Prior Good Works in the Age of Reasonableness

The demise of the mandatory Federal Sentencing Guidelines proclaimed in *United States v. Booker* initially meant that federal district judges regained a little bit of the discretion they once had in deciding sentencing matters because the Guidelines were now only advisory. Whereas sentences were once judged on whether they complied with the terms of the Guidelines, appellate review after *Booker* comes under a “reasonableness” standard rather than strict consideration of the correctness of a district court’s Guidelines analysis. Although *Rita v. United States* is clear that the Guidelines remain of paramount importance because a sentence within the prescribed range is presumptively reasonable, the Court’s decision in *Gall v. United States* has restored a considerable measure of the judicial discretion in sentencing lost after the adoption of the Guidelines. In *Gall*, the Court held that a district judge “must make an individualized assessment based on the facts presented” in deciding the sentence. Such individualization was largely eliminated by the adoption of the mandatory Guidelines in 1987, and so the focus on the defendant and not just the offense will again be paramount in federal sentencing.

In the aftermath of this expanding earthquake—to steal Professor Berman’s apt description—triggered by *Booker*, there comes the inevitable cleanup operation. Although a within-Guidelines sentence remains a presumptively reasonable one after *Rita*, even those decisions are now subject to *Gall’s* abuse-of-discretion standard for reviewing all federal sentencing decisions. The Court explained in *Gall* that the district judge “must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” Thus, defendants can argue for a more flexible application of the relevant Guidelines provisions to seek a reduced sentence and to request a non-Guidelines sentence based on the particular facts of the case. The flexibility of *Booker’s* reasonableness standard, when combined with *Gall’s* forgiving standard of review for sentences, creates a significant play in the joints of the Guidelines that has not been present in the system for twenty years.

Greater discretion in sentencing means less predictability in individual cases because the background of the person being sentenced takes on a larger role in assessing the appropriate punishment. The *Gall* Court noted, “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” In this renewed focus on the individual, a key area that will become more prominent in sentencing in white-collar cases is a defendant’s prior good works, which the Guidelines discouraged as a sentencing factor but to which judges in the new *Booker* age of reasonableness will pay greater attention in their sentencing decisions.

The increasingly harsh sentences seen of late in white-collar cases may be mitigated to a greater degree by a person’s community service and charitable contributions. With greater discretion comes the potential for disparity, and in this article I offer three rules of thumb for trial courts imposing sentence, and appellate courts reviewing the reasonableness of a punishment, to consider when deciding whether a defendant’s prior good works should be a factor in the sentence. An increase in individualized sentences is a likely outcome of *Gall*, and the recent focus on the prosecution of corporate executives, particularly CEOs, makes consideration of prior good works an appropriate issue in deciding sentences for defendants who once stood at the pinnacle of a business.

I. The Heavy White-Collar Sentences After *Booker*

Even with the Sentencing Guidelines now advisory, the effect of such discretion is not necessarily reflected in sentences handed down in high-profile business crime cases. Former WorldCom CEO Bernie Ebbers received a 25-year prison term, whereas former Enron CEO Jeffrey Skilling received a bit over 24 years. Adelphia Communications’ controlling family saw its 80-year-old patriarch, former CEO John Rigas, sentenced to 15 years, whereas son Timothy, the former CFO, received a 20-year sentence. Lesser-known corporate chieftains like Sanjay Kumar from Computer Associates and Walter Forbes of Cendant also received double-digit sentences. The judges in those cases used the Guidelines as their starting point, which *Booker* mandates, and then departed downward from the pure
Guidelines calculation, although the prison terms remain substantially greater than those seen in earlier white-collar cases.

Ebbers’s sentence already has passed muster with the Second Circuit, which found the prison term “harsh but not unreasonable.” Skilling is appealing his conviction and sentence, so it is too early to say whether his virtual life sentence will be sustained. The important point about these substantial prison terms imposed on first-time offenders who pose no threat of physical harm to the community is that the loss caused by the crimes of conviction is the major driver in the sentencing calculation. Under Section 2B1.1 of the Guidelines, the primary provision covering fraud offenses, a loss of $1 million triggers a 16-level increase in the offense level, which exceeds any of the other enhancements usually seen at sentencing, such as obstruction of justice, multiple victims, or role in the offense.

II. The Libby Commutation

Any discussion of sentencing, particularly in white-collar cases, now must take account of President Bush’s decision to commute the thirty-month sentence of I. Lewis “Scooter” Libby, the former chief of staff for Vice President Cheney, from his conviction on perjury, false statement, and obstruction of justice charges. In issuing the Grant of Executive Clemency, the President stated that any jail sentence for Libby was “excessive.” He reached that conclusion based on the fact that “Mr. Libby was a first-time offender with years of exceptional public service and was handed a harsh sentence based in part on allegations never presented to the jury.”

Since the commutation, defense attorneys have filed a number of “Libby motions” that seek to equate their clients with the former Bush administration official. For example, attorney Troy Ellerman cited Libby in arguing for a reduced sentence for his convictions related to leaking the grand jury testimony of Barry Bonds and others related to the Balco steroids investigation. A supplemental brief filed shortly after the Libby commutation argued that “[l]iving with the guilt, torment and uncertainty of where his life was headed since he committed these acts, then losing two full professional careers, and suffering wide spread public ridicule in the media has already resulted in Mr. Ellerman being held to a ‘higher standard’ for his actions than other defendants. In this regard, Mr. Ellerman has already been punished in a fashion similar to that of Lewis Libby.” Although Ellerman’s argument fell on deaf ears—he received a 30-month prison term, the same as originally given to Libby—the argument shows that the President’s decision to eliminate an “excessive” sentence may lead to further disparity in punishment.

III. Reasonableness Review

The majority in Booker made clear the importance of the Guidelines analysis when it stated that the district court “must consult those Guidelines and take them into account when sentencing.” Rita requires district courts to begin the sentencing process with the Guidelines, and Gall makes clear that the first step in reviewing a sentence is to determine whether the Guidelines were correctly analyzed by the judge.

Reasonableness review is important not so much in the front end of the analysis—the Guidelines calculation itself—but in the judge’s decision whether to exercise discretion to take into account factors outside the strict Guidelines determination. In that analysis, Gall makes it clear that district judges now enjoy broad—but not unfettered—discretion to select a sentence based on factors peculiar to the case. The defendant in Gall received probation after pleading guilty to conspiracy to distribute Ecstasy, a significant departure from the Guidelines, based on his immaturity at the time, withdrawal from the conspiracy, and subsequent rehabilitation on his own. The Eighth Circuit overturned the sentence because the factors were insufficient to justify such a substantial departure from the Guidelines, and in upholding the sentence, the Supreme Court rejected the application of an effective de novo standard of review that requires any greater justification for a non-Guidelines sentence than its reasonableness.

The question is no longer how much of a role the reasonableness review will play in federal sentencing. The issue now is how the district courts will exercise their reinvigorated discretion in meting out sentences, and whether the Guidelines determination diminishes in importance as judges individualize sentences. Congress has not yet responded to Booker by adopting a legislative fix that would curtail judicial sentencing discretion, such as the adoption of so-called topless Guidelines that might comply with the Sixth Amendment. Whether Gall pushes the Department of Justice to seek greater uniformity in sentences through a legislative fix remains to be seen. What we are likely to see in the near term is the development of a type of “common law” of federal sentencing that accords less weight to the Guidelines than Booker seemed to imply in the remedial portion of the decision when the majority said judges “must consult” them first.

IV. Sentencing Discretion

White-collar cases present the type of situation in which courts will be pushed hard to exercise whatever discretion the Supreme Court and the lower courts allow in sentencing because of the nature of the offenses and the defendants charged. White-collar crimes are by nature non-violent, and the vast majority of white-collar defendants are first-time offenders who pose little risk of recidivism. Moreover, there are no mandatory minimum sentences for these types of crimes, unlike the drug and weapons offenses that pervade the federal system, so the judge has a somewhat freer hand to tailor the punishment without having to explain a departure from a legislatively imposed sentencing requirement. In terms of offender characteristics, many white-collar defendants are like the judges they appear before—or perhaps the judge’s children—in terms
of age, educational background, and social status. These defendants tend to have privately retained counsel, some from leading law firms paid by corporate employers, who can commit greater resources to sentencing issues than an overworked (and undercompensated) federal defender or panel attorney juggling a much larger caseload.

The Sentencing Reform Act, in 18 U.S.C. § 3553(a), provides a general policy that judges should “impose a sentence sufficient, but not greater than necessary, to comply with the purposes of punishment, a statement that provides little meaningful guidance beyond the assertion to do what is right. Section 3553(a) follows that hortatory assertion with a list of general considerations in determining the appropriate punishment, such as the need “to afford adequate deterrence to criminal conduct” in a sentence that will also “reflect the seriousness of the offense . . . promote respect for the law, and . . . provide just punishment for the offense.” These exhortations do not provide much of an analytical framework for judges actually making the sentencing decision because they are convenient touchstones that can be used to justify almost any result.16

Although Rita does not disturb the sentencing analysis in those cases in which the judge chooses to impose the Guidelines sentence, Gall clearly imparts to district courts much greater flexibility to adopt a non-Guidelines sentence based on certain individual factors that may be quite prominent in white-collar cases. The first issue in the sentencing of white-collar offenders will remain the issue of loss or gain, or the impact of the defendant’s conduct on the judicial or administrative system for those cases that fall outside the fraud and misappropriation contexts. Beyond that, the question will be whether, and to what degree, a court will look to the specific circumstances of the defendant in deciding what punishment is appropriate.

The background of most white-collar defendants as (otherwise) law-abiding citizens who contribute to their community, particularly through charitable contributions, can become an important basis for seeking a reduced sentence. Under the reasonableness regime ushered in by Booker, the “good works” of the defendant may take on even greater prominence in the sentencing process. For white-collar defendants, the nonviolent nature of their offenses, and their personal histories of community service and charity, can become a potent means to argue in favor of a lenient sentence than that called for by the Guidelines, and to direct the court’s attention to factors that favor a lighter sentence than that called for by the Guidelines, and to emphasize the positive aspects of the defendant to draw attention away from the facts surrounding the offense that brought the person into court in the first place. Although many judges continue to adhere to the Guidelines, I think it will be only a matter of time before more of them start putting their restored discretion to work. Certainly defense counsel would be remiss in not seeking to direct the court’s attention to factors that favor a lighter sentence than that called for by the Guidelines, and to emphasize the positive aspects of the defendant to draw attention away from the facts surrounding the offense that brought the person into court in the first place.

As the assessment of good works gains in importance as a sentencing consideration, the potential for increased sentencing disparity will emerge. One impetus for adoption of the Sentencing Reform Act was the perception that certain types of defendants, mostly of the white-collar variety, were the beneficiaries of lenient sentencing, whereas those charged with other types of crimes, many of them minority group members, received much more drastic punishments. In Section 3553(a)(6), one factor for determining a sentence is “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” Although individualized sentences will lead to greater disparity, that is not necessarily bad. Section 3553(a)(1) also states that another consideration in sentencing is “the history and characteristics of the defendant,” so perfect uniformity is neither a goal of the Guidelines nor a good result in every case.

The problem with sentencing disparity is the perceived unfairness of having like conduct treated differently, especially if the reason for the difference is based on personal characteristics that favor one group over another. Consideration of a defendant’s prior good works is worthwhile because of what it tells about a defendant’s character, but what constitutes “good works” is quite malleable and opens up the process to factors that a court should be careful about considering in imposing a sentence. Although the Guidelines sought to eliminate such consideration in all but the few exceptional cases, the threshold for what a court will consider may become individualized to the judge deciding the sentence—a ticket to the type of disparity perceived as unfair.

V. Good Works and Sentencing Disparity

The Guidelines limit consideration of a defendant’s specific characteristics because they take an offense-based approach to punishment rather than an offender-based view. Section 5H1.11 of the Guidelines takes a negative view of a defendant’s personal background and history of community involvement as a relevant sentencing factor: “Military, civic, charitable, or public service; employment related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.” Even under the Guidelines when they were mandatory, a court could in the rare case take one or more of these factors into consideration in departing from the prescribed sentence, but the judge would have to act in the face of a strong presumption against using any of these to reduce the punishment. In the Booker age of reasonableness, at least some of the institutional constraint on sentencing discretion imposed by the Guidelines is gone. Although many judges continue to adhere to the Guidelines, I think it will be only a matter of time before more of them start putting their restored discretion to work. Certainly defense counsel would be remiss in not seeking to direct the court’s attention to factors that favor a lighter sentence than that called for by the Guidelines, and to emphasize the positive aspects of the defendant to draw attention away from the facts surrounding the offense that brought the person into court in the first place.

VI. Three Rules for Considering Prior Good Works

What I offer in this Article are some rules of thumb for sentencing courts to consider about good works when the defendant asks the judge to look beyond the Guidelines
because of that person’s contributions to society. Anything can be a “good work,” so it is impossible to define that term as a shortcut to figuring out what counts, much less how it should be counted. As with any individualized process, each case will have unique aspects, either in kind or degree, so simply saying what is or is not a good work is hardly worthwhile for courts, especially appellate courts reviewing a sentence for its reasonableness. Instead, it is the context of the good work in a broader understanding of the white-collar defendant’s life that should inform a sentencing judge in analyzing whether (and how strictly) to follow the Guidelines.

A. Money Matters

The socioeconomic status of a defendant is important in analyzing the person’s good works, such as devotion to community causes, working to help others, and providing financial assistance. For the middle-class defendant, the catalog of good works may appear to be skimpy, at least as compared to the corporate CEO who sits on the boards of charitable foundations and raises significant amounts for worthy causes. Unlike the corporate chief executive or high-level public servant, the middle-class defendant may not be able to generate the volume of letters, some from prominent individuals, attesting to the impact of community service and advocating for a reduced sentence. Scooter Libby’s sentencing generated over 150 letters, many from Government leaders, whereas a more ordinary defendant may have few, if any, supporters who can take the time to write.

In looking at a defendant’s works and community standing, it is important to consider the pressure a middle-class person faces in earning a sufficient living and, in many instances, supporting a family, while still performing good works in the community. In United States v. Serrata, the Tenth Circuit overturned a district court’s 5-level downward departure based on, among other things, the civic, charitable, and public service records of three former correctional officers convicted of assaulting an inmate and subsequently obstructing an investigation of their conduct. The good works offered by the defendants included work in their churches and coaching Little League teams.

Although a good argument can be made that the crimes were serious enough that prior good works should not even be considered, the Tenth Circuit’s view of the defendants’ activities was instead almost dismissive. The court stated: “While the defendants’ community activities are certainly commendable, it is difficult to conclude that their community involvement is ‘present to an unusual degree.’” Such activities do not sound like much, but anyone who has coached youth sports knows the time and energy required to be successful. Service to one’s church can have a far-reaching impact on both those served and other members of the faith community. For a person living on a correctional officer’s salary, like the defendants in Serrata, whose job involves significant pressure and the potential threat of violence, such community involvement may be more than just “commendable.”

Assessing a lower sentence based on good works necessarily looks past the offense conduct to encompass other aspects of the defendant’s life. The assault by the guards in Serrata caused harm to the inmate, and their false statements during the investigation of the incident showed a significant disrespect for the law. There may be good reasons to disregard a defendant’s good works in such a situation. After Booker, however, courts have greater discretion to consider such information, and to the extent they do so, good works should not be judged in a vacuum. The defendant trying to make ends meet on a middle-class salary who still gives to charity and uses precious free time for community projects should not be viewed as doing something less extraordinary than the wealthy person who has an abundance of time and money.

B. Beware the Corporate Chieftain

The flip side of the first rule of thumb is that those in positions of corporate authority have devoted in large part their lives to the organization, and much of what they do is wrapped up in advancing that business. Courts have been careful to note that use of one’s personal wealth should not be the basis for a finding of extraordinary good works to allow a lower sentence. In United States v. Thurston, the First Circuit stated: “Those who donate large sums because they can should not gain an advantage over those who do not make such donations because they cannot.” In United States v. Tocco, the Sixth Circuit explained that use of wealth alone is insufficient, reflecting the “ancient concept of justice that a man of wealth, position, power, and prestige should not be given special consideration in the law.” When the district court sentenced former Cendant chairman Walter Forbes, the judge noted that he had a net worth of $200 million, so that “[r]elatively speaking, it seems to me that with that net worth, and that amount of income, that $2.5 million of charitable giving is very modest.”

The emphasis on personal time spent, and not just money, moves the issue away from personal economics, at least somewhat. But the corporate executive, particularly the CEO, becomes involved in community projects in many cases to advance the interests of the business. Purchasing goodwill through charitable contributions and membership in local organizations can be a benefit to a corporation, especially if the executives live in that community. It is often impossible to separate the business purpose from the concept of selfless giving that underlies the notion that good works should be a basis for imposing a lower sentence.

In United States v. Cooper, the Third Circuit reviewed the sentence of a defendant who had been CFO and then CEO of a publicly traded company that went bankrupt. Cooper entered a guilty plea to filing a false tax return related to unreported income from the pledge of warrants on company stock, and securities fraud for failing to report the use of corporate assets to secure personal loans. His salary during the relevant period ranged from $600,000 to $1.3 million. The district court granted a
reduced sentence based on “exceptional” community service that included organizing a youth football team in the inner city and paying for the education of four team members at a suburban high school, and later paying for the college education of one. The Third Circuit upheld the lower sentence, noting that while “thousands of shareholders lost millions of dollars when the value of [the company]’s stock plummeted,” his “good works are exceptional.” Judge Slovit dissented, noting that “although Cooper’s actions certainly benefitted the targeted youths, they also benefitted Cooper’s corporation and ultimately therefore, Cooper himself.” She also raised questions about the motivation for the good works, noting that Cooper did not begin some of the cited work until after the criminal investigation began, and that the four youths brought from the inner city helped Cooper’s son practice football with “more formidable players.”

A more recent Third Circuit decision takes a bit more jaundiced view of a defendant’s good works that appeared timed to help mitigate a possible sentence. In United States v. Tomko, the district court sentenced a defendant who owned a construction company and pleaded guilty to tax evasion to probation, 250 hours of community service, and a $250,000 fine. The Guidelines called for a sentence of 12 to 18 months. Reversing, the Third Circuit stated: “Even assuming arguendo the purest of motives for Tomko’s well timed interest in Habitat for Humanity, and viewing as completely altruistic the letters attesting to his beneficence, this single factor fails to justify the downward variance granted in this case.” Like Cooper, the decision in Tomko was 2–1, showing how divisive such departures in white-collar cases can be.

The sentencing of Robert Johnson, former CEO of publicly traded financial printer Bowne & Co., raises similar issues about what should constitute sufficient good works by the corporate executive. Johnson entered a guilty plea to possession of child pornography and obstructing a federal investigation for trying to destroy the computer files containing the illegal images. The Guidelines calculation provided a range of 27 to 33 months in prison, and the district court sentenced Johnson to 15 months, noting his commitment to community service as a basis for the reduced sentence. Johnson’s attorney submitted an extensive letter to the district court before the sentencing seeking a lower term, and one basis was Johnson’s “extraordinary commitment to community service and good works.” Among the good works were Johnson’s donation of “tens of thousands of dollars to numerous charities over the years, and [creating] a $1,000,000 charitable trust to be distributed among several organizations.” The letter further highlighted Johnson’s service on the boards of a number of charities and his position as a long-serving member of the New York State Board of Regents, which oversees the state education system.

Are these sufficient good works to justify a reduced sentence? Certainly the charitable contributions should not count toward a reduced sentence when considered in the context of Johnson’s financial resources. For the other types of service, it is difficult to separate out the personal from the business when the corporate executive can reap a reputational benefit for himself and his company while also doing good in the community. The point is not that executives, particularly CEOs, cannot engage in extraordinary good works. The important issue is that the corporate position can provide the luxury of community involvement at the highest levels, including appointments to public service positions, and the use of such time is viewed as a benefit to the corporation. The executive tends to work at the top, raising money and pushing a particular cause, but is rarely on the ground where the actual work takes place. Good works by an executive do take place, but a court should take them with a healthy dollop of salt when asked to look beyond the criminal conduct of a corporate leader like Johnson by taking into account that person’s community involvement.

C. Elected Officials Violating the Public Trust Should Not Receive Credit for Good Works

The Guidelines do not prohibit an elected official convicted of a crime related to the misuse of office from seeking a reduced sentence based on his or her good works, but judges should not grant such reductions. Like the business executive whose work and personal life often are wrapped together, so too the elected representative in these days of perpetual campaigns. This is not to say that a politician cannot engage in good works. Rather, my point is that the betrayal of the public trust by such officials who use their office for personal gain goes beyond the type of misconduct of the corporate executive who misleads shareholders or even loots the company.

Public office brings with it enormous power to affect the lives of many citizens, and with it the responsibility to maintain the public’s trust in Government institutions. The harm from misusing one’s office for personal gain should not simply be an assessment of the illicit benefits to the individual and possible monetary harm to the government, the type of analysis seen in private fraud cases when ascertaining loss. Democratic institutions require that officeholders make their decisions for the greatest public good and not to line the individual’s pocket or secure employment for relatives.

Separating public acts from private works is often impossible because virtually all of the elected official’s acts involve the exercise of public authority. The burden of elected office means that the official loses the privacy the rest of us enjoy, for whom what one does outside the office is not necessarily a reflection on an employer. Public officials should be held to a higher standard because of their role in leading the Government. Although the consideration of good works looks beyond the crime of conviction to view the whole individual, that approach should not be followed when the defendant is an elected official who betrayed the public trust. For example, the bribes
accepted by Congressman Randy “Duke” Cunningham to steer no-bid contracts to those showering him with gifts. The fact that Representative Cunningham worked on behalf of his constituents should not affect a sentence imposed for the misuse of office for personal gain.

VII. Conclusion

Gall expands the discretion of the district courts to look beyond the Guidelines in imposing punishment in limited circumstances. For white-collar defendants, this expansion presents an opportunity to introduce information previously excluded for the most part from the sentencing decision, including evidence of their good works. Such evidence likely will be plentiful for most white-collar defendants, who often have no prior criminal record and a pattern of community involvement. Evidence of prior good works is hard for prosecutors to oppose, at least on the merits, because one can hardly denigrate the community service of an individual or question his or her devotion to a particular cause unless there is clear evidence of a sudden change of heart. Prosecutors often relied on the Guidelines’ prohibition on considering such evidence except in extraordinary cases, but that constraint on the sentencing judge will dissipate over time.

The burden is on the sentencing judge to look at the evidence carefully, mindful that disparity is borne out of small decisions about what will permit a decrease in the sentence. More important, appellate courts reviewing the reasonableness of sentences, even under the abuse-of-discretion standard, can monitor how courts view good works to prevent wealth- and status-based distinctions from creeping too heavily into the system. Good works are a worthwhile consideration for courts, but not when the conduct is viewed in a vacuum, and certainly not when those works are a matter of writing checks and attending black-tie events. For the elected official who misuses the authority of a public office for private gain, such acts should not play any role in the sentencing process because of the incalculable harm caused to the system.

Notes

2 127 S. Ct. 2456 (2007).
4 Id. at 596.
6 128 S. Ct. at 596.
7 In a second case decided the same day as Gall, Kimbrough v. United States, 128 S. Ct. 558 (2007), the Court upheld a district court’s below-Guidelines sentence based on the district judge’s determination that the crack/powder sentencing differential resulted in an inappropriately harsh sentence, and held that the goal of imposing a sentence no greater than necessary to accomplish the purposes of an appropriate punishment allowed the court to select a reasonable sentence. The Court stated, “The ultimate question in Kimbrough’s case is whether the sentence was reasonable….” Id. at 576.
8 Gall, 128 S. Ct. at 597.
13 543 U.S. at 265 (emphasis added).
14 128 S. Ct. at 602. The Court noted, “On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court’s reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence.” Id.
15 See Brief for Amici Curiae of the Federal Public and Community Defenders and the National Association of Federal Defenders, Gall v. United States, No. 06-7949, filed July 26, 2007 (“This Court should now make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court’s assessment of the facts and its judgment as to the appropriate sentence under 3553(a). The district courts are best situated to ensure that the goals of sentencing are met in individual cases, to develop a common law of sentencing, and to provide the Commission with the information it needs to improve its generally applicable advice.”).
16 See United States v. Gammicchia, 498 F.3d 467, 469 (7th Cir. 2007) (“The factors are intangibles, ‘weighable’ only in a metaphorical sense, that the sentencing judge is in a better position than the appellate judges to place them in the balance with competing considerations.”).
17 See United States v. Tomko, 498 F.3d 157, 171 (3d Cir. 2007) (“We must note, however, that consideration of such good works is not specifically prohibited, and, especially in the post-Booker world, we believe it is well within the discretion of a sentencing judge to consider such factors.”).
18 425 F.3d 886 (10th Cir. 2005).
19 Id. at 915 (quoting U.S.S.G. § 5K2.0).
20 398 F.3d 51, 79 (1st Cir. 2004).
21 200 F.3d 410, 434 (6th Cir. 2000).
23 394 F.3d 172 (3d Cir. 2005).
24 Id. at 178.
25 Id. at 181. Cooper’s son, who played football with the four inner-city youths, testified at the sentencing hearing about “the selfish feeling that my father wanted me to play with the talented attributes that Alonzo and his friends had. Because, if you want to be good in sports, you need to play with these types of kids.” Id.
26 498 F.3d 157, 172 (3d Cir. 2007).
28 Based on Bowne & Co.’s SEC filings, in 2003, Johnson received almost $1 million in compensation and stock.
awards. He resigned in 2004, when the Government investigation identified his receipt of the child pornography through his company computer.

29 The Guidelines already provide for a 4-level increase for elected officials and a minimum offense level of 18. U.S.S.G. § 2C1.1(b)(3) (“If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.”). While the Guidelines penalize the elected official, that does not prevent an argument that prior good works should mitigate the sentence, perhaps below what the enhancement would have provided.

30 There may be instances when a court should take into consideration an official’s good works when the elective office is a fairly minor one, and it is clear that the community work is largely unrelated to the person’s campaign or use of public authority. This would be especially pertinent if the charge is unrelated to that office, or the community work predated election to office.