FIRST-TIME OFFENDER, PRODUCTIVE OFFENDER, OFFENDER WITH DEPENDENTS: WHY THE PROFILE OF OFFENDERS (SOMETIMES) MATTERS IN SENTENCING

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ABSTRACT

Should a single mother of four young children who commits theft be sentenced to a lesser sanction than a woman who commits the same crime but has no dependents? Should a billionaire philanthropist be sentenced to a lesser penalty than the average citizen for assaulting a random bystander? Should a first-time thief receive a lighter sanction than a career thief for the same theft? The relevance of an offender’s profile to sentencing is unclear and is one of the most under-researched and least coherent areas of sentencing law. Intuitively, there is some appeal in treating offenders without a criminal record, those who have made a positive contribution to society, or who have dependents more leniently than other offenders. However, to allow these considerations to mitigate penalty potentially licenses offenders to commit crime and decouples the sanction from the severity of the offense, thereby undermining the proportionality principle. This article analyzes the relevance that an offender’s profile should have in sentencing. We conclude that a lack of prior convictions should generally reduce penalty because the empirical data shows that, in relation to most offenses, first-time offenders are less likely to reoffend than recidivist offenders. The situation is more complex in relation to offenders who have made worthy social contributions. They should not be given sentencing credit for past achievements given that past good acts have no relevance to the proper objectives of sentencing and it is normally not tenable, even in a crude sense, to make an informed assessment of an individual’s overall societal contribution. However, offenders should be accorded a sentencing reduction if they have financial or physical dependents and if imprisoning them

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is likely to cause harm to their dependents. Conferring a sentencing discount to first-time offenders and those with dependents does not license them to commit crime or unjustifiably encroach on the proportionality principle. Rather, it recognizes the different layers of the legal system and the reality that sentencing law should not reflexively overwhelm broader maxims of justice, including the principle that innocent people should not suffer. This article argues that fundamental legislative reform is necessary to properly reflect the role that the profile of offenders should have in the sentencing regime.

I. INTRODUCTION

The impact that the past criminal history and achievements of offenders and their family ties should have on sentencing outcomes is one of the most unsettled and doctrinally complex areas of sentencing law. The main overarching guiding sentencing principle is the proportionality doctrine, which in its most basic form requires that the punishment should fit the crime. Thus, a key focus of the sentencing inquiry is on the harshness of the sanction and the seriousness of the offense. The offender’s profile, at least ostensibly, stands outside this perspective.

However, on closer analysis considerations personal to the offender are inextricably bound up in the sentencing inquiry. Thus, in most sentencing systems the key consideration affecting the penalty (apart from the circumstances of the offense) is the prior criminal history of the offender. Moreover, the proportionality principle does not exhaust the range of considerations that properly inform the correct sentence and its duration. Other sentencing considerations, such as rehabilitation, may be capable of accommodating factors relating to the offender into the sentencing inquiry.

In this article, we examine the relevance that three considerations that relate to the profile of many offenders should have in the sentencing calculus: the absence of prior convictions; the offender’s past positive good acts; and the offender’s family ties,
particularly where other individuals are financially or physically dependent on the offender.

The complexity of the inquiry regarding the profile of the offender has resulted in an incoherent and unsatisfactory jurisprudence. The general trend of the sentencing landscape is that the absence of prior convictions is a mitigating sentencing consideration, except in relation to certain defined offenses. However, there has been no considered attempt by the courts to justify the rationale for this discount, nor to identify the circumstances in which the sentencing reduction does not apply. Past good acts do not normally mitigate penalty. Family ties can, in some situations, mitigate penalty, but these circumstances (on their face) are rare.

We conclude that the current state of the law in this area is fundamentally normatively and empirically flawed. The absence of prior convictions should mitigate more significantly than is currently the case, given that the empirical data shows that in relation to most offense types, first offenders are statistically less likely to reoffend than recidivists. Offenders who have made significant social contributions should not receive a discount. However, offenders who have dependents should be treated more leniently than other offenders. The interests of the dependents should not be totally ignored in the sentencing calculus. They are innocent parties whose flourishing will necessarily be diminished by imprisonment of the offender. The objectives of sentencing law are important, but sentencing law does not overwhelm, and is not superior to, other legal imperatives such as the prohibition against punishing the innocent. The interest of blameless dependents should not be totally subordinated to the need to thoroughly punish offenders. First-time offenders and offenders with financial or physical dependents should receive a penalty reduction in the order of twenty-five percent. For considerations of clarity, the nature and quantum of the penalty adjustments in this article are examined from the perspective of a reduction to a term of imprisonment. However, in principle, in relation to proposed short terms of imprisonment, the mitigation that should be provided to first-time offenders and those with defendants could result in a penalty

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4 See infra text accompanying notes 52–54, 85, 106–13.
6 See infra text accompanying notes 65–67, 120–21, 128.
substitution, such that a term of imprisonment is avoided altogether in favor of, say, probation or a fine.

The manner in which the profile of the offender should be accommodated in the sentencing calculus is discussed in the context of the sentencing systems operating in the United States and Australia. The sentencing regimes in these jurisdictions have many commonalities (principally because they have the same overarching goals in the form of community protection, deterrence, and rehabilitation), however, the means invoked to pursue these objectives are strikingly different. The contrasting manner in which these respective sentencing systems deal with an offender’s profile illustrates possible approaches to the issue. It is argued, however, that ultimately both sentencing systems are flawed when it comes to incorporating the profile of offenders into sentencing determinations.

In Part II of this article, we examine the manner in which sentencing law currently deals with the offender’s profile. The remaining part of the article makes reform recommendations regarding the manner in which the profile of the offender should be factored into the sentencing inquiry. Part III argues that first offenders should receive a discount for all offense types, with the possible exception of property offenses. This is followed in Part IV by an explanation of the reasons that past good acts should not mitigate penalty. In Part V, we argue that offender dependency should reduce penalty. This is a particularly complex, multilayered issue which requires consideration of a number of multidisciplinary principles and ideals, including the right to a family, the proscription against punishing the innocent, and the doctrine of double effect. Part VI of the paper provides an overview of the main rationales of sentencing and notes that implementation of the recommendations will not undermine any of the key sentencing objectives so long as the recidivist premium for serious sexual and violent offenders is maintained even in relation to offenders with

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8 See infra Part II.
dependents. The concluding remarks, in Part VII, set out the reforms that should occur to accommodate the analysis in this article.

II. THE CURRENT STATE OF THE LAW

A. The United States

The United States does not have uniform sentencing laws or procedures. Each state and the federal jurisdiction have their own sentencing system. The federal sentencing regime in particular is important given that approximately ten percent of all inmates have been sentenced for violating federal criminal laws and, as has been noted by Douglas A. Berman and Stephanos Bibas, this system “profoundly shapes American criminal justice.” There are a number of key similarities that mark sentencing law throughout the United States, notwithstanding the uniqueness of each sentencing system.

A defining feature of sentencing in the United States is the heavy reliance on standard or fixed penalties. Most jurisdictions in the United States have some form of standard or mandatory penalty provisions. These penalties are normally set out in grids which utilize two main variables in arriving at the set penalty: offense seriousness and criminal history. The penalties prescribed in the grids are generally severe and this has contributed to a steep increase in prison numbers over the past two decades. Currently, more than two million Americans are incarcerated. This equates

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9 Although, as is discussed infra, the loading that is currently accorded for prior offending should be significantly diminished.

10 See Douglas A. Berman & Stephanos Bibas, Making Sentencing Sensible, 4 OHIO ST. J. CRIM. L. 37, 40 (2006); see also Ronald F. Wright, Federal or State? Sorting as a Sentencing Choice, CRIM. JUST., Summer 2006, at 16 (discussing the differences between the state and federal sentencing systems).

11 See infra note 16.

12 Berman & Bibas, supra note 10, at 40.


14 See, e.g., FED. SENTENCING GUIDELINES MANUAL § 5A (2013). See Charlie Savage, Dep't of Justice Seeks to Curtail Stiff Drug Terms, N.Y. TIMES, Aug. 12, 2013, at A1 (attributing the dramatic increase in the federal prison population to mandatory minimum sentences for drug offenses).

15 See LAUREN E. GLAZK & ERINN J. HERBERMAN, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 243936, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 3 (2013). The exact number of prisoners is 2,228,400. Id. More than 200,000 inmates are in federal prisons. Total U.S. Correctional Population Declined in 2012 for Fourth Year,
to an imprisonment rate of over 900 people per 100,000 adults, and sets the United States apart from all other nations on the basis that it imprisons more of its citizens than any other country.

The Federal Sentencing Guidelines ("Federal Sentencing Guidelines" or "Guidelines") are perhaps the best known standard penalty laws and are typical of the manner in which such sentencing provisions operate. The Guidelines adopt two key variables which operate to determine the penalty level, which is prescribed in the form of a range. The variables are offense severity and an offender’s criminal history.

The penalty levels and ranges are precisely designated. There are forty-three levels in total, with the penalty range gradually increasing from the bottom level (one) to the highest level (forty-three). The incremental increase in the ranges is illustrated by the fact that the top of the range in one level overlaps with the bottom of the range in the next level. The objective of the Guidelines is to further the central objectives of sentencing, in the form of "deterrence, incapacitation, just punishment, and rehabilitation." In addition to this, the Guidelines seek to promote the principle of proportionality, which contends that the harshness of the sanction should be matched by gravity of the crime.

The principle of proportionality is, however, compromised by the fact that the offender’s criminal history has a cardinal impact in determining the appropriate penalty range. Each offense has six different penalty ranges correlating with designated criminal history points, which range from one to thirteen or more. The

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19 The Guidelines are promulgated by the U.S. Sentencing Commission and issued pursuant to 28 U.S.C. § 994(a). FED. SENTENCING GUIDELINES MANUAL § 1A1.1. For analysis and criticism of the Guidelines, see BARON-EVANS & COFFIN, supra note 5.
20 See FED. SENTENCING GUIDELINES MANUAL § 5A.
21 Correlating to zero to six months imprisonment. See id.
22 Correlating to life imprisonment. See id.
23 See id. § 1A1.3.
24 Id. § 1A1.2.
25 Id. § 1A1.3.
27 Criminal history points are principally determined by reference to the seriousness of the past offending and the time period since the past offenses. See FED. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2(e).
28 See id. § 5A.
first criminal history category incorporates zero to one criminal history points, while the sixth (and highest) category applies for thirteen or more criminal history points. The designated penalty level for the same offense varies markedly depending on an offender’s criminal history, so much so that the average penalty difference between a first offender and serious recidivist is approximately double. By way of example, the presumptive penalty for an offense at level twenty for an offender with a criminal history score of I is thirty-three to forty-one months. This escalates to seventy to eighty-seven months for an offender who commits the same offense but has a criminal history score of VI.

The U.S. Supreme Court has held that these Guidelines are advisory, instead of mandatory. Despite this, the courts are still required to take the Guidelines into account in sentencing offenders. As noted by the U.S. Sentencing Commission: “An advisory guideline . . . continues to promote certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based in the individualized facts of the case.” It is perhaps for reasons associated with this that more than half of federal sentences continue to be imposed within the range stipulated in the Guidelines.

As noted above, the main variables that determine the appropriate advisory penalty range are the seriousness of the offense and the prior criminal history of the offender; however these considerations are not exhaustive. There are also a large number of circumstances that are set out in the Guidelines which allow a court to deviate from the prescribed sentencing range. These come in two forms: “departures” and “adjustments.” Departures, strictly speaking, are designated aggravating and mitigating considerations prescribed in Chapter Five, Part K of the Guidelines and include factors such as assisting authorities and diminished capacity.

