhancement except for convictions obtained in a proceeding in which the accused was not represented by counsel and had not competently and intelligently waived the right to counsel); People v. Nguyen, 152 Cal. App. 4th 1205 (Cal. App. 6th Dist. 2007) (holding that juvenile conviction could not be used as a “strike” under Three Strikes Law because juveniles have no right to a jury trial).
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been repealed or held unconstitutional. Just as lines have been drawn in the context of bad acts, so too can they be drawn regarding good acts. Indeed courts have already confronted and decided issues such as the quality and quantity of good acts an individual must have performed, how far in the past the acts may have occurred, and whether to allow repeated mitigation for the same good act. While identification and quantification will undoubtedly entail more work with respect to good acts than to bad, line drawing raises questions about administrability rather than about the normative issue of whether prior good acts should be considered at sentencing.

The line drawing argument is most persuasive if we think that consensus regarding good acts will be difficult (if not impossible) to achieve. There are, I am certain, 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 also 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. Indeed, while there are members of society who believe that our criminal laws are over-inclusive, there are undoubtedly other members of society who 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

241 See, e.g., United States v. Akers, 409 F.3d 904 (8th Cir. 2005); United States v. Cox, 245 F.3d 126 (2d Cir. 2001).
244 Allen v. State, 453 N.E.2d 1011, 1013 (Ind. 1983) (“Defendant apparently had nine years of service in the Marine Corps including substantial duty in Vietnam, and had received an honorable discharge. However, defendant . . . had received some degree of leniency in sentencing on prior crimes committed in the states of California and Ohio apparently because of his military record. The trial court here was obviously justified in concluding that defendant's military record was no longer a mitigating circumstance.”).
245 For a brief discussion about administrability issues, see infra text accompanying notes 270-271.
aggravate an offender’s sentence. A system committed to sentencing symmetry could simply submit the identification of good acts to the same political process, and then the line drawing objection would not present a principled justification between aggravating for bad acts and mitigating for good acts.

E. Victim-Centered Punishment

Another retribution-based objection that could be raised to the consideration of good acts centers on the victim of an offender’s crime. In its most simple terms, 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 at least some victims of violent crimes appear more outraged when they have been victimized by a recidivist. But the objection begins to unravel under closer inspection.

To determine 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. The theory is that, presumably, the victim would wish to aggravate an offender’s sentence based on bad acts but not to mitigate

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246 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 military is the appropriate line to draw regarding good act mitigation. See supra notes 22-24 and accompanying text.

The fact that other political systems have not chosen to draw such lines should not be interpreted as a general consensus that good acts ought not to mitigate punishment. As discussed above, see Section II.A. supra, the political process seems to be much more adept at identifying aggravating than mitigating circumstances. To the extent that a system has failed to identify good acts as a potential category of mitigation, we cannot plausibly say that a consensus has been reached to exclude specific types of good acts as worthy of mitigation.

247 This objection may not apply to so-called “victimless crimes.”

248 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).
based on good acts. One problem with this version of the victim-centered objection is that it suggests that sentencing systems should only aggravate and not mitigate sentences, because the victim would likely be outraged no matter the reason for the sentence reduction. 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. 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. If the objection is based only on a victim’s wishes, and if it does 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.

A second possible version of the victim-centered objection would rely on the harm the victim has suffered. 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, thus mitigation would seem inappropriate. But this version of the objection applies equally to prior bad acts. An offender who has committed

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249 This is not unlike the flaw with the deterrence argument discussed above in Part III.C. See supra text accompanying notes 217-219.
250 See, e.g., supra notes 184&185.
251 See, e.g., Stephanos Bibas, Forgiveness in Criminal Procedure, 4 OHIO ST. J. CRIM. L. 329, 336 (2007) (“We naturally assume that victims therefore want vengeance and call for blood, and indeed sometimes they do. While victims do want to see justice done, they are open to mercy as well.”); see also Susan Bandes, When Victims Seek Closure: Forgiveness, Vengeance, and the Role of the Government, 27 FORDHAM URB. L.J. 1599, 1599-1601 (2000) (giving examples of different victim reactions); Vitiello, supra note 248, at 1659-61 (same).
252 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 251, at 347 (acknowledging this concern, but responding that victim forgiveness is a “neutral metric[]” that may be appropriately used “to structure and guide discretion”).
253 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 Andrew Ashworth, Desert, in PRINCIPLED SENTENCINGS: READINGS ON THEORY AND POLICY 141, 143 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998). For a brief discussion on the importance of victim harm in punishment decisions, see Hessick, supra note 252, at 391-92.
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. 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 the offender.

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. Under this theory, an offender is believed to have wronged the victim not simply in causing her harm, but also in conveying a message to the victim that she is worth less than the offender. 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 humanity.” In other words, an offender’s crime suggests that the offender is more important than the victim; and an offender is punished 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. This theory (like the wishes of the victim view) has the potential to deny 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

255 Hampton, supra note 254, at 1686.
256 “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.” Hampton, supra note 254, at 1691.
“in a way that has lowered [her] rather dramatically in value relative to others in society.”²⁵⁷

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 the message of her crime that she is superior to her victim or anyone else in society. Like all other members of society, the victim has benefited from the offender’s prior good acts (at least indirectly). And 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.²⁵⁸ Especially in the case of charitable works, it seems intuitive that persons who need not worry about their own welfare or the welfare of their immediate family may

²⁵⁷ 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.” Hampton, supra note 254, at 1698.

²⁵⁸ See United States v. Thurston, 358 F.3d 51, 80 (1st Cir. 2004) (“It is hardly surprising that a corporate executive like Thurston is better situated to make large financial contributions than someone for whom the expenses of day-to-day life are more pressing; indeed, business leaders are often expected, by virtue of their positions, to engage in civic and charitable activities. Those who donate large sums because they can should not gain an advantage over those who do not make such donations because they cannot.”) For examples of other courts expressing the concern that good works sentencing reductions for white collar defendants may be tantamount to considering a defendant’s socioeconomic status, see United States v. Haversat, 22 F.3d 790, 796 (8th Cir. 1994); United States v. Nava-Sotelo, 232 F. Supp. 2d 1269, 1285 (D.N.M. 2002); United States v. McHan, 920 F.2d 244 (4th Cir. 1990); United States v. Scheiner, 873 F. Supp. 927 (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 9, at 105-08; Henning, supra note 5, at 9.
be more likely to give their time and efforts to help others. \[^{259}\] Also, good works in poorer communities may occur more informally and thus may be more difficult to prove at sentencing. \[^{260}\]

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, \[^{261}\] though Hispanics are under-represented in the armed forces. \[^{262}\] And lower socioeconomic status is also highly correlated with military enlistment. “[S]tudies 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.” \[^{263}\]

But while military enlistment data undercuts the race and class argument, statistics on volunteer work in the United States during 2005 confirm different volunteer rates based on race and class that would support the argument. Approximately 30% of all white Americans performed “unpaid volunteer activities for an organization at any point from September 1, 2004, through September 2005,” as compared to 22.1% of African Americans, 20.7% of all Asian Americans, and 15.4% of all Hispanic or Latino Americans. \[^{264}\] More

\[^{259}\] Henning, *supra* note 5, at 10 (“In looking at a defendant’s works . . ., it is important to consider the pressure a middle-class person faces in earning a sufficient living while, in many instances, supporting a family and still performing good works in the community.”).

\[^{260}\] 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* Section III.D *supra*.

\[^{261}\] Meredith A. Kleykamp, *College, Jobs, or the Military? Enlistment During a Time of War*, 87 SOC. SCI. Q. 272, 276 (2006) (“the proportion of the military made up by African Americans rose from about 11 percent in 1972 (roughly the same proportion in the general population) to about 30 percent by the mid 1980s and fell to roughly 22 percent by 2002”).

\[^{262}\] *Id.* at 277.

\[^{263}\] *Id*.

educated individuals also tended to volunteer at higher rates,\(^\text{265}\) as did employed persons as compared to unemployed persons.\(^\text{266}\)

But 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.”\(^\text{267}\) And both employment status and education level achieved are also predictive of recidivism.\(^\text{268}\)

Because accounting for prior bad acts at sentencing almost certainly results in undesirable class or race 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, it is possible to 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 such effects, it does not necessarily mean that those effects should be permitted for aggravating factors but not mitigating. To the contrary, given that our political system appears to over-identify aggravating punishment factors,\(^\text{269}\) it might make sense to counterbalance that effect by incorporating any tolerance of secondary race and class effects into mitigation rather than aggravation.

\(^{265}\) 45.8% of college graduates performed volunteer work, as compared to 33.7% of persons who had completed some college but not obtained a bachelor’s degree, 21.2% of persons who graduated high school but did not attend college, and 10% of persons with less than a high school diploma. Id.

\(^{266}\) See id. (noting that 31.3% of persons employed in the civilian work force performed volunteer work, as compared to 26.4% of persons unemployed). See supra notes 150-151.

\(^{267}\) Michael Tonry, Selective Incapacitation: The Debate over Its Ethics, in PRINCIPLED SENTENCING 176 (Andrew von Hirsch & Andrew Ashworth eds., 1992); see also FIRST OFFENDER, supra note 146, at 21, exh. 1 (noting that white offenders account for 63.5% of all federal offenders with no criminal history points and 61.0% of all federal offenders with a single criminal history point, but they account for only 50.0% of federal offenders with two or more criminal history points; in contrast African American offenders account for 25.7% of all federal offenders with no criminal history points and 30.3% of all federal offenders with a single criminal history point, but they account for significantly more — 41.8% — of federal offenders with two or more criminal history points); see also supra note 149.

\(^{268}\) See supra notes 150-151.

\(^{269}\) See supra text accompanying notes 88-97.
CONCLUSION

There may be good reasons not to reduce an offender’s sentence on the basis of her prior good acts. Such a practice entails an inquiry into events unconnected with the offense of conviction, and accounting for prior actions may have secondary race and class effects. But convincing as these arguments may be, they apply with equal force to the practice of increasing on offender’s sentence on the basis of her prior bad acts, including convictions and uncharged conduct. All U.S. jurisdictions increase an offender’s sentence for prior bad acts, at least under some circumstances. To increase an offender’s sentence for bad acts, but to refuse to decrease her sentence for good acts creates an imbalance in sentencing policy, and such an imbalance is 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 supra on recidivism rates and deterrence. But each potential distinction suffers its own shortcomings. Either the distinction is insufficiently supported by empirical data (recidivism rates) or there are reasons to doubt that the distinction is based on principles and arguments that we are willing to accept (deterrence).

Assuming that the normative question posed by this Article can be answered in the affirmative — that is, 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 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 will depend 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. 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 to reject an

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individual defendant’s evidence of prior good acts as relevant to her 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 specify 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, etc.), and they would likely set an inflexible reduction (e.g., decrease the offense level by two levels for all qualifying offenders). 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.

There is a legislative consensus in this country that an offender’s sentence should be increased if she has previously committed crimes. But, as explained 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 that those sentencing schemes which account only for prior good acts and not prior bad acts have failed to give adequate consideration to mitigating sentencing factors.

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271 Such a detailed description and inflexible reduction would mirror other mitigating sentencing provisions in the Federal Guidelines. See, e.g., USSG § 3B1.2 (mitigating role reduction).