EXAMINING GOOD CHARACTER AS A MITIGATING FACTOR IN CANADIAN SENTENCING

by

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DEDICATION

To My Family

ABSTRACT

China has long been sceptical on mitigating sentences based on the offender's good character, while good character mitigation is widely accepted in Canada. This study was to examine the justification of good character mitigation in Canada so that China can better face the future choice in sentencing: whether to consider good character a mitigating factor. Through examining the use of good character in Canadian sentencing practice, the justification of good character mitigation in Canada has been questioned.

A three-part argument has been put forward to support the removal of good character as a mitigating factor in Canada: first, the workability of the very concept of "good character" is low; second, theoretical basis for mitigating sentences on good character is problematic; third, the present practice contributes to a form of status-based discrimination.

This study shows that the justification of good character mitigation is not as strong as we have expected it to be. Even in Canada, a country which has good character mitigation with a long history, the consideration of good character as a mitigating factor needs further discussion. The adoption of good character mitigation in China should be more cautious.

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Examining Good Character as a Mitigating Factor in Canadian Sentencing

It is often said that sentencing is perhaps the most difficult task that faces a Judge. Each case is different, each offender is different, and the law permits a wide range of sentences for most offences. The task for any Judge on a sentencing is to weigh all the factors that must be taken into account and come up with an appropriate sentence.[1]

[1] *R. v. Gonzales*, 1999 CarswellNWT 66 at para. 2 (N.W.T.S.C.) (WLeC).

Chapter 1

Introduction: Does being good really matter?

There are advantages to having good character in the eyes of others. In the criminal law context, the strength of an offender's character may be a mitigating factor in sentencing, as it is in Canada. Good character mitigation is not as widely accepted in China, where a recent tribunal case has become the focus of a debate. As reported,

> On April 19, 2007, a case of intentional assault was heard in the People's Court of Fengtai District, Beijing. In contrast to past cases, chief of the judicial branch in the defendant's birthplace appeared in court and read a social investigation report which gave evidence of the defendant's behaviour under ordinary circumstances. Apparently this is the first time that evidence was given about the defendant's past behaviour through a social investigation report and used as the judge's foundation for sentencing in China.
>
> Before the opening of the court session, Xingping Chen, chief of the Judicial Branch of Fang Village, sat next to the prosecutor. Since there were only certain kinds of name plates (public prosecutor, defendant, agents ad litem, etc.) available, staff-members hastily wrote "Judicial Branch" on a piece of white paper and stuck it to the table.
>
> At 10:00 am, the court session began. The prosecutor said that in the wee hours of February 20, 2006, Lao Wang's friend lost his mobile phone in a reserved room at a Karaoke bar. Thinking it was Mr. Fang who stole it, the two had an argument and Lao Wang eventually assaulted Mr. Fang with the help of a few friends. Mr. Fang was severely injured. After the police started their investigation, Lao Wang gave Fang 45,000 Yuan for compensation. Lao Wang has admitted to this charge.
>
> After the public prosecutor gave evidence, Xingping Chen read a social investigation report obtained through his extensive investigation with his staff. In the report, it was mentioned that ". . . Lao Wang's behaviour under ordinary circumstances is fairly good: he has never quarrelled with his neighbours or violated the law." "Lao Wang is an employee of Beijing Caddice Plant. Director Zhang said he was an enthusiastic worker . . . We are shocked by this incident." "Lao Wang's family and colleagues testified that he was honest and not that kind of person who stirs up trouble." "According to his behaviour under ordinary circumstances before the arrest, we thought Lao Wang would no longer cause any harm to society, and that his employer and the Resident's Committee in his community would help to reform him, so we asked the court to mitigate his punishment when sentencing."[2]

This case triggered intensive debates in China, because it is said to be the first case to use an official report on someone's "morality" as evidence of the offender's good character in

[2] Xin Wu, "A Court in Beijing Includes Morality Investigation as Reference for Sentencing at the First Time" (in Chinese) *Morning Post of Beijing* (20 April 2007), online: Sina <http://www.sina.com.cn> [translated by author].

sentencing. In China, judges are traditionally more sceptical about good character mitigation than in Canada.

Some argue that to adduce morality in the courts violates the principle of justice, because it is difficult to combine multiple moral standards with one-dimensional law.[3] Moral prejudice creates a negative image of the offender, which results in differential treatment in similar cases, due to people's different moral views. [4] Many Chinese academics worry about the increased flexibility of the law and discretion of judges; they worry that it will permit some criminals to escape punishment.[5] On the other hand, some academics have commented that the so-called morality investigation does not conflict with Chinese sentencing theory, which takes into account personal dangerousness. If the criminal's behaviour under ordinary circumstances is good, it shows that the criminal is not very dangerous. As such, it should be easier to reform the offender, which in turn results in cutting back on correctional resources.[6] Another argument in favour of this practice is its common use in Western countries.[7]

In Canadian sentencing practice, good character is used as a mitigating factor, similar to the concept of "behaviour or performance under ordinary circumstances" in Chinese sentencing practice. It is common for a judge to ask for a pre-sentence report before sentencing. Debate on mitigating factors in sentencing is also a hot topic in Canada. Canadian scholars have begun to consider the scope of factors which may affect sentencing and their justifications.

[3] Yunxiang Zou, "Worries on Incorporating Morality Investigation into Courts" (in Chinese) *New Beijing* (22 April 2007), online: Xinhua Net <http://news.xinhuanet.com>.

[4] Zhuyi Ye, "How to Judge the Morality of People Who Are Entitled to Give Judgments on Others' Morality" (in Chinese) *Net of Ningbo, China* (22 April 22 2007), online: CNNB <http://www.cnnb.com.cn>.

[5] Linlin Xu, "Be Alert on the Harm to Judicial Justice Caused by 'Morality Investigation'" (in Chinese) *Xinhua Net* (22 April 2007), online: Xinhua Net <http://news.xinhuanet.com>.

[6] Li Li, "From Trading Crimes with Merits to Compensation for Mitigation'" (in Chinese) online: (2007) 8 Legal Debate 16 <http:// zz.chinacourt.org/index_1.php>.

[7] Jia Pu, "It is Reasonable and Legislative for Sentencing to Consider Morality" (in Chinese) *Red Net* (22 April 2007), online: Xinhua Net <http://news.xinhuanet.com>.

With the growing communication between China and the Western world, China is increasingly influenced by Western sentencing practices. The attempt to include considerations of morality in sentencing is a reflection of this trend. Though good character is widely accepted as a mitigating factor in Canada, it remains controversial. By challenging the justification of good character as a mitigating factor in Canada, I can participate more actively in the ongoing debate on this topic in China, which is sure to influence the future choice of Chinese sentencing practices.

In this thesis, I will attempt to examine good character as a mitigating factor from a practical and a theoretical perspective and argue for the removal of good character as a mitigating factor in Canadian sentencing practice. I will provide the following three-part argument to support my claim: first, I will show that the very concept of good character is unworkable; second, I will argue that even if there exists a clear notion of good character, there are no good reasons for mitigating sentences on this basis; third, the present practice amounts to a form of status-based discrimination, resulting in lighter sentences for members of the middle or higher classes. Based on my findings with respect to the Canadian sentencing system, I will argue that it may be unwise for China to adopt the use of good character mitigation as part of its own sentencing practice.

In Chapter 2, I look at case law from the past ten years to examine the use of good character in Canadian sentencing practice. In Chapter 3, I discuss the concept of good character and the difficulties in applying it into practice. In Chapter 4, I consider the assumption that good character actually means “somewhat good.” I argue that even under this meaning, using good character to mitigate sentencing cannot be justified. In Chapter 5, I attempt to answer the question of whether good character should be considered a mitigating factor in Canadian sentencing practice by examining its compatibility with leading theories of punishment. I ultimately find that using good character to mitigate a sentence does not fit within these theories of punishment. In Chapter 6, I discuss one of the major harms that taking good character into account can cause: status-based discrimination. Finally, I will explore ways to solve these problems in practice. I argue that good

character should be ruled out among mitigating factors in Canadian sentencing practice, and that China should be careful not to adopt the use of good character mitigation.

Chapter 2

Use of good character in Canadian sentencing practice

Before I move on to the application of good character in practice, it is important to differentiate between "good character" and "character evidence" at two separate levels: trial and sentencing. In general, "character connotes a person's disposition, whether a particular trait, a group of traits, or the sum of all traits." [8] However, the general rules at trial and during sentencing are completely different. At the trial level, the introduction of character evidence invites further inferences about conduct, whether the accused committed the crime or not; it looks backwards at what happened in the past. During sentencing, the introduction of character evidence helps to find the appropriate punishment for the offence; it looks forward to what sentence should be given and "attempts to accomplish policies with an eye to the future." [9] During the trial, character evidence is primarily excluded subject to the trial judge's discretion, while character evidence in sentencing is always permitted to "fashion sentences in order to accomplish the goals sought to be achieved by sentencing."[10] In addition, the witnesses at trial are not allowed to give their personal opinions of the accused's good character or specific incidents of good character, but may only swear to the general reputation of the accused in the community.[11] In sentencing, on the other hand, "character is much broader and will often include achievements and opinions from relatives, friends, associates, and acquaintances."[12] Owing to different rules applied at the two levels, it is important to keep in mind that I am studying good character at the sentencing level only.

[8] David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Carswell, 2007) at 417.

[9] James Landon, "Character Evidence: Getting to the Root of the Problem through Comparison" (1996--1997) 24 Am. J. Crim. L. 581 at 613.

[10] *Ibid.* at 614.

[11] Roger E. Salhany, *The Practical Guide to Evidence in Criminal Cases,* 6th ed. (Scarborough: Carswell, 2002) at 133.

[12] Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 132.

2.1 Good character as a mitigating factor in Canadian sentencing practice

Many factors affect sentencing practice. Section 718.1 of the *Criminal Code* says the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[13] In section 718.2, certain aggravating factors are mentioned, but none of the mitigating factors can be found in the *Criminal Code*.[14] In English criminal law, only one mitigating factor is listed in the legislation: the guilty plea.[15] In Canada, all of the factors that could mitigate a final sentence are left to the discretion of the judge. As such, studies on the current use of mitigating factors in Canada refer only to case law.

It is difficult to give a precise definition of what constitutes good character, or to pinpoint its legal criteria. Many people may agree that an honest person is a person of good character, but is honesty enough to lead to a presumption of good character? What if a person is not only honest but also generous? Is he or she a person of good character or *better* character? What about a person who is not honest but did a lot of volunteer work and contributed a lot to the community? As these examples show, there can be several different criteria on what constitutes good character.

Since good character is not listed in Canadian legislation, uncovering its meaning and the criteria which will indicate how a judge might be convinced of the offender's good character will require looking at past judgments. This is also the only way to uncover the current state of the use of good character as a mitigating factor in sentencing practice. I selected twenty-one Ontario cases in which good character is considered as a mitigating factor over the past ten years.[16] Based on

[13] *Criminal Code,* R.S.C. 1985, c. C-46, s. 718.1.

[14] *Ibid.* at s. 718.2.

[15] *Criminal Justice Act 2003* (U.K.), 2003, c. 44, s. 144.

[16] These twenty-one cases are selected from the database of Westlaw online. I began my concrete searching work on 27 July 2007 under the searching condition of " 'good character' /p mitigat! and sentence!". Owing to the timely update of online Westlaw database, people may have different searching results if the searching happens on a different day. Of the forty-nine cases that matched this search, only twenty-one cases qualified after I carefully read them one by one (see Appendix).

the cases I selected, I have found some common features of good character from the judge's point of view.

2.2 Selection of cases

In 1995, *Bill C-41* received Royal Assent as Chapter 22 of the Statutes of Canada, and was put into effect on September 3, 1996. This bill has been called "the first significant sentencing reform bill in decades."[17] In section 726.2 of the *Criminal Code*, judges are required to provide reasons for sentencing in all cases, which helps the accused and the general public to understand the decision-making process.[18] Therefore, cases since 1996 must present a clear analysis of what judges are thinking and reasons for the final sentence. I have selected post-1996 cases to ensure that I can read explanations of the role of good character as much as possible. More importantly, recent cases are the best reflection of contemporary ideas.[19]

2.3 Analysis of the sample cases

2.3.1 General introduction to the cases

Among the twenty-one cases considered,[20] there are seventeen types of charges. The distribution of these charges is listed below (see Table 1).

[17] Julian V. Roberts & David P. Cole, eds., *Making sense of sentencing* (Toronto: University of Toronto Press, 1999) at 31.

[18] *Ibid*. at 45.

[19] I would like to sincerely thank Amy Kaufman for helping me locate all the cases I wanted.

[20] During my research, I noticed other words similar to good character in the judgments which have similar functions to good character, such as "exemplary life" or "unblemished background." I have ever considered whether to extend the scope of my research to include these words as keywords. Adding these keywords besides "good character" would mean extending the object and scope of my study. In addition, this would imply the pre-assumption that "exemplary life" or "unblemished background" is equal to "good character." However, I have no intention to add any personal assumption since I am seeking the present legal thinking in the sentencing practice, in other words, in the Judge's mind. My study focuses on good character only; therefore, I decided to reject those cases that did not use the term of good character.

Table 1: Distribution of the Cases According to Charges

		Frequency	Percentage	Valid Percentage	Cumulative Percentage
Valid	Sexual assault	4	19.0	19.0	19.0
	Aggravated assault	2	9.5	9.5	28.6
	Fraud	2	9.5	9.5	38.1
	Impaired driving	2	9.5	9.5	47.6
	(a) Keep common bawdy house, (b) permitting premises to be used as common bawdy house, and (c) permitting indecent theatrical performance	1	4.8	4.8	52.4
	Arson	1	4.8	4.8	57.1
	Assault with weapon or causing bodily harm	1	4.8	4.8	61.9
	Breach of trust by public officer	1	4.8	4.8	66.7
	Conspiracy; Theft	1	4.8	4.8	71.4
	Forgery and related offences; Fraud	1	4.8	4.8	76.2
	Importing cocaine	1	4.8	4.8	81.0
	Indecent assault; gross indecency	1	4.8	4.8	85.7
	Manslaughter	1	4.8	4.8	90.5
	Murder	1	4.8	4.8	95.2
	Possession of child pornography	1	4.8	4.8	100.0
	Total	21	100.0	100.0	

As the table shows, the scope of offences where good character is considered as a mitigating factor is wide, from possession of firearms and other weapons to murder and sexual offences; from offences against the person and their reputation to fraudulent transactions relating to contracts and trade.[21]

2.3.2 Good character as recognized in Ontario sentencing practice

As seen in these cases, a judgment of the offender's character is usually incorporated into the introduction of his or her background information, such as employment, education, family ties, reputation, etc. For example, in *R. v. Clarke*,[22] when the judge talked about the offender's good character, he said:

> As indicated, the appellant is a first offender of previously good character. He is described as a good and responsible father and comes from a supportive family. He had a good employment record and has been involved in volunteer work in the community.[23]

This brief explanation contributes to the difficulty I have in uncovering the requirements of good character in sentencing practice. It is unclear which points make the judge draw a conclusion regarding the offender's good character. Are factors such as volunteer work, family support, and employment record used to mitigate the sentence independently, or are they used as evidence of the offender's good character? It is especially confusing when the judge lists "previous good character" as a mitigating factor alongside these other factors under the heading of mitigating factors.[24] In this paper, I will not make assumptions about what constitutes the offender's good character when judges use good character to mitigate sentences or make any inferences

[21] I thought that cases which mentioned good character would focus primarily on non-violent crimes. On the contrary, many cases involving good character are cases of aggravated assault and sexual assault, and even murder and manslaughter in one case. This is contrary to people's assumptions of what a good person might be involved in.

[22] (2004),189 O.A.C. 331.

[23] *Ibid.* at para. 18.

[24] *R. v. Aburto* (1998), 228 A.R. 317 at para. 6, 188 W.A.C. 317.

according to the expression of the judgements. Rather, I will look to the language judges have used in their judgments to determine how they are convinced of the offender's good character in order to reveal the present situation of judging good character in sentencing practice. I will look at four aspects of the application of good character: 1) the types of offenders who are recognized as people of good character; 2) the factors correlated to the finding of good character; 3) the type of evidence provided to establish the offender's good character; 4) the specific indicia that people are referring to when they speak of the offender's good character.

1. The types of offenders most often recognized as having good character

As seen in the case law, good character is generally related to a person's background information: age, education, employment, etc. If all of these factors are determined to be good,[25] the odds of the offender being considered a person of good character are quite high. I have located four usual background factors – employment, first time offender status, education and age – as variables which offenders found to possess good character have in common in the judgments. Regarding age as a factor, I will analyze the distribution of the offenders' ages to determine which age group is most commonly found to have good character. I will also look at the frequency of the remaining factors from the sample cases[26] in order to differentiate the importance of each factor in determining the offender's good character.

A) Frequency of the background factors

Fourteen cases mention the offenders' ages. Offenders recognized as having good character are generally relatively young; those under the age of 29 account for 78.6% of the group (see Table 2). Among the twenty-one cases, two cases do not mention any background factors in the

[25] Strictly speaking, these objective factors cannot be classified as good or bad in moral sense. For example, it is hard to say that being married is better than being unmarried, or that a job with a salary of $40,000 is better than one with a salary of $30,000. However, in everyday life, people have certain expectation of others.

[26] The data is collected on the basis of how often it is mentioned in cases. Take "employment" for example. I do not care whether the offender is employed; I only look at the expression in the judgment. If the judge mentioned that the offender was employed when talking about his or her character, the element of employment will be seen as helping to determine his or her good character. Even though the offender has a job, I would not count it as a case of relating good character to employment if the judge did not mention the offender's job when discussing good character.

judgments. The distribution of the background factors among the remaining nineteen cases is also listed in Table 2, below. Employment and first time offender status seem to be the most prevalent; indicating the profound influence these factors have on the establishment of good character.

Table 2: Frequency of the Background Factors

Factors	Age		Employment (Being employed)	First time offender	Education (high school or above)
Frequency	Under 20	2	15	14	5
	21 -- 29	9			
	39 -- 49	3			

B) Conclusions

The figures show being employed and first time offender status as having the highest percentages with 78.9% and 73.7%, respectively. As such, it can be inferred that people of good character are usually employed with no previous criminal records. Among the sample cases involving background factors, 44.1% of the offenders are employed. This is about three times the percentage of the element of education mentioned in the judgments, which indicates that employment plays a more important role than education when considering good character.

As for the distribution of the offender's age, the youngest is 18, while the oldest is 39. Offenders in their twenties are the most common. One possible explanation for this age distribution is that because people in their twenties are relatively young, they are less likely to have a long record of offences. In addition, this is consistent with the high frequency of first time offender status.

2. Factors correlated with the finding of good character

Since no clear grounds are provided in the judgments that establish the offender's good character, I looked at the frequency of the relevant personal factors that were mentioned,

together with the finding of good character in the judgments to draw a clearer notion of what factors are often correlated with a finding of good character. Using this method, it is possible to find the unifying principle hidden behind the judgments, which will indicate what grounds are used to establish good character.

A) Factors chosen

I looked to two sources in determining the list of factors. First, I selected the factors based on the opinions of leading academics. For example, most academics believe that reputation and volunteer work reflect the offender's good character,[27] so I chose these two elements as two correlated factors and examined their frequency in the cases.

Second, I chose the factors based on my observations of the case law. For example, if the judge in a particular case mentioned that the offender was supported by a well-respected family, I included "family support" as one of the correlated factors.

In the end I was able to define eight factors: a) volunteer work / community service; b) a supportive family; c) family dependence (other family members are relying or have relied on the offender's financial or emotional support); d) possible effects on the offender's future; e) likelihood of future crimes; f) "out of character"; g) worthy social contributions; and h) community ties.

B) Frequency of these factors in the judgments

Among the twenty-one cases, two cases do not mention any of the academically assumed correlated factors.[28] The frequency and percentage of these factors are listed in Table 3.

[27] Manson, *supra* note 12.
[28] Since two cases do not mention any correlated factors, the percentages are based on the remaining nineteen cases.

Table 3: Frequency and Percentage of the Correlated Factors

Factors	Frequency	Percentage
Volunteer work / community service	10	52.6
A supportive family	9	47.3
Family dependence	6	31.6
Community ties	5	26.3
Prediction of future crimes	3	15.8
“Out of character”	2	10.5
Possible effects on the offender’s future	1	5.3
Worthy social contributions	1	5.3

C) Conclusion

Based on the figures, the most relevant factor correlated to the finding of good character is “volunteer work / community service,” accounting for 52.6%. This reveals that people tend to judge the offender’s character from his or her past behaviour in the community. “A supportive family” comes in second place, accounting for 47.3%, which shows that people with family support are generally considered good people. “Family dependence” and “community ties” fall somewhere in the middle, with percentages of 31.6% and 26.3%, respectively. The frequency of the remaining factors is never more than 20%. I find it surprising that “worthy social contributions” has the low percentage of 5.3%, since contributing to society is the most direct way to show a person’s good character.

3. The type of evidence used to establish good character

Among the cases, four types of evidence are provided to demonstrate the person’s good character: pre-sentence report, report from company officials, reference letters, and testimony. Meanwhile, five of the twenty-one cases do not mention the type of evidence used, and five cases mention two forms of evidence. One case mentions three forms of evidence. The total frequency of each form of evidence can be seen in Table 4, below.

Table 4: Types of Evidence (16 Cases)

Types of Evidence	Pre-sentence Report	Reference Letter	Testimony	Report from Company Officials
Frequency	10	9	2	1

Evidence from the pre-sentence report ranks first, accounting for 62.5%. The second type of evidence is reference letters, accounting for 56.3%. The high percentages for reference letters and pre-sentence reports reflect their crucial positions in establishing good character. Meanwhile, the fact that only these two types of evidence are used in most cases implies a potential danger on the credibility of good character determination.[29]

4. The specific indicia of good character

In everyday life, people are prone to confuse character with other personality traits, such as behavioural model, habits, temperament, emotional disposition, enduring preferences and values, skills, talents and abilities.[30] I have organized these traits in Table 5 by picking out all the complimentary words used to describe the offender's good character in the judgments.

Table 5: The Indicia of Good Character

Good character	Complimentary Expression
Moral value	"good"; "tremendous, positive impact"; "caring"; "kind"; "responsible"; "unselfishly"; "commendable lifestyle"
Intellectual value	"talented"
Will power	"hardworking"; "strong work ethic"
Other personality traits	"young"; "calm"; "shy"; "active"; "more stability"

[29] For more information, see 28, below.

[30] Peter Goldie, *On Personality* (London: Routledge, 2004) at 11--13 [Goldie, *Personality*].

As Table 5 shows, the expression of the offender's good character is not limited to moral value; people talk about intelligence and perseverance as well. In other words, people are generally unaware of the difference between character traits and personality traits in sentencing practice.

2.4 Conclusion: Features of good character recognized in current sentencing practice

Generally speaking, offenders who are deemed people of good character are usually young, first time offenders who are employed and have a higher education. Factors related to community and family also play a crucial role in speaking to the offender's good character. In addition, the types of evidence used to demonstrate the offender's good character are simple and limited, focusing on pre-sentence reports and reference letters. Finally, people tend to confuse character traits and personality traits when speaking of the offender's good character, which, I believe, weakens any justification of good character mitigation based on the ideal character traits people ascribe to good character.

Chapter 3

The concept of good character is unworkable

In this part, I argue that the concept of good character itself is unworkable. I will discuss four problems that arise when good character is put into practice: first, judgments about who has good character and who does not are highly subjective; second, judgments about who has good character are almost always based on insufficient evidence; third, there is overlap between good character and a variety of other distinct mitigating factors; and finally, the varied functions of good character in sentencing practice make it an empty concept.

3.1 Character and personality

Before my discussion on the lack of workability of good character in practice, I would like to first differentiate two similar concepts – character and personality – which are usually intuitively confused in everyday life.

3.1.1 Personality and personality traits

Personality is defined as a "quality or assemblage of qualities which make a person what he is, as distinct from other persons."[31] It is used not only to describe and judge people, but also to explain and predict what they will do in the future.[32] In everyday life, when people talk about a person's personality, they tend to think of his or her family background, physical characteristics, education, employment, etc., because all these attributes can have a bearing on that individual's personality.[33]

[31] *The Oxford English Dictionary*, 2d ed., s.v. "personality".

[32] Goldie, *Personality*, *supra* note 30 at 3--4.

[33] *Ibid.* at 18.

Personality traits are different aspects of personality. Examples include descriptions such as generous, kind, charming, stupid, thoughtless, good-looking, etc. The more traits people know about someone, the more they understand that person's personality.

3.1.2 Personality and character

Arguments of character are not limited to the law. Character is also important in politics, history and philosophy.[34] As explained in the dictionary, "the word *character* . . . has two sources, distinguished . . . by the terms *êthos* and *charaktêr. Êthos,* originally referring to a disposition or custom . . . that guides a person's actions and that is a suitable object of moral praise and blame. The earliest uses of *charactêr* . . . refer to an impression . . . ; metaphorically, 'characters' are signs (actions, facial features, social positions) that reveal something about a person's soul."[35] With the development of the field of psychology in the seventeenth century, the word "character" began to include a person's psychological traits.[36] In psychology, the concept is used to "describe behaviour motivations and personality traits that make each person an individual."[37] Owing to the dualism of morality and psychology, character can be described as an evaluation of an individual's moral qualities based on and determined by their psychological formation.

Character is deeper than personality in some sense.[38] The broad definition of personality includes not only personality traits but also character traits.[39] A character trait means "a disposition reliably to respond to certain kinds of reasons — unlike a mere action-tendency, behavioural habit or temperament, like being charming, or being fidgety or being gloomy."[40] It is reason-responsive,

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[34] Douglas Walton, *Character Evidence: An Abductive Theory* (The Netherlands: Springer, 2006) at 1.

[35] Maryanne Horowitz, ed., *New Dictionary of the History of Ideas* (Detroit: Charles Scribner's Sons, 2005) s.v. "Character" (Gale).

[36] *Ibid.*

[37] Bonnie Strickland, ed., *Gale Encyclopedia of Psychology,* 2d ed. (Detroit: Gale, 2001) s.v. "character" (Gale).

[38] Goldie, *Personality, supra* note 30 at 13.

[39] *Ibid*. at 27.

[40] *Ibid*. at 13.

an important feature distinguishing character traits from other personality traits. Compared with other personality traits, character traits are more profound since they relate to a person's moral value.[41] Therefore, when people say a person is of good character, they mean that the person has all the character traits that "right-thinking people" approve of.

It seems as though the concept of character has been well defined in theory, but when it comes to application in sentencing practice, things are quite different. The recognition of good character in sentencing practice is very difficult, which makes it an unworkable concept.

3.2 First Difficulty: Highly subjective judgments

The criteria for good character are not sufficiently developed in Canadian sentencing law, which makes defining good character a highly subjective practice. Judges have a high level of discretion when it comes to deciding who has good character and who does not. Furthermore, a finding of good character is based on a highly subjective reasoning process. These two points contribute to the fact that the current criteria of good character are highly subjective as well.

3.2.1 Judicial discretion is too high when it comes to judging the offender's character

The grounds said to establish an offender's good character are varied,[42] which makes a high level of discretion possible. In Chapter 2, I defined eight factors related to good character,[43] which means that at least eight kinds of factors are considered by judges when considering the offender's character. Judges are free to follow their own individual beliefs, which can vary greatly from case to case and judge to judge. Judges' attitudes will affect the final sentence, which increases judicial arbitrariness in the long run.

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[41] *Ibid*. at 27.

[42] More information can be found at 14, above.

[43] *Ibid.*

In addition, it is rare to find explanations of why the judge thinks a given offender has good character in the judgments. In most cases, the judge only gives us the conclusion: "he has general good character."[44] Even though the judge gives some evidence of good character, which is usually a restatement of the offender's background information, we are still not provided with his or her considerations of what constitutes the offender's good character. Sometimes a finding of good character is just a conclusive sentence without any evidence or room for criticism. The judge has complete discretion in judging the offender's character.

3.2.2 A finding of good character is the result of a highly subjective reasoning process

The reasoning process behind a finding of good character is highly subjective. From the perspective of the reasoning process, "character is something that one agent perceives as being 'inside' another agent."[45] Therefore, character relates to a relationship between two agents. According to Douglas Walton, "[i]t is not just a set of stable characteristics or dispositions that one agent has, it is something constructed by one agent in order to explain, predict and evaluate the actions of another."[46] The reasoning process is thus one of guesswork and estimation under circumstances of incomplete knowledge.[47]

In order to objectivise the process of judging good character so that character evidence can be more traceable and convincing, Douglas Walton in his book *Character Evidence* puts forward an abductive theory[48] to make character evidence more objective. It is important to note, however, that he is looking at character evidence at the trial level, not the sentencing level. In his model, the primary agent whose character is to be judged uses practical reasoning to solve a

[44] *R. v. Mcginty*, 2002 YKTC 81.

[45] Walton, *supra* note 34 at 63.

[46] *Ibid.*

[47] *Ibid*. at 177.

[48] In fact, Douglas Walton specifically talks about character evidence at trial, not in sentencing, but since they are identical in nature, the process of coming to a conclusion about people's character is the same.

problematic situation. The practical reasoning of the primary agent is evaluated by a secondary agent using "a dialogue method of question and answer." Both participants are agents who can approach practical problems and seek out a solution in roughly the same way, or at least by the same process of thinking. The primary agent, at the primary level, is presented as a body of factual data – an object to be studied. The secondary agent takes the case as a set of given facts and asks questions about the facts. By using abductive reasoning (finding the most probable explanation), the secondary agent can draw a conclusion on the primary agent's character.[49] This is an attempt to make the judgment of good character more objective, but it indicates that the very nature of good character judgment is nothing more than other people's presumptions, obtained through a subjective reasoning process. How much the abductive reasoning can help objectify the reasoning process is still a problem.

Additionally, this model is designed for character evidence at trial; it cannot solve the subjective problem in sentencing. At trial, witnesses of character evidence must appear in court and submit to cross-examination. As such, there is an opportunity to question the witness, whose perception will affect how the offender's character is perceived. In sentencing, on the other hand, the judge usually accepts the conclusion suggested in the pre-sentence report or reference letters. In essence, they are both opinions from ordinary people who are familiar with the offender. Usually the witness does not need to appear in court. There is no way of knowing the character of the witness and his or her reasoning process. As such, biases or prejudices could affect the credibility of the reference letter. At the sentencing level, we have no institutional design to objectify the reasoning process of good character, taking efficiency and economic factors into account. Judges seldom question and examine the character of the witness and only accept his or her opinions as expressed in reference letters. The cases show that this problem has not attracted enough attention from the judges.

[49] Walton, *supra* note 34 at 209--10.

3.2.3 The criteria for good character is highly subjective

Judges' discretion, along with their highly subjective reasoning process when making decisions about the offender's character, results in a lack of development of the criteria required for good character in sentencing practice.

In Chapter 2, I argued that no clear standard or unifying principle has been identified as establishing good character in sentencing practice.[50] Sometimes good character relates to the offender's criminal records; sometimes it comes from a claim that the offence is out of character. Mostly it refers to the offender's background, which includes factors such as education, employment and family support. An absolute, fixed standard used to establish good character is invisible in practice. The standard varies in different cases and with different judges, and the percentage of each variable is relatively low.[51] Consequently, it is difficult to pin down a unifying principle that defines good character.

Furthermore, the self-defined recognition of good character results in an unequal opportunity for mitigation. The same term "good character" means different things to different people. Suppose A and B have the same good character, but A's friends are reluctant to call anyone good, while B's friends are not. If this is the case, B's sentence may be mitigated, but A's will not. Owing to the lack of definable criteria and to different people's different attitudes, a given sentence will always depend on random elements, which results in great uncertainty.

3.3 Second Difficulty: Insufficient evidence

The methods used to give evidence about good character are problematic in everyday life. Nevertheless, judges still adopt these methods when sentencing, because no special legal

[50] This is the reason why I must define certain correlated factors myself.

[51] See Chapter 2, above, for more on this topic.

reasoning has been created to ensure that judgments are more credible. In addition, the special features of a sentencing hearing make this an even bigger problem. Therefore, it is almost impossible to adduce enough evidence in a sentencing hearing to make a meaningful judgment about a person's character, which will inevitably threaten any argument on the justification of good character as a mitigating factor.

3.3.1 Two bad practices used to prove good character

Everyday life is full of discussions about personality and character because people use these terms to describe and judge others. Assertions about character are in fact generalizations, or hypotheses about a person's attitude and conduct.[52] Owing to character's reason-responsive disposition, it is especially useful to help predict things about people.[53] However, experiments in social psychology generally show that people do not have the traits that we expect them to have; character is "fragile." [54] When we try to ascribe the character of others, "the empirical evidence is, surprisingly, that we are bad at this practice." [55] Two bad methods used to prove good character indicate a potential problem regarding the credibility of a finding of good character in practice.

1. Inferring good character from insufficient behavioural evidence

Since character cannot be seen directly, one conventional and acceptable way of defining good character is to observe what a person does. From a person's acts, we can draw conclusions about the person's internal character. For example, if a person always donates to homeless children, people may consider him or her a person of good character. In criminal law, inferring bad character from bad acts is widely accepted. Joel Feinberg writes, "a person's faulty act is

[52] Walton, *supra* note 34 at 8.

[53] Goldie, *Personality, supra* note 30 at 4--5.

[54] *Ibid.* at 52.

[55] Peter Goldie, *The Emotions: A Philosophical Exploration* (Oxford: Oxford University Press, 2000) at 152 [Goldie, *Emotions*].

registerable only if it reveals what sort of person he is in some respect . . . ."[56] Modern theorists like George Fletcher and Robert Nozick also defend the connection between bad acts and bad character. In *Rethinking Criminal Law*, Fletcher asserts that the inference from acts to character grounds criminal culpability. He notes, "the question becomes whether a particular wrongful act is attributable either to the actor's character or to circumstances which overwhelmed his capacity for choice . . . ."[57] Nozick believes that a criminal offender is judged by the defect in character that his act betrays.[58] Since the inference from bad acts to bad character has been widely accepted in criminal law, it is natural for people to accept the inference from good acts to good character.

However, owing to the confirmation bias, people tend to jump to conclusions about someone's character "on the strength of insufficient behavioural evidence."[59] In other words, once people convince themselves of someone's good character, they tend to look for confirming evidence and ignore or downplay any evidence against their assumption.[60]

Two defects can be found in this practice. First, the link between actions and character is intuitively assumed. As Ekow Yankah claims, there is "[n]o guarantee that a person's actions are linked to the traits with which we intuitively associate them."[61] Modern behavioural science shows that behaviour is affected by both psychological (internal) and situational (external) factors. A strictly intuitive assumption ignores the situational factors. Situational factors also contribute to actions, meaning actions may not stem from a person's internal character. This psychological critique undermines the clear path between character and behaviour. As Andrew Lelling notes, "character theories of excuse cannot accurately assign blame because they ignore situational

[56] Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970) at 126.

[57] George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978) at 801.

[58] Robert Nozick, *Philosophical Explanations* (Cambridge: The Belknap Press of Harvard University Press, 1981) at 382.

[59] Goldie, *Emotions, supra* note 55 at 55.

[60] Gilbert Harman, "Moral Philosophy Meets Social Psychology" (1999) 99, Proceedings of the Aristotelian Society 315 at 325.

[61] Ekow N. Yankah, "Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment" (2004) 25, Cardozo L. Rev. 1019 at 1037--38.

details, and thus rely on character analysis that explains only a fraction of the behavioural story."[62]

Second, it is difficult to tell when an action is affected by internal character. We cannot deny that actions are related to character, and that actions could thus represent some internal character. The difficulty lies in finding a clear notion on when the act is affected by internal character and when it is affected by external factors. When looking at a specific act, it is difficult to differentiate between the proportion of internal and external factors. Therefore, the inference from action to character becomes unreliable.

2. Inferring good character from circumstantial evidence

The second bad practice is giving evidence about good character based on circumstantial evidence. There are two important types of circumstantial evidence for our purposes. The first comes from drawing inferences about character based on stereotypes. A person with a good education and a supportive family is easily regarded as having good character; a person from a single-parent family with a drug problem will usually be judged as having bad character. This is a result of a history of social prejudice and bias. People are sometimes able to accept exceptions to the general rule, but they think this initial inference is right most of time. Thus, we jump to a conclusion about someone's character based on nationality, employment, residence, or other attributes.[63]

The second type of circumstantial evidence includes both verbal and non-verbal cues, which are often used to infer a person's character. For example, a person's accent or choice of words may lead others to assume certain things about his or her character. Things like clothing, cars, or manners can be non-verbal cues of a person's character. It takes "little imagination to see how

[62] Andrew E. Lelling, "A Psychological Critique of Character-Based Theories of Criminal Excuse" (1998) 49 Syracuse L. Rev. 35 at 39.

[63] Goldie, *Personality*, *supra* note 30 at 53.

this analysis can be extended to race, religion, economic status, and the rest; social perception is infused with stereotypes of negligible evidential value."[64]

The major flaw of this practice is to "turn generalisations into exceptionless law."[65] There is undeniably some value in using generalizations as a guide for understanding the world, but the problem is that they are generally not helpful when it comes to understanding people. This is because "the variations amongst people within any nation or culture or profession or gender or hair-colour group are so great — greater than the variations between the average or what is 'typical' for any given nation or nature."[66] For example, it may be true that on average, children from single-parent families act out more than those from two-parent families, but there are many children from single-parent families who are well behaved and kind. There are so many exceptions that it is difficult to say for certain that generalizations have any predictive or explanatory value when it comes to specific individuals.[67]

In general, people understand very little about any given person and as such they tend to generalize on a very superficial level when they attribute this or that character to anyone.[68] In everyday life, we are used to simplifying others' characters in order to easily explain and predict their thoughts and actions. In fact, this tendency also reflects certain idealism – we expect others to do what we think they ought to do.[69] Therefore, the "good character" we attribute to people from this type of reasoning is rather tenuous, and it is always open to change.

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[64] John M. Doris, *Lack of Character: Personality and Moral Behavior* (Cambridge: Cambridge University Press, 2002) at 93.

[65] Goldie, *Personality*, *supra* note 30 at 53.

[66] *Ibid.* at 54.

[67] *Ibid.* at 55.

[68] Friedrich Nietzsche, *Human All too Human: A Book for Free Spirits,* trans. by R. J. Hollingdale, (Cambridge: Cambridge University Press, 1986) at 84.

[69] Goldie, *Personality, supra* note 30 at 60.

3.3.2 Special difficulties in testifying about an offender's good character in a sentencing hearing

It is difficult to draw inferences about someone's good character in everyday life, but it is even more difficult to infer good character under the institutional design of a sentencing hearing.

1. The origin of the recognition of a person's good character

From the study in Chapter 2, we can see that evidence of good character generally takes on two forms: letters of reference and pre-sentence reports.[70] It seems natural to base a finding of good character on these two forms owing to the features of character. A person's character is not something that can be sensed right away; it takes time to uncover. Only familiar and related people can give an accurate judgement about a person's character since normally they have had the opportunity to observe them over a long period of time. Reference letters are usually written by friends or relatives; pre-sentence reports are based on an investigation by people within the community. Additionally, in order to uphold justice, it is impossible for judges to know about the character of the offenders in advance. The only opportunity for contact with the offenders is in court. To make a finding on the character of the offender, the judge can only rely on reference letters and pre-sentence reports, which are nothing more than other people's personal opinions.

2. Judgements of good character that rely on common sense

All judgements about the offenders' good character in sentencing are based on opinions of ordinary people. A finding of good character is the outcome of judgements by ordinary people based on morality, which does not reflect legal thoughts or reasoning. Therefore, the bad practices in the judgment on good character in everyday life will inevitably be reflected in the

[70] See table 4, above, at 15.

courts. All the flaws in the judgment of good character in everyday life cannot be overcome in a sentencing hearing.

3. Limited types of evidence and economic considerations create a special difficulty when testifying about good character in a sentencing hearing

The types of evidence of good character are simple and limited. Generally speaking, pre-sentence reports and reference letters are the two main types of evidence of good character. Therefore, the judgement of a person's character is based primarily on other people's evaluations. These simple and limited forms of evidence narrow the scope of knowledge the judge can have about the offender's good character. This, in turn, will reduce the credibility of the final judgement of a person's character.

In addition, owing to economic factors and considerations of efficiency, the witness is not questioned as he or she would be at trial. It is rare for writers of reference letters or relatives to appear in court to give their testimony, and it is even more rare for them to be questioned. This concession for efficiency reduces the credibility of the evidence of good character as well.

3.4 Third Difficulty: Overlap between good character and a variety of other distinct mitigating factors

As noted in sentencing practice, the way to testify about good character is to refer to the offender's past behaviours or circumstantial factors, but some of the past behaviours or factors are already used to affect sentencing, such as co-operation with the police, worthy social contributions, good deeds, charitable donations, contribution to the community, volunteer work, reputation, employment records, criminal records, first time offender status, etc. Generally speaking, these factors are usually viewed as a symbol of good character in people's minds, but owing to the vagueness of the grounds used to establish good character, no one can draw a

clear boundary line between good character and these factors. Do all the above factors make up a person's good character? Is a finding of good character the result of adding them all together? It is difficult to answer these questions clearly.

Moreover, there is the risk that one element will be considered twice. The functions of the above elements are not equal, and some elements have greater influence on the sentence. Take first time offender status for instance. It has been widely accepted as an independent mitigating factor during sentencing. This leads to a dilemma. Either first time offender status is evidence of good character or it is not. If it is not used as evidence of good character, this is counter-intuitive, for what else could be better evidence of good character than a clean criminal record? But if it is used as evidence of good character, this appears to count first-time offender status twice as a mitigating factor.

In addition, as seen in Chapter 2, the different types of correlated factors can be grouped into two categories: family support and community ties.[71] Therefore, to consider good character is to examine the offender's family support and community ties in some sense. For example, Justice Lipson has commented: "[o]ther mitigating factors such as his full-time employment and good family and community support are important since they tend to speak to his otherwise good character."[72]

However, the influences of family support and community ties on sentencing are usually independently considered by judges as evidence of rehabilitative potential. Thus, it is particularly difficult to give meaningful content to good character when most of the things that we would tend to associate with it are already recognized as independent mitigating factors. In the pages that follow, I will discuss the overlap between good character and four additional factors.

[71] More information can be found at 14, above.

[72] *R. v. Sukhu,* 2005 ONCJ 109 at para. 14.

3.4.1 Good character and "first time offender"

Being a first time offender is widely accepted as an independent mitigating factor which affects sentencing. A first time offender is an offender who has no criminal record except for the present offence. In people's minds, if a person is of good character, he or she certainly should not have a criminal record. In *R. v. M. (J.E.)*,[73] Justice Schuler argues that "[t]he (criminal) record . . . disentitles Mr. Martin from claiming good character."[74] People seldom think an offender is of good character, because it is intuitively accepted that good people do not commit crimes. Consequently, most first time offenders are deemed to be people of good character, which is demonstrated by the high percentage of first time offender status in Table 2. [75]

It seems as though these two concepts should not overlap, since common sense confirms that just because a person is a first time offender is not enough to result in a finding of good character. People should have higher moral expectations of people who they think of as having good character than the mere fact that they are first time offenders. However, owing to the vagueness of the grounds used to establish good character, the two concepts overlap quite often. For example, in *R. v. Oliver*,[76] the judge said, "[t]he evidence supported the Crown's submission as to the appellant's previous good character. He had no criminal record and it appears from the pre-sentence report that he had no previous involvement with the police or authority."[77] It is clear that not having a criminal record, that is, being a first time offender, becomes evidence of the offender's good character. A similar comment can also be found in *R. v. Safaei*, which states "[a] lengthy criminal record is a basis to reject a reduction in sentence based on previous good character."[78]

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[73] 1997 CarswellNWT 76 (N.W.T.S.C.) (WLeC).

[74] *Ibid.* at para. 8.

[75] See 12, above.

[76] (1997), 99 O.A.C. 234, 34 W.C.B. (2d) 432 [*Oliver* cited to O.A.C.].

[77] *Ibid*. at para. 11.

[78] 2005 CarswellOnt 4648, at para. 22 (Ont. Sup. Ct. J.) (WLeC).

Owing to the ambiguity of the concept of good character, “first time offender” might make the concept of good character seem empty, especially when it is connected with age. If an offender is old and does not have a criminal record, it is easier to conceive of him or her as a person of good character. The judge may think it is especially difficult to keep a clean criminal record for many years, and it is not difficult for the offender to find a few friends to testify about his or her good character. To be a first time offender is thus almost a guarantee of being judged a person of good character. If that is the case, the existence of good character is meaningless, and it can only lead to the danger of considering one mitigating factor twice.

3.4.2 Good character and voluntary surrender

Voluntary surrender is often thought of as evidence of the offender’s self-reflection and regret. If a person seems like he or she is trying to reflect on his or her offence, people tend to judge him or her well. Additionally, voluntary surrender also saves judicial resources. If a person voluntarily put himself or herself in a disadvantageous position, people tend to think he or she is naturally good, and therefore it will be easier to judge him or her as having good character.

3.4.3 Good character and worthy social contributions

In some circumstances, based on the pragmatic consideration, the State encourages offenders to contribute to society. Allowing worthy social contributions to be a mitigating factor encourages offenders’ contributions, which in turn benefits society as a whole. In my opinion, this factor should be easily differentiated from good character, since it does not matter whether it is a good person or a bad person who contributes to society. Even though the offender is bad, if he or she has made any worthy social contributions, his or her sentence can be mitigated. This is the result of balancing two conflicting interests. For example, consider a person who does a good deed by chance, like saving a child from drowning,[79] or invents something that is important to human

[79] *R. v. Lawson*, 2001 CarswellOnt 1428 (Ont. Sup. Ct. J.) (WLeC).

beings. They are both contributions to society, but these contributions may not relate to any of the offender's subjective thoughts or personal character.

However, in people's minds, good deeds are only connected with good people. If a murderer saved a drowning child by chance or by mistake, people still tend to evaluate him or her positively. As mentioned above, people tend to judge others based on insufficient evidence and infer good character from good acts or good deeds, even though these acts or deeds may have nothing to do with the offender's true nature. Therefore, people who have made worthy social contributions are often considered as having good character.

Volunteer work contributes to society as well. Is it also a form of worthy social contributions? If the answer is "yes," we have to pay attention to the important role volunteer work plays in testifying about the offender's good character. In some cases, the evidence of volunteer work or social contribution is deemed a symbol of good character.[80] Thus, with the help of "volunteer work," the concepts of "good character" and "worthy social contributions" are closely connected.

3.4.4 Good character and co-operation with the police

Co-operation with the police as an independent factor affecting sentencing is recognized by many nations, including China.[81] In exceptional cases, the state may ask the offenders for help. For example, the police may try to encourage the offender to disclose evidence about other offences or other offenders. In this type of situation, the state will offer offenders a mitigated sentence in exchange for information. This is also based on the pragmatic consideration, unrelated to people's character. The reasons why offenders decide to co-operate with the police vary, but may range from regret for what they have done, or revenge towards another offender, which has nothing to do with a person's good character. However, people are generally moved by the offender's active co-operation, which may point to the offender's good character in their eyes.

[80] *R. v. Rajendram* (1999), 47 M.V.R. (3d) 66 at paras.11--13 (Ont. Sup. Ct. J.).

[81] Art. 68 of *Xingfa* [the Criminal Code], PRC.

All of these factors are generally considered independently in sentencing practice, and all of them can be said to be components or symbols of good character to some extent. As such, it is difficult to pinpoint their exact role in sentencing. If all the factors which are supposed to lead to a finding of good character can be used to mitigate sentencing independently, then the concept of good character has no meaningful content. Its independent existence as a mitigating factor needs further consideration.

3.5 Fourth Difficulty: The varied functions of good character in sentencing

It would be hasty to conclude that good character is a mitigating factor, since sometimes it cannot mitigate the final sentence. For example, when good character is used to provide an opportunity for the offender to commit the crime, sometimes it is considered as a neutral factor. In *R. v. Montpellier*,[82] Justice Gauthier said:

> [T]he previous good character of Pierre Montpellier . . . in my view, is not a mitigating factor in this case, as it is precisely that good character and reputation and position in the community which provided the opportunity for the commission of these offences.[83]

Studies have shown that "some courts have singled out some kinds of offences as unsuited to mitigation on this ground."[84] The effect of good character has been minimized in cases about the operation of a motor vehicle, in perjury, and in drawn out, complex crimes.[85] As Professor Allan Manson concluded, "in general, courts have found that good-character claims are inappropriate when dealing with offences committed in the dark corners of people's lives."[86] Therefore, the function of good character in sentencing is unpredictable: sometimes it can mitigate the

[82] 2004 CarswellOnt 6419 (Ont. Sup. Ct. J.) (WLeC).

[83] *Ibid.* at para. 19.

[84] Ruby Clayton, *Sentencing*, 6th ed. (Toronto: LexisNexis Canada, 2004) at 240.

[85] *Ibid.* at 241.

[86] *Supra* note 12 at 132.

punishment; sometimes it is considered as a neutral element, while other times it can even aggravate the punishment. These various functions of good character make us question the value of the concept itself.

3.5.1 Good character as an aggravating factor in practice

In *R. v. Thomas*,[87] Justice Poupore expresses his view on the function of good character:

> [G]enerally evidence of good character goes to mitigation of the sentence; but if the offences were committed over a series of acts, planned and carried out over a long time, it becomes an aggravating factor;[88]

In this case, when speaking of the offender's general good character, he noted:

> Given the nature of the offences, it is not unusual for him to appear to be an upstanding citizen and teacher. However, it was this reputation that assisted the offender in gaining the trust of these young girls so that he might later prey upon them. His reputation made it that much more difficult for the victims to come forward in a timely way with the hope of being believed.[89]

Therefore, good character sometimes acts as an aggravating factor. There are three possible justifications for using good character as an aggravating factor.

1. Good character as an indication of the offender's abuse of trust

Good character can be an aggravating factor if victims have been led to trust the offender because of his or her seemingly perfect background or the offender's high reputation has been deliberately used to commit crimes.[90] The fact that an offender has done good things in the past or has been highly regarded in the community can help to commit crimes. Offenders appeared to

[87] 2005 CarswellOnt 3875 (Ont. Sup. Ct. J.) (WLeC).

[88] *Ibid.* at para. 13.

[89] *Ibid.* at para. 19.

[90] Richard G. Fox & Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Melbourne: Oxford University Press, 1985) at 467.

be people of good character, and they were able to secure the trust of their victims because they were thought to be worthy of respect. People of good character are often considered trustworthy and so rarely will others guard against them. Consequently, this affords offenders the opportunities to successfully commit crimes. “It was, after all, that same good character that enabled them to perpetuate this scheme. It is more an aggravating than a mitigating factor.”[91]

Good character can be used to help commit crimes in two ways. First, the offender may take advantage of people’s respect and on their judgment of his or her good character. As Justice Rogerson stated in *R. v. Campbell*:[92]

> Mr. Campbell, you took advantage of the respect you had within the community to pillage almost 1.4 million dollars from your unsuspecting clients. It seems to me many members of our society are very cynical about lawyers. You, sir, only add to that cynicism and make it very difficult for lawyers to conduct their vital and necessary work when you take advantage of your position to steal from the very people who come to you for help. It is no excuse for you to say you got in over your head as a result of your business dealings in a restaurant and a trucking business. Honest businessmen would not employ criminal thefts to attempt to bolster their business.[93]

If offenders use their apparent good character to help carry out crimes, and fully appreciate what they are doing, they are voluntarily abusing people’s trust on them. Second, the offender’s good character makes it easier for him or her to commit a crime, and more difficult for his or her criminal behaviour to be detected. As the crown argues in *R. v. Damji*, “it was precisely because he was of apparently of good character, that he was able to commit these offences.”[94]

These two examples show that people naturally tend to give trust to offenders of good character. In other words, people of good character are good at gaining others’ trust. As such, their crimes constitute a breach of that trust. Consequently, the gravity of the punishment should involve the

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[91] *R. v. Koval*, 2001 CarswellOnt 6199 at para. 65 (Ont. Sup. Ct. J.) (WLeC).

[92] 2005 ONCJ 286.

[93] *Ibid.* at para.14.

[94] *R. v. Damji*, 2002 CarswellOnt 4436 at para.12 (Ont. Ct. J.) (WLeC).

breach of trust and give priority to general and specific deterrence, which makes good character an aggravating factor.

2. Some indicia of good character demonstrate the offender's high culpability

In some cases, the question of why people of good character may be involved in these offences will lead people consider good character as an aggravating factor. In *R. v. Prokofiew*,[95] Justice Corbett commented:

> Indeed, it is generally the case that substantial frauds are perpetrated by persons such as Mr. Prokofiew and Mr. Solty, who have the intelligence, the experience, and the stature that gives them the opportunity to take advantage of the system. I do not view the letters attesting to their otherwise good character as being mitigating factors in this case. Both men have had unblemished characters up until the events in this proceeding. They have no prior criminal record. I certainly take that into account in passing sentence upon them, but I do not view it as a mitigating factor that they were men of high repute and achievement in the business community. In many respects, many people would view that as an aggravating factor and lead one to wonder why on earth they were involved in this.[96]

People of good character in the legal field are usually well educated and come from a supportive family, so they know more and have comparatively more options than those of bad character. They often have a stable job or the ability to get one, and it is easy for them to gain respect and support among the community. The cost for them to choose a law-abiding life and be a person of good character is comparatively low. People of bad character are usually socially deprived. They often do not have family supports and are not well educated, which makes it harder for them to secure a stable job. They may be discriminated against and isolated within the community. For them, leading a law-abiding life and being a person of good character can be quite difficult. From this point of view, people of good character are more blameworthy, and their culpability is even higher than people of bad character.

In addition, people of good character may also carefully plan and carry out crimes, which indicates that they have a good appreciation of their wrongdoings. If they choose to continue to

[95] 2005 CarswellOnt 3201 (Ont. Sup. Ct. J.) (WLeC).

[96] *Ibid*. at para. 14.

wilfully harm society regardless of people's expectations and the respect that comes with the reputation of good character, this shows that the culpability of people of good character may be even higher than the culpability of people of bad character.

3. Crimes committed by people of good character result in greater social harm

Some offences may last for a long time owing to the assistance of good character. After committing crimes, people of good character may hide within the community, and are generally less suspicious and thus harder to find. Moreover, crimes committed by people of good character may have a more profound effect on present and future life. People may begin to question other people of good character in the community and feel insecure about everyone. Feeling secure is an important aspect of happiness. Under these circumstances, there are good reasons to consider good character an aggravating factor.

3.5.2 Good character as a neutral factor in sentencing

In sentencing practice, the offender's good character may be neither a mitigating nor an aggravating factor. In *R. v. L. (C.)*,[97] Justice Romilly insists that "previous good character is not a mitigating factor to be considered in sentencing for sexual assault upon children under one's care."[98] The reason is clearly stated in *R. v. B. (S.)*:[99]

> Obviously, opinion of good character can never be a mitigating circumstance when a person is found guilty of sexual abuse of a child. Courts have said again and again and I do not think that it is very difficult to understand that individuals of otherwise good character have, in secret, proceeded to sexually abuse children. Sexual abuse of children is not something you do in public, it is something you do hidden. Therefore, they are totally *irrelevant* these opinions of good character. It is great that Mr. B. has received or has the merit of having the opinion of good character outside of any sexual abuse of children, but that is *irrelevant* for the consideration of this court

[97] 1998 CarswellBC 49 (B.C.S.C.) (WLeC).

[98] *Ibid* at para. 15. See also *R. v. M. (G.)* (1992), 77 C.C.C. (3d) 310 (Ont. C.A.).

[99] 2005 CarswellOnt 4526 (Ont. Sup. Ct. J.) (WLeC).

> when deciding what is the proper and fit sentence here. No other mitigating factors have been submitted by counsel but in any event I see absolutely none.[100]

In other words, the offender's good character cannot reveal the part of his or her nature represented by the offence, so the irrelevance of the offender's good character to his or her offence means that good character can neither mitigate nor aggravate sentencing.

Interestingly, another reason why good character is a neutral factor is discussed in *Ryan v. The Queen*,[101] where the judge argues that the offender *should* be a person of good character if he is a priest, so it is neither a mitigating nor an aggravating factor.[102] In other words, if you have a certain occupation, such as being a priest, it is your obligation to be or to be viewed as a person of good character. It is just a requirement of your career. In this type of situation, I cannot find any justification for mitigating or aggravating sentencing.

In addition, being a person of good character is not a burden that gives the defendant a moral right to have his or her sentence mitigated. People of good character already have a good reputation and are respected within the community; these are the rewards for their good character. Should they continue to benefit from their good character in sentencing? This way of thinking seems flawed.

I argue that the level of difficulty involved in being a person of good character also matters. If the offender can be a person of good character as easily as someone else can be a person of bad character, evidence of previous good character should not have a great influence on mitigation, since the good character of this offender is not tantamount to effort or other important values. If it turns out that the offender sacrificed a lot to maintain a record of previous good character, the judge may want to give more consideration to its mitigating effect. On this reasoning, for people who easily maintain their good character, good character can only be considered as a neutral

[100] *Ibid.* at para. 9.

[101] [2001] HCA 21, 75 ALJR 815, 118 A Crim R 538, 179 ALR 193.

[102] *Ibid.* at paras. 1, 34, 77.

factor, while for those who work very hard to be people of good character, good character could be accepted as a mitigating factor.

3.5.3 The chaotic situation caused by the function of good character in sentencing

Different or controversial ways of considering good character are found in practice. For example, in cases where the crime is carried out over a long period of time, such as *R. v. Spiller*,[103] the court has said:

> Good character may be a mitigating circumstance in some kinds of crimes . . . in my opinion, this is not so, where the offence is a series of acts, planned and carried out over a lengthy period . . . .[104]

However, in *R. v. W. (B.D.)*,[105] a typical "case of complex crimes planned and carried out over a lengthy period of time,"[106] the offender had fifty letters of reference which said that his attributes included "good character, trustworthiness, honesty, leadership qualities and forthrightness" and that he led a life "devoted to public service and to helping others."[107] The judge's attitude was completely different: "it is clear from his full and careful reasons that the sentencing judge did take into consideration, when imposing [the] sentence, the many mitigating factors which had been put forward on the appellant's behalf."[108]

All three possible outcomes of good character in sentencing – mitigation, neutrality and aggravation – have been found in practice, and each has its own justifications. However, the function good character will have in a specific case is left to the judge's discretion. There are no

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[103] [1969] 4 C.C.C. 211, 68 W.W.R. 187 (B.C.C.A.) [*Spiller* cited to C.C.C.].

[104] *Ibid.* at para. 1.

[105] 81 B.C.A.C. 290, 132 W.A.C. 290, [1996] B.C.W.L.D. 2620 [*W.(B.D.)* cited to B.C.A.C.].

[106] Clayton, *supra* note 84 at 241.

[107] *Supra* note 105 at para. 14.

[108] *Ibid*. at para. 21.

general uniform criteria on the application of good character. The case law reveals some contradictions when good character is put to use in sentencing practice.

3.5.4 The ability of good character to affect sentencing is problematic

As mentioned in the discussion above, the role that good character can play in sentencing may vary. Thus, there are justifications for using good character as a mitigating or aggravating factor in sentencing. Some argue that this simply reflects the complexity of the concept itself. However, it is possible that the concept of good character has become so wide that it is now an empty concept. If it can be seen both as a mitigating and aggravating factor, its ability to affect sentencing becomes meaningless. It shows that the concept cannot greatly influence or guide the sentence. It may be time to reconsider the necessity of good character as an element affecting sentences.

Chapter 4

Good character defined as any good features the offender may possess

The four difficulties presented in Chapter 3 are a result of the desire to apply some ideal meaning of good character in practice. I assume here that what we are looking for is not the ideal, perfect concept of good character, but rather for any good features the offender may possess. Will this make good character as a mitigating factor more acceptable and reasonable?

If we are simply looking for any good qualities that offenders possess, we do not need any criteria for offenders to qualify as people of good character. If this is the case, what we are doing in practice is not problematic, because we are just finding any "good" in the offender worth considering, no matter how little there may be. So long as we know someone has helped another human being once, for example, he or she could be said to be a person of good character. If the expression "good character" only has a symbolic meaning rather than an ideal meaning, there would be no difficulty in recognizing good character. Nevertheless, the justification for good character as a mitigating factor under this meaning is still problematic.

4.1 Sentencing and the duty of the state

Sentencing is the state's responsibility. The modern state has duties of humanity and justice.[109] Under the duty of humanity, the modern state is bound to treat each of its citizens as "a thinking, feeling human being."[110] Questions of justice are questions about "how people are to be treated

[109] John Gardner, "Crime: In Proportion and in Perspective" in Andrew Ashworth & Martin Wasik, eds., *Fundamentals of Sentencing Theory* (Oxford: Clarendon Press, 1998) 31 at 34–35.

[110] *Ibid*. at 34.

relative to one another."[111] This implies the requirement that the state should keep its distance from citizens, leaving them free to make their own mistakes. A just person is artificially blind to certain qualities of people and aspects of their lives in order to isolate criteria for differentiating among those who come before him or her. For example, the judge does not care whether the offender's favorite color is red or blue, or whether he or she likes dancing or jogging. As the old adage goes, justice is blind.[112] The primary role of courts is the administration of justice. At the sentencing level, the judge leaves room for something like a guilty plea to bring about the offender's wider life story in the name of humanity, but "what falls to be mitigated is none other than the sentence which is, in the court's opinion, required by justice."[113] The proper starting point for the courts is to create a just sentence. This just sentence refers to "relativities between the State's treatment of different people, not relativities between how the State treats someone and how that someone treated someone else."[114]

In the name of humanity, the courts care about the offender's good character as a reflection of the offender's fuller range of qualities, but this is subject to the consideration of a just sentence. To pass a just sentence which indicates how different people's punishments should stand vis-a-vis one another, the courts must put offenders against a background of assumed uniformity. The scope of the "uniformity" is different under different theories of punishment. For example, limiting retributivism may identify rehabilitative potential as a criterion to differentiate among offenders, while the just deserts theory will ignore the potential for rehabilitation and then incorporate it into the background of assumed uniformity. In spite of the different scope of assumed uniformity, if good character is only something good within the offender, without the normal, moral expectation which we usually attach to the meaning of good character, it will fall into the scope of assumed uniformity. The judge does not care whether the offender had ever given one dollar to the beggar in the street or not, because giving one dollar to a beggar is not enough to differentiate between

[111] *Ibid.* at 35.

[112] *Ibid.* at 36.

[113] *Ibid.* at 37.

[114] *Ibid*. at 38.

offenders; it can only be a part of the offender's broad life history. Without any substantial meaning or value behind "good character," the consideration of good character cannot be justified under the duty of justice, which is the starting point for a court. All the justifications of good character mitigation are based on the value of the ideal meaning of good character we expect. Once it cannot be a criterion of differentiating among offenders, it can only become one of the factors the state should ignore for the fulfillment of justice. Therefore, the courts should not apply good character if this only means finding some good within the offender.

4.2 Sentencing and social accounting

If we discuss good character under the definition of "some good within the offender" (instead of using the ideal notion of this concept) and mitigate sentencing based on any evidence of the offender's goodness, we fall into a sort of pure social accounting. This social accounting can be used to calculate how much punishment the offender deserves under the just deserts theory. It can also be used to calculate how much the sentence can be reduced within the boundaries of proportionate sentencing under the limiting retributivism theory. The real problem lies with the idea of social accounting itself.

Certain other factors are considered to give different punishments according to different circumstances. However, a "sentence is not a mathematical process and metaphorical references to terms such as 'credit' and 'discount' should not be taken literally."[115] Sentencing means to give offenders a proper punishment for their offences with full consideration of various sentencing goals, not evaluate their past achievements and faults and then calculate how much society owes them. There are two reasons why it is inappropriate to view sentencing as social accounting.

[115] Ian Freckelton, "Good character, Paedophilia and the Purposes of Sentencing" (2001) 8 Psychiatry Psychol. & L. 202 at 205.

First, sentencing does not judge a person from every angle. Pure social accounting will turn sentencing into a process that attempts to make a kind of balance sheet of people's past life. "The offence(s) committed would be the major factor on the minus side; and any creditable social acts would be major factors on the plus side."[116] The problem is whether it is "a court's proper function to concern itself with these matters . . . ."[117] The role of the court is to create a sentence for the particular crimes committed. "It 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."[118]

In addition, it is impossible to give a precise account of any given offender, since judges do not have enough resources to rely on. If we need to give a precise account of an offender, we need to have a whole moral evaluation system figured out first, which could record people's daily lives. This, however, would violate another conflicting right: privacy.

[116] Andrew Ashworth, *Sentencing and Criminal Justice*, 4th ed. (Cambridge: Cambridge University Press, 2005) at 173.

[117] *Ibid.* at 174.

[118] *Ibid.*

Chapter 5

Good character does not fit into major theories of punishment

The expression "good character as a mitigating factor" gives rise to two important problems. The first one is the recognition of good character which is discussed through case law in Chapters 2, 3 and 4. The second problem centers on "mitigating," that is, why good character is entitled to mitigate the final punishment. Good character has long been considered a mitigating factor despite the existence of problems with the concept of good character, as noted above. It is thus necessary to find some justification for good character mitigation in sentencing practice. It is one thing to say that good character can be recognized in practice so that it could be considered a mitigating factor, while it is quite another to say that good character should be considered a mitigating factor.

It seems intuitive to accept that people of good character can have their sentence mitigated. Subconsciously, people think of a person with good character as the opposite of an offender, so it seems very natural to mitigate sentencing based on good character. Perhaps that is the reason why this issue has not attracted much attention from academics in Canada.

Good character mitigation is rarely studied; only a few relevant materials can be found in publication. In fact, the topic of sentencing was not critiqued in great detail until the late 1980s, since it is traditionally thought of as an "art" and not a science. If sentencing were an art, rules regulating sentencing would be less important. A perfect sentence would depend on a judge's feelings or experience, like art for an artist. This idea is easy to find in the judgments. For example, in *R. v. Crowell*,[119] the judge commented that "sentencing is not a science but an art, practised, often with great skill, by judges in courts of criminal jurisdiction."[120] Mitigating factors

[119] (1992),16 C.R. (4th) 249, 76 C.C.C. (3d) 413, 115 N.S.R. (2d) 355, 314 A.P.R. 355 (S.C.A.D.) [*Crowell* cited to C.R.].

[120] *Ibid.* at para. 10. Similar comments can be found in *R. v. R. (P.S.)* (1999), 138 Man. R. (2d) 75 (C.A.), *R. v. Biln*, 1999 BCCA 369,125 B.C.A.C. 254, 204 W.A.C. 254, *R. v. Holmgren*, [1995] O.J. No. 286 (Ont. Gen. Div.) (QL) at para. 56:

usually occupy one chapter together with aggravating factors in textbooks. There is even less written on good character. It is usually mentioned in a very abstract and simple way. As for the justification of good character as a mitigating factor, it is only mentioned in a few sentencing textbooks.[121]

There are two major theories of sentencing today: just deserts and limiting retributivism. If we are to justify good character mitigation, it will likely be in accordance with one of these two theories. In this part, I argue that the major theories of criminal punishment do not accord well with good character mitigation. Before I get into the discussion of good character mitigation, I distinguish "good character" mitigation from "out of character" mitigation, since they are usually used interchangeably in sentencing practice. Finally, I will introduce Prof. Andrew Ashworth's discussion of Durkheim, which provides a new perspective on good character mitigation.

5.1 The distinction between "good character" mitigation and "out of character" mitigation

The concept of an offence being "out of character" is sometimes mentioned in cases when the judge discusses the influence character has on sentencing. For example, in *R. v. Collins*,[122] the judge said, "to the extent that she has no prior criminal record, this behaviour is out of character for her."[123]

The discussion of an offence being "out of character" is often confused with a discussion of an offender's "good character." Sometimes good character is referred to as "out of character." The

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"Sentencing is an art, not a science. An enterprise of the heart and mind, not the impersonal product of a computer." In *R. v. Cameron*, 183 N.S.R. (2d) 257 at para. 10, 568 A.P.R. 257 (S.C.), "sentencing is an art, forged by the judge's own instincts and experience." It also can reflect in some scholars' works, see Ruby Clayton, *Sentencing*, 6th ed. (Toronto: LexisNexis Canada, 2004).

[121] I referred mainly to two textbooks: Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) and Clayton C. Ruby, *Sentencing* (6th Edition) (Toronto: LexisNexis Canada, 2004).

[122] 2005 ONCJ 224.

[123] *Ibid.* at para. 19.

logic is as follows: the offence is bad, while the criminal act is out of the offender's usual character, so the prior character of the offender is good. Based on the confusion of "good character" and "out of character," some scholars further justify "good character" mitigation based on "out of character" mitigation. According to this opinion, good character "is usually directed to showing the offence is out of character,"[124] "and therefore . . . is less likely to be repeated."[125] According to this reasoning, if the offender is of previous good character, and the offence is bad, the offence is out of character. Therefore, the offence was a one-time thing, and the offender may not commit a crime again. Consequently, the offender may need less punishment to be reformed. However, the confusion of the two concepts makes it hard to distinguish whether "good character" indicates that the offence is "out of character," or whether the offence's being "out of character" is evidence of the offender's previous "good character."

I doubt whether the concepts of "good character" and "out of character" are the same. I think they are two different concepts, although some overlapping exists. If the offence has been carried out many times over many years, even though the offender is considered to be of "good character," it is difficult to say that the offence is "out of character." Thus, Justice Mchugh referred, in *Ryan v. The Queen*,[126] to " . . . there being multiple offences committed over a number of years, such as to preclude the contention that the offences were 'out of character.'"[127]

In fact, these two concepts are not defined for the same purpose. "Good character" is a kind of moral evaluation of the offender's previous acts and true nature, while "out of character" refers to the disaccord between the previous knowledge of the offender and the specific offences he or she committed, so it does not relate to any value judgement. Even if the offender is of previous bad character, his or her offences can still be out of character. For example, consider an offender who is a coward and often steals, and who one day violently murders somebody. This murder

[124] Manson, *supra* note 12 at 132.

[125] Clayton, *supra* note 84 at 240.

[126] *Supra* note 101.

[127] Freckelton, *supra* note 115 at 206.

can be said to be out of character too, even though it is hard to say the offender is of previous good character. On the contrary, some offenders of previous good character have committed the same crimes many times over the course of several years, such as theft or fraud, before they are caught. In those cases, it is hard to say that the offence is out of character, even though it is true that the offender is otherwise of good character. Therefore, it is an oversimplification to equate "good character" with "out of character."

In my thesis, I only discuss "good character." Whether the offence is out of character is beyond the scope of this paper. I will only focus on the offender's previous good character from a moral point of view. As to the latent inference that once an offence is out of the offender's character, it is less likely to be repeated, I have no intention to formulate a full argument, though I have some doubts about its truth.

5.2 Examining the justification of good character as a mitigating factor in theories of punishment

Good character is a factor that can mitigate a final sentence. In other words, it will affect the level of punishment. The decisive elements of a final sentence vary under different theories of punishment. If we are to justify good character mitigation, it must fit into some theory of punishment.

Punishment is a form of suffering, and as such it requires justification. Different theories have been put forward regarding the justification of punishment. All these theories can be said to generally fall into two basic camps: consequentialism and retributivism. Consequentialism is a theory with forward-looking goals, which insists that "the justification of any human practice depends on its actual or expected consequences."[128] The actual or expected consequence of

[128] R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) at 3 [Duff, *Punishment*].

punishment is crime prevention. There are three ways in which punishment contributes to crime prevention: deterrence, incapacitation and reform or rehabilitation. How and how much an offender should be punished is decided according to the need for crime prevention and public protection; the offender can thus be punished beyond the harm his offence has done. The theory of retributivism, on the other hand, is backward-looking. The punishment of the offender serves to undue on some level the wrong the offender has done. The punishment is what the offender deserves for her crime, so the amount of the punishment should relate to the severity of her crime.

The opposition between the two theories has long existed. Each theory has its own rationality and challenges. The challenge faced by consequentialists is sacrificing the offender's interests for society's goals. Is this fair? The difficulty faced by the retributive theory is punishing a harmless offender. Is this necessary? In the midst of the debate between these competing theories, H.L.A. Hart tried to "provide a framework for the discussion of the mounting perplexities," and he claimed that "a plurality of different values and aims should be given as a conjunctive answer to some single question concerning the justification of punishment."[129] He distinguished the "general justifying aim" of punishment from principles of distribution. By Hart's account, the "general justifying aim" of punishment is the beneficial consequence – crime prevention, while our pursuit of that aim must be restrained by the principles of distribution that "punishment must be reserved for voluntary offences"[130]and "a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a commonsense scale of gravity."[131] This further leads to the question of the justification of these constraint rules. Regarding the question of why the innocent should not be punished, "one obvious [answer] is turn to a retributivist notion of desert,"[132] because they do not deserve to be

[129] H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press,1968) at 2 -- 3.

[130] *Ibid.* at 22.

[131] *Ibid*. at 25, see also Duff, *Punishment*, *supra* note 128 at 11.

[132] Duff, *Punishment*, *supra* note 128 at 12.

punished. This is a “negative” version of retributivism, according to R. A. Duff, since it does not tell us the positive justification for punishment.[133]

Joel Feinberg and R. A. Duff engage in further discussion regarding the justification of the state’s duty to detect, convict, and punish the guilty. Feinberg defends the expressive function of punishment, stating that “the very physical treatment itself expresses condemnation . . . that certain forms of hard treatment have become the conventional symbols of public reprobation.”[134] Duff further claims that punishment serves a communicative purpose rather than a simply expressive purpose. Punishment is justified by the communication of deserved censure. With this communication, punishment is given “the forward-looking purpose of persuading offenders to repent their crimes.”[135]

People have long been aware of the problems with the two theories, and no one strictly insists on a pure consequentialist or retributivist theory today. Legal academics are attempting to come up with a new way to justify the institution of punishment. Among these efforts, two theories have profoundly affected the current legislation and sentencing practice: one is the theory of just deserts, and the other is the theory of limiting retributivism. Considering these two theories’ profound influence in Western countries, I would like to examine good character within these two theories to find out whether good character is compatible with the basic theory of punishment. Since theories of just deserts and limiting retributivism have prevailed in the Western world, if good character is not compatible with either of them, this suggests that good character should probably not be considered a mitigating factor. Thus, its theoretical basis is questionable.

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[133] *Ibid*.

[134] Feinberg, *supra* 56 at 100.

[135] Duff, *Punishment*, *supra* note 128 at 30.

5.3 Good character within the just deserts theory

The just deserts theory is put forward by Andrew Ashworth and Andrew von Hirsch. It argues that "punishment involves imposing a deprivation ('hard treatment') on someone, in a manner that conveys censure."[136] The level of punishment should convey the level of the state's censure on the wrongdoings. Thus, the sanction should be proportionate with the severity of the offence and the offender's culpability. From this, we can infer that the factors which affect the final punishment must have something to do with the severity of the crime and the offender's culpability. According to the just deserts theory, the severity of crime can be reflected through the harm done by the offender, while culpability relates to cognitive ability and volitional controls. Besides the two fundamental factors, additional factors, referred to as equity factors, may also affect the amount of punishment.

In this part, I first discuss the relationship between good character and the decisive elements of sentencing under the just deserts theory. Next, I examine the relationship between good character and equity issues. I argue that good character is irrelevant to all of the factors previously mentioned. Consequently, it does not fit into the just deserts theory.

5.3.1 Good character and the decisive elements of sentencing

According to the just deserts theory, punishment should be proportionate to the offender's wrong-doings. As such, the decisive elements of sentencing can be classified into two categories: the severity of the crime and the culpability of the offender. The severity of the crime can be reflected by the harm done by the offender, while the element of culpability includes cognitive ability and volitional controls. I would like to discuss whether good character can affect either of these elements.

[136] Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing* (Oxford: Oxford University Press, 2005) at 17.

1. Good character and the harm caused by the offence

"Harm refers to the injury done or risked by the act."[137] The harm done by the offence is an objective factor. According to the just deserts theory, the severity of the harm is determined by the interests violated by the offence. To gauge the level of harm, one relies on the concept of a living standard. The living standard is graded on four levels: subsistence, minimal well-being, "adequate" well-being and standard well-being. Using this scale, it is possible to "gauge the degree to which a given intrusion affects the person's living standard."[138]

No personal factors are considered when looking specifically at the harm caused by the offence. The harm originates from the criminal behaviour, and the assessment of the harm is based on the intrusion it causes in another person's life. It makes no difference whether the harm is caused by a good or a bad person. Therefore, there is no room left for the offender's character to affect the harm.

2. Good character and the culpability of the offender

Culpability is a concept that determines the extent to which the offender should be responsible for the consequences of his or her act, and it usually refers to the factors of intent, motive and circumstance.[139] People of good character have the same, if not higher, level of culpability as those without good character. I would like to analyze the culpability of people with good character by looking at cognitive and volitional factors.

First, people of good character can appreciate consequences. From the empirical study in Chapter 2, we know that people of good character are usually well-educated with a supportive

[137] *Ibid.* at 186.

[138] *Ibid.* at 202.

[139] *Ibid*. at 186.

family and have a tight connection with their community. During socialization, they learn the knowledge of the law. A competent adult is normally expected to have at least a minimal understanding of other people's basic interests, and of how various kinds of criminal conduct can infringe upon such interests.[140] What about those who cannot be considered competent adults? It is clearly reasonable to mitigate a sentence based on a person's lack of understanding. For example, young offenders or people with mental disabilities are entitled to receive mitigated sentences on this ground. When it comes to people of good character, considering their higher education, family support and community ties, we should have higher normative expectations of them. Since these higher expectations are moral expectations, rather than legal requirements, we cannot aggravate the sentence based on their good character. Correspondingly, it is irrational to mitigate the sentence of people of good character based on cognitive factors.

Second, people of good character have at least the basic volitional controls required by law. There is no evidence that people of good character have less self-control than those with bad character. On the contrary, people of good character are usually well-educated, and most of them are employed and have strong community ties. As such, a certain level of self-control has been ingrained in them through school, community or society. Additionally, they are generally highly regarded by their families and friends, and have good reputations in the community. This further suggests that they have a high level of self-control, which results in them having good relationships with people around them. They can control their conduct as well as or better than most people. Consequently, there is no ground to mitigate their sentence based on volitional factors.

A discussion on the culpability of the offender usually focuses on the culpability of those who are socially deprived. People will consider whether those who are socially deprived should be less responsible for what they have done because of their limited choices, but no one would think it is just to give people of good character mitigation for their culpability. Usually, people of good

[140] Douglas Husak & Andrew von Hirsch, "Culpability and Mistake of Law" in S. Shute, J. Gardner & J. Horder eds., *Action and Value in Criminal law* (Oxford: Clarendon Press, 1993) 157.

character have more choices, compared to those who are socially deprived, so good character cannot affect the culpability of the offender.

5.3.2 Good character and equity factors

From the discussion above, we know that good character will not mitigate a sentence based on harm and culpability. If the just deserts theory strictly insists that a sentence can only be determined based on harm and culpability, good character as a mitigating factor will not be compatible with it. However, the just deserts theory has been revised since its birth, and it incorporates some other elements which are used in practice in most countries, such as old age or serious illness, to affect final punishment.[141] Therefore, within the just deserts theory, it is possible for other elements besides harm and culpability to affect sentencing. In the following part, I will explore whether good character can become a mitigating factor based on consideration of equity.

It seems intuitively right that other factors, unrelated to the seriousness of the crime or the penalty's degree of onerousness, should affect the final sentence in special cases. For example, what if the offender became seriously injured as a consequence of the crime? The most challenging problem facing the just deserts theory is why and to what extent equity factors can affect the sentence and still be compatible with the principle of proportionality. This topic has not been dealt with by academics who advocate the just deserts theory, and they admit that they still have not come up with a systematic analysis.[142] Nevertheless, the development of this new area makes the just deserts theory more compatible with current sentencing practice. I will examine good character under the reasons provided by the just deserts theory in the newly published *Proportionate Sentencing* by von Hirsch and Ashworth, which represents the current level of study on this topic. If good character can be justified as being one of the equity factors, we can

[141] Hirsch & Ashworth, *supra* note 136 at 165.

[142] *Ibid.*

conclude that it is a possible mitigating factor under the just deserts theory. If not, it would be injudicious to exclude good character from mitigating factors in the just deserts theory owing to the imperfection and immaturity of the systematic analysis on equity factors. However, we can say at least under the current level of study, that good character does not fit within this theory. According to the just deserts theory, there are three possible reasons why judges should consider equity factors when sentencing: the "equal impact" principle, compassion and quasi-retributive conceptions.[143]

1. Good character and the "equal impact" principle

Many arguments in support of good character mitigation are based on the notion that it is right to try to avoid clear inequalities of impact. Two claims – conviction counting as punishment, and shame and disgrace as a partial punishment – represent this argument. I will introduce the two claims and further question the justification of good character mitigation based on the "equal impact" principle.

A) Arguments in support of good character mitigation based on the "equal impact" principle

To justify good character mitigation on the "equal impact" principle, it must be shown that offenders who have good character suffer more than corresponding offenders without good character. Where does this extra suffering come from? Legal philosophers have suggested two possible origins.

The first is that for a person of good character "the mere fact of conviction is a punishment."[144] This justification is based on the assumption that people of good character will suffer more by being convicted for an offence. Why is this the case? One possible explanation is that the extra

[143] In my opinion, the idea reflected in *Proportionate Sentencing* represents the newest development on the just deserts theory, so I set the three reasons provided in this book as the standard to examine the compatibility of good character with equity factors.

[144] Clayton, *supra* note 84 at 240.

suffering lies in the loss of future interests. Such consequences may include loss of, or disqualification from, employment, loss of pension rights, cancellation or suspension of trading or other licenses, or the decrease in educational opportunities. The courts have been ambivalent on this issue. Sometimes a sentence is lessened to take into account any additional detriment, like in *R. v. Gray*[145] where the "impact or effects of his being in court"[146] were discussed, while sometimes it was insisted "that instinctive response to tragedy must not interfere with even-handed objectivity in dealing with these events."[147] Another explanation is that this extra suffering can only come from people's own subjective feelings. This relates to the second origin presented by some scholars.

The second origin of the extra suffering is that a person of good character would inevitably feel shame and disgrace, and therefore the suffering caused by these feelings should be treated as a partial punishment in itself.[148] From this point of view, either people of bad character do not suffer shame and disgrace, or the suffering of people of good character will be more intense. This justification is also based on an assumption about people's subjective feelings. In fact, it is closely related to the subjective aspect of "conviction being a punishment already." The suffering caused by conviction itself includes the shame and disgrace felt by people of good character; therefore, these two origins can be made into one. In general, the extra suffering can be classified into two categories: objective loss and subjective feelings for people of good character.

B) Objective loss for people of good character

People of good character normally have good reputations and promising futures, but a conviction could destroy everything they had or will ever have. On the contrary, people of bad character will not suffer this type of loss, since they have never had nor would they expect to have as much as those with good character. In this respect, the conviction itself is a special punishment only for

[145] (2000), 39 C.R. (5th)185 (Ont. Sup. Ct. J.).

[146] *Ibid*. at para.12.

[147] *R. v. Maguire*, 2005 CarswellOnt 1696 at para. 24 (Ont. Sup. Ct. J.) (WLeC).

[148] Clayton, *supra* note 84 at 240.

people of good character. I question the rationality of this argument. It is true that people of good character will lose something important if convicted, but that is because they have committed a crime. Offenders deserve the loss that comes with a conviction and sentence. When they committed the crime, they should have expected this outcome.

Furthermore, people of bad character suffer this type of loss as well. They also have their reputation and corresponding promising futures to think about. This assumption implies that family, community ties, promising futures, etc. mean less to people of bad character than to those of good character. In fact, when it comes to impacts on their futures, a conviction can only put people of bad character in an even worse position. If the conviction itself can serve as punishment for people of both good and bad character, why should people of good character have special mitigating treatments? This implies that the future of people of good character is more important than the future of people of bad character. It is not a strong or convincing argument.

C) Subjective feelings of people of good character

Subjective feelings relate more to personal psychological traits or life experience than to the moral evaluation of character. It is not necessarily the case that people of good character will feel more pain than people of bad character. Perhaps an optimist will feel less pain than a pessimist, whatever previous character the offender holds. The range of factors which could affect the feelings of different individuals faced with a given sentence is immense.[149] When Jeremy Bentham listed what he termed as "circumstances influencing sensibility," he came up with thirty-two such circumstances.[150] However, good character is not on the list. It is assumed that people of good character feel more pain than others, but this assumption lacks support from either empirical or theoretical aspect. It implies that people are more sympathetic to the subjective

[149] Andrew Ashworth & Elaine Player, "Sentencing, Equal Treatment and the Impact of Sanctions" in Ashworth & Wasik, *supra* note 109, 251 at 255.

[150] *Ibid*. See also Mary Peter Mack, ed. *A Bentham Reader* (New York: Pegasus, 1969) at 102.

feelings of those of good character. But what makes their feelings deserve special consideration? I cannot find any justification for this argument.

In addition, even if the assumption is correct that people of good character do feel more pain than people of bad character, does it matter what the offenders feel? Should criminal law care about the subjective feelings of offenders? The suffering felt by different offenders does not increase the severity of punishment. The "equal impact" principle requires that "sentences ought to have a roughly equal impact on offenders."[151] This suggests that "where an offender is likely to suffer from the sentence to a significantly different degree than most other people, there is a case for reducing its length."[152] However, understanding the "impact" is crucial. According to Andrew Ashworth and Elaine Player, "[t]he type of sensitivity that could be legitimately considered should . . . include physical and psychological illness and significant physical and mental abuse from which the prison authorities fail to provide adequate protection."[153] Usually this kind of consideration only refers to the offender's objective situation, such as disability, age, illness, bodily injury, etc. It is rare to consider the offender's subjective feelings regarding the conviction. As Ashworth and Player have commented, "[e]xtending the range of individual sensibilities beyond these factors seems to us to represent a dangerous path that leads to invidious value judgements and discrimination."[154]

Finally, applying subjective feelings in practice is difficult, because information about an offender's sentiments towards punishment is typically "far less precise and certain, particularly at the time of sentencing."[155] If a court wants to consider the subjective feelings of the offender, the central question is "what counts as sufficiently objective and certain evidence."[156] In practice, the

[151] Ashworth, *supra* note 116 at 176.

[152] *Ibid.*

[153] Ashworth & Player, *supra* note 149 at 260.

[154] *Ibid*.

[155] *Ibid.* at 258.

[156] *Ibid*. at 259.

only objective standard found and used is the finding of good character. That is the origin of this justification of good character, but I question the credibility of this standard. Are people of good character necessarily more hurt by a conviction than those of bad character? Furthermore, how can we know how painful the conviction is to different people of good character? Another problem is how we might go about measuring the amount of suffering among people of good character in order to give correspondingly reasonable mitigation. To expect the courts to do this work is asking for complex judgements beyond the capabilities of judges. Thus, the difficulty in applying this in practice can only generate inequity and judicial arbitrariness in the end.

I would like to cite Justice Corbett's comments in *R. v. Prokofiew*[157] to conclude on the irrationality of this justification:

> I do not accept any of these submissions. The loss of reputation, income and income potential are a result of their own misconduct. They have brought this upon themselves. This sort of submission seems to come to the fore when the criminal before the Court was formally a pillar of the community, living a life of affluence and privilege. Look at what they have lost. Look at this argument though the other way around. The Court sometimes has before it criminals of a very different socioeconomic past, persons living in poverty, often facing very great challenges, often living lives of quiet desperation. When they resort to crime to alleviate their hardship, they are told it is no excuse, and it is no excuse. The laws against fraud are minimum standards, and they apply to all, the rich and the poor alike. But, just as the Court will not relieve the poor from the burden of punishment for breaching society's codes of minimum standards, neither will the Court go lightly on an affluent criminal because of the loss of wealth and position that follows exposure of criminal behaviour.[158]

2. Good character and a general account of equity mitigation

Among the three possible reasons for justification of equity mitigation,[159] the "equal impact" principle "does not actually function as true equity mitigation, because it actually does not call for the qualifying defendant to suffer less punishment: it is merely a way of preventing such

[157] *Supra* note 95.

[158] *Ibid.* at para.16.

[159] More information can be found at 55, above.

defendants suffering more."[160] Therefore, it cannot work well where "it would seem desirable actually to reduce the degree of onerousness of the penal imposition he must suffer."[161] For example, it would be just to give a scaled-down prison sentence to the very old or ill defendant on the reasoning of the "equal impact" principle. What if the very old or ill defendant should not go to prison at all? In this type of situation, the equal-impact principle demonstrates how it is inaccessible. Furthermore, it is also too narrow in its potential application, because it cannot apply to cases where severity of the sanction does not seem to be altered, such as the passage of time since the offence, etc. Owing to the narrow scope that "equal impact" principle can cover, it is inappropriate to consider it as a general account for all equity mitigation.[162]

Arguments based on compassion play an important role in judgments about equity factors, but they raise a further issue: compassion for what?[163] In addition, quasi-retributive grounds which link the offender's misfortune and his punishment for penalty reduction [164] do not offer a general reason to explain all of the equity factors independently.

Academics responded to this by putting forward another reason for mitigation based on equity factors: compassion for the defendant's suffering, arising from quasi-retributive grounds.[165] Quasi-retributive grounds relate to "the wider underlying conceptions of penal censure as a response to criminal offending."[166]

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[160] Hirsch & Ashworth, *supra* note 136 at 173.

[161] *Ibid.*

[162] *Ibid*.

[163] *Ibid.* at 174.

[164] *Ibid*.

[165] *Ibid.* at 175.

[166] *Ibid.* at 174.

The link between suffering and quasi-retributive grounds could be either some "independent source of misery, or the suffering inflicted by the punishment itself for equity mitigation."[167] Good character is not an "independent source of misery," and the suffering is caused by the punishment. To qualify as an equity factor that can be used to mitigate a sentence, good character must elicit compassion for the offender's suffering, arising from quasi-retributive grounds.

A) Good character and compassion

The first reason why equity factors could mitigate a sentence is to evoke sympathy for the offender's suffering. Notions of compassion seem to play an especially important role in the case of the very old or seriously ill defendant, "where there seem to be obvious reasons for sympathy – for their having to both endure the discomforts of their disability and the deprivations of punishment."[168] It is an emotive intuition in nature that people should, and ought to, show sympathy for people in these types of situations. The reasons why we think people should have compassion can be based on deep philosophical and ethical arguments, but no one would deny that human beings are, and should be, creatures with feelings of mercy. Compassion is the foundation that allows equity factors to affect sentencing, which implies that these equity factors must point to something that deserves sympathy.

Should we have compassion for people of good character? People of good character usually have good living conditions and are accepted and respected by people around them. They generally do not suffer many hardships or experience the physical limitations experienced by people who are old or ill. As indicated in the discussion of the "equal impact" principle above, people of good character do not suffer more than those of bad character.[169] Thus, the reasons and bases for sympathy are questionable.

[167] *Ibid.* at 175.

[168] *Ibid*. at 174.

[169] More information on this topic can be found at 55--59, above.

B) Good character and quasi-retributive grounds

It is important to clearly define the scope of quasi-retributive grounds, which will be crucial in determining the qualification of something being able to function as an equity factor. According to von Hirsch and Ashworth, quasi-retributive grounds may relate to the reflective process, which should be provided by penal censure for offenders to reflect on their wrongdoings. For example, "voluntary reparation" and "time delay since the offence" are mitigating factors based on this ground.[170] Another ground is related to "the morally demanding character of the penal censure in punishment."[171] The morally demanding character of penal censure invites the offender to accept criticism, show regret for his or her past conduct and stop committing crimes in the future. As such, a certain resiliency is needed to help respond to such invitations. Consequently, the offender must be able to respond constructively. If the offender is unable to do so due to serious illness or old age, we show compassion for this reduced ability and respond with a mitigated sentence.[172] In sum, the authors provide two types of quasi-retributive grounds: one is related to the offender's reflective process; the other to the morally demanding character of penal censure. However, neither one is related to good character.

First, good character has no relation to the offender's reflective process. There are two ways for an equity factor to relate to the offender's reflective process: first, the factor can be considered evidence of the offender's careful reflective process, like in cases of "voluntary surrender"; second, the equity factor can demonstrate that the reflective process has been inappropriately disrupted, like in cases where there is a "time delay since the offence," so the criminal act cannot exactly reflect how bad the offender is.[173] People of good character have no less opportunity to reflect on their conduct than other offenders, and their reflective process is not disrupted. In addition, the concept of good character does not mean that the offender has a better appreciation of (or regret) for his or her wrongdoings. Rather, it is just a conclusion drawn from the offender's

[170] Hirsch & Ashworth, *supra* note 136 at 174.

[171] *Ibid.* at 176.

[172] *Ibid.*

[173] *Ibid.* at 178.

past behaviour and other people's opinions. Thus, the concept of good character is unrelated to the offender's reflective process.

Second, good character has no relation to the morally demanding character of penal censure. The morally demanding character of penal censure requires that the defendant be able to accept criticism and respond to it constructively. Owing to the general finding that people of good character are often well educated, their ability to respond to the moral demands and accept criticism is arguably quite high.

In sum, good character does not accord with the just deserts theory. According to the just deserts theory, two things could be done to mitigate sentencing: one is to recognize that the crime is less serious than it appears to be; the other is to appeal to equity factors. Good character cannot affect the seriousness of offences, and it cannot be considered an equity factor. Therefore, the justification of good character as a mitigating factor under the just deserts theory is problematic.

5.4 Good character within the limiting retributivism theory

Limiting retributivism is another important theory in Western countries. In Canada, it is the leading theory of punishment. This can be inferred from sections 718 and 718.1 of the *Criminal Code*.[174] It is necessary to examine good character under this theory in the Canadian legal context.

5.4.1 Introduction to the theory of limiting retributivism

The theory of limiting retributivism was established by Norval Morris and has since been further developed by a number of other scholars, including Michael Tonry and Richard Frase. The limiting retributivism theory argues that the sentence should be proportionate to the crime. However, this theory acknowledges that it is impossible to establish a strict schedule for crime

[174] *Supra* note 13.

and punishment, so this principle of proportionality can only function as a general boundary. As such, the actual sentence should be based on other objectives and principles. These objectives and principles "include not only traditional crime-control purposes such as deterrence, incapacitation, and rehabilitation but also considerations of equality (uniformity) and a concept Morris calls parsimony."[175] The judge has the discretion to determine which objectives and principles should be adopted as long as the sentence remains within this general boundary. The just deserts theory can be understood as "positive retributivism" since it provides a positive justification of punishment: we ought to punish criminals because they deserve to be punished.[176] On the contrary, limiting retributivism can be seen as "negative retributivism," which "tells us it is not unjust to punish the guilty, but it does not tell us why we should punish them."[177] It seems that limiting retributivism provides a better way to reconcile the conflicting purposes of punishment.

The concept of desert can also be found in the limiting retributivism theory, but it only "set(s) upper and occasionally lower limits on sentencing severity."[178] The different conflicting purposes function as "the necessary fine-tuning of the sentence imposed in a particular case."[179] There is room for varying a sentence for instrumental reasons, which are not based on what the offender deserves. Therefore, the final sentence relates to elements on two levels: the general limitation and the specific principles. I would like to discuss the compatibility of good character with these two sorts of elements.

[175] Richard S. Frase, "Limiting Retributivism" in Michael Tonry ed., *The Future of Imprisonment* (Oxford: Oxford University Press, 2004) 83 at 83.

[176] Duff, *Punishment*, *supra* note 128 at 12.

[177] *Ibid.*

[178] Frase, *supra* note 175.

[179] *Ibid.*

5.4.2 Good character and the general limitation

According to the limiting retributivism theory, the general limitation is set by the seriousness of the crime; that is, the severity of crime and the culpability of the offender. As indicated in the discussion under the just deserts theory,[180] good character cannot affect either of these two factors. Thus, good character is unrelated to the general limitation that is set for individual crimes.

5.4.3 Good character and specific objectives and principles

The limiting retributivism theory holds that the seriousness of the crime can only set general limits on a specific sentence. Within these limits, a judge can decide on the objectives or principles of punishment. The objectives include deterrence, incapacitation, and rehabilitation. Both uniformity and parsimony are principles considered within limiting retributivism. I would like to examine the relationship between good character and each of these objectives and principles to test the relevance of good character as a mitigating factor within the limiting retributivism theory.

1. Good character and the objective of crime prevention

In general, the main objective of crime prevention is achieved through incapacitation and deterrence. "Incapacitation is one of the mechanisms through which prisons contribute to crime prevention. While incarcerated an offender is restrained from committing crimes, at least outside the prison walls."[181] Since taking good character into account usually means reducing the severity of punishment, good character as a mitigating factor would not be justified under this objective.

[180] More information can be found at 51--54, above.

[181] *The Encyclopaedia of Crime and Justice,* 2nd ed., Vol. 2 (New York: Macmillan Reference USA, 2002) "Incapacitation", at 809 [*Encyclopaedia*].

Deterrence is "the prevention of socially undesirable behaviour by fear of punishment,"[182] which can be classified into two categories: general deterrence and individual deterrence. General deterrence is not concerned with the future behaviours of the offenders themselves, but the effect those punishments will have on other potential offenders. It "signifies the deterrent effect of the threat of punishment."[183] Again, looking to good character evidence will result in a less severe punishment for most offenders; correspondingly, potential offenders will not be deterred. Therefore, good character as a mitigating factor does not help the objective of general deterrence.

Individual deterrence focuses on the particular offender on whom the particular punishment is imposed.[184] The objective of individual deterrence is usually realized through the hardship and disadvantages the offender will experience through sentencing. Since good character is not synonymous with increased hardship,[185] it is difficult to justify its use under this objective.

2. Good character and rehabilitation

Some legal academics suggest another justification, as expressed by Justice Twaddle in *R. v. Hogg*[186] that good character mitigation is based on the rehabilitative objective. According to this point of view, the offender's previous good character suggests a kind of re-integrative potential;[187] therefore, "the offender needs less punishment in order to reintegrate him or her into society."[188]

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[182] *Ibid.* "Deterrence", at 507.

[183] *Ibid*.

[184] *Ibid*.

[185] It may be argued that people of good character will respond more to deterrence than people of bad character, so good character as a mitigating factor may help achieve the objective of deterrence. I argue that this justification of good character as a mitigating factor is more appropriately explained under the principle of parsimony, because it includes the idea of giving a less severe punishment in order to achieve the required effects.

[186] 2004 MBCA 114, 184 Man. R. (2d) 317, 318 W.A.C. 317.

[187] Manson, *supra* note 12 at 132.

[188] Ashworth, *supra* note 116 at 174. In this book, Ashworth named this factor "worthy social contributions." The name is different, and the content is also a little different. The extension of "worthy social contributions" is broader and clearer than good character. In fact, the phrase "good character" is not used in other countries. It is also not a common and generally

Since the offender does not need that much punishment, the sentence can be mitigated based on utilitarian considerations such as saving judicial resources. This implies that the level of punishment should match the needs of re-integration.

This idea has been widely accepted since it fits well with people's intuitions, but I would like to give it further consideration. Good character does not necessarily mean there is a high level of rehabilitative potential, and we tend to make "unreliable prediction[s] of people's action[s] on the strength of their presumed traits."[189] In fact, we usually overestimate the role of good character in predicting people's future behaviour.[190] The offender's relationships, employment and social network are most likely to affect his or her rehabilitation potential more than anything else.

A) The meaning of rehabilitation

Rehabilitation has long been accepted as a correctional goal.[191] The concept of rehabilitation rests on the assumption that criminal behaviour is caused by factors such as a person's social surroundings, psychological development, or biological makeup, and not simply their "free will."[192] Rehabilitation is not the same thing as retribution, which focuses on correcting the harm caused by the offender and balancing the scales of justice, but it is similar to deterrence and incapacitation owing to their utilitarian goals of crime reduction.[193] The fundamental characteristic of rehabilitation is that it seeks to reform offenders into law-abiding people. In doing so, it seeks a more individualized punishment to help both the offender and the larger society to which they will eventually return.[194]

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accepted mitigating factor in most countries. Thus, if you want to find out other scholars' opinions, you can only find opinions that are similar. Of course, if you consult only Canadian scholars' works, the title is the same.

[189] Goldie, *Emotions*, *supra* note 55 at 152.

[190] *Ibid.*

[191] *Encyclopaedia*, *supra* note 181, Vol. 3, "Rehabilitation" at 1315.

[192] *Ibid.*

[193] *Ibid.* at 1316.

[194] *Ibid.*

To justify good character as a mitigating factor under the objective of rehabilitation, good character must provide some evidence that it will affect the offender's future behaviours. If there is any connection between the offender's previous good character and his or her future law-abiding behaviour, good character can play a role in rehabilitation. However, I argue that the existence of such a connection is doubtful.

B) The debate between character traits and situationism in social science

Besides providing explanations for people's behaviour, character is also used to predict what people will do in the future. There has been a lengthy debate about the influence of character and situational traits on future behaviour. One school of thought argues that an individual's behaviour will be consistent in any situation and across time based on certain character traits. Social psychologists, on the other hand, focus on the influence of situational factors on future behaviours.[195] At present, both of these claims are supported by empirical studies.[196]

Nevertheless, predicting future behaviour based on character traits is "very often empirically inadequate: [t]hey are confounded by the extraordinary situational sensitivity observed in human behaviour."[197] One psychology study shows that "as the early behaviour of an individual directed toward a primary, instinctive goal is modified by environmental circumstances, the motivational system of the individual is also modified, and the character of the individual is affected."[198] Moreover, environmental elements also play an important role in character formation, even though "there is some dispute among psychologists about whether, or to what extent, character may be controlled by conscious or rational decisions, and about whether, or to what extent, character may be dominated by unconscious or irrational forces."[199]

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[195] William Fleeson, "Moving Personality beyond the Person-situation Debate: the Challenge and the Opportunity of within-person Variability" (2004) 13 Current Directions in Psychological Science 83.

[196] Michelle Inness, *The Person and the Situation: Predicting Well-being Outcomes at Work* (Ph. D Thesis, Department of Management, Queen's University, 2006) [unpublished] at 15.

[197] Doris, *supra* note 64 at 15.

[198] Bonnie Strickland, ed., *Gale Encyclopedia of Psychology* 2d ed. (Detroit: Gale, 2001) s.v. "character" (Gale).

[199] *Ibid.*

There are many experiments carried out to study the connection between character and the prediction of behaviour. For example, in one experiment, dimes were left in public telephones in a mall. When individuals left the telephone booths, a member of the experiment team would drop his papers in front of them. The study was designed to determine whether any correlation could be found between those who had found the dime in the telephone and those who stopped to help the person who had dropped his papers. The results showed that of those who found the dime, 14 out of 16 helped; of those who did not find the dime, only 1 out of 25 helped.[200] It seems that situational factors were more relevant when predicting kind behaviour, since there were no major differences in character between those who found the dime and those who did not.[201]

The very nature of predicting future behaviour is examining a particular individual's behavioural consistency. Focusing exclusively on the influence of character traits on future behaviour is no longer widely accepted. Kurt Lewin proposed that human behaviour is a function of both personal and situational factors. [202] Today, academics have started to consider both factors simultaneously. The compromise is that human behaviour can still be analyzed in terms of character, but such evidence is recognized to be highly variable and dependent on the situation.[203] This claim has two parts: a) character traits are situation-selecting; and b) character traits are situationally sustained.[204] The character traits individuals possess are connected to the special situations individuals are part of. Future behaviour will be consistent if situational factors remain stable. People will act as they usually do when faced with similar situations. In other words, one can only expect the *usual* behaviour in the *usual* circumstances.[205]

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[200] A. M. Isen & P. F. Levin, "Effect of Feeling Good on Helping: Cookies and Kindness" (1972) 21 Journal of Personality and Social Psychology 384.

[201] Goldie, *Personality*, *supra* note 30 at 62.

[202] Inness, *supra* note 196 at 1.

[203] Walton, *supra* note 34 at 14.

[204] Doris, *supra* note 64 at 89.

[205] *Ibid.* at 65.

C) The relationship between good character and the rehabilitative potential in sentencing

Some argue that people of good character have a higher rehabilitative potential, and therefore, they do not need the same level of punishment as those with bad character. However, the relationship between good character and rehabilitation is far more complex than it appears. I will now provide four problems with the relationship between good character and rehabilitation in sentencing.

First, the function of situational factors has long been ignored when predicting an offender's rehabilitative potential. Behavioural consistency is based on situational consistency. An offender may have a "criminal" character trait, which is manifested in the appropriate situation, but he or she will exhibit this particular character trait only in certain situations.[206] Similarly, if the offender's good character is bolstered by his or her family support, and the judge may be convinced that the offender will continue to show his or her good character as long as his or her family continues to support him or her. However, in this type of situation, are we mitigating the offender's sentence based on his or her good character or his or her family support? The situational factors are hidden behind the offender's good character. In practice, "we seem to overemphasise the importance of difference in (character) traits in determining action, and underemphasise the importance of the details of the situation."[207] It is doubtful how much influence good character alone can have. As noted above, character is "fragile."[208]

Second, an offender may have some good character traits, but may also have certain negative character traits which led him to commit the offence. Take a sexual offence, for instance. It is "usually perpetrated in private . . . Accordingly, evidence of good community reputation has little probative value."[209] Moreover, what is generally called good character could refer to different

[206] R. A. Duff, "Dangerousness and Citizenship" in Ashworth & Wasik, *supra* note 109, 141 at 155 [Duff, "Dangerousness"].

[207] Goldie, *Personality*, *supra* note 30 at 63.

[208] For more information on this topic, see 22–28, above.

[209] Manson, *supra* note 12 at 132, see also *R. v. Profit*, [1993] 3 S.C.R. 637, aff'g (1992), 11 O.R. (3d) 98 (C.A.).

aspects of individuals. A compassionate person who often helps others may be charged with fraud, a crime that relates to a person's trait of honesty, regardless of his or her compassion. The offender may be compassionate and kind, even though he or she committed fraud. In the future, the offender will usually act compassionately, but this does not help to predict whether he or she will be honest in the future. To overcome this dishonesty, the offender needs punishment in the same way that indifferent offenders need it in order to be rehabilitated.

Unless the good character traits are matched with the traits that require rehabilitation, good character as a mitigating factor is meaningless. For example, assume that a normally calm person violently assaults someone one day. Since calmness is in many ways the opposite of violence, and violence is the very nature of the crime of assault, this character trait could show that the offender may need less punishment to be rehabilitated. Nevertheless, even if the nature of the current offence is one of violence, this does not suggest that any subsequent offence committed will be of the same kind. It is useless to use present good character traits to predict future behaviour that is different in nature from current good character traits. Therefore, it would be wrong to draw a general conclusion that good character means that less punishment will be needed to rehabilitate offenders.

Third, some features of good character do not lead to the assumption that less punishment is needed. Good character is based on three things: moral values, will power, and intelligence.[210] Among them, only moral values may help to predict future behaviour. For example, assume that A is known for his strong will power and perseverance. Owing to these good character traits, he is respected and has a good reputation in the community. Can we say that he could be easily reformed based simply on the fact that perseverance is one of his character traits? Probably not, especially if his goal in life is to become a great criminal, rather than a law-abiding citizen. Intelligence also has no direct relationship with rehabilitation. For example, assume B is very

[210] Goldie, *Personality*, *supra* note 30.

talented. If B uses her talent to commit crimes, she may need more punishment in order to protect the public.

Of course, if people were able to differentiate these features when judging a person's character, there would be no problem. However, in practice, people confuse all three features. Moreover, the difference between character traits and personality traits is not clear in sentencing practice,[211] and personality traits do not have much influence when predicting people's future behaviour. Therefore, a finding of good character does not necessarily equal strong rehabilitative potential.

Finally, there is insufficient empirical evidence related to the ability to predict future behaviour. The difficulties of predicting whether a person will behave well towards others have been widely examined in the criminal literature. According to the Floud Committee's survey of the available studies two decades ago, the best method of predicting "dangerousness" has only a fifty percent success rate, and many of the prediction methods had only a thirty-three percent success rate.[212] Even though studies on the ability to predict people's law-abiding behaviour are not as well developed as studies on predicting people's dangerous behaviour, we can still infer that there does not exist an extremely credible way of predicting good behaviour.

Another Home Office study by Stephen Brody and Roger Tarling in England[213] shows that "the risk of being a victim of one of these serious offences was as great from the large number of 'non-dangerous' as from the small number of 'dangerous' offenders."[214] This explains the difficulty in predicting people's rehabilitative potential. It raises issues regarding the problems of the "false positive": failing to identify people of good character who subsequently commit the crimes and are not easily rehabilitated. When such people are released early or put back into the

[211] See table 5 at 15, above.

[212] Jean Floud & Warren Young, *Dangerousness and Criminal Justice* (London: Heinemann, 1981).

[213] U. K., Home Office, *Taking Offenders out of Circulation* (Home Office Research Study 64) by Stephen Brody & Roger Tarling (London: HMSO, 1981) at 29--30.

[214] Ashworth, *supra* note 116 at 216.

community, the interests of the victims are threatened, and there is generally a lot of public outcry if they do not behave as the judge predicted. This may put pressure on judges to mitigate sentencing based on good character, and the legislatures may feel the pressure to narrow the scope or application of mitigation based on good character. In fact, the problem of the "false positive" represents the difficulty in predicting the rehabilitative potential of people of good character. The fact that these types of predictions are so unreliable, combined with the reality of political pressure, makes mitigation based on good character especially vulnerable.

In general, the relationship between good character and rehabilitation leads to many uncertainties, both theoretically and practically. Good character does not determine rehabilitative potential as well as people would like to believe.

3. Good character and the principles of uniformity and parsimony

Limiting retributivism does not have strict requirements on uniformity, since the principle of proportionality only creates a general limitation. Good character does not have much of a connection with the offence, so its mitigation will lead to inequality. Consequently, it does not fit with the principle of uniformity.

It is right to abandon the excessive punishment imposed on offenders according to the principle of parsimony. If good character mitigation can be justified under this principle, there must be some excessive punishment imposed on people of good character. However, as shown in the discussion of the "equal impact" principle above, [215] people of good character do not suffer more because of their good character. Therefore, people of good character are not burdened with unnecessary punishment. Good character mitigation cannot be justified under the principle of parsimony.

[215] See discussion on the "equal impact" principle at 55–59, above.

Generally speaking, good character is not compatible with the two main theories of punishment. The theoretical basis of good character is not consistent with theories of punishment.

5.5 Ashworth's justification of "worthy social contribution"

Good character is not a widely accepted mitigating factor in Western countries, but different states do have some similar concepts. Some academics have provided justification for similar concepts. In England, for example, judges look at "worthy social contribution" instead of "good character." Of course, "worthy social contribution" is not the same thing as "good character," but it can be seen as a kind of "British" good character. Therefore, the justification for this to be considered a mitigating factor has some features in common with good character mitigation. In order to find more possible justifications for applying good character, I have included the justification of worthy social contribution provided by Andrew Ashworth, a leading English scholar on this question.

Professor Ashworth questions the rationality of worthy social contribution as a mitigating factor, but he offers another possible justification: a form of moral or social reinforcement. He thinks that the only explanation for mitigating a sentence based on worthy social contribution is a kind of "modified Durkheimian concept of sentencing as a form of moral / social reinforcement."[216] From this point of view, if a court does not consider good character when sentencing, it might reduce the value of good character in people's minds, and thus may weaken "the collective conscience of society."[217] Therefore, this idea implies strong retributive considerations.

This justification offers a different view on using good character as a mitigating factor in sentencing. Durkheim's punishment theory considers "punishment as a social institution which is first and last a matter of morality and social solidarity. The existence of strong bonds of moral

[216] Ashworth, *supra* note 116 at 174.

[217] *Ibid.*

solidarity [are] the conditions which cause punishments to come about, and, in their turn, punishments result in the reaffirmation and strengthening of these same social bonds."[218] Crimes are acts that seriously violate a society's collective conscience. Since crime violates society's most fundamental moral code, the society uses punishment (the most severe form of social reaction) as a response.[219] As a result, punishments fix and reaffirm the damage caused to the collective conscience.

Professor Ashworth does not provide detailed explanations on why he believes worthy social contribution is a *modified* Durkheimian concept, so I can only infer what he means by "modified." Crimes violate the society's collective conscience, and punishment is the result of this violation, so the severity of the punishment should be determined by the severity of the violation. Ashworth maintains that since worthy social contribution has a positive effect on the collective conscience, the collective conscience that is violated by the crime is partly reformed. Therefore, the final amount of punishment should subtract an amount equal to the positive effect generated by the offender's worthy social contribution.

It seems reasonable and fair to engage in this balancing and accounting, but most theorists think it wrong to punish someone simply to reinforce social messages to others, just like people's long existing doubt on the justification of general deterrence: "treating the criminal as a means to satisfy social purposes rather than as an end in himself."[220] There generally needs to be some connection between the offender's blameworthiness and the punishment. Consequently, this justification is in need of further support.

[218] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Oxford: Clarendon Press, 1990) at 28.

[219] *Ibid.* at 29.

[220] Kent Greenawalt, "Punishment" (1983) 74 J. Crim. L. & Criminology 343 at 353.

Chapter 6

Present practice amounts to status-based discrimination

Not only is the justification for good character as a mitigating factor weak, the present practice of good character mitigation amounts to status-based discrimination. I will examine the possible discrimination-based dangers of establishing good character as a mitigating factor.

6.1 The possibility that good character may become a new "status"

If good character is used as a mitigating factor, some people will hold special rights under the law. In addition, relying solely on judges cannot resolve this problem. Therefore, the practice of good character mitigation can only generate one result: those who already possess more social resources can get more mitigation.

6.1.1 The use of good character in practice has a close relationship with status

In sentencing practice, people who are found to have good character are usually well educated and have stable families and decent jobs. It is true that character has no direct relationship with class, but the upper and middle classes have more resources to create the factors that help establish their good characters. Thus, good character mitigation leads to discrimination against the socially deprived who lack these resources.

A) Good education

In general, only the middle or upper class can afford a good education. The advantages of being able to afford a good education are obvious. Higher education generally leads to a decent life in the future, which in turn helps to provide a good education for the next generation. Social deprivation, on the other hand, determines the fate of many of its victims from birth.

B) Employment

It is difficult for a person to find a decent job without a good education or a perfect background. One feature that defines the middle and upper class is their ability to find decent and stable jobs. Employment is not allowed to be a factor when mitigating sentences according to the principle of equality before the law, but it will continue to affect sentencing with the help of the concept of good character, because having a stable job means having a better chance of being considered a person of good character.

C) Volunteer work

Usually people with perfect backgrounds will have more opportunities for volunteer work, since nobody wants to work with a person of bad character. Volunteer work helps to build people's community ties and reputation. In addition, the fact that people in the upper or middle class have money makes it possible for them to have time to do volunteer work. The positive effect also extends to the amount of time given to the volunteer work and the number of organizational memberships.[221] Generally speaking, "there is relatively widespread participation, with higher participation levels among those with higher socioeconomic status."[222] More people with higher education, employment status and income are found in various kinds of voluntary organizations than other kinds of people.[223] For the socially deprived, everyday life is difficult enough. They will have less energy and time to spend on volunteer work, since they have to make a living through paid work. Therefore, it is no wonder that "disadvantaged racial and ethnic groups are less likely to be involved in voluntary associations than are groups higher in the ethnic or racial stratification system."[224]

[221] James Curtis, Edward Grabb & Thomas Perks, "Inequalities in Political and Community Participation" in David A. Green & Jonathan R. Kesselman eds., *Dimensions of Inequality in Canada* (Vancouver: UBC Press, 2006) 189 at 207.

[222] David A. Green & Jonathan R. Kesselman, "Dimensions of Inequality in a Just Society" in Green & Kesselman, *supra* note 221, 1 at 13.

[223] Curtis, Grabb & Perks, *supra* note 221, 189 at 191.

[224] *Ibid*.

In practice, it is common to base good character on people's family ties, education, employment and volunteer work. These factors, with the exception of family ties, are all closely related to people's status, which makes it easier for the upper or middle class to establish their good character than for those who are socially deprived. Other factors, like reputation, charitable donations, or promising futures, on which people from the upper or middle class have obvious advantages, also help to create positive images of character. In fact, these inferences are consistent with assumptions based on stereotypes of race, gender and class.

Another disadvantage related to status is the currently accepted indicia of good character evidence. According to the current indicia of good character adopted in sentencing practice, the reference letter plays a crucial role in establishing the offender's good character. The upper and middle class have more hidden advantages in the presentation of reference letters.

The character of the person who writes the reference letter will affect the credibility of the reference letter itself. Therefore, reference letters written by famous people will be more convincing than those written by ordinary people. Comparatively speaking, those who are poor or who belong to a minority class usually have fewer opportunities to acquire such reference letters. It is rare to have an opportunity to meet someone famous, let alone get a reference letter from that person. In addition, reference letters are usually written by friends and relatives. People usually befriend others with similar backgrounds or who live in close proximity. Reference letters for offenders from the upper or middle class are often written by people from the upper or middle class. These people are usually well-educated, and can write more moving reference letters than those who are not well-educated. Their flawless backgrounds will help give credibility to the reference letters as well. Furthermore, the number of reference letters people can usually acquire depends on the scope of their communications. It is helpful to know more people through employment or volunteer work. This is another advantage held by the upper or middle class.

In general, the recognition of a person's good character is connected with their upper or middle class status. The opportunity to be recognized as a person of good character is uneven for people in different classes. However, the question of what people have made of themselves should be answered by looking at what they have done, "not [at their] membership of an actuarially defined group."[225]

6.1.2 Judges are not perfect

Some argue that perfect judges who are smart enough will be able to identify people of good character no matter what class they belong to. This is possible, but the problem is that not all judges have this ability.

More importantly, judges' efforts at recognizing good character without looking to socio-economic status are not obvious in sentencing practice. A judge considers the person's criminal record, education, employment, volunteer work, reputation, etc., but he or she generally does not go a step further and think about the underlying reasons that offenders have these features. The judge does not dig deeper to uncover the reasons behind the situations of people who are not well-educated, do not have good employment and do not contribute to the community. Is that because they are bad people, regardless of the limitations imposed by their status? Judges' rare attempts to differentiate good character and status result in good character being an actual status hidden by the word "character."

Judges deserve our trust in general, but this does not mean that every judge in every single case makes a correct judgment. The hidden inequalities that surface when testifying about good character cannot simply be resolved by relying on perfect judges.

[225] Duff, "Dangerousness", *supra* note 206 at 156.

6.2 Good character mitigation in practice: Indirect, status-based discrimination

Discrimination can have two forms: direct and indirect. An example of a decision made using direct discrimination would include an inappropriate reference to race, skin colour, gender, age, employment status, or any other characteristic not relevant to the decision being made. In comparison, "[i]ndirect discrimination occurs when a rule or practice that is framed as general, in fact applies differentially to particular groups of persons."[226] Good character is a general rule to be considered as a mitigating factor in practice, but the good character rates are significantly and consistently higher for people from the upper or middle class than for people from the lower class. Any discussion of good character becomes a discussion of those status-based factors: family, education, employment, etc. Therefore, consideration of the offender's character is likely to lead to a special modified punishment for those who are socially deprived.

6.3 Harm caused by status-based discrimination

Discrimination itself conflicts with the principle of "equal concern and respect before the law." Therefore, once mitigating sentencing based on good character turns into status-based discrimination in sentencing, its justification may inevitably be questioned even though there was no other harm done to society. However, good character mitigation will have other disadvantages in sentencing. In particular, it will aggravate the existing problems of disproportionate representation in the correctional system and the possibility of building a criminal class.

6.3.1 Disproportionate representation in the correctional system

In practice, good character as a mitigating factor is likely to be closely connected with social status, such as family support, employment and education. It is understandable that courts would

[226] Barbara A. Hudson, "Doing Justice to Difference" in Ashworth & Wasik, *supra* note 109, 223 at 223.

"avoid passing a sentence which will result in an offender losing a job,''[227] missing out on a good education or ruining existing firm family ties. Judges tend to give people who have firm family support, good employment and higher education less punishment in order to isolate them from society as little as possible. One result of this approach may intensify the disproportionate representation in the correctional system, owing to the rare recognition of good character in those who are socially deprived. More importantly, a correctional population that is made up almost entirely of one small section of society might indicate some severe defects in that system.[228]

1. Over representation of the elements related to good character in the correctional system

A) <u>The representation of Aboriginal people</u>

The representation of Aboriginal people in the Canadian adult population is 3%, but their representation in custody is 22%, which has increased by two percentage points since 2000 – 2001. [229] In Saskatchewan,

> …5.2% of Aboriginal adults were involved in correctional services compared to 0.3% of non-Aboriginal adults.
>
> Aboriginal adults comprised 57% of those involved in a correctional service compared to 10% of the Saskatchewan adult population.[230]

The high percentage of Aboriginal people in the correctional system is a symptom of their disadvantageous position in mainstream society. Although there must be a number of explanations for this fact, we should pay careful attention to the fact that Aboriginal people are less likely than other Canadians to have the characteristics that the legal system takes as indicative of good character. The result – that Aboriginal accused are generally less able to

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[227] Ashworth, *supra* note 116 at 227.

[228] Nils Christie, *A Suitable Amount of Crime* (London: Routledge, 2004) at 102.

[229] Karen Beattie, "Adult Correctional Service in Canada, 2004/2005" (2006) 26:5 Juristat 1 at 16, online: Statistics Canada <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-002-XIE/85-002-XIE2006005.pdf>.

[230] Sara Johnson, "Returning to Correctional Services after release: A profile of Aboriginal and non-Aboriginal adults involved in Saskatchewan Corrections from 1999/00 to 2003/04" (2005) 25:2 Juristat 1 at 1, online: Statistics Canada < http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-002-XIE/0020585-002-XIE.pdf>.

establish grounds for mitigation than others – constitutes a form of disparate impact discrimination against them which aggravates their over-representation in the correctional system.

B) Marriage

Marital status is an important element used to demonstrate the offender's family ties. Married people have more advantages on obtaining positive judgment of their character based on family support and family dependence. Therefore, the representation of married people involved in correctional service is low. For example, according to a report in Nova Scotia, New Brunswick and Saskatchewan in 2004 – 2005, among the offenders involved in correctional service, 57% were single, 22% were in a common-law relationship and 10% were married. [231]

Statistics also shows that the Aboriginal people have a lower marriage rate than non-Aboriginal people. As reported,

> A smaller proportion of Aboriginal people were married (7%) compared to non-Aboriginal people (11%) while approximately 30% of Aboriginal people involved in correctional services were in a common-law relationship, nearly twice the proportion for non-Aboriginal people (17%).[232]

C) Education

Statistics related to education show that the correctional system holds more people with a low level of education. Additionally, when education is considered together with Aboriginal status, the statistics are even more astounding. As reported,

> Compared to the general Canadian adult population, the population in correctional services has a relatively low level of education. For example, roughly 35% of the general population in New Brunswick, Nova Scotia and Saskatchewan aged 25 years and older had less than a high school diploma. In the corrections population within these jurisdictions, nearly half of all adults aged 25 and older had not completed high school (46%). The highest level of education obtained by more than one in six adults over 25 years of age in correctional services was primary school (16%), 7% of which had not completed primary school. Low education attainment was more prevalent

[231] Beattie, *supra* note 229 at 17.

[232] *Ibid.*

> among Aboriginal adults compared to non-Aboriginal adults under correctional supervision. More than double the proportion of non-Aboriginal adults in corrections had completed high school or a higher level education compared to Aboriginal adults (68% versus 30%).[233]

D) Employment

The pattern of employment is similar to that of marriage and education. As reported, only 42% of adults involved in corrections were employed as of their most recent admission to correctional services. [234]

2. Good character and reasons for the over-representation in the correctional system

It is unfair to attribute these disproportionate findings only to good character mitigation. According to Nils Christie, only acts can be crimes; crimes are selected acts to be designated as crimes.[235] Therefore, "[a]cts with the potentiality of being seen as crimes are like an unlimited natural resource . . . Crime is thus a product of cultural, social and mental processes."[236] According to the crimes reflected in legislation, some classes may have a higher chance of being put into the correctional system. Thus, the over representation arises partly from a difference in the rate of offending.[237] Nevertheless, crimes are not created for a special class (status), but for special sorts of acts. What links people to crimes are their actions, no matter which status or class they belong to.

It is true that the structure of people found in the correctional system is determined by many factors. In *Sentencing and Criminal Justice*, Ashworth analyzed many reasons for the imbalance of race, gender, etc. in the sentencing and correctional system.[238] The crucial research question

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[233] *Ibid*.

[234] *Ibid*.

[235] Christie, s*upra* note 228 at 3.

[236] *Ibid*. at 10.

[237] Hudson, *supra* note 226 at 226.

[238] Ashworth, *supra* note 116 at 221.

is not quantitative; it is not about numbers relating to the different types of people imprisoned. Rather, it is a qualitative question of whether the explanation of this apparently anomalous sentencing can be found in other factors, besides the nature of the crime. Good character as a mitigating factor would become a new factor among those "other factors." We are aware of obvious discrimination based on social deprivation, but good character is intensifying the problem in a way that is hidden.

Since there is already an over-representation of certain classes in the correctional system for other reasons, it is especially crucial to limit unnecessary considerations which might intensify this tendency. Good character mitigation is one of these unnecessary considerations. Nowadays, the racial, class or status distinctions which were once used to create different treatment options for different people no longer exist, but "class and race distinctions continue to operate in more subtle and less visible ways."[239] Through the mitigation of good character, the upper and middle class are partly excluded from the correctional system. The relatively short detainment they have within the correctional system makes it easier for them to assimilate back into mainstream society, which further increases their representation in mainstream society. Correspondingly, the representation of the lower class is decreased. Therefore, it is natural that "individuals with higher socioeconomic status are more likely to take part in all forms of political expression."[240]

6.3.2 The possibility of producing a criminal class

There has been some talk of the state creating a criminal class instead of attempting to reform offenders, because it seems as though certain people tend to commit more offences, and once these people commit a crime, it is more likely that they will recommit over and over. Good character mitigation becomes one of the possible causes of a criminal class.

[239] Garland, *supra* note 218 at 203.

[240] Green & Kesselman, *supra* note 222, 1 at 13.

1. Building a lifetime caste for criminals through the use of good character

The high re-involvement rate among offenders, and among Aboriginal offenders in particular, is a clear sign that a criminal class is being formed. As reported, 31% of offenders returned to correctional services within two years of their release in 2002 – 2003.[241] The re-involvement rate among Aboriginal people is even higher at 45% compared to 29% of non-Aboriginal people.[242] According to another report in Saskatchewan,

> Aboriginal adults were also more likely to have a larger number of re-involvements in the Saskatchewan correctional system than non-Aboriginal persons: they were three times more likely to have three re-involvements (9% versus 3%) and five times more likely to be re-involved four or more times (11% versus 2%).[243]

In addition, rates of re-involvement in correctional service are not only higher but also increase more rapidly for Aboriginal people than for non-Aboriginal people, "with 29% of Aboriginal adults versus 13% of non-Aboriginal adults returning during the first twelve months following release."[244]

There are a variety of reasons for the high re-involvement rate among offenders. I argue here that good character mitigation will become one of them. Giving people of good character less punishment seems to be widely accepted by most people, which reflects the latent mistake that exists in human beings' subconscious minds: throwing extreme offenders into a new lifetime caste. Judges use the concept of character to emphasize how different the offender is from law-abiding people. So long as people who are thought to have good character are singled out, we are ready to build a lifetime caste for offenders. However, this lifetime caste is harmful to modern

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[241] Bettie, *supra* note 229 at 13.

[242] *Ibid*.

[243] Johnson, *supra* note 230 at 1.

[244] *Ibid.*

society: in an effort to isolate offenders, we are producing a criminal class that ends up being a threat to the rest of the community.

2. Harm caused by the existing criminal class

It is unwise for society to have extremely opposite classes co-existing, since this is dangerous for social security. When people build a caste for criminals, they build a "prison" for themselves at the same time. Locks or electric security systems are used for self-protection, and people do not dare to go out at night. As such, they are trapped in a different kind of prison, created out of their own fears. Further, the constraint on the offender's freedom has some time limit, whereas the limits ordinary citizens create for themselves have no clear boundaries.

According to David Garland, besides conveying a symbolism of censure, punishment can also broadcast to its social audience about other meanings: the depiction of social authority, individual subjects, social relations and other representations.[245] Not only does punishment exist within a specific penal culture that is supported by wider cultural forms,[246] but punishment and its declarations also play "an active part in the generative process through which…cultures are produced and reproduced in society."[247] Sentencing is not just about giving the offender the appropriate punishment; it is also about power, legitimacy, normality, morality, personhood, social relationship, and several other factors.[248] It conveys specific meanings in terms that are generally understood by the social audience,[249] including the offender, the victim, the judge and the public. To mitigate sentencing based on good character is to spread an idea of discrimination against social deprivation in society.

[245] Garland, *supra* note 218 at 266--73.

[246] *Ibid*. at 211.

[247] *Ibid*. at 251.

[248] *Ibid*. at 252.

[249] Paul Q. Hirst, *Law, Socialism and Democracy* (London: Allen and Unwin, 1986) at 142--58.

It is commonly held today that "[a] person might have committed some acts we deplore, but he also has other sides."[250] A democratic and ideal society should give its citizens equal respect and judge every person equally. In modern society, everyone should be respected and responsible for his or her own actions, and everyone should have the chance to change his or her behaviour. No one is a monster; people are complex and have many sides. People who have become part of a "criminal" caste should have the opportunity to come out of it. People who belong to the caste of good character can step into the caste of criminals. This way of thinking, which avoids strict character judgements, conveys a message of tolerance and equal concern for both individuals and society in general.

[250] Christie, *supra* note 228 at 49.

Chapter 7

Conclusion

By examining the justification of good character as a mitigating factor in sentencing, I argue that good character should be removed from the category of mitigating factors in Canadian sentencing. The adoption of the use of good character mitigation in sentencing in China may thus need further consideration.

7.1 Abandoning the general abstract concept of good character as a mitigating factor in Canadian practice

In the discussion above, I argue that the recognition of good character and its justification as a mitigating factor is problematic in practice. The problems caused by the use of good character as a mitigating factor outweigh the advantages; it is meaningless to keep using this concept in sentencing.

7.1.1 Reasons for abandoning the general abstract concept of good character

Generally speaking, there are three reasons why good character should not be used as a mitigating factor: first, the concept of good character is unworkable; second, there is no good reason to mitigate sentencing based on good character; and third, status-based discrimination results from mitigation based on good character in practice.

The first problem is that there are no general rules for using good character mitigation in sentencing. In sentencing practice, other personal factors are often thought of as indicators of a person's good character, such as age, volunteer work, employment, first time offender status, family support, etc. There are three main flaws in current practice when using the notion of good

character: first, judgments about who has good character and who does not are highly subjective; second, we tend to draw a conclusion of good character based almost always on insufficient evidence; third, there is an overlap between good character and a variety of other distinct mitigating factors. For all these reasons, the concept of good character is unworkable.

The second problem is that current arguments in favour of mitigation based on good character are weak. Mitigation based on good character cannot fit into the just deserts theory or the theory of limiting retributivism, two major theories of punishment.

The third problem is that current practice on good character mitigation amounts to status-based discrimination against those who are socially deprived. The recognition of good character has countless ties with social status, which is advantageous to the upper and middle class. This discrimination has contributed to the disproportionate representation in correctional service, and it will further create a criminal class in society.

After carefully examining the notion of good character, I argue that the category of good character should not be used to mitigate a sentence. The removal of good character as a mitigating factor will not affect the whole sentencing system much; it will only make the mitigation system more coherent and reasonable.

7.1.2 Problems to be resolved after abandoning the general concept of good character

When good character is considered as a mitigating factor, many problems are hidden behind the abstract concept of good character. Once we remove good character in sentencing, two problems are exposed. One is the role of personal factors which are often thought of as an indicator of a person's good character, such as age, volunteer work, employment, family support, etc.; the other is the role of other similar concepts, such as "out of character" and "worthy social contributions." Therefore, the successful reforms are meant to resolve the two difficulties after the

general concept of good character is no longer in use. In fact, the removal of good character from practice is the only thing we need to do. If the general concept of good character is eliminated, all of the overlapping factors will gain independent roles in sentencing.

1. Independent establishment of personal background information

It seems that some personal background information is already used independently as a mitigating factor in practice. The case law shows that good character is often considered alongside this background information as an additional mitigating factor.[251] This is problematic since the concept of good character is nothing more than a consideration of this background information. As such, judges are essentially using the same mitigating factors twice. If they are reflections of good character, they should be incorporated under the concept of good character. In other words, these elements of background information could be used independently in sentencing, rather than as components of good character. Additionally, owing to their fixed and clear meanings, judicial arbitrariness could be greatly reduced as well. As to whether or to what extent these elements should mitigate sentencing, that is a separate issue to be discussed at a later date.

2. Independent establishment of other overlapping mitigating factors

As discussed above,[252] the concept of good character often overlaps with other mitigating factors, like first time offender status, "out of character," worthy social contributions, productive member of society, co-operation with the police, etc. The existence of these factors makes good character an empty concept. Therefore, the removal of good character from the category of mitigating factors will not affect the sentencing system.

[251] *R. v. Persaud* (2002), 159 O.A.C. 134, 26 M.V.R. (4th) 41.

[252] More on this topic can be found at 28--33, above.

7.1.3 Limits and credibility of the research and conclusions

I would like to make a few mentions on the limits of my research, which will inevitably affect the credibility of my final conclusions.

The first limit of my research is that the empirical study is not statistically representative. The number of these sample cases is so small as to be statistically insignificant. Although I deal with these cases by way of statistical analysis, I do so merely by way of illustration, in order to set out some common features of sentencing practice in Canada. Furthermore, my way of defining variables may not be accepted by all scholars. In addition, the studies on cases where good character is not considered to be a mitigating factor might show some new observations on the topic of good character mitigation. Considering all these limits, I must be cautious in my conclusions: they are based on the present study provided by this thesis; therefore, they are only provisional until a more comprehensive study can be carried out on this subject.

7.2 China's future choice

The use of good character mitigation in China is not yet widespread. After carefully examining good character as a mitigating factor in Canada, my general argument is to abandon the abstract concept of good character owing to its lack of practical and theoretical justifications. China may be heading down the wrong path if it is considering the use of good character as a mitigating factor in judicial practice. Since character mitigation is not yet widely used in China, I think the trend towards the use of character should stop and reverse back to what Chinese traditionalists argue: morality should not be introduced into the courts. Certainly, it seems unwise to completely abandon the possibility of adopting good character mitigation in China based on Canadian sentencing practice, but at least it indicates that China should be more careful when making choices about sentencing in the future.

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Appendix: Cases where good character is considered as a mitigating factor in Ontario in the past ten years

No.	Style of Cause	Citation	Charge(s)
1	*R. v. A. (B.)*	2004 CarswellOnt 8782 (Ont. Ct. J.) (WLeC)	Murder
2	*R. v. Blakeley* (1998)	40 O.R. (3d) 541, 111 O.A.C. 144, 127 C.C.C. (3d) 271, 36 M.V.R. (3d) 81	Impaired driving causing bodily harm
3	*R. v. Bjellebo*	2000 CarswellOnt 403 (Ont. Sup. Ct. J.) (WLeC)	Forgery and related offences; Fraud
4	*R. v. Clarke* (2004)	189 O.A.C. 331	Fraud
5	*R. v. D. (R.W.)* (2005)	199 O.A.C. 254, 198 C.C.C. (3d) 541	Sexual assault
6	*R. v. D'Andrea* (2004)	62 W.C.B. (2d) 123 (Ont. C.A.)	Fraud
7	*R. v. Doust* (2001)	20 M.V.R. (4th) 123 (Ont. Sup. Ct. J.)	Impaired driving causing death
8	*R. v. Eisnor*	2002 CarswellOnt 6097 (Ont. Sup. Ct. J.) (WLeC)	Aggravated assault
9	*R. v. Finley*	1998 CarswellOnt 1110 (Ont. Ct. J. (Gen. Div.)) (WLeC)	Sexual assault
10	*R. v. Francis*	1999 CarswellOnt 4888 (Ont. Sup. Ct. J.) (WLeC)	Assault with a weapon or causing bodily harm
11	*R. v. Greene*	2000 CarswellOnt 2916 (Ont. Sup. Ct. J.) (WLeC)	Manslaughter
12	*R. v. H. (C.N.)* (2002)	167 O.A.C. 292, 170 C.C.C. (3d) 253, 62 O.R. (3d) 564, 9 C.R. (6th) 103	Importing cocaine

13	*R. v. Hammoud*	2002 CarswellOnt 585 (Ont. Sup. Ct. J.) (WLeC)	Sexual assault
14	*R. v. K. (J.)*	2007 ONCJ 66	Indecent assault; Gross indecency
15	*R. v. Kwok*	2007 CarswellOnt 671 (Ont. Sup. Ct. J.) (WLeC)	Possession of child pornography
16	*R. v. Lawson*	2001 CarswellOnt 1428 (Ont. Sup. Ct. J.) (WLeC)	Breach of trust by public officer
17	*R. v. Malfara*	2000 CarswellOnt 6562 (Ont. Sup. Ct. J.) (WLeC)	Conspiracy; Theft
18	*R. v. Maxwell*	1999 CarswellOnt 5841 (Ont. Sup. Ct. J.) (WLeC)	Arson
19	*R. v. McKeigan*	2000 CarswellOnt 1577 (Ont. Ct. J.)	(a) Keeping common bawdy house; (b) Permitting premises to be used as a common bawdy house; and (c) Permitting indecent theatrical performance.
20	*R. v. Sukhu*	2005 ONCJ 109	Aggravated assault
21	*R. v. Wark*	2006 ONCJ 197	Sexual assault