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29 See id.
30 See id.
31 See id.
32 See id.
35 FED. SENTENCING GUIDELINES MANUAL § 1A2.
37 See FED. SENTENCING GUIDELINES MANUAL §§ 3A1.1–.5, 3B1.1–.5, 3C1.1–.4, 3E1.1, 4A1.1, 4A1.3, 4B1.1, 4B1.3–.5, 5H1.1, 5H1.3–.4, 5H1.7–.9, 5H1.11, 5K1.1, 5K2.0–.24.
38 Id. §§ 5K1.1, 5K2.13.
Departures in fact also refer to atypical or unusual cases where the normal operation of an aggravating or mitigating factor would have an unwarranted result. Adjustments are aggravating and mitigating factors which, if applicable, result in a reduction or increase in penalty by a set amount. The Guidelines also expressly exclude certain considerations as relevant to penalty, such as race, religion, and economic status.

There are over forty aggravating and mitigating considerations set in the Guidelines, with the number of aggravating factors exceeding mitigating factors by a ratio of approximately two to one. The fact that there are more aggravating than mitigating considerations is in keeping with the approach in other states.

For the purpose of this article, the most important category of mitigation in the Federal Sentencing Guidelines is matters personal to the offender. To this end, the Guidelines stipulate that the following factors can reduce a penalty:

- prior clean record (i.e. “aberrant behavior”), except in relation to designated offenses, which are discussed further below, and
- military service (“if it is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines”).

The Guidelines also state that several factors personal to the offender cannot reduce penalty. They are:

- employment record;
- family ties and responsibilities;

See id. § 5K2.20. This will only be satisfied if “the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.” Id. § 5K2.20(b).

Id. § 5K2.20(c); see also BARON-EVANS & COFFIN, supra note 5, at 185–96 (discussing the background of the aberrant behavior provision). While over seventy-four percent of judges stated that aberrant behavior is “ordinarily relevant” to whether a penalty should be reduced, in 2010, this consideration was cited in only 1.7% of cases in which a below-Guideline penalty was imposed. Id. at 194.

Id. § 5H1.11.

Id. § 5H1.5; see also BARON-EVANS & COFFIN, supra note 5, at 106–09 (arguing that employment record should be mitigatory).

FED. SENTENCING GUIDELINES MANUAL § 5H1.6; see also BARON-EVANS & COFFIN, supra note 5.
• civic, charitable, or public service or employment-related contributions;\(^{49}\) and
• record of prior good works.\(^{50}\)

The appropriateness of the above Guidelines was reconsidered in 2010 when the U.S. Sentencing Commission altered military service from being an irrelevant to a relevant factor but preserved the status of the other considerations detailed above as being normally irrelevant to penalty.\(^{51}\)

Thus, on their face the Guidelines prescribe that the absence of prior convictions can mitigate penalty.\(^{52}\) The policy statement greatly attenuates the circumstances where aberrant conduct mitigates penalty. It provides:

(a) IN GENERAL.—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant’s criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).

(b) REQUIREMENTS.—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

(c) PROHIBITIONS BASED ON THE PRESENCE OF CERTAIN CIRCUMSTANCES.—The court may not depart downward pursuant to this policy statement if any of the following circumstances are present:

(1) The offense involved serious bodily injury or death.
(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.
(3) The instant offense of conviction is a serious drug

\(^{49}\) FED. SENTENCING GUIDELINES MANUAL § 5H1.11; see also BARONS-EVANS & COFFIN, supra note 5, at 127–39 (discussing the background of this provision).
\(^{50}\) FED. SENTENCING GUIDELINES MANUAL § 5H1.11; see also BARON-EVANS & COFFIN, supra note 5, at 127–39 (discussing the background of this provision).
\(^{51}\) See FED. SENTENCING GUIDELINES MANUAL § 5H1.11; BARON-EVANS & COFFIN, supra note 5, at 128–35 (discussing the backdrop to these changes).
\(^{52}\) FED. SENTENCING GUIDELINES MANUAL § 5K2.20.
trafficking offense.

(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.\textsuperscript{53}

The impact of this is to limit the discount to first offenders who have not committed an offense against a minor, or an offense that involves serious harm to another person, or a firearm or a serious drug offense.\textsuperscript{54}

The Guidelines also state that prior good acts and family connections (including the dependency of others) are irrelevant to sentence.\textsuperscript{55} While the Guidelines stipulate that the latter two factors should not reduce penalty, as noted above, post-Booker this is not an obligatory stipulation and judges can mitigate penalty for these reasons.\textsuperscript{56} Further, the Guidelines expressly state: “The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.”\textsuperscript{57}

And in fact, in some instances, courts have invoked good acts as a basis for penalty reduction—although at times the mitigating bar has been elevated to require the acts to be extraordinarily good.\textsuperscript{58}

Several state legislative schemes also expressly provide that good acts should mitigate. These typically state that the “character and attitudes” of an offender are mitigating. For example, in Idaho it is stipulated that where “[t]he character and attitudes of the defendant indicate that the commission of another crime is

\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} Id. §§ 5H1.6, 5H1.11.


\textsuperscript{57} FED. SENTENCING GUIDELINES MANUAL § 1A1.4(b).


\textsuperscript{59} See United States v. Repking, 467 F.3d 1091, 1095–96 (7th Cir. 2006) (per curiam); United States v. Serrata, 425 F.3d 886, 915 (10th Cir. 2005); United States v. Strange, 370 F. Supp. 2d 644, 649 n.6 (N.D. Ohio 2005); Hessick, supra note 43, at 1124.
unlikely.\textsuperscript{60} this weighs against a sentence of imprisonment.\textsuperscript{61} More broadly, in North Carolina it is prescribed that if an offender “has been a person of good character or has had a good reputation in the community” then this is a mitigating factor.\textsuperscript{62}

Good acts are also relevant to mitigation in capital cases.\textsuperscript{63} However this approach cannot be universalized to the sentencing for other offenses given that the individualized nature of sentencing in this domain stems from the Eighth Amendment.\textsuperscript{64}

In relation to family ties, section 5H1.6 of the Federal Sentencing Guidelines states: “In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.”\textsuperscript{65}

The commentary to this provision elaborates on the circumstances when family obligations may warrant a departure. The commentary provides:

Circumstances to Consider.—

(A) In General.—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant’s family.

(iii) The danger, if any, to members of the defendant’s family as a result of the offense.

(B) Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant’s family requires, in addition to the court’s consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) The defendant’s service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential

\begin{itemize}
\item[\textsuperscript{60}] Idaho Code Ann. § 19-2521(2)(i) (West 2014).
\item[\textsuperscript{61}] Id.; see also Hessick, supra note 43, at 1117–18 & n.31 (stating that the other state legislative schemes that accord weight to good character include Hawaii, Idaho, Illinois, Indiana, North Dakota, and New Jersey).
\item[\textsuperscript{63}] Hessick, supra note 43, at 1118.
\item[\textsuperscript{64}] Id. at 1127.
\item[\textsuperscript{65}] Fed. Sentencing Guidelines Manual § 5H1.6 (2013) (emphasis added).\end{itemize}
financial support, to the defendant’s family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant’s family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant’s caretaking or financial support irreplaceable to the defendant’s family.

(iv) The departure effectively will address the loss of caretaking or financial support.66

Despite the narrow framework regarding the circumstances when family ties should reduce a sentence, the courts have, post-Booker, regularly invoked family ties and responsibility as a basis for imposing a sentence below the Guideline range—in fact, this is the most commonly employed mitigating factor in Chapter 5 of the Federal Sentencing Guidelines Manual for reducing penalty.67

An example of family obligations reducing a sentence is the decision in United States v. Schroeder68 where the court stated that the sentencing court’s decision to ignore the illness of an adopted child as being relevant to sentence was an error.69 The offender in this case was a carer for his adopted daughter who was prone to illness as a result of having a compromised immune system.70 In reaching this decision, the court noted that in order for such family ties and responsibilities to reduce penalty below the Guideline level the situation must be extraordinary. The court stated:

A defendant’s extraordinary family circumstances can constitute a legitimate basis for imposing a below-guide-lines sentence. Sentencing Guideline 5H1.6 provides that “family ties and responsibilities are not ordinarily relevant in

66 Id. § 5H1.6 cmt. n.1.
67 BARON-EVANS & COFFIN, supra note 5, at 115. In the years 2008, 2009, and 2010 family ties were involved in about twelve percent of cases in order to reduce penalty below the Guideline level. Id.
68 United States v. Schroeder, 536 F.3d 746 (7th Cir. 2008).
69 See id. at 756.
70 Id. at 750–51.
determining whether a departure may be warranted,” but a district court may impose a below-guidelines sentence “once it finds that a defendant’s family ties and responsibilities . . . are so unusual that they may be characterized as extraordinary.”

The court’s observation that Schroeder’s criminal conduct was the cause of the alleged hardship to his daughter is an obvious and not dispositive one, since the culpability of a defendant who appears for sentencing is a given. When a defendant presents an argument for a lower sentence based on extraordinary family circumstances, the relevant inquiry is the effect of the defendant’s absence on his family members. The defendant’s responsibility for the adverse effects of his incarceration on his family is not the determinative issue. If it were, there would never be an occasion on which the court would be justified in invoking family circumstances to impose a below-guidelines sentence. The court was required to consider Schroeder’s family circumstances argument and provide an adequate analysis of how much weight, if any, it should command. The fact that the consequences of incarceration are attributable to his own misconduct may be a factor in the analysis but it is not the sole factor nor is it dispositive. Thus, on remand the court should consider whether Schroeder’s family circumstances are a mitigating factor.71

Family considerations can also be mitigating pursuant to some state sentencing statutes.72 The most direct and clear expression of this is found in North Carolina, where section 15A-1340.16(e)(17) of the General Statutes of North Carolina states a mitigating factor

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71 Id. at 755–56 (quoting United States v. Canoy, 38 F.3d 893, 906 (7th Cir. 1994)) (citing United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992)); see United States v. Tiller, 549 F. App’x 795, 800 (10th Cir. 2013); United States v. Gutierrez-Sierra, 513 F. App’x 767, 770 (10th Cir. 2013); United States v. Loya-Castillo, 498 F. App’x 799, 802 (10th Cir. 2012); United States v. Barnes, 660 F.3d 1000, 1009 (7th Cir. 2011); United States v. O’Doherty, 643 F.3d 299, 215 n.3 (7th Cir. 2011); United States v. Runyan, 639 F.3d 382, 384 (7th Cir. 2011); United States v. Gary, 613 F.3d 706, 710–11 (7th Cir. 2010); United States v. Pape, 601 F.3d 743, 747 (7th Cir. 2010); United States v. Poetz, 582 F.3d 835, 838–39 (7th Cir. 2009); United States v. Munoz-Nava, 524 F.3d 1137, 1148 (10th Cir. 2008); United States v. Peña, 930 F.2d 1486, 1495 (10th Cir. 1991). For a strict application of the extraordinary circumstances test, see United States v. Culbertson, 406 F. App’x 56, 58–59 (7th Cir. 2010), and Gary, 613 F.3d at 709–11.

as: “[t]he defendant supports the defendant’s family.”

B. Australia

Like the situation in the United States, there is no uniform sentencing system in Australia. Each of the eight jurisdictions has its own sentencing law and process, which is prescribed by a combination of legislation and common law. In addition to this, the federal jurisdiction has its own discrete sentencing system. While there is divergence in terms of the finer details of each of the sentencing systems, the broad approach is similar.

The key sentencing objectives are community protection, deterrence, and rehabilitation. The proportionality principle is also a cardinal consideration in determining the nature of a sanction and its length or severity.

A key point of departure between the sentencing systems in Australia and the United States is that standard or mandatory penalties in Australia are rare. Instead sentencing in Australia is largely a discretionary process, whereby judges have considerable discretion to impose a penalty, so long as it does not exceed the maximum penalty for the relevant offense. This methodology is termed the “instinctive synthesis.”

