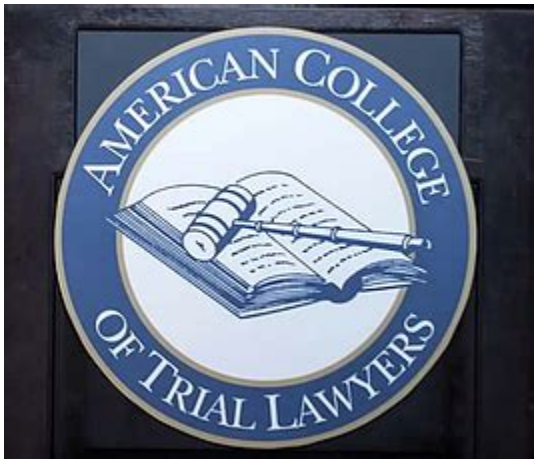
Temple University
Beasley School of Law



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AGENDA

9:00 AM – 10:00 AM
Sentencing Advocacy
Presenters: Hon. Gerald McHugh, Linda Dale Hoffa, Robert Livermore, and Leigh Skipper

10:00 AM – 11:00 AM
Ethics Presenters: Thomas J. Duffy and Beth Weisser

11:00 AM – 11:15 AM
15-Minute Break

11:15 AM – 12:15 PM
"Brain Lessons" – Cognitive psychology, social science, and lessons for advocacy and persuasion
Presenters: Professors Grant Rost and Jules Epstein

12:15 -12:30 PM
15-Minute Break

12:30 -1:30 PM
Gifts of Cross-Examination: approaches to disciplining witnesses, increasing listening skills on cross, and benefiting from an adverse witness' answers
Presenters: Professors Marian Braccia, Elizabeth Lippy, and Temple Law adjunct faculty member Professor Kristen Feden

SPEAKER BIOGRAPHIES

Marian Braccia is the Director of the LL.M. in Trial Advocacy Program and a Practice Professor of Law at Temple University Beasley School of Law, where she brings particular expertise in courtroom technology, e-discovery issues, and trial skills.

Prior to joining the full-time faculty, Professor Braccia taught Introduction to Trial Advocacy and an experiential course in criminal prosecution for several years as an adjunct in Temple's trial advocacy program. She has also served as a coach for Temple's National Trial Team.

Professor Braccia is an accomplished litigator, having served as an Assistant District Attorney in the Philadelphia District Attorney's office from 2006 to 2018 under D.A.s Abraham, Williams, Hodge, and Krasner. In addition to serving as a trial attorney in Major Trials and the Family Violence and Sexual Assault Unit, in 2012 Professor Braccia was appointed to a supervisory position in the District Attorney's Charging Unit, and in 2014 launched Philadelphia's Domestic Violence Diversion Program, assuming a caseload in excess of 200 dockets, monitoring participants' treatment progress, and reporting on program statistics to the DOJ's Office of Violence Against Women. In August 2017, she took on added responsibilities as Director of Information Technology for the DA's Office.

Tom Duffy oversees all cases handled by the attorneys of the firm, which include motor vehicle accidents, trucking accidents, construction accidents, product liability, premises liability, medical malpractice, birth injury, spinal cord injury, emergency room injury, other personal injury and aviation disasters.

Tom founded the firm over thirty years ago, when he left a promising career at a large Philadelphia firm to establish his own practice, a practice that has developed into a very experienced and respected group of partners and staff with one singular focus—helping individuals and families who are the victims of catastrophic injury.

Tom has received countless distinctions, awards and titles as testimony to his work and influence in the legal community, and most notably:

- Being selected in 2016 by The Best Lawyers in America as the sole "Lawyer of the Year" for Plaintiffs Personal Injury Litigation in Philadelphia
- Being listed annually in the Super Lawyers Top 100 in Pennsylvania/Top 100 in Philadelphia and ascending to the "Top Ten in Pennsylvania" list annually since 2016

He has also been recognized for his high professional legal standards and ethics, rated "AV" by LexisNexis Martindale Hubbell, and listed in LexisNexis Martindale Hubbell's Bar Register of Preeminent lawyers.

A respected attorney in his field who has successfully argued before the Pennsylvania Supreme Court, Tom authored the closing chapter of the 2003 book "*Medical-Legal Aspects of Pain and Suffering*," and is a lecturer who has given many educational presentations on trial practice.

Jules Epstein is Professor of Law and Director of Advocacy Programs at Temple University Beasley School of Law. He is faculty for the National Judicial College and lectures nationally on subjects including eyewitness evidence, the law of Evidence, trial and appellate advocacy, and criminal law. With Professor Grant Rost, he is co-author of the *Brain Lessons* blog. In the past years Professor Epstein has argued and won several Evidence-related cases in the Pennsylvania Supreme Court.

Kristen M. Gibbons Feden is an Associate at Saltz, Mongeluzzi and Feden. She is widely regarded as one of the Nation's leading litigators in the field of sexual abuse and civil rights.

Kristen has proven herself to be fearless when fighting for survivors against high-profile offenders and large institutions. Christened by the New York Times as "The Prosecutor Who Stared Down Bill Cosby," Kristen is internationally recognized as a leading litigator in the #MeToo Movement. Nationally acclaimed as a fierce litigator, Kristen has represented numerous sexual abuse survivors in their pursuit of civil justice and received a multitude of awards for her tireless work with the most vulnerable survivors, many of whom were in their darkest moments when they sought her out.

Linda Dale Hoffa chairs the White Collar/Government Investigations Practice Group at the Philadelphia law firm Dilworth Paxson LLP. Before re-entering private practice, she was the Criminal Division Chief at the U.S. Attorney's Office in Philadelphia and after that served as the top criminal prosecutor at the Pennsylvania Attorney General's Office. She has supervised, as well as conducted, thousands of criminal investigations, and tried many high profile and complex cases. She is a Lecturer in Law at the University of Pennsylvania Carey School of Law.

Elizabeth Lippy is Practice Professor of Law and Director of the Trial Advocacy Program at Temple University Beasley School of Law, having previously served as Assistant, and then Associate Director of Trial Advocacy at American University's Washington College of Law for almost a decade. She brings extensive experience in both advocacy education and litigation training, and particular expertise in courtroom technology and remote advocacy; the military judicial system; the prosecution and defense of complex sexual assault cases; and coaching student-advocates for success in trial competitions and in the courtroom.

In addition to her work in advocacy education, Professor Lippy is an experienced litigator. She is Of Counsel at Fairlie and Lippy, P.C., which she co-founded in 2009, and Executive Director of

Trial Advocacy Consulting and Training, LLC (TACT), which provides trial advocacy training and consulting to practicing attorneys nationwide. She is a 2003 graduate of Temple University Beasley School of Law, where she excelled as a member of the National Trial Team and served as a trial team coach and Visiting Lecturer for the LL.M. in Trial Advocacy program from 2003 to 2009.

Rob Livermore is an Assistant United States Attorney in Eastern District of Pennsylvania and a Fellow in the American College of Trial Lawyers. He has been a federal prosecutor for 20 years specializing in organized crime cases. He has been an instructor at the National Advocacy Center for 15 years where he helps to train new federal prosecutors. He also trains prosecutors from around the world on how to more effectively prosecute organized crime cases. Prior to becoming a federal prosecutor, Rob was a state prosecutor in Virginia. He graduated from George Washington University Law School in 1998.

Hon. Gerald Austin McHugh is a federal judge in the United States District Court for the Eastern District of Pennsylvania. He took the bench in May 2014. He is a Fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers. Before becoming a judge, he represented plaintiffs in aviation, product liability, medical malpractice, and civil rights matters, trying numerous cases to verdict. After graduating from Penn Law School, he began his career by clerking for the court where he now sits.

Prior to joining the court, McHugh was a partner at the Philadelphia law firm of *Raynes McCarty*. McHugh earned an A.B. graduating *summa cum laude* in 1976 from St. Joseph's University. He went on to earn a J.D., graduating *cum laude* from the University of Pennsylvania Law School in 1979.

Professor Grant Rost is a former plaintiff's personal injury attorney who represented clients in almost all 88 counties in Ohio while working for a large personal injury firm. He first came to Liberty University School of Law as an administrator but now teaches full time. Professor Rost teaches primarily in lawyering skills, focusing on writing and oral advocacy. He is one of three moot court coaches for Liberty's nationally ranked moot court teams. After competing as an advocate on the University of Akron's nationally ranked law school trial teams, Professor Rost also coached mock trial teams at the high school, collegiate, and law school levels. In his free time, Professor Rost is an avid outdoorsman and a professional photographer.

To supplement his legal education and advance his skill as a teacher and trainer, Professor Rost earned a Master of Education from Lynchburg College in 2015. He has presented at numerous training conferences for lawyers and law professors at Stetson College of Law, American University's Washington College of Law, and Samford University's Cumberland College of Law. Along with nationally recognized Evidence professor, Jules Epstein, Professor Rost is co-

author of the Brain Lessons for Trial Lawyers monthly blog out of Temple University School of Law.

Professor Rost's areas of research and writing focus on cognitive biases, heuristics, and courtroom persuasion. He is the author of *Campfires, Car Accidents, and the Cosmos: Persuasive Appeals to Jurors Through the Human Appetite for Wonder.* 4 Stetson J. Advoc. & L. 54 (2017)

Leigh Skipper is the chief federal defender of the Federal Community Defender Office for the Eastern District of Pa. As the chief federal defender, he oversees one of the largest federal defender offices in the country, responsible for the training, strategy and supervision of over 60 attorneys as well as investigators, technology and administrative support staff, responsible for federal criminal representation in the trial, appellate and capital habeas units. He is adjunct faculty at Drexel University Klein School of Law and a member of the Ameican College of Trial Lawyers.

Beth Weisser is a partner at Fox Rothschild. Beth's practice focuses on complex commercial litigation with an emphasis on white collar criminal defense and regulatory compliance work, as well as media, defamation and privacy law. She also represents attorneys in disciplinary proceedings and hearings before the Pennsylvania Board of Law Examiners.

Beth has significant experience with pre-trial and trial proceedings in both state and federal courts, as well as alternative dispute resolution. While she represents clients in a variety of industries, Beth spends considerable time representing clients in health care and higher education.

CLE MATERIALS

SENTENCING

Who appointed *me* God?

Reflections of a Judge *on* Criminal Sentencing

BY TIMOTHY J. CORRIGAN

IN my 14 years as a federal district judge, I estimate that I have sentenced well over 2,000 individuals.[1] Sentencing is the most multifaceted, emotional, and challenging task a judge performs. After a particularly difficult sentencing, I often say, sometimes to myself and sometimes aloud, "Who appointed me God?" or "Why did I possibly think that I was the right person for this job?" or "Why did anyone possibly think I was the right person for this job?" Of course, I know that sentencing judges are not God; we are mere mortals tasked with the sometimes impossible assignment of determining a sentence that is "sufficient, but not greater than necessary."[2] But sentencing judges do have very wide discretion,[3] and, in all but a few cases, the decision of the sentencing judge is final. The consequences of that sentence may have far-reaching implications in the lives of crime victims, defendants, their families, and others. A sentence can have a ripple effect that can be felt by many and for a very long time.

This essay is personal, not scholarly, though I have read a good bit of sentencing scholarship.[4] I also did not rely on data-driven research or a reading of sentencing decisions by other judges (though I have read many over the years). Nor have I attempted to undertake a comprehensive review of all major issues that arise in sentencing; rather, these are some selected topics — bias, the role of punishment, the "cooperation conundrum," avoiding randomness, remorse and rehabilitation, conducting the sentencing hearing — that I deem to be representative and of special interest.[5] While the citations are to federal law, the themes discussed largely apply to any judge, state or federal, who sentences criminal defendants. I am betting that many of my experiences are similar to yours and that many of the questions I have you also share. Given that sentencing is the most sobering and important task given to us as judges, I think it instructive for us to step back every now and then, analyze what we are doing and why we are doing it. At the very least, writing this essay has been worthwhile (and somewhat therapeutic) for me; I hope reading it will prove of some value to you.

It was my very first sentencing as a district judge. The defendant stood convicted of operating a marijuana-grow operation. Not realizing the importance of accurately cataloging the number of marijuana plants, a law enforcement agent had indiscriminately stuffed the marijuana plants into

garbage bags. The cutoff point for whether the defendant's sentence carried with it a minimum-mandatory sentence was whether there were 100 or more marijuana plants. To determine this number, a DEA expert removed the marijuana from the garbage bags and attempted to reconstruct each individual plant from the broken, mangled, tangled mess. Some of the plants were a little more than an inch high, while others were full bushes. Following this painstaking effort, the DEA expert opined at sentencing that there were 102 separately identifiable marijuana plants. However, the defendant's counsel had hired his own expert biologist who performed the same reconstruction but found that there were only 98 marijuana plants, two short of the minimum-mandatory quantity.

I determined that each expert had equally impressive credentials (both had DEA backgrounds), used equally valid methodologies, and made equally credible presentations. In my first substantive act as a sentencing judge, I found that the evidence was in equipoise (a concept I had learned in law school evidence and had never before had occasion to apply), and because the government bore the burden of proving drug quantity at sentencing, I would not impose the minimum-mandatory sentence. Afterward, I thought to myself, "Are they all going to be like this?"

Just as "there is no crying in baseball," there is also no crying allowed by the judge when sentencing a person to prison. So powerful are the emotions at many sentencings, that in a heavy sentencing week, my courtroom deputy will hand out a full box of tissues to defendants, family, victims, and occasionally court personnel. But never to me.

However, it is the children who sorely test my resolve. He was eight years old, and his father, a now twice-convicted drug dealer, was before the Court for sentencing. Here is the child's letter to me:

Dear Judge,

I need my dad he's the only thing that can keep this family alive. My mom agrees, my sister, and cousin we need him and his strength. I love him and miss him if it happened to you I think you'd know how I feel. If you don't let him go let his soul be free with the lord.

Sincerely

At the bottom of the page he had circled what looked like a wet spot and written beside it, "This isn't water, it's a tear." Possibly the saddest thing I had ever read in a sentencing letter.

This same defendant's daughter addressed me, standing just a few feet away from her father:

I feel like my life is really changing right now. I'm 23 and I need my dad. He has persuaded me to go into the Air Force. He is very adamant that he wants me to do something with my life, he wants me to be successful and my eight year old brother, he's taking it really hard. We both are. But I love my dad and I know he's sorry for what he's done. I know he's ashamed, I know he's remorseful.

[My brother] — he's really been having a really hard time. At times he doesn't want to go to my mom. We don't want to put too much of a burden onto my mom. So sometimes he'll come to me . . . . And he used to love baseball. But now he'll say, it's not the same because dad's not there [she begins crying]. Sorry. It's just been a really tough time because we are used to being the four of us. But like I said, I know my dad is remorseful and sorry for what he's done."[6]

Feeling the need to respond to her, all I could muster was this:

I know that it's difficult for you. I know I won't say anything that's going to make a difference to you but I do want you to know a couple of things. Sometimes in life people make bad decisions, but it doesn't make them bad people. And it's obvious that your father loves you, it is obvious that you are making something out of yourself even though you are facing this difficult circumstance and that's exactly what you should be doing and exactly what he would want you to do. And one of the tragedies of situations like this is it doesn't just affect the person who is before the Court, it affects the whole family and lots of other people and I really understand that. I really do.

There's not always something I can do to make it all go away but I understand it and I think it showed a lot for you to stand up here today and talk to me and I'm proud that you are going to be serving our country.

As I uttered this last sentence, I came perilously close to violating the "no crying" rule.

BIAS

Winston Churchill once said, "Nothing in life is so exhilarating as to be shot at without result." I am not so sure about that.

On June 23, 2013, I was shot at while I was sitting in my own home in my favorite chair with my wife just a few feet away. The bullet, I am told, narrowly missed my head, and if it had not, would surely have been fatal. Thinking about it now, even three years removed, "exhilarating" is not the word that comes to mind.

My assailant turned out to be a criminal defendant whom I had sentenced several years earlier. The first time I conducted a sentencing after this unhappy event, I was concerned whether it would change my sentencing calculus. Knowing that the FBI and other law enforcement agencies had investigated the crime against me and the U.S. Attorney's Office was prosecuting it, would I now become "pro-prosecution"? Knowing that my assailant was on supervised release when he attempted to kill me, would I now be more likely to give longer prison sentences to keep locked up those who might try to do me harm? On the other hand, would I start to pull my punches, becoming more lenient in the hope that I could curry favor with a potential future assailant?

It turned out that none of those things happened. While my return to the bench within days of the shooting carried with it some anxiety, I can honestly say that the

incident did not affect my sentencing decisions. How can I be so sure? By identifying the possible bias in advance and taking care to be conscious of it, sort of an "examination of conscience," I was able to neutralize its possible effects.

I recognize that I have just appointed myself arbiter of my own possible bias, but truthfully, no one else is likely to accuse a judge of sentencing bias unless it is egregious or documented. We judges must monitor ourselves for impermissible biases and do everything possible to eliminate them from our thinking.

There are other potential sources of bias in sentencing. Some are obvious — i.e., racial, ethnic, gender, or religious. Though not all would agree, I think that most judges are on guard against these types of bias.[7] Even so, judges must remain vigilant so that these biases do not creep into their sentencing decisions.

Other biases are less easily recognized. Take, for example, two bank robbers, identical in all respects in terms of their criminal conduct and backgrounds. At the sentencing of bank robber number one, the bank teller victim declines to testify or provide a victim impact statement. At the sentencing of bank robber number two, the teller comes in and shares her story of being in fear for her life, discusses how the effects of her harrowing experience cause her to continue to live in fear, and says that she suffers from post-traumatic stress disorder. She asks the judge to impose the maximum sentence. Is the sentencing judge likely to be influenced by the victim's testimony such that he gives a harsher sentence to bank robber number two than to bank robber number one, even though their conduct was identical? If so, is that impermissible sentencing bias or simply consideration of the effect of the crime on the victim as part of a rational sentencing calculus?

One day, after sentencing a female defendant, I was eating lunch with my staff, and my court reporter and courtroom deputy expressed the view that I was often more lenient when I sentenced women. This surprised me. Did I have a soft spot for female defendants? Because we sentence relatively few female defendants in comparison to males, I could recall many of those sentencings. Female defendants, much more commonly than males, are the sole providers and caretakers of young children. I therefore would often take into account the needs of these children in fashioning an appropriate sentence. So what my staff saw as leniency, I saw as a legitimate consideration concerning "the history and characteristics of the defendant."[8] But I was glad that they had raised this issue because it allowed me to identify a potential source of bias. I recently sentenced a male defendant who was the only caregiver for a young child, and I explicitly took that into account in structuring his sentence.

On June 23, 2013, I was shot at while I was sitting in my own home in my favorite chair with my wife just a few feet away. The bullet, I am told, narrowly missed my head, and if it had not, would surely have been *fatal*.

Not long ago, I was confronted with a case in which the defendant questioned whether I had been biased against him because he was a Chinese national. Two defendants were accused of importing massive quantities of chemicals into the United States for use in manufacturing synthetic drugs. The first defendant, an American, was caught in 2011, immediately cooperated, and spent the next four and a half years providing an extraordinary level of cooperation to the government, going undercover on a number of occasions, and putting himself in harm's way. This American defendant also testified before a number of grand juries and in trials around the country and had completely rehabilitated himself, operating a successful business and volunteering in the community. The American defendant also lured his Chinese counterpart to the United States, where he was arrested. Both defendants faced sentences in the 135-168-month range under the advisory guidelines.

I sentenced the American first. The government filed what was a highly unusual (in our district) request for a 16-level departure under United States Sentencing Guidelines § 5K1.1 because of the defendant's cooperation, recommending only a very short prison sentence (the case agent actually disagreed with the prosecutor and wanted probation). After a day-long sentencing hearing, I sentenced the American defendant to probation, home detention, and a substantial period of supervised release, requiring 1,500 hours of community service and a community service financial contribution of $500,000 (the defendant had already forfeited to the government over $5 million).

When it came time to sentence the Chinese defendant, there was no § 5K1.1 cooperation motion and very little the Chinese defendant could do to cooperate, given that the American defendant had gotten there first and spilled all of the beans. Other aggravating factors also existed. The government asked for a downward variance to 96 months. I sentenced the Chinese defendant to 50 months. In so doing, I acknowledged the disparity between the American and Chinese defendants' sentences but found that disparity to be appropriate:

> *I want to be clear about this that there will be a disparity between [the Chinese defendant's] sentence and [the American defendant's] sentence; there will be.*
>
> *And I want to make absolutely clear — I hope it need not be said, but I want to say it anyway: That has nothing to do with their nationality or where they come from*

or what their culture is or anything like that. It really has to do with their case.

I view [the Chinese defendant] — and this happens all the time in our criminal justice system. The person who gets there first — and in this case it was [the American defendant] — who, when confronted with his crimes, agreed to cooperate with the government, and then just jumped in with both feet for a four-and-a-half-year period, racking up numerous prosecutions and other information for the government, none of which [the Chinese defendant] had an opportunity to do — but that's not all that unusual.

[The American defendant] effectively allowed the government to prosecute [the Chinese defendant] in circumstances under which the government would have otherwise not been able to do so . . . .

And so what has happened is one business partner in an illegal enterprise has turned government's evidence and helped the government prosecute another one and in part is rewarded for that . . . .

But the fact of the matter is [the Chinese defendant] was a Chinese national when he was arrested here in the United States [and] there was virtually no chance he would get released and be able to do any kind of cooperation that was proactive, even if he were in a position to do so.

And you can call that an inherent unfairness in the system or you can call it the way it is or you can call it whatever you want, but it is the truth.

So there is going to be a disparate sentence but I don't think it will [be] unwarranted. And I would think that if the shoe would have been on the other foot, that if somehow [the Chinese defendant] had been the first one to the table and he had brought in [the American defendant] and others I think he probably would have gotten the same type of consideration that [the American defendant] got. I don't necessarily always think that's the best system that we have that rewards cooperation to such an extent . . . .

So I think there's going to be disparity. And I could see why somebody might object to that disparity, but I just don't think it's unwarranted sentencing disparity. I do think that [the Chinese defendant] has presented himself as a person who was importing illegal substances into the United States knowingly over a long period of time and in great quantities.

…*[T]here* is another feature of our sentencing regime for which we must account: A defendant's sentence is also supposed "to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the *offense*."

A few days after I sentenced the Chinese defendant, he wrote me a long letter questioning the fairness of his sentence in comparison to the American defendant and suggesting, among other things, that his nationality played a role. While I understand why he might feel that way, I think he is wrong. And I hope that by accounting for the potential bias in my sentencing decision, I have avoided "*unwarranted* sentencing disparities among defendants with similar records who have been found guilty of similar conduct."[9]

All of us who sentence have potential biases, blind spots, or predilections that, if we do not acknowledge them, can subconsciously affect our sentencing decisions. But if we do take care to "examine our conscience," identify these potential biases, and do everything we can to neutralize them, we are doing the best we can.

THE ROLE OF PUNISHMENT

It is not uncommon for a probation officer to tell me before a sentencing, "I don't think you will ever see this person again." Indeed, by the time of sentencing, some defendants have demonstrated appropriate remorse, completely turned their lives around, and have already transitioned to becoming law-abiding, productive citizens. Thus, their "history and characteristics" are positive, specific deterrence is not an issue, and the public needs no protection "from further crimes of the defendant."[10] Sometimes these defendants receive sentences of either time served or probation. But there is another feature of our sentencing regime for which we must account: A defendant's sentence is also supposed "to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense."[11]

Thus, "just punishment" must also be meted out. This requirement sometimes results in a prison sentence even when all other sentencing factors point to a non-incarcerative disposition. I frankly struggle when deciding such cases. But the concept of accountability and punishment for past misconduct has long been rooted in our criminal justice system.

In a recent *New York Times* article, Judge Stefan R. Underhill, a federal district judge for the District of Connecticut, writes of sentencing a man to 18 years in prison after he "had sold heroin, assaulted rival dealers, and murdered a potential witness."[12] Because the defendant was cooperative, the government had filed a substantial assistance motion (apparently advocating for even less than the 18 years Judge Underhill imposed), which allowed Judge Underhill to ignore the mandatory life sentence that the defendant would have otherwise faced. Judge Underhill then recounts a meeting he had with the defendant in prison and his belief that the

man had been completely rehabilitated and needed no further incarceration. (He had served about 11 years at that point.) Judge Underhill advocates for a "second-look review" to allow judges in certain circumstances one opportunity mid-sentence to adjust a sentence downward based on a defendant's extraordinarily good conduct and rehabilitation in prison.

While I am open to considering Judge Underhill's idea for a "second-look" at some sentencings (indeed, all judges have imposed sentences on which they would like a "do-over"), I question whether the defendant in Judge Underhill's case would be deserving of such consideration. Even if you accept Judge Underhill's belief that the defendant has been completely rehabilitated and poses no future threat to society, he still committed a cold-blooded premeditated murder, among other serious crimes. Under our current sentencing norms, it may well be that the 18 years of imprisonment he received was the minimum necessary "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

THE COOPERATION CONUNDRUM

The vagaries of how courts apply substantial assistance protocol lead too often to inconsistent and questionable results. While I understand the value of a criminal defendant cooperating with the government in the pursuit of solving further crime, I have long questioned the outsized role that cooperation plays in the federal sentencing regime. Here are just a few of the recurring problems I have noticed when dealing with substantial assistance motions.

The paradigm case, which fortunately does not happen frequently, occurs when the more culpable party, or even the ring leader, cooperates against his underling. In the worst-case scenario, the cooperator, with the benefit of a substantial assistance motion, can break through a minimum-mandatory sentence, while the underling, because of his lesser role and concomitant lesser knowledge, has nothing to offer the government. Fortunately, these cases are relatively few, as the government seemingly recognizes that this situation creates unfairness and finds a way to either accord cooperation status to the underling or otherwise account for the problem in its charging decisions.

Another problematic issue arises when a defendant provides valuable information to the government, but, for reasons outside of the defendant's control, the government cannot or chooses not to use that information in aid of a new prosecution. Because § 5K1.1 and § 3553(e) speak of "substantial assistance in the investigation or prosecution of another person who has committed an offense," the government will decline to file a substantial assistance motion unless the cooperation leads to the making of or assistance in a new case (or prosecution of codefendants). All too often, this leaves an otherwise worthy and cooperative defendant standing at the altar.

The issue of third-party cooperation has proven troublesome. Until the government in our district tightened its standards as to when it will allow third-party cooperation (partially in reaction to complaints from the bench), I had a number of instances where the use of third-party cooperation was flawed. The most notorious example was a case in which a third party provided cooperation for which two of his cousins, both facing sentencing, attempted to claim credit. When I asked the government how it would decide who should get the benefit of the third cousin's cooperation, the government attorney told me that he would leave it up to the cooperating cousin to decide which cousin he thought more deserving. Really? And this doesn't even address the issue of whether the court ought to be encouraging third parties to potentially put themselves in harm's way to benefit a defendant who takes none of the risk.

There are no national DOJ guidelines or other uniform standards as to how the government recommends or the court decides how much sentencing credit to give a defendant who is the beneficiary of a substantial assistance motion.[13] In my own district, there is a written U.S. Attorney policy that if the substantial assistance leads to a new prosecution, the government will recommend a four-level reduction from the otherwise applicable advisory guidelines. If the substantial assistance leads to the prosecution of a codefendant, the government will seek a two-level reduction. Greater departures require supervisory approval.[14] In other districts, the government recommends sentencing credit based on a percentage reduction of the advisory guidelines range (the percentage varies widely, even up to 50 percent); in still others, the government makes no recommendation at all to the sentencing judge. Given the court's ability under *Booker*[15] to vary downward in any event, the amount of credit given for substantial assistance perhaps is not as significant as it once was; however, it is still important and there appears to be little consistency in its application around the country and sometimes within the same district.[16]

I have always been struck by the disparity that can arise in using guidelines levels as the basis for substantial assistance credit. For example, a defendant being sentenced either as a career offender or for an extremely serious offense and who has a lengthy criminal history might have an advisory guideline range of 35/6, which recommends a sentence between 292 and 365 months. If this defendant receives the benefit of a four-level reduction for his cooperation, his guidelines become 188 to 235 months, well over a 100-month reduction. A less blameworthy defendant with a shorter criminal record who receives the same four-level reduction reaps much less benefit. A defendant with an advisory guideline range of 16/2 (24 to 30 months), who receives a four-level substantial assistance reduction, has an adjusted guidelines range of 12 to 18 months, or 12-month difference. Thus, the more serious the offense that you commit and the worse your criminal record, the more you will benefit by your cooperation. The same holds true, by the way, if you apply a consistent percentage reduction to these two defendants' guidelines. While there may well be cases where this type of disparity is appropriate, there are undoubtedly others where it is not. The sentencing judge, of course, is not bound by these recommendations, but surely they are influential, whether the judge explicitly uses them or subconsciously utilizes them as an "anchor."[17]

Then, there is the defendant who "refuses" to cooperate. There can be reasons for this other than obstinacy or lack of

remorse. Sometimes, family members are involved and a cooperating defendant would have to name his own family to get sentencing credit. In other cases, defendants fear their cooperation will become known and either they or their family will be at risk.[18] Still others just can't bring themselves to implicate somebody else. I recently had a defendant who did cooperate tell me in open court that he felt like "a piece of sh_t" for doing so.

Finally, the government's decision whether to seek pretrial detention and the court's decision whether to detain a defendant can dictate whether a defendant is able to provide meaningful cooperation. A detained defendant may only provide historical cooperation, while one at liberty can be proactive and possibly earn a larger reward.

These are just some concerns (not original to me) with the premium that we place on cooperation in our federal criminal justice system. We are overdue for a system-wide reevaluation of this process. I am not suggesting the elimination of cooperation as a feature of sentencing, but the current regime is in need of study and reform.

LOOKING FOR CONSISTENCY (OR AT LEAST TRYING TO AVOID RANDOMNESS)

A judge who has sentenced for any length of time lives in fear of catching herself coming and going. When people ask me what goals I am trying to achieve when I sentence someone, I always say that one thing I am trying to do is avoid randomness. Putting aside minimum-mandatory cases, why did I sentence the drug defendant last week to 151 months when I'm getting ready to sentence this drug defendant to 48 months? Why am I sentencing the bank robbery defendant who claimed to have a firearm but never displayed one to more time than the bank employee who embezzled far more money from the bank? Why, under the sentencing guidelines, does the defendant who went on a crime spree and robbed multiple banks not face significantly increased exposure than if he had robbed just one? Why am I sentencing a large-scale drug importer to 50 months when a couple of years ago I gave 54 months to a single mother of an eight year old, who had committed serial identity theft and continued to do so even after she knew she was under investigation? Why do the sentencing guidelines eventually forgive a defendant for her long-ago past crimes, while the Armed Career Criminal Act has no such statute of limitations? Why under the advisory sentencing guidelines do repeat offenders of certain crimes pay a much higher penalty than repeat offenders of other types of crimes? Why is a repeat offender sometimes facing less time under the guidelines the second time than he was the first?

No **judge worth her salt can fail to be concerned with trying to achieve consistency, proportionality, and the avoidance of "unwarranted" disparity or apparent randomness in the sentencing *process*.**

I could go on. I am not trying to be critical of the United States Sentencing Commission (which has the impossible task of setting guidelines for every federal crime and accounting for every conceivable sentencing scenario) or deny the difficulty in creating a fair and consistent sentencing regime.[19] Indeed, there may well be good answers to some or all of my rhetorical questions, but to the extent that we seek to have "the punishment fit the crime" and to "avoid unwarranted sentencing disparity," sentences given in unrelated cases or at different times may sometimes be difficult to reconcile or explain when viewed on a broader spectrum.

One answer is that every judge tries to sentence each defendant based on the individual facts and circumstances of the case without regard to the sentence that same judge (or another) may have given a different defendant convicted of another crime at a different time. This can be true even in the same case. I knew, for example, that when I sentenced the American drug importer to probation, I was likely to face a difficult decision as to how to sentence the Chinese exporter. Yet, I did not think it appropriate for me to "penalize" the American in order to reach some artificial "consistency" vis-a-vis the Chinese defendant.

The answer certainly is not to return to a mandatory guidelines scheme. Giving the sentencing judge discretion (as has occurred post-*Booker*) properly places the sentencing responsibility in the hands of the judge, allowing the judge to try to achieve a just sentence in the individual case. Indeed, I actually think the system we have now with advisory guidelines and sentencing discretion works relatively well. (It would work better if we eliminated or drastically reduced the number of minimum-mandatory sentences.) Even if we returned to a system requiring more deference to the guidelines, many of the problems of potential inconsistency I am describing would still be present.

Every time we sentence someone, we are expressing a societal value judgment as to the appropriate sentence for that particular crime and that particular defendant. No judge worth her salt can fail to be concerned with trying to achieve consistency, proportionality, and the avoidance of "unwarranted" disparity or apparent randomness in the sentencing process.

HOW DO WE KNOW WHETHER TO BELIEVE A DEFENDANT'S REMORSE?

This question, lurking in the background of many cases, was present in spades in a recent sentencing of a 19 year old who pled guilty to conspiracy to provide material support to terrorists. The defendant had trained himself to participate in jihad and traveled to the Middle East hoping to join

Al-Qaeda in Yemen, only to be rebuffed and returned home to the United States, where he continued to espouse the desire to commit terrorist acts. At sentencing, the defendant expressed remorse and regret, renouncing all of his radical leanings, telling me he considered himself to be an American who wanted to get his MBA and perhaps study how to combat terrorism. Where he had previously been bearded, long-haired, and robed, he was now clean-cut. My struggle over the sincerity of the defendant's remorse and rehabilitation was apparent:

> *If the Court was convinced that Bell's repentance was sincere and permanent, he would still need to be punished, but a lesser term of imprisonment would suffice. If the Court was convinced that Bell's radicalization was permanent and his remorse feigned, the full 30-year maximum term might well be appropriate because he would present an ongoing terrorist threat. What, though, if the Court cannot be sure?*
>
> *Bell has admitted that he was a terrorist, that he had accepted and fully subscribed to the extremist views of Anwar al-Awlaki, and that he had become radicalized to the point of turning these views into action both in the United States and abroad. There may be lingering doubt whether he would have indeed fought and killed had he joined Ansar al-Shari'a or another terrorist group. But there is reason to think that he would have . . . .*
>
> *Bell understood that he would be considered a terrorist for his actions. Yet, he persisted in his radical agenda even after returning to the United States and knowing he was under surveillance by federal law enforcement.*
>
> *Bell's past lies and full embrace of the terrorist ideology color his current expressions of remorse and make it difficult for the Court to know whether to believe his seemingly sincere renunciation of terrorism and re-acceptance of the label of "American." Bell is undoubtedly bright and capable of feigning remorse to obtain a more favorable sentence. But on the other hand, though it contains discrepancies, his letter's expressions of regret and hope of rejoining society and becoming a law-abiding citizen cannot be ignored.*
>
> *At the sentencing hearing, the Court was interested to hear from Bell himself. As committed to the cause as he was in the many videos, the Court thought it might be difficult, if not impossible, for him to personally and publicly reject his past statements and actions. But he did. Had he done otherwise, the Court's decision here would have been easier. As it is, though, the Court cannot gainsay the possibility that, having now been in custody for nearly two years, Bell has permanently turned away from terrorism.*
>
> *If he has, Bell would still have to pay for his crimes, but the Court's sentence could reflect that a troubled young life had begun the journey of rejoining civilized society. However, unlike other crimes, where, in a close case, the Court might give the benefit of the doubt to a seemingly remorseful defendant, terrorism-related crimes are different. Terrorism endangers the lives and property of the public at large, seeks to weaken or destroy societal institutions, and tries to spread as much fear and panic as possible. While the Court hopes that Bell's disavowal of this path is real, the need to protect the public from further crimes of this defendant remains an important consideration.*[20]

THE SENTENCING HEARING

Those of you veteran sentencers need no help from me as to how to conduct a sentencing hearing or arrive at your sentence. However, there may be some newer judges who might benefit from brief discussion of some things I have learned along the way:

1. *Read everything beforehand.* Even the letters. While numerous letters from a defendant's family or friends can be repetitious, they often contain useful nuggets (both positive and negative) and give you better insight into the person's character. (Then you can also truthfully tell the letter writers at sentencing that you have read them.) By the way, I am constantly amazed by how many criminal defendants lead double lives. At the same time they are committing serious crimes, their families and friends (who are either ignorant of their acts or willfully blind) consider them the salt of the earth.

2. *If at all possible, sentence related defendants or related cases together.* If you do not, you may find yourself having sentenced a defendant and later realize that a related defendant's sentence is not going to make sense, or you learn information in the related defendant's case that you would have liked to have known at the time you sentenced the first defendant. You are also more likely to be internally consistent within a case or a set of related cases if you sentence all of the defendants at the same time or nearly so. Indeed, I sometimes wait to impose sentence until I have heard all the related cases and then pronounce with everyone together.

3. *Be solicitous of victims who appear in person and of the defendant's family and friends.* It is a stressful time for all of them, and they very often do not understand what is going on. Take the time to thank them for being there and explain to them what is happening. If they are going to speak, consider letting them go first in case they have to leave and otherwise try to put them at ease.

4. *Don't underestimate how much what you say and how you say it during a sentencing hearing matters.* Offer victims, whose lives may have been devastated, sympathy and hope. Be empathetic to defendants' families who oftentimes are living a nightmare. There is nothing inconsistent with imposing a just sentence and trying to encourage a defendant to do better. I can only think of a few defendants (one remorseless father convicted of molesting his own child; another an unrepentant and defiant Ponzi schemer) for whom I could not find something positive to say. If appropriate, I will even compliment the lawyers and case agent for a job well done.

5. *Use the sentencing hearing to work out your own thinking.* More than any other type of hearing, you will learn more at a sentencing hearing that could influence

your ultimate decision. Often times, when I am questioning lawyers or witnesses at a sentencing hearing, I am listening to what they have to say but also verbalizing my own thoughts so I can in effect test my reasoning.

6. *Do not pronounce sentence until you are ready.* Early on, I felt the eyes of the courtroom on me and would start to pronounce a sentence before I was really sure what I was going to say. I have gotten over that. I always take at least a few minutes after presentations have closed to gather my thoughts and sometimes longer. If I need to take a recess, I do. In the rare case, I will continue the sentencing until another day so that I can give the matter more thought or perhaps research an issue as to which I am uncertain. Once you pronounce a sentence, that is it for all time. Don't rush.

7. While precedent under § 3553(a) does not require you to articulate each and every sentencing factor, I generally try to do so anyway, even if briefly, to *explain to all parties present my thinking and why I am going to give the particular sentence.* This approach has the added benefit of giving the appellate court a more complete understanding of your reasoning and allows you to listen to yourself as you speak to make sure that you are satisfied with your rationale and the result that you reach. I often find, too, that the family and friends of a defendant (and sometimes the defendant himself) don't appreciate the severity of the crime or the defendant's prior record. Taking the time to explain that may at least help them to better understand the sentence. I also articulate the sentencing guidelines, any applicable minimum-mandatory, and the statutory maximum, and I try to explain what they mean.

8. Although the law does not require it, I *give prior notice to a defendant if I am considering varying upward from the guidelines.* While upward variances are less common than downward variances, they do happen, and I do not want a defendant to be blindsided when it does. If it is not apparent until sentencing that I might upwardly vary, I offer the defendant a continuance to prepare to argue against that course of action. Likewise, if the government is surprised by a downward variance and thinks it can provide me with additional information to convince me otherwise, I will give it an opportunity to do so.

9. *Don't be afraid to be creative if circumstances allow.* You have broad discretion in imposing a sentence, and there are times when you should use it.

   A couple of examples come to mind from my own experience. There was a 60-year-old defendant, president of a small construction company, who at the behest of his neighbor took a "treasure map" and tried to dig up a crate stuffed with kilograms of cocaine which had been buried on a Caribbean island years before. (I likened the case to "Breaking Bad" meets "Walter Mitty.") Although the cocaine turned out to be unusable, and the defendant could not retrieve it without the aid of undercover government agents, he was nevertheless guilty of attempted possession of a substantial quantity of cocaine. Fortunately, the defendant qualified for the safety valve, leaving the minimum mandatory off the table. He had zero criminal history and was unlikely to ever get so much as a future traffic ticket. Without objection by the government, I sentenced the defendant to 60 days in prison, a period of home detention, and supervised release. One of the conditions of supervised release was that the defendant use his construction knowledge to work 20 hours a week for Habitat for Humanity. At the defendant's suggestion, I also required him to build a "Splash Park" in his hometown at his own expense.

   Another defendant was a twice-convicted drug dealer facing a significant period of imprisonment. After the defendant was apprehended, his estranged wife suffered an injury that rendered her a quadriplegic. At the sentencing, the wife's sister essentially argued to me, "Don't you dare put him in jail and let him sit comfortably there while his wife, who needs 24 hours a day assistance, goes without. The defendant will suffer much more having to attend to her than he ever will in a prison cell." Again with the concurrence of the government, I gave the defendant an extended period of supervised release and required that he provide full-time care for his wife during the entire term of his supervision. He continues to do so to this day.

   All of us have had cases where a nontraditional sentence makes sense. If you can do so, try to get the government and the defendant on board, but even if you can't, it still might be the right thing to do.

10. Both at sentencing and in your written criminal judgment, *be specific in your recommendations to the Bureau of Prisons and to Probation and tailor those recommendations to the individual needs of the defendant.*

CONCLUSION

I am sometimes asked what's the most important attribute of a good judge. I used to answer that question differently, but now I say "humility." This is especially true in sentencing. No matter how long we have done it, we can never forget what an awesome responsibility it is to decide whether and for how long to deprive someone of their liberty. We also must remember our duty to those affected by the sentencing, to the general public, and

TIMOTHY J. CORRIGAN is a U.S. District Judge for the Middle District of Florida. He serves on the Judicial Conference Committee of the Administration of the Magistrate Judges System and the Florida Commission on Access to Civil Justice. **The author expresses his appreciation to the Honorable Marcia Morales Howard for her invaluable contributions to this article.**

to the cause of justice, to do everything we can to get it right. One aspect of that responsibility is to continually reexamine the various components of sentencing and recognize that sentencing, more than any other judicial function, is dynamic and needs constant attention. If we work hard at it, avoid complacency, and strive for a just sentence in every case, even if we are never fully satisfied that we are achieving it, we are doing all that can be asked of us.

[1] Though this number is enough for me to speak with some experience on the subject of sentencing, it is a fraction of the number sentenced by my veteran state court counterparts.

[2] 18 U.S.C. § 3553(a).

[3] *See United States v. Booker*, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); *United States v. Rosales-Bruno*, 789 F.3d 1249, 1273 (11th Cir. 2015) (finding that "the sentence did not exceed the outer bounds of the wide range of discretion that district courts are afforded"); *Ledford v. Peeples*, 605 F.3d 871, 922 (11th Cir. 2010) (explaining that when reviewing for an abuse of sentencing discretion "the relevant question is not whether we would have come to the same decision if deciding the [sentencing] issue in the first instance," but instead, "whether the district court's decision was tenable, or, we might say, 'in the ball park' of permissible outcomes").

[4] *See, e.g.*, Jeffrey J. Rachlinski et al., *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 Ind. L.J. 695 (2015); Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 Am. Crim. L. Rev. 1 (2015); Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 Ala. L. Rev. 735 (2014); Nancy Gertner, *How to Talk About Sentencing Policy—And Not Disparity*, 46 Loy. U. Chi. L.J. 313 (2014); Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 Ohio St. J. Crim. L. 523 (2007); Lynn S. Adelman et al., *Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges*, 75 Fordham L. Rev. 1 (2006); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 Duke L.J. 951 (2003); Alan Ellis, *Views From the Bench on Sentencing Representation: Part 1*, Law360 (Mar. 1, 2016), http://alanellis.com/wp-content/uploads/2016/03/prison-sentencing-representation-law360-1.pdf; Matthew Van Meter, *One Judge Makes the Case for Judgment*, The Atlantic (Feb. 25, 2016), http://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/.

[5] As this essay went to press, I attended a seminar put on by the United States Sentencing Commission which reminded me that there are so many other aspects of sentencing to discuss: reentry and drug courts, the role of the Bureau of Prisons, and proposed guidelines reforms, to name a few. Maybe next time.

[6] All transcript quotes are substantially accurate but have been lightly edited for ease of reading.

[7] The current public debate about whether the enforcement of drug laws has had a disproportionate effect on African American and other minority communities has less to do with sentencing bias by judges and more to do with how the drug laws are enforced, the role of minimum-mandatory sentences, and lengthy drug sentences which were imposed under the preexisting mandatory sentencing guideline regime.

[8] 18 U.S.C. § 3553(a)(1).

[9] *Id.* § 3553(a)(6) (emphasis added).

[10] *Id.* § 3553(a)(1), (2)(B), and (c).

[11] *Id.* § 3553(a)(2)(A).

[12] Stefan R. Underhill, Opinion, *A Judge's Regret and a Killer's Remorse*, N.Y. Times, Jan. 24, 2016, at SR4.

[13] I have confirmed this both by research and an unscientific poll of some of my colleagues around the country.

[14] I am told that this long-standing policy is currently under review.

[15] *United States v. Booker*, 543 U.S. 220 (2005).

[16] For a recent discussion of variances in Federal Criminal Procedure Rule 35(b) sentencing reductions around the country, *see* United States Sentencing Commission, The Use of Federal Rule of Criminal Procedure 35(B) (2016).

[17] Rachlinski, *supra* note 4, at 700 (discussing the "anchoring" effect of numeric reference points, even when such numbers are arbitrary).

[18] The Judicial Conference Committee on Court Administration and Case Management, with the aid of the Federal Judicial Center, is studying the risks faced by cooperators and is in the process of providing guidance to sentencing courts. In connection with this effort, the FJC has just published *Survey of Harm to Cooperators: Final Report*. *See* Margaret S. Williams et al., Federal Judicial Center, Survey of Harm to Cooperators: Final Report (2016).

[19] A member of the Sentencing Commission, Circuit Judge William Pryor of the Eleventh Circuit Court of Appeals, has recently suggested significant reforms to the post-*Booker* sentencing regime. Judge Pryor proposes, among other things, a guidelines structure in which Congress and the Sentencing Commission would create a system of presumptive guidelines, a radically simpler system with wider sentencing ranges and fewer enhancements. Those remaining enhancements would be found by juries, not judges, unless a defendant admitted to the enhancements in pleading guilty. At the time this article went to press, Judge Pryor's article, *Returning to Marvin Frankel's First Principles in Federal Sentencing*, had not yet been published but should now be available to the reader.

[20] *United States v. Bell*, 81 F. Supp. 3d 1301, 1324–25 (M.D. Fla. 2015).

MODERN SENTENCING MITIGATION

John B. Meixner Jr.[*]

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Sentencing has become the most important part of a criminal case. Over the past century, criminal trials have given way almost entirely to pleas. When a case is charged, it almost always ends up at sentencing. And notably, judges learn little sentencing-relevant information about the case or the defendant prior to sentencing, and have significant discretion in sentencing decisions. Thus, sentencing is the primary opportunity for the defense to affect the outcome of the case by presenting mitigation: reasons why the nature of the offense or characteristics of the defendant warrant a lower sentence. It is surprising, then, that relatively little scholarship in criminal law focuses on mitigation at sentencing. Fundamental questions have not been explored: Do the Sentencing Guidelines—which largely limit the relevance of mitigating evidence—make mitigation unimportant? Does the extent or type of mitigation offered have any relationship with the sentence imposed?

This article fills that gap by examining a previously unexplored data set: sentencing memoranda filed by defense attorneys in federal felony cases. By systematically parsing categories of mitigating evidence and quantitatively coding the evidence, I show mitigation is a central predictor of sentencing outcomes, and that judges approach mitigation in a modern way: rather than adhering to the strict, offense-centric structure that has dominated sentencing since the advent of the Sentencing Guidelines in the 1980s, judges individualize their sentences in ways that consider the personal characteristics of each defendant, beyond what the Guidelines anticipate. And particular types of mitigation, such as science-based arguments about mental and physical health, appear especially persuasive.

The results have significant implications for criminal justice policy: while my data show that mitigation is critical to judges' sentencing decisions, both the Guidelines and procedural rules minimize mitigation, failing to encourage both defense attorneys and prosecutors to investigate and consider it. I suggest reforms to make sentencing more equitable, such as requiring the investigation and presentation of mitigation to constitute effective assistance of counsel, easing the barriers to obtaining relevant information on mental and physical health mitigation, and encouraging prosecutors to consider mitigation in charging decisions and sentencing recommendations.

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INTRODUCTION

Until 2000, Precias Freeman lived a normal life. She grew up in a good home, was active in her church, and was getting ready to have a baby.[1] Then, after she slipped in the shower and broke her tailbone, she was prescribed hydrocodone—a common opioid—to manage her pain.[2] Her use quickly turned into addiction. She worked for a doctor who—once the prescription lapsed—allowed her to write her own 30-pill prescriptions for the drug.[3] She started small, but at the height of her addiction, was taking 60–80 pills per day, an amount that could easily kill a person who had not built up such a tolerance.[4] "[E]very[] day I woke up . . . the first thing

[1] Sentencing Transcript at 14, 28–32, United States v. Freeman, No. 17-cr-00079 (D. S.C. Dec. 13, 2018), ECF No. 91.

[2] United States v. Freeman, 992 F.3d 268, 271 (4th Cir. 2021).

[3] *Id.*

[4] Sentencing Transcript at 14, 27, United States v. Freeman, No. 17-cr-00079 (D. S.C.

on my mind was how do I not have to feel like I am about to die."[5]

While Freeman initially took all of her pills herself, it was not long before she was selling them to support her habit. She began printing duplicate prescriptions for other patients who had been prescribed opioids. Filling the prescriptions, she would take half the pills herself and sell the rest—below market rate—to an acquaintance.[6] Eventually, the DEA learned about the fake prescriptions, and Freeman was arrested and prosecuted federally.[7] Based in part on the number of pills she had sold over a period of years, she faced an extraordinarily high Sentencing Guideline range: 210–240 months' imprisonment. Freeman argued that she should be sentenced below that range because her drug addiction was a mitigating circumstance that reduced her culpability.[8] Her attorney explained how Freeman had only sold the pills to support her own dependency; how she suffered from the disease of addiction; how she needed treatment.[9]

The judge was not persuaded: he sentenced Freeman to 210 months' imprisonment.[10] She appealed, and achieved an extraordinarily unusual result: the Fourth Circuit reversed her sentence, holding that "the district court failed to seriously consider Freeman's addiction as mitigating."[11] It outlined how drug addiction can "take over a person's life" and explained that the "overwhelming record evidence" of Freeman's severe addiction merited a variance below the guideline range.[12] The decision was remarkable—as the dissenting judge noted, it was the first time in the history of the circuit that a within-Guideline sentence had been reversed as substantively unreasonable.[13]

But was the district judge's decision *not* to more strongly weight Freeman's mitigating addiction evidence remarkable as well? The Guidelines largely restrict the extent to which mitigating factors like the ones Freeman raised can be considered by the sentencing judge. But the federal sentencing statute, in contrast, permits judges to weigh extremely broad factors like the "nature and circumstances of the offense" and the "history and characteristics" of the defendant in deciding whether to impose a within-Guideline sentence.[14] How do those competing influences affect sentencing decisions? Was it unusual for the judge to discount Freeman's addiction, or was it typical? Would the judge have treated other possible mitigation—like a difficult upbringing or evidence of Freeman's good character or remorse—

Dec. 13, 2018), ECF No. 91.

[5] *Id.* at 28.

[6] *Freeman*, 992 F.3d at 271–72.

[7] *Id.* at 272.

[8] *Id.* at 273–74.

[9] Sentencing Transcript at 13–19, United States v. Freeman, No. 17-cr-00079 (D. S.C. Dec. 13, 2018), ECF No. 91.

[10] *Freeman*, 992 F.3d at 274.

[11] *Id.* at 280.

[12] *Id.* The court also identified other mitigating circumstances that influenced its decision, including the fact that Freeman's sentence was higher than other similarly situated defendants and that there were no identifiable victims of the offense. *Id.* at 279–81.

[13] *Id.* at 281 (Quattlebaum, J., dissenting).

[14] 18 U.S.C. § 3553(a)(1).

differently? What about mitigating aspects of the crime itself, like the lack of direct victims, or the fact that Freeman made little money from the drug sales?

Questions like these are central to our understanding of how judges impose sentences. And their answers should shape how we structure sentencing rules and doctrines. But surprisingly, very little legal scholarship has explored sentencing mitigation in non-capital cases. While a few scholars have categorized types of mitigation and placed them within broader theoretical frameworks, and some laboratory studies have tried to model mitigation's relationship with general views of criminal culpability, almost none have examined mitigation in a real-world context.

This article fills that gap. I report the results from the first empirical study examining mitigation practices in real non-capital federal cases. I gathered data by coding sentencing memoranda filed by defense attorneys in over 300 felony cases. By systematically identifying and parsing common categories of mitigation, quantitatively coding the evidence, and statistically examining the relationships between the text and the sentence imposed, I show mitigation is a central predictor of sentencing outcomes, and that judges approach mitigation in a modern way: rather than adhering to the strict, offense-centric structure that has dominated sentencing since the advent of the Sentencing Guidelines in the 1980s, judges individualize their sentences in ways that consider the personal characteristics of each defendant, beyond what the Sentencing Guidelines anticipate. The results have significant implications for criminal justice policy: while my data show that mitigation is critical to judges' sentencing decisions, both the Guidelines and procedural rules and doctrines minimize mitigation, failing to encourage both defense attorneys and prosecutors to investigate and consider it.

The Article proceeds in six parts. In Part I, I describe how sentencing has become the most critical part of a criminal case. With trials having given way almost entirely to guilty pleas, and with most convictions giving judges significant authority to choose from a wide range of potential sentences, sentencing affects the defendant's future more than any other part of the case. Judges also have significant discretion at sentencing and are well insulated from sentencing appeals. And surprisingly, judges learn little sentencing-relevant information during earlier stages of the case. They are not typically assigned to the case until it has passed the early substantive portions of litigation, and common events like plea hearings provide judges little actual information about the case or defendant. Instead, judges learn nearly all relevant sentencing facts from either the presentence report provided by the probation department or the parties' sentencing memoranda—briefs in which the defense is free to outline virtually any type of mitigation that favors a reduced sentence, from descriptions of the defendant's minimal role in the crime, to the defendant's disadvantaged upbringing, good character, or history of mental health problems. And, while the Sentencing Guidelines largely restrict the importance of mitigation, the Supreme Court's decision in *United States v. Booker* allowed judges to sentence outside of the Guidelines by weighing broad statutory factors like the "nature and circumstances of the offense" and the "history and characteristics" of the defendant, setting up a tension between the Guidelines and the statute.

In Part II, I analyze the limited empirical research on what types of mitigating

factors might impact a judge's sentencing decision, if at all. I describe two different categories of data: first, surveys given to federal judges asking them to rank how relevant various types of mitigation typically are to their sentencing decisions; and second, laboratory experiments, in which researchers provide laypeople with vignettes featuring crime scenarios with various types of mitigating information, asking them to make culpability judgments based on the vignettes. The data imply that several types of mitigation may be important, but also have some inconsistent results and don't reflect the full array of considerations that go into real sentences.

In Part III, I describe my novel approach to the question: coding sentencing memoranda filed by defense attorneys in federal felony cases, and examining the relationship between mitigation and the sentence imposed. I divide mitigation primarily into "offense" mitigation—mitigating facts related to the offense itself—and "personal" mitigation—mitigating characteristics about the defendant, independent of the crime. Under those broad umbrellas, I identified 16 different common categories of mitigation and systematically parsed and coded each type, allowing me to identify relationships between the extent of presentation of each category and the sentence imposed. The study is the first of its kind, exploring the mitigating evidence that defense attorneys present in a broad variety of criminal contexts. I also describe my hypotheses—based on the survey and experimental literature—in Part IV.

Part V reports the results from my study. I find broad support for the notion that mitigation is critically important at sentencing, even despite a Guideline system that minimizes it. Contrary to the rigid, offense-centric structure that the Guidelines encourage, judges' sentences are strongly associated with the mitigating evidence presented by defense counsel. Lengthier and more robust mitigating arguments are associated with lower sentences relative to a defendant's Guideline range, and, in particular, extensive presentation of personal mitigation correlates more strongly with lower sentences than offense mitigation. Mitigating arguments that are supported by concrete evidence—such as medical records or specific acts demonstrating remorse—are also associated with lower sentences. And science-based arguments about the defendant's mental and physical health that are relevant to the offense—such as addiction or mental illness—are more strongly associated with reduced sentences than any other mitigating argument.

In Part VI, I discuss the legal and policy implications of my results. While mitigation is an extremely important aspect of a criminal case, current procedural structures are not designed to treat it as such. I focus on three areas for potential reform. *First*, broadening effective assistance of counsel. In capital cases, the investigation and presentation of mitigating evidence is treated as a critical part of a defense attorney's role, and attorneys who do not properly research and present mitigation can sometimes be found ineffective. But the same is not true for attorneys in non-capital felony cases, resulting in enormous disparities in the quantity and quality of mitigation presented, and reducing the extent to which defendants' interests are protected. *Second*, increasing neuroscience-based health mitigation evidence. In my data, health-related mitigation had a substantially stronger association with reduced sentences than any other type of mitigation, and mental health-related mitigation was a strong component of that. Neuroscience-based

mitigation, in the form of behavioral testing or imaging examining defendants for cognitive impairments, has extensive potential to provide strong mitigating evidence, yet is uncommon outside of defendants who present competency concerns. *Third*, presenting mitigation to prosecutors. Prosecutors play a significant role in determining sentences, both through the plea deals they offer and their sentencing recommendations to judges. And prosecutors may be becoming more receptive to mitigating arguments with the wave of progressive prosecutors who have taken office over the past five years. Yet it is likely that prosecutors are rarely presented with mitigating evidence to consider. I explore ways to remedy this problem and encourage the early and extensive presentation of mitigation to prosecutors.

I. MITIGATION'S IMPORTANCE IN MODERN SENTENCING

A. The Critical Role of Sentencing

Criminal prosecutions involve an array of complex procedures, but over the past century, those procedures have increasingly become secondary to one critical moment of the case: sentencing. Trials—once the central component of the criminal justice system—have become nearly extinct.[15] As of 2018, only about 2% of federal felony cases result in trials, and state courts have only slightly higher rates.[16] Where trial may once have been thought of as the most important part of the case, it is no longer. Instead, we have "a system of pleas, not a system of trials," to the point where pleading "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[17] With so many cases resulting in pleas, nearly every case charged is destined for sentencing. Of the few that do reach trial, most will still end up at sentencing following a conviction.[18]

Because there are many procedural steps in a criminal case, one might think that, by the time the case reaches sentencing, the judge is intimately familiar with it, making the sentencing procedure itself relatively rote. Not so. Many of the most substantive steps happen before the case is even assigned to the trial judge who will later sentence the defendant. Take the federal system, for example.[19] Before a

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[15] *See, e.g.*, Hon. Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 133 (2018) ("[F]rom 2006 to 2016, the percentage of defendants disposed of by jury trials declined by forty-seven percent.").

[16] *Caseload Statistics and Data Tables*, U.S. COURTS, tbl.D-4 (2018) https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited October 11, 2021); Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

[17] Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1912 (1992)).

[18] *Caseload Statistics and Data Tables*, *supra* note 16, tbl.D-4 (reporting just 320 federal acquittals against 1,559 federal trial convictions in the year ending September 30, 2018).

[19] I focus primarily on the federal system here because this project uses federal sentencing memoranda as a data set, and so my description of the underlying federal procedure is most relevant to the conclusions I make. But while state systems have many

suspect is arrested, a prosecutor may present a criminal complaint to the court seeking an arrest warrant.[20] The complaint is one of the most detailed documents describing the circumstances of the alleged offense and characteristics of the defendant (such as any criminal history).[21] But the complaint is reviewed by a magistrate judge, before the district judge is assigned.[22] Likewise, search warrants—of which there may be dozens in a single case—contain a wealth of information about the case and its participants, and are reviewed by the magistrate judge, not the district judge.[23]

The magistrate judge's primary role continues after arrest. The magistrate oversees the defendant's initial appearance in court, and one of the most substantive events prior to sentencing: a hearing to determine whether the defendant will be detained pending trial or placed on pretrial release.[24] That hearing involves a detailed discussion of both "the nature and circumstances of the offense charged" and "the history and characteristics" of the defendant.[25] Functionally, the prosecutor typically describes the investigation and circumstances of the crime in detail, and the defense attorney provides positive characteristics about the defendant that counsel in favor of pretrial release.

Other players also learn about the case earlier than the district judge: the prosecution typically presents the case to a grand jury (or occasionally to the magistrate) to secure an indictment, but that testimony is outside of the view of the court, and is typically never revealed to the district judge.[26] And after the prosecution secures an indictment, the defendant is entitled to an arraignment in open court where the magistrate ensures the defendant has received a copy of the indictment and reviews it with the defendant.[27] None of these proceedings are reviewed by the district judge in the ordinary course.

Only after all of these procedural steps are complete is the case even assigned to

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individual differences, they are similar to the federal system in that the trial judge has little exposure to the case prior to sentencing. *See generally* NATIONAL CENTER FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 1–27 (2008) (outlining state sentencing structures).

[20] FED. R. CRIM. P. 3.

[21] *Id.*

[22] *Id.* (The complaint . . . must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.").

[23] FED. R. CRIM. P. 41(b)–(e) (describing the magistrate judge as the arbiter of federal search warrants).

[24] FED. R. CRIM. P. 5(d)(3); 18 U.S.C. § 3142 (outlining statutory rules for release or detention of a defendant pending trial).

[25] 18 U.S.C. § 3142(g). The magistrate judge must also consider "the weight of the evidence" favoring release or detention, and "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." *Id.*

[26] See U.S. CONST. amend. V (requirement presentment of "capital, or otherwise infamous crime[s]" to grand jury); see also *Charging*, OFFICE OF THE UNITED STATES ATTORNEYS, https://www.justice.gov/usao/justice-101/charging (last visited October 11, 2021) (describing grand jury process).

[27] FED. R. CRIM. P. 10.

the district judge who oversees its later elements, including sentencing.[28] But after arraignment, there are almost no substantial hearings that occur as a matter of course, which means the district judge typically learns little about the case prior to sentencing. If the defendant pleads guilty, the *only* hearing that the district judge must necessarily conduct prior to sentencing is a plea hearing.[29] And while one might intuitively think that a plea hearing would involve significant discussion of the substance of the case, it is instead largely focused on procedure. Its main component involves the district judge advising the defendant of the rights that he relinquishes by pleading guilty and determining whether the defendant's plea is voluntary.[30] While the defendant must give a factual basis for the plea, that can be as simple as the defendant merely agreeing that he committed the elements of the offense, without any further detail.[31]

Of course, there are other possible stages prior to sentencing at which the district judge might learn more about the case's substance. In rare cases, there will be a trial, or the parties may trigger less extensive (but still substantive) litigation. The defendant may file a motion to suppress evidence or otherwise challenge the indictment or preindictment procedure, or the parties may file evidentiary motions in preparation for trial or have discovery disputes that must be resolved by the court.[32] But extensive motion practice is infrequent, and cases commonly resolve without any substantive motions.

So most cases arrive at sentencing with the judge as a relatively fresh slate. How do judges learn the relevant information they need to impose a sentence? As described in more detail below, they primarily learn it through two documents. First, the probation department prepares a presentence report ("PSR") with information about the offense and the defendant. Second, the parties file briefs—typically called "sentencing memoranda"—arguing their positions.[33]

Once judges have this information, they have significant discretion in

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[28] *See* Peter G. McCabe, A Guide to the Federal Magistrate Judge System, Federal Bar Association White Paper 22–29, *available at* https://www.fedbar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2.pdf (noting that "[m]agistrate judges have no authority to dispose of felony cases" but describing how they conduct initial felony proceedings in most cases). The system is similar in most states. For example, in Michigan, initial proceedings—including the probable cause hearing that often functions as an initial mini-trial in the case—are conducted by a district judge, but a circuit judge is then assigned for sentencing, and that judge also typically handles pleas. *See* Mich. Comp. Laws § 766.4; MICH. CT. RULES 6.008 ("The district court has jurisdiction over all . . . felonies through the preliminary examination" while the "circuit court has jurisdiction over all felonies from the bindover from the district court").

[29] *See* FED. R. CRIM. P. 11.

[30] FED. R. CRIM. P. 11(b)(1)–(2).

[31] *See* FED. R. CRIM. P. 11(b)(3); *Guilty Pleas*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 403, 413 n.1322 (2009) ("A judge may find a factual basis to support the plea from anything that appears in the record, including the government's own proffer. The government need not present uncontroverted evidence of guilt; it need only submit evidence based on which a court could reasonably find the defendant guilty.").

[32] *See generally* FED. R. CRIM. P. 12(b)(3) (outlining various pretrial motions).

[33] *See infra* notes 49–53.

determining the sentence. While some federal crimes carry statutory penalties that either require a mandatory minimum sentence or a specific statutory sentence that the judge must impose, most statutes simply provide an upper limit, allowing the judge to impose a sentence anywhere as high as that limit or as low as probation.[34] The vast majority of federal convictions are for crimes not carrying any mandatory penalties: in 2016, only about 13% of all federal defendants sentenced were subject to a mandatory minimum penalty on any of their convictions.[35] All convictions—whether involving a mandatory sentence or not—result in the calculation of a Sentencing Guideline range for the judge to consider, but after the Supreme Court's landmark decision in *United States v. Booker* in 2005,[36] judges gained flexibility to sentence outside the Guidelines, which became the "starting point and the initial benchmark" for the judge's sentence, rather than the ending point.[37] Judges have two options in sentencing a defendant outside of the Guideline range: they can *depart* from the range either upward or downward by finding one of a number of aggravating or mitigating circumstances described in the Guidelines.[38] But much more commonly, they can *vary* from the Guideline range and impose a sentence outside of it based on any of the (very broad) sentencing factors outlined in the primary federal sentencing statute, 18 U.S.C. § 3553(a).[39] Indeed, in 2016, 49% of federal sentences were below the bottom of the Guideline range.[40]

Judges' sentencing discretion is enhanced by the fact that they can consider almost *any* evidence at sentencing.[41] The federal rules of evidence do not apply.[42] And almost all evidence is relevant to the appropriate sentencing considerations, too: because the § 3553(a) factors that judges must consider at sentencing are so broad (encompassing, for example, "the nature and circumstances of the offense and the

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[34] *See, e.g.*, 18 U.S.C. § 924(a)(2) (providing 10-year statutory maximum penalty—but no mandatory minimum penalty—for most federal firearms offenses); 21 U.S.C. § 841(b)(1)(C) (same for drug trafficking offenses not reaching certain quantities).

[35] U.S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 37 (2017) (outlining that 8,342 of 62,251 sentenced defendants were subject to mandatory minimum penalty).

[36] 543 U.S. 220 (2005).

[37] United States v. Gall, 552 U.S. 38, 49–50 (2007); *see also Booker*, 543 U.S. 220 (2005).

[38] *See* U.S. SENTENCING GUIDELINES MANUAL Ch. 1, Pt. A(4)(b) (U.S. SENTENCING COMM'N 2018).

[39] For a helpful discussion of the difference between a departure and a variance, see United States v. Grams, 566 F.3d 683, 686 (6th Cir. 2009).

[40] U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/TableN.pdf.

[41] Kevin R. Reitz, *Proof of Aggravating and Mitigating Facts at Sentencing*, in MITIGATION AND AGGRAVATION AT SENTENCING 228, 231 (Julian V. Roberts ed.) (2011); Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 251 (2018) ("[C]ourts can consider almost everything when exercising their sentencing discretion.").

[42] FED. R. EVID. 1101(d). There is one exception: evidentiary rules protecting privileges do apply. *Id.*

history and characteristics of the defendant," and the need "to reflect the seriousness of the offense"), most evidence will bear on those considerations.

The last phase of criminal procedure—appeal—continues the pattern of trial judges' near-total discretion over sentencing. Sentences are extremely well insulated from reversal: they are reviewed only for abuse of discretion.[43] This means that a sentence is only reversed if the judge (1) commits a "significant procedural error," such as incorrectly calculating the Guidelines, or (2) applies a "substantively unreasonable" sentence, meaning it improperly weighed the sentencing factors outlined in 18 U.S.C. § 3553(a).[44] This same standard of review applies "[r]egardless of whether the sentence imposed is inside or outside the guidelines range."[45] And because the § 3553(a) factors are so broad, judges are very rarely reversed for substantive unreasonableness.[46] Thus, unless a judge makes an error in calculating the Guidelines or following basic sentencing procedure, her sentencing decisions are nearly unreviewable.

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So far, we have learned a few things. (1) Nearly all criminal cases reach sentencing, most often through pleas; (2) trial judges learn almost all information relevant to sentencing through pre-sentencing briefing or at the hearing itself; and (3) judges have significant discretion to consider a large swath of information and impose a sentence that is nearly certain to survive appellate review. Sentencing has arguably become the most critical part of the case.[47] And because of the parties' direct involvement in sentencing through the filing of sentencing memoranda and the presentation of evidence, sentencing is a critical opportunity for the lawyers—particularly defense attorneys—to influence the outcome.[48] How? By presenting mitigating evidence to the judge, asserting why the defendant should be given a lower sentence. In the next subpart, I explore the framework of mitigation in today's sentencing, focusing on the way mitigation is presented to the judge and the kinds of mitigation that are relevant.

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[43] Gall, 552 U.S. at 51.

[44] *Id.*

[45] *Id.*

[46] *See* Carrie Leonetti, *De Facto Mandatory: A Quantitative Assessment of Reasonableness Review After Booker*, 66 DEPAUL L. REV. 51, 89 (2016) (describing "extraordinary deference to district court sentences").

[47] As one federal judge has put it, "[o]nce viewed as 'trial judges,' federal district judges are increasingly seen as 'sentencing judges.'" Conrad & Clements, *supra* note 15, at 101. I note, however, that plea bargaining is also extremely influential in determining both criminal liability and the ultimate sentence. I explore this in more detail *infra* notes 307–310.

[48] Conrad & Clements, *supra* note 15, at 102 (Explaining that criminal attorneys "can now more aptly be termed 'sentencing advocates' than 'trial lawyers'" and noting that prosecutors in one federal district appeared at only 16 trials, compared with over 900 sentencing hearings and supervised release revocation hearings in one year).

B. The Framework of Sentencing and Mitigation

Once a defendant has been convicted of a federal offense—whether by plea or trial—there are two primary mechanisms by which a judge receives information relevant to sentencing prior to the hearing. The first is the *presentence report ("PSR")*. After conviction, a probation officer is assigned to the case to conduct a presentence investigation.[49] The officer interviews the defendant to assess his "history and characteristics," including any criminal record, financial circumstances, and "circumstances affecting the defendant's behavior that may be helpful in imposing sentence," which often includes information about the defendant's family background, upbringing, history of physical or mental illness, drug use, and a variety of other characteristics.[50] Based on that information, the probation officer prepares a report, which includes information from the interview, along with a background of the offense and the probation officer's calculation of the relevant Sentencing Guidelines.[51] The officer provides that report to the parties and the judge. In most cases, the report is the judge's first in-depth look at both the nature of the offense and the characteristics of the defendant.

The second mechanism by which the judge receives pre-hearing sentencing information is the primary subject of this study: the sentencing memorandum. Though the Federal Rules of Criminal Procedure do not require the parties to file a sentencing memorandum (nor do they require the judge to permit the parties to do so), most jurisdictions permit them (and many judges require them).[52] The sentencing memorandum is the primary—and typically the only—way attorneys can provide information to the court advocating for a particular sentence before the sentencing hearing. Thus, it is the main vehicle by which defense attorneys can provide mitigation to the court counseling for a lower sentence.[53] Because there are

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[49] *See generally* FED. R. CRIM. P. 32(b).

[50] FED. R. CRIM. P. 32(d)(2)(A); Rita v. United States, 551 U.S. 338, 342 (2007).

[51] *Id.* PSRs are confidential, and are not made a part of the public record. *See, e.g.*, Standing Order 2015-02, United States District Court, District of Maryland https://www.mdd.uscourts.gov/sites/mdd/files/2015-02.pdf (last visited October 11, 2021) ("[P]resentence reports are confidential court records to which the public has no right of access."). The Sentencing Commission has, however, made a template PSR available. United States Sentencing Commission, *Presentence Investigation Report*, https://www.icpsr.umich.edu/summerprog/2009/nijworkshop/PSRDrugScenario.pdf (last visited October 11, 2021)

[52] *See infra* note 190 and accompanying text (describing jurisdictions from which sentencing memoranda were gathered for this study). For example, Judge Victoria Roberts of the Eastern District of Michigan notes that the court "will request sentencing memoranda on matters in contention." Practice Guidelines, Judge Victoria A. Roberts, United States District Court, Eastern District of Michigan, https://www.mied.uscourts.gov/altindex.cfm?pagefunction=pgToPDFAll&judgeID=19 (last visited October 11, 2021).

[53] Attorneys do, of course, conduct sentencing advocacy at the sentencing hearing itself, in addition to filing a sentencing memorandum. But that advocacy is likely less impactful than the sentencing memorandum. By the time of the sentencing hearing, the judge has already considered most of the relevant sentencing arguments by reviewing the parties'

no formal rules governing what sentencing memoranda can contain, they take many forms. Some memoranda focus heavily on the defendant's background, portraying the defendant as a person with a full life independent of the crime he committed. Others focus much more heavily on the crime, describing mitigating circumstances of the offense, such as the defendant's limited role or the small amount of harm caused. And sentencing memoranda often contain a rich array of information that would never be part of the PSR. While a PSR may, for example, report that the defendant has a history of mental illness, it will not detail how that mental illness impacted the defendant's life or provide a narrative of how the illness affects culpability. The PSR's role in presenting mitigation might be thought of as similar to a movie trailer: while it gives a broad preview of what is to come, the sentencing memorandum contains the full plot.

An effective defendant's sentencing memorandum, of course, must contain information that is *legally* relevant to the judge's sentencing decision. What sources provide the authority for what can be considered mitigating? A brief look at the history of sentencing law is instructive in understanding the current framework.

Before 1984, federal judges imposed indeterminate sentences: guided only by statutory maximums and minimums, they sentenced the defendant to a maximum and minimum range of imprisonment, and parole boards decided when prisoners were released.[54] This was standard for the day: in 1970, every state also had a similar indeterminate system.[55] Because there was no specific sentencing statute or other guidepost to restrict the bases on which judges sentenced, they had an enormous amount of discretion.[56] Inherent in this model was an individualized sentencing focus, in which judges had flexibility to consider mitigating evidence that they found relevant. The dominant theory of sentencing was rehabilitation, and sentencing decisions were focused heavily on individual defendants' personal history and characteristics.[57]

The drawbacks of that system are well-documented: the significant discretion that the indeterminate system provided to judges and parole officials raised concerns that sentences and parole decisions were unpredictable, inconsistent across similarly situated individuals, and, most troublingly, subject to discrimination based on race,

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sentencing memoranda and meeting with the probation officer to discuss the PSR.

[54] Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169–70 (1995); *see also* U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 1 (2018); Mistretta v. United States, 488 U.S. 361, 363 (1989).

[55] Tonry, *supra* note 54, at 170.

[56] *See, e.g.*, Douglas A. Berman, *Balanced and Purposeful Departures: Fixing A Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 25 (2000); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 297 (1993) (describing "unfettered judicial discretion" prior to enactment of the Guidelines).

[57] Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN L. REV. 277, 278 (2005); Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

gender, and other inappropriate characteristics.[58] Eventually, these concerns culminated in the Sentencing Reform Act of 1984.[59] Among a number of substantive changes, the Act abolished the federal parole system, enacted the federal sentencing statute now codified at 18 U.S.C. § 3553, established the United States Sentencing Commission, and required that sentences fall within the sentencing Guidelines that were later promulgated by the Commission.[60] Notably, while the Sentencing Reform Act set standards in place to attempt to rein in sentencing disparity, it did not adopt any particular theory of punishment, or even describe the central purpose of sentencing.[61]

The Guidelines provided (and still provide) the first source of mitigating authority for a sentencing judge to examine. The Sentencing Reform Act directed the Commission to "consider whether [a number of individual characteristics] have any relevance to the nature…of an appropriate sentence, and shall take them into account only to the extent that they do have relevance."[62] The Commission did this in several ways. First, it made the defendant's criminal history a central part of the Guideline calculation.[63] Second, it outlined the individual characteristics described in the Sentencing Reform Act, and included policy statements in the Guidelines as to whether they were relevant in sentencing. Four factors "may be relevant in determining whether a departure is warranted" under the Guidelines: age, mental and emotional conditions, physical condition (including drug or alcohol

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[58] *E.g.*, Marvin E. Frankl, *Lawlessness in Sentencing*, 41 CIN. L. REV. 1, 54 (1972) ("The evidence is conclusive that judges are of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the differences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes."); MARVIN E. FRANKL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895 (1990). For a detailed discussion of this period of sentencing reform, *see* Berman, *supra* note 56, at 26–41.

[59] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551–3742, 28 U.S.C. §§ 991–98); *see also* 28 U.S.C. § 991(b)(1)(B) (noting purpose of "avoiding unwarranted sentencing" in the Act); Koon v. United States, 518 U.S. 81, 113 (1996) ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system."). For an excellent review of the complex factors that led to the development of the Guidelines, see KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING 38–77 (1998).

[60] *Summary, H.R.5773 - Sentencing Reform Act of 1984*, CONGRESS.GOV, https://www.congress.gov/bill/98th-congress/house-bill/5773 (last visited October 11, 2021); *see also* 28 U.S.C. §§ 991; 18 U.S.C. § 3553.

[61] Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 BOSTON UNIV. L. REV. 161, 172 (2016).

[62] 18 U.S.C. § 994(d). For a discussion of the Guidelines' implementation of this directive, *see generally* U.S. SENTENCING GUIDELINES MANUAL Chapter 5, Part H introductory commentary.

[63] *See generally* U.S. SENTENCING GUIDELINES MANUAL Chapter 4.

dependence) and prior military service.[64] But most other individual characteristics outlined in the Sentencing Reform Act "are *not* ordinarily relevant in determining whether a departure is warranted."[65] Thus, the Guidelines largely restrict the importance of mitigation and confine it to very specific categories.

With most potential mitigating factors excluded from serious consideration, the Guidelines are instead focused on aggravating characteristics. The Guideline range in each case is largely made up of (1) an offense level, which is primarily determined by the statute of conviction and the number and severity of aggravating factors involved in the offense itself,[66] and (2) the defendant's criminal history score.[67] As other scholars have noted, the Guidelines function to "significantly restrict[] the role of mitigation at sentencing."[68]

Does this render individualized mitigation at sentencing largely irrelevant in the federal system? For a period, it did.[69] Until 2005, the Guidelines were "mandatory and binding on all judges," and their sentences had to follow the Guidelines' provisions.[70] While sentencing judges could sentence outside the Guidelines if that sentence was justified by a departure, the structure of the Guidelines restricted mitigation so greatly that departures were rarely warranted.[71] Thus, at the time, the presentation of mitigating evidence in categories disfavored by the Guidelines would have been relatively unhelpful in the vast majority of cases because the Guidelines prevented judges from considering it relevant beyond minor adjustments to a within-Guidelines sentence.

Then, in 2005, the system changed dramatically. Following a series of decisions holding that any facts that increased the statutory penalty for a crime must be found by a jury beyond a reasonable doubt,[72] the Supreme Court held in *United States v. Booker* that the mandatory Guideline scheme outlined in the Sentencing Reform Act violated the Sixth Amendment.[73] The Court's remedy was to strike the provisions of

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[64] *Id.* §§ 5H1.1, 3, 4, 11.

[65] *E.g.*, *id.* §§ 5H1.2, 5, 6, 7, 11, 12.

[66] U.S. SENTENCING GUIDELINES MANUAL Chapters 2–3. For example, the primary drug distribution guideline, § 2D1.1, outlines aggravating factors that, if present, raise the offense level (such as the presence of a weapon, the use of violence, the use of bribes, or the maintenance of a premise for distributing drugs). *Id.* § 2D1.1(b)(1), (2), (11), (12).

[67] *See generally* U.S. SENTENCING GUIDELINES MANUAL Chapter 4.

[68] Hessick & Berman, *supra* note 61; Berman, *supra* note 57, at 289 ("A broad array of potentially mitigating offender characteristics have been formally or functionally rendered 'not ordinarily relevant' or largely inconsequential to federal sentencing determinations."); *see also* Berman, *supra* note 56, at 46–49; Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors*? 88 B.U. L. REV. 1109 (2008).

[69] Hessick & Berman, *supra* note 68, at 172–73.

[70] *Booker*, 542 U.S. at 233.

[71] *See id.* at 234 ("[D]epartures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range.").

[72] *See* Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004).

[73] *Id.* at 244.

the Sentencing Reform Act that made the Guidelines mandatory, thus making them "effectively advisory."[74]

Once the Guidelines were advisory, the universe of potentially relevant mitigating evidence expanded greatly. The Guidelines are one component of the statutory "factors to be considered in imposing a sentence" under 18 U.S.C. § 3553(a).[75] But after *Booker*, judges are no longer required to restrict their considerations of mitigation to what the Guidelines allow. And while the Guidelines significantly limit the relevance of most mitigation, § 3553(a) does not. Quite the contrary: it instructs judges to weigh incredibly broad factors in determining the sentence. The first two—and most commonly referenced at sentencing—are "the nature and circumstances of the offense" and "the history and characteristics of the defendant."[76] While potential mitigation like a disadvantaged upbringing or evidence of good character was generally irrelevant under the Guidelines, it is central to "the history and characteristics of the defendant."[77] After *Booker*, there is tension between the Guidelines' approach and the sentencing statute's approach: while the Guidelines remain central to sentencing, if mitigation truly matters to judges, there is now room for them to consider it.[78]

In addition to the flexibility brought about by *Booker*, there are other reasons to believe that a defendant's history and characteristics are now becoming more important as sentencing considerations.[79] First, Supreme Court jurisprudence has increasingly recognized that individualized defendant characteristics are critical to sentencing. Even before *Booker*, the Supreme Court explained that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[80] Since then, the Court has recognized that "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence."[81] The Court has also recognized that modern neuroscience indicates that

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[74] *Id.* at 245.

[75] 18 U.S.C. § 3553(a); (a)(4).

[76] *Id.* § 3553(a)(1).

[77] *See* Rita v. United States, 551 U.S. 338, 364–65 (2007) (Stevens, J., concurring) ("Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines. These are, however, matters that § 3553(a) authorizes the sentencing judge to consider." (citations omitted)).

[78] *Compare* Paul J. Hofer, *Federal Sentencing After Booker*, 48 CRIME & JUST. 137, 145 (2019) ("While *Booker* increased judicial discretion, it has done relatively little to address excessive severity and use of incarceration."), *with* Berman, *supra* note 57, at 291 ("[M]any federal district judges have started to use the new discretion they possess in the wake of the Supreme Court's decision in *Booker* to consider and give effect to offender characteristics at sentencing.").

[79] *See, e.g.*, Berman, *supra* note 57, at 289–91.

[80] Koon v. United States, 518 U.S. 81, 113 (1996).

[81] Pepper v. United States, 562 U.S. 476, 488 (2011) (alterations in original).

individual psychological and physical differences can affect behavior, influencing culpability. For example, in *Graham v. Florida*, the Court opined that because "parts of the brain involved in behavior control continue to mature through late adolescence," juvenile offenders' crimes are "not as morally reprehensible as [those] of an adult."[82] Second, Legislative reforms have pushed in an individualized direction too. The First Step Act of 2018—a rare bipartisan piece of legislation—stands as a recent example.[83] That statute shifted the balance back toward individualized sentencing and rehabilitation by reducing or eliminating a number of mandatory minimum sentencing statutes, requiring the Department of Justice to develop standards to assess the recidivism risk of defendants, and permitting defendants to directly request post-sentencing reductions from courts based on individualized circumstances.[84] Third, a wave of social reform efforts—gaining in mainstream popularity following the 2020 murder of George Floyd and resulting protests—have focused on reducing mass incarceration, in part through more individualized sentencing. Indeed, President Joe Biden's 2020 presidential campaign platform endorsed legislation that would encourage reduced sentences for individuals whose criminal conduct was driven by substance abuse or mental health disorders, or who are likely to age out of crime.[85] And while social reforms are separate from judicial decisions, they can be a guidepost for future sentencing behavior and demonstrate shifting directions in general views toward sentencing. In short, trends appear toward a shift away from the rigid sentencing policy developed

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[82] 560 U.S. 48, 68 (2010); *see also* Miller v. Alabama, 567 U.S. 460, 472 (2012) (explaining that juveniles' "transient rashness, proclivity for risk, and inability to assess consequences—both lessen[] a child's moral culpability and enhance[] the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." (internal quotation marks omitted)).

[83] Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, Brennan Center for Justice (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next (outlining the bill as identifying "criminal justice reform as a rare space for bipartisan consensus and cooperation in a fractured national political environment").

[84] Pub. L. No. 115-391, §§ 101–02, 401–04, 404, 603 132 Stat. 5194 (2018).

[85] *SAFE Justice Act summary sheet*, BOBBYSCOTT.HOSUE.GOV https://bobbyscott.house.gov/sites/bobbyscott.house.gov/files/SAFE%20Justice%20Act%20Fact%20Sheet.pdf (last visited October 11, 2021); *see also Biden Criminal Justice Plan*, JOEBIDEN.COM, https://joebiden.com/justice/ (last visited October 11, 2021) (endorsing SAFE Justice Act). Other policy initiatives indicating this shifting view are also worth noting, such as President Obama's Clemency Initiative, which served largely as an individualized resentencing process. *Obama Administration Clemency Initiative*, JUSTICE.GOV, https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative (last visited October 11, 2021). Other jurisdictions, like the United Kingdom, have explicitly recognized racial disparities in sentencing and instructed judges to consider those potential disparities. *See Sentencing guidelines for firearms offences published*, United Kingdom Sentencing Council (Dec. 9, 2020), https://www.sentencingcouncil.org.uk/news/item/sentencing-guidelines-for-firearms-offences-published/.

in the 1980s, toward a modern approach of more individualization and consideration of each defendant's personal characteristics.

To return now to our earlier question of what sources provide the authority for what can be considered mitigating at sentencing, we have reviewed the two main sources: the Guidelines, which provide for limited mitigation, and § 3553(a), which provides for broad mitigation. And while some states limit the potential categories of mitigation more than the federal system does, many either track the federal language or have similar broad language that authorizes judges to consider a variety of mitigation.[86]

So the potential categories of mitigation are very broad. One naturally wonders: Do the Guidelines render mitigation relatively unimportant, even after *Booker*? If mitigation is important, are there particular types of mitigating arguments that are more effective than others?

Surprisingly, little scholarly work has focused on these questions. Instead, the sentencing scholarship has focused primarily on the merits and problems of the Guideline system,[87] statutory mandatory sentences,[88] theories of punishment underlying sentencing generally,[89] and constitutional considerations in sentencing.[90] Mitigation has been a greater focus of the literature in the capital sentencing context.[91] But capital sentencing involves an entirely different array of procedures than sentencing in felony cases. Juries—rather than judges—control the sentencing phase of capital cases, and the constitution requires that they "must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual."[92] As a result, enormous resources are typically devoted to the mitigation process in capital

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[86] *E.g.*, HAW. REV. STAT. ANN. § 706-606 (tracking majority of federal language); N.J. STAT. ANN. § 2C:44-lb (providing broad list of factors to consider including the "nature and circumstances of the offense" and various defendant characteristics); CAL. R. CT. 4.421(c), 4.423(c) (providing list of sentencing factors and permitting judge to consider "[a]ny other factors . . . that reasonably relate to the defendant or the circumstances under which the crime was committed"); ARK. CODE ANN. § 16-90-804(c)(9) (providing catchall authorization to depart from Guideline range for "[a]ny other compelling reason); ALASKA STAT. § 12.55.155 (outlining extensive list of more than 50 potential aggravating and mitigating factors).

[87] *E.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

[88] *E.g.*, Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200 (2019).

[89] *E.g.*, Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1 (2006).

[90] *E.g.*, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006).

[91] *E.g.*, Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 WASH. U.L. REV. 581, 583 (2012); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835 (2008); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

[92] Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007).

cases, and the relevant considerations are different from routine felony cases.[93] Moreover, capital cases compose only a tiny fraction of all criminal cases.[94] If we want to learn about how mitigation works in the vast majority of criminal cases, we need to look outside the death-penalty context.

There is a small literature that has taken a first step toward exploring mitigation in non-capital cases by identifying prominent categories of mitigating factors.[95] The most recent and comprehensive of these studies—conducted by Carissa Hessick and Douglas Berman—attempted to identify "consensus" mitigating factors across jurisdictions by surveying state and federal sentencing statutes and examining judge and layperson intuition about mitigation.[96] They concluded that eight mitigating factors were endorsed as relevant by all of their sources, placing those as "consensus" factors that may be more relevant than other potential factors.[97] Those factors were (1) an imperfect defense—which included justifications for the crime such as duress, diminished capacity, or provocation; (2) the role of others in the offense; (3) providing compensation to victims; (4) the amount of harm caused by the defendant; (5) the defendant's culpability based on factors such as limited mens rea, age, or cognitive impairment; (6) the likelihood of recidivism; (7) remorse; and (8) collateral consequences that the defendant or his family would suffer as a result of punishment.[98]

Other scholars have identified overlapping—though not identical—potential mitigating factors. Paul Robinson and his coauthors identified a series of "extralegal punishment factors"—mitigating factors other than those related to the harm of the offense or the extent of the individuals' involvement in the offense.[99] They outlined four categories of mitigation: (1) the offender's reaction to the offense—which included the acknowledgement of guilt and remorse; (2) the victim's or public's reaction to the offense—which included the victim's forgiveness or demand for punishment; (3) the offender's status, such as good or bad character, or special contributions to society; and (4) suffering apart from the punishment itself, such as collateral consequences suffered by the offender or his family.[100]

The most formalized list of factors comes from a series of policy statements in Chapters 5H and 5K of the Guidelines: age, education and vocational skills, mental

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[93] *See* Hughes, *supra* note 91, at 608–27 (providing interview data on capital mitigation specialists' experiences).

[94] Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1070 (2009).

[95] *See, e.g.*, Hessick & Berman, *supra* note 68, at 185–201; Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VANDERBILT L. REV. 737, 740–41 (2012); MITIGATION AND AGGRAVATION AT SENTENCING (Julian V. Roberts ed.) (2011) (focusing primarily on law in United Kingdom); Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 66–70 (2013).

[96] Hessick & Berman, *supra* note 68, at 185–87.

[97] *Id.* at 187.

[98] *Id.* at 188–201.

[99] Robinson et al., *supra* note 95, at 740–41.

[100] *Id.* at 743–66.

and emotional conditions, physical condition, including drug or alcohol dependence, employment record, family ties and responsibilities, role in the offense, criminal history, dependence on criminal activity for a livelihood, prior military service, lack of guidance as a youth and similar circumstances, substantial assistance given to authorities, victim contribution to the offense, commission of the offense to avoid a lesser harm, coercion and duress, diminished capacity, voluntary disclosure of the offense, and aberrant behavior.[101] While the Guidelines function largely to *restrict* these factors as considerations for a Guidelines departure,[102] they provide a good starting point for factors that a judge might consider in deciding whether to grant a downward variance below the Guideline range.

These sources identify a wide array of potential mitigating factors. But they can be organized. Most broadly, they all fall under one of the two sentencing factors outlined in 18 U.S.C. § 3553(a)(1): they either mitigate based on the "nature and circumstances of the offense" or the "history and characteristics of the defendant."[103] The former category is offense focused, and independent of the person who committed the offense: factors described by Hessick & Berman such as the role of others in the offense and the harm caused by the defendant.[104] I term this type of mitigation "offense mitigation."

The latter category, in contrast, is independent of the offense and instead assesses the defendant as a person. Factors described by Hessick & Berman such as the defendant's personal characteristics that are relevant to culpability, collateral consequences, and physical or mental challenges fall into this category. Likewise, most of Robinson, Jackowitz, and Bartels's "extralegal punishment factors," as well as most of the mitigating factors outlined in the Guidelines, focus on the offender's personal characteristics. I term this type of mitigation "personal mitigation," because the focus is on the individual person, rather than the offense.[105]

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In Part I-B, we learned that there is a vast amount of information that a judge may consider as mitigation at sentencing in routine felony cases. And we have identified some of the potential mitigating categories that they might consider. But this does not answer our key questions: is mitigation actually important to sentencing, in spite of the Guidelines? In what ways? And if it is, are there ways we can improve our rules and procedures to get the most relevant information to sentencing decisionmakers?

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[101] U.S. SENTENCING GUIDELINES MANUAL § 5H1.1–12, 5K2.10-13, 16, 20.

[102] *See supra* notes 66–71 and accompanying text.

[103] *See, e.g.*, Berman, *supra* note 79, at 277–78 (dividing sentencing considerations between "offense conduct and offender characteristics"); CAL. R. CT. 4.421–423 (separating aggravating and mitigating factors into "factors relating to the crime" and "factors relating to the defendant").

[104] Hessick & Berman, *supra* note 68, at 191–95.

[105] I am not the first to use this term. *See, e.g.*, Joanna Shapland, *Personal Mitigation and Assumptions About Offending and Desistance*, *in* MITIGATION AND AGGRAVATION AT SENTENCING, *supra* note 95, at 60.

There are two ways we might be able to answer those questions. The first is to directly study mitigation in real criminal cases by examining mitigating arguments made by attorneys—either at sentencing or in sentencing memoranda—and statistically test whether certain mitigating arguments are associated with changes in sentences. In this paper, I report the results of the first such study in American cases.[106] But there is a second way, which has been explored in a small literature: indirectly measure the effects of mitigation through surveys and experiments. In the next Part, I explore those studies.

II. SURVEY AND EXPERIMENTAL DATA ON MITIGATION

A. Judicial Surveys

Perhaps the simplest way to try to understand what factors judges consider most relevant to sentencing is to simply *ask*. That was the idea behind a large-scale survey of federal district judges conducted by the Sentencing Commission in 2010.[107] The commission contacted 942 federal judges and surveyed them via email on a number of topics, including the relevance of each of 26 mitigating factors outlined in Chapters 5H and 5K of the Guidelines.[108] Judges were presented with each potential mitigating factor, and asked to indicate whether the factor was "[o]rdinarily relevant" or "not ordinarily relevant" to both within-guideline sentencing determinations and determinations of whether to grant a variance or departure.[109] Four factors—all related to the *mental or physical health* of the defendant—were seen as among the most relevant to departure and variance considerations: mental condition, emotional condition, physical condition, and diminished capacity.[110] Indeed, mental condition and diminished capacity were viewed as the two most relevant factors, rated by 79% and 80% of judges, respectively, to be ordinarily relevant mitigators.[111]

Just below that, 74% of judges indicated that two mitigating factors related to *remorse* were typically relevant to variance/departure considerations: voluntary disclosure of the offense and exceptional efforts to fulfill restitution obligations.[112]

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[106] *See infra* Parts III–V.

[107] U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 2 (2010) [hereinafter U.S. SENTENCING COMM'N, 2010 JUDGES SURVEY].

[108] *Id.* at 2–4, tbl.13. The factors were entirely derived from the Guideline policy statements described *supra* note 101. *Id.* at tbl.13.

[109] *Id.* at tbl.13. Judges' responses to the two questions—relevance to a within-range determination and relevance to a variance or departure—were largely correlated. *See id.*

[110] *Id.* One caveat to the results of the 2010 survey is worth mentioning here: the Commission reported the survey results, but did not conduct any statistical testing to determine whether differences between groups were statistically significant.

[111] *Id.* Emotional condition was considered relevant by 60% of judges, and physical condition by 64%. *Id.*

[112] U.S. SENTENCING COMM'N, 2010 JUDGES SURVEY, *supra* note 107, at tbl.13; *see also* Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133 (2015) (reporting results of judicial survey regarding remorse).

Importantly, both of those mitigating factors provide concrete evidence of remorse by showing that the defendant took steps to correct the harms caused by the crime. Those were closely followed by a number of mitigating factors indicating the defendant's *good character* despite the crime committed: that the crime was aberrant behavior (74% of judges considered relevant), the defendant's prior good works (62%), civic, charitable, or public service (60%), military service (64%), and employment record (65%).[113] Last, the majority of judges found that the defendant's *age* (67%) and *family ties and responsibilities* (62%) were typically relevant to the variance/departure decision.

Some other factors stood in contrast. Notably, the majority of judges did not find that *prior trauma* or disadvantages were typically relevant: lack of guidance as a youth (49% of judges considered relevant) and a disadvantaged upbringing (50%) were less favored.[114] Likewise, judges considered certain *addictions*, like drug and alcohol dependence and gambling addictions, less relevant.[115]

While the 2010 survey is the most recent and comprehensive examination into federal judges' views of mitigation, two other surveys warrant brief mention. First, in 2003 (prior to *Booker*) the Sentencing Commission conducted a similar survey of federal judges' general views on the Guidelines.[116] In one open-ended question asking judges to state the greatest challenge to the Guidelines, the single most-given answer was "the sentencing Judge should be given more opportunity to take into account the personal characteristics of the defendants," mirroring the results of the 2010 survey in which judges indicated that many defendants' personal characteristics were ordinarily relevant in sentencing.[117] Likewise, the survey included questions about whether a number of the potentially mitigating characteristics outlined in Chapters 5H and 5K of the Guidelines should have been given more or less emphasis.[118] Similar to the results of the 2010 survey, over 60% of judges said that mental condition should be given greater emphasis—higher than any other category.[119] Other results tended to align with judges' responses in the 2010 survey as well: 59% of judges said that family ties/responsibilities should be given greater weight, and age, employment record, prior good works, and emotional conditions also stood out as categories that judges thought should be emphasized more.[120]

Second, in 2014, federal district judge Mark Bennett and professor Ira Robbins

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[113] U.S. SENTENCING COMM'N, JUDGES SURVEY, *supra* note 107, at tbl.13.

[114] *Id.*

[115] *Id.*

[116] U.S. SENTENCING COMM'N, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES (2003).

[117] *Id.* at III-24. I note that this response was given by circuit judges, rather than district court judges. *Id.* But district judges listed the same concern as the second most important, just below disparities between the crack and powder cocaine Sentencing Guidelines, which were 100-to-1 at the time. *Id.* at II-15.

[118] *Id.* at B-8.

[119] *Id.*

[120] For each of those categories, more than 45% of judges responded that the category should be given greater emphasis. *Id.*

conducted a survey of federal judges, asking them a variety of questions about the impact of allocution—in-person sentencing arguments at the sentencing hearing.[121] Though the questions in the survey were relatively broad—and in some cases open-ended—judges ranked "genuine remorse" as the most important factor, along with character-related arguments, such as demonstrating concrete post-incarceration plans.[122] Importantly, though, the survey did not directly ask about the impact of health or addiction-related evidence during allocution, unlike the Sentencing Commission surveys.[123]

In sum, the judicial surveys imply that several potential mitigating factors are especially relevant to judges: defendants' health (especially mental health), indicators of the defendant's remorse, indicators of good character, family ties (which could indicate that the family would suffer collateral consequences from punishment), and age. In contrast, historical indicators of a defendant's disadvantage—like a traumatic upbringing—may be less relevant.

B. Experimental Studies on Mitigation

The second way to examine the relative importance of mitigating factors is to test them *experimentally* by presenting participants with vignettes about crimes and offenders, manipulating the extent and type of mitigation, and observing effects on sentences. There are some advantages to this method: while artificial, it allows researchers to tightly control and isolate the type of mitigation presented, allowing conclusions about cause and effect, rather than just correlation.

Though there have been a number of such studies, a few are particularly relevant to the questions addressed here. One of the most recent—and perhaps the most

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[121] Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 ALA. L. REV. 735 (2014).

[122] *Id.* at 752–53, 757.

[123] *Id.* at 793–94 tbls.16a–16b. One other notable survey, conducted by Professor Stephen Garvey as part of the Capital Jury project, surveyed jurors in capital cases, asking them how various aggravating and mitigating factors influenced their likelihood to vote for a death sentence. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1540–41 (1998). In line with the Sentencing Commission surveys, health-related mitigation, like mental disabilities or other diminished capacity, were reported as the strongest mitigating factor after lingering doubt over the defendant's guilt. *Id.* at 1159 tbl.4, 1564–65. Childhood trauma and other poor circumstances for the defendant also tended to mitigate, as did youthfulness at the time of the crime. *Id.* I also note one UK study that straddled the line between a survey and observational research about mitigation. Jessica Jacobson and Mike Hough observed over 100 sentencings in UK courts and attempted to categorize mitigating factors that were raised by either the prosecution or defense in their arguments, or by the judge in pronouncing sentence. *See* Jessica Jacobson & Mike Hough, *Personal Mitigation: An Empirical Analysis in England and Wales*, *in* MITIGATION AND AGGRAVATION AT SENTENCING 146, 146–50 (Julian V. Roberts ed.) (2011). They also attempted to code for whether the mitigation had an impact on sentencing based on the qualitative wording of the argument and judge's statements, and concluded that personal mitigation was critical to a number of reduced sentences. *Id.* at 148–52.

comprehensive—was conducted by Paul Robinson, Sean Jackowitz, and Daniel Bartels.[124] Robinson and his colleagues provided layperson participants with five vignettes—each describing the circumstances of a hypothetical criminal offense—and asked the participants to determine how much punishment the offender deserved for his crimes.[125] The participants first read baseline scenarios—in which no mitigating facts were present—and assigned sentences.[126] Then, the participants read the same vignettes with mitigating facts included and were asked whether the mitigating facts influenced their sentences.[127]

Because of the number of mitigating factors tested (18) across five separate crime vignettes, the results were complex, but three broad trends emerged. First, mitigation related to "true remorse," where the defendant has expressed presumptively valid remorse or *demonstrated* remorse by providing compensation to victims—caused the greatest reductions in sentences.[128] Interestingly, however, similar mitigation where the defendant's sincerity was not supported by action—such as a mere acknowledgement of guilt or simple apology to victims—did not cause similar reductions.[129] Second, indicators of *collateral consequences*—for example, that the defendant's family would suffer punishment as a result of incarceration—were the second most powerful mitigators.[130] Third, indicators of *character* independent of the crime—such as good or bad deeds done by the defendant, or the defendant's special talents—had very little impact.[131]

The results reported by Robinson and his coauthors largely mirror the results of the Sentencing Commission's surveys, indicating that remorse and collateral consequences are potentially powerful mitigators.[132] They diverge, however, on the issue of character. Judges reported character as among the most important kind of personal mitigation, yet laypeople in the study by Robinson and his coauthors found it only minimally mitigating. Also notably, the judicial surveys indicate that judges find health—especially mental health—to be a critical factor in sentencing, but the Robinson study did not evaluate that potential mitigator.

One recent study, by Colleen Berryessa, focused exclusively on mental health mitigation.[133] As in the Robinson study, participants were presented with vignettes

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[124] Robinson et al., *supra* note 95.

[125] *Id.* at 774–75.

[126] *Id.*

[127] *Id.* at 774–78.

[128] *Id.* at 782–83 tbls.5–6.

[129] *Id.*

[130] *Id.* Others have found similar results. *See, e.g.*, William Austin, *The Concept of Desert and its Influence on Simulated Decision Makers' Sentencing Decisions*, 3 LAW & HUM. BEHAV. 163 (1979) (measuring effects of collateral offender suffering on punishment).

[131] Robinson et al., *supra* note 95, at 782–83 tbls.5–6.

[132] Robinson et al. did not find strong effects of age as a mitigator. *Id.* But other studies have. *See, e.g.*, Christine E. Bergeron & Stuart J. McKelvie, *Effects of Defendant Age on Severity of Punishment for Different Crimes*, 144 J. SOC. PSYCHOL. 75, 86–87 (finding reduced punishment for both old and young offenders as compared to middle-aged offenders).

[133] Colleen M. Berryessa, *The Effects of Psychiatric and "Biological" Labels on Lay Sentencing and Punishment Decisions*, 14 J. EXP. CRIMINOL. 241 (2018).

of committed crimes and asked to assign an appropriate prison term.[134] Some participants were told that a psychiatrist had diagnosed the defendant with one of several psychiatric illnesses, and others were further told that the illness had particular biological bases.[135] The presence of several of the psychiatric illnesses significantly decreased the amount of punishment that participants assigned to the offender, and that reduction was more pronounced for one of the illnesses when participants were told that it had a biological basis.[136] While the results were varied across all of the illnesses, they imply that laypeople may judge individuals as less culpable for their crimes when knowing they suffer from illnesses that affect their judgment, especially when those illnesses are thought of as biological.[137]

Both the judicial surveys and Robinson's study indicated that true remorse may be a powerful mitigating factor as well.[138] While there are limited studies directly examining the impact of remorse on specific sentencing decisions, there is a significant psychological literature showing that expressions of true remorse following a crime tend to reduce laypeople's view of the offender's blameworthiness.[139] However, at least one study has indicated that bare emotional expressions of remorse—without any evidence to support them—are not mitigating, and can sometimes *increase* culpability judgements.[140]

The story is more mixed on character as a mitigator: the judicial surveys indicate that it is among the most relevant individual characteristics for sentencing, but it was one of the least mitigating factors in Robinson's study. Generally, the psychological literature implies that character mitigation should have at least some influence in sentencing. A number of studies have found that individuals with high "social attractiveness"—likeability that is generally associated with good character—are blamed less for criminal conduct. For example, one prominent study presented participants with vignettes in which a person did a bad act (such as throwing a punch in a fight, or driving carelessly, resulting in an accident).[141] When the participants were told that the person had done good acts earlier in the day (such as being polite,

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[134] *Id.* at 244–45.

[135] *Id.* at 244.

[136] *Id.* at 246–48 & tbls.1–2.

[137] Berryessa's data are also in line with prior similar research. See, e.g., Lisa G. Aspinwall, *The Double-Edged Sword: Does Biomechanism Increase or Decrease Judges' Sentencing of Psychopaths?*, 337 SCIENCE 846 (2012) (evidence that defendant's psychopathy had biological basis was mitigating); Michelle A. Barnett et al., *When Mitigation Evidence Make a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 756 (2004) (in vignette experiment, presentation of mitigating mental illness reduced the likelihood of a death sentence by nearly half).

[138] *See supra* notes 112, 128 and accompanying text.

[139] *See, e.g.*, Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity and Expectancies about Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291 (2000).

[140] Alayna Jehle et al., *The Influence of Accounts and Remorse on Mock Jurors' Judgments of Offenders*, 33 LAW & HUM. BEHAV. 393, 396–99 (2008).

[141] Mark D. Alicke & Ethan Zell, *Social Attractiveness and Blame*, 39 J. APPLIED SOC. PSYCHOL. 2089, 2093–2100 (2009).

acting honestly, or helping others) the person was seen as less blameworthy for the later bad act, and, in some cases, less causally responsible for it.[142] Other studies have found similar results.[143] Based on these studies, one would anticipate that criminal defendants who demonstrate social attractiveness—by providing evidence of good works they did before committing their crime, for example—would be viewed as less blameworthy by judges, and thus receive more lenient sentences.

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Part I-B gave us a background of the potential universe of mitigating factors that could be considered at sentencing. Now, in Part II, we have learned a bit about how those factors might compare—which ones we expect to be the *most* mitigating at sentencing.

But while these studies provide models of how we *expect* mitigation to work, they cannot fully tell us how mitigation works in practice, for several reasons. First, as with most survey or laboratory methodologies, they are artificial, and lack the richness of real-world scenarios. Judges in real cases have to balance many types of mitigation against a host of other considerations—a process not modeled in these studies. Second, judges' self-reports of what they consider mitigating may not align with their actual behavior.[144] Third, *all* of the experiments described above used laypeople, rather than judges, as subjects, and thus do not capture the judge's unique position as a repeat player in sentencing. And fourth, none of the experiments accounted for the Guidelines' minimization of mitigation, which could serve to blunt its effects. To more completely understand how mitigation influences decisions, we need to examine the rich context of real cases. In the next Part, I describe the methods I used to empirically measure mitigation presented in over 300 felony cases: by coding sentencing memoranda filed by defense attorneys for over a dozen categories of mitigation, and statistically testing how the mitigation predicts sentencing decisions.

III. METHOD

A. Identifying Categories of Mitigation

I sought to categorize mitigation both with *specificity*—that is, separating

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[142] *Id.* at 2095–96, 2100.

[143] *See, e.g.*, Nona J. Barnett & Hubert S. Field, *Character of the Defendant and Length of Sentence in Rape and Burglary Crimes*, 104 J. SOC. PSYCHOL. 271 (1978); Harold Sigall & David Landy, *Effects of the Defendant's Character and Suffering on Jurdic Judgment: A Replication and Clarification*, 88 J. SOC. PSYCHOL. 149 (1972).

[144] *See, e.g.*, Barbara O'Brien et. al., *Ask and What Shall Ye Receive? A Guide for Using and Interpreting What Jurors Tell Us*, 14 U. PA. J.L. & SOC. CHANGE 201, 204–10 (2011) (describing problems with using subjective self-report data in jury context); Robert E. Kraut & Steven H. Lewis, *Person Perception and Self-Awareness: Knowledge of Influences on One's Own Judgments*, 42 J. PERSONALITY & SOC. PSYCHOL. 448 (1982) (judges' self-reports are only moderately accurate at estimating actual influences on their judgments).

between categories of mitigation that are qualitatively different, such as mitigation based on a defendant's health concerns or mitigation based on a defendant's character—and also with *reliability*—that is, ensuring the measurement of a particular category of mitigation is repeatable, such that multiple observers agree on the coding.

To achieve both of those goals, before collecting any data, I examined three groups of sources to identify potential mitigating factors: (1) the U.S. Sentencing Guidelines and the federal sentencing statute, 18 U.S.C. § 3553(a); (2) generally accepted categories of mitigation outlined in the prior literature;[145] and (3) a pilot sample of 50 federal sentencing memoranda.

From those sources, three broad categories of mitigation emerged. The first two categories—under which most mitigation falls—track the first and most important sentencing factor under § 3553(a): "the nature and circumstances of the offense and the history and characteristics of the defendant."[146] I divided that factor into two categories. First, *offense mitigation* relates to the "nature and circumstances of the offense," capturing mitigating arguments based on how culpable the defendant is for the crime itself.[147] Second, *personal mitigation* relates to the defendant as a person and how his "history and characteristics" affect his culpability.[148] Under each of those categories, I coded for separate mitigating arguments, described in detail below.

In the pilot sample of cases I reviewed, defense attorneys spent most of their memoranda discussing offense mitigation and personal mitigation. This should not be surprising—nearly all mitigation outlined in the sentencing literature is captured by those two categories, and § 3553(a)(1) tends to be considered the broadest and most important sentencing factor. But the sentencing memoranda also contained a third type of discussion related to the theory of punishment underlying the sentence. In such *theories-of-punishment discussion*, attorneys make arguments about *why* the offense and personal mitigation should affect the sentence, including the need to deter, incapacitate, and rehabilitate.

After identifying the categories of mitigation, I constructed a coding rubric, outlining in detail the characteristics of each mitigating factor, how the factors should be coded, and providing examples to promote reliability.[149] I describe each of the mitigating factors below, and summarize them in Table 1.

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[145] The most comprehensive sources on this—and the ones on which I primarily relied—were Hessick & Berman, *supra* note 68, and Robinson et al., *supra* note 95. But there were others as well. *See, e.g.*, *Shapland*, *supra* note 105, at 68 (listing factors).

[146] 18 U.S.C. § 3553(a)(1).

[147] *See infra* notes 150–160 and accompanying text.

[148] *See infra* notes 161–179 and accompanying text.

[149] Coding rubric (on file with author).

TABLE 1. MITIGATION FACTORS AND CATEGORIES

Mitigating Factor	Category
Relative Seriousness	Offense
Relative Culpability	Offense
Victim Harm—Minimizing	Offense
Victim Harm—Acknowledging	Offense
Remorse—Supported	Offense
Remorse—Unsupported	Offense
Historical Trauma	Personal
Character	Personal
General Family Background	Personal
Collateral Consequences	Personal
Health—Supported	Personal
Health—Unsupported	Personal
Age	Personal
Deterrence	Theories of Punishment
Incapacitation	Theories of Punishment
Rehabilitation	Theories of Punishment

1. Offense Mitigation

a. Relative Seriousness

General facts about the scope, significance, and seriousness of the offense itself often dominate sentencing. In calculating an offense level for each crime, the Sentencing Guidelines focus heavily on characteristics defining how dangerous, broad in scope, or otherwise serious the offense was.[150] The federal sentencing statute likewise directs judges to broadly consider "the nature and circumstances of the offense" and "the need for the sentence imposed . . . to reflect the seriousness of

[150] For example, the fraud Guideline determines the offense level based on offense characteristics such as the monetary amount of loss, number of victims, and the sophistication of the scheme. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1), (2), (10).

the offense."[151] Unsurprisingly, then, defense attorneys in the pilot memoranda focused heavily on attempting to mitigate the facts of the offense itself—arguing that the characteristics of the offense were not as serious as the Guidelines reflect, rendering the defendant less culpable and warranting a reduced sentence. Others have identified this category as significant for mitigation as well: in Hessick's & Berman's taxonomy, it falls under "harm caused by the defendant."[152]

This is a broad category that covers a number of different arguments. For example, attorneys may argue that the Guidelines themselves overstate the seriousness of the offense, that the specific characteristics of the crime made it less harmful to society at large, or that aspects of the investigation were improper. When making this type of mitigating argument, attorneys often describe the circumstances of the offense, and contrast those circumstances with other offenses of a similar nature. Likewise, this category also captures general descriptions of the offense that do not fit within the other offense mitigation categories. Though these passages are often more descriptive than argumentative, they are typically intertwined with arguments about the relative seriousness of the offense.

b. Relative Culpability

Attorneys also often seek to minimize the defendant's particular role within the offense itself as compared to others—either codefendants, others involved but not charged, or others involved in similar offenses. While the Sentencing Guidelines in part account for this by either raising the range for a leadership role under § 3B1.1 or lowering the range for a minimal role under § 3B1.2, attorneys also often argue that a defendant's minimal role in the offense should adjust his sentence downward to a greater extent than what is captured by the Guidelines. The federal sentencing statute also instructs judges to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[153] This project coded arguments about that sentencing factor as relative culpability, because the argument centers on comparisons with others who have committed the same or similar offenses. Relative culpability arguments were common in the pilot memoranda, and the factor was captured in Hessick's & Berman's review as the "role of others in the defendant's crime."[154]

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[151] 18 U.S.C. § 3553(a)(1), (2)(A).

[152] *See* Hessick & Berman, *supra* note 68, at 194–95. Some of the state statutes identified by Hessick & Berman covered broad mitigating factors accounting for the relative seriousness of the offense. *See, e.g.*, ALASKA STAT. § 12.55.155(d)(9) ("[T]he conduct constituting the offense was among the least serious conduct included in the definition of the offense . . . .").

[153] 18 U.S.C. § 3553(a)(6).

[154] Hessick & Berman, *supra* note 68, at 191–93. I note that Hessick's & Berman's category is broader than mine—theirs also includes victim wrongdoing, which is a mitigating factor in many state statutes. *Id.* Victim wrongdoing mitigation is likely more common in state cases than federal ones, since most violent crimes are prosecuted by the state. I did not observe arguments about victim wrongdoing in any of the pilot sentencing memoranda that I reviewed, so I did not include it in this category.

c. Victim Harm (minimizing or acknowledging)

Defense attorneys also sometimes seek to mitigate the characteristics of the offense by highlighting that the defendant caused either minimal harm to victims, or less harm to victims than in other violations of the same statute. This category is related to relative seriousness, but while that category captures arguments about the general nature of the offense, this one captures arguments specific to direct victim harm. Hessick and Berman found that a number of states identify minimal harm caused to victims as a mitigating circumstance, and included those under their "harm caused by the defendant" consensus factor.[155] The factor may be especially important in federal cases, which involve individual victims less frequently than state cases, rendering victim harm more unique and potentially more damaging to defendants.

Interestingly, defense attorneys in the pilot memoranda approached victim harm in one of two ways: either by arguing that the victim harm was minimal, or by explicitly acknowledging and accepting that the defendant harmed victims. The coding scheme categorized those two categories of victim-related mitigation separately.

d. Remorse (supported or unsupported)

A defendant's remorse is one of the most prominent mitigating factors in the prior literature.[156] Robinson et al. focused heavily on it in their experiments, splitting remorse into separate categories of "true remorse"—sincere contrition for the offense—acknowledgement of guilt, and apology.[157] The judicial surveys identified *actions* associated with remorse—voluntary disclosure of the offense and efforts to make victims whole—as powerful mitigators as well.[158] Likewise, Hessick and Berman identified making victims whole as a consensus mitigating factor.[159] Unsurprisingly, expressions of remorse were common as mitigation in the pilot sentencing memoranda as well.

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[155] Hessick & Berman, *supra* note 68, at 194–95; *see, e.g.*, IDAHO CODE § 19-2521(2)(a) ("The defendant's criminal conduct neither caused nor threatened harm . . . ."); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(1) ("The defendant's conduct neither caused nor threatened serious physical harm to another.").

[156] I included remorse under the umbrella of offense mitigation—rather than personal mitigation—though it does straddle the line between the two categories. While a statement of remorse is a characteristic of the defendant's mental state, it is inherently connected to the offense itself, unlike the personal mitigating factors described below. Statements of remorse typically focus on admission of the harm that was done, regret for what the defendant did, and ways to right the wrong the defendant caused—all focused on the offense itself. This is in contrast with personal mitigation, which focuses on the defendant entirely separate from the crime. But importantly, whether remorse is placed as offense mitigation or personal mitigation does not materially affect the results reported below.

[157] Robinson et al., *supra* note 95, at 743–46.

[158] U.S. SENTENCING COMM'N, 2010 JUDGES SURVEY, *supra* note 107, at tbl.13.

[159] *See* Hessick & Berman, *supra* note 68, at 193–94.

Remorse is somewhat unique among the other categories of offense mitigation in that judges are placed in a difficult position of judging the genuineness of remorse. Nearly every defendant expresses some statement of remorse prior to sentencing. The Robinson et al. study modeled this at least in part—one of their remorse categories, "true remorse," presumed that the remorse was legitimate, whereas the other remorse categories did not, and this led to a difference in the effectiveness of remorse as a mitigator.[160]

To reflect that difference in this study, this project coded expressions of remorse into two separate categories based on objective criteria: one where the defendant presented supporting evidence—such as specific acts relating to the offense that indicate contrition—and one where the defendant simply provided an unsupported statement of remorse. To promote reliability, only claims of remorse that contained a concrete description of action taken by the defendant were treated as remorse with support. Those specific steps could come in a number of ways, for example: actions to benefit victims, aid to law enforcement, or steps the defendant has taken to ensure he does not reoffend. But the key was specificity: vague descriptions of indicators of the defendant's remorse were coded as remorse that did not contain any supporting evidence.

2. Personal Mitigation

a. Historical Trauma

One of the most common forms of personal mitigation in the pilot memoranda was descriptions of the defendant's unfortunate upbringing, abuse, or other prior trauma. While the Guidelines specifically mention that a "lack of guidance as a youth" should not ordinarily be a consideration for a Guideline departure, defendants often argue that this type of mitigation warrants a variance. Because many defendants come from at-risk communities, this type of mitigation often takes the form of describing the defendant's less-fortunate upbringing. Indeed, in the 2010 judicial survey, 50% of judges said that they saw a "disadvantaged upbringing" as normally relevant to a departure or variance consideration. Likewise, attorneys may also describe trauma or other difficulties that led more directly to the commission of the offense. This project coded any type of historical trauma—primarily used to explain why the defendant's difficult life resulted in the commission of a crime—under this category. Importantly, however, *current* mental or physical injury or illness were coded separately, as described below.

b. Character

A second major category of personal mitigation is good character: good deeds, achievements, or actions that show the judge the defendant is more than just the

[160] *See supra* notes 128–129 and accompanying text. Trying to assess evidence of remorse is also particularly important because there is potential for pernicious racial biases to creep in when judging remorse. *See* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301 (2018).

crime he committed. The sentencing Guidelines limit the extent to which these circumstances warrant a departure: vocational skills, employment record, and civic service (other than military service) are generally not considered grounds for a departure.[161] Nevertheless, judges routinely consider these factors in determining whether to grant a variance. This is borne out in the literature: in the 2010 survey, over 60% of judges said that a number of character-related mitigating categories were ordinarily relevant to their variance and departure determinations;[162] Hessick's & Berman's "recidivism" category includes a number of mitigating factors related to prior criminal history and character;[163] and Robinson et al.'s "offender status" categories were comprised of character-related mitigation.[164] Mitigating arguments under this factor can take a variety of forms. Defendants may argue that they have a strong work ethic and employment history; that they engaged in prior volunteer work, helping others, or other good deeds; or that they behaved well following arrest by following conditions of pretrial release. In fraud cases, defendants sometimes argue that they have not lived a life of excess. And they may also emphasize that their criminal history is limited. While the Guidelines in part consider this by calculating a criminal history category for each defendant that affects the Guideline range,[165] the Guidelines also recognize that, in limited circumstances, a defendant's criminal history category may over-represent his true criminal past.[166] And even where that guidance does not apply, a judge may vary from the Guideline range based on the defendant's limited criminal past.[167]

c. General Family and Social Background

One other category of mitigation observed in the pilot sentencing memoranda is less well-described in the literature: general discussion of defendants' family connections and support system. These descriptions typically operated as a general background to humanize the defendant as a real person with real personal connections. There is not a clear framework within which this type of mitigation fits. The Sentencing Guidelines provide that "family ties and responsibilities" are not ordinarily relevant to a departure determination, but 62% of judges in the 2010 survey said they were ordinarily relevant to their departure or variance considerations. To capture the limited discussion of general family and social background in the pilot memoranda, the coding scheme limited this category to simple descriptions of the defendant's family and social background that did not fall

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[161] U.S. SENTENCING GUIDELINES MANUAL § 5H1.2, 5, 11, 12.

[162] *See supra* note 113 and accompanying text. As with remorse, there are potential race- and class-based pitfalls associated with trying to judge character. *See, e.g.*, *Deborah L. Rhode, Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 371–74 (2019).

[163] Hessick & Berman, *supra* note 68, at 197–98.

[164] Robinson et al., *supra* note 95, at 751–58.

[165] U.S. SENTENCING GUIDELINES MANUAL § 4A1.1, Ch. 5 Pt. A.

[166] *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(b)(1).

[167] *See* 18 U.S.C. § 3553(a)(1) (permitting judge to consider the "history and characteristics of the defendant" generally).

in other categories, such as good character, trauma, or collateral consequences.

d. Collateral Consequences

Another common form of personal mitigation presented in sentencing memoranda is the extent of hardship—beyond imprisonment—that the defendant or others will suffer as a result of conviction and punishment.[168] Defendants may discuss the fact that they will lose employment, the right to vote or carry a firearm, or that the conviction will have immigration consequences, such as deportation. Defendants may also argue that their families will suffer as a result of their punishment because the defendant is a provider or caregiver. As described above, the Guidelines specifically mention that "family ties and responsibilities" are not ordinarily relevant to a departure,[169] but mention of collateral consequences mitigation was common in the pilot memoranda. Likewise, Hessick and Berman identified a similar factor—"hardship"—as one of their consensus mitigating factors,[170] Robinson et al. tested it as "special hardship apart from punishment" for the defendant or his family,[171] and the judicial surveys indicated that judges consider family ties—which come with attendant collateral consequences—as often relevant.[172]

e. Health (supported or unsupported)

The defendant's mental or physical health difficulty is another often-discussed mitigating factor. The Sentencing Guidelines provide a mixed policy as to whether health problems can be mitigating: while "mental and emotional conditions" and "physical condition or appearance" "may" be relevant to a departure consideration, drug or alcohol dependence or abuse is ordinarily not.[173] But judges in the 2010 survey reported viewing certain types of health mitigation—particularly mental health—as very relevant, and experiments likewise imply that it is a relevant mitigator.[174] These arguments can take many forms, including the presence of mental health problems, drug addiction, or other physical ailments.

Like expressions of remorse, the data described in Part II imply that health-related mitigation may have special significance, over and above other categories of mitigation. And health-related mitigation is similar to expressions of remorse in another way: it is often capable of being supported by objective evidence, primarily in the form of medical documentation from treating health care providers. This is distinct from other forms of personal mitigation: in the pilot memoranda, discussion

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[168] For discussion of collateral consequences in the sentencing mitigation context, *see* Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 250–52 (2018).

[169] U.S. SENTENCING GUIDELINES MANUAL § 5H1.6.

[170] Hessick & Berman, *supra* note 68, at 200–01.

[171] Robinson et al., *supra* note 95, at 760–62.

[172] U.S. SENTENCING COMM'N, 2010 JUDGES SURVEY tbl.13.

[173] U.S. SENTENCING GUIDELINES MANUAL § 5H1.3–4.

[174] *See supra* notes 110–111, 133–137 and accompanying text.

of historical trauma, character mitigation, and family circumstances were rarely accompanied by specific evidence. But health-related mitigation can easily be supported by the documentation it often generates. Like expressions of remorse, we might expect that when a defendant can support his claims of health related mitigation with evidence, they will be more persuasive, so the coding scheme separately coded arguments in which health-related mitigation was supported and those in which it was not.[175]

Evidence can come in a variety of different forms. Two common methods were (1) reference to an attached medical report or other exhibit providing support; and (2) reference to specific paragraphs of the PSR. The scheme considered the second form as providing support only if the reference was not confined to the defendant's own report of injury or illness to the probation officer. In contrast, where a description of a defendant's medical issue contained no evidence, it was coded accordingly.

f. Age

Last, a defendant's age can also be a mitigating factor of its own, unrelated to any specific health concerns. The Guidelines explicitly account for age as a potential mitigating factor, but only when "considerations based on age . . . are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[176] Both Robinson et al. and Hessick & Berman also identified age as a primary mitigating circumstance.[177] Age-based mitigating arguments were common in the pilot memoranda, including arguments both that a defendant's elderly status was mitigating and that a defendant's youthful age rendered him less culpable. Both types of arguments have support in the legal framework. The Guidelines' discussion of age primarily focuses on old age as a mitigator.[178] And the U.S. Supreme Court has described how young criminal defendants often have not reached full cognitive development, implying their culpability for criminal conduct may be reduced.[179]

3. Theories of Punishment Discussion

Outlining offense mitigation and personal mitigation is the primary purpose of most sentencing memoranda. But undergirding that mitigation is discussion about *why* those particulars of the case warrant a lower sentence. More succinctly, they

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[175] *See, e.g.*, Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 56 (2012) ("Concerns about fraud and malingering . . . surround claims of mental disorders and PTSD.").

[176] U.S. SENTENCING GUIDELINES MANUAL § 5H1.1.

[177] Robinson et al., *supra* note 95, at 763–64; Hessick & Berman, *supra* note 68, at 196 (describing youthful age as a component of the "defendant's culpability" consensus factor).

[178] U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 ("Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement may be equally efficient.").

[179] Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 567 U.S. 460, 472 (2012).

articulate why the defendant's suggested sentence would satisfy the various purposes of punishment.

Notably, the sentencing reform act did not adopt a single theory of punishment.[180] Instead, 18 U.S.C. § 3553(a)(2) outlines different goals of punishment that judges must consider in sentencing, such as deterrence,[181] incapacitation,[182] and rehabilitation.[183] In the pilot memoranda, attorneys frequently provided short, cabined discussions explicitly referencing and discussing one or more of the § 3553(a)(2) categories. Thus, this project coded for any sentencing discussion that explicitly raised any of those three goals of punishment or cited the portions of § 3553(a) instructing the judge to consider those goals of punishment.

4. Sentencing Information

I collected two sentencing measures from each case: the total Sentencing Guideline range applicable to the defendant's convictions, and the total sentence imposed for those convictions. While those figures may seem self-explanatory, identifying them in a given case is not always simple. The district court is required to calculate the Guideline range, and typically announces it on the record at the sentencing hearing.[184] Thus, if a sentencing transcript was available, I reviewed it to identify the Guideline range as announced by the court. Unless a case is appealed, however, a sentencing transcript is typically not made public. In cases where a transcript was not available, I consulted other portions of the record to identify the Guideline range, such as the parties' sentencing memoranda or the plea agreement.[185] Identifying the sentence is more straightforward: the judge must include it in the judgment.[186] When there were multiple counts of conviction, I calculated the total sentence by combining sentences ordered to be served

[180] Hessick & Berman, *supra* note 68, at 170–72.

[181] 18 U.S.C. § 3553(a)(2)(B) (requiring judge to consider "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct").

[182] *Id.* § (a)(2)(C) (requiring judge to consider "the need for the sentence imposed . . . to protect the public from further crimes of the defendant").

[183] *Id.* § (a)(2)(D) (requiring judge to consider "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"). I note that § 3553(a)(2)(A) also instructs judges to consider the fourth major theory of punishment—retribution—by requiring the sentence "to provide just punishment for the offense." I observed little discussion of this factor in the pilot memoranda, perhaps because the notion of what sentence would provide just punishment so subjective. Thus, I did not code for discussion under § 3553(a)(2)(A).

[184] *See* Gall v. United States, 552 U.S. 38, 51 (2007) (explaining that it is procedural error for a court to "fail[] to calculate (or improperly calculat[e]) the Guidelines range").

[185] In 17 cases, it was impossible to identify the Guideline range either because none of the available documents discussed it, or—more commonly—it was disputed in the available documents and nothing in the public record indicated how the court resolved the dispute. I removed these cases from the sample and replaced them with other cases from the same district and year.

[186] FED. R. CRIM. P. 32(k)(1).

concurrently and adding sentences to be served consecutively.[187] From those data, I calculated each defendant's sentence as a percentage of the midpoint of the Guideline range, which served as the primary dependent measure in most of my analyses.[188] I collected sentencing information last, after doing all other coding, to avoid any possible bias in the coding.

B. Identification and Selection of Cases

Before gathering cases to use in the sample, I first weighted each federal judicial district to account for the fact that different districts hear different numbers of criminal cases.[189] Using the weighting variable to determine how many cases to select from each district,[190] I sampled four recent years of cases, from 2015 through 2018. I used the Lexis CourtLink system to search all criminal cases, and used a random number generator to randomly select the correctly weighted number of criminal cases from each year and district. I selected a large sample of just over 300 total felony cases in which a sentencing memorandum was filed.[191]

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[187] That is to say, if a defendant was sentenced to 30 months' incarceration on Count 1, 30 months' incarceration on Count 2 to be served concurrently with Count 1, and 60 months' incarceration on Count 3 to be served consecutively to all other counts, I would combine the two 30-month sentences and add the 60-month sentence, for a total sentence of 90 months.

[188] I note that I also coded the primary type of crime for which the defendant was convicted. I divided crime type into six categories: firearms, drug trafficking, child exploitation, fraud/theft, violent crime, and other. Because I did not have specific hypotheses about crime type effects, I did not initially conduct analyses by crime type, but I included the measure to allow for future analyses. I also used the crime type data as a partial control for race effects in one of the follow-up analyses I report below. *See infra* notes 266–268 and accompanying text.

[189] To do this, I took data from the United States Courts, which tracks the total number of criminal cases filed nationally in federal district courts, and calculated a weighting variable based on the total number of criminal cases heard in each district between 2015 and 2018. *Caseload Statistics and Data Tables*, U.S. Courts, tbl.D-3 (2018) https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited October 11, 2021).

[190] I identified 20 districts for which sentencing memoranda were not available due to local practices of either filing them under seal or providing them directly to the court off of the public record. Those districts were not included in the sample. Though there was no way around this problem, not being able to examine sealed sentencing memoranda does introduce some bias into the sample, as discussed *infra* note 273 and accompanying text

[191] In total, the sample included 78 cases from 2015, 75 from 2016, 77 from 2017, and 72 from 2018. This sample is roughly equivalent to other studies that involve the coding of legal language. *See, e.g.*, Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 333 (2001); Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 69–73 (2008) (collecting and describing similar studies). The best way to select a sample size in most quantitative research is to first conduct a power analysis, which helps to determine the probability of detecting an effect, given a particular sample size, if a true effect exists. JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 1 (1977). But to do a power analysis, one typically needs to be able to estimate the strength of

Not all of the cases selected in this initial pass were suitable to investigate mitigation because a number of case characteristics can limit the extent to which mitigating evidence will be presented to the court or considered in the sentence. I removed any cases with the following characteristics, and replaced them from the same year and district using the same random selection described above:[192]

- Cases in which the government recommended that the defendant receive a downward departure for "substantial assistance to authorities" under USSG § 5K1.1, which can blunt the impact of other mitigation.[193]
- Cases involving plea agreements with a set, agreed-upon sentence, eliminating the judicial discretion of interest here.[194]
- Cases where the top or bottom of the Guideline range was restricted by a mandatory minimum or statutory maximum sentence, limiting the judge's sentencing discretion.[195]
- Illegal reentry offenses prosecuted under 8 U.S.C. § 1326, which tend to be sentenced under a different set of standards and considerations than other felony cases, as convicted individuals are often subject to ICE detention and removal from the country in addition to federal sentencing.[196]
- Sentences that were reversed on appeal, which are difficult to assess because there have been multiple sentencing proceedings.[197]
- Cases involving an upper guideline range of life imprisonment, which make it difficult to calculate the midpoint of the range.[198]

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the effect being studied based on prior research. *See id.* at 14–15. That was not feasible here, given the novelty of this study.

[192] This method is similar to the one taken by the Sentencing Commission in analyzing sentencing data more broadly. See U.S. SENTENCING COMM'N, THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING, 2005–2017 22 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf 14 (describing exclusions in its study).

[193] I removed 17 cases from the sample on this basis.

[194] 8 cases. This relatively low number is worth noting—while prosecutors wield significant power in determining sentence, my data suggest it is relatively rare that they explicitly dictate the sentence through a set plea agreement. For a helpful discussion of the factors limiting prosecutors' power to dictate sentences through plea agreements, *see* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 849 (2018); Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 778 (2020) (describing prosecutorial power as "contingent").

[195] 21 cases.

[196] 12 cases.

[197] 2 cases.

[198] 6 cases.

- Cases in which the judge gave a probationary sentence, which make it difficult to calculate the sentence as a proportion of the midpoint of the Guideline range.[199]

C. Coding Methods and Intercoder Reliability Check

Most of the primary dependent variables in this study involved counts of the number of words an attorney spent on a particular type of mitigating argument. All citations were coded as part of the analysis, and all footnotes as if they were incorporated into the main text. To promote reliability, unless a paragraph *clearly* contained language that fell into multiple coding categories, single paragraphs were coded as a single category. There were, of course, instances in which single paragraphs did have multiple categories of discussion, but those were the exception, rather than the rule.

After developing and finalizing the coding rubric on the initial 50 pilot cases and collecting the full sample of cases, I randomly selected an additional 15 cases using the same criteria I used to collect the full sample. I and a second coder independently coded each of the 15 test cases to assess the reliability of coding for each of the independent variables.[200] After coding, I evaluated reliability using the Smith index[201]—twice the number of agreements in a category divided by the sum of the frequency that each rater used that category.[202] The reliability ranged from 0.96 to 0.55 (and above .77 in all categories but one), averaging 0.88 across all variables.[203] In general, reliability indicators at the levels achieved here are viewed as having either "almost perfect" reliability (above 0.8) or "substantial" reliability (between 0.6 and 0.8).[204]

IV. HYPOTHESES

Hypothesis 1: Increases in the amount of mitigation presented in sentencing

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[199] 11 cases.

[200] A reliability check is a critical part of ensuring the validity of results from coding schemes like this one, but legal scholars often do not conduct one. Hall & Wright, *supra* note 191, at 101 (reporting that only 14% of reviewed coding projects contained reliability testing).

[201] Charles P. Smith, *Content Analysis and Narrative Analysis*, *in* HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY 313–35 (Harry T. Reis & Charles M. Judd eds., 2000).

[202] I accounted for whether the coders applied the measure to the same point in the text. So, for example, if each coder coded 60 words of qualifications analysis, but only 40 of those words overlapped, the analysis would only consider the coders as having agreed on 20 words. Thus, under the Smith index, the reliability for such a scenario would be (40*2)/(60+60) = .66.

[203] For the complete data, see Appendix A.

[204] *See, e.g.*, Hall & Wright, *supra* note 191, at 115–16; Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159, 165 (1977).

memoranda will be associated with lower sentences relative to the Sentencing Guideline range.

The studies described in Part II suggest that mitigation matters when assessing culpability. Across a broad range of experimental contexts, laypeople asked to make sentencing decisions provide reduced sentences when mitigating evidence is present.[205] And judges have repeatedly responded in surveys that they frequently consider a variety of mitigating circumstances in making sentencing decisions, even within the structure of the Sentencing Guidelines.[206] Thus, I anticipated that when defense attorneys made mitigating arguments in sentencing memoranda, those arguments would impact judges' sentencing decisions. In the context of my data, I expected that judges would impose lower sentences (relative to the midpoint of the Guideline range) as the amount of mitigation presented increased.

[205] *See generally supra* Part II.B.
[206] *See generally supra* Part II.A.

Hypothesis 2: Increases in the amount of personal mitigation will be more strongly associated with lower sentences relative to the Sentencing Guideline range than offense mitigation.

The Sentencing Guidelines provide little room for adjustments in sentencing based on mitigation—especially personal mitigation. Instead, they focus largely on aggravating factors about the offense itself, combined with the defendant's criminal history, to arrive at a Guideline range. Yet, both the survey and experimental literature imply that judges consider personal mitigation very relevant.[207] Moreover, as described above, current trends—in all three branches of government and socially—appear to be pushing toward more individualized sentencing.[208] Thus, I expected that personal mitigation presented in sentencing memoranda would be more strongly associated with reduced sentences than offense mitigation.

Hypothesis 3: Certain categories of personal mitigation—character, collateral consequences, and especially health—will be more strongly associated with reduced sentences than other personal mitigation factors.

The experimental data on mitigation are limited to a handful of judicial surveys and a small literature of laboratory experiments, but we can cull some predictions from those data. Three of the categories of personal mitigation coded in this study—character, health, and collateral consequences—find consensus support in both the survey and experimental data.

Among those mitigators, I expected that health mitigation—when supported by evidence—would exert the strongest influence. Health mitigation (especially mental health) was reported by judges as ordinarily relevant to the decision to vary or depart from the Guideline range more consistently than any other mitigating factor.[209] The experimental data likewise show powerful effects of health mitigation.[210] And health mitigation is typically the only form of personal mitigation that is accompanied by concrete, objective evidence in the form of reports or evaluations from health care providers, potentially giving it more credibility than other forms of personal mitigation.

Hypothesis 4: Evidence-based remorse mitigation will be more strongly associated with reduced sentences than other offense mitigation factors.

The judicial surveys and laboratory experiments also indicate that remorse is a strong mitigator. Both the 2010 judicial survey and the Robinson et al. and related studies implied that *showing* remorse through action, rather than just explaining it through words, are the most strongly mitigating.[211] Thus, I anticipated that evidence-based remorse mitigation would be the strongest offense mitigation factor.

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[207] *See supra* Part II.
[208] *See supra* notes 79–85 and accompanying text.
[209] *See supra* notes 110–111, 119 and accompanying text.
[210] *See supra* notes 133–137 and accompanying text.
[211] *See supra* notes 128–129, 138–140 and accompanying text.

Hypothesis 5: Mitigating arguments based on objective evidence will have a greater mitigating effect on the sentence than subjective statements from the defendant.

At sentencing, judges are often placed in the difficult position of having to make decisions with limited evidence. Nearly all defendants express some type of remorse, and judges have to determine whether that remorse is genuine in deciding how to weigh it. Likewise, a defendant may claim significant mitigating health problems or history of addiction, but the claims will be difficult to evaluate without evidence. Some of the judicial survey results and experiments provided at least initial data indicating that *supported* remorse arguments are likely stronger than unsupported ones.[212] I expected the data here would show a similar trend, with evidence-supported mitigation (in both categories where I measured it: remorse and health) more strongly associated with reduced sentences relative to the Guideline range.

V. RESULTS

A. Characteristics of the Cases and Sentencing Memoranda

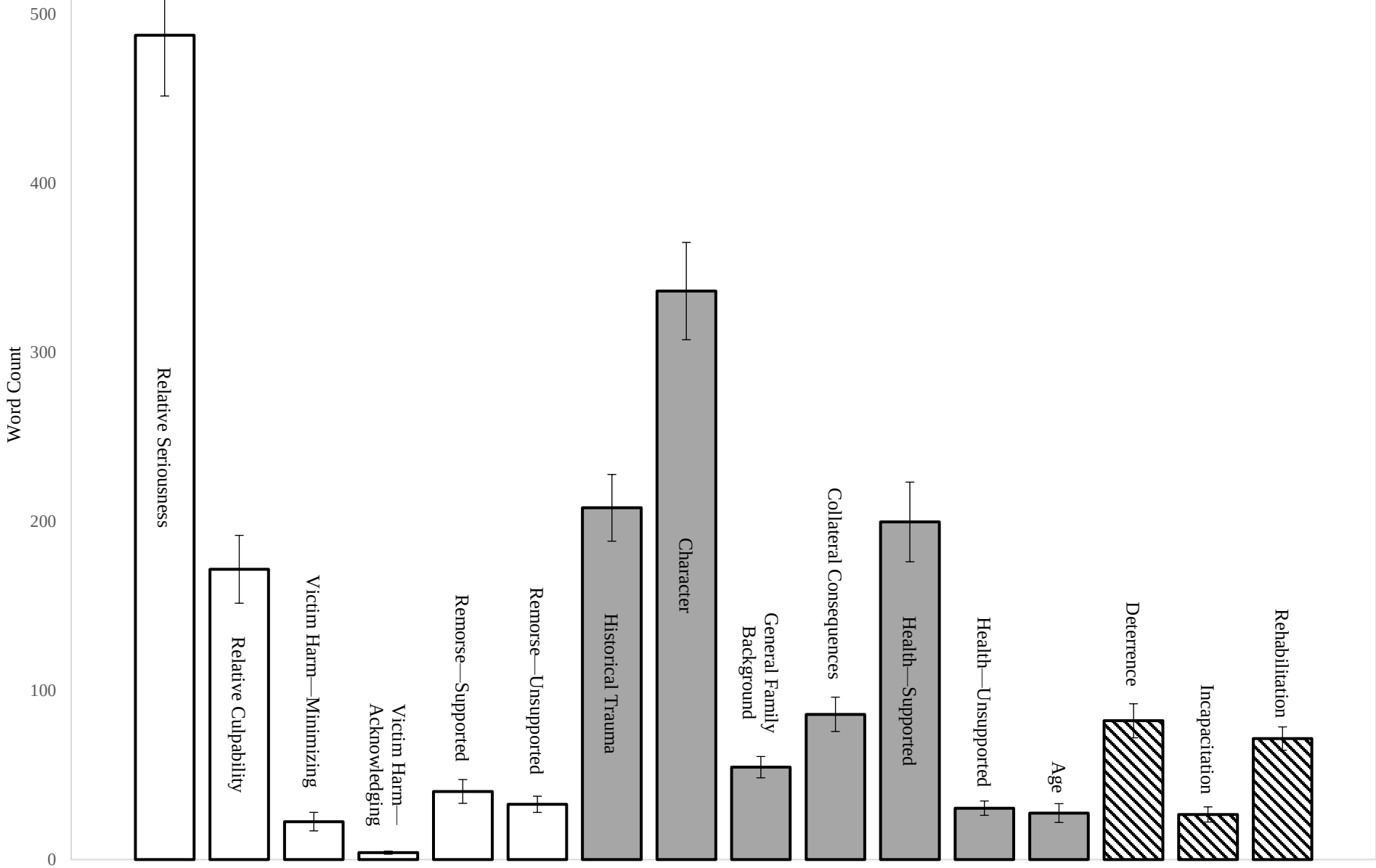
Figure 1 provides the total mean word counts for all coded variables, with full statistics in Appendix B.[213] To examine which mitigating factors received the most attention in the sentencing memoranda, I conducted a 16 x 1 repeated measures ANOVA, comparing the means of each of the 16 mitigating factors.[214]

[212] *See supra* notes 112, 128–129 and accompanying text.

[213] Because not all sentencing memoranda included discussion of all of the mitigating factors, the table also identifies the percentage of total sentencing memoranda that include each mitigating factor (termed "frequency of use").

[214] ANOVA—standing for analysis of variance—is a statistical test that allows a researcher to examine the difference between discrete independent variables (here, different mitigating factors) and a continuous dependent variable (here, word counts of mitigation) by comparing variances among the data. *E.g.*, Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1608 n.130 (2015).

Figure 1. Average word counts of mitigating factors (white bars represent offense mitigation; grey bars personal mitigation, and crosshatched bars theories of punishment discussion)



Unsurprisingly, I found large differences in the amount of text devoted to each factor.[215] Relative seriousness was the most prominent mitigating argument, and differed significantly from all other arguments.[216] Character was the next most frequent, and also differed from all other arguments.[217] Relative culpability, historical trauma, and health (with supporting evidence) were the third most frequent.[218] They were followed by collateral consequences, deterrence, and rehabilitation.[219] None of the other categories averaged more than 70 words per sentencing memorandum.

Some categories were predisposed to shorter presentation, as can be seen in Appendix B. For example, general family background mitigation appeared in 77% of the memoranda—the same frequency as character mitigation—but accounted for less than 50 words per memorandum. In contrast, health mitigation supported by evidence appeared in just 37% of the memoranda, but accounted for over 190 words per memorandum.

The mean sentence as a percentage of the midpoint of the Guideline range across all cases was 74%, which is roughly in line with the national average across all cases.[220] There were differences in overall sentence as a percentage of the midpoint of the Guideline range across crime types as well.[221] The overall difference was driven largely by slightly longer sentences in firearms cases, which had an average sentence of 85% of the midpoint of the Guideline range.[222] There were also small differences in sentence as a percentage of the midpoint of the Guideline range across circuits.[223] This effect was driven largely by slightly lower sentences in the 2nd (average sentence of 51% of the midpoint of the Guideline range), 7th (61%), and DC (61%) Circuits.[224] There were no significant differences in sentence across the

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[215] I conducted a 16 x 1 repeated measures ANOVA to identify whether there were effects between categories. The test was highly significant. $F(15, 4515) = 77.54$, $p < .001$, $\eta = .205$. I conducted Tukey post-hoc tests to identify differences between individual categories of mitigation.

[216] All p's < .01.

[217] All p's < .01.

[218] The three categories differed from every other category. All p's < .01. They did not differ significantly from each other. All p's > .3.

[219] The three categories differed from every other category. All p's < .05. They did not differ significantly from each other. All p's > .2.

[220] *See* U.S. SENTENCING COMM'N, *supra* note 192, at 21–24 (reporting federal data that, between 2014 and 2017, average sentences ranged from 24% to 21% below the bottom of the guideline range, and 16.5% when examining only cases involving complete judicial discretion).

[221] I conducted a 6 x 1 one-way ANOVA to identify whether there were differences in sentence between crime type. The test was highly significant. $F(5, 296) = 3.25$, $p = .007$, $\eta = .052$.

[222] I tested individual differences between crime types using Tukey post-hoc tests. Firearms crimes trended toward proportionally longer sentences than all other crime types except violent crime and other crime (all p's < .1).

[223] I conducted an 11 x 1 one-way ANOVA to identify whether there were differences in sentence between circuit. The test was significant. $F(10, 291) = 1.9$, $p = .045$, $\eta = .061$.

[224] I tested individual differences between circuits using Tukey post-hoc tests. The D.C.

four years in my sample.[225]

B. Predictive Value of the Sentencing Memoranda

Most of my hypotheses focused on the extent to which the quantity of mitigation predicts sentencing outcomes. I tested each hypothesis statistically, as described below.

*Hypothesis 1: Increases in the amount of mitigation presented in sentencing memoranda will be associated with lower sentences relative to the Guideline range (**Supported**).*

Figure 1 shows the total mitigation word count for all of the categories coded in this study plotted against sentence as a percentage of the midpoint of the Guideline range. As can be seen from the trend line, increased overall volume of mitigating arguments was associated with a reduced sentence. The association was highly significant, with a correlation coefficient of -.35.[226] Thus, the data support hypothesis 1: presenting more mitigation was associated with a reduction in sentence relative to the Guideline range.

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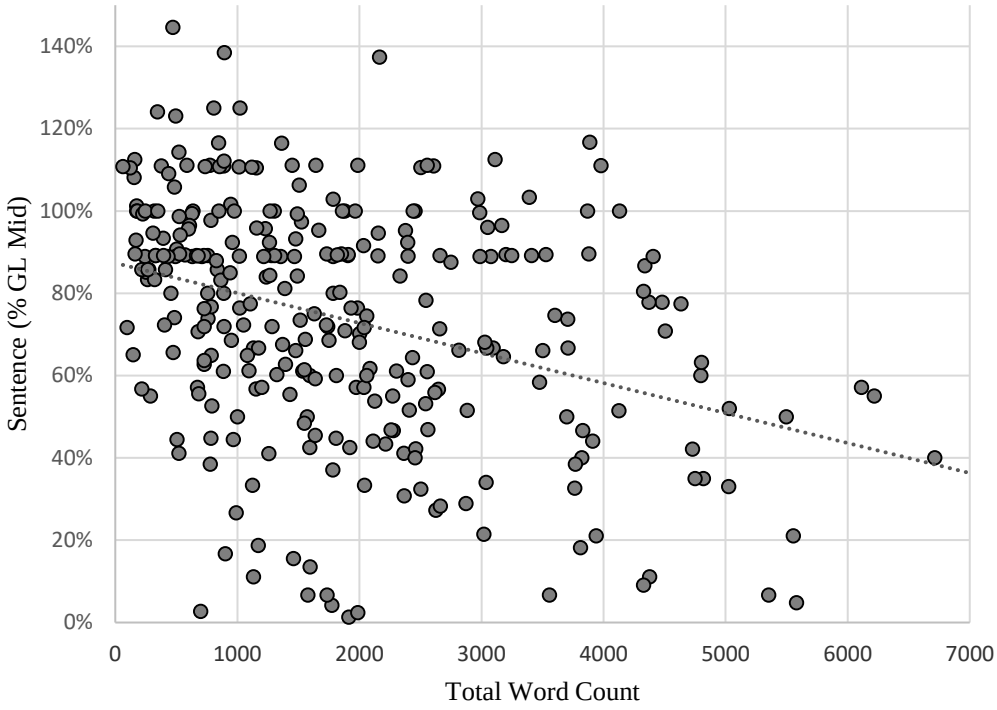
circuit's sentences trended toward being lower than the First and Eighth Circuits (p's < .1); the Second Circuit's sentences trended toward being lower than all circuits other than the Seventh and D.C. Circuits (all p's < .1); and the Seventh Circuit's sentences trended toward being lower than all circuits other than the Second, Tenth and D.C. Circuits (all p's < .1).

[225] The result of the 4 x 1 one-way ANOVA was: $F(3, 298) = .208$, $p = .891$, $\eta = .002$.

[226] $p < .001$. A correlation coefficient of -.35 is generally considered moderate, though there are disagreements as to the specific boundary lines between the various descriptive strengths of correlations. JEREMY MILES & PHILIP BANYARD, UNDERSTANDING AND USING STATISTICS IN PSYCHOLOGY 210 (2007) (as a general matter, a correlation coefficient of r = .1 constitutes a weak correlation, r = .3 constitutes a moderate correlation, and r = .5 constitutes a strong correlation).

Figure 2. Total mitigation word count and sentence



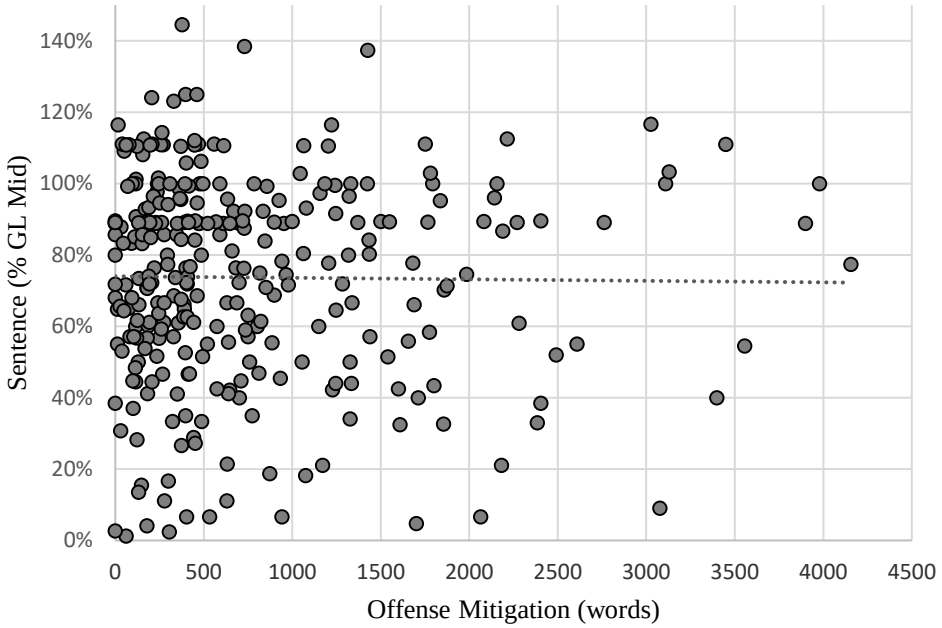
*Hypothesis 2: Increases in the amount of personal mitigation will be more strongly associated with lower sentences relative to the Guideline range than offense mitigation (**Supported**).*

Figures 3 and 4 show the total word counts of offense mitigation and personal mitigation, respectively, plotted against sentence as a percentage of the midpoint of the Guideline range. As can be seen from the trend lines, as the amount of personal mitigation in a sentencing memo increases, the sentence relative to the midpoint of the Guideline range decreases, whereas that relationship is largely absent for offense mitigation. To test this statistically, I conducted a multiple linear regression with sentence (as the percentage of the midpoint of the Guideline range) as the dependent variable and the three categories of mitigation (offense, personal, and theories of punishment) as independent predictor variables. The overall model was highly significant.[227] Only personal mitigation significantly predicted the sentence: personal mitigation had a standardized beta weight of -.485,[228] meaning that when the amount of personal mitigation argument increases by one standard deviation, the sentence decreases by .485 standard deviations.[229] Offense mitigation and theories-

[227] $F(3, 299) = 29.53$, $p < .001$. The R^2 of the model was .23.
[228] $p < .001$.
[229] *See, e.g.*, PAUL D. ALLISON, MULTIPLE REGRESSION: A PRIMER 30 (1999) (describing

of-punishment discussion had beta weights of .039[230] and .014,[231] respectively—neither of which was significant. In short, increased amounts of personal mitigation were strongly associated with reduced sentences, whereas increased amounts of offense mitigation and theories-of-punishment discussion were not.

Figure 3. Offense mitigation word count and sentence

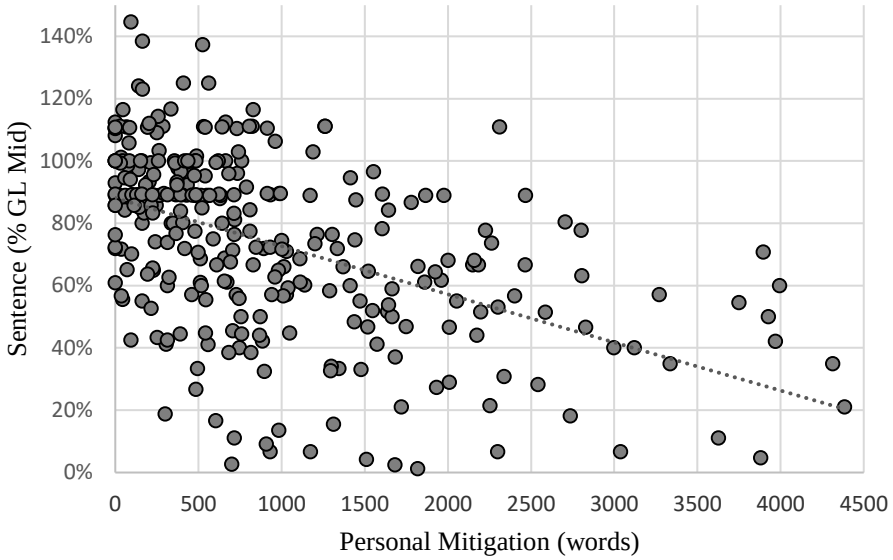


standardized beta weights). The standardized beta weight can generally be treated as an estimate of the effect size of a given variable. Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars*, 80 TEMP. L. REV. 201, 243 (2007). Putting these abstract numbers to practice, say the midpoint a particular defendant's guideline range was 100 months. The mean sentence in my data set was 74% of the midpoint of the guideline range. So, without knowing anything more, we would expect this defendant's sentence to be 74 months. But increasing in the amount of personal mitigation presented by 928 words—one standard deviation of that statistic in my data, *see* Appendix B—would predict a reduction in sentence of .485 standard deviations of the midpoint of the guideline range. The standard deviation of that statistic my data set was 28.6%. Multiplying the numbers out, with the 928-word increase in personal mitigation, we would expect the defendant's sentence to be just over 60 months if observed over a large sample.

[230] $p = .45$.

[231] $p = .8$.

Figure 4. Personal mitigation word count and sentence



I also examined whether attorneys spent more words on any of those three categories of mitigation, independent of sentence. I ran a 3 x 1 repeated measures ANOVA with the category of mitigation (offense, personal, and theories-of-punishment) as within-subjects factors. The mean number of words dedicated to offense mitigation was 761; to personal mitigation was 936; and to theories of punishment was 180. All three of those values differed significantly—attorneys did devote more words to personal mitigation than other types, though the difference was not so great as the sentencing results suggest it should be.[232]

*Hypothesis 3: Certain categories of personal mitigation—character, collateral consequences, and especially health—will be more strongly associated with reduced sentences than other personal mitigation factors (**Supported**).*

To examine the relative impact of the 16 mitigating factors that I coded for, I conducted a multiple linear regression with sentence (as the percentage of the midpoint of the Guideline range) as the dependent variable and the sixteen mitigating factors as predictor variables. The overall model was highly significant.[233] Table 2 outlines the relative predictive value of each mitigating factor, with offense mitigation factors shaded in white, personal mitigating factors shaded in light gray, and theories-of-punishment factors in dark gray.

[232] All three differences were significant at the $p < .01$ level. See Appendix B for complete data.

[233] $F(16, 285) = 8.673$, $p < .001$. The R^2 of the model was .33.

TABLE 2. REGRESSION DATA OF MITIGATING FACTORS

Independent Variable[234]	**Standardized Beta Weight**	**P-value**
Relative Seriousness	.075	.145
Relative Culpability	-.020	.691
Victim Harm—Minimizing	.054	.290
Victim Harm—Acknowledging	.034	.497
Remorse—Supported†	-.102	.057
Remorse—Unsupported*	.113	.025
Historical Trauma†	-.099	.060
Character**	-.194	.001
General Family Background	-.027	.597
Collateral Consequences**	-.190	.001
Health—Supported**	-.330	.000
Health—Unsupported	.057	.263
Age	.057	.263
Deterrence	-.026	.636
Incapacitation	.006	.902
Rehabilitation	.088	.110

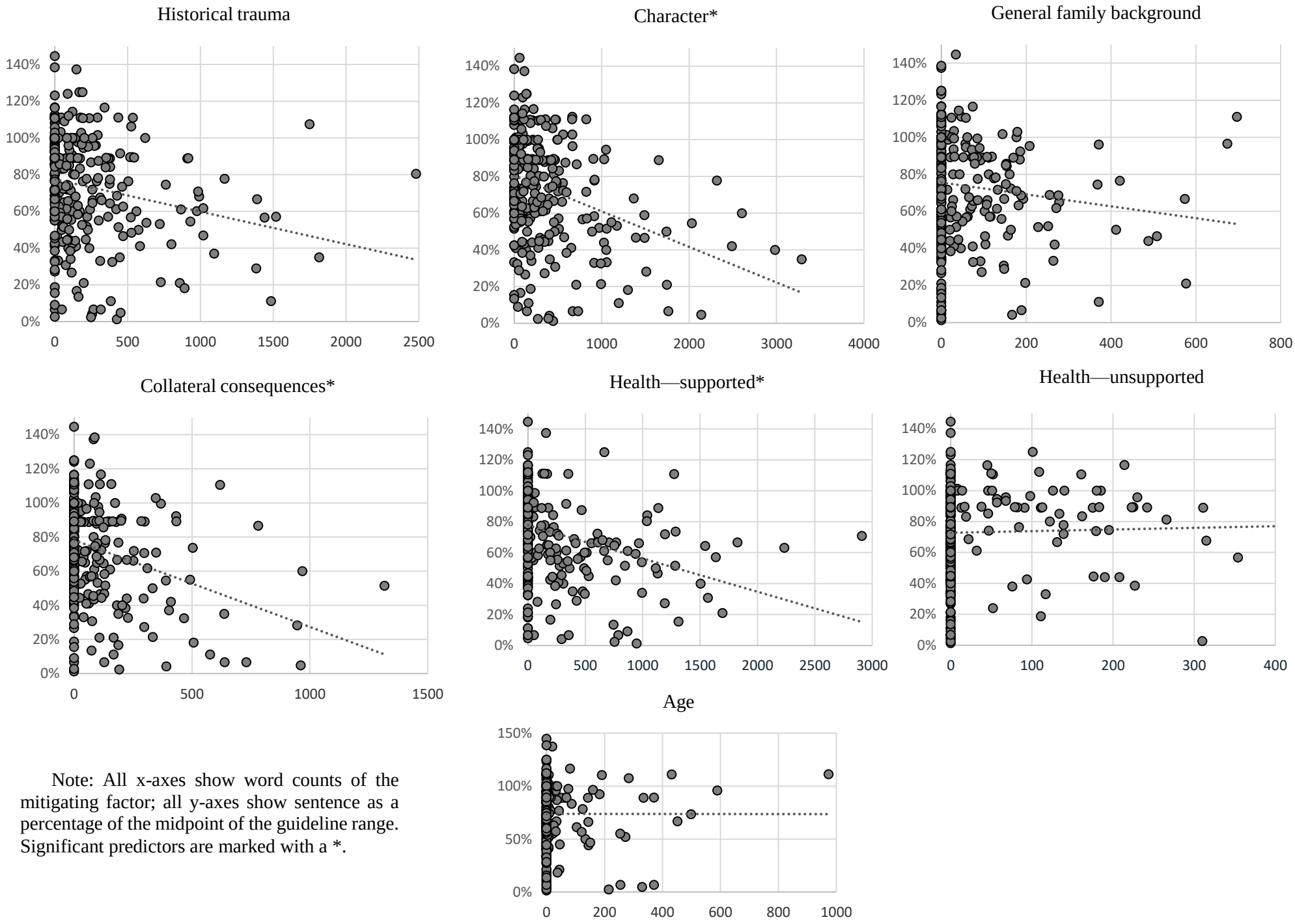
Four mitigating factors significantly predicted sentence at the $p < .05$ level: remorse (unsupported), character, collateral consequences, and health (supported). Relating specifically to hypothesis 3, there was a pronounced hierarchy in the

[234] Variables denoted by a * are significant at the $p < .05$ level; with a ** are significant at the $p < .01$ level. Variables denotes by a † trend toward significance at the $p < .1$ level. I note that these p-values are not adjusted to account for multiple comparisons. Whenever a researcher conducts multiple analyses, the possibility of obtaining a statistically significant p-value purely by chance increases. One common correction for this problem is the Bonferroni correction, which halves the required p-value to obtain statistical significance for each comparison. Here, with 16 mitigating factors, the Bonferroni-corrected p-value required to obtain significance would be 0.05/16 = 0.003. However, Bonferroni adjustments are very conservative and are not always applied in the multiple regression context, especially when the results occur in anticipated directions, as mine do. Here, the only results that would be affected by applying a Bonferroni correction are for the historical trauma factor and the two remorse factors, and conclusions about those factors are already tempered based on their borderline significance at the .05 level.

strength of different categories of personal mitigation. Supported health mitigation was by far the most associated with reduced sentences relative to the Guideline range: with a beta weight of -.33, when the amount of supported health mitigation argument increases by one standard deviation, the sentence (as a percentage of the midpoint of the Guideline range) decreases by .33 standard deviations (holding all other variables constant). That is a greater than 50% stronger relationship than either of the character or collateral consequences factors, which both had nearly identical beta weights of -.194 and -.190, respectively. Historical trauma tended to predict the sentence, with a beta weight of -.099, but was not significant at the .05 level.[235] So, while historical trauma nearly significantly predicts sentence, its relationship with sentence is about half as strong as the relationship between character mitigation and sentence or between collateral consequences mitigation and sentence. And all of those arguments were much stronger predictors than general family background, unsupported health mitigation, and age, none of which approached significance in predicting sentence. Figure 5 visualizes those relationships. In total, the data support Hypothesis 3: Supported health mitigation is the strongest form of mitigation in the study, and collateral consequences and character are the next strongest. All three are significant and powerful predictors of a defendant's sentence.

[235] $p = .06$.

Figure 5. Personal mitigation factors and sentence



Note: All x-axes show word counts of the mitigating factor; all y-axes show sentence as a percentage of the midpoint of the guideline range. Significant predictors are marked with a *.

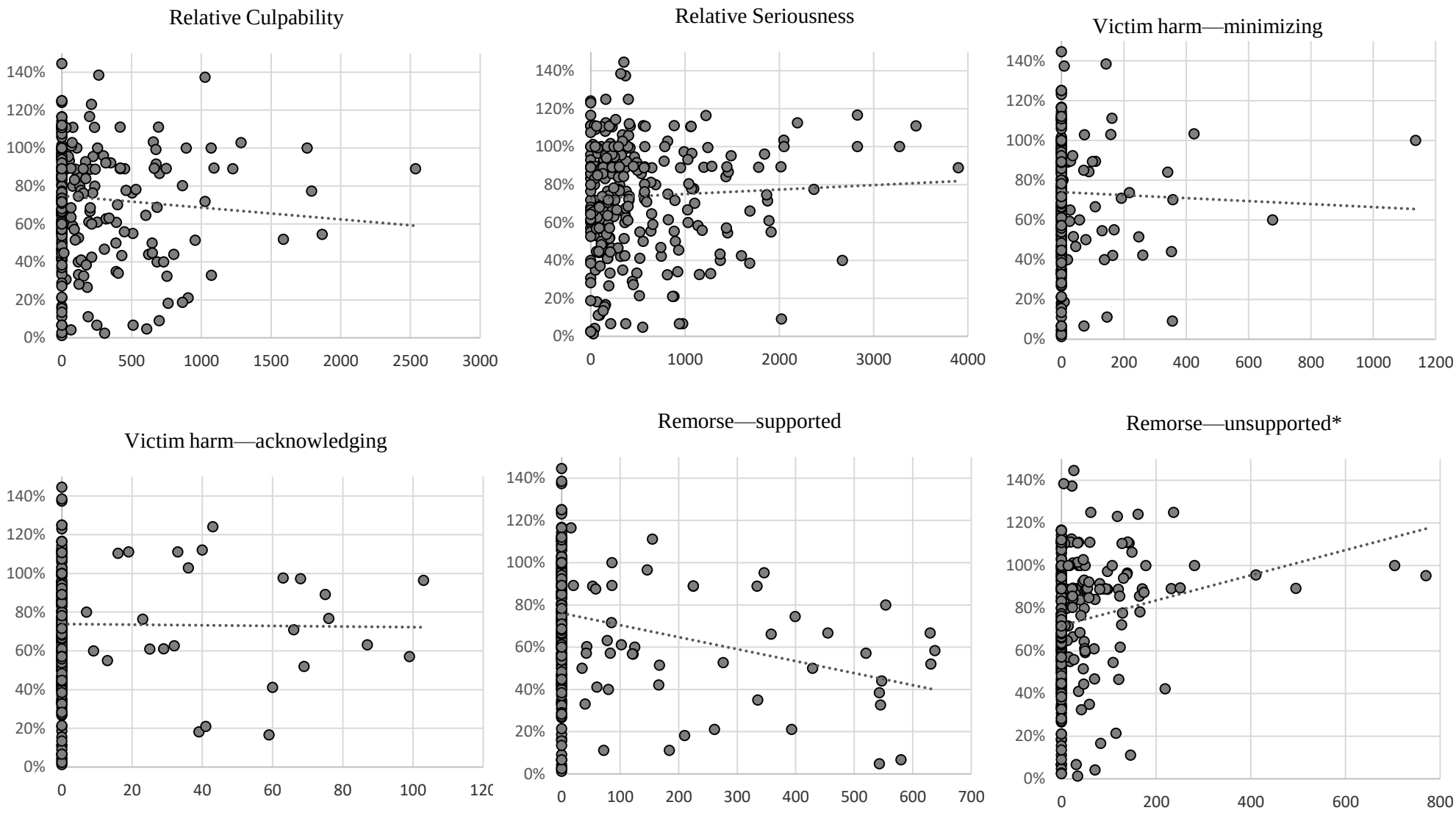
*Hypothesis 4: Evidence-based remorse mitigation will be more strongly associated with reduced sentences than other offense mitigation factors (**Moderately supported**).*

To investigate Hypothesis 4, I used the same multiple linear regression outlined in Table 2. As expected, none of the offense mitigation factors significantly predicted sentence other than remorse. Relative culpability had a very slight negative relationship with sentence—that is, as relative culpability mitigation increased, sentence decreased—but the relationship was small and not significant.[236] Interestingly, relative seriousness mitigation had a very slight positive relationship with sentence, meaning that as that type of mitigating argument increased, the sentence increased. That relationship, however, was not close to significant.[237] Remorse, however, did show a trend toward significantly predicting sentence when supported and also significantly predicted an *increased* sentence when unsupported.[238] I examine this relationship in more detail under the next hypothesis.

Figure 6 visualizes the relationship between each offense mitigation factor and sentence.

[236] As seen in Table 2, the standardized beta weight was -.02, $p = .691$.
[237] *See supra* Table 2.
[238] As seen in Table 2, $p = .057$.

Figure 6. Offense mitigation factors and sentence

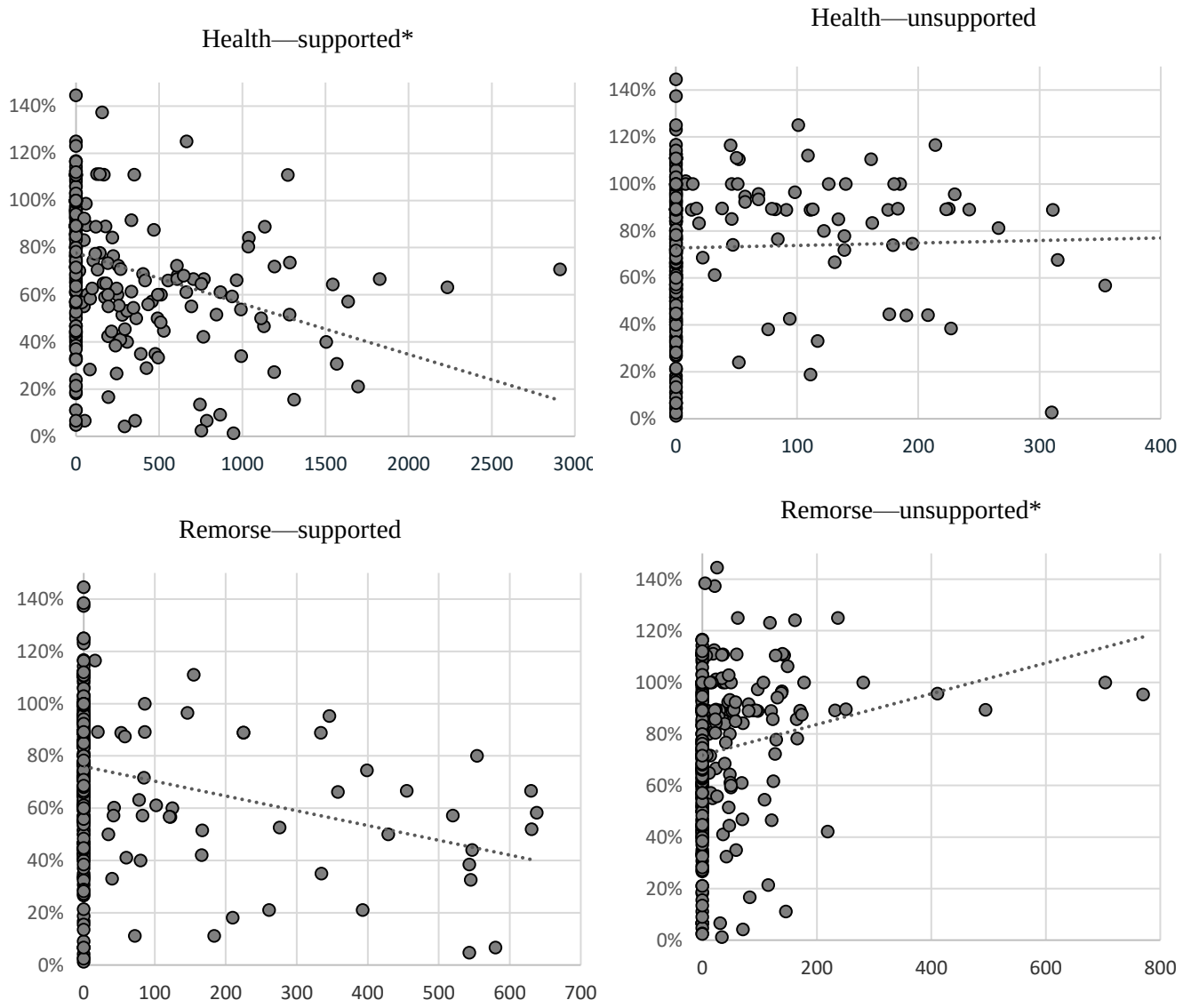


Note: All x-axes show word counts of the mitigating factor; all y-axes show sentence as a percentage of the midpoint of the guideline range. Significant predictors are marked with a *.

*Hypothesis 5: Mitigating arguments based on objective evidence will have a greater mitigating effect on the sentence than subjective statements from the defendant (**Supported**).*

As discussed above, two of the factors in the study included a unique separate code for argument either containing supporting evidence or not: remorse and health. I anticipated that arguments supported by evidence would be more associated with reduced sentences than unsupported arguments, in line with both the experimental evidence and a commonsense notion of how judges assess mitigation. I investigated this hypothesis by examining the same multiple linear regression described in the last hypothesis, outlined in Table 2. As predicted, there were stark differences in the relationship between those factors and the sentence depending on whether they were supported by evidence. Figure 7 shows those differences.

Figure 7. Remorse and health mitigation factors and sentence



Note: All x-axes show average word counts of the mitigating factor; all y-axes show sentence as a percentage of the midpoint of the guideline range. Significant predictors are marked with a *.

When supported by evidence, remorse mitigation was the only offense mitigation factor that was even close to producing a significant negative association with sentence.[239] Interestingly, when not supported by evidence, remorse mitigation had a significant positive relationship with sentence, meaning that as more unsupported remorse mitigation is presented, the sentence is expected to *increase* relative to the Guideline range.[240] Unsupported remorse was the only mitigating factor in the study with a significant positive association with the sentence.

Health mitigation also had the same effect as predicted. When supported by evidence, health mitigation had by far the strongest association with reduced sentences among all mitigating factors in the study.[241] But when health mitigation was unsupported by evidence, it did not have a significant relationship with the sentence.[242] I explore the implications of both of these effects *infra* Part VI.

VI. DISCUSSION AND IMPLICATIONS FOR LEGAL REFORM

A. Interpretation of Results

This study reports the first empirical examination of the impact of mitigation on sentencing in real federal felony cases. On the whole, my data support the hypotheses that (1) mitigation evidence is impactful and leads to reduced views of blameworthiness (and associated reduced sentences), despite the Guidelines' minimization of mitigation, and (2) particular types of mitigating evidence are more persuasive to decision makers than others.[243] While the data reported here are complex, I draw four main conclusions from them.

First, mitigation is potentially powerful at sentencing, despite the Guidelines. I found a highly significant correlation between the amount of mitigation presented as a whole in sentencing memoranda and the sentence given.[244] This implies that sentencing judges are doing what the sentencing statute instructs them to do: consider all relevant aspects of both the offense and the offender in fashioning the

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[239] *See supra* Figure 6; Table 2.

[240] As seen in Table 2, the standardized beta weight was .113, $p = .025$.

[241] *See* Table 2.

[242] The beta weight was .057, p = .263. *See* Table 2.

[243] As I note below, the regression-based methods I use make it difficult to draw causal conclusions, because we cannot know for sure whether the effects I observe are due to the presentation of mitigation, or due to other factors that might be correlated with the presentation of mitigation. *See, e.g.*, J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2535 (2020) (describing difficulties in drawing casual inferences from regression results). I discuss this in more detail *infra* notes 262–273 and accompanying text.

[244] It is worth noting, of course, that there is significant variability in the data. This means that, in a single case, a longer presentation of mitigation will not always be more persuasive. The takeaway for attorneys should not be to simply write longer sentencing memoranda. Instead, it should be that, among a large sample, length serves as a reasonable proxy for strength of mitigating arguments, and attorneys should seek to present as many strong mitigating arguments as possible.

sentence.[245] Moreover, judges do this even in the context of Guidelines that largely restrict the impact of mitigation. Their sentences reflect the modern, post-*Booker* structure: rather than adhering to the strict Guideline approach, judges go outside of the Guidelines to individualize their sentences based on mitigating evidence. The result also implies that defendants with greater mitigating characteristics will tend to be sentenced more leniently. Individuals who suffered from long-undiagnosed mental illness that steered them away from a stable life; who contributed heavily to their communities yet could not avoid a criminal path; whose critical support for their families would be derailed by incarceration—the more extensive these characteristics, the more likely the defendant received a lighter sentence relative to their Guideline range. This is one of the chief goals of modern sentencing: treating each defendant separately, and applying the principle of parsimony to each case individually in order to impose the least punitive sentence that can still meet the ends of punishment.[246]

Second, mitigation's power is primarily driven by personal mitigation. When I separated mitigation into the main categories of offense mitigation, personal mitigation, and theories-of-punishment argument, only personal mitigation significantly predicted the deviation of the sentence from the midpoint of the Guideline range.[247] This effect was striking, and again reflects judges' modern post-*Booker* views of sentencing. Recall that, just before *Booker*, surveyed federal judges said that the greatest challenge to the Guideline-dominated sentencing scheme was the need "to take into account the personal characteristics of the defendants."[248] Likewise, judges in the 2010 survey continued to indicate that numerous individual factors that are captured under the umbrella of personal mitigation were often relevant in sentencing.[249] My data support the notion that judges' sentencing decisions indeed correspond to those views. In that way, my data reflect the modernization of mitigation that has been progressing for the past 15 years, moving from a restrictive, offense-centric Guideline scheme[250] to a more flexible, individualized approach, closer to the nature of sentencing prior to the Sentencing Reform Act of 1984.[251] It also highlights the fact that, because the Guidelines

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[245] Importantly, all of the mitigation that I coded for in the sentencing memoranda was legally relevant to sentencing—that is, it was based on permissible considerations under the Guidelines or 18 U.S.C. § 3553(a).

[246] *E.g.*, Dean v. United States, 137 S. Ct. 1170, 1175 (2017) ("The list of [§ 3553(a)] factors is preceded by what is known as the parsimony principle, a broad command that instructs courts to 'impose a sentence sufficient, but not greater than necessary.'"); *see also* Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CM. LEGAL F. 1, 49 ("The parsimony principle . . . calls for the imposition of the least punitive or burdensome punishment that will achieve valid social purposes.").

[247] *See supra* notes 227–232 and accompanying text.

[248] *See supra* note 117 and accompanying text.

[249] *See supra* notes 107–115 and accompanying text.

[250] *See, e.g.*, Berman, *supra* note 57, at 289 (arguing that "offense conduct—and especially quantifiable harms such as the amount of drugs or money involved in an offense—has an extraordinary and arguably disproportionate impact on sentencing outcomes").

[251] Of course, personal mitigation may have more impact than offense mitigation on the sentence as a proportion of the Guideline range in part because a large component of the

minimize individualized personal mitigation, judges are forced to grant variances below the Guidelines in order to properly account for that mitigation, rather than granting departures within the Guidelines' structure.[252]

Third, health-related mitigation is particularly important. When I compared all of the individual mitigators in the study using multiple regression, health mitigation (when supported by evidence) was by far the most powerful predictor of the deviation of the sentence from the midpoint of the Guideline range. Indeed, the amount of health mitigation in a sentencing memorandum was a more than 50% stronger predictor of the sentence deviation than the next strongest mitigators—character and collateral consequences.[253] To put that in perspective, for a defendant with a Guideline range midpoint of 50 months, my data predict that each 400-word increase in the amount of health mitigation presented would correspond with a five-month decrease in sentence.[254] That is a striking relationship that makes sense of the data that examined *supra* Part II. Judges in the 2010 survey ranked mental condition, emotional condition, physical condition, and diminished capacity all as among the most relevant mitigating factors at sentencing, and experimental data in both the capital and felony context similarly identify mental health trauma as a potentially powerful mitigator.[255] The data also align with an increasing understanding that

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Guideline range is based on aggravating and mitigating factors related to the offense itself, so judges may consider those facts already "baked in" to the range. While this is likely at least a partial driver to the personal mitigation effect I found, I doubt it is the complete explanation, for several reasons. First, even though some characteristics of the offense contribute to the Guideline range, the Guidelines by no means account for all aspects of the offense conduct. Thus, there is still significant daylight for attorneys to present offense mitigation even given a particular Guideline range. Second, some aspects of personal mitigation are "baked in" to the Guideline range just like the offense conduct. Most notably, the amount and severity of a defendant's criminal history is often the single greatest determinant to the Guideline range—at certain base offense levels, the difference between a defendant with the lowest possible criminal history and the highest amounts to a 700% increase in Guideline range. U.S. SENTENCING GUIDELINES MANUAL Ch. 5 Pt. A (sentencing table). Third, while extensive personal mitigation was associated with greater reductions in sentence compared to offense mitigation, attorneys spent only slightly more words on personal mitigation than offense mitigation: on average they spent just over 47% of their mitigation argument on personal mitigation and just over 43% on offense mitigation. Though this difference was statistically significant, it is not large. If all offense mitigation and aggravation were accounted for in the Guidelines and nothing remained to be argued at sentencing, one would not expect that attorneys would spend nearly half of their mitigation argument on offense mitigation.

[252] United States v. Lacy, 99 F. Supp. 2d 108, 112 (D. Mass. 2000) (Gertner, J.) ("[W]hile the Guidelines' emphasis on quantity and criminal history drives these high sentences, sadly, other factors, which I believe bear directly on culpability, hardly count at all: Profound drug addiction, sometimes dating from extremely young ages, the fact that the offender was subject to serious child abuse, or abandoned by one parent or the other, little or no education.").

[253] *See supra* notes 233–235 and accompanying text.

[254] For a fuller explanation of the calculation involved to convert a beta weight to a predicted sentencing value, *see supra* note 229.

[255] *See supra* notes 110, 133–137 and accompanying text.

mental illness impacts decision making and has significant implications for culpability, and that incarcerated people with mental or physical illness also suffer more during incarceration.[256] Moreover, judges are very familiar with the frequency of mental and physical health problems in the population of those they sentence: incarcerated individuals have higher rates of mental and physical illness, both of which are often untreated in that population. Judges thus have a front-row seat to the vicious cycle of mental illness, addiction, and crime.[257] The implication for attorneys is clear: investigating and presenting detailed mitigation about a defendant's health conditions, supported by an evidentiary record from health care providers, is likely among the most important things defense attorneys can do to aid their clients.[258]

Fourth, mitigation is robust in a broad array of categories. In addition to health mitigation, I found that both character and collateral consequences mitigation significantly predicted sentencing outcomes, and evidence-supported remorse mitigation and historical trauma mitigation trended strongly toward predicting sentencing outcomes. These results imply that judges consider mitigation in a socially positive way, conducting a sophisticated evaluation of culpability that accounts for defendants' limited opportunities, positive roles in their communities, important roles in the lives of their families, and genuine expressions of regret for committing the crime.[259]

My data imply that judges are appropriately considering mitigation in another way as well: across both expressions of remorse and health mitigation, judges' sentences' mirrored the extent to which the mitigation was grounded in evidence, in the direction that we would hope. This indicates that judges are critically evaluating the evidence presented to support those types of mitigation claims, and are focused

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[256] *See, e.g.*, E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 148–56, 159–83 (2013); E. Lea Johnston, *Mental Health Courts and Sentencing Disparities*, 62 VILLANOVA L. REV. 685, 688–90 (2017).

[257] *See, e.g.*, E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders With Serious Mental Illness*, 71 FLA. L. REV. 515, 517 (2019) ("[R]oughly 14% of male inmates and as many as 31% of female inmates suffer from one or more serious mental illnesses," rates which are "two to three times higher than those of the general population."); *see also* Christine Montross, *We Must Change How Our Criminal Justice System Treats People with Mental Illness*, Time (Aug. 5, 2020), https://time.com/5876045/we-must-change-how-our-criminal-justice-system-treats-people-with-mental-illness/ (describing frequent mental health issues in prisons).

[258] One drawback of my data in this context is that I did not code separately for different types of health mitigation as outlined in the Guidelines and by other commentators, such as mental illness, drug & alcohol addictions, or physical injury. All of those types of health mitigation are represented in one category in my data. The reason for this was practical—I wanted to ensure that all of the coding maintained a high reliability, which becomes more difficult as the number of categories increase and become more specific. But coding specifically for types of health mitigation—and identifying relationships between those types and sentences—is an area ripe for future work.

[259] *See* Berman, *supra* note 57, at 287–88 (describing how juries are well-positioned to identify the specifics of offense conduct, while judges are "better positioned to consider (potentially prejudicial) offender characteristics").

on separating genuine mitigation from unsupported allegation.

* * *

In sum, my data imply that judges interpret mitigation in a modern way, reflecting an evolving social understanding of criminal culpability. The trends that I observed indicate judges' increased recognition that prior circumstances affect the likelihood that individuals turn to crime, thereby influencing culpability;[260] that modern science and medicine can inform medical circumstances that affect culpability; and that sentencing should take these individualized factors into account beyond the limited ways the Guidelines provide.[261]

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[260] *See, e.g.*, Jesse Cheng, *Compassionate Capital Mitigation*, 18 OHIO ST. J. CRIM. L. 351, 357–58 (describing mitigation in terms of how choices and circumstances throughout a defendant's life impacts how he came to view committing a crime as a realistic option).

[261] One important takeaway from my results is that the Sentencing Guidelines do not account for the mitigating factors that judges evidently believe are relevant. Some state systems—when identifying portions of Sentencing Guidelines that are out of line with judicial views—have revised those Guidelines. But the federal system has not done so. *See* MODEL PENAL CODE: SENTENCING § 6A.05 cmt.e (AM. LAW INST. Final Proposed Draft Apr. 10, 2017) ("In contrast to the federal history . . . state commissions that have observed high rates of departure from particular presumptive guidelines have often treated this finding as a basis to revise the relevant guidelines so that they fall more closely in sync with judicial decisions."). The recently finalized Model Penal Code: Sentencing recommends a more comprehensive method requiring that Guidelines identify "nonexclusive lists of aggravating and mitigating factors that may be used as grounds for departure from presumptive sentences." *Id.* § 6B.02(1); *see also* STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, Standard 18-3.2 (AM. BAR ASS'N 1993) ("The legislature or the agency . . . should identify factors that may mitigate the gravity of an offense or an offender's culpability in commission of the offense.").

The 2017 sentencing amendments to the Model Penal Code are relevant to mitigation in another way as well: for the first time, the Model Penal Code adopted proportionality—the idea that punishment should be in proportion to an actor's moral blameworthiness—as the dominant rationale of punishment. MODEL PENAL CODE: SENTENCING § 1.02(2) (requiring sentences "in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders" and permitting utilitarian considerations, like deterrence and incapacitation, only when "reasonably feasible" within the boundaries of proportionality). Mitigation is a central component of proportionality analysis, as mitigating evidence shapes the extent to which a defendant is blameworthy for his conduct. *See* Paul H. Robinson, *Mitigations: The Forgotten Side of the Proportionality Principle*, 57 HARVARD J. LEGIS. 220 (2020). For example, when a defendant presents mitigating evidence indicating that he suffers from a significant mental illness, the evidence may indicate that he had a reduced ability to control his criminal conduct, thus lowering his moral blameworthiness for the crime and leading to a reduced sentence under a proportionality rationale. *See id.* at 244–49 (describing experimental evidence of mitigation's impact on proportionality analysis). While not the focus of this paper, certain aspects of my data support the notion that judges rely on proportionality analysis in rendering sentences. For example, I observed that health-related mitigation was the strongest predictor of reduced sentences in the study. That finding makes sense from the

There are, however, important limitations to my methods. First, and most critically: the public docket from which I gathered sentencing memoranda does not contain defendants' demographic data, so I was unable to study how race, class, and gender interact with mitigation. Race and class touch nearly every aspect of the criminal justice system, and mitigation is very likely no different.[262] Courts and commentators have long noted that some of the mitigating factors I study here could disproportionately benefit wealthy white defendants.[263] The paradigmatic example is charitable acts, which could mitigate a sentence as evidence of good character, but may be more common among privileged individuals who have the means to carry out—and document—those acts. Other categories of mitigation that I found were associated with reduced sentences may also be more available to white and upper-class defendants. For example, more privileged defendants may be able to more clearly support mitigating mental and physical health issues, as they are more likely to have received treatment and be able to document their problems.[264] Likewise, wealthier defendants will have greater resources to investigate and present mitigation. And even when less privileged defendants are able to present substantial mitigation, there may be race- and class-based bias in the way the judge interprets it. But the issue is nuanced as well: historical trauma mitigation, which trended toward a significant association with reductions in sentence, may be more prevalent among less affluent, nonwhite defendants. And other important mitigating factors, like remorse and collateral consequences, may have less predictable patterns.

Though the public docket does not contain data about defendants' race or other demographic information, there may be ways to study how race and class interact with mitigation. Sentencing memoranda occasionally contain explicit references to the defendant's race, education level, or socio-economic status from which one might be able to glean relevant data. Likewise, internet searches using the defendant's name or other publicly available case information will sometimes yield demographic information about the defendant. Though using these methods might result in sampling biases (as the availability of demographic information may correlate with the contents of the sentencing memorandum itself), they would be important first steps.

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perspective of proportionality, but the presence of health-related mitigation—like addiction or mental illness—might undercut an incapacitation-based argument for reduced punishment, as the defendant's addition or mental illness might *increase* his risk of recidivism.

[262] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010)., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22 (2012); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75 (2015).

[263] *See, e.g.*, Hessick, *supra* note 68, at 1159 n.265 (collecting cases); Hessick & Berman, *supra* note 61, at 215–17; Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227 (2014) (noting that increased judicial discretion may raise case "judges to give undue leniency to criminals of their own class.").

[264] *See, e.g.*, M.N. Oliver, *Racial Health Inequalities in the USA: The Role of Social Class*, 122 PUB. HEALTH 1440 (2008).

I note one measure that I took to control for race in my data. While I did not have access to defendants' demographic information, I did code for the type of crime for which they were convicted.[265] There are differences in the racial makeup across federal crime types. For example, in 2018, about 53% of federal firearm offenders were black and 26% were white.[266] In contrast, about 40% of economic crime offenders were white, and 36% were black.[267] Leveraging those differences, I repeated the regression outlined in Table 2, with defendants' crime type coded as a dummy variable to control for its effect. The results were materially the same as those reported in Table 2, with one exception: when controlling for crime type, historical trauma mitigation significantly predicted a reduced sentence,[268] whereas it had only a marginally significant relationship with sentence when crime type was not controlled for. While this perhaps only provides a marginal control for effects of race, it is a useful starting point.

There are several other limitations that warrant mention. First, while it is tempting to conclude that presenting an increased amount of mitigation *causes* judges to impose lower sentences, we cannot draw that conclusion. All of the analyses I describe here relate to the correlations—statistical associations—between amounts of mitigation presented and sentence. Correlation does not equal causation. That means that information other than the sentencing memoranda I examined may drive—or at least contribute to—the sentencing effects I observed. What other sources of information might be driving the effects, if not the sentencing memoranda? There are two potential sources. First, there may be variables that are not inherently related to mitigation but might correlate with it, like race, gender, and socio-economic status. Though I sought to control for those as discussed above, follow up projects will be necessary to fully tease apart the relationship between race, gender, and socio-economic status on mitigation. Second, there may be variables that communicate much of the same information that sentencing memoranda do, but are not accounted for in my data. One good example of this is the PSR prepared by the probation officer, which often contains overlapping information with the sentencing memorandum, but is not made publicly available, making it impossible to control for in my analysis.[269] This second category of endogeneity is less of a concern for the conclusions I draw here, because the *source* of mitigation is largely irrelevant, so long as mitigation itself is responsible for the

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[265] *See supra* note 221 and accompanying text.

[266] U.S. SENTENCING COMM'N, FISCAL YEAR 2018 OVERVIEW OF FEDERAL CRIMINAL CASES 18 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf.

[267] *Id.*

[268] $p < .02$

[269] There are other similar potential variables, such as victim impact statements, letters and statements to the judge from defendants and their families and other supporters, or evidence that is introduced at the sentencing hearing itself. While I suspect that the sentencing memorandum is the most important part of the sentencing process—at least as far as impacting the sentence imposed—my data may be missing important effects of those other sentencing aspects. Some are a part of the public record in the case, and would be good candidates for future study.

sentencing effects I observe. Take the PSR as an example. It is largely generated from the same inputs as the sentencing memorandum: it is drafted following the probation department's interview with the defendant, and the defense attorney is present for that interview and has a significant role in crafting the PSR. In that way, both the PSR and sentencing memoranda contain similar information about the variable of interest here: the amount and weight of mitigating evidence about a defendant that is presented to the judge prior to sentencing. The conclusions I draw largely do not change based on whether the mitigation influences the judge via the sentencing memorandum or the PSR. For example, say a particular PSR and sentencing memorandum provide a judge with similar information about a defendant's traumatic upbringing, and the information form the PSR is what drives the judge's decision to impose a lower sentence. The inference about judicial behavior is still the same regardless of whether the change is driven by the sentencing memorandum or the PSR: mitigation influenced the sentence.[270]

Moreover, while linear regression will never be able to rule out unmeasured possible drivers of variation, the data I report here work in concert with prior experimental data that found causal relationships between mitigation and culpability judgments.[271] Critically, my data largely aligned with my *a priori* hypotheses, which were based on those prior, controlled experimental studies. While the correlational data I report here cannot lead to clear causal conclusions, when combined with the experimental data, they provide significant support for the theory that presenting mitigating evidence at sentencing influences judges' sentencing decisions.

My measure of mitigation—word counts—also has limits: the number of words spent discussing a particular mitigating factor in a sentencing memorandum does not necessarily reflect the significance of the mitigation. Certain types of mitigation may simply be more complex—and require more words to describe—than others. But while this problem undoubtedly means that word counts are a *noisy* measure, there are several reasons to conclude that they are a good proxy of the weight of a category of mitigating evidence. First, the word counts in this study strongly predicted sentencing decisions across a variety of different mitigation factors. If the number of words devoted to a particular mitigating factor were entirely unrelated to the strength of that mitigation, one would expect to see no relationship between the two. Second, those relationships occurred in anticipated directions, in line with prior experimental and survey data about mitigation. Third, word counts and similar quantity measures have been reliably used in a variety of other contexts—including many legal contexts—as a proxy for weight.[272] And fourth, judges did not find

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[270] I note one other question that my data leave unanswered: if mitigation is influencing sentencing as I theorize here, is that influence is the result of good lawyering or a defendant whose background contains many mitigating circumstances to raise? The differences I observed were almost certainly a combination of both, but future work will be necessary to tease apart the differences.

[271] *See* supra Part II.

[272] *See, e.g.*, Hall & Wright, *supra* note 191, at 117 (noting that "some studies count the number of words or paragraphs devoted to discussing particular factors as an indication of the factors' relative importance"); David L. Schwartz, *Explaining the Demise of the Doctrine of Equivalents*, 26 BERKELEY TECH. L.J. 1157, 1215 (2011) (using word counts as a proxy

additional words persuasive when the arguments were not supported by evidence (in the remorse and health categories), implying that judges are not simply deferring to (or being overwhelmed by) the sheer length of arguments.

There is also some inherent sampling bias in the cases that I collected. In order to examine cases where there was potential for mitigation to have an impact on the sentence, I excluded a number of categories of cases—most notably, those where a defendant cooperated with the government leading to a government request for a reduction in sentence.[273] Though those exclusions were only a small proportion of the total population of cases, if the nature of the mitigation presented in those cases is different from what is presented in the cases in my sample, then my data do not present a full picture of how mitigation operates in all federal cases. Likewise, I could not examine any cases in which the sentencing memorandum was not filed publicly. While one common reason for a sentencing memorandum to be sealed is because a defendant is cooperating with the government, there are other reasons as well, such as when the memorandum contains extensive discussions of victims or sensitive personal information about the defendant, like health conditions. Indeed, it is possible that the strong effects of health mitigation I found might *underrepresent* the true effect, because defendants with the strongest mitigating health conditions might present those circumstances in sealed memoranda that I was unable to examine.

B. Implications for Legal Reform

The data I report here provide significant insight in understanding how mitigation interacts with sentencing outcomes. While the data are interesting from a theoretical perspective, they also have significant implications for legal reform and public policy. I describe three below, related to (1) effective assistance of counsel, (2) the use of neuroscience to inform health mitigation, and (3) the presentation of mitigation to prosecutors.

1. Requiring Investigation and Presentation of Mitigation to Constitute Effective Assistance of Counsel.

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of significance in judicial opinions); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 1978-2005, 156 U. PA. L. REV. 549, 587 (2008) ("[I]n explaining (or defending) their analysis of a legal issue, judges are generally more likely to dedicate a greater share of their explanations to considerations that they deem to be more important."); Jennifer L. Groscup et. al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339, 343 (2002) ("[T]he length of the discussion in words devoted to several variables was recorded as a measure of the attention paid to these concepts by the courts."); Jeffrey H. Kahn et al., *Measuring Emotional Expression With the Linguistic Inquiry and Word Count*, 120 AM. J. PSYCHOL. 263 (2007); Robert A. Josephs et al., *Judgment By Quantity*, 123 J. EXPERIMENTAL PSYCHOL.: GENERAL 21 (1994).

[273] *See supra* notes 193–199 and accompanying text.

Inherent within the Sixth Amendment right to counsel is a right to *effective* counsel—lawyering that meets a certain basic level of competence, the lack of which would "undermine[] the proper functioning of the adversarial process" such that the proceeding "cannot be relied on as having produced a just result."[274]

That right extends to sentencing.[275] In capital cases—where mitigation is a firmly entrenched part of the sentencing phase—the right has translated to a requirement that defense attorneys thoroughly investigate and present mitigation in arguing for a non-death sentence.[276] But in non-capital cases, what constitutes effective assistance at sentencing is far less clear.[277] Before *Booker*, the Supreme Court held that failing to raise a legitimate challenge to the Guideline range was prejudicial and ineffective.[278] The Court has not squarely readdressed that issue since *Booker* rendered the Guidelines advisory,[279] and while some lower courts have found ineffective assistance based on advisory Guideline errors, those cases are infrequent.[280] Given the difficulty of even showing that an attorney's failure to raise a meritorious Guideline challenge amounts to ineffective assistance of counsel, one can imagine how difficult it is to assert that a failure to present mitigating evidence would amount to ineffective assistance—mitigation usually does not affect the Guideline range. Unsurprisingly, with this framework in place, several courts have held that a failure to present mitigating evidence in non-capital felony sentencing is not ineffective.[281] And those cases often contain language implying the near-

[274] Strickland v. Washington, 466 U.S. 668, 686 (1984).

[275] *E.g., id.*; *see also* Glover v. United States, 531 U.S. 198, 199 (2001) (applying *Strickland* test in non-capital felony case).

[276] *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 534 (2003). For a full discussion of the requirements of investigating and presenting mitigation in capital cases, *see* Gohara, *supra* note 95, at 54–57.

[277] *Strickland* itself implied that the standard at a typical felony sentencing may be less stringent than in the capital context. *Strickland*, 466 U.S. at 686 ("We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance.").

[278] *Glover*, *supra* note 275, at 200.

[279] The Supreme Court has, however, explained that "[w]hen a defendant is sentenced under an incorrect Guidelines range . . . the error itself can, and most often will" be sufficient to show prejudice. Molina-Martinez v. United States, 136 S. Ct. 1338, 1345 (2016). But that holding does not mean that a failure to make proper guideline arguments will always amount to deficient performance.

[280] *See, e.g.*, United States v. Curtis, 360 F. App'x 413, 414 (4th Cir. 2010) (failing to object to improperly calculated guideline range amounted to ineffective assistance); United States v. Daily, No. CRIM. 03-381 1 JRT, 2011 WL 3920260, at *2 (D. Minn. Sept. 7, 2011).

[281] *See, e.g.*, United States v. Israel, No. 17-10948, 2020 WL 7658421, at *11 (5th Cir. Dec. 23, 2020) ("[F]ailing to put on mitigating evidence at the punishment phase of the trial . . . is not per se ineffective assistance." (quoting Rector v. Johnson, 120 F.3d 551, 564 (5th Cir. 1997)); Rodriguez v. United States, No. 8:08-CV-21-T-27TBM, 2010 WL 1790430, at *5 (M.D. Fla. May 4, 2010) (defendant did not establish failure to present mitigation); Luellen v. United States, No. 1:08CR102 LO, 2011 WL 4565348, at *5 (E.D. Va. Sept. 28, 2011) (decision concerning whether to present mitigating witness was strategic, and not ineffective); United States v. Perrigo-Haddon, 221 F. App'x 619, 621 (9th Cir. 2007)

impossibility that a defendant could show his counsel was ineffective on that ground. For example, in one bank robbery case where the defendant's history of mental illness went unpresented, the Fifth Circuit required the defendant to make a "specific, affirmative showing of what the mitigating evidence would have been to lead to a lower sentence."[282]

At the time *Strickland* was decided and modern ineffective-assistance jurisprudence was developed, mitigation had a less critical role because the Guidelines heavily restricted the extent to which judges could consider many potentially mitigating circumstances. After *Booker*, mitigation has taken on a greater significance. But as Carissa Hessick has noted, the ineffective assistance jurisprudence has been unable to catch up with that heightened importance because sentencing judges' increased discretion has resulted in a lack of substantive sentencing law, which makes it more difficult to demonstrate ineffective assistance.[283] And even if an attorney entirely fails to investigate for mitigating circumstances, it is difficult for a defendant to show prejudice when he cannot demonstrate any certainty that the mitigation would have affected his Guideline range or sentence—a problem exacerbated by the Guidelines' restrictive view of mitigation.

That near-impossibility appears extraordinarily unfair given that my data (as well as the experimental and survey data about mitigation) suggest that mitigation in felony cases is powerful, and strongly associated with lower sentences. In effect, the data imply that defendants *are* likely prejudiced by a failure to present mitigation, even if they cannot demonstrate it in the single case. And the data also show that there is an enormous range in the amount of mitigation presented across cases. While some of that is surely tied to factors outside defense attorneys' control—some defendants simply have more mitigating circumstances to raise than others—there is unquestionably a wide range in the quality of defense attorneys' presentations. My data suggest those differences in the quality of representation may be outcome-determinative; that is, they may affect the sentence the defendant receives.[284] That is exactly the type of injustice that ineffective-assistance

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(suggesting certain mitigating evidence "was not particularly important or material").

[282] *Israel*, 2020 WL 7658421, at *11.

[283] Hessick, *supra* note 94, at 1105.

[284] Former federal defender Carrie Leonetti put it well in a recent piece:

> One of the last sentencing hearings that I had was before a pretty conservative, former-prosecutor judge, the same one who had tried to do me a solid with the phone call to my boss a few months earlier. It was a half-day affair, during which I presented substantial mitigating evidence on my client's behalf. Mostly, the evidence consisted of the nature of her mental illness and horrible childhood abuse that probably contributed to it—the same mitigating evidence that most criminal defendants have, if investigated and presented. At the end of the hearing, the judge gave my client a sentence substantially below her guidelines. After the Court recessed, I had this conversation:
>
> > Judge: "Boy, Ms. Leonetti, your clients seem to have the most incredible mitigating circumstances. It's amazing how you always draw these really sympathetic clients."

jurisprudence seeks to avoid.

How can we remedy this? There are a number of possible ways, but I suggest two first steps. First, recognizing that mitigation is central to post-*Booker* advisory sentencing, lower courts should identify a baseline duty under the *Strickland* framework to make reasonable investigations into mitigating circumstances for *all* felony defendants. This already exists in the capital context—ineffective assistance in many capital cases results from counsel's failure to investigate mitigating circumstances.[285] Adopting this requirement for non-capital cases would not require any new theoretical underpinning (though it would require greater resources). The idea behind requiring an investigation into mitigating circumstances in death penalty cases—to permit the sentencing party to evaluate the full scope of the nature of the crime and the characteristics of the defendant in deciding whether to impose a serious penalty—applies equally in felony cases.[286] And there is daylight for district courts to reach this conclusion; the current case law does not make clear that the duty to investigate mitigating evidence applies only in capital cases.[287] But a review of the cases indicates that virtually no non-capital cases have applied a mitigation-investigation requirement.[288]

> Me: "Your Honor, with all due respect, seriously? I work in an office with ten lawyers. Our cases are assigned pretty much at random. I'm not a statistician, but don't you think that me 'drawing' all of the sympathetic ones is, um, mathematically unlikely?"

I will never forget the look on his face as it slowly dawned on him that he spent most of his days hammering equally sympathetic defendants simply because their lawyers were not doing their jobs." Carrie Leonetti, *Painting the Roses Red: Confessions of a Recovering Public Defender*, 12 OHIO ST. J. CRIM. L. 371, 383 (2015).

[285] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 691 (1984) (in capital context, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); Williams v. Taylor, 529 U.S. 362, 396 (counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background").

[286] *See, e.g.*, Gohara, *supra* note 95, at 44 ("[T]here is simply no principled reason that the same circumstances that courts have recognized narrow opportunity and distort the lives of people charged with capital crimes should not be presented to courts sentencing people for lesser offenses."); William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13 (2019) (arguing for broad application of Eighth Amendment principles that currently require individualized sentencing only in capital cases).

[287] Indeed, current American Bar Association standards require defense attorneys to investigate, at least summarily. ABA Standards for Criminal Justice 4-8.3 (2015) ("Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible."). But this pales in comparison to the guidance provided in capital cases, which is far more detailed. *See* Hessick, *supra* note 283, at 1110–11; American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 959–60 (2003) (outlining requirement for participation of mitigation specialist in capital cases).

[288] For example, I conducted a Westlaw search containing the terms, "mitigat! & reasonabl! /s invest!" which yielded only capital cases applying the requirement. *See also*

A second step would be to clearly identify what that investigation should entail, including providing guideposts for specific types of mitigation that defense counsel should investigate and present. The most straightforward way to do this would be through the American Bar Association's Standards for Criminal Justice, which the Supreme Court has referenced as a "guide to determining what is reasonable" conduct under the *Strickland* standard.[289] While the ABA guidance for non-capital criminal cases recommends that defense counsel "gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible,"[290] it does not provide any further detail as to what type of mitigation is relevant. In contrast, the guidance in capital cases contains commentary outlining in detail the type of mitigation that should be investigated, including "medical history," "family and social history," "other traumatic events," "educational history," "military service," "employment and training history," and "prior juvenile and adult correctional experience."[291] Criminal justice would be better served by explicitly articulating similar requirements in all felony cases, where those same categories of mitigation are likely to impact the sentence, as my data imply.

Of course, part of the reason for the current low requirement is surely caseload volume and a lack of funding.[292] The significance and rarity of capital cases means that more resources are warranted and available to be devoted to them, allowing for far more detailed investigation into mitigation. But conducting a basic investigation into the history and background of a defendant need not always be expensive—it can start with a simple and detailed discussion with the defendant and follow-up investigation from there. And, in the wake of the murder of George Floyd and subsequent mass attention to criminal justice issues in America, indigent defense has seen a rise in public support, which may lead to greater resources. Public defender offices should consider focusing increased funding on mitigation, especially on hiring mitigation specialists to work in routine felony cases.[293]

2. Increasing the Use of Health Mitigation Through Neuroscience and Mental Health Examination.

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supra note 281 (collecting cases).

[289] *Strickland*, 466 U.S. at 688, *see also* Williams v. Taylor, 529 U.S. 362, 396 (2000); Rompilla v. Beard, 545 U.S. 374, 387 (2005); Hessick, *supra* note 94, at 1075.

[290] ABA Standards for Criminal Justice 4-8.3 (2015).

[291] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1022–23 (2003); *see also* Gohara, *supra* note 95, at 59 ("While the current guidelines for noncapital defense sentencing advocacy are broad enough to warrant some degree of independent sentencing investigation beyond the data provided by probation departments or prosecutors, they remain a far cry from the capital guidelines' specific prescriptions for comprehensive social history investigation.").

[292] Gohara, *supra* note 95, at 70–73.

[293] Gohara, *supra* note 95, at 48–49. For a helpful examination into the role of mitigation specialists, albeit in the death penalty context, *see* Hughes, *supra* note 91; *see also* American Bar Association, *supra* note 291, at 959–60 (describing role of mitigation specialist).

One of the most striking effects this study revealed is that health mitigation is the strongest potential mitigator when sufficiently supported by evidence in the record—associated with a 50% greater reduction in sentence than any other mitigator.[294] And while my data did not code separately for different types of health-related mitigation, a substantial amount of what I observed related to mental health—disorders and addiction—rather than pure physical ailments. The judicial survey and experimental data are also consistent with those results.[295]

Thus, explaining to the judge that a defendant has significant, documented health problems—especially mental health—that could impact criminal culpability appears to be a critical part of felony sentencing. This conclusion will come as no surprise to practitioners in capital cases. There, the investigation into and presentation of a defendant's history of mental illness is frequently a critical part of the penalty phase—indeed, the Supreme Court has repeatedly explained the necessity of such mitigation in its death penalty jurisprudence.[296] One potentially powerful way to provide evidence of mental illness in capital cases is through neuroscience evidence, which can come as either imaging evidence (such as an MRI or CAT scan) or behavioral testing or examination that provides data about the function of an individual's brain that is relevant to his mental health, and ultimately his culpability.[297] In a recent study, Deborah Denno identified over 500 cases during a 20-year period—most of them capital cases—in which neuroscience evidence was used either to show mitigating mental health circumstances, or to show that a defense attorney was ineffective in failing to present such mitigation.[298] Some of the

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[294] *See supra* notes 233–235 an accompanying text.

[295] *See supra* notes 110–111 and accompanying text.

[296] *See, e.g.*, Porter v. McCollum, 558 U.S. 30, 40 (2009); Wiggins v. Smith, 539 U.S. 510 (2003).

[297] *See, e.g.*, Nita A. Farahany, *Neuroscience and Behavioral Genetics in U.S. Criminal Law: An Empirical Analysis*, 2 J. L. & BIOSCIENCES 485 (2015); Judith G. Edersheim et al., *Neuroimaging, Diminished Capacity and Mitigation*, in NEUROIMAGING IN FORENSIC PSYCHIATRY: FROM THE CLINIC TO THE COURTROOM 163, 175–84 (Joseph R. Simpson ed. 2012) (describing various mitigation arguments that can be developed through imaging, including frontal lobe disorders, psychosis, anxiety disorders, substance use disorders, and developmental disorders); Deborah W. Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 B.C. L. REV. 493, 500, 548–49 (2015); Shelly Batts, *Brain Lesions and their Implications in Criminal Responsibility*, 27 BEHAV. SCI. & L. 261, 261–63 (2009); Eyal Aharoni et al., *Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience*, 1124 ANN. N.Y. ACAD. SCI. 145 (2008); Michael S. Pardo & Dennis Patterson, *Philosophical Foundations of Law and Neuroscience*, 2010 ILL. L. REV. 1211 (2010); Amanda C. Pustilnik, *Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness* 95 J. CRIM. L. & CRIMINOLOGY 217 (2006); Gideon Yaffe, *Neurologic Disorder and Criminal Responsibility*, in HANDBOOK OF CLINICAL NEUROLOGY (2013). For a more general examination into the emerging field of law & neuroscience, including the potential for neuroimaging techniques to provide mitigation, *see* LAW AND NEUROSCIENCE 1–67 (Owen D. Jones, Jeffrey D. Schall, & Francis X. Shen eds. 2014).

[298] Denno, *supra* note 297, at 501–11.

mitigating evidence that Denno examined allowed experts to draw very powerful conclusions about defendants' reduced culpability based on their mental health, such as concluding that a defendant's brain structure caused "an impaired capacity to conform his conduct to the requirements of law."[299] And while some had previously speculated that neuroscience could serve as a double-edged sword—sometimes providing aggravating evidence of the defendant's future dangerousness—Denno's data largely contradicted that theory, finding that neuroscience evidence was usually mitigating and fit in with "a criminal justice system that is willing to accept modern methods of assessing defendants' mental capabilities, and expects its attorneys to do the same."[300]

Mitigating neuroscience evidence is common in capital cases, but not in routine felony cases.[301] But capital defendants are surely not alone in having mitigating mental illness that could be supported by neuroscience evidence at sentencing. The very same reasons that neuroscience data may be mitigating in capital cases—for example, by showing a defendant was less culpable for his crime because mental illness or addiction reduced his ability to control his behavior—apply in other criminal cases as well.[302] And while capital defendants may have greater rates of mental illness or other potentially mitigating health circumstances than defendants in non-capital criminal cases, that difference could not come close to accounting for the difference in rate of presenting mitigating neuroscience evidence. Instead, the very likely explanation is that defendants in all types of felony cases have mitigating mental health problems that are simply not being investigated.

Based on the data that I report here, that lack of evidence should cause significant concern because it means that judges are not receiving information that is potentially more relevant to their sentencing decision than any other mitigating information. The problem likely stems at least in part from attorneys who are simply unaware of the benefit of presenting neuroscience evidence—or any health evidence at all—as mitigation. But in addition to that, cost is likely a particularly prohibitive factor—hiring experts to evaluate defendants for mental health mitigation is expensive. While cost may seem like an insurmountable hurdle, it is worth noting that neuroscience evidence of the type that Denno documented is often used in felony cases in one non-sentencing context: competency. When either the

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[299] *Id* at 515–16 (discussing Simmons v. State, 105 So. 3d 475, 483 (Fla. 2012)).

[300] *Id.* at 544.

[301] Over two-thirds of the cases Denno found were capital cases. *Id.* at 502. And those rare non-capital cases where neuroscience evidence is presented typically involve very serious charges with extensive prison sentences. *See, e.g.*, King v. Kemna, 226 F.3d 981, 985 (8th Cir. 2000) (neuroscience mitigation evidence presented in first-degree assault case involving gunshot); Bernice B. Donald & Erica Bakies, *A Glimpse Inside the Brain's Black Box: Understanding the Role of Neuroscience in Criminal Sentencing*, 85 FORDHAM L. REV. 481, 494.

[302] Donald & Balkies, *supra* note 301, at 498 ("Neuroscience can provide a qualified assessment of how culpable society may want to hold a particular person, given their background and its effect on their abilities to process situations in accordance with societal norms."); *see also* Deborah W. Denno, *Courts' Increasing Use Consideration of Behavioral Genetics Evidence in Criminal Cases: Results of a Longitudinal Study*, 2011 MICH. ST. L. REV. 967, 976–79 (2011) (describing how genetic evidence can contribute to mitigation).

prosecution or the defense raises doubt that the defendant is competent to stand trial, the court is required to refer the defendant for an evaluation if there is "reasonable cause" for the doubt.[303] What qualifies as "reasonable cause" is a matter of discretion for the district judge, but operates as a very low bar—the judge can make the decision based on his mere observations of the defendant's behavior or reports of such behavior from counsel.[304] The end result is that the defendant generally receives an examination any time either party indicates a good faith doubt as to the defendant's competency.

One way to allow the court to benefit from more complete health-related mitigation at sentencing would be to create a procedural mechanism that requires a similar evaluation if there is "reasonable cause" to believe that the defendant suffers from a health problem that is relevant to the sentencing determination. Such a measure would require the action of a legislative body or a rulemaking committee, and would likely be costly. But there is at least some indication that there would be particular support for an increased focus on mental health—it is one of the few personal mitigation categories the Guidelines explicitly recognize "may be relevant in determining whether a departure is warranted,"[305] and an array of recent research indicates that mental health issues are pervasive in the criminal justice system and have complex interactions with crime.[306]

Absent a change in procedural rules, a second way to achieve similar ends would be to amend the ABA Standards for Criminal Justice to explicitly require a mental health investigation of the type described above if a defense attorney has reasonable cause to believe her client suffers from a health problem that is relevant to the sentencing determination. This would be a less complete measure than a statutory or procedural rule change: if a defense attorney failed to follow the ABA guidance, a defendant's only recourse would be to claim ineffective assistance of counsel, which is a long and difficult path. In contrast, a statutory or rule-based change would be directly supervised by the trial court, and would allow a defendant to challenge any error on direct appeal. But a change to the ABA rules would be a significant first step.

3. Presenting Mitigation to Prosecutors.

So far, we have discussed mitigation in the context of sentencing and judicial decisionmaking. But there is another decisionmaker whose impact on the sentence can, in some circumstances, be just as great: the prosecutor. Prosecutors wield significant power throughout the course of a case: they decide whether to charge an individual, what charges to bring, whether and what type of plea bargain to offer,

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[303] *Id.*

[304] United States v. Jackson, 815 F. App'x 398, 402 (11th Cir. 2020).

[305] U.S. SENTENCING GUIDELINES MANUAL § 5H1.3.

[306] *See* Johnston, *supra* note 257, at 518–23 (summarizing associations between mental illness and crime, but noting that other factors also associated with mental illness, such as substance abuse, employment instability, and family problems, mediate those effects).

and what sentence to recommend to the judge if the case results in a conviction.[307] Prosecutors carry out these tasks with almost complete discretion and little requirement to report the reasons for their decisions.[308] While there is a compelling case that sentencing is a critical part of the criminal justice process,[309] charge and plea bargaining are undoubtedly also important—through plea bargains, prosecutors can affect the maximum and minimum penalties to which the defendant is subject by dismissing charges, restrict the range of sentences available to the judge for the charges to which the defendant pleads guilty, or even entirely bypass the sentencing process when the parties agree to a particular sentence.[310] And even after conviction, prosecutors have a role in crafting the sentence by making a sentencing recommendation to the judge. While my data suggest that prosecutors' ability to shape the sentence is heavily constrained by judges' consideration of mitigating evidence, there is no doubt that prosecutors impact sentencing.

Given that role, one might think that there would be a systematic method for defense counsel to present mitigation to the prosecution during the course of the litigation, either to secure a more favorable plea agreement or to persuade the prosecutor to make a more lenient sentencing recommendation. There is not. The federal rules of criminal procedure do not require the parties to meet and confer regarding mitigating circumstances; indeed, they explicitly prohibit the court from "participating" in plea negotiations.[311] Of course, defense counsel are always free to contact the prosecution and present mitigation in the plea bargaining process. But it is unclear how often this happens in practice.[312] Given the wide variability in the amount of mitigation presented in sentencing memoranda,[313] it is likely that there is similarly wide variability among defense counsel in the extent to which they present mitigation to prosecutors.

To the extent that prosecutors do receive mitigation before engaging in plea negotiations or making a sentencing recommendation, we similarly do not know how that mitigation affects their decisionmaking. Prosecutors are extremely difficult to study because they do not release information about their decisions—we know very little about even core prosecutorial functