

TRAUMA AND SENTENCING: THE CASE FOR MITIGATING PENALTY FOR CHILDHOOD PHYSICAL AND SEXUAL ABUSE

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People who lack guidance when they are young have an increased risk of committing crimes. The nurturing that many people receive during their formative years can play a key role in the development of appropriate values and behavior. Yet there is a reluctance to acknowledge the diminished culpability of offenders who have lacked appropriate guidance during their childhood because it is feared that doing so might be perceived as justifying criminal behavior and hence leading to more crime. The Federal Sentencing Guidelines expressly state that lack of guidance as a youth should not be a mitigating sentencing consideration. Despite this, approximately half of all federal judges believe that it should reduce the harshness of the penalty that is imposed on offenders. In this Article, we examine whether lack of guidance as a youth should serve to reduce the severity of criminal sanctions. We conclude that youthful neglect should not of itself mitigate penalty because this would make sentencing law too obscure and uncertain. There is not even an approximate line that can be drawn to demarcate the boundaries between appropriate and inadequate guidance as a youth. However, experiences that are commonly associated with being neglected during childhood and often profoundly set back the mental and/or emotional state of children, namely being subjected to physical or sexual abuse, are more concrete in nature and should be a mitigating factor in sentencing. Empirical evidence demonstrates that people who are subjected to such trauma in their childhood years have an increased risk of subsequently engaging in harmful behavior, such as criminal activity. Further, relatively clear criteria can be established to demarcate the scope and application of these experiences during childhood for sentencing purposes. Reforming the law to make childhood sexual and physical abuse a mitigating consideration would improve the doctrinal coherency of the law and may have the incidental benefit of generally reducing sentences for female offenders and for offenders from socio-economically deprived backgrounds, including African Americans. This reform could be implemented in

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a manner that does not compromise community safety, provided that it is complemented by targeted, effective rehabilitative measures.

INTRODUCTION.....	2
I. THE CURRENT APPROACH TO ABSENCE OF GUIDANCE AS A YOUTH IN SENTENCING IN THE UNITED STATES.....	5
A. Federal Jurisdiction	8
B. California.....	12
C. Texas	15
D. New York	18
E. Florida	21
F. Summary of the U.S. Approach	23
II. REASONS FOR TREATING CHILDHOOD PHYSICAL AND SEXUAL ABUSE (BUT NOT THE CONCEPT OF CHILDHOOD NEGLECT) AS A MITIGATING FACTOR	24
A. Childhood Neglect is an Obscure Concept.....	24
B. Childhood Physical and Sexual Abuse Can Be Defined for the Purpose of Mitigation, and Research Substantiates the Link Between Children’s Experience of Sexual and Physical Abuse and Their Subsequent Criminal Offending	26
1. Defining Sexual Abuse and Physical Abuse	26
2. Research Concerning the Link Between Childhood Abuse and Criminal Offending	28
3. Possible Reasons for the Link Between Child Abuse and Adolescent and Adult Criminal Offending	33
4. Discussion of Studies Investigating Whether Childhood Sexual Abuse and Physical Abuse Have Specific and Different Effects From One Another on Subsequent Offending	35
III. CHILDHOOD PHYSICAL AND SEXUAL ABUSE AS A MITIGATING FACTOR COHERES WITH THE CRIMINAL LAW FRAMEWORK	38
A. Diminished Culpability and Sentencing Mitigation for Childhood Physical and Sexual Abuse.....	38
B. A Discount for Traumatized Offenders Will Not Increase Crime.....	41
C. Reducing Penalties for Traumatized Offenders Will Not Reduce Community Safety if the Objective of Rehabilitation Is Also Pursued	44
IV. CASE STUDY: FEMALE OFFENDERS AND AFRICAN AMERICAN OFFENDERS	50
A. Female Offenders	50
B. African American Offenders	55
CONCLUSION.....	58

INTRODUCTION

The misfortune of having experienced childhood neglect can significantly increase the likelihood that the victim will commit criminal acts as an adult.¹ Nevertheless, the United States Sentencing Commission Guidelines (“Federal Sentencing Guidelines” or “Guidelines”) expressly declare that lack of

1. Cathy Spatz Widom, *Long-Term Impact of Childhood Abuse and Neglect on Crime and Violence*, 24 CLINICAL PSYCHOL.: SCI. & PRAC. 186, 196 (2017).

guidance as a youth is not a consideration that can reduce penalty.² Approximately half of the federal judges recognize that this is an ostensibly flawed approach.³ A survey of federal judges showed that 49% of them believe that a neglected upbringing should be a factor that can operate to reduce penalty severity.

An examination of the rationale and justification for the criminal law and sentencing, and of the impact of experiencing childhood neglect, exposes a potentially profound incoherency in the manner in which sentencing courts deal with offenders who have not had appropriate guidance as youths. A key consideration that underpins the criminal law and sentencing is culpability. In order for individuals to be culpable for their behavior, they need to be responsible for it, which assumes a capacity to make decisions that do not violate the criminal law. Adverse childhood experiences that delay or interfere with the development of sound cognitive or emotional judgment militate against the capacity for individuals to make prudent choices. From a normative perspective, a strong argument can be made for imposing lighter penalties on offenders from neglected backgrounds. However, pragmatically, this is not readily tenable. Such a discount would risk making the law too obscure. Moreover, conferring a discount for a neglected background might be seen as conferring a license to certain offenders to commit more crime.

In this Article, we explore the appropriate approach to dealing with neglected upbringings in the sentencing calculus. We argue that a neglected upbringing of itself should not be a mitigating factor, principally because it would make the law too indeterminate. There is no even approximate measure of what constitutes an appropriate level of guidance as a youth. However, empirical data does show that young people who have inadequate guidance experience disproportionately high levels of extreme adverse events, including being subjected to sexual or physical abuse.⁴ Such events are tangible in nature and substantial empirical evidence has established that victims of childhood sexual or physical abuse have a significantly increased risk of offending in later life. The reasons for this are not clear, but we examine a number of different theories that have been postulated to explain this link between victims' childhood abuse and subsequent criminal offending, including: "Social Control Theory"; "Social Learning Theory"; and "General Strain or Social-Psychological Strain Theory."⁵

Irrespective of which explanation is most sound, the inescapable reality is that abused children, for reasons not of their own making, can be more likely to

2. U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (U.S. SENTENCING COMM'N 2016).

3. *See infra* Part II.

4. *See id.*

5. Janet Currie & Erdal Tekin, *Understanding the Cycle: Childhood Maltreatment and Future Crime*, 47, J. HUM. RESOURCES 509, 511 (2012); James Topitzes et al., *From Child Maltreatment to Violent Offending: An Examination of Mixed-Gender and Gender-Specific Models*, 27 J. INTERPERSONAL VIOLENCE 2322, 2323 (2012).

commit crimes in their adulthood than those who have not experienced maltreatment. It follows that a strong argument can be mounted in support of the view that such offenders should be treated more leniently at the sentencing stage. We argue that childhood trauma stemming from physical or sexual abuse reduces the culpability of victims who subsequently offend and should therefore be reflected in the form of a sentencing discount for those offenders. We suggest that the nature of the discount should be in the order of 25%.

It is pertinent to emphasize at the outset that implementation of our proposal will not compromise community safety because we recommend that the childhood trauma discount be applied only in circumstances where either: (i) the offender has committed a crime that is neither violent nor sexual and there is no risk of him or her committing such an offense in the foreseeable future; or (ii) the offender has committed a sexual or violent crime, but there is evidence confirming that the offender has high prospects of rehabilitation. Importantly, there is now emerging information regarding measures that can be taken to reduce the likelihood of recidivism.⁶ Implementing these measures in conjunction with a sentencing discount for offenders who were traumatized as youths will ensure that sentencing is more normatively sound, while in fact enhancing community safety.

If implemented, a key outcome of our recommendation could be that a significant number of female and African American offenders will receive reduced penalties, but there will be no consequent reduction in community safety. Studies have found a connection between the experience of childhood abuse by females and African Americans, in particular, and their subsequent offending. In addition, the number of female offenders who are incarcerated is growing and a notable proportion of them have reported that they were victims of childhood abuse. African Americans' experience of such childhood trauma is higher overall than for other groups in the U.S., and they are grossly overrepresented in prisons and jails.⁷

The reform proposals and recommendations in this Article are significant and overdue, and relate to an under-researched area of sentencing law. The link between childhood sexual and physical abuse and offending as an adult has been well documented in psychological and social sciences literature. However, as yet, it has not informed sentencing practice and policy because these streams of knowledge have not merged. This Article bridges this gap by providing a clear explanation of the research into the criminogenic impact of childhood sexual and physical trauma, and aligning this knowledge with doctrinally and jurisprudentially sound sentencing principles.

In the next part of the Article, we discuss the current approach to childhood neglect in sentencing in the United States. It emerges that there is a large degree of inconsistency between the manner in which offenders who were abused as children are dealt with at the sentencing stage. Some jurisdictions,

6. *See infra* Part III.

7. *See infra* Part IV.

such as federal courts, generally provide no discount for such trauma, whereas others, such as New York, confer a penalty discount on the basis of childhood neglect. However, in all the jurisdictions discussed in this Article (the federal jurisdiction and four largest U.S. states: California, Texas, New York and Florida), there is considerable uncertainty regarding the rationale, applicability, and scope of a proposed discount on the basis of childhood abuse.

In Part II of the Article, we explain why the concept of childhood neglect should not mitigate penalty, but childhood physical abuse and sexual abuse should do so. This is followed by a discussion of studies that have confirmed the link between childhood sexual and physical abuse and criminal offending as an adult. Part III of the Article includes a detailed consideration and rebuttal of possible arguments against mitigating the severity of sanctions where offenders have been subjected to childhood sexual and violent abuse. Part IV examines the impact that our reform proposal could have on two cohorts of offenders: females generally and African Americans. As noted above, a penalty discount of the nature we suggest would go some way to ameliorating the disproportionately severe impact of the criminal justice system on these cohorts. The reform proposals in this Article are summarized in the concluding remarks.

I. THE CURRENT APPROACH TO ABSENCE OF GUIDANCE AS A YOUTH IN SENTENCING IN THE UNITED STATES

Before detailing the current approach to childhood neglect in the sentencing calculus, we provide a brief overview of the American criminal sentencing system. This will contextualize the discussion that follows.

While different sentencing systems exist at both the U.S. federal and state levels,⁸ there are overarching and important similarities between them, such as their respective objectives. Shared sentencing goals include community protection (also known as incapacitation), general deterrence, specific deterrence, rehabilitation, and retribution.⁹ Although different jurisdictions prioritize different objectives, the most prominent one in the past few decades has been community protection.¹⁰ Community protection emerges most clearly via strict prescriptive sentencing laws—with fixed, minimum, or presumptive penalties¹¹—that every U.S. jurisdiction now features to some degree.¹²

8. Sentencing (and more generally, criminal law) in the United States is mainly the province of the states. *See* *United States v. Morrison*, 529 U.S. 598, 613 (2000) (*citing* *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

9. *See* USSG § 1A1.2, *supra* note 2.

10. NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 9 (Jeremy Travis et al., eds., 2014).

11. For the purposes of clarity, these both come under the terminology of fixed or standard penalties in this Article.

12. NAT'L RESEARCH COUNCIL, *supra* note 10, at 325.

Moreover, twenty U.S. jurisdictions have extensive guidelines for their individual sentencing systems.¹³

Sentencing charts or grids typically outline prescribed penalties, and penalties are chiefly calculated using two considerations: criminal history¹⁴ and offense seriousness. Michael Tonry is one of a number of scholars who have criticized prescribed penalties because of their severity and exacerbation of the mass incarceration crisis. Tonry observes:

Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), life-without-possibility-of-parole laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe “career criminal,” “dangerous offender,” and “sexual predator” laws (Tonry 2013). These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.¹⁵

The increase in guideline or prescriptive penalties has resulted in a corresponding increase to incarceration rates and lengths of prison terms.¹⁶ More Americans are undergoing a correctional sanction than in any other country in the world.¹⁷ Currently, there are more than 2.1 million Americans in prisons or local jails.¹⁸ This rate has been steadily increasing over the past forty

13. Alabama, Alaska, Arkansas, Delaware, District of Columbia, Federal (U.S. courts), Florida, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington. See Richard S. Frase & Kelly Lyn Mitchell, *What Are Sentencing Guidelines?*, U. MINN. ROBINA INST. CRIM. L. & CRIM. JUST. (March 21, 2018), <http://sentencing.umn.edu/content/what-are-sentencing-guidelines>.

14. This is based mainly on the number, seriousness, and age of the prior convictions.

15. Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL’Y 503, 514 (2014). See also Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, in PREVIOUS CONVICTIONS AT SENTENCING 91 (Julian V. Roberts & Andrew von Hirsch eds., 2010). For further criticism of the Guidelines, see Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005); James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173 (2010); and Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 37 OHIO ST. J. CRIM. L. 37, 40 (2006).

16. See Michael Mitchell & Michael Leachman, *Changing Priorities: State Criminal Justice Reforms and Investments in Education*, CTR. ON BUDGET & POL’Y PRIORITIES 1 (Oct. 28, 2014), <http://www.cbpp.org/research/changing-priorities-state-criminal-justice-reforms-and-investments-in-education>; see also *More Prison, Less Probation For Federal Offenders*, PEW CHARITABLE TRUSTS (Jan. 2016), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders>.

17. See *infra* Part III.

18. Danielle Kaeble & Lauren E. Glaze, *Correctional Populations in the United States, 2015*, BUREAU OF JUSTICE STATISTICS 2 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

years,¹⁹ and has more than doubled over the past fifteen years.²⁰ The imprisonment rate is 660 per 100,000 people or, viewed slightly differently, 860 per 100,000 adults.²¹ The scale of this is illustrated by the fact that the United States is the world's biggest incarcerator. Its imprisonment rate is approximately ten times that of certain Scandinavian countries, including Sweden and Finland.²²

The Pew Center reported in 2012 that the average duration of a sentence of incarceration had increased 36% from 1990.²³ In 2013, the Sentencing Project found that more than 10% of inmates in the U.S. were serving life sentences²⁴ (a four-fold increase since 1984, despite a decrease in crime rates over those years).²⁵ The Sentencing Project also noted that, in 2013, 22% more inmates in U.S. prisons were serving life sentences without the possibility of parole than in 2008.²⁶ A more recent study showed a record-high number of offenders serving life terms.²⁷ Currently, 161,957 prisoners are serving a life term, while 44,311 additional offenders are serving a virtual life sentence (meaning a sentence of fifty or more years).²⁸ This equates to 13.9% of the overall prison population.²⁹ African American prisoners account for almost half (48.3%) of this population.³⁰ The incarceration rate for life terms in the U.S. is an astounding approximately 50 per 100,000 of the population, roughly the same rate as the entire incarceration rates in Denmark, Finland, and Sweden.³¹ In addition, more

19. In fact, during this period it has quadrupled. See NAT'L RESEARCH COUNCIL, *supra* note 10, at 1.

20. Albert R. Hunt, *A Country of Inmates*, N.Y. TIMES, (Nov. 20, 2011), <http://www.nytimes.com/2011/11/21/us/21iht-letter21.html>.

21. Kaebler & Glaze, *supra* note 18, at 12.

22. MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT: TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 10 (2014). Rates in the OECD range from 47 to 266 per 100,000 in adult populations. John Pfaff and James Forman argue that the key reason for the increase in incarceration numbers is stricter prosecution practices, where felonies were charged at a higher rate and in larger number. See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 6 (2017).

23. PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 13 (2012), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf.

24. ASHLEY NELLIS, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

25. *Id.*

26. *Id.*

27. ASHLEY NELLIS, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 5 (2017), <http://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf>.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

than two-thirds of offenders at the federal level serving life imprisonment are doing so for convictions for non-violent crimes.³²

A. Federal Jurisdiction

The Federal Sentencing Guidelines exemplify America's prescribed penalty laws and sentencing guidelines. The Guidelines have been analyzed more than any other prescribed penalty systems.³³ They have also significantly influenced sentencing at the state level, and of course have had an impact on the many offenders sentenced under them.³⁴ Melissa Hamilton notes that the "federal government now operates the single largest criminal justice system by inmate count in the United States. Indeed, the federal prison system itself is among the top ten largest by country in the world."³⁵ And it has been acknowledged that:

[H]istory proves that decisions made in Washington affect the whole criminal justice system, for better or worse. Federal funding drives state policy, and helped create our current crisis of mass incarceration. And the federal government sets the national tone, which is critical to increasing public support and national momentum for change. Without a strong national movement, the bold reforms needed at the state and local level cannot emerge.³⁶

Despite the Federal Sentencing Guidelines being advisory rather than mandatory (a rule laid down by the Supreme Court in *United States v. Booker*),³⁷ the sentencing ranges they provide have had a substantial impact on

32. *Id.* at 13.

33. See USSG, *supra* note 2.

34. See Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 37 OHIO ST. J. CRIM. L. 37, 40 (2006). There are more than 200,000 federal prisoners. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 1 (2014), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5109>. Also, as noted below, the broad structure of the Federal Guidelines is similar to many other guideline systems in that the penalty range is not mandatory and permits departures in certain circumstances. See *infra* note 37 and accompanying text.

35. Melissa Hamilton, *Sentencing Disparities*, 6 BRIT. J. AM. LEG. STUD. 176, 182 (2017).

36. AMES C. GRAWERT ET AL., A FEDERAL AGENDA TO REDUCE MASS INCARCERATION 1 (2017), <https://www.brennancenter.org/sites/default/files/publications/a%20federal%20agenda%20to%20reduce%20mass%20incarceration.pdf>.

37. See *United States v. Booker*, 543 U.S. 220, 267 (2005) (excising the provision making the Guidelines mandatory as contrary to the Sixth Amendment right to a jury trial); see also *Pepper v. United States*, 562 U.S. 476, 481 (2011) ("[W]hen a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence [that may] support a downward variance from the now-advisory Federal Sentencing Guidelines range."); *Irizarry v. United States*, 553 U.S. 708, 715 (2008) ("[T]here is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a)"); *Gall v. United States*, 552 U.S. 38, 41 (2007) ("[W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or

many sentences. Only recently have judges deviated more from the Guidelines. For example, only 46% of sentences imposed by federal courts in 2014 were within the Guidelines whereas, before that time, the majority of sentences fell within them.³⁸ Since 2014, there has been only a marginal increase to the number of sentences imposed within the guideline range. Specifically, 48.6% of sentences in 2016 fell within the guideline range, with a slight increase to 49.1% in 2017.³⁹

The Federal Sentencing Guidelines are similar to other grid sentencing systems in that an offender's prior convictions and the perceived severity of the crime hold the most weight in determining his or her penalty.⁴⁰ Criminal history can account for a significant increase in penalty severity. For example, a level fifteen⁴¹ crime in the Federal Sentencing Guidelines mandates a presumptive penalty of 18 to 24 months of incarceration for a first offender, and 41 to 51 months for an offender with 13 or more criminal history points.⁴² A level thirty-five crime prescribes 168 to 210 months (or 14 to 17 and a half years) incarceration for a first time offender, and 292 to 365 months (24 to 30 and a half years) for an offender with the highest criminal history score.⁴³

Criminal history score and offense severity are the two most important considerations that influence the nature and severity of the criminal sanction, but there are many other factors that influence sentencing under the Guidelines. The Guidelines establish dozens of other matters that can affect which penalty

significantly outside the Guidelines range—under a deferential abuse-of-discretion standard”); *Rita v. United States*, 551 U.S. 338, 339 (2007) (holding that federal appellate court may apply presumption of reasonableness to district court sentence that is within properly calculated Sentencing Guidelines range).

38. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); see also AMY BARON-EVANS & JENNIFER NILES COFFIN, NO MORE MATH WITHOUT SUBTRACTION: DECONSTRUCTING THE GUIDELINES' PROHIBITIONS AND RESTRICTIONS ON MITIGATING FACTORS i (2010), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/no-more-math-without-subtraction.pdf. For a discussion regarding the potential of mitigating factors to have a greater role in federal sentencing, see William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in MITIGATION AND AGGRAVATION AT SENTENCING 247 (Julian V. Roberts ed., 2011); U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT: FISCAL YEAR 2014, 1 (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf.

39. U.S. SENTENCING COMM'N, ANNUAL REPORT: FISCAL YEAR 2017 5 (2017), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017-Annual-Report.pdf>.

40. See Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1115 (2008).

41. USSG, *supra* note 2, at 420-421. Offense levels range from 1 (least serious) to 43 (most serious).

42. *Id.* at 392. The criminal history score ranges from 0 to 13 or more (worst offending record).

43. *Id.* at 420-21.

is imposed as well.⁴⁴ Also, judges are allowed to deviate from a guideline⁴⁵ when certain mitigating and aggravating considerations apply; such considerations take the form of “adjustments” and “departures”. Adjustments are considerations that increase or decrease the designated amount of a penalty.⁴⁶ For example, an offender who shows remorse can have his or her penalty decreased by up to two levels, while an offender who pleads guilty can have his or her penalty lowered by three levels.⁴⁷ Departures⁴⁸ also facilitate courts’ imposition of sentences outside a given guideline range.⁴⁹ 18 U.S.C. § 3553(b) empowers courts to use considerations not specified in the Guidelines as rationales for departing from the applicable guideline range.⁵⁰ However, when judges invoke 18 U.S.C. § 3553(b), they must specify their reason for stepping outside the range.⁵¹ In other words, they must provide some detail justifying their sentencing decision.

Historically, neglect during youth was a basis for reducing penalty severity in the federal system. As noted by Evans, in *United States v. Floyd*, “the Ninth Circuit held that lack of youthful guidance was a valid basis for downward departure, recognizing that it ‘may have led a convicted defendant to criminality.’ In that case, the defendant had been abandoned by parents at a young age.”⁵² However, in the 1992 amendment cycle, the Commission added a provision that specified that lack of guidance as a youth should *not* mitigate sentence; as section 5H1.12 of the Guidelines states: “lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.”⁵³

Nevertheless, it is still possible for judges to mitigate penalties on account of neglected youth pursuant to § 3553(a), which requires judges “to consider the history and characteristics of a defendant and the companion language in

44. AMY BARON-EVANS & PAUL HOFER, LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION i (2010), https://static1.squarespace.com/static/551cb031e4b00eb221747329/t/5883e40717bffc09e3a59ea1/1485038601489/Litigating_Mitigating_Factors.pdf.

45. *Id.*

46. These are set out in Chapter 3 of the U.S. Sentencing Guidelines. USSG *supra* note 2, at 341.

47. *Id.* at 389. However, § 5K2.0(d)(4) provides that the court cannot depart from a guideline range as a result of “[t]he defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See § 6B1.2 (Standards for Acceptance of Plea Agreement).”

48. *Id.* § 5K.

49. *Id.* § 1A4(b).

50. *Id.* § 5K2.0(a)(2)(B); *see also Gall*, 552 U.S. at 38; *Pepper*, 562 U.S. at 500.

51. USSG, *supra* note 2, § 5K2.0(e).

52. Evans, *supra* note 44, at 139 (citing *United States v. Floyd*, 956 F.2d 293, 1101 (9th Cir. 1992)).

53. USSG, *supra* note 2, § 5K2.0(e).

§ 3661 that “[n]o limitation shall be placed on the information concerning the background, character, and conduct” that may be considered for purposes of sentencing.”⁵⁴ As further noted by Evans:

After *Booker*, there is no longer any need to show extreme abuse or neglect to avoid the prohibitions of § 5H1.12, and courts have begun to consider disadvantaged youth or lack of guidance as a youth as a factor for sentencing below the guideline range. See, e.g., *United States v. Mapp*, No. 05-80494, 2007 WL 485513 (E.D. Mich. Feb. 9, 2007) . . . *United States v. Howe*, No. 08-6541, 2010 WL 1565505 (6th Cir. April 21, 2010) (recognizing that . . . a variance under § 3553(a) is not constrained by a finding of extraordinariness). Consideration of this factor at sentencing is more common than caselaw suggests. Before 2009, the Commission did not publish the number of times judges cited lack of youthful guidance as a reason for imposing a sentence below the guideline range. However, in fiscal year 2008, lack of youthful guidance was cited 109 times as a reason for sentencing below the guideline range. In fiscal year 2009, when the factor appeared for the first time in the Commission’s Sourcebook, “lack of youthful guidance/tragic or troubled childhood” was cited 104 times under § 3553(a) as a reason for sentencing below the guideline range. In 2010, it was cited in 149 cases.⁵⁵

The Sentencing Guidelines’ default position that youthful neglect is irrelevant to sentencing is thus often circumvented by the use of § 3553(a).⁵⁶ Judges’ inclination to invoke youthful neglect as a mitigating factor was supported by the Commission of federal judges in 2010:

[J]udges said that mitigating factors, including many restricted, discouraged, and prohibited by the Commission, should be considered “ordinarily relevant” to the question whether to impose a sentence below the guideline range. Overall, 59% of judges said that the mitigating factors listed in the survey should be “ordinarily relevant” to the determination of a sentence outside the guideline range. These include age (67%) [and] lack of guidance as a youth (49%).⁵⁷

Courts at the state level in the United States have taken a variety of approaches to childhood neglect and abuse as sentencing mitigation factors. Some states have mitigation-specific statutes, whereas other states build mitigating factors into the statutes of a given offense. Neglect and abuse predominantly appear as non-statutory factors, and courts generally view them as mitigating in nature and relevant to sentencing. However, courts often weigh a defendant’s childhood neglect or abuse against the facts surrounding a given offense. This ad-hoc balancing analysis is highly defendant and case-specific, and thus neglect and abuse sometimes result in a sentencing reduction or reconsideration, while at other times have no effect on sentencing at all. We now examine more closely the approaches that are taken to the relevance of childhood trauma and neglect in the four largest American states.

54. Evans, *supra* note 44, at 74 (citing 18 U.S.C. § 3661 (2016)).

55. *Id.* at 147 (citation omitted).

56. 18 U.S.C. § 3553 (2016).

57. Evans, *supra* note 44, at 48.

B. *California*

Most criminal offenders in California are sentenced to prison for a set amount of time under the state's Determinate Sentencing Law (DSL), meaning they are sentenced to a set amount of time (e.g., seven years).⁵⁸

The California Legislature has declared that "the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice."⁵⁹ Factors for increasing sentence length are termed "specific enhancements" or aggravating circumstances; these are conduct enhancements specific to the crime, such as using a weapon or causing great bodily harm.⁶⁰ The DSL rules specify that "mitigation" or "circumstances in mitigation" mean factors that the court may consider in its broad discretion in imposing one of three (low, medium, or high) authorized prison terms for a given offense.⁶¹ "Mitigation" also means factors that the court may use to justify striking additional punishment for an enhancement when it has discretion to do so.⁶²

Mitigating factors in California are divided into two distinct categories: factors relating to the crime and factors relating to the defendant.⁶³ Rule 4.423 enumerates six mitigation factors relating to the defendant:

[T]hat the defendant has no prior criminal record or an insignificant criminal record; that the defendant was suffering from a mental or physical condition at the time of the offense; that the defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process; that the defendant made restitution to the victim; and that the defendant had a prior satisfactory performance on probation, supervision, or post-release parole.⁶⁴

The statute on mitigating circumstances includes a third category, titled "Other factors," which consists of one catch-all sentence: "[a]ny other factors statutorily declared to be circumstances in mitigation or that reasonably relate to the defendant or the circumstances under which the crime was committed."⁶⁵

In short, the enumerated mitigation factors are not exclusive or exhaustive but illustrative—courts may consider a broad scope of information during

58. *Sentencing, Incarceration, & Parole of Offenders*, CAL. DEP'T OF CORR. AND REHAB., (2017), https://www.cdcr.ca.gov/Victim_Services/sentencing.html#CALIFORNIAS_SENTENCING_LAWS.

59. CAL. PENAL CODE § 1170 (West 2018).

60. CAL. RULES OF COURT, Rule 4.405(3) (West 2018); *see* CAL. PENAL CODE, §§ 1170.11, 1170.7, CAL. RULES OF COURT Rule 4.421.

61. CAL. RULES OF COURT Rule 4.405(4) (defining "mitigation" and "circumstances of mitigation"); CAL. PENAL CODE § 1170(b) ("[W]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.").

62. CAL. RULES OF COURT Rule 4.405(4)-(5).

63. CAL. RULES OF COURT Rule 4.423.

64. CAL. RULES OF COURT Rule 4.423(b)(1)-(6).

65. CAL. RULES OF COURT Rule 4.423(c).

sentencing, including every legitimately relevant factor.⁶⁶ Thus the enumerated mitigation factors do not prohibit judges from applying additional criteria reasonably related to the sentencing calculus and decision.⁶⁷ Those non-statutory criteria can include sentencing factors such as childhood neglect youth and trauma in the form of physical or sexual abuse.

A thorough review of California criminal cases reveals that courts typically consider neglected youth, childhood physical abuse, and childhood sexual abuse as mitigating sentencing factors under determinate sentencing. Judges then compare those factors against aggravating ones in an ad-hoc balancing test. In general, if the aggravating factors outweigh the mitigating factors, courts impose the “high” term of incarceration.⁶⁸ If the mitigating and aggravating factors are equal, courts impose the medium or middle term. If the mitigating factors outweigh the aggravating factors, courts impose the low term. Courts’ analyses of these factors are highly case-specific, and the individual judicial balancing act is undoubtedly a result of the wide discretion that judges have to use whatever information they deem relevant at sentencing, in whatever way they see fit. We now examine the key cases on this issue.

In *People v. Churich*, the defendant violently attacked his elderly mother and seriously injured her.⁶⁹ Testimony indicated that the victim had repeatedly physically abused her son when he was a child, beating him daily and burning his hands.⁷⁰ Nonetheless, the court held that despite that abuse, which had occurred forty to fifty years ago, there was “no excuse” for his actions that day.⁷¹ Moreover, the court held that the aggravating factors outweighed those in mitigation, and thus the high term was appropriate; the crime was highly violent, vicious, and callous (the defendant beat, punched and kicked his mother to the ground and then continued assaulting her with a frying pan), the defendant betrayed his mother’s trust and confidence, and the defendant had an “extensive” domestic violence history.⁷² In *People v. Ayala*, the defendant was convicted of first-degree murder with a robbery special circumstance.⁷³ It was undisputed that he had a severely traumatic home environment, including a

66. See *People v. Tatlis*, 230 Cal. App. 3d 1266, 1274 (Ct. App. 1991), *aff’d in part, rev’d in part sub nom.* *Tatlis v. Ylst*, 21 F.3d 1116, No. 91-56420, 1994 WL 126744 (9th Cir. Apr. 13, 1994).

67. 22A CAL. JUR. 3D *Criminal Law: Posttrial Proceedings* § 391 (West 2018).

68. LEGISLATIVE ANALYST’S OFFICE, OVERVIEW OF FELONY SENTENCING IN CALIFORNIA 2 (2017) <http://www.lao.ca.gov/handouts/crimjust/2017/Overview-of-Felony-Sentencing-in-California-022717.pdf> (“[U]nder determinate sentencing, statute specifies low, medium, and high terms of incarceration—known as the ‘sentencing triad’—for each offense.”).

69. *People v. Churich*, No. A150838, 2017 WL 6523776, at *1 (Cal. Ct. App. Dec. 21, 2017), *review denied* (Mar. 14, 2018).

70. *Id.* at *2.

71. *Id.* at *4.

72. *Id.*

73. *People v. Ayala*, No. F040115, 2003 WL 21921116, at *1 (Cal. Ct. App. Aug. 13, 2003).

childhood history of physical and sexual abuse, and a family “immersed in alcohol, drugs, and domestic violence.”⁷⁴ The court “seriously considered” those mitigating circumstances, yet found that they did not rise to the level of outweighing the aggravating factors of the robbery murder; the high term sentence was imposed.⁷⁵ Judges have ruled similarly in many other cases.⁷⁶

In *People v. Bolt*, the court held that the mitigating factors of the defendant’s severely traumatic and abusive childhood (and his cooperation and admission of culpability) equally balanced his crime of molesting a young child 400 times over a six-year period, and the court imposed the middle term.⁷⁷ The appellate court in *In re Lucas* found that the defendant’s trial counsel was ineffective for failing to argue that the defendant’s deep history of childhood neglect, abandonment, and physical and sexual abuse should be mitigating factors at sentencing.⁷⁸ The defendant’s death sentence was vacated.⁷⁹ Yet, in *People v. Sims*, the court upheld a jury-imposed death sentence.⁸⁰ The court ruled that the prosecutor’s argument at sentencing that the defendant’s childhood history of physical, sexual, and emotional abuse had *no* mitigating significance, was proper argument, including the following statements by the prosecutor: “[I]f it were a mitigating factor that a person had a bad childhood, that would apply to virtually every violent felon currently incarcerated . . . you would be emptying prisons because it would apply to virtually everybody.”⁸¹

Judges in California have broad sentencing discretion amongst the three tiers of low, medium, and high sentences. Childhood neglect and abuse are viewed as mitigating factors, and although they can theoretically outweigh the aggravating factors in a given case, pragmatically the courts give little weight to this mitigating factor.

74. *Id.* at *6-7.

75. *Id.* at *11.

76. See, e.g., *People v. Brock*, No. B169224, 2005 WL 100942, at *4 (Cal. Ct. App. Jan. 19, 2005) (finding the sexual abuse defendant experienced as a child did not outweigh his own offense of lewd and lascivious conduct against a minor); *People v. Smith*, No. F054514, 2008 WL 4696026, at *4 (Cal. Ct. App. Oct. 24, 2008) (finding that defendant’s history of childhood neglect and sexual abuse did not outweigh aggravating nature of assault where defendant tried to run someone over with his car).

77. *People v. Bolt*, No. B156407, 2003 WL 21054400, at *1 (Cal. Ct. App. May 9, 2003).

78. *In re Lucas*, 33 Cal. 4th 682, 716 (2004).

79. *Id.* at 736.

80. 5 Cal. 4th 405, 463 (1993), *overruled on other grounds by* *People v. Storm*, 28 Cal. 4th 1007, 1031-32 (2002).

81. *Id.* at 463-64.

C. Texas

Texas, the second most populous U.S. state after California,⁸² divides criminal offenses into tiers. The eight “Offense Tiers” increase in severity: misdemeanors (lower-level crimes with a maximum punishment of up to one year in jail) are sorted by Class C, Class B, and Class A, and felonies by State Jail Felony, Third Degree, Second Degree, First Degree, and Capital Felony.⁸³ Statutes divide criminal offenses into these tiers, and judges then hold wide sentencing discretion within them. For example, the sentence for a Third Degree felony is two to ten years; for a Second Degree Felony two to twenty years; and for a First Degree Felony five years to life.⁸⁴

To understand how mitigating factors operate in Texas, it is important first to set out the manner in which aggravating factors operate. Aggravating factors are captured by the statutory elements defining specific crimes, and are therefore factored into the sentencing range a judge receives following conviction for an offense.⁸⁵ In addition, offenses may substantively qualify under multiple tiers (e.g. “theft of service” under section 31.04 of the Texas Penal Code can be charged from a Class C Misdemeanor up to a First Degree Felony, depending on the monetary value involved),⁸⁶ thus affording prosecutors tremendous discretion in electing what charges to bring in a given case. That wide discretion shapes judicial discretion at sentencing, because judges are sentencing offenders based on the severity of the charge(s) that the prosecution has chosen.

Sentencing mitigation factors in Texas are non-statutory. They derive from caselaw. For instance, evidence that relates to the offense or defendant and that tends to reduce a defendant’s moral blameworthiness can be offered as a mitigating factor during sentencing.⁸⁷ A defendant must have the opportunity to offer mitigation evidence during sentencing if it has not already been elicited during the proceedings, especially if the defendant requests the opportunity to do so.⁸⁸ “Mitigating evidence” applies in every case where the defendant offers evidence to assist the jury or judge in assessing the fair and proper sentence for the offense committed, and includes the defendant’s level of culpability and all

82. As of 2017, California was the most populous U.S. state with 39.5 million residents. Texas ranked second, with 28.3 million residents. *State Population Totals and Components of Change: 2010-2017*, U.S. CENSUS BUREAU (Sept. 4, 2018), <https://www.census.gov/data/datasets/2017/demo/popest/state-total.html>.

83. TEX. PENAL CODE ANN. § 12.03-.04 (West 2017).

84. *Id.* §§ 12.32-34.

85. *See, e.g., id.* § 22.02 (including causing serious bodily injury or using a deadly weapon during the commission of an assault as examples of aggravating assault factors).

86. *Id.* § 31.04(e).

87. *See* Willingham v. State, 897 S.W.2d 351, 359 (Tex. Crim. App. 1995); Ellison v. State, 165 S.W.3d 774, 778 (Tex. App. San Antonio 2005), *aff’d*, 201 S.W.3d 714 (Tex. Crim. App. 2006); Garcia v. State, 704 S.W.2d 495, 498 (Tex. App. 1986).

88. Castro v. State, 807 S.W.2d 417, 418 (Tex. App. 1991).

other relevant matters.⁸⁹ Allowable mitigating factors must bear a common relationship to the circumstances of the offense itself or to the defendant personally.⁹⁰ Circumstances personal to the defendant can include childhood neglect and abuse.

Texas is typically regarded as a tough-on-crime, tough-on-criminals state. Texas is especially well known for its historical and frequent use of capital punishment. The state has executed 550 offenders between 1982 and April 2018, more than one third of the national total.⁹¹ An extensive survey of the relevant caselaw shows that the overwhelming majority of cases discussing childhood neglect and abuse as potential sentencing mitigation factors are capital punishment cases. This is due in part to many defendants sentenced to death in Texas filing ineffective assistance of counsel claims in their appeals, often arguing that their trial counsel was deficient for failing to raise mitigation factors of neglect and abuse. Other reasons why neglect and abuse are noticeably absent from non-capital cases remain less clear. One possible explanation is that Texas (unlike California) does not have statutory mitigating circumstances for sentencing and hence appellate courts for non-capital cases feel less inclined to opine on them in opinions.⁹² In any event, for our purposes, it suffices to note that in Texas abuse and neglect are mainly raised as mitigating factors in capital cases. We now highlight a few examples.

Texas courts appear to take one of two positions regarding neglect and abuse as mitigating factors during sentencing. The first is the pro-defendant position: courts view neglect and abuse as mitigating factors. In *Ex parte Alexander*, the court vacated the defendant's death sentence by holding that certain statutory rules in Texas capital punishment cases had deprived the jury of an "adequate mechanism for exercising its reasoned moral judgment" concerning whether mitigating evidence warranted a life rather than death sentence.⁹³ That mitigating evidence included a "troubled childhood": the defendant struggled with significant physical abnormalities and emotional disturbance, but did not receive treatment, and he grew up in an abusive and broken home.⁹⁴ In *Mason v. State*, the defendant's death sentence was upheld, in part because the trial court's refusal to allow mitigating evidence of the defendant's childhood abuse at sentencing was upheld as constitutional under

89. *Eaves v. State*, 141 S.W.3d 686, 692-93 (Tex. App. 2004).

90. *Goudeau v. State*, 788 S.W.2d 431, 435-36 (Tex. App. 1990).

91. *Death Row Information*, TEX. DEP'T OF CRIMINAL JUSTICE (Sept. 27, 2018), https://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html; *Executions by State and Region*, DEATH PENALTY INFO. CTR. (Sept. 29, 2018), <https://deathpenaltyinfo.org/number-executions-state-and-region-1976>.

92. Perhaps defense attorneys also feel less inclined to bring up neglect and abuse arguments on appeal, either because they were previously addressed by the trial court at sentencing, or because they believe such arguments would be fruitless in front of strict Texas courts that have no statutory directives to consider mitigating factors, or both.

93. *Ex parte Alexander*, No. AP-76,818, 2012 WL 2133738, at *1 (Tex. Crim. App. June 13, 2012).

94. *Id.*

death penalty case requirements.⁹⁵ Nevertheless, a heated dissent underscored the mitigating value of the defendant's past abuse: "from his earliest childhood [the defendant] was beaten and abused by his natural father, and by a succession of alcoholic stepfathers...[t]his exposure to violence . . . and level of childhood abuse and formative effect on appellant's personality . . . clearly has mitigating significance."⁹⁶ The dissent in *Boggess v. State*, where for the same reasons as in *Mason* mitigating evidence was excluded and a death sentence upheld, struck a similar tone: "[the defendant] was abused and neglected by his natural mother from infancy through early years, suffering from malnutrition and other mistreatment that caused his legs to bow, his eyes to "roll" and his vision to deteriorate."⁹⁷ Per the dissent, because the jury could not consider the defendant's traumatic childhood, they were unable to "give effect to mitigating evidence relevant to appellant's background, character, record and circumstances of the offense."⁹⁸ Complicated sentencing laws for capital punishment cases in Texas often preclude such evidence as a matter of law, but the vivid sensory descriptions of abuse, trauma, and suffering show how they can serve as powerful mitigating factors.

The second position adopted by Texas courts in relation to neglect and abuse as mitigating factors during sentencing is the more pro-State one. This position views neglect and in particular abuse as *not* mitigating factors, or at least not mitigating enough for their absence at the punishment phase to warrant a sentencing reconsideration. In *Mann v. State*, a rare non-death penalty case where abuse was discussed, the defendant appealed his nine-year sentence for possession and promotion of child pornography under a single ineffective assistance of counsel claim – that his attorney failed to present mitigating evidence of the defendant's own childhood sexual abuse at the hands of his father.⁹⁹ The appellate court held that defense counsel was not ineffective for failing to offer that evidence, stating "[w]e cannot assume that all jurors would consider evidence of childhood sexual abuse as a mitigating factor in assessing punishment."¹⁰⁰ Not only could that not be assumed, the court said, but moreover it ruled that the defendant "had not provided any evidence demonstrating that the jury would have assessed a lighter punishment had counsel presented evidence of [the defendant's] sexual abuse as a child."¹⁰¹ Yet the court did not elaborate on how the defendant might have produced such evidence, which would seemingly require predictive insight into jurors' minds.

95. *Mason v. State*, 905 S.W.2d 570, 576 (Tex. Crim. App. 1995) (en banc).

96. *Id.* at 580-81.

97. 855 S.W.2d 645, 649 (Tex. Crim. App. 1991).

98. *Id.* at 652.

99. No. 2-04-016-CR, 2004 WL 1636263, at *1 (Tex. App. July 22, 2004).

100. *Id.* at *2.

101. *Id.* at *3.

The impetus for the *Mann* court's first point – that it could not assume how jurors would view childhood sexual abuse – stems from *Curry v. State*.¹⁰² In *Curry*, the defendant was convicted of capital murder for robbing and killing a convenience store clerk, and was sentenced to death.¹⁰³ The appellate court held that the trial court did not err in overruling the defendant's challenge for cause of a juror who during *voir dire* stated that he would not consider factors such as a defendant's physical or sexual abuse or a deprived childhood as mitigating factors.¹⁰⁴ The court's rationale was that the juror had not said that he would not consider a defendant's history of abuse and a deprived childhood, but rather that he would not consider them as *mitigating*.¹⁰⁵ Nevertheless, the court did not explain the distinction between those two responses, and why the former would be prejudicial while the latter proved permissible.

Thus, Texas's sentencing structure confers significant discretion on judges. Aggravating factors are statutorily built into offense elements, but defendants' ability to present mitigating factors at sentencing derives from caselaw. Whether neglect and abuse constitute mitigating circumstances is most often analyzed in capital punishment scenarios. Because that determination is so case-specific, courts are divided in their positions on the matter and the general trend that emerges from the cases is that childhood abuse is rarely an influential mitigating factor.

D. *New York*

Most offenders in New York receive indeterminate sentences. They are sentenced to a range (e.g. fifteen years to life) as opposed to a determinate or fixed (e.g. eight years) sentencing structure like California uses. New York labels felonies "Violent" or "Non-Violent" and classifies them from "A" to "E," with "A" the most serious.¹⁰⁶ The letter classifications correspond to the maximum end of a sentencing range. For instance, for a Class C felony, the term "shall not exceed fifteen years."¹⁰⁷ The "Violent" and "Non-Violent" labels correspond to the minimum end. For example, the minimum sentence for a Class C felony for a first-time offender for a "Non-Violent" felony conviction is no jail, but the minimum for that same offender for a "Violent" felony conviction is three and a half years.¹⁰⁸

102. *Mann*, 2004 WL 1636263, at *6; *Curry v. State*, 910 S.W.2d 490 (Tex. Crim. App. 1995).

103. *Curry*, 910 S.W.2d at 492.

104. *Id.* at 494.

105. *Id.*

106. N.Y. Penal Law § 70.00, § 70.02.

107. N.Y. Penal Law § 70.00(2).

108. N.Y. Penal Law § 70.00, § 70.02.

In New York, aggravating factors are typically defined in the statutory elements for specific crimes,¹⁰⁹ and thus are incorporated in a conviction and accounted for in the sentencing range provided to judges. Mitigating factors are also often outlined in crime-specific statutes. While aggravating factors often explicitly determine the classification and hence the sentencing range that a defendant receives, New York statutes tend to list mitigating factors without detailing their role in reducing a specific sentence.¹¹⁰

During sentencing, judges in New York balance neglect and abuse as mitigating factors against the facts of an offense. This ad-hoc balancing approach is similar to that of California, though California has standalone mitigating factors statutes while New York does not. Defendants in New York often appeal their sentence as “harsh and excessive,”¹¹¹ hoping for a sentence reconsideration and eventual reduction. Caselaw shows that a sentence is considered harsh and excessive when a New York appellate court finds it to be extreme and unjust in comparison to sentences typically imposed against similarly situated defendants.

In *People v. Benson*, the court “expressly acknowledged” the defendant’s cognitive impairments and “tumultuous upbringing” at his murder sentencing, but found those mitigating factors to be outweighed by the record showing that the defendant repeatedly shot the victim at close range, in a residential housing complex in front of the victim’s fiancée and young stepchild.¹¹² Accordingly, the appellate court found that the trial court did not abuse its sentencing discretion in imposing the maximum sentence.¹¹³ Other cases feature similar language and outcomes. In *People v. Masters*, the appellate court found that the mitigation factor of the defendant’s “troubled childhood” did not offset the “violent and heinous nature” of his rape and sexual abuse convictions, and thus held that his forty-year sentence was neither harsh nor excessive.¹¹⁴ In *People v. Arnold*, the court ruled that the defendant’s “childhood hardships” did not mitigate the violent nature of his offense, which included repeatedly stabbing the unarmed victim.¹¹⁵ In addition, in *People v. Scotchmer*, the defendant had a documented “history of abuse...neglect,” and the sentencing court “expressly and at length took into consideration the many mitigating factors,” including the defendant’s five-year placement in an abusive foster care, and his harmful childhood home environment where he was subjected to “domestic violence,

109. See, e.g., N.Y. Penal Law § 125.26 (noting that if the murder victim was a police officer, for example, the murder charge becomes aggravated).

110. See, e.g., N.Y. Penal Law § 400.27(9) (listing six mitigating factors for first-degree murder conviction, such as the defendant’s criminal history and mental state at the time of the offense, but without tying specific mitigating factors to specific reductions in sentence).

111. See N.Y. Crim. Proc. Law § 450.30(1) (McKinney) (stating that an appeal from a sentence “may be based upon the ground that such sentence was harsh or excessive”).

112. *People v. Benson*, 119 A.D.3d 1145, 1148 (2014).

113. *Id.* at 1148-49.

114. 36 A.D.3d 959, 960-61 (2007).

115. 32 A.D.3d 1051 (2006).

substance abuse, and significant physical and verbal abuse and neglect.”¹¹⁶ Still, the appellate court found that the defendant’s extensive history of childhood trauma did not render his negotiated and non-maximum twenty-five year sentence unduly harsh or excessive.¹¹⁷ Those mitigating factors were not enough to overcome the defendant’s double intentional murder of his mother and her boyfriend, in which he shot them in rapid succession at close range.¹¹⁸

Finally, a look at the youthful offender provisions of New York’s Criminal Procedure Law offers an additional perspective on neglect and abuse as mitigating factors. These provisions state that offenders between the ages of sixteen and nineteen, per the discretion of the sentencing court, can be sentenced as juveniles or youthful offenders rather than adults in order to avoid stigmatizing them as lifelong convicts for “thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals.”¹¹⁹ In *People v. Victor J.*, the thirteen-year old defendant was convicted of various sex offenses for repeatedly sodomizing his four-year old victim over the course of three years.¹²⁰ The trial court sentenced the defendant as a youthful offender, finding that his “violent acts were a direct result of his earlier experience as a victim of child sexual abuse, specifically, a re-enactment of that experience, and the result of emotional trauma not of his own making.”¹²¹ The defendant’s own childhood sexual abuse directly mitigated his later sexual abuse of another child. The appellate court overturned this decision as a matter of law. The court first noted that a defendant in the designated age range is not eligible to be found a youthful offender for first-degree rape and sodomy unless the court specifically finds that there were “mitigating circumstances that bear directly upon the manner in which the crime was committed.”¹²² The court then explained that the defendant’s own past sexual abuse did not relate to the manner in which he committed the current offense:

The explanation defendant provided for his criminal conduct, namely, that he himself had been sexually molested in the past, which trauma propelled him to re-enact that molestation, does not, in our view, bear on the *manner* in which the crime was committed. Rather, it was at best something that prompted or motivated him, as a drug addict’s habit may motivate him to commit robbery.¹²³

116. 285 A.D.2d 834, 836–37, (2001).

117. *Id.*

118. *Id.* at 834.

119. *People v. Drayton*, 39 N.Y.2d 580, 584 (1985).

120. *People v. Victor J.*, 720 N.Y.S.2d 304, 305 (2000).

121. *Id.* at 306.

122. *People v. Victor J.*, 724 N.Y.S.2d 162, 163 (2001) (citing N.Y. Crim. Proc. Law § 720.10(2)(a)(iii) and (3)). Other circumstances that allow offenders to be sentenced as juveniles in New York include the defendant not being the sole participant in the crime and the defendant’s participation being relatively minor. Neither of those factors applied in *Victor J.*

123. *Id.* at 206-07.

The court thus ruled that the defendant's own past as a child sexual abuse victim did not constitute a mitigating circumstance under the law.¹²⁴ *Victor J.* shows yet another case where neglect and abuse were not mitigating *enough*. The cases show a tough-line approach to neglect and abuse as mitigating factors, perhaps even more so in *Victor J.* given the defendant was thirteen when he began his offenses. On the other hand, the defendant's repeated child sodomy was described as "horrible...frightening...extremely serious" acts that "betrayed" the trust of the young victim and left him with "permanent scars."¹²⁵ The courts, unsurprisingly, tend to give far more credence to the acts perpetrated on a victim than the traumatic childhood experiences of a defendant given that the trauma suffered by the victim is necessarily a key focus of the sentencing hearing.

New York uses a predominantly indeterminate sentencing structure. Mitigating factors are sometimes detailed in the statutes, but the statutes do not detail exactly how those factors should reduce a given sentence. New York does not have separate statutes exclusively focused on mitigating circumstances. Sentencing courts balance mitigating factors such as neglect and abuse with the characteristics of the offender and moreover the facts of the offense at hand. Caselaw suggests that, with respect to sentencing, a defendant's crime and the manner by which he commits it hold more weight than any neglect or abuse he suffered as a youth.

E. *Florida*

Florida's Criminal Punishment Code governs the state's criminal sentencing policy. The Code came into effect on October 1, 1998, and applies to offenses committed on or after that date.¹²⁶ Compared to previous guidelines, the Code allows for greater upward discretion in sentencing, stipulates for increased penalties, and lowers mandatory prison thresholds.¹²⁷ Thus, Florida's approach to punishment over the last two decades has become harsher. Section 775.082 details penalties for felony categories, the applicability of various sentencing structures, and mandatory minimum sentences for certain reoffenders.¹²⁸ Felonies are categorized by degree. A third-degree felony is punishable by up to five years in prison; a second-degree felony by up to fifteen years; a first-degree by up to thirty years; and a "Life Felony" by up to life in prison.¹²⁹ Judges therefore have wide sentencing discretion within a given felony degree.

124. *Id.*

125. *Id.* at 207.

126. FLA. DEP'T OF CORR., FLORIDA CRIMINAL PUNISHMENT CODE: SCORESHEET PREPARATION MANUAL 4, http://www.dc.state.fl.us/pub/scoresheet/cpc_manual.pdf.

127. *Id.*

128. Fla. Stat. Ann. § 775.082 (West 2018).

129. *Id.*

Section 921.0026 is Florida's "Mitigating circumstances" statute. It applies to all felony offenses—aside from capital felonies — committed on or after the Code came into effect on October 1, 1998.¹³⁰ While felony degrees correspond with maximum sentences, a points calculation system determines the lowest permissible sentence. Under section 921.0026, a downward departure from that minimum sentence is "prohibited unless there are [mitigating] circumstances or factors that reasonably justify" it.¹³¹ The statute details fourteen mitigating circumstances, such as a defendant's minor role in the offense, impaired intellectual capacity, cooperation with police, and age.¹³² Aside from certain nonviolent felonies, the statute explicitly forbids a defendant's substance abuse or addiction, including intoxication at the time of the offense, as mitigating factors under any circumstance.¹³³ Neglect and abuse are not listed as mitigating factors in section 921.0026.

An examination of Florida caselaw shows that courts analyze neglect and abuse as mitigating factors *only* in capital punishment cases. This is likely attributable to neglect and abuse not being among the mitigating factors explicitly outlined in section 921.006, and thus courts are effectively instructed to disregard them at non-capital sentencing proceedings. As for capital murder cases, when a defendant's conduct was not significantly influenced by his youth, his own childhood abuse will not necessarily constitute a mitigating circumstance.¹³⁴

Similar to courts in Texas, appellate courts in Florida cases sometimes view childhood neglect or abuse as mitigating enough to warrant reconsidering a death sentence, and other times do not. In *Morton v. State*, the Florida Supreme Court upheld the defendant's death sentence.¹³⁵ The court ruled that the trial court did not abuse its discretion in ascribing little weight to the defendant's abusive childhood because he was nineteen at the time of the crime and his experience of abuse had stopped when he was eight; he had a substitute stable father figure growing up after his mother divorced her abusive alcoholic husband and remarried; and there was no evidence that the defendant's childhood experiences diminished his ability to know right from wrong.¹³⁶ In *Campbell v. State*, however, the Florida Supreme Court held that the rejection of the defendant's deprived and abusive childhood as a mitigating factor was in error when the record revealed such extreme abuse at the hands of his parents

130. Fla. Stat. Ann. § 921.0026 (West 2018).

131. *Id.*

132. *Id.* at (2)(a)-(n).

133. *Id.* at (3).

134. *Lara v. State*, 464 So. 2d 1173 (Fla. 1985).

135. 789 So. 2d 324, 332 (Fla. 2001).

136. *Id.*; see also *Douglas v. State*, 878 S. 2d 1246 (Fla. 2004) (finding that the trial court did not err in assigning little mitigation weight to defendant's abusive childhood, given that abuse ended when defendant was nine or ten and followed by his mother's long-term relationship with two men who were kind and not abusive at all to defendant, and given that many witnesses testified that the defendant had a supportive, close-knit family).

that he was permanently removed from their home.¹³⁷ The court ruled similarly in *Elledge v. State*, finding that undisputed evidence that the defendant's alcoholic mother beat him regularly for no apparent reason during his childhood for up to fifteen minutes at a time until she "drew blood" constituted a non-statutory mitigating factor.¹³⁸

The Criminal Punishment Code regulates sentencing in Florida. The Code, implemented in 1998, signifies a shift towards a stricter approach to punishment. It allows judges more discretion in upward sentencing, as well as builds in increased penalties and lowers mandatory thresholds for incarceration. Felonies are categorized by degree, and judges have wide discretion at sentencing within those degrees. Florida's section 921.0026 is the state's "Mitigating circumstances" statute, but neglect and abuse are not listed. Neglect and abuse as potential non-statutory mitigating factors seem to arise exclusively in capital punishment cases. Courts land on both sides of the issue, as their analyses are very specific to individual cases and defendants.

F. *Summary of the U.S. Approach*

Thus, there is no consistent approach to the manner in which childhood abuse is treated by sentencing courts in the U.S. The fact that it is not designated by statute in any of the surveyed jurisdictions suggests that it is not deemed a compelling consideration – certainly by legislators. This is echoed in the case law. In two of the largest states (Texas and Florida), childhood abuse is effectively only applicable in relation to capital cases and, when it is raised, it normally does not operate to reduce the penalty. In the other jurisdictions discussed above, while the courts at times raise childhood abuse as an express mitigating factor, it generally appears to be attributed little weight, given that it rarely serves to produce a lower penalty.

The reason why offenders who have been subjected to abuse as children rarely seem to receive lower penalties is unclear. A plausible reason is that this stems from the perfunctory manner in which the issue is dealt with at the sentencing stage. It emerges from the above cases that the courts have not undertaken a considered jurisprudential analysis of the basis for childhood abuse as a possible mitigating factor. This necessarily undermines the doctrinal persuasiveness of the consideration and its capacity to influence significantly the outcome of sentencing cases. In the next Part of this Article we undertake a normative and jurisprudential analysis of childhood abuse as a possible mitigating factor.

We now examine the possible normative, jurisprudential and empirical bases for treating childhood physical and sexual abuse as a mitigating consideration, but also explain why childhood neglect alone should not reduce penalty.

137. 571 So. 2d 415, 419 (Fla. 1990).

138. *Elledge v. State*, 613 So. 2d 434, 436 (Fla. 1993).

II. REASONS FOR TREATING CHILDHOOD PHYSICAL AND SEXUAL ABUSE (BUT NOT THE CONCEPT OF CHILDHOOD NEGLECT) AS A MITIGATING FACTOR

There is no definitive answer to the question of how experiences of childhood neglect should be treated in the sentencing calculus, and there are three main arguments against it being factored into it at all. The first is that it would potentially make the law too obscure. The second reason for not conferring a sentencing discount for an offender's neglected upbringing is that it may result in the reality, or at least the perception, that certain people have a license to commit criminal offenses. Third, even if sound normative arguments did exist for conferring a discount on offenders who have experienced childhood neglect, their weight would diminish if community safety was compromised as a consequence of providing penalty discounts to this cohort of offenders.

The first argument is compelling, but it can be negated if specific forms of child abuse are designated as constituting a mitigating factor. The second and third reasons are not persuasive and we discuss them in Part IV of the Article, as our response to them is intertwined with reasons in support of mitigating penalty in cases of particular forms of childhood abuse. We now consider the first reason at some length.

A. *Childhood Neglect is an Obscure Concept*

Sentencing is the area of law where the community acts in its most coercive manner, impinging on fundamental human interests in the form of liberty and financial resources and, in extreme cases, exterminating the lives of offenders. In this forum, it is vitally important that rule of law virtues, including consistency and transparency, are observed.¹³⁹ Concepts that are relied upon to reach sentences must be clear and precise. Arguably, however, the concept of childhood neglect is too inexact for sentencing purposes. Neglect can arguably arise in an infinite array of circumstances, ranging from a failure or refusal to accede to an individual's preferences to a deliberate decision not to provide a vulnerable person with the necessities of life. There is no clear demarcation between appropriate and inappropriate parenting. Further, as childhood is generally regarded as lasting for approximately eighteen years, it is not feasible for courts to evaluate accurately and consistently the quality of an offender's upbringing given the enormous number of activities and events that occur during such a long time period.

People's childhoods are often described in terms such as "good" and "bad." No clear definitions are attributed to these terms, but it is generally understood

139. See generally, JOEL FINNIS, NATURAL LAW AND NATURAL RIGHTS 270-76 (1980); JOSEPH RAZ, THE AUTHORITY OF LAW 214-16 (1979); H. L. A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013). But see Geoffrey C. Shaw, *H. L. A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666 (2013).

that a good upbringing means that the child has been raised in a caring, supportive environment where there has been an attempt to develop the child's potential and capability. A bad childhood is usually regarded as one in which the child's interests and flourishing have not been promoted or developed. This is often coupled with other extremely negative experiences. These descriptions of neglectful and non-neglectful upbringings have some meaning, but are too broad to constitute legal standards. Moreover, a court cannot undertake a thorough analysis of an individual's upbringing to determine its quality; the subjectivity and approximation involved in such an assessment would simply be too high. Indeed, the vagueness of the concept of a neglected childhood was one of the key reasons for the U.S. Sentencing Commission rejecting childhood neglect as a mitigating factor. Evans noted that, according to then Chair of the Commission, William W. Wilkins, Jr., and General Counsel John Steer, the Commission criticized the Ninth Circuit's decision in *Floyd* on the basis that the "label" of "lack of youthful guidance, amorphous as it is, potentially could be applied to an extremely large number of cases prosecuted in federal court, thereby permitting judges wide discretion to impose virtually any sentence they deemed appropriate (within or below the guidelines)."¹⁴⁰

Notwithstanding the obscurity of the general concept of a neglected childhood, it is possible to identify two specific traumatic childhood events clearly and precisely – namely, physical abuse and sexual abuse – that would be appropriate to mitigate penalty in cases where offenders have experienced them. Both of these aspects of some people's upbringing are more definitive *and* relevant from the criminogenic perspective than neglect generally. Childhood physical and sexual abuse can be highly relevant because empirical evidence shows that: (i) traumatic events that occur in childhood can have greater impact on individuals who experience them than those that occur to them later in life; and (ii) there is a link between childhood physical and sexual abuse and a predisposition towards irresponsible and often criminal behaviour in later life.¹⁴¹ We now discuss in greater detail the nature of these traumatic events that could potentially mitigate penalty.

140. William Wilkins & John Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 84 (1993) (citing *United States v. Floyd*, 956 F.2d 203 (9th Cir. 1991)).

141. See, e.g., STEVEN BOX, RECESSION, CRIME AND PUNISHMENT 96–97 (1987) (discussing research on criminal behavior indicating that weak social bonds and income inequality are strongly related to criminal activity); Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 499 (2013) (discussing the impact of poverty on one's mental state and arguing that this should be an equivalent defense to insanity).

B. *Childhood Physical and Sexual Abuse Can Be Defined for the Purpose of Mitigation, and Research Substantiates the Link Between Children's Experience of Sexual and Physical Abuse and Their Subsequent Criminal Offending*

1. *Defining Sexual Abuse and Physical Abuse*

Researchers recognize various forms of child abuse that can traumatize their victims, including emotional abuse, psychological abuse, neglect, sexual abuse and physical abuse.¹⁴² The concepts of emotional and psychological abuse are extremely broad. There is no established and validated approach that should be adopted to cater for a child's emotional and psychological needs and hence these concepts are not able to be defined with sufficient specificity or clarity for the purpose of gaining expression in the law. "Neglect cases" have encompassed matters in which "the parents' deficiencies in child care were beyond those found acceptable by community and professional standards at the time. These cases represent extreme failure to provide adequate food, clothing, shelter, and medical attention to the child."¹⁴³ Notwithstanding this description, the concept of neglect is indeterminate and reducing the severity of a sentence due to an offender's experience of childhood neglect might be perceived as legitimizing his or her offending. Concepts such as standards "acceptable by community" and "professional standards at the time" are at best convenient sounding descriptors, which are devoid of substantive content.

By contrast, it is possible to develop definitions of sexual abuse and physical abuse that clearly indicate the nature of their impact on the victims and their potential to diminish the victims' culpability for offending as adults. It would be a straightforward matter to translate these definitions into mitigating factors.

Sexual abuse cases can incorporate different charges ranging from "assault and battery with intent to gratify sexual desires" to "fondling or touching in an obscene manner," sodomy, and incest.¹⁴⁴ Yet, regardless of the specific charges, any experience of sexual abuse as a child should reduce the severity of the sentence that the victim receives. No child should ever be subjected to sexual activity and there is no acceptable level of sexual activity that is appropriate for children. All forms of child sexual abuse are unequivocally reprehensible.

For the purpose of developing a mitigating factor for childhood physical abuse, it would be necessary to construct a definition of this concept that indicates the conduct that would exceed current lawful discipline of children

142. Teresa Goddard & Julie Ann Pooley, *The Impact of Childhood Abuse on Adult Male Prisoners: A Systematic Review*, J. POLICE CRIM. PSYCHOL. (2018).

143. Cathy Spatz Widom & M. Ashley Ames, *Criminal Consequences of Childhood Sexual Victimization*, 18 CHILD ABUSE AND NEGLECT 303, 308 (1994).

144. *Id.* at 307.

through physical means. At present, U.S. states permit parents and teachers to use discipline methods that cause children physical pain or discomfort; to attempt to modify or punish behavior, they can spank, slap, smack, or hit children on the buttocks and other parts of their bodies, including with objects, such as a belt or wooden paddle.¹⁴⁵

In most U.S. states, however, adults can be charged with “child abuse,” including if their discipline of children by physical means exceeds that which is deemed lawful.¹⁴⁶ At present, the distinction between lawful physical punishment and physical abuse is not always clear, particularly because lawful or reasonable chastisement is a defense to a charge of child abuse.¹⁴⁷ For instance, section 273(d) of the California Penal Code provides that “any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition is guilty of a felony,” but parents can claim the defense of “reasonable parental discipline.”¹⁴⁸ CALJIC 4.80 states:

It is lawful for a parent reasonably to discipline a child, and in doing so to administer reasonable punishment. . . . However, it is unlawful for a parent to inflict unjustifiable punishment upon a child. Corporal punishment is not justified and is therefore unlawful if the punishment was not reasonably necessary, or was excessive, under the circumstances.¹⁴⁹

Whether punishment is “reasonably necessary” or “excessive” is obviously open to varied interpretations. Notwithstanding this lack of clarity, it is possible to develop a definition of child physical abuse that falls outside the bounds of lawful or reasonable chastisement and can mitigate sentence. For the purpose of sentencing, penalties could be reduced if the offender experienced physical abuse as a child that caused him or her serious physical injury, such as “bruises, welts, burns, abrasions, lacerations, wounds, cuts, bones and skull fractures,”¹⁵⁰ as this would encompass circumstances in which an adult “knowingly and

145. MURRAY A. STRAUS ET AL., *THE PRIMORDIAL VIOLENCE: SPANKING CHILDREN, PSYCHOLOGICAL DEVELOPMENT, VIOLENCE, AND CRIME* 3-4 (2014); Andrew Rowland et al., *Physical Punishment of Children: Time to End the Defense of Reasonable Chastisement in the UK, USA and Australia*, 25 INT’L J. CHILD. RTS. 165, 167-68, 183 (2017); Child Maltreatment and Violence Committee, *Policy Statement on Corporal Punishment*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Nov. 1, 2018), https://dev.aacap.org/AACAP/Policy_Statements/2012/Policy_Statement_on_Corporal_Punishment.aspx. In certain districts in Texas, upon enrolling their children to school, parents are asked whether they consent to their children being punished physically. Rowland, at 176, 184.

146. Straus, *supra* note 145, at 6.

147. *Id.*; see also Michael Freeman & Bernadette J Saunders, *Can We Conquer Child Abuse if We Don’t Outlaw Physical Chastisement of Children?*, 22 INT’L J. OF CHILD. RTS. 681, 690-92 (2014).

148. Neil Shouse, *Spanking Your Child: Is It Criminal Child Abuse in Oakland, California?*, SHOUSE CAL. LAW GROUP BLOG (Mar. 23, 2016), <https://www.shouselaw.com/spanking-your-child-is-it-criminal-child-abuse-in-oakland-california>.

149. *Id.*

150. Widom & Ames, *supra* note 143, at 308. See also Straus, *supra* note 145, at 3-4; Freeman & Saunders, *supra* note 147, at 684, (quoting MURRAY A. STRAUS, *BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES* 4 (1994)).

willfully inflicted unnecessarily severe corporal punishment” or “unnecessary physical suffering” on a child.¹⁵¹ Importantly, this definition would be consonant with current cultural and social standards. While physical punishment of children (also described as “corporal punishment”) is not unanimously endorsed in the U.S.—indeed the American Academy of Child and Adolescent Psychiatry “does not support” it¹⁵²—a very high number of American parents continue to use it and consider it does no harm.¹⁵³ Nevertheless, it is likely that there would be ready agreement across society that punishment that causes serious physical injury to children is unacceptable.

It is therefore tenable to identify episodes of childhood sexual and physical abuse in a relatively clear-cut manner. This is especially relevant in the sentencing context because, as noted above, empirical evidence shows that there is a connection between trauma of this nature and the victims’ subsequent commission of crimes as adolescents and adults.

In the next sub-section, we examine general trends in research that have confirmed the link between children’s experience of sexual and physical abuse and their subsequent offending, as well as some theories that have been developed to explain this connection. We then discuss examples of significant studies in this area and their findings.

2. *Research Concerning the Link Between Childhood Abuse and Criminal Offending*

An individual’s experiences, and especially those that take place early in life, can have a profound impact on the decisions and choices they make, and on their actions. In the early 1960s, the medical profession began to raise concerns about the prevalence of “battered child syndrome,” that is, children suffering injuries caused by beatings, which were often inflicted by their parents.¹⁵⁴ At this time, George C. Curtis, professor of psychiatry, postulated that, in response to these experiences, child victims might “become tomorrow’s ... perpetrators of other crimes of violence.”¹⁵⁵

Since then, the notion that “yesterday’s victims become tomorrow’s offenders and perpetrators of violence”¹⁵⁶ has metamorphosed into “one of the most influential conceptual models for antisocial behavior in the social and

151. Michael G Maxfield & Cathy Spatz Widom, *The Cycle of Violence Revisited 6 Years Later*, 150 ARCHIVES PEDIATRICS & ADOLESCENT MED. 390, 391 (1996).

152. Child Maltreatment and Violence Committee, *supra* note 145.

153. Straus, *supra* note 145, at 4, 7; Freeman & Saunders, *supra* note 147, at 684; Rowland, *supra* note 145, at 172, 183.

154. George C. Curtis, *Violence Breeds Violence – Perhaps?*, 120 AM. J. PSYCHIATRY 386, 386 (1963); Topitzes et al., *supra* note 5, at 2323.

155. Curtis, *supra* note 154, at 386.

156. Maxfield & Widom, *supra* note 151, at 395.

behavioral sciences”: the “cycle of violence.”¹⁵⁷ According to this hypothesis, “violence begets violence”;¹⁵⁸ children’s experience of abuse increases their risk of engaging in criminal offending, including violence, later in life.¹⁵⁹

Extensive research has been conducted to test the hypothesis that there is a connection between children’s experience of physical and sexual abuse (in addition to other forms of maltreatment, including emotional abuse, psychological abuse and neglect) and their subsequent commission of crimes as adolescents and adults.¹⁶⁰ Many empirical studies—withstanding differences between them in their designs, methodologies and means of assessment, and the samples and data on which they relied—have found that individuals’ experiences during childhood of physical and sexual abuse are a key risk factor for and increase the likelihood of them offending in later life.¹⁶¹

Some of that research (and especially earlier studies) has been criticized for lacking “methodological rigor.”¹⁶² Specifically, it has been contended that results of studies that rely heavily on data that is self-reported and retrospective (that is, offenders inform the researchers about their past experiences) can be unreliable due to the exigencies of memory; people may forget past incidents and/or reconstruct them incorrectly and inconsistently.¹⁶³ Offenders could fabricate information about their childhood victimization if they assume that it will lessen the severity of their sentences.¹⁶⁴ Results of such studies may be biased for other reasons, such as that males tend not to underreport the full extent of childhood abuse,¹⁶⁵ and because the data is “collected at [only] one point in time.”¹⁶⁶ Nevertheless, the validity of studies that rely on this methodology has been defended on the basis that self-reported data is

157. Matthew DeLisi et al., *Does Childhood Sexual Abuse Victimization Translate Into Juvenile Sexual Offending?: New Evidence*, 29 VIOLENCE & VICTIMS 620, 620 (2014).

158. Cathy Spatz Widom, *The Cycle of Violence*, 244 SCIENCE 160, 160 (1989).

159. DeLisi et al., *supra* note 157, at 620-21; CATHY SPATZ WIDOM & MICHAEL G MAXFIELD, AN UPDATE ON THE “CYCLE OF VIOLENCE”, NAT’L INST. OF JUSTICE 1 (2001), <https://www.ncjrs.gov/pdffiles1/nij/184894.pdf>.

160. Goddard & Pooley, *supra* note 142; Topitzes et al., *supra* note 5, at 2323; Widom, *supra* note 158.

161. Kathryn H. Howell et al., *The Relationship Between Types of Childhood Victimization and Young Adulthood Criminality*, 27 CRIM. BEHAV. & MENTAL HEALTH 341, 342 (2017); Joshua P. Mersky & Arthur J. Reynolds, *Child Maltreatment and Violent Delinquency: Disentangling Main Effects and Subgroup Effects*, 12 CHILD MALTREATMENT 246, 246 (2007); Widom, *supra* note 1, at 187-88, 194.

162. Mersky & Reynolds, *supra* note 161, at 246.

163. Cathy Spatz Widom, *Child Abuse, Neglect, and Violent Criminal Behavior*, 27(2) CRIMINOLOGY 251, 253 (1989); Nicole Trauffer & Cathy Spatz Widom, *Child Abuse and Neglect, and Psychiatric Disorders in Nonviolent and Violent Female Offenders*, 4 VIOLENCE & GENDER 137, 138 (2017); Widom & Ames, *supra* note 143, at 304.

164. Widom, *supra* note 163, at 253.

165. Topitzes et al., *supra* note 5, at 2324.

166. Widom & Ames, *supra* note 143, at 305.

commonly used in criminology and has been proven to be reliable.¹⁶⁷ Further, these studies' reliability purportedly increases when they focus on severe abuse and accumulate data while the subjects are still young and thus not too far removed temporally from their experiences of victimization.¹⁶⁸

In fact, a greater problem plagues studies that rely on clinical samples without matching them with data obtained from comparison or "control groups."¹⁶⁹ It is critical that this research matches abused people with non-abused individuals and that it takes into account variables such as familial, socio-economic and other demographic characteristics, as well as "base rates—from the same population of people in the same time period."¹⁷⁰

In any event, several significant longitudinal, prospective studies, which have used control groups, have yielded the same results as the bulk of research that deploys other methodologies.¹⁷¹ For those studies, researchers collected data at different intervals over a substantial period of time about individuals who experienced child abuse and also about a control group that had not been abused and was matched to the victims in age, sex, race and socio-economic background.¹⁷² This research confirmed a clear association between childhood abuse and the victims' criminal behavior in adolescence and adulthood.¹⁷³

In 1989, Cathy Spatz Widom, one of the foremost researchers in this field, reported on a prospective, longitudinal study of a large sample of victims of child abuse and neglect whose cases had been heard in courts in a metropolitan county in the Midwest between 1967 and 1971.¹⁷⁴ This sample was matched with a control group of individuals who had not been abused, and demographic variables, including age, sex and race, were kept constant.¹⁷⁵ The study found that the abused children were more likely than the control group to be arrested as juveniles (26% compared with 17%), had more arrests as adults for non-traffic offenses (29% compared with 21%), and had more arrests for violent offenses (11% compared with 8%).¹⁷⁶

Using data from that study, Timothy Ireland and Widom subsequently found that "child abuse and/or neglect is a statistically significant predictor of

167. Violeta Misheva et al., *The Effect of Child Maltreatment on Illegal and Problematic Behaviour: New Evidence on the "Cycle of Violence" Using Twins Data*, 30 J. POPULATION ECON. 1035, 1046 (2017).

168. *Id.* at 1042.

169. Maxfield & Widom, *supra* note 151, at 392; Widom, *supra* note 163, at 253.

170. Widom, *supra* note 163, at 253; Widom & Ames, *supra* note 143, at 305.

171. Widom, *supra* note 158, at 187-88.

172. *See, e.g.*, Maxfield & Widom, *supra* note 151, at 390; Widom, *supra* note 158, at 161.

173. *See, e.g.*, Hyunzee Jung et al., *Gendered Pathways from Child Abuse to Adult Crime Through Internalizing and Externalizing Behaviors in Childhood and Adolescence*, 32 J. INTERPERSONAL VIOLENCE 2724, 2726 (2017); Topitzes et al., *supra* note 5, at 2325; Widom & Maxfield, *supra* note 159, at 1.

174. Widom, *supra* note 158, at 161.

175. *Id.* at 162.

176. *Id.*

having at least one alcohol and/or drug [-related offense] arrest in adulthood” (though not in adolescence).¹⁷⁷ Specifically, they concluded, “there is a 39% increase in the odds of being arrested for an alcohol- or drug-related offense in adulthood for abused and neglected children in comparison to controls.”¹⁷⁸

Widom cautioned in 1989 that, while her study demonstrated that individuals who suffered child abuse had a significantly higher risk of subsequent criminal offending than those who had not been victimised, a large proportion of the abused people did not ultimately offend.¹⁷⁹ Nevertheless, Widom varied her conclusion in a follow-up study of the same sample that she conducted together with Michael Maxfield six years later, in 1994 when the 1,575 subjects (908 were victims of child abuse and 667 individuals comprised the control group) had reached an average age of 32.5 years.¹⁸⁰ Additional arrest data had been accumulated by this point and the number of victims of child abuse who had engaged in criminal activity had grown.¹⁸¹ By this time, close to half of the individuals who had experienced child abuse and neglect had been arrested for non-traffic offenses and almost two-thirds of the abused and neglected male and African American subjects had been arrested as juveniles or adults.¹⁸²

This later research thus confirmed that childhood abuse can continue to have an impact on the victims’ criminal offending beyond adolescence and early adulthood.¹⁸³ These studies concluded that “being abused or neglected as a child increased the likelihood of arrest as a juvenile by 59 percent, as an adult by 28 percent, and for a violent crime by 30 percent.”¹⁸⁴

Diana English, Widom and Carol Brandford replicated and extended these earlier studies by using a different sample of people in a different time period.¹⁸⁵ They reported in 2002 that “as a whole the abused and neglected youth were 11 times more likely to be arrested for a violent crime as a juvenile (8.8% versus 0.8%), 2.7 times more likely to be arrested for a violent crime as an adult (23% versus 8.7%), and 3.1 times as likely to be arrested for any (adult

177. Timothy Ireland & Cathy Spatz Widom, *Childhood Victimization and Risk for Alcohol and Drug Arrests*, 29 INT’L J. ADDICTIONS 235, 247, 241-42 (1994).

178. *Id.* at 247-48.

179. Widom, *supra* note 158, at 164.

180. Widom & Maxfield, *supra* note 159, at 1.

181. *Id.*; Maxfield & Widom, *supra* note 151, at 392-93.

182. Maxfield & Widom, *supra* note 151, at 392.

183. *Id.* at 394.

184. Widom & Maxfield, *supra* note 159, at 1; *see also* Widom, *supra* note 158, at 187 (“[T]hese findings indicated that being abused and neglected as a child increased the likelihood of arrest as a juvenile by 53%, as an adult by 38%, and for a violent crime by 38%, but that the majority did not become criminal.”).

185. DIANA J. ENGLISH ET AL., CHILDHOOD VICTIMIZATION AND DELINQUENCY, ADULT CRIMINALITY, AND VIOLENT CRIMINAL BEHAVIOR: A REPLICATION AND EXTENSION 5-6 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/192291.pdf>.

or juvenile) violent crime (27.1% versus 8.9%), compared to the matched control group.”¹⁸⁶

Another important study that substantiated the cycle of violence hypothesis was conducted by Joshua Mersky and Arthur Reynolds using prospective data from the Chicago Longitudinal Study.¹⁸⁷ This was an ongoing investigation of administrative data and prospectively administered child, parent, teacher and self-reports in relation to a large sample of individuals, most of whom were African American and some of whom were Hispanic, who were born in 1979 and 1980, and came from an economically-disadvantaged background in metropolitan Chicago.¹⁸⁸ In 2007, Mersky and Reynolds reported that the abused children ultimately committed violent offenses at a significantly higher rate than the individuals who had not experienced child abuse.¹⁸⁹ They also tentatively found that abused children who came from backgrounds that were poor for long periods of time had a higher risk of arrest for violent offenses than abused children who came from families that were either wealthier or endured shorter periods of economic difficulties.¹⁹⁰

Also relying on prospectively accumulated data from the Chicago Longitudinal Study, James Topitzes, Mersky and Reynolds reported in 2012 that, in most cases, individuals who were abused as children “were more than twice as likely as their nonmaltreated counterparts to have any recorded violent offense,” and “significantly more likely to be convicted of one or more adult nonviolent (4.53% vs. 1.80% ...) or violent (7.33% vs. 2.86% ...) weapons charges.”¹⁹¹ Further, “maltreatment significantly increased the risk of committing any verifiable violent offense in adolescence or adulthood (29.22% vs. 13.58% ...) or across both adolescence and adulthood (5.4% vs. 1.44% ...).”¹⁹²

More recently, Violeta Misheva, Dinand Webbink and Nicholas Martin examined retrospective self-report data from Australian twins aged between 24 and 36.¹⁹³ In 2017, they reported that childhood physical and sexual abuse significantly increased illegal behavior.¹⁹⁴ From their narrative synthesis of recent literature that has investigated the effect of child abuse on adult males who commit criminal offenses, in 2018, Teresa Goddard and Julie Ann Pooley concluded, “prisoners abused in childhood had an increased likelihood to report engaging in violent offending in adulthood,” and “physical abuse and sexual abuse were significantly related to violent crime.”¹⁹⁵

186. *Id.* at 33-34.

187. Mersky & Reynolds, *supra* note 161, at 247, 253.

188. *Id.* at 248; Topitzes et al., *supra* note 5, at 2322, 2325.

189. Mersky & Reynolds, *supra* note 161, at 253-4.

190. *Id.* at 255.

191. Topitzes et al., *supra* note 5, at 2334, 2338.

192. *Id.* at 2334.

193. Misheva et al., *supra* note 167, at 1036.

194. *Id.* at 1038, 1055, 1064.

195. Goddard & Pooley, *supra* note 142.

It is important to acknowledge that children's experience of abuse does not always and inevitably lead to them offending.¹⁹⁶ Individuals respond to trauma differently from one another and may have other life experiences that affect the impact of the abuse on them.¹⁹⁷ Nevertheless, in general, research has found that childhood abuse remains a major risk factor for subsequent criminality even if other matters, including unemployment and drug abuse, also contribute to individuals' likelihood of offending.¹⁹⁸ People who have experienced child abuse can be more likely to offend than those who are not victims of such trauma.¹⁹⁹ Studies have also found that, even if individuals' experience of abuse as children may not initially appear to have had an effect on them, its impact can manifest later in adulthood.²⁰⁰ For instance, in 2008, Stephen Cernkovich, Nadine Lanctot and Peggy Giordano published findings of their longitudinal study of a sample of females who had experienced physical and sexual abuse during childhood, that this trauma did not predict antisocial behavior when the subjects were adolescents, but it had a "substantial, lagged effect" and did predict their criminality in adulthood.²⁰¹

3. *Possible Reasons for the Link Between Child Abuse and Adolescent and Adult Criminal Offending*

While empirical research has clearly established that there is a connection between child abuse and adolescent and adult criminality, the reasons for this link are not as patent. Curtis postulated that victims of child abuse might become violent adults because, as a consequence of their experiences, they "have an unusual degree of hostility toward ... the world".²⁰² Still today, the precise causes of the connection between child sexual and physical abuse and the victims' subsequent criminal offending remain contentious and various theories have been proffered to explain it,²⁰³ including cognitive behavioral, psychodynamic and family system theories.²⁰⁴ The most prominent of those theories are three psychological theories: "Social Control Theory"; "Social Learning Theory"; and "General Strain or Social-Psychological Strain Theory".²⁰⁵

196. Widom, *supra* note 158, at 193, 196.

197. Stephen A Cernkovich et al., *Predicting Adolescent and Adult Antisocial Behavior Among Adjudicated Delinquent Females*, 54 CRIME AND DELINQ. 3, 25 (2008); Widom, *supra* note 158, at 160.

198. Currie & Tekin, *supra* note 5, at 533; Widom, *supra* note 158, at 187; Howell et al., *supra* note 161, at 349.

199. Howell et al., *supra* note 161, at 342.

200. Widom, *supra* note 158, at 195-96.

201. Cernkovich et al., *supra* note 197, at 23, 26.

202. Curtis, *supra* note 154, at 386.

203. Widom, *supra* note 158, at 188.

204. Goddard & Pooley, *supra* note 142, at 7.

205. Currie & Tekin, *supra* note 5, at 511; Topitzes et al., *supra* note 5, at 2323.

According to Social Control Theory, people are inherently inclined towards antisocial behavior, but strong social bonds with parents and conventional peers, and involvement in conventional activities at home, school and with peers, discourage them from engaging in it.²⁰⁶ Childhood abuse disrupts the usual social bonds that promote prosocial behavior, however, which increases the risk that the victims will pursue their “natural impulses” and offend in adolescence and adulthood.²⁰⁷

Social Learning Theory, which is frequently used to explain the cycle of violence, posits that victims of child abuse observe, learn from, imitate and model their own behavior on adults’ violence that they have experienced.²⁰⁸ These victims do so because they internalise understandings that aggression and violence are appropriate and useful means of achieving objectives, resolving conflict and responding to stress.²⁰⁹

Proponents of General Strain or Social-Psychological Strain Theory maintain that child abuse causes strain or stress for the victims, which is a “noxious” stimulant that creates developmental problems and changes to brain functioning that ultimately lead to antisocial, aggressive behaviour, as this conduct “dissipates the negative emotionality” relating to the abuse.²¹⁰

Other theories similarly suggest that childhood abuse detrimentally affects the development of victims’ “social-cognitive processes” and brains, which increases their risk of engaging in criminal offending, including violence, later in life.²¹¹ Clinical literature concerning child sexual abuse proposes that this trauma in particular “results in complex mental health problems that profoundly affect self-regulation, healthy attachments, and cognitive and neurological development.”²¹²

The differences between explanations that have been posited for the connection between childhood abuse and subsequent criminality do not reduce the significance of this link. Indeed, notwithstanding these variances, the extensive empirical research confirming the existence of the connection is sufficient to justify recognizing that the culpability of an offender who suffered some childhood trauma is diminished as a consequence of this experience.

206. Currie & Tekin, *supra* note 5, at 511; Cernkovich et al., *supra* note 197, at 6.

207. Misheva et al., *supra* note 167, at 1039; Currie & Tekin, *supra* note 5, at 511.

208. Currie & Tekin, *supra* note 5, at 511; Misheva et al., *supra* note 167, at 1039.

209. Misheva et al., *supra* note 167, at 1039; Widom, *supra* note 158, at 186.

210. Cernkovich et al., *supra* note 197, at 8, 23; Topitzes et al., *supra* note 5, at 2328; Currie & Tekin, *supra* note 5, at 511.

211. Misheva et al., *supra* note 167, at 1039; Baron-Evans & Coffin, *supra* note 38, at 80–84 (citing Debra Niehoff, *Ties that Bind: Family Relationships, Biology, and the Law*, 56 DEPAUL L. REV. 799, 847 (2007)).

212. MARY STATHOPOULOS & ANTONIA QUADARA, CORRECTIVE SERVS. NSW WOMEN’S ADVISORY COUNCIL, WOMEN AS OFFENDERS, WOMEN AS VICTIMS: THE ROLE OF CORRECTIONS IN SUPPORTING WOMEN WITH HISTORIES OF SEXUAL ABUSE 4-5 (2014) (internal citations omitted).

As noted above, researchers have recommended examining the ecological context in which children suffer abuse on the basis that other life experiences and risk factors can interact with the effects of childhood trauma and also lead to the victims engaging in crime.²¹³

4. *Discussion of Studies Investigating Whether Childhood Sexual Abuse and Physical Abuse Have Specific and Different Effects From One Another on Subsequent Offending*

We maintain that childhood experience of trauma reduces offenders' culpability regardless of whether the abuse was physical and/or sexual. Although there have been varied research findings regarding the respective impact of these forms of violence, this evidence has confirmed that both can be connected with the victims' subsequent criminal offending.

According to Janet Currie and Erdal Tekin, many victims of maltreatment experience both physical and sexual abuse; they found that "sexual abuse is three times ... higher among those who also experienced physical abuse ... than those who did not experience physical abuse."²¹⁴ They also reported in 2012 that, if an individual experiences more than one form of abuse, their risk of offending increases, perhaps because the maltreatment is more severe.²¹⁵ Other researchers have explicitly considered whether childhood sexual abuse and physical abuse have specific and different effects from one another on victims' later criminal offending.²¹⁶ Some of the evidence is inconsistent on this point. For instance, it has often been assumed that child victims of sexual abuse have a particular risk of subsequently committing sex offenses.²¹⁷ Many of the studies in which Widom has been involved have nonetheless found that most children who are sexually abused do not become sex offenders, and most sex offenders were not sexually abused as children.²¹⁸ Yet other research has found a strong connection between childhood sex abuse and subsequent sexual offending.²¹⁹

In 1994, Widom and M. Ashley Ames reported on their study that compared the impact of child sexual abuse and physical abuse (and neglect) on

213. Mersky & Reynolds, *supra* note 161, at 247; Widom, *supra* note 1, at 194-95.

214. Currie & Tekin, *supra* note 5, at 529.

215. *Id.* at 529, 535.

216. Widom & Ames, *supra* note 143, at 305.

217. Cathy Spatz Widom & Christina Massey, *A Prospective Examination of Whether Childhood Sexual Abuse Predicts Subsequent Sexual Offending*, 169 JAMA PEDIATRICS 1, 2 (2015).

218. Widom, *supra* note 158, at 191, 196.

219. Goddard & Pooley, *supra* note 142 (citing Marie Connolly & Richard Woollons, *Childhood Sexual Experience and Adult Offending: An Exploratory Comparison of Three Criminal Groups*, 17 CHILD ABUSE REV. 119 (2008) and Lorraine E Cuadra et al., *Child Maltreatment and Adult Criminal Behavior: Does Criminal Thinking Explain the Association?* 38 CHILD ABUSE NEGL. 1399 (2014)); DeLisi et al., *supra* note 157, at 629.

subsequent offending.²²⁰ They compared the official criminal histories of a large sample of victims of childhood sexual abuse with cases of physical abuse and neglect, and with a control group, which had matching characteristics and had not been abused.²²¹ They found that physically abused and sexually abused children were at similar risk to one another of later arrest as juveniles and adults.²²² Most of the male and female individuals in their study who had been sexually abused as children did not have an “official criminal history,” which led Widom and Ames to conclude, “while it is clear that individuals who were sexually abused in childhood are at increased risk of arrests as juveniles and adults, many do not become delinquents or adult criminals.”²²³ Widom and Ames also found that individuals who had been physically abused as children had the greatest likelihood of a subsequent arrest for violence and for sex crimes, including violent sex crimes, while childhood sex abuse victims were more likely to be arrested in later life for prostitution than physically abused children.²²⁴

Widom and Christina Massey conducted a follow up of Widom and Ames’ study, when the subjects were at an average age of fifty-one years, which confirmed their earlier findings.²²⁵ They reported in 2015 that, generally, children who were abused were more likely to be arrested for a sex offense than those who had not been abused.²²⁶ Yet males who had been victims of physical abuse had an increased risk of arrest for sexual offenses, but having a history of childhood sexual abuse did not significantly raise this risk.²²⁷

Maxfield and Widom’s earlier study had found that victims of child physical abuse were more likely than victims of sexual abuse to be arrested subsequently for violent offenses.²²⁸ This conclusion was consistent with Widom’s report in 1989 that child victims of physical abuse had the highest level of arrests for violent criminal behavior.²²⁹ Maxfield and Widom noted that “victims of sexual abuse were overwhelmingly female ... and females less often had a record of violent offenses” than males.²³⁰

Robin Weeks and Widom examined retrospective reports of child abuse and neglect of 301 adult male inmates of a New York State medium security

220. Widom & Ames, *supra* note 143, at 306.

221. *Id.*

222. *Id.* at 310.

223. *Id.* at 315.

224. *Id.* at 310-12, 314.

225. Widom & Massey, *supra* note 217, at 2, 4-5.

226. *Id.* at 4.

227. *Id.*

228. Maxfield & Widom, *supra* note 151, at 390, 393.

229. Widom, *supra* note 158, at 163.

230. Maxfield & Widom, *supra* note 151, at 393.

facility.²³¹ This study found that 68% of the cohort reported that they had experienced physical abuse, sexual abuse or neglect when they were under 12 years of age.²³² Weeks and Widom also found that “violent and nonviolent offenders reported similar rates of childhood physical abuse.”²³³ In addition, “about 26 percent of sex offenders reported sexual abuse, compared to violent offenders (13 percent), nonviolent offenders (18 percent), and nonsex offenders (12 percent),” but sex offenders ... reported rates of physical abuse similar to other offenders.”²³⁴

These results were reinforced by Kathryn Howell et al.’s study of 2,244 Swedish young adults who had experienced childhood abuse.²³⁵ They reported in 2016 that, whereas “physical violence ... during childhood” was “significantly associated with higher levels of criminal behaviour during young adulthood,” sexual abuse was not.²³⁶

Nevertheless, in contrast to Widom’s and Maxfield and Widom’s earlier studies, English, Widom and Brandford reported that both childhood physical abuse and sexual abuse “predicted higher rates of arrest for violence, compared to controls.”²³⁷ Currie and Tekin subsequently reported that “sexual abuse appears to have the largest effects on crime,” compared with other forms of maltreatment,²³⁸ and other researchers have found evidence reinforcing the link between childhood sexual abuse and subsequent sexual offending. Widom in fact noted in 2017 that her earlier study with Ames was “limited because of the study sample ages”, and “it is possible that” this study “showing little or no association between childhood sexual abuse and risk of arrest for sexual offenses may have underestimated the relationship because sexual offenders [can be] older than other kinds of offenders when first convicted.”²³⁹

Matthew DeLisi et al. studied data, including information collected by correctional facilities, professional and correctional staff observations, and self-report information, in relation to 2,520 male juveniles who were imprisoned in a large southern state.²⁴⁰ They reported in 2014 that childhood sexual abuse “conferred a 467% increased likelihood of sexual offending,” though it “was associated with between an 83% and an 85% *reduced* likelihood of being committed for a homicide offense and between a 68% and an 80% reduced likelihood for serious person/property offending, such as aggravated

231. Robin Weeks & Cathy Spatz Widom, *Early Childhood Victimization Among Incarcerated Adult Male Felons*, NAT’L INST. OF JUST. RES. PREVIEW 1 (1998), <https://www.ncjrs.gov/pdffiles/fs000204.pdf>.

232. *Id.*

233. *Id.*

234. *Id.*

235. Howell et al., *supra* note 161, at 344.

236. *Id.* at 349.

237. English et al., *supra* note 185, at 37-38.

238. Currie & Tekin, *supra* note 5, at 535.

239. Widom, *supra* note 158, at 190.

240. DeLisi et al., *supra* note 157, at 622-23.

robbery.”²⁴¹ In addition, they noted that most of the youth who were committed for sexual offenses were not victims of sexual abuse, but “79.9% of the youth who had been sexually abused were also committed for a sexual offense.”²⁴² DeLisi et al. referred to earlier meta-analyses that had similarly found “a significant association between [childhood sexual abuse] and sexual offending,” though they also noted other studies’ “equivocal findings” about this association.²⁴³

III. CHILDHOOD PHYSICAL AND SEXUAL ABUSE AS A MITIGATING FACTOR COHERES WITH THE CRIMINAL LAW FRAMEWORK

We now set out our proposal for mitigating criminal sanctions in circumstances where the offender has experienced childhood physical or sexual abuse and explain why this coheres with fundamental tenets of criminal liability and why it will not result in a diminution in community safety.

A. *Diminished Culpability and Sentencing Mitigation for Childhood Physical and Sexual Abuse*

Thus, it emerges that children who are subjected to sexual or physical abuse have an increased risk of committing crimes as adults. This reality provides the core basis for treating childhood physical and sexual abuse as a mitigating consideration, in a manner that is consistent with the broader criminal law framework. It is acknowledged that the sentencing process is not a proper forum for imparting empathy to an offender or seeking to rectify his or her difficult past. Rather, for a consideration to affect sentencing outcomes, it must be logically relevant to a sentencing objective or a justifiable aggravating or mitigating factor. One concept – the notion of culpability – plays a role in both sentencing and the framework of the substantive criminal law. Further, the concept of culpability explains and justifies the provision of a sentencing reduction to offenders who were traumatized when they were children.

Criminal law focuses on forbidding the commission of harmful acts to individuals and communities. Criminal law represents society’s strongest form of condemnation, and it is the vehicle through which society acts in its most coercive manner against individuals.²⁴⁴ Ultimately, the criminal law’s directive is straightforward: to prohibit and punish conduct that harms others’ important interests.²⁴⁵ Offenders’ mental states play a key role in the framework of the

241. *Id.* at 629-30.

242. *Id.* at 630.

243. *Id.* at 621.

244. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 18 (4th ed. 2003).

245. Harm is the main reason for the prohibition of certain conduct as assumed in Jan Górecki’s argument for decriminalizing certain “victimless” acts (e.g., homosexuality). See JAN GÓRECKI, A THEORY OF CRIMINAL JUSTICE 33-38 (1979).

substantive criminal law,²⁴⁶ in the sense that criminal liability typically attaches only to intentional behavior, reckless behavior, or (in some cases) negligent behavior.²⁴⁷ In addition, many crimes are demarcated principally according to the offender's mental state. For instance, intentionally taking another person's life constitutes "murder," while ending another person's life through negligence can constitute "manslaughter."

There is a considerable overlap between the substantive criminal law (that is, establishing the elements of criminal offenses and defenses) and sentencing law with respect to the role of culpability.²⁴⁸ In general, the substantive criminal law tightly restricts the availability of certain defenses.²⁴⁹ Duress, necessity, accident, and insanity are key excuses that can exculpate otherwise criminal acts.²⁵⁰ Due to the nature of criminal law and the desire to prohibit harmful acts, the criteria for these legal excuses are narrow and binary. In other words, a defendant is either guilty or not guilty and, if he or she is not guilty, he or she lies outside the scope of legal punishment. At the sentencing stage of proceedings, the law so far as culpability is concerned is broader and more flexible. Various degrees of blame and wrongdoing can be factored into sentencing by increasing or decreasing the level of punishment. Therefore, considerations that are relevant to legal defenses, but do not technically or fully conform to the strict requirements of a criminal defense, may yet play a role at the sentencing stage of the inquiry. This approach instils a sense of coherency across the criminal law system.

A justification for permitting childhood sexual and physical trauma to be a mitigating factor can thus be developed if it aligns with recognized and justifiable legal excuses. For example, the impact of childhood trauma can be similar to the effect of having a mental illness, which is both a criminal defense and an established sentencing mitigating factor.²⁵¹ Serious forms of mental illness can exculpate criminal liability, but lesser forms of mental illness, such as depression, while not excusing criminal behavior, can result in a penalty

246. *Id.*

247. ASHWORTH, *supra* note 244, at 87.

248. *See, e.g.*, 18 U.S.C.A. § 3553(a) (showing how both offense and offender characteristics are taken into account at sentencing). The seven factors considered are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for [applicable categories] (5) any pertinent policy statement; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

249. For an example of strict liability crimes where defenses do not usually apply, see C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 86 (1987).

250. For a discussion regarding the justification of criminal excuses, see *id.* at 86–122.

251. *See* Stanley Yeo, *The Insanity Defence in the Criminal Laws of the Commonwealth of Nations*, SING. J. LEGAL STUD. 241 (2008) for an analysis of the insanity defense.

discount.²⁵² The broad reason for this is the understanding that the offender who experienced the illness was not fully responsible for his or her conduct. By analogy, we have seen that children who have suffered physical abuse and/or sexual abuse have an increased likelihood of committing crimes as adults, and this statistical heightened probability makes offenders who have experienced such trauma less blameworthy for their actions.

Analogies can be drawn between childhood physical and sexual abuse and two other defenses for the purpose of demonstrating why this trauma should be a mitigating factor. Those defenses are necessity and duress.²⁵³ Both contain discrete elements that need to be satisfied for otherwise criminal behavior to be excused.²⁵⁴ The specific elements of these defenses differ slightly across jurisdictions. Nevertheless, those differences are immaterial for the purposes of this Article, because any argument for applying a legal excuse as a mitigating sentencing consideration depends on one or more elements of the defense having not been met. What remains relevant for this discussion is that traumatized defendants often find themselves in situations similar to those that attract necessity or duress defenses, both of which center on the defendant's lack of true choice. These defenses presume that defendants do not decide to commit crimes, but rather that they are influenced to do so by the exigencies of the desperate situations in which they find themselves.²⁵⁵ As mentioned previously, with respect to sentencing, the lack of choice that stems from an external factor does not need to be so significant that it is the principal reason for the commission of the crime.²⁵⁶

252. Mirko Bagaric, *A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational – The Sentencing of Offenders with Mental Disorders*, 29 HARV. HUM. RTS. J. 1 (2016).

253. See Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 499-500 (2013).

254. See Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 575 (2011), for a discussion of the elements of duress; Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259 (2008), for a discussion of the elements of necessity and its divergence in some United States jurisdictions.

255. In relation to necessity, the paradigm scenario in which it operates is when a defendant commits a crime to avoid a greater harm occurring, which has been caused by natural events—it is pressure of the situation that “forces” the defendant to commit a crime. The classic statement of the necessity defense derives from *R v. Dudley* [1884] 14 QBD 273 (Eng.). Duress, by contrast, occurs where a defendant is forced by the threats and overwhelming pressure of another person to commit the crime. See, e.g., *United States v. Bailey*, 444 U.S. 394 (1980).

256. Causation is one of the most important, yet ill-defined, principles of the law. The seminal work on the topic is H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 27-28 (2d ed. 1985). See also *THE OXFORD HANDBOOK OF CAUSATION* (Helen Beebe et al. eds., 2009).

Childhood trauma unquestionably limits the victims' choices.²⁵⁷ The key consideration is *the extent* to which the choices of people who were sexually or physically abused during their youth are limited, and the degree to which this experience inclines them towards committing crimes. It is impossible to quantify the extent to which people who had traumatic upbringings have diminished opportunities. Yet it is clear that, not only are traumatized people's choices restricted, but also that those limitations make them more prone to offending. This reality means that such individuals are less responsible for their crimes than offenders who have not experienced childhood sexual or physical abuse. Thus, a strong argument exists that traumatized individuals should receive a reduced sentence.

It follows that childhood trauma can be defined with enough precision to provide a relatively clear standard for courts to apply it as a mitigating factor. Also, there is a strong theoretical basis doctrinally for this to occur. However, in order to establish a well-reasoned recommendation to this end, we first need to counter other possible criticisms of this approach.

B. *A Discount for Traumatized Offenders Will Not Increase Crime*

As discussed above, two other reasons (beyond the obscurity of the concept of neglect) have been posited for not mitigating the severity of criminal sanctions on the basis of an offender's traumatized youth. The first is that it would supposedly give traumatized youth a license to commit crime. The second, related reason is that it would diminish community safety. We consider these arguments in that order.

The argument that if traumatized individuals were subject to reduced penalties they would commit more crime is flawed. A more thorough explanation of the key proposal in this Article reinforces why this is the case. The sentencing discount that traumatized offenders should receive needs to be sizeable enough to reflect their substantially lower culpability than other offenders, but not so significant as to render the penalty grossly disproportionate to the seriousness of the offense. There is no bright line regarding the figure that is appropriate to balance these competing objectives. However, some guidance can be obtained from other sentencing systems where similar tensions have been calibrated with a degree of success. To this end, an analogy can be drawn with the approach in Australia. The sentencing objectives in Australia (in the form of community safety, general and specific deterrence, rehabilitation and rehabilitation) are similar to those in the United States.²⁵⁸ While Australia has a predominantly discretionary sentencing process, a

257. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 57 (2d ed. 2012) (discussing the limiting effects of poverty on one's mobility, employment opportunities, education, and social circles).

258. See Mirko Bagaric, *The Punishment Should Fit the Crime – Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343 (2014).

prescribed discount is set for offenders who plead guilty to offences.²⁵⁹ This discount is normally in the range of 25%.²⁶⁰ This has not yielded vastly disproportionate imposed sanctions.²⁶¹ At the same time, a 25% discount is considerable enough to give offenders a practical incentive to plead guilty, and thus it appears to provide enough mitigation to be meaningful. The discount is obviously most easy to apply in relation to prison terms, given that this involves a simple 25% reduction in the length of the term that would otherwise be imposed. However, it also should apply in relation to the in/out decision regarding whether offenders should be imprisoned at all. There is no established basis for substituting penalties. There is no established framework for this process. The concept of a sanction unit has been suggested; however, attempts to inject content into such an approach have not been adopted or even developed with a high degree of specificity.²⁶² This is largely because of the number and different types of variables involved and a high degree of subjectivity that exists regarding the extent to which individuals covet different types of interests (such as liberty and financial resources), which are targeted or affected by different types of criminal sanctions, such as imprisonment and fines. Despite such complexities and inevitable approximations that are involved in comparing different forms of sanctions, in our view consideration should be given to reducing short prison terms (say of less than two years) to equivalent periods of probation when the trauma discount is applicable.²⁶³

259. *Id.*

260. *See, e.g., Phillips v The Queen* (2012) VSCA 140, n.38 (Austl.) (“The extent of the discount varies between jurisdictions. In NSW it appears to be in the order of 20-25%; in WA, 30-35%; 25% in SA and 10-33% in NZ.”); *Cameron v The Queen* (2002) 209 CLR 339, 340 (Austl.) (noting a typical sentence reduction of between 20% to 35% in Western Australia). For examples of statutes mandating consideration of guilty pleas in sentencing, *see Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1) (Austl.); *Penalties and Sentences Act 1992* (Qld) s 13(3) (Austl.); *Sentencing Act 2017* (SA) pt 2 div 2 sub-div 4 ss 39, 40 (Austl.).

261. *See, e.g., Phillips v The Queen* (2012) VSCA 140, 15, 26–27 (Austl.) (noting that an 11.5% discount for a guilty plea in a case of a violent murder was an acceptable derivation from the norm due to the severity of the crime).

262. For a discussion regarding the concept of sanction (or punishment) units and sanction substitution or equivalences, *see* NORA V. DEMLEITNER ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 631-33 (3d ed. 2013) (discussing the concept of a day fine which adjusts the amount to the income of the offender, but not as a substitute to imprisonment); MICHAEL TONRY, *SENTENCING MATTERS* 131 (1996); ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 59-63 (1993); Voula Marinos, *Thinking About Penal Equivalents*, 7 *PUNISHMENT & SOC’Y* 441 (2005); Joan Petersilia & Elizabeth Piper Deschenes, *Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions*, 74 *PRISON J.* 306 (1994).

263. A caveat to the scope of this Article is that we do not consider at length the manner in which the discount for abusive childhood should apply in relation to capital cases. Ostensibly, it should be capable of reducing the penalty to life imprisonment which, as we have seen above, has occurred in some instances. However, given that the death sentence is only imposed for serious sexual and violent offenses, *see* DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/>, consistent with our reform proposal, the discount should only be applicable where there is strong evidence of rehabilitation. However, this approach is

Most importantly, a discount of this nature will not lessen the deterrent impact of the criminal law on traumatized offenders. Empirical evidence demonstrates that there is no connection between harsher penalties and crime reduction.²⁶⁴ There are two general forms of deterrence: *specific* and *general* deterrence.²⁶⁵ A large number of studies have been conducted regarding the effectiveness of each form of deterrence.²⁶⁶ A detailed discussion of them lies beyond the scope of this Article, but the commentary below provides a high-level synopsis of their relevant conclusions.

Specific deterrence “aims to discourage crime by punishing individual offenders for their transgressions, thereby convincing them that crime does not pay.”²⁶⁷ In other words, “it attempts to dissuade offenders from re-offending by inflicting an unpleasant experience on them (normally imprisonment) which they will seek to avoid in the future.”²⁶⁸ Available empirical data indicates that specific deterrence is ineffective, and thus prescribing harsh sanctions will not make individuals any less likely to re-offend over time.²⁶⁹ “The level of certainty of this conclusion is very high—so high, that specific deterrence should be abolished as a sentencing consideration.”²⁷⁰ In fact, it seems that, rather deterring criminals, harsh sanctions, such as imprisonment, have a criminogenic effect and make offenders 2 to 4% more likely to reoffend.²⁷¹ Therefore, since imposing less punishment does not change the probability that any offender will re-offend, offenders who receive less punishment for certain forms of crime will not be any more likely to re-offend.

complicated by the fact that in capital cases the rehabilitative prospects of the offender are less important because the alternative sanction is life imprisonment, which means that the offender cannot further harm the community in any event. Thus, the rehabilitation requirement is not as important in relation to capital cases. Ultimately, the death penalty, because of its extreme nature, raises for discussion a number of different human rights and normative considerations. Indeed, the literature and analysis regarding the desirability of the death penalty is voluminous. It can only be examined in the context of a stand-alone dissertation focusing on this issue. This is not a meaningful limitation to this Article, given that not all states impose a death penalty, and since 1976, there have been less than 1500 executions. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. There are thirty states that still have the death penalty. *Id.*

264. Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work—and What It Means for Sentencing*, 35 CRIM. L.J. 269, 269 (2011) [hereinafter Bagaric & Alexander, *(Marginal) General Deterrence*].

265. Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159, 159 (2012) [hereinafter Bagaric & Alexander, *Specific Deterrence*].

266. For an overview, see Bagaric & Alexander, *(Marginal) General Deterrence*, *supra* note 264; Bagaric & Alexander, *Specific Deterrence*, *supra* note 265.

267. Bagaric & Alexander, *Specific Deterrence*, *supra* note 265, at 159.

268. *Id.*

269. *Id.* at 161.

270. *Id.*

271. Bagaric & Alexander, *Specific Deterrence*, *supra* note 265, at 159.

General deterrence, the other main form of deterrence, comes in two forms.²⁷² “Marginal general deterrence concerns the correlation between the severity of the sanction and the prevalence of an offense.”²⁷³ Absolute general deterrence centers on the threshold question of whether the threat of a criminal sanction (of whatever nature) being imposed and the incidence of criminal conduct bear any connection to one another.²⁷⁴ The findings with respect to general deterrence are relatively settled.²⁷⁵ Existing data show that in the absence of the threat of punishment for criminal conduct crime would escalate, and the capacity of humans to lead happy and fulfilled lives would be compromised.²⁷⁶ In that regard, general deterrence works in the absolute sense: there is a connection between the existence of criminal sanctions and criminal conduct.²⁷⁷ Nonetheless, available evidence has not confirmed a direct correlation between higher penalties and a reduction in the crime rate.²⁷⁸ It can thus be concluded that marginal deterrence should be discounted as a sentencing objective, unless and until at a minimum there is sufficient evidence to demonstrate that it works.²⁷⁹ Therefore, decreasing penalties for offenders who have been subjected to childhood sexual or physical abuse will not lead to a higher likelihood of other individuals committing crime.

Thus, the import of the empirical data is relatively clear. The premise that reducing penalty severity for traumatized offenders will instill in them an understanding that they have a license to commit crime, though appealing intuitively, is flawed.

*C. Reducing Penalties for Traumatized Offenders Will Not Reduce
Community Safety if the Objective of Rehabilitation Is Also Pursued*

In recent decades, as we have seen, the overarching objective behind sentencing has been community protection, and incarceration has been used as the main vehicle for achieving this goal. Incarceration is not a guaranteed method of protecting the community against offenders given that 95% of offenders who are incarcerated will be released at some point.²⁸⁰ Nevertheless,

272. Bagaric & Alexander, *(Marginal) General Deterrence*, *supra* note 264, at 270.

273. *Id.*

274. FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 14 (1973).

275. For an overview of the literature, see DONALD RITCHIE, *VICTORIAN SENTENCING ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE* (2011).

276. *See* Bagaric & Alexander, *(Marginal) General Deterrence*, *supra* note 264, at 280-82.

277. *See id.*

278. *Id.* at 269.

279. *See id.*

280. *See* James Gilligan, *Punishment Fails. Rehabilitation Works*, N.Y. TIMES (Dec. 19, 2012), <http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works>. The majority of those who are not released within a few years often die while in prison. A small number are also executed. In fact, in 2016, the

the community can be certain that, during an offender's period of incarceration, he or she will not commit crimes in the community. A 25% sentencing discount for traumatized offenders would necessarily result in such offenders spending less time incarcerated, thereby increasing their time spent in the community and the period during which they could conceivably commit crimes. However, that does not necessarily mean that crime rates will rise, especially if courts ensure that offenders who receive the sentencing discount are amenable to and are required to undertake rehabilitative measures. In recent years, considerable advances have been made in the programs and other measures that can assist in rehabilitating offenders, and sentencing decisions can be framed to accommodate these advances so that community protection is not compromised as a consequence of offenders' childhood abuse mitigating their penalty.

A significant number of studies have examined the effectiveness of rehabilitation as a mechanism for reducing re-offending. After performing extensive research between 1960 and 1974, Robert Martinson concluded in an influential paper that empirical studies had not demonstrated that any rehabilitative programs had succeeded in reducing recidivism.²⁸¹ Several years later, the Panel of the National Research Council in the U.S. drew a similar conclusion – that no significant variations existed between the recidivism rates of offenders who received different sentences, which it concluded “suggests that neither rehabilitative nor criminogenic effects [that is, the possible corrupting effects of punishment] operate very strongly.”²⁸² Martinson, though, later modified his views, stating that some forms of rehabilitation programs could be effective and that “no treatment . . . is inherently either substantially

smallest number of death sentences were imposed than in any other year up to that point since 1972 when the Supreme Court declared the U.S. death penalty unconstitutional. *See* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2016: YEAR END REPORT 3 (2016), <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf>. There are three reasons that prisoners do not get released. The most common is that they are sentenced to life imprisonment. As of 2012, about 160,000 inmates were serving a life sentence and of these, approximately 49,000 had been sentenced to life without the possibility of parole. SENT'G PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>. In 2013, approximately 5,000 inmates died in state and local prisons and jails each year, with suicide as the leading cause. MARGARET NOONAN ET AL., U.S. DEP'T. OF JUSTICE, NCJ 248756, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000-2013 - STATISTICAL TABLES 1 (Aug. 2015), <https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf>. The number of deaths in federal prisons (444 in 2014) is reported in MARGARET NOONAN, U.S. DEP'T. OF JUSTICE, NCJ 250150, MORTALITY IN STATE PRISONS, 2001-2014- STATISTICAL TABLE 1 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/msp0114st.pdf>.

281. R.M. Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INT. 22, 25 (1974).

282. DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 66 (Alfred Blumstein et al. eds., National Academy Press 1978).

helpful or harmful. The critical factor seems to be the *conditions* under which the program is delivered.”²⁸³

More recent empirical studies have increasingly indicated that interventions can reduce the likelihood of many offenders re-offending. Following a wide-ranging review of published studies on rehabilitation (that compared recidivism rates of offenders who had received rehabilitative treatment with those who had not), Howells and Day indicated almost twenty years ago that some rehabilitative programs did in fact appear to reduce recidivism.²⁸⁴ Similarly, in a broad, but thorough review of many relevant studies and meta-analyses of research undertaken since Martinson’s work,²⁸⁵ in 2007, Mark W Lipsey and Francis T Cullen found that rehabilitation treatment can produce lower recidivism rates amongst convicted offenders, and it possesses a “greater capability for doing so than correctional sanctions [alone].”²⁸⁶ It appears that the most successful rehabilitation programs focus on facilitating changes to offenders’ criminogenic needs, that is, factors that influence the likelihood that an offender will re-offend, such as their levels of self-control, problem-solving skills, and anti-social attitudes.²⁸⁷ Such programs may incorporate multi-systemic therapy and cognitive behavioral therapy, and have strong theoretical and research bases.²⁸⁸ Particularly effective programs have targeted anger management, sexual offending, and drug and alcohol use.²⁸⁹

For instance, in a 2011 report summarizing previous studies into the effectiveness of certain rehabilitation programs, Karen Heseltine, Andrew Day and Rick Sarre, stated that drug and alcohol abuse treatment programs were shown to reduce substance abuse and re-offending.²⁹⁰ Such a finding is consistent with that of Ojmarrh Mitchell, David Wilson, and Doris MacKenzie, who performed a major analysis of studies on the effectiveness of drug

283. R.M. Martinson, *New Findings. New Views: A Note of Caution Regarding Sentencing Reforms*, 7 HOFSTRA L. REV. 243, 254 (1979).

284. KEVIN HOWELLS & ANDREW DAY, *THE REHABILITATION OF OFFENDERS: INTERNATIONAL PERSPECTIVES APPLIED TO AUSTRALIAN CORRECTIONAL SYSTEMS* 112 (1999); Kelly Richards, *Trends & Issues in Crime and Criminal Justice*, AUSTL. INST. CRIMINOLOGY 1 (May 2011), <https://aic.gov.au/publications/tandi/tandi416>.

285. Mark Lipsey & Francis Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297 (2007), at 298, 302, 306, 313.

286. *Id.* at 302, 306, 313-14.

287. *Id.* at 310; Howells & Day, *supra* note 284, at 112.

288. Lipsey & Cullen, *supra* note 285, at 306-07, 310-11.

289. *Id.* at 306-07, 310-11; David Wexler, *Therapeutic Jurisprudence and Readiness For Rehabilitation*, 8 Fla. Coastal L. Rev. 111, 111-12 (2007); see Michael King, *Therapeutic Jurisprudence Initiatives in Australia and New Zealand and Overseas*, 21 J. Jud. Admin. 19 (2011); KAREN HESELTINE ET AL., AUSTL. INST. CRIMINOLOGY, *PRISON-BASED CORRECTIONAL OFFENDER REHABILITATION PROGRAMS: THE 2009 NATIONAL PICTURE IN AUSTRALIA* 14 (2011), <https://aic.gov.au/publications/rpp/rpp112> at 14, 22.

290. Heseltine et al., *supra* note 289, at 14.

treatment programs in prison.²⁹¹ Those studies looked at drug users; they compared the re-offending patterns between 1980 and 2004 of offenders who completed a drug rehabilitation program with those who completed no such program or only a minimal program. Sixty-six studies in total were analyzed. The report concluded that:

Overall, this meta-analytic synthesis of evaluations of incarceration-based drug treatment programs found that such programs are modestly effective in reducing recidivism.²⁹²

Moreover, the authors noted that programs that focused on *multiple* problems of drug users (termed “therapeutic communities”) proved to be the most effective rehabilitative programs, while “boot camp” programs showed no evidence of positive outcomes.²⁹³

One recent telling report surveyed the views of offenders in the federal prison system, as it sought to investigate the most effective methods of reducing recidivism. The report produced thirteen recommendations,²⁹⁴ including that federal prison officials “conduct a thorough and individualized assessment of every prisoner’s strengths, needs, and risk factors,” and provide inmates with increased access to jobs, computers, and quality education inside prison.²⁹⁵

The above summary of the research into the effectiveness of rehabilitation is encouraging and indicates that focused and nuanced programs can reduce the risk of recidivism of offenders who participate in them.²⁹⁶ The attempt to achieve the objectives of community protection and rehabilitation hinges on two main considerations: the likelihood of an individual offender re-offending; and the potential for rehabilitative measures to reduce that offender’s probability of recidivism.²⁹⁷ Richard Berk and Jordan Hyatt opined that “[i]deally, the forecasts of an offender’s likelihood of recidivism and rehabilitation should be highly accurate. They also should be derived from procedures that are practical, transparent, and sensitive to the consequences of forecasting errors.”²⁹⁸

291. Ojmarrh Mitchell et al., *The Effectiveness of Incarceration-Based Drug Treatment on Criminal Behavior*, CAMPBELL COLLABORATION (Aug. 2012), https://campbellcollaboration.org/media/k2/attachments/Mitchell_Incarceration-Based_Drug_Treatment_Update.pdf; see also Lipsey & Cullen, *supra* note 285.

292. Mitchell et al., *supra* note 291, at 29.

293. *Id.*

294. Kevin A. Ring & Molly Gill, *Using Time to Reduce Crime: Federal Prisoner Survey Results Show Ways to Reduce Recidivism*, FAMS. AGAINST MANDATORY MINIMUMS 1, 23 (June 2017), https://famm.org/wp-content/uploads/Prison-Report_May-31_Final.pdf.

295. *Id.* at 24-25.

296. See also Lipsey & Cullen, *supra* note 285, at 307; Ruth M. Hatcher et al., *Aggression Replacement Training with Adult Male Offenders within Community Settings: A Reconviction Analysis*, 19 J. FORENSIC PSYCH. & PSYCHOL. 517, 525-26 (2008).

297. Richard Berk & Jordan Hyatt, *Machine Learning Forecasts of Risk to Inform Sentencing Decisions*, 27 FED. SENT’G REP. 222 (2015).

298. *Id.*

Presently, courts do not rely on such procedures or on scientific learning to identify those offenders who are the best candidates for rehabilitation. Instead, sentencing judges use “clinical judgment” as an evaluating tool. “Clinical judgment” is an approach “that relies on intuition guided by experience,” and often results in “wildly inaccurate” risk assessments whose “rationale” is “opaque.”²⁹⁹ Further, courts have no mechanism for systematically reviewing whether rehabilitation programs have in fact succeeded in reducing the recidivism of offenders whom those courts found were likely to be rehabilitated.

Whether a particular offender will re-offend can never be predicted with total certainty, but significant data has been gathered on the characteristics that are associated with offenders who have a higher likelihood of re-offending. These characteristics include previous imprisonment; extensive criminal record; male gender; and young age.³⁰⁰ Although courts usually do consider offenders’ criminal histories and age in attempting to predict their prospects of rehabilitation (and thus their prospects of not re-offending), crude data is not informative when it is not interpreted through empirically-tested tools for forecasting rehabilitation and recidivism.

It is, however, now possible to discern offenders’ rehabilitative prospects more accurately than ever before. “Risk and needs assessment tools have been developed which assess the risk of offenders reoffending and identify needs of those offenders that, if met, would lower their probability of recidivism.”³⁰¹ The methodology underpinning risk and needs assessment tools is often termed “structured professional judgment.”³⁰² It varies from a strictly actuarial approach in that the “primary goal of this type of instrument is to provide information relevant to needs assessment and a risk management plan rather than to predict antisocial behavior.”³⁰³ Thus the score produced from applying this instrument is not intended to reflect definitively an offender’s likelihood of re-offending, and considerations outside of those used in the instrument can be evaluated with respect to reducing an individual’s risk of recidivism.

A number of risk and needs assessment tools have been developed. The Ohio Risk Assessment System (ORAS)³⁰⁴ is one of the most popular. ORAS applies eight risk and need factors as follows: history of antisocial behavior;

299. *Id.*

300. *Id.*

301. Nathan James, CONG. RESEARCH SERV., R44087 *Risk and Needs Assessment in the Criminal Justice System*, FED’N AM. SCIENTISTS 2 (July 10, 2018), <https://fas.org/sgp/crs/misc/R44087.pdf>.

302. Christopher Slobogin, *Risk Assessment*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 196, 2199 (Joan Petersilia & Kevin R. Reitz eds., 2012).

303. *Id.*

304. For an explanation of the manner in which it is used, see Mass. Superior Court Working Grp. on Sentencing Best Practices, *Criminal Sentencing in the Superior Court: Best Practices for Individualized Evidence-Based Sentencing*, DEAKIN U. (Mar. 2016), available at <https://www.mass.gov/files/documents/2018/01/08/CRIMINAL%20SENTENCING%20IN%20THE%20SUPERIOR%20COURT%203.17.pdf>.

antisocial personality patterns; antisocial cognition; antisocial associates; quality of family relationships; performance at school and work; levels of involvement in leisure and recreation; and any history of substance abuse.³⁰⁵ Risk and needs assessment tools are commonly relied on in determining probation conditions³⁰⁶ and the appropriateness of parole.³⁰⁷ On the other hand, they are only occasionally used in sentencing process considerations, such as to determine whether an offender should be imprisoned, placed under community supervision,³⁰⁸ and/or be subject to any conditions or requirements.³⁰⁹

Existing research, while acknowledging that risk assessment and risk and needs assessment tools are not perfect, suggests that “the best models are usually able to predict recidivism with about 70% accuracy—provided it is completed by trained staff.”³¹⁰ Risk and needs assessment tools are more accurate than unstructured judgments – current risk assessment tools have been found to yield a true positive rate of 50 to 80%, which represents a significantly higher rate than both chance and the true positive rate of unstructured assessments.³¹¹ In addition, even recidivism rates of offenders deemed at a high risk of re-offending were reduced when those offenders participated in treatment programs that risk and needs assessments had identified would benefit them.³¹²

305. James, *supra* note 301, at 6-7.

306. Pamela M. Casey, Roger K. Warren & Jennifer K. Elek, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, NAT'L CENTER FOR ST. CTS. 1, 1 (2011), <http://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx>.

307. *Id.*

308. *Id.*

309. James, *supra* note 301, at 1-3; *see also* Slobogin, *supra* note 302, at 197-98.

310. Edward Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203, 212 (2010). Moreover, risk assessment tools are generally more accurate than predictions based solely on clinical judgment. *See* D.A. Andrews, James Bonta & J. Stephen Wormith, *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7, 7-27 (2006); William M. Grove, David H. Zald, Boyd S. Lebow, Beth E. Snitz & Chad Nelson, *Clinical Versus Mechanical Prediction: A Meta Analysis*, 12 PSYCHOL. ASSESSMENT 19, 19-30 (2000).

311. Slobogin, *supra* note 302, at 200-01.

312. James, *supra* note 301, at 8. For the earlier research findings regarding the accuracy of such tools, *see* Max Maller & Richard Lane, *A Risk Assessment Model For Offender Management*, AUSTL. INST. CRIMINOLOGY (Sept. 2002), <https://pdfs.semanticscholar.org/1622/3d85ed9bf45758574f5d4458d0123d043931.pdf>; Frank Morgan, Neil Morgan & Irene Morgan, *Risk Assessment in Sentencing and Corrections, A Report to the Criminology Research Council*, CRIMINOLOGY RES. GRANTS (1996), <http://crg.aic.gov.au/reports/22-95-6.pdf>; Carleen Thompson & Anna Stewart, *Review of Empirically Based Risk/Needs Assessment Tools for Youth Justice: Amended Report for Public Release*, GRIFFITH U. (Jan. 2006), https://www.researchgate.net/profile/Carleen_Thompson/publication/311768274_Review_of_empirically_based_riskneeds_assessment_tools_for_youth_justice_Amended_report_for_public_release/links/5859c42908ae3852d2559cc8.pdf; Brooke Winters & Hennessey Hayes, *Assessing the Queensland Community Corrections RNI (Risk Needs Inventory)*, 12 CURRENT IN ISSUES CRIM. JUST. 288, 290 (2001). *See also* Slobogin, *supra* note 302, at 203-05.

Given the developments in risk assessment and risk and needs assessment tools, we recommend that courts use them to ensure that community protection will not be compromised if offenders' childhood physical or sexual abuse mitigates their penalty.³¹³ These tools should be used in the following ways: (i) to determine whether an offender should receive a prison sentence; (ii) to determine the appropriate sentence length for offenders where incarceration has been found to be necessary; and (iii) to inform the decision about the specific rehabilitation programs in which offenders should be required to participate.

We also suggest that the 25% sentencing discount only be applied where an offender has experienced childhood physical or sexual abuse and either: (i) the offender has not committed a violent or sexual offense and application of these tools indicates that there is no risk of him or her re-offending by committing such a crime in the foreseeable future; or (ii) the offender has committed a violent or sexual offense, but application of the tools indicates that the offender has a strong likelihood of rehabilitation. In both of these scenarios, application of the sentencing discount will not undermine achievement of the aim of community safety.

IV. CASE STUDY: FEMALE OFFENDERS AND AFRICAN AMERICAN OFFENDERS

As demonstrated above, there are strong arguments for providing a 25% sentencing discount for offenders who have experienced childhood sexual or physical abuse. We now focus on two cohorts of offenders that may benefit in particular from the discount: female offenders and African American offenders. Empirical research has confirmed the connection between these individuals' experience of childhood abuse and their subsequent offending. In addition, in the case of female offenders, there has been a growth in the number who are incarcerated and, of those offenders, a significant portion report that they were victims of childhood trauma. African Americans experience a higher rate of childhood physical and sexual abuse and they are overrepresented in prisons and jails. This discussion provides a practical illustration of how the discount would operate and the extent to which its application could help ameliorate the disproportionately harsh manner in which both of these cohorts of offenders are dealt with by the criminal justice system.

A. *Female Offenders*

It has been suggested that, due to the different socialization of females and males, female victims of child abuse are more likely to internalize their emotions in response to these experiences and suffer depression and other mental health issues, whereas male victims are more inclined to externalize

313. See Berk & Hyatt, *supra* note 297, at 223.

their emotions in the form of aggressive behaviour.³¹⁴ Nevertheless, the empirical evidence does not consistently support this claim.³¹⁵ Although many studies have examined males because they commit more offenses overall, it has been recognized that the number of females who have criminal convictions, including for violent offenses, is significant and rising.³¹⁶ Moreover, it appears that child abuse has a similarly profound impact on the victims' subsequent criminality regardless of their gender,³¹⁷ though it may have subtly different effects on the nature of female and male offending respectively.

Some studies have exclusively focused on female subjects and have found a clear connection between their experience of childhood sexual abuse and physical abuse and their subsequent criminal offending. For instance, in their longitudinal study of a sample of females who were adolescent offenders, which is discussed above, Cernkovich, Lanctot and Giordano found that "physical abuse and sexual abuse during childhood and adolescence substantially increase the likelihood of being in the high offender group in adulthood, by 579% ... and 287% ... respectively."³¹⁸ Using a prospective cohort design with documented cases of females who were victims of child abuse matched with a control group of females who had not been abused, Nicole Trauffer and Cathy Spatz Widom also investigated the impact of child abuse on female criminality and particularly violent offending.³¹⁹ They reported in 2017 that females who had experienced child abuse were at an increased risk of being arrested for both non-violent offenses (33.4% compared with 22.92% of non-abused females) and violent offenses (13.91% compared to 6.56% of the non-abused control group).³²⁰ They also noted that, of another sample of female prisoners in the U.S., 47% reported they had experienced sexual abuse as children and 40% reported having experienced childhood physical abuse.³²¹ Trauffer and Widom did find in their study, however, that virtually half the females who had been abused as children were not arrested for any offense.³²²

Not only is there a clear link between females' experience of sexual and physical abuse as children and their subsequent offending, but the number of females who are incarcerated is growing, despite their low participation in

314. Widom, *supra* note 158, at 164; English et al., *supra* note 185, at 6, 35.

315. English et al., *supra* note 185, at 35; Widom, *supra* note 158, at 196.

316. Cernkovich et al., *supra* note 197, at 4; Trauffer & Widom, *supra* note 163, at 137. See generally, Mirko Bagaric & Brienna Bagaric, *Mitigating the Crime that is the Over-Imprisonment of Women: Why Orange Should Never be the New Black*, 41 VT. L. REV. 538, 545-47 (2017).

317. Widom, *supra* note 1, at 189-90.

318. Cernkovich et al., *supra* note 197, at 21.

319. Trauffer & Widom, *supra* note 163, at 137-38.

320. *Id.* at 139-40.

321. *Id.* at 137 (citing SHANNON LYNCH ET AL, BUREAU OF JUSTICE ASSISTANCE, WOMEN'S PATHWAYS TO JAIL: THE ROLES AND INTERSECTIONS OF SERIOUS MENTAL ILLNESS & TRAUMA (2012)).

322. *Id.* at 141.

crime overall. Further, of that cohort, a significant number have reported that they were victims of childhood trauma, and particularly of sexual abuse. Sexual victimization is an especially traumatic experience and can have particularly deleterious effects on child victims of it.³²³

Females constitute more than half of the people in the U.S.,³²⁴ though far fewer females than males commit crimes overall.³²⁵ The rate of increase in incarceration of females over the last forty years is astounding. A report published in January 2018 shows that the rate of increase of female prisoners since 1978 greatly exceeds that of their male counterparts. The report by the Prison Policy Initiative notes:

The story of women's prison growth has been obscured by overly broad discussions of the "total" prison population for too long. ... Across the country, we find a disturbing gender disparity in recent prison population trends. While recent reforms have reduced the total number of people in state prisons since 2009, almost all of the decrease has been among men. ... In 35 states, women's population numbers have fared worse than men's, and in a few extraordinary states, women's prison populations have even grown enough to counteract reductions in the men's population. ... Women have become the fastest-growing segment of the incarcerated population... [and] although women represent a small fraction of all incarcerated people, women's prison populations have seen much higher relative growth than men's since 1978. Nationwide, women's state prison populations grew 834% over nearly 40 years — more than double the pace of the growth among men.

A U.S. Department of Justice study found that between 23% and 37% of female prisoners reported being victims of physical or sexual abuse before their eighteenth birthday.³²⁶ For male prisoners, the rate was 6% to 14%.³²⁷ The rate of female inmates who had been sexually abused prior to age eighteen spanned from 15% (federal inmates) to 26% (state inmates), compared with 2% (federal) and 5% (state) for males.³²⁸ Female prisoners also experienced much higher rates of abuse than the general public. Specifically, female prisoners

323. See Laura P. Chen et al., *Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-Analysis*, 85 MAYO CLINIC PROC. 618, 625–26 (2010) (finding a statistical correlation between sexual victimization and mental illness, especially when the victim is a child).

324. The exact figure is 50.8%. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/00> (last updated, July 1, 2015).

325. See WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All; see also PRISON POLICY INITIATIVE, UNITED STATES INCARCERATION RATES BY SEX (2010), <https://www.prisonpolicy.org/graphs/genderinc.html> (reporting that the incarceration rate for women in the United States is 126 per 100,000).

326. Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers*, BUREAU OF JUSTICE STATISTICS 1 (April 1999), <https://www.bjs.gov/content/pub/pdf/parip.pdf> (showing the rates for being abused at anytime during their lives were 40% to 57%).

327. *Id.* (showing the rates for ever being abused is 7% to 16% anytime before sentence).

328. *Id.*

were three to four times more likely than the general female population to have been abused.³²⁹ In contrast, male prisoners were only twice as likely to have been abused.³³⁰ The study also found a strong link between past abuse and violent crime, noting that “[t]hirty-four percent of abused women and 21% of women not abused were in prison for a violent offense.”³³¹ Females’ experience of abuse in the past therefore resulted in more than a 50% increase in the likelihood of them later being incarcerated for a violent offense.³³²

Researchers have compared the connection between childhood abuse and subsequently criminal offending for males and females respectively. They have found that child abuse is a major risk factor for subsequent offending for both males and females, but that it can lead to them committing different types of crimes from one another. Further, in the case of females, who are less likely to commit violent crimes generally than males, the experience of childhood abuse had a particularly significant impact on the likelihood of them subsequently committing violent crimes.

In her 1989 report, Widom noted her finding that, although males are generally arrested for criminal behaviour as adults more frequently than females, both males and females who have experienced child abuse are more likely to have an arrest as an adult than those who are not victims of child abuse.³³³ Yet Widom also reported that female victims of child abuse were at particular increased risk as adults of committing property, drug and order offenses, though not of committing violent or sex offenses.³³⁴ Ireland and Widom similarly found that “among females, being abused ... is a significant predictor of adult arrests for alcohol- and/or drug-related offenses”, and “being an abused ... female increases the odds of being arrested for an alcohol and/or drug offense by 2.8 times when compared to the control females.”³³⁵ This statistic did not apply to males who had experienced child abuse compared with the males in the control group.³³⁶

Maxfield and Widom found that the number of abused females who had been arrested for violent crimes in the same cohort that Widom investigated six

329. *Id.* (showing the rate was 12% to 17% in the general community).

330. *Id.* (showing the rate was 5% to 8% for the general male population).

331. *Id.* at 3.

332. *Id.* at 3 (noting this pattern was also noted with men, but to a lesser degree given that “[a]mong State prisoners, 61% of abused men were serving a sentence for a violent offense, compared to 46% of those reporting no past mistreatment.”); *see also* MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS’ STORY 7 (2015), http://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf (documenting a very high link between female juvenile incarceration and sexual abuse).

333. Widom, *supra* note 158, at 162; Widom, *supra* note 163, at 260, 265.

334. Widom, *supra* note 163, at 265-66.

335. Ireland and Widom, *supra* note 177, at 249.

336. *Id.*

years earlier had increased over time,³³⁷ which suggests “there is clear evidence that child maltreatment in girls leads to externalizing behavior and violence in adulthood.”³³⁸ Importantly, they also reported that “childhood victimization increases arrests for violence among females and males, but in different ways.”³³⁹ Abused females “were at increased risk of arrest for a violent crime as a juvenile or adult, despite the fact that females are less likely to be arrested for violence.”³⁴⁰ Specifically, “compared to nonmaltreated girls, abused and neglected girls were at increased risk for arrest as a juvenile, as an adult, and for a violent crime, with odds ratios of 1.94, 2.09, and 2.38, respectively.”³⁴¹ By contrast, “compared with control males, abused ... males were *not* at increased risk for violent offending as juveniles or adults,” but they did have “an increased risk in the frequency of participation (the number of violent arrests)” they each received.³⁴²

English, Widom and Brandford’s report found that, while abused males were 2.5 times as likely as control males to be arrested for a violent crime, abused females were 7.4 times as likely to be arrested for a violent crime as control females.³⁴³ This team otherwise noted similarities between the impact of child abuse on females’ and males’ subsequent criminality. Specifically, they found that, compared with matched control males and females respectively, abused males were five times more likely while abused females were nearly four times more likely to be arrested as a juvenile, and abused males and females were roughly twice as likely to be arrested as adults.³⁴⁴

Topitzes, Mersky and Reynolds also reported that child abuse was a major risk factor for subsequent violent offending regardless of the victim’s sex.³⁴⁵ Like Maxfield and Widom, they found that more males than females committed violent crimes, but “the maltreatment-violence connection was only significant among females” in relation to “any violent arrest.”³⁴⁶

Consistent with earlier studies, Currie and Tekin found that there can be differences between the types of crimes that males and females who were abused as children commit. They relied on national data obtained through a comprehensive survey of adolescents in the National Longitudinal Study of Adolescent Health, including individuals who had been abused as children and those who were not abused and did not commit crimes.³⁴⁷ Currie and Tekin

337. Maxfield & Widom, *supra* note 151, at 394; Widom & Maxfield, *supra* note 159, at 3-4.

338. Widom, *supra* note 158, at 189.

339. Widom & Maxfield, *supra* note 159, at 4.

340. *Id.*

341. Widom, *supra* note 158, at 189.

342. Widom & Maxfield, *supra* note 159, at 4.

343. English et al., *supra* note 185, at 35.

344. *Id.* at 31.

345. Topitzes, *supra* note 5, at 2338-39.

346. *Id.* at 2339.

347. Currie & Tekin, *supra* note 5, at 510, 513.

reported in 2011 that males who were abused as children were more likely to commit armed robberies and assaults, whereas females who were victims of child abuse were more likely to commit burglaries or thefts.³⁴⁸

Hyunzee Jung et al. explicitly tested the theory that females and males have a propensity to exhibit internalising and externalising behavior respectively in response to childhood abuse.³⁴⁹ They used data from the Lehigh Longitudinal Study, which commenced in 1973 as part of assessing a child abuse treatment and prevention program for cases referred by child welfare agencies in two counties of eastern Pennsylvania.³⁵⁰ In 2017, they reported a positive association between early internalizing behaviour and adult crime for females, but not for males, while there was a positive association between early externalizing behaviour and adult crime for males, but not for females.³⁵¹

As noted above, research has demonstrated that there can be a strong connection between the experience of childhood abuse and male and female victims' subsequent criminal offending, although the reasons for this link are not fully understood. The number of females in the correctional system is steadily rising, and at a faster rate than that of men and a significant number of female prisoners have reported experiencing child abuse. Consequently, the trauma discount would serve to offset this unjustifiable trend to some extent.

B. *African American Offenders*

Child abuse and neglect are extremely serious concerns in America, and the seriousness of the problem is especially acute for African Americans. In addition, research has found that African American victims of childhood trauma offend at a higher rate than those who have not been abused.

States have adopted their own definitions of child abuse and neglect based on standards implemented by federal law. The Child Abuse Prevention and Treatment Act (CAPTA) has provided a minimum definition of child abuse and neglect as: "[a]ny recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act, which present an imminent risk of serious harm."³⁵² Most states recognize four major forms of maltreatment: neglect, physical abuse, psychological abuse, and sexual abuse.³⁵³ While each form of maltreatment can occur separately, they can also occur in

348. *Id.* at 527.

349. Jung et al., *supra* note 173, at 5.

350. *Id.*

351. *Id.* at 10.

352. 42 U.S.C. § 5101, as amended by the CAPTA Reauthorization Act of 2010 (P.L. 111-320).

353. See U.S. DEPT. OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, CHILD MALTREATMENT 2015 viii (2015), https://www.acf.hhs.gov/sites/default/files/cb/cm_2015.pdf.

combination.³⁵⁴ That might explain why most available statistics provide prevalence rates for maltreatment of youth by racial group, but do not provide the more granular analysis of the specific type of maltreatment (for example, physical abuse) by racial group.

The U.S. Department of Health and Human Service's (HHS) *Child Maltreatment 2015* report (published in 2017) found that the rate of maltreated African American youth was 14.5 per 1,000 children (1.45%), higher than any other race or ethnicity.³⁵⁵ By comparison, the rate for Hispanic children was 8.4 per 1,000 children (0.84%), and for White children 8.1 per 1,000 children (0.81%).³⁵⁶ Other studies have yielded similar findings. A 2014 study, focused on the prevalence of childhood maltreatment between birth and age eighteen, drew on confirmed data from the National Childhood Abuse and Neglect System. The study found that, in 2011, a total of 670,000 children (0.9% of all U.S. children) experienced a confirmed report of maltreatment.³⁵⁷ African American children were maltreated at a rate of 1.5%, the highest of any racial group and almost twice that of White children at 0.8%.³⁵⁸ The study also found that African American youth had the highest cumulative *risk* of maltreatment of any race or ethnicity, at 20.9%.³⁵⁹ The next highest group was Native American children at 14.5%, while White children experienced a 10.7% risk.³⁶⁰ Finally, the study found that, at 2011 rates, one in eight American youth had the highest cumulative *risk* of maltreatment of any race or ethnicity, at 2ht U.S children experienced maltreatment "so persistent or severe" between birth and their eighteenth birthday that it resulted in a government agency-generated report, but the figure for African American children was one in five.³⁶¹ Put another way, 12.5% of all American children are severely maltreated at least once between birth and age eighteen, while the rate for African American children is 20%.

Empirical research has also found that African Americans who experience childhood abuse have high rates of offending. Indeed, as discussed in Part II above, the African American subjects of Mersky and Reynolds' study were found to have committed violent offenses at a much greater rate than those who had not experienced childhood abuse. This finding is consistent with both Widom's 1989 and Maxfield and Widom's 1996 reports, which found that African American people who were abused as children had higher rates of violent arrests compared with the control group that was also African American

354. *See id.*

355. *Id.* at 44 (Table 3-9 Victims by Race and Ethnicity, 2015).

356. *Id.*

357. Christopher Wildman et al., *The Prevalence of Confirmed Maltreatment Among American Children, 2004-2011*, 168 JAMA PEDIATRICS 8, 706-713 (Aug. 2014), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/1876686>.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

(whereas the White individuals who were victims of child abuse did not have higher rates of violent arrests compared to a White control group).³⁶²

English, Widom and Brandford's study used a sample of people from the Northwest in the 1980s that included Native Americans as well as White and African American subjects.³⁶³ They reported that the experience of abuse "significantly increases a child's risk of delinquency, adult criminality, and ever being arrested, regardless of whether the youth are Caucasian, African American, or Native American", though the relative risk for arrests was higher for some groups.³⁶⁴ They found that "the [relative risk] for adult and any arrest is higher for Caucasian abused and neglected children compared to Caucasian controls, than the [relative risk] for African American and Native American abused and neglected children compared to African American and Native American controls."³⁶⁵ Yet they conjectured that "this pattern of results may be related to the base rates of arrest for youth of different ethnic backgrounds" and, specifically, "Caucasian youth [had] lower base rates of arrest in this sample" so "childhood victimization may [have appeared] to have a [stronger] effect" than for the other groups.³⁶⁶

The fact that African American people are disproportionality sexually and physically abused during their childhood means that they will also disproportionately benefit from the trauma discount. This would be a welcome reform to the sentencing system. African Americans are incarcerated at more than four times the rate of White Americans and the trauma discount would redress some of the patent injustice that stems from this unfortunate reality.³⁶⁷

This consideration is also relevant to debunking an argument that providing a trauma discount would inappropriately introduce elements of race into the sentencing calculus. One reason that was provided for not allowing childhood neglect to be a mitigating factor in the United States federal jurisdiction is because this would enable racial and ethnic considerations to influence the sentencing calculus. Thus, in submissions to the Federal Sentencing Commission regarding the suitability of childhood neglect as a mitigating factor, the Department of Justice's *ex officio* member of the Commission expressed concern that "the consideration of offender characteristics would

362. DIANA J ENGLISH ET AL., NAT'L INST. OF JUSTICE, CHILDHOOD VICTIMIZATION AND DELINQUENCY, ADULT CRIMINALITY, AND VIOLENT CRIMINAL BEHAVIOR: A REPLICATION AND EXTENSION 4 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/192291.pdf>.

363. *Id.* at 5-6.

364. *Id.* at 32-33.

365. *Id.* at 32.

366. *Id.* at 32-33.

367. Heather C. West et al., PRISONERS IN 2009, U.S. DEP'T OF JUSTICE (2010), available at <http://bjs.gov/content/pub/pdf/p09.pdf>; see PRISON REFORM TRUST, BROMLEY PRISON FACTFILE 3 (2015), available at <http://www.thebromleytrust.org.uk/files/bromleybriefingsautumn2015.pdf> (showing that the over-representation of racial minorities in the United Kingdom is similar).

inject “uncertainty” into the sentencing process, and also raised the specter of racial and ethnic disparity.”³⁶⁸

This view was rejected by a contrary submission to the Commission by U.S. Representatives John Conyers and Robert C. “Bobby” Scott, who stated that “consideration of any factor, aggravating or mitigating, that is relevant to one or more purposes of sentencing, is justified and warranted, even if the factor occurs more or less frequently in some racial or socioeconomic groups than others.”³⁶⁹ They noted that, by permitting departures based on offender characteristics that would benefit members of all groups, such as disadvantaged upbringing, “the Commission might help to reduce any demographic differences in sentencing.”³⁷⁰

The view expressed by Conyers and Scott is manifestly correct. Discrimination only occurs if people benefit when there is no reason for conferring the advantage on them. As noted above, there is a sound doctrinal and jurisprudential basis for mitigating the sentences of offenders who were subjected to childhood trauma and the fact that these offenders may come disproportionately from certain racial or ethnic backgrounds is not a basis for failing to align the law with sound principle.

CONCLUSION

Children who have neglected or abusive upbringings can have an increased likelihood of committing crime when they are adults. Numerous theories have been postulated to explain this link, but none has provided a definitive explanation for the connection. Irrespective of the precise reasons for this link, the heightened risk of abused and neglected children offending later in life is unrelated to choices they have made voluntarily. Given their diminished level of culpability, a tenable argument can be made in favour of mitigating the severity of sanctions that are imposed on them. An examination of current sentencing law and practice shows that no statutory provisions in the jurisdictions examined in this Article currently embody such a mitigating factor. In some jurisdictions, courts, as a matter of caselaw, have stipulated that a neglected or abusive upbringing can be a mitigating factor. However, an analysis of the caselaw demonstrates that courts rarely place considerable emphasis on this consideration. A possible reason for this is that no clear and persuasive rationale has been developed for mitigating the penalty of offenders who were subjected to childhood abuse.

In this Article, we have considered literature from psychology and the social sciences regarding the impact of childhood abuse, in conjunction with an analysis of sentencing law jurisprudence. It emerges that childhood neglect should not be a mitigating factor. The key reason for this view, as we have

368. *Id.*

369. Baron-Evans & Coffin, *supra* note 38, at 148.

370. *Id.* at 148.

seen, is that this consideration is amorphous and the courts cannot apply it accurately or consistently; there is not even an approximate manner in which to distinguish between an upbringing that has an appropriate level of nurturing and one that falls short of this standard.

Nevertheless, by contrast, childhood sexual and physical abuse can be defined clearly and empirical data confirms that such trauma can be connected with the victims' subsequent criminal offending. As we have seen, people who are subjected to physical or sexual abuse during their childhood have an increased likelihood of committing criminal offenses, and this heightened probability diminishes those offenders' level of culpability. Consequently, childhood sexual or physical abuse should be a mitigating consideration that is reflected in a 25% sentencing discount. Where the offenders have committed minor and mid-range offenses, application of this discount will affect decisions about whether these offenders will be incarcerated, and will result in the conversion of sentences that would have involved a prison term into probation. Where offenders have committed more serious offenses, application of the discount will reduce the term of incarceration that the offenders receive, but only if either the offense is not one that has compromised community safety, or a risk and needs assessment tool establishes that the offender is a good candidate for rehabilitation.

The introduction of a sentencing discount for offenders who are victims of childhood abuse will make the law more normatively sound and will not lead to more crime, given that there is no correlation between the imposition of harsher penalties and lower rates of crime. Moreover, this reform would enhance the jurisprudential integrity of the sentencing system and lower incarceration rates – especially in relation to African American and female offenders, who are currently disproportionately punished by the sentencing system – and do so in a manner that does not compromise community safety, given that the discount would not apply in relation to serious sexual or violent offenses unless it was clear that the offender was a strong candidate for rehabilitation.