In accordance with this approach, judges are required to identify all of the factors that are relevant to a particular sentence and arrive at a judgment regarding the precise penalty that is

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75 Sentencing Guidelines: Australia, supra note 74.
76 See RICHARD EDNEY & MIRKO BAGARIC, AUSTRALIAN SENTENCING: PRINCIPLES AND PRACTICE 5 (2007); supra text accompanying note 7.
79 See id. at 1–2.
80 R v Williscreft [1975] VR 292, ¶ 31 (Austl.); see also Barbaro v The Queen [2014] HCA 2, ¶ 41 (Austl.) (“[T]he synthesis of the ‘raw material’ which must be considered on sentencing, including material like sentencing statistics and information about the sentences imposed in comparable cases, is the task of the sentencing judge . . . .”).
appropriate in all of the circumstances. However, judges are not required, nor permitted, to set out with particularity the precise weight that has been conferred to any particular sentencing factor.

Another important contrast between the sentencing systems in the United States and Australia is that there are a far greater number of aggravating and mitigating considerations in Australia. One study identified nearly 300 such considerations in Australia. The large number of factors that increase and decrease penalties in Australia combined with the instinctive synthesis approach to sentencing has resulted in the sentencing process being criticized for its obscurity, lack of transparency, and unpredictability.

For the purposes of this article, the most important mitigating or aggravating factors are those relating to the profile of the offender. In Australia, at common law, the starting position regarding an offender’s character is that the absence of prior convictions is a mitigating factor. So too is an offender’s character and past good acts. At common law, the concept of character has not been explored with any degree of precision and, in particular, it has not been distinguished from simply the absence of prior convictions. Some legislative provisions do, however, stipulate a distinction between the absence of prior convictions and good character. For example, in New South Wales, the Crimes (Sentencing Procedure) Act 1999 states the absence of significant prior convictions and good character mitigate penalty.

Section 16A of the Commonwealth’s Crimes Act 1914 provides that in determining the appropriate sentence the court is to consider the “character” and “antecedents” of the accused. The

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82 See id. at 269.
85 See, e.g., DPP (Cth) v D’Alessandro (2010) 26 VR 477, ¶ 26 (Austl.) (“It is true that the respondent has no prior convictions. He therefore comes to be sentenced as a person of good character.”).
87 See, e.g., D’Alessandro, 26 VR 477, ¶ 26 (failing to distinguish the offender’s good character from his lack of prior convictions).
88 Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(3)(e) (Austl.).
89 Id. s 21A(3)(f).
90 Crimes Act 1914 (Cth) s 16A(2)(m) (Austl.).
term “antecedents” is generally understood to mean the criminal history of the offender.\textsuperscript{91} Section 8(1)(b) of Victoria’s Sentencing Act 1991 states that in determining whether to record a conviction, one of the considerations that a court is to consider is “the character and past history of the offender.”\textsuperscript{92} Victoria is one of the few jurisdictions that defines character. Section 6 states:

In determining the character of an offender a court may consider (among other things):

(a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender; and

(b) the general reputation of the offender; and

(c) any significant contributions made by the offender to the community.\textsuperscript{93}

While these provisions distinguish between the absence of prior convictions and good character,\textsuperscript{94} the courts in applying these provisions have not carefully analyzed them and the two concepts are typically fused, such that the absence of prior convictions is a proxy for good character. Thus, in \textit{Director of Public Prosecutions (Cth) v D’Alessandro}, the court stated: “It is true that the respondent has no prior convictions. He therefore comes to be sentenced as a person of good character.”\textsuperscript{95}

In \textit{R v Gent}, the court noted that there is a distinction between the lack of prior convictions and good character, but did not elaborate on how good character is ascertained in a concrete manner. The court stated:

It has been said that there is a certain ambiguity about the expression “good character” in the sentencing context. Sometimes, it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community.\textsuperscript{96}

Accordingly, the absence of prior convictions alone is mitigating. Further, it has been held that a penalty reduction may be

\begin{footnotesize}
\textsuperscript{91} \textit{Cobiac v Liddy} (1969) 119 CLR 257, 277 (Austl.) (Windeyer, J.).
\textsuperscript{92} \textit{Sentencing Act 1991} (Vic) s 8(1)(b) (Austl.).
\textsuperscript{93} \textit{Id.} s 6.
\textsuperscript{94} \textit{Id.} ss 6, 8(1)(b).
\textsuperscript{95} \textit{DPP (Cth) v D’Alessandro} (2010) 26 VR 477, ¶ 26 (Austl.).
\end{footnotesize}
warranted if there is simply a lack of prior convictions for the current offense type for which the offender is being sentenced. However, there is no evidence that the absence of prior convictions plus positive good deeds is more mitigating than the absence of prior convictions alone.

In establishing good character, one relatively settled principle is that the current offenses should normally be ignored. In *Ryan v The Queen*, Judge McHugh stated:

It is necessary to distinguish between the two logically distinct stages concerning the use of character in the sentencing process. First, it is necessary to determine whether the offender is of otherwise good character. When considering this issue, the sentencing judge must not consider the offences for which the prisoner is being sentenced. Because that is so, many sentencing judges refer to the offender’s “previous” or “otherwise” good character.

The willingness of courts to find good character simply on the basis of the absence of prior convictions is indicative of a broad approach to this trait as being mitigating, but this is largely negated by the large number of exclusions to the circumstances when good character is operative to mitigate penalty.

The courts have held that the good character is of far less significance (i.e. has little mitigatory operation) in four situations. The first situation is where the offense in question is normally committed by people without a criminal history. Secondly, no reduction is appropriate where the offender’s good character enabled him/her to occupy the position from which the offenses could be committed. Thirdly, good character does not reduce penalty where there is a powerful countervailing sentencing objective that typically applies to the offense in question. Finally,
good character is of little relevance where the offender is sentenced for a number of offenses which are committed over a period of time.105

Broken down to offense type, good character is of less significance in relation to a number of offense types—often because more than one of the exceptions applies. Thus, driving offenses causing death or serious injury106 and child pornography107 do not attract a significant first-time offender discount because they are often committed by people with this profile.108 Good character is not a significant consideration for white collar financial offenses109 or child sexual offenses110 because it is often the good character of the offender that enabled him/her to occupy a position enabling him/her to commit the offense, and these offenses are normally committed by people of good character.111

First-time offenders who commit drug distribution offenses also do not get a considerable discount, because general deterrence is a strong consideration in relation to this offense type and it, too, is

527, ¶¶ 21, 25.

105 *See* *Kennedy*, [2000] NSWCCA 527, ¶ 22.

106 *In* *R v MacIntyre* (1988) 38 A Crim R 135 (Austl.), Chief Judge Lee at CL stated in relation to the offense of culpable driving that:

His Honour took into account, of course, the good character of the respondent, and properly so. But it must be said that this class of offence is one which in many, perhaps even in most, cases is committed by persons who are not in any sense members of the criminal class or who even have criminal convictions against them, and for that reason the courts need to tread warily in showing leniency for good character to avoid giving the impression that persons of good character may, by their irresponsible actions at the time, take the lives of others and yet receive lenient treatment. *Id.* at 139; *see also* *Pasznyk v The Queen* [2014] VSCA 87, ¶ 67 (Austl.) (“Culpable driving is an offence frequently committed by people of otherwise good character, so that the offending in such cases truly might be described as an aberration.” (footnote omitted)).

107 *See* *Mouscas v The Queen* [2008] NSWCCA 181, ¶ 37 (Austl.) (“For the offence of possession of child pornography where general deterrence is necessarily of importance and is frequently committed by persons of prior good character, it is legitimate for a court to give less weight to prior good character as a mitigating factor.”); *see also R v Gent* (2005) 162 A Crim R 29, ¶¶ 62–64 (Austl.) (discussing the approach of giving less weight to prior good character in child pornography cases); *Heathcote v The Queen* [2014] VSCA 37, ¶ 46 (Austl.) (holding that the sentencing judge correctly assigned minimal weight to the offender’s prior good character in case involving child pornography offenses).

108 *See* *Gent*, 162 A Crim R 29, ¶¶ 63–64 (noting that child pornography offenses are often committed by persons of prior good character); *Pasznyk*, [2014] VSCA 87, ¶ 67 (Austl.) (noting that culpable driving offenses are often committed by persons of prior good character).


110 *See* *Ryan v The Queen* (2001) 206 CLR 267, ¶¶ 33–35 (Austl.).

111 *See* *T v The Queen* (1990) 47 A Crim R 29, 39 (Austl.) (“[I]t lamentably is all too common for the perpetrators of these [child sexual abuse] offences to be men who in other respects have led exemplary lives and have commanded the respect of others.”); *R v Swift* (2007) 169 A Crim R 73, ¶ 46 (Austl.) (noting that white collar offenders are usually first-time offenders who generally lead “blameless lives” otherwise).
supposedly often committed by offenders without prior convictions.\textsuperscript{112} Armed robbery is another serious offense for which the weight accorded to the good character discount is reduced.\textsuperscript{113}

In some circumstances, a first-time offender is charged with a number of offenses. This often occurs in relation to child sexual offenses and child pornography offenses,\textsuperscript{114} and in these circumstances little weight is accorded to previous good character.\textsuperscript{115}

In \textit{R v Kennedy}, the court stated:

Less weight might also be given to prior good character in a case where there is a pattern of repeat offending over a significant period of time. That will frequently be the case in child sexual assault offences because such offences are often committed during a period of an ongoing relationship between the offender and the complainant.\textsuperscript{115}

Thus, while the good character is a mitigating factor, the significance of this consideration is undermined by the large number of exceptions relating to when it can reduce penalty.

In Australia, hardship to family members\textsuperscript{116} can mitigate penalty.\textsuperscript{117} This is a common law principle, which has also been

\textsuperscript{112} In \textit{Gent}, the court stated:

The rationale for extending less weight to prior good character may vary depending upon the class of offence. With respect to drug couriers, Street CJ (Glass JA and Yeldham J agreeing) said: “This Court and other criminal courts have said on many occasions that, in the drug traffic in particular, the circumstances that the accused person has a clear earlier record will have less significance than in other fields of crime.

Very frequently, those selected to play some part in the chain of drug trafficking, as the appellant plainly enough was, are selected because their records, their past and their lifestyles are not such as to attract suspicion. It is this in particular which has led the courts to take in the case of drug trafficking a view which does not involve the same degree of leniency being extended to first offenders.”\textit{Gent}, 162 A Crim R 29, ¶ 55 (citation omitted) (quoting \textit{R v Leroy} (1984) 55 A LR 338, ¶ 25 (Austl.)); see also \textit{DPP (Cth) v Thai} [2014] VSCA 122, ¶ 14 (Austl.) (“[I]n cases of sentencing for the importation of drugs, previous good character ordinarily has less significance than it may have in other cases.”); \textit{Dao v The Queen} [2014] VSCA 93, ¶ 9 (Austl.) (footnote omitted) (“[P]ast good character is of lesser weight in sentencing for large scale drug trafficking offences. General deterrence is at the forefront of sentencing considerations, and that applies to persons of past good character as much as to inveterate criminals.”).

\textsuperscript{113} See \textit{R v Knell} [2001] VSCA 82, ¶ 9 (Austl.).

\textsuperscript{114} See \textit{Gent}, 162 A Crim R 29, ¶ 54 (citing \textit{Ryan}, 206 CLR 267, ¶ 34).

\textsuperscript{115} \textit{R v Kennedy} [2000] NSWCCA 527, ¶ 22 (Austl.); see also \textit{Versi v The Queen} [2013] NSWCCA 206, ¶¶ 179–81 (Austl.) (noting that if the offense is not an isolated one, good character should be given less mitigating weight (citing \textit{Kennedy}, [2000] NSWCCA 527, ¶¶ 21–22; \textit{R v Hermann} (1988) 37 A Crim R 440, 448 (Austl.))).

\textsuperscript{116} In \textit{R v MacLeod} the court held that, in principle, hardship to nonfamily members (in this instance employees of the offender) could mitigate a penalty. \textit{R v MacLeod} [2013] NSWCCA 108, ¶¶ 42–44 (Austl.). However, on the facts of the case, the hardship was not sufficiently severe. \textit{Id. ¶¶ 51–55.}

adopted in a number of statutory regimes. Section 10(1)(n) of South Australia’s Criminal Law (Sentencing) Act 1988 provides that when a court is sentencing an offender, it must have regard to “the probable effect any sentence under consideration would have on dependants of the defendant.”

In a similar vein, in the Commonwealth sphere, section 16(A)(p) of the Crimes Act 1914 provides that in sentencing an offender, the court must take into account “the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants.”

While hardship to others can mitigate penalty, the courts have applied this test with a degree of reluctance and have demanded that the hardship reach extreme levels before it can moderate penalty: exceptional hardship must be demonstrated. The reasons for this are set out in *Markovic v The Queen* as follows:

The case law reveals that the “exceptional circumstances”

118 Criminal Law Sentencing Act 1988 (SA) s 10(1)(n) (Austl.).

119 Crimes Act 1914 (Cth) s 16A(p) (Austl.).

120 In some instances, the test for hardship to others to be taken into account has been held to be at the level of the “truly exceptional.” See *R v Day* (1998) 100 A Crim R 275, 277–78 (Austl.) (Wood, J.) (quoting *R v Edwards* (1996) 90 A Crim R 510, 516 (Austl.)). Another manner in which this test has been expressed has been to confuse the relevance of hardship to others for the purpose of sentence to what have been termed “extreme cases,” which would justify a departure from the general prohibition precluding consideration of matters of hardship to others. See *T v The Queen* (1990) 47 A Crim R 29, 40 (Austl.) (quoting *Boyle v The Queen* (1987) 34 A Crim R 202, 206 (Austl.)); *R v Adami* (1989) 42 A Crim R 88, paras. 20–22 (Austl.) (citing *R v Amuso* (1987) 32 A Crim R 308 (Austl.); *R v Moffa (No. 2)* (1977) 16 SASR 155 (Austl.); *R v Wirth* (1976) 14 SASR 291 (Austl.); *Boyle*, 34 A Crim R at 204–05, 206 (Burt, C.J.) (quoting *Wirth*, 14 SASR at 294). The reference to “extreme” cases may also include what may be termed “unusual” situations that may arise in the context of hardship to others. This was evident in the case of *R v Le*, where an appeal was allowed. *Le*, 107 A Crim R at 355. In the period between the date of sentence and the hearing of the appeal the appellant’s husband, who had been caring for the couple’s two young children, died and Justice Grove noted that the “unusual circumstances of the case would permit the release of the appellant so she could take care of her children. *Id.* at 356–57; see also *R v Richards* (2006) 160 A Crim R 120, ¶¶ 43–44, 49, 51 (Austl.) (holding that the impact of an immediate prison sentence on the defendant’s son, who had psychological problems and for whom the defendant was the primary caregiver, was relevant to the defendant’s sentencing, and that the sentence imposed on the defendant was “manifestly excessive” and should be reduced); *Hull v Western Australia* (2005) 156 A Crim R 414, ¶ 19 (Austl.) (“In extreme cases, a sentencing court may take into account serious illness suffered by a member of the offender’s family where that family member will be subjected to an unusual measure of hardship as a result of the offender’s imprisonment and where the offender will therefore be subjected to an unusual measure of hardship as a result of that imprisonment.”) (citing *Anderson v The Queen* (1997) 92 A Crim R 348 (Austl.).

121 See *Markovic v The Queen* [2010] VSCA 105, ¶3 (Austl.). In this case, the court held that there is no “residual discretion of mercy” that can mitigate penalty for hardship if the exceptional circumstances test is not satisfied. *Id.* ¶¶ 15–16 (internal quotation marks omitted).
test was developed in response to several considerations, as follows. First, it is almost inevitable that imprisoning a person will have an adverse effect on the person’s dependants.

... ...

Secondly, the primary function of the sentencing court is to impose a sentence commensurate with the gravity of the crime. Thirdly, to treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less. Fourthly, to treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would “defeat the appearance of justice” and be “patently unjust.” Hence it is only in the exceptional case, where the plea for mercy is seen as irresistible, that family hardship can be taken into account.122

The trend of the decisions demonstrates that courts have applied the test strictly.123 For example, in R v Nagul124 the court held that family hardship in the form of the offender’s wife being diagnosed with cancer and their son completing secondary school did not cross the threshold to constitute a mitigating consideration.125

A broader, more compassionate approach (from the perspective of the offender and his/her family members) was taken in R v Hill,126 where the court stated:

In the present case, medical evidence and a further

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122 Id. ¶¶ 6–7 (footnotes omitted).
124 R v Nagul [2007] VSCA 8 (Austl.).
125 Id. ¶¶ 36, 46. The court stated:

In the present case, I am of the view that the circumstances of hardship do not warrant the exercise of mercy such as to reduce the period of the head sentence that would otherwise be appropriate. . . . It is impossible not to sympathise with the applicant’s family and recognise the hardship that they will bear because of his imprisonment, but in all the circumstances, as I have said, I consider that this does not justify the exercise of discretion to extend mercy in relation to the head sentence. It is important to bear in mind in this context the caution sounded by Callaway JA in Carmody, namely that the sentencing judge will be failing in his or her duty of proper sentencing considerations where overwhelmed by an emotional response to the hardship that a sentence would impose upon the family of the offender. Similarly the exercise of mercy should not undermine the general principle that, save for exceptional circumstances, hardship to family members by reason of the offender’s imprisonment is not a relevant consideration for sentencing purposes.

Id. ¶ 46 (footnote omitted) (citing Carmody v The Queen (1998) 100 A Crim R 41, 46–47 (Austl.)).
126 R v Hill (2011) 110 SASR 588 (Austl.).
affidavit has been put before this Court. This material was not before the sentencing judge. The further evidence discloses a significant hardship suffered by the defendant’s family, by reason of the support that was given by him to his ailing father prior to his incarceration. The defendant’s mother is a nurse at the Lyell McEwin Hospital. The family is financially reliant upon her retaining her employment. She works two days a week, during which time the defendant would ordinarily assume the position of primary caregiver to his father. Since his incarceration, his 14-year-old sister has had to assume some of these responsibilities which the defendant would otherwise have attended to. This has placed additional strain on the family, and has had a particularly acute effect on the defendant’s father’s mental health.

The hardship identified is one that goes beyond the economic or emotional hardship to be expected when one is imprisoned. An approach to sentencing that weighs the interests of the defendant’s family with other matters, such as the gravity of the offending, is warranted.  

While it is generally accepted that in order for hardship to family to be mitigating it must be exceptional, there is some authority that, in the context of the Crimes Act 1914, normal hardship is sufficient. Judge Beech-Jones, in dissent, in R v Zerafa stated:

If in other contexts Courts are bound to consider the impact of their orders on innocent third parties, why is the impact on children of any sentence under consideration to be excluded unless their hardship is only exceptional? The primary objects in sentencing of “retribution, deterrence [and

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127 Id. ¶¶ 42–43. Family hardship also mitigated penalty in DPP (Vic) v Coley (2007) VSCA 91, ¶ 45 (Austl.) and MGP v The Queen [2011] VSCA 321, ¶ 10 (Austl.). Where the offender is a female and is pregnant or has a very young child, this is a mitigatory factor. See HJ v The Queen [2014] NSWCCA 21, ¶¶ 66, 76; R v Togias (2001) 127 A Crim R 23, ¶ 7.

128 It should be noted that family hardship which is not exceptional can mitigate penalty if knowledge of the hardship causes additional distress to the offender, making his time in imprisonment more onerous. In Markovic, the Court of Appeal stated:

An offender’s anguish at being unable to care for a family member can properly be taken into account as a mitigating factor—for example, if the court is satisfied that this will make the experience of imprisonment more burdensome or that it materially affects the assessment of the need for specific deterrence or of the offender’s prospects of rehabilitation. These are conventional issues of mitigation, and they are not subject to the “exceptional circumstances” limitation.


129 R v Zerafa [2013] NSWCCA 222 (Austl.).
the] protection of society” described by Wells J in *Wirth* can still be given effect to without requiring sentencing courts to divide the forms of hardship occasioned to an offender’s family into those which meet the description “exceptional” and those which do not. The assessment of probable hardship to family members is a task that sentencing courts are perfectly able to undertake, and no doubt they do. In any event, the words of the section and the secondary materials indicate a clear policy choice on the part of the legislature on this topic.\textsuperscript{130}

C. Overview of Relevance of Offender Profile in Sentencing in the United States and Australia

Thus, it is clear that there are starkly different approaches to the relevance of the profile of the offender in determining criminal penalty in the United States and Australia.

In summary, the above analysis reveals the following ten points:

1. The United States and Australian sentencing regimes both recognize that there are at least three different aspects of an offender’s profile that can potentially impact on criminal penalty.
2. The considerations are the absence of prior convictions, good deeds, and family obligations.
3. To the extent that these considerations apply in the sentencing realm they mitigate, rather than aggravate, penalty.
4. The Australia sentencing regime allows more scope for the profile of the offender to mitigate penalty than in the United States.
5. The absence of prior convictions can mitigate penalty in Australia. However, there are a number of offense types where good character carries little weight, including white collar crime, child sexual offenses, and very serious offenses.
6. The absence of prior convictions can mitigate penalty in

the United States. However, as is the case in Australia, they are not mitigatory in relation to child sexual offenses, serious violent offenses, and drug offenses. Unlike Australia, in these circumstances, the absence of prior convictions does not normally mitigate at all, as opposed to having a reduced mitigatory weight.

7. Past good character can mitigate penalty in Australia. However, the utility of this principle is to some degree undermined by the fact that past good character is often simply equated with the absence of prior convictions.

8. Past good character normally does not mitigate in the United States.

9. In Australia family ties can mitigate penalty where the imprisonment of the offender would cause exceptional hardship to dependents of the offender.

10. In the United States there is a statutory preference against family ties mitigating penalty; however, the judiciary invoke it as a mitigating factor relatively infrequently.

We now consider which of the above approaches, if any, is sound. As it transpires, few of the above principles can withstand critical analysis.

III. THE ABSENCE OF PRIOR CONVICTIONS SHOULD MITIGATE

As we have seen, prior convictions aggravate penalty. However, it is not the case that the absence of an aggravating factor should necessarily mitigate penalty. In order for the absence of prior convictions to mitigate penalty, it is necessary to make an independent argument in support of this proposition.

To this end, it is important to ground the existence of any mitigating (or aggravating) factors within the construct of a coherent doctrinal rubric. Despite the multifaceted nature of aggravating and mitigating considerations, one of us has recently argued

that considerations should only aggravate or mitigate sentence if they: (i) advance an objective of sentencing (which itself is justifiable); (ii) are necessary to give effect to the proportionality principle; (iii) are justified by reference to

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131 See supra text accompanying notes 30–32; see also Roberts, supra note 3, at 309 (“Today, most jurisdictions employ explicit statutory sentencing enhancements for recidivist offenders . . . .”).
broader objectives of the criminal justice system; or (iv) are supported by reference to the requirements of broader (concrete) principles of justice.132

The most compelling argument for the relevance of a good criminal record to sentencing stems from the first of these considerations: the objectives of the sentencing system. A key objective of the sentencing system is to reduce crime. Indeed, protection of the community has been described as the cardinal goal of sentencing.133 The community has less reason to fear offenders who are unlikely to reoffend than those who have a high likelihood of reoffending.

The absence of a prior conviction (or only a minor criminal record) should mitigate penalty if it is demonstrated that first-time offenders or those with only minor prior convictions are less likely to reoffend than offenders with a long criminal history. The empirical data regarding the impact of prior convictions on recidivism have been analyzed in two relatively recent reports in both the United States and Australia.

A report by the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, titled *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, examined the recidivism patterns of prisoners released in 2005.134 The report examined the recidivism patterns of prisoners for five years postrelease.135

The report noted that the last time a similar wide-ranging analysis was undertaken was for prisoners released twenty-one years earlier—in 1994.136 The utility of the 1994 study was to some extent limited because it tracked prisoners for only three years postrelease.137 The current study noted that it was not possible to exactly match the study of the two cohorts for a number of reasons, including the increased accuracy of the 2005 data,138 more states participated in the latter survey (thirty in 2005 compared to fifteen

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133 See, e.g., *Channon v The Queen* (1978) 33 FLR 433, 438 (Austl.); see also infra Part VI (discussing how the community protection consideration should impact sentencing).


135 Id.

136 Id. at 2.

137 Id. at 1.

138 Id. at 3–4.
in 1994).\textsuperscript{139} and a greater portion of older offenders were released in 2005.\textsuperscript{140} Noting these differences, the report noted that it is not tenable to make accurate comparisons of the respective recidivism rates.\textsuperscript{141} However, the best comparison that could be made was to compare the reoffending rates for the respective cohorts (while controlling for known disparities) for arrests for violent offenses.\textsuperscript{142} This comparison showed that the proportion of released prisoners who were arrested for a violent offense within three years in 1994 and 2005 was very similar, with a slight increase for the 2005 cohort (21.8\% for the 2005 cohort compared to 21.3\% for the 1994 cohort).\textsuperscript{143} This (slight) increase is despite the fact that during this period one would have assumed that the quality and effectiveness of rehabilitation programs would have improved.\textsuperscript{144}

Given the limited span of the 1994 study, the observations below relate to findings concerning the 2005 cohort. The study noted that there were 404,638 prisoners released in 2005 from prisons in 30 states, which held 76\% of the total prison population in the United States.\textsuperscript{145} The prisoners that were released in 2005 were divided into four cohorts: drug offenders (31.8\%), property offenders (29.8\%), violent offenders (25.7\%), and public order offenders (12.7\%).\textsuperscript{146}

In terms of crude findings, the report showed a very high correlation between previous imprisonment and reoffending. Overall, more than two-thirds (67.8\%) of the 404,638 prisoners released in 2005 were arrested within three years of release and more than three-quarters (76.6\%) were arrested within five years of release.\textsuperscript{147}

The report also revealed a distinction in the recidivism rate for offenders depending on the type of offense they committed. By reference to the five-year time frame, the offenders who reoffended at the greatest rates were property offenders.\textsuperscript{148} This was followed

\textsuperscript{139} Id. at 2.
\textsuperscript{140} Id. As noted below, older offenders reoffend less frequently. Id. at 1.
\textsuperscript{141} Id. at 2.
\textsuperscript{142} Id. at 5.
\textsuperscript{143} Id.
\textsuperscript{144} For an overview of the effectiveness of rehabilitative techniques, see Mirko Bagaric & Theo Alexander, The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’T Work, Rehabilitation Might and the Implications for Sentencing, 36 CRIM. L.J. 159, 161, 167–71 (2012).
\textsuperscript{145} DUROSE ET AL., supra note 134, at 6.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 1.
\textsuperscript{148} Id.
by drug offenders, public order offenders, and then violent offenders. In exact terms the reoffending rates for these cohorts over five years were property offenders (82.1%), drug offenders (76.9%), public order offenders (73.6%), and violent offenders (71.3%). These offenses are further broken down into more specific offense types. The types of offenses which meaningfully departed from these averages in terms of having a lower recidivism rate for the respective offense cohorts are homicide (51.2%) and rape (60.1%), both of which are categorized as violent offenses; fraud/forgery (77.0%), which are property offenses; and driving under the influence (59.9%), which is a public order offense. The offense types which had noticeably higher recidivism rates are robbery (77.0%) and assault (77.1%), both of which are violent offenses, and larceny/motor vehicle theft (84.1%) and burglary (81.8%), both of which are property offenses.

The data becomes especially illuminating when broken down into the types of offenses for which offenders recidivate. Overall, 28.6% of the released cohort was arrested for a crime of violence within five years. The arrest percentages for the other offense types were higher: property offenses (38.4%), drug offenses (38.8%), and public order offenses (58%). The data also indicated crime-type specialization, with a higher portion of offenders incarcerated for violent offenses being more inclined to commit an offense of violence postrelease (33.1%), compared to those incarcerated for a property offense (28.5%), public order offense (29.2%), and drug offense (24.8%). Similar specialization patterns also applied for property, drug, and public order offenses.

When recidivism did occur, it normally occurred shortly after release. More than a third (36.8%) of prisoners who were arrested within five years of release, were arrested within the first six months postrelease and more than half (56.7%) were arrested within a year of release.

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149 Id.
150 Id. at 1, 8.
151 Id. at 8.
152 Id.
153 Id.
154 Id. at 9.
155 Id. The combined total is more than 100% because some offenders were arrested for more than one offense. Id.
156 Id.
157 Id.
158 Id. at 1.
The age of the offender was an important predictor of reoffending. Within five years of release, 84.1% of offenders who were 24 years or younger were arrested.\textsuperscript{159} By contrast only 69.2\% of offenders aged 40 or older were arrested within five years.\textsuperscript{160}

Another important finding to emerge from the study was that recidivism rates increase significantly depending upon the extent of inmate criminal history. The percentage of inmates with four or fewer prior arrests who committed another offense within five years after release was 60.8\%.\textsuperscript{161} This increased to 75.9\% for inmates with five to nine prior arrests and 86.5\% for inmates with ten or more prior arrests.\textsuperscript{162}

The study also examined recidivism by variables other than arrest. These included conviction and return to prison.\textsuperscript{163} The advantage of using arrest as the determinant is that it happens earlier in time, whereas conviction and return to prison can take considerably longer, taking the event outside the five year study period.\textsuperscript{164} However, examining the data from the perspective of a return to prison is illuminating because it provides a useful contrast to similar data in Australia (which is discussed below).

The report noted that within three years of release 49.7\% of inmates were reimprisoned and this grew to 55.1\% within five years of release.\textsuperscript{165} Broken down to offense type for which an inmate was imprisoned the most likely cohort to be reimprisoned were property offenders (61.8\%), compared to drug offenders (53.3\%), public order offenders (52.6\%), and violent offenders (50.6\%).\textsuperscript{166}

The findings in this report are generally consistent with the situation in Australia. The most recent wide-ranging report on recidivism levels in Australia notes that for offenders released from Australian prisons during the 2009–2010 financial year, the rate at which prisoners were returned to prison within two years was 39.3\%.\textsuperscript{167} This had remained relatively steady over the preceding
five years, with the highest rate being forty percent and the lowest 38.5%. The actual recidivism levels were higher given that the data do not include released prisoners who reoffended within two years but received a sanction other than imprisonment.

This report did not provide information regarding recidivism and offense type. However, an earlier report by the Australian Bureau of Statistics set out more acute findings regarding reoffending for a number of prisoner cohorts, including one focusing on prisoners released during the period July 1, 1994 through June 30, 1997. The report noted that recidivism levels varied markedly depending on the offense type for which an offender was incarcerated. Offenders imprisoned for theft and burglary were returned to prison (over a ten-year period) more than fifty percent of the time, compared to drug and sexual assault offenders whose rate of prison return was less than twenty-five percent. Moreover, the report noted significant levels of offense specializations—when offenders did return to prison, they were disproportionately more likely to have committed their original offense type than were other prisoners.

The significant advantage of both the United States and Australian studies is that they involve very high numbers of offenders, the offending types are broken down into offense categories, and they track offenders for a considerable period of time. It is not tenable, however, to make a direct comparison of the studies given that offense classifications are not identical, the follow-up period is longer in Australia (for the 1994–1997 cohort), and the classification of criminal history is different (the Australian report compares first-time offenders with repeat offenders while the United States report focuses on offenders with varying numbers of prior convictions: four or fewer, five to nine, and ten or more).

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168 Id. at C.22.
169 See id. at C.20.
171 Id. at ii, 10.
172 Id. at 29.
173 Id. at 29–30.
174 Id.
175 Id. at 31–32.
176 See DUROSE ET AL., supra note 134, at 8; ZHANG & WEBSTER, supra 170, at 22.
177 DUROSE ET AL., supra note 134, at 6, 10; ZHANG & WEBSTER, supra note 170, at 22, 30–31.
However, despite these caveats, a number of clear conclusions emerge. They are as follows:

- first-time offenders, and those with a minor criminal record, reoffend at a considerably lower rate than offenders with a significant criminal history;\footnote{DUROSE ET AL., supra note 134, at 8, 10; ZHANG & WEBSTER, supra note 170, at 22, 30–31.} 
- the offenders who reoffend most frequently are property offenders and, in particular, inmates who have been convicted of burglary and larceny (known as theft in Australia);\footnote{DUROSE ET AL., supra note 134, at 8, 10; ZHANG & WEBSTER, supra note 170, at 22, 30–31.} 
- offenders who tend to recidivate the least are those convicted of violent and sexual offenses;\footnote{DUROSE ET AL., supra note 134, at 8, 10; ZHANG & WEBSTER, supra note 170, at 22, 30–31.} and 
- offenders tend to specialize in offense type.\footnote{DUROSE ET AL., supra note 134, at 8, 10; ZHANG & WEBSTER, supra note 170, at 22, 30–31.}

The above analysis is counter to existing sentencing orthodoxy in the United States and Australia, that serious offenders (such as violent, sex and drug offenders) should receive little, if any, mitigating consideration for the absence of prior convictions. Further, in Australia, white collar offenders also get less of a reduction on the basis of prior criminal record.\footnote{See Mirko Bagaric & Theo Alexander, A Rational Approach to Sentencing White-Collar Offenders in Australia, 34 ADEL. L. REV. 317, 323–24 (2013).} The rationale for this is that such offenses are normally committed by people who do not have a criminal past.\footnote{See id. at 324.}

The observation that certain offenses are committed more frequently by offenders without a criminal record is no more relevant than to note that certain offenses are committed more regularly by offenders of a certain race, or indeed, height or weight range. Observations of this nature only assume relevance if they impact on a sentencing objective. On this standard, the disproportionate commission of certain offenses by first-time offenders is inert. Sentencing is a purposive endeavour and its objectives are forward looking and come in the form of deterrence, rehabilitation, and community protection.\footnote{See infra Part VI.} The only nonforward looking aim is the principle of proportionality, which informs how much punishment is appropriate. Moreover, it is flawed to not
provide a discount to offenders simply because the offense is serious. Offenders with a good criminal record who commit serious offenses are less likely to reoffend than those with an established criminal past.\textsuperscript{185} Community protection remains relevant, and possibly even more relevant, to serious offenders.

Accordingly, reforms should be introduced that acknowledge the empirical data regarding the disproportionately lower rate of recidivism of offenders with no, or only a minor, criminal record. All offenders with a good prior record should receive this discount. If an exception is to be made to this, it should be for property offenders who, the data indicate, reoffend at a higher rate than other offenders.\textsuperscript{186} This is especially the case in relation to inmates convicted of burglary and larceny.\textsuperscript{187}

White collar offending can also loosely be termed a property crime.\textsuperscript{188} However, in neither the United States nor the Australian study is there an attempt to separately evaluate this form of crime. However, to the extent that the data match the offending types which are commonly committed by white collar offenses, they most naturally correlate with ‘deception’ offenses in Australia and fraud or forgery offenses in the United States.\textsuperscript{189} As noted above, both of these offense types have lower recidivism levels than other types of property offenses.\textsuperscript{190}

The other important operational consideration is the appropriate size of the discount. It needs to be large enough to reflect the lower risk presented by first-time offenders but, at the same time, not so large that the penalty would be so light as to be grossly disproportionate to the seriousness of the crime. A reduction in the order of twenty-five percent satisfies these considerations. This is the typical penalty reduction that offenders in Australia receive if they plead guilty to an offense\textsuperscript{191} and that guilty plea has not resulted in patently disproportionate sanctions being imposed.\textsuperscript{192} At the same time, it is considerable enough to offer offenders a

\textsuperscript{185} See DUROSE ET AL., supra note 134, at 10; ZHANG & WEBSTER, supra note 170, at 31–32.
\textsuperscript{186} See ZHANG & WEBSTER, supra note 170, at 30.
\textsuperscript{187} See id.
\textsuperscript{188} Bagaric & Alexander, supra note 182, at 320.
\textsuperscript{189} DUROSE ET AL., supra note 134, at 8; ZHANG & WEBSTER, supra note 170, at 44.
\textsuperscript{190} DUROSE ET AL., supra note 134, at 8; ZHANG & WEBSTER, supra note 170, at 30.
\textsuperscript{192} Crimes (Sentencing Procedure) Act 1999 (Cth) s 22; Criminal Law (Sentencing) Act 1988 (Cth) s 10B–C.
pragmatic incentive to plead guilty, and hence, it is a meaningful
degree of mitigation.

Accordingly, all offenders with a good criminal record should receive a sentencing discount. The definition of a good criminal record is admittedly obscure. The United States study focused on offenders with varying numbers of prior convictions, while the Australian study contrasted repeat offenders with those who had no prior convictions.\textsuperscript{193} In both systems, a significantly lower rate of recidivism was noted when compared with other surveyed cohorts.\textsuperscript{194} This difference was most marked in relation to the Australian study.\textsuperscript{195} Considerations of clarity and empirical force incline to the view that the good prior track record should be confined to first offenders.

IV. GOOD ACTS SHOULD NOT MITIGATE PENALTY

We now turn to whether good acts should mitigate penalty. The most extensive consideration of whether good acts should mitigate penalty is by Carissa Hessick. She contends that offenders who have committed past good acts should get a reduction in penalty.\textsuperscript{196} However, this conclusion does not stem from an overarching analysis of the doctrinally sound role of good acts in the sentencing calculus, but derives from the role that bad acts, and in particular prior convictions, currently play in sentencing law and practice.\textsuperscript{197} Hessick correctly observes that prior criminal history is a strong aggravating sentencing factor and, for reasons of parity, she contends that prior good acts should have the opposite effect.\textsuperscript{198} However, this approach does not firmly press the argument for good acts being mitigatory. First, “[m]itigating and aggravating factors

\textsuperscript{193} Durose et al., supra note 134, at 6; Zhang & Webster, supra note 170, at 19.
\textsuperscript{194} Durose et al., supra note 134, at 10; Zhang & Webster, supra note 170, at 30.
\textsuperscript{195} See Zhang & Webster, supra note 170, at 35–38 (discussing the empirical data collected on recidivists’ repeat participation in criminal conduct).
\textsuperscript{196} Hessick, supra note 43, at 1133.
\textsuperscript{197} Id. at 1134.
\textsuperscript{198} Id. at 1135–36. Hessick does, however, contend that good acts would not be mitigating under theories of mitigation proposed by other commentators, because they do not relate to the seriousness of the crime, the offender’s decision to commit the crime, or offender’s culpability. Id. at 1136; see also Dan Markel, Against Mercy, 88 Minn. L. Rev. 1421, 1435–36 (2004) (identifying a system where leniency in sentencing may be granted after considering other facets of the defendant’s character outside the commission of the crime); Carol S. Steiker & Jordan M. Steiker, Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing, 102 Yale L.J. 835, 846–48 (1992) (defining evidence of good character as a mitigating factor to the severity of sentencing).
do not represent different sides of the same coin.” Thus, for example, while a vulnerable victim increases the penalty, a robust and resilient victim does not reduce the sanction—the opposite of an aggravating factor does not necessarily mitigate. Moreover, while prior convictions do have a profound aggravating impact, it is not the case that this approach is logically or normatively defensible. Indeed, it has been recently argued that prior convictions should assume far less prominence in the sentencing inquiry. Thus, in order to assess the relevance of good acts to sentencing, a wider examination is necessary.

A potential obstacle to good acts reducing penalty relates to the definitional issue of what exactly constitutes a “good” act. Hessick attempts to overcome this line-drawing difficulty by stating that the focus should not be on whether an offender is a “good” person, or the offender’s motives, but the nature of the act itself. There is some validity to this approach. While the number of concrete ways in which a person can behave is almost incalculable, there are some actions that are objectively and unequivocally positive. Common examples include paying taxes and engaging with people in a polite and civil tone.

Even more praiseworthy are benevolent acts that benefit others, and which involve no tangible benefit to the individual, such as charity work and donating money to the less well off. Then there are some acts, often underpinned by rare talent or commitment (or both), which enhance the lives of many people. The setting in which this can occur comes in a variety of forms; ranging from music, sport, and art (forums in which millions of people can be engaged) to medical research (which can develop new medicines that save millions of lives). By way of further example, Hessick contends that military service (and charitable work) should mitigate irrespective of the motive.

Thus, it is possible to identify, with a degree of accuracy, acts which are positive. However, the line-drawing exercise is considerably complicated by the fact that humans perform an infinite number of acts and tasks. Moreover, while people perform

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202 Id. at 1148.
many acts, they are not necessarily consistent and coherent in their behavior, and hence there is a degree of arbitrariness associated with focusing only on certain categories of acts for sentencing purposes. Bad acts (apart from prior convictions) must also be factored into this assessment.

At this point, the inquiry becomes very complex. To make an assessment about an individual’s overall weight of good and bad acts would require “a superhuman level of insight into the individual.”\textsuperscript{203} For this reason, Andrew Ashworth contends that judges “should not be interested in inquiring either into any bad social deeds the offender has been involved in, except previous offences, or into any good social deeds.”\textsuperscript{204}

Complexity in line-drawing or definition of a legal concept is not a principled reason for rejection of a proposal.\textsuperscript{205} However, in relation to any legal issue, accuracy in outcome is important. There must be a basis for confidence that the principle is likely to be correctly applied, otherwise the integrity of the process is undermined. Integrity risks need to be factored into the decision regarding whether a principle should be adopted. The risk of error needs to be accommodated. If the concept in question is inherently vague, only a strong argument in support of the principle can justify the exhaustive search necessary to formulate the criteria and determine the boundaries which might give the principle workable legal operation. No such strong justification exists for incorporating good acts into the sentencing inquiry.

Past positive contributions should not mitigate criminal sanctions because they do not bear on the objectives of the sentencing system. There is no evidence that charity workers, for example, recidivate less frequently than other offenders. Further, there are no wider principles of law and justice that support punishing offenders who have committed commendable acts less harshly. In a market-based system, many good acts are rewarded financially, and where there is no financial benefit, people often receive nontangible rewards in the form of feelings of satisfaction and accomplishment. Thus, to confer a sentencing discount for past acts would be to “double-dip” when it comes to acknowledging such behavior. Thus, no good acts should mitigate penalty, including military service.

It is pertinent to note, however, that good acts can be divided into

\textsuperscript{203} Nigel Walker, Punishment, Danger and Stigma 138 (1980).
\textsuperscript{204} Andrew Ashworth, Sentencing and Criminal Justice 174 (4th ed. 2005).
\textsuperscript{205} Hessick, supra note 43, at 1156–57.
two temporal components. The first are those prior to the sentence. Second, are those that are likely to occur in the future, but may be frustrated by the imposition of a criminal sanction. A stronger argument can be made in favor of the latter acts being mitigatory. These acts have not occurred and hence, unlike past acts, the benefit to others has not yet been transmitted.

But even the prospect of such actions should not mitigate penalty. In any decision making process, concrete benefits should be preferred over speculative ones. In a properly crafted sentence, the benefits of a proportionate sentence are clear, whereas the performance of future good acts is never certain. Moreover, the capacity of an individual to significantly improve the lives of others, to the point that the lives of others would be diminished if the proposed acts were not performed, is slight. Boxer Mike Tyson entertained and delighted millions of people with his punching prowess prior to being imprisoned for three years for rape at the height of his career in 1991. However, his incarceration did not cause a meaningful reduction in the well-being of any other person.

Theoretically, it is possible to imagine situations where imprisoning an offender will reduce the flourishing of many people. A classic instance is a brilliant scientist on the verge of a life-saving medical breakthrough. However, the rarity of such an episode underscores the undesirability of such a principle. General legal principles should not be developed to accommodate extreme scenarios.

V. OFFENDERS WITH PHYSICAL OR FINANCIAL DEPENDENTS SHOULD RECEIVE A REDUCED SENTENCE

However, different conclusions apply regarding the sentencing of offenders with certain family ties. The lives of nearly all individuals are interconnected with other people. There is enormous diversity in the type of connections that individuals have and the number of people with whom they are connected. Despite this, certain connections are demonstrably more profound and important than

others. An individual’s life can, in some situations, become so interconnected with others that they become dependent on them.

There are different forms of dependency. The main ones are emotional, physical and financial. There is no clear line regarding when any of these forms of interconnectedness becomes a dependency, but in general terms, a dependency occurs where the other person’s flourishing is significantly negatively impacted if the relationship were to be severed.209

As noted above, the concept of dependence has been broached in sentencing cases, but has not been defined with any degree of precision.210 This reflects the peripheral relevance of family ties in the sentencing domain. The form of dependency that is the most obscure, and perhaps the most common, is emotional dependence. This is a concept that does not have a legal recognition in other areas of the law. It is not one that requires examining in the sentencing context either. It is inherently vague and unverifiable with any degree of rigor, and hence, incapable of forming a concept which can properly inform outcomes in the sentencing realm.

Other forms of dependence are, however, more concrete. Financial and physical dependence are relatively well established in other areas of law, such as migration211 and social security.212 The criteria used to establish these form of dependency (or adaptations of them) can be readily transported to sentencing law. The classic instance of financial dependency is a sole parent who works to support the material needs of his/her children. Physical dependency includes situations where a spouse caters for the mobility requirements of a seriously chronically ill partner, for example, one with severe symptoms of multiple sclerosis or dementia.

There are two principles that weigh in favour of financial or physical dependency having a mitigating effect. The first is the right to family. The other is the prohibition against punishing the innocent. We consider them in that order.

The right to a family is enshrined in a number of international and domestic law legal instruments. Article 17 of the International Covenant on Civil and Political Rights provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or

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209 For a further discussion of this topic, see generally Bagaric, supra note 206.
210 See supra Part II.
211 See, e.g., Migration Act 1958 (Cth) (Austl.).
212 See, e.g., Social Security Act 1991 (Cth) (Austl.).
correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.\textsuperscript{213}

Article 23 of the same instrument states:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.\textsuperscript{214}

The right to a family has been one of the less commonly litigated human rights, and hence, there is little developed jurisprudence regarding its meaning and scope. It expressly includes the right to found a family, and by implication, the capacity to live in a familial structure.\textsuperscript{215} Imprisoning a family member, and especially the family member who is the principal provider for the family, places at risk the integrity, flourishing, and sometimes, the viability of the family as a unit.\textsuperscript{216}

However, irrespective of the content of the right to a family, it is unlikely that it can be invoked to ground a strong stand alone argument in favor of reducing the sanctions imposed on offenders with dependents. This is because of an intrinsic feature of rights.

No right is absolute. This has been acknowledged by leading rights proponents. Ronald Dworkin accepts that it is correct for a government “to infringe on a right when it is necessary to protect a more important right, or to ward off some great threat to society.”\textsuperscript{217} In a like manner, Robert Nozick states that consequential “considerations would take over to avert ‘moral catastrophe.’”\textsuperscript{218}


\textsuperscript{214} Id. at art. 23; see also Charter of Human Rights and Responsibilities Act 2006 (Cth) s 17 (Austl.) (noting similar terms); Human Rights Act 2006 (Cth) s 11 (Austl.) (noting similar terms).


\textsuperscript{218} ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 495 (1981).
Rights can be defeated in two broad situations. The first is where they clash with a more important right.\textsuperscript{219} The right to physical integrity is normally subordinate to the right to life.\textsuperscript{220} Thus, it is permissible to harm a person who uses potentially life-threatening force against another individual.\textsuperscript{221} In fact, sometimes it is even permissible to kill an attacker.\textsuperscript{222}

The second situation where rights can sometimes be eroded is where they are contrary to the common good.\textsuperscript{223} For example, the right to protest on the roadways can often be defeated by the right of a community to be able to efficiently travel, and security concerns override the right to privacy of passengers who board planes, who must make themselves subject to identity checking and a search of their baggage and clothing.\textsuperscript{224}

There is no clear methodology for identifying the hierarchy of rights and the circumstances when rights may be limited. Hence the often abstract notion of a right is rarely a defining concept in favor of implementing a concrete social, economic, or legal proposal. This is especially so in relation to rights whose contours are indeterminate and still evolving, such as the right to a family. The scope for this right to be used as a jurisprudential sword to carve out mitigation for offenders with dependents is further minimized by the fact that in some contexts it is expressly subject to the interests of the criminal justice system. Thus, for example, Article 8 of the European Convention on Human Rights provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\textsuperscript{225}

While the right to a family has tenable application to the


\textsuperscript{221} Id.

\textsuperscript{222} Id.


\textsuperscript{224} See id. (discussing the balancing act between individual rights and the common good).

\textsuperscript{225} Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8 Nov. 4, 1950, 213 U.N.T.S. 221 (emphasis added).
sentencing of offenders with dependents, its obscure nature and the jurisprudential complexities associated with its limits when contrasted with competing considerations diminish its capacity to be operationalized in the sentencing realm so as to ground the basis for a concrete mitigating factor.\textsuperscript{226} Yet, there is a more forceful principle, which can be invoked to this end.

Mitigation for dependency can also be supported on the basis of the principle that the innocent should not be punished. This principle is not only widely accepted and weighty but is also seemingly clear-cut.\textsuperscript{227} The proscription applies most acutely in relation to people who have committed no crime and who are subjected to criminal sanctions. The principle has been most dramatically illustrated in the context of punishment deliberately inflicted on people known to be innocent. A good example is the following dilemma devised by H. J. McCloskey:\textsuperscript{228}

Suppose a sheriff were faced with the choice either of framing [an African American] for a rape which had aroused white hostility to [African Americans] (this particular [African American] being believed to be guilty) and thus preventing serious anti-[African American] riots which would probably lead to loss of life, or of allowing the riots to occur. If he were . . . [a] utilitarian he would be committed to framing the [African American].\textsuperscript{229}

The proscription against punishing the innocent is so powerful that it is one of the reasons that utilitarianism has fallen out of favor as the most influential theory of punishment\textsuperscript{230}—it is thought that any theory that commits us to such heinous outcomes must be flawed.\textsuperscript{231} The proscription against punishing the innocent extends to not only punishing accused persons that are known to be innocent, but also to those that the system does not know to be innocent; that is, to all wrongful convictions.\textsuperscript{232}

\textsuperscript{226} See, e.g., \textit{R v YL} [2004] ACTSC 115, ¶¶ 52–53 (Austl.) (noting that the right to a family does not even entail that in certain circumstances children cannot be taken from their parents by the state).


\textsuperscript{228} Duff believes that disproportionate punishment and punishment for strict liability offenses also constitute punishment the innocent. See id.


\textsuperscript{231} See id. at 133.

\textsuperscript{232} See id. at 147–48. Hence the establishment of organizations such as the Bluhm Legal Clinic, Center on Wrongful Convictions. See generally, \textit{Center on Wrongful Convictions}, BLUHM LEGAL CLINIC, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/ (last
On closer analysis, however, the scope of the operation of the no punishment of the innocent principle is unclear. In particular, it is not certain whether the principle extends to those who indirectly suffer from the punishment, such as the dependents of offenders. The answer to this in part turns on the definition of punishment. A large number of definitions of punishment have been proposed. According to John McTaggart and Ellis McTaggart, punishment is “the infliction of pain on a person because he has done wrong.” More expansive is one of the most influential modern day sentencing jurists, Andrew von Hirsch, who states: “[P]unishing someone consists of visiting a deprivation (hard treatment) on him, because he has committed a wrong, in a manner that expresses disapprobation on the person for his conduct,” or “[p]unishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong.” Jeremy Bentham used more succinct terms in stating that “all punishment is mischief: all punishment in itself is evil.” C. L. Ten emphasizes the hardship that is an inherent aspect of punishment. According to him, punishment “involves the infliction of some unpleasantness on the offender, or it deprives the offender of something valued.” This is a theme which has also been noted by R. A. Duff who stated: “The intrinsic point of punishment is that it should hurt—that it should inflict suffering, hardship or burdens.” A more extensive definition is offered by Nigel Walker, who believes that punishment “involves the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases death.”

Despite the different language that has been used to define and describe punishment, broken down to its core and intrinsic features it can be defined as a deprivation or hardship which is imposed for a
transgression which has been committed.\textsuperscript{240} Thus, orthodox terminology and thinking suggests that punishment by its very nature involves the infliction of a degree of inconvenience or hardship on an offender by an authority (i.e., a court) and it also involves a connection between the offending and the punishment.\textsuperscript{241} However, while conventional thinking debunks the concept of punishing being applicable to hardship which is not imposed by an authority, legal principle and practice is more accommodating to a wider understanding of the meaning of punishment.\textsuperscript{242}

Courts in Australia have accepted that incidental suffering sustained by the offender can be used as a basis for offsetting or reducing the need for formal punishment.\textsuperscript{243} Thus, injuries sustained by an offender during the commission of an offense\textsuperscript{244} and public humiliation\textsuperscript{245} and reduced employment prospects\textsuperscript{246} stemming from the offense are mitigatory.\textsuperscript{247} These incidental hardships are regarded as offsetting the need for a fully proportionate penalty because they are a component of a net punishment experienced by the offender.\textsuperscript{248}

This evinces a liberal approach to the nature of punishment, given that there is no requirement for the court to intentionally impose the hardship. Pain occasioned to the offender’s dependents is arguably even more closely associated with the orthodox view of punishment than incidental punishment, given that it is foreseeable at the time of the imposition. Accordingly, by analogy, it too should operate to mitigate penalty on the basis of an extended approach to the understanding of the concept of punishment.\textsuperscript{249} Of course, analogies are only as strong as the cornerstones that are utilized. The suggestion that incidental harm suffered by offenders is a form of punishment is contestable. However, even if the analogy breaks down, the ideal behind the analogy can be persuasively recast. Recasting the principle “the

\textsuperscript{241} Id. at 36–37.
\textsuperscript{242} R v Hannigan (2009) 193 A Crim R 399, ¶ 15 (AustL); Bagaric, supra note 240, at 37.
\textsuperscript{243} Hannigan, 193 A Crim R 399, ¶¶ 15, 42.
\textsuperscript{244} Id. ¶¶ 15, 46.
\textsuperscript{245} Ryan v The Queen (2001) 206 CLR 267, ¶ 123 (AustL).
\textsuperscript{247} Id. ¶ 78.
\textsuperscript{248} See id.
\textsuperscript{249} However, the weight that should be applied to operation of this principle is diluted by the level of indirectness of the imposition.
innocent should not be punished” into the principle that “the innocent should not suffer” circumvents the stricture possibly associated with the concept of punishment, without meaningfully eroding the appeal and persuasiveness of the principle. It is clear that dependents of offenders are innocent.\(^{250}\) It is also clear that they suffer if the offender is imprisoned. The only way to ameliorate this suffering is to not imprison the offender, or to reduce the severity of the punishment, and in particular, the length of the prison term.

Thus, there is a coherent argument for accommodating the interests of dependents into the sentencing calculus. It could be countered that pain experienced by dependents should be ignored because the hardship they experience, while foreseeable, is not intended. This form of argument invokes the “doctrine of double effect.”\(^{251}\) This is the principle that it is permissible to perform an act having two effects, one good and one bad, where the good consequence is intended and the bad merely foreseen, there is proportionality between the good and bad consequences, and those consequences occur relatively simultaneously.\(^{252}\)

The doctrine is employed in a wide variety of situations in an attempt to justify practices which result in bad consequences which were foreseeable. In the wartime or battlefield context it supposedly justifies why it is permissible to bomb a military target despite the fact that it will invariably result in civilian deaths. In the medical setting it is sometimes invoked to justify killing unborn babies where the pregnancy is a demonstrable risk to the life of the mother. Moreover, it is sometimes used to explain why it is permissible to prescribe or administer high quantities of pain killers to terminally ill patients, even though it may result in their death.\(^{253}\)

The soundness of the doctrine, however, is not universally accepted. The key distinction employed by the doctrine is devoid of a coherent foundation. There is no basis for distinguishing between consequences that are intended as opposed to those that are “merely” foreseen—certainly in a manner that is morally

\(^{250}\) This of course assumes that they did not participate in the offense.


\(^{252}\) See Thomas Nagel, *The View From Nowhere* 179 (1986).

significant.  It is untenable for a person who wishes to make a political protest to throw a bomb into a crowd and to exculpate himself/herself from censure on the basis that the death of the bystanders was merely foreseen—his/her actual intention (supposedly) being to highlight an important social injustice.

The correct approach is that there is no logical or normative difference between consequences that we foresee and those which we intend. Individuals are responsible for all consequences which they knowingly cause. The only tenable foundation for the distinction adverted to by the doctrine of double effect is the consequentialist position that it is acceptable to bring about consequences which are merely foreseen if these bad consequences are outweighed by the benefits resulting from the act. And, from the perspective of the innocent person who suffers from the imposition of a criminal sanction, it certainly does not matter whether his/her suffering is intentional or merely foreseen: it hurts just the same. The doctrine of double effect is devoid of an overarching justification, and cannot be used to ignore the plight of the dependents of offenders.

There is no clear basis for determining the discount that should be available to offenders who have dependents. It needs to be significant enough to ease some of the suffering of the dependents, but not so large so as to meaningfully impinge on the proportionality principle. Once again, a twenty-five percent discount is appropriate for reasons set out in relation to the proposed first-offender discount.

The operation of mitigating factors should not operate in a simple cumulative manner; otherwise, a combination of mitigating factors could potentially amount to a discount of 100% or more. Instead, the discounts or additions are to be applied individually, to the contracted sentence, following application of the previous consideration. Thus, a first offender who has dependents should not receive a fifty percent discount of the entire sentence. Rather, the discount is 42.5% (i.e., twenty-five percent plus the remaining part of the sentence—seventy-five percent—multiplied by twenty-five percent). This discount is not inconsiderable. However, as discussed above, neither are the principles in support of the

255 See id.; see also Dolinko, supra note 251, at 521 (discussing the need for one of two arguments to justify the practice of punishment in all possible situations).
256 See Dolinko, supra note 251, at 521 (applying this consequentialist position to justify punishment).
VI. FIRST-OFFENDER AND DEPENDENTS DISCOUNTS WILL NOT UNDERMINE OTHER VALID SENTENCING OBJECTIVES

The core argument in this article in favor of a sentencing discount for first-time offenders is that the community has less to fear from offenders who have not previously committed an offense. The objective of community protection will not be meaningfully undermined if first-time offenders receive a shorter sentence, given that first-time offenders are less likely to reoffend than other offenders. The rationale in favor of a discount for offenders with dependents is different: it stems from the need to observe the principle that the innocent should not suffer.

However, the analysis thus far has not taken into account all key objectives of sentencing. Prior to confirming the recommendations in this paper, it is necessary to assess whether the proposals would conflict with or undermine any of the main sentencing objectives. If, for example, shorter sentences for first-time offenders would limit the capacity for punishment to deter crime, it may be appropriate to abandon or attenuate the proposals in this article.

The key contemporary sentencing objectives are incapacitation, rehabilitation, general deterrence, and specific deterrence. We now assess the desirability of the reforms in this article through the lens of each of these aims. We start with the objectives that do not in fact influence the current discussion. Rehabilitation cannot operate to counter the proposals. Rehabilitation, when it is applicable, favors a more lenient sentence and hence the proposals are consistent with this objective.

Specific deterrence and general deterrence also cannot properly be invoked to counter the proposals, given the limited efficacy of sentencing to achieve these ends. There have been an enormous number of empirical studies regarding whether sentencing can achieve these goals. We have recently analyzed this data at length. The following is a summary of the current knowledge.
The theory of specific deterrence is the view that offenders can be dissuaded from committing crime in the future by inflicting hardship on them. If offenders are met with an undesirable sanction for committing crime they will, so the theory runs, be reluctant to again commit an offense because of their desire to avoid the same unpleasant experience. This theory is not supported by the empirical data. Thus, mitigating the penalties that are imposed on some offenders will not make them more likely to reoffend in the future.

The studies that establish the inability of sentencing to deter specific offenders have been undertaken over several decades and across a wide range of jurisdictions and different time periods. A relatively recent literature review of the studies examining the efficacy of criminal punishment to achieve the goal of specific deterrence was undertaken by Daniel Nagin, Francis Cullen, and Cheryl Jonson. The authors looked at over fifty separate studies which analyzed the impact of custodial sanctions on reoffending and contrasted this with the recidivism levels associated with less harsh sanctions. They also reviewed studies which focused on ascertaining if sentence duration impacted the rate of reoffending.

The authors concluded that harsher sentences do not lead to lower rates of offending. In fact, imprisonment may lead to slightly higher rates of recidivism than less harsh sanctions. The authors noted:

Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic...
[(that is, the possible corrupting effects of punishment)] rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.271

This position is confirmed by more recent research.272 It is futile to argue for increased penalties with the aim of decreasing the likelihood that offenders will reoffend in the future. Accordingly, it cannot be validly asserted that the proposals in this paper should not be pursued because the goal of specific deterrence will be compromised.

The type of deterrence that is most commonly invoked in support of harsh criminal sanctions is general deterrence.273 This is the theory that people will be discouraged from committing criminal offenses if they are aware of the penalties that are imposed on actual offenders.274

General deterrence can be broken down into two separate theories. The most common manner in which it is typically employed is what is known as marginal general deterrence.275 It is the theory that there is a causal nexus between the harshness of criminal sanctions and the incidence of crime: supposedly, crime will be reduced with increasingly harsh penalties.276 The more modest general deterrence theory is that there is a link between the imposition of some form of hardship (which need not be particularly severe) and the crime rate. This is known as absolute general deterrence.277

The weight of the existing empirical data suggests that only

271 Id. at 145.
272 See Donald P. Green & Daniel Winik, Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders, 48 CRIMINOLOGY 357, 381 (2010) (finding that incarceration had little effect on likelihood of recidivism).
273 See Dieter Dölling et al., Is Deterrence Effective? Results of a Meta-Analysis of Punishment, 15 EUR. J. CRIM. POL'y RES. 201, 201 (2009).
276 See id. at 14, 72.
277 See id.; see also Herbert M. Kritzer, Enforcing the Selective Service Act: Deterrence of Potential Violators, 30 STAN. L. REV. 1149, 1152 n.12 (1978) ("Absolute deterrence refers to whether the creation of a sanction, usually by legislative enactment, reduces or eliminates a particular type of behavior. The concept of absolute deterrence does not address differences resulting from variations in the nature of the sanctions themselves.").
absolute general deterrence is valid.278 If individuals did not believe that as a result of criminal activity they could be subjected to a sanction, the crime rate would escalate considerably.279 Accordingly there is a causal nexus between the rate of crime and the presence of criminal penalties. This nexus does not extend to a link between more severe penalties (even in the form of the death penalty) and less crime.280 The upshot of this is that general deterrence theory can be used to justify the existence of criminal sanctions, but not to justify the need for particularly harsh penalties.281

Thus, deterrence properly informs sentencing only to the extent that it requires a hardship to be imposed for criminal offending. It does not require a particularly burdensome penalty, merely one that people would seek to avoid. This aim can be satisfied by a fine or a short prison term. Thus, a twenty-five percent reduction to a term of imprisonment for first-time offenders or those with dependents cannot reduce the deterrent impact of a sentence (to the extent that deterrence is achievable through a state imposed system of

278 See Ritchie, supra note 263, at 7, 15 (finding that while absolute deterrence enjoys historical support, the existing research suggests that increases in sentence severity do not correspond to increased deterrent effects).

279 See id. at 7.

280 See John J. Donohue III, Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin, in Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom 269, 274, 309 (Steven Raphael & Michael A. Stoll eds., 2009) (noting that research on the impact of imprisonment on crime is unable to separate the effects of incapacitation from deterrence); William Spelman, The Limited Importance of Prison Expansion, in The Crime Drop in America 97, 123 (Alfred Blumstein & Joel Wallman eds., 2000) (concluding that the dramatic increase in the incarceration rate had a limited impact on the observed decrease in the crime rate in the United States); Nigel Walker, Sentencing in a Rational Society 60–61, 191–92 (1969); John K. Cochran et al., Deterrence or Brutalization? An Impact Assessment of Oklahoma’s Return to Capital Punishment, 32 Criminology 107, 129 (1994); Dölling et al., supra note 273, at 220–22 (finding that the threat of the death penalty did not appear to have a statistically significant effect on the crime rate); Anthony N. Doob & Cheryl M. Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, 30 Crime & Just. 143, 187–89 (2003); Steven D. Levitt, Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not, 18 J. Econ. Persp. 163, 175–76 (2004) (expressing skepticism about the deterrent effect of the death penalty); William Spelman, What Recent Studies Do (and Don’t) Tell Us About Imprisonment and Crime, 27 Crime & Just. 419, 423 (2000) (noting that research on prison effectiveness has been unable to distinguish between the effects of incapacitation and deterrence). But see Dale O. Cloninger & Roberto Marchesini, Execution and Deterrence: A Quasi-Controlled Group Experiment, 33 Applied Econ. 569, 576 (2001) (finding support for the deterrence hypothesis in the death penalty context); Paul R. Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 187–88, 190 (2004) (finding that while there was an observed deterrent effect between the death penalty and the murder rate, the deterrent effect was related to the actual implementation of executions, as opposed to just having the death penalty available).

sentencing).

Incapacitation and community protection are often used interchangeably—282—the principal means by which the community is protected from criminals is by incapacitating them behind prison walls.283 There is no need to incapacitate offenders (from the perspective of community protection) if they would not offend if they were not imprisoned. As noted above, empirical data establishes that offenders with a criminal past are less likely to commit another offense than criminals with a long criminal history and hence this cohort of offenders is entitled to a discount.284 However, this is not necessarily the case with offenders who have dependents. Often they will have a criminal record.285

In Part II of this article, we noted that in all sentencing systems there is a heavy loading that is applicable to recidivists. One of us has recently argued that this premium is too weighty.286 However, victimology studies establish that sexual and violent offenses (unlike other offenses) often have a lasting destructive impact on the lives of victims.287 Moreover, these offenses are disproportionately committed by recidivists.288 Accordingly, it has been suggested that recidivist offenders who commit serious violent or sexual offenses should receive a penalty loading, albeit one that is lighter than is currently the situation.289 The premium that should be imposed for these types of offenses on recidivists is twenty to fifty percent.290 Offenders who have dependents and fall into this cohort group should still have a reduced penalty, but the discount will need to be calculated with reference to the serious offender recidivist enhancement. This means that offenders with

282 See Kevin Bennardo, Incarceration’s Incapacitative Shortcomings, 54 SANTA CLARA L. REV. 1, 1 (2014) (discussing the different types of incapacitation theories).
283 See id. at 2.
286 See Bagaric, supra note 200, at 415.
289 See Bagaric, supra note 200, at 359–61, 410–11.
290 Id. at 411.
dependents who have a criminal record and commit serious sexual or violent offenses should still have their penalty mitigated by twenty-five percent in the interests of their dependents but this reduction will in some cases not totally cancel out the recidivist premium.291

VII. CONCLUSION

The focus of sentencing is most directly on the nature of the offense, and in particular, the harm caused by the crime. Factors personal to the offender typically assume little relevance, apart from prior convictions which can carry considerable aggravating weight. One of the key reasons that the profile of the offender has not assumed a greater role in the sentencing inquiry is because this area of law is under-researched and underdeveloped.

A systematic analysis of the relevance of offender profile to sentencing reveals that it should assume more prominence than is currently the situation. So far as sentencing is concerned, there are three aspects to an offender’s profile. The first is the offender’s prior criminal history. Much has been written, and even more legislated upon, regarding a bad criminal history. This article has examined good criminal history. Pursuant to the objectives of sentencing, it emerges that good criminal history should have a considerable impact on sentencing. First-time offenders reoffend at lower rates than repeat offenders, and hence, are less of a danger to the community. The objective of community protection applies less acutely to them. It follows that first offenders should receive a sentencing discount in the order of twenty-five percent. This rule should not be subject to any exceptions depending on offense type as is currently the situation.

The second relevant aspect of an offender’s profile is any past good act. On close analysis, it emerges that offenders who have committed previous past good acts should not get a discount beyond that associated with a good criminal history (assuming that, in fact, they have not previously committed an offense). There is no tenable basis for accurately calculating the net caliber of an individual’s acts, and even if such a calibration could be undertaken, it would be futile given that an offender’s past conduct is irrelevant to any proper objective of sentencing.

291 There will be no cancellation where the recidivist loading is in excess of twenty-five percent.
The impact that sentencing has on the lives of people connected to an offender is an area that is not currently sufficiently accommodated in the sentencing calculus. Offenders should be punished commensurate with the gravity of their offense. However, principles which are acutely applicable to the sentencing domain do not exhaust the range of considerations that should properly inform sentencing outcomes. Sentencing is not superior to other areas of law. There is a need for legal and normative coherence in all areas of the law. The principle that the innocent should not suffer is universal, and should be accommodated. Offenders who have physical or financial dependents should have a penalty reduction in the order of twenty-five percent. Operationalizing a clear principle of this nature will have an especially positive impact in the United States federal system by abolishing a major disjunct that currently exists in relation to this area of the law. As we have seen, the current default position pursuant to the Federal Sentencing Guidelines is that family ties are not relevant to sentencing, however, the reality reveals that this consideration is often applied by courts to mitigate sentence.

The recommendations in this article, if adopted, will make sentencing law consistent with the available empirical evidence regarding recidivism levels and cohere the law with wider principles of justice, while continuing to emphasize the importance of matching the punishment to the crime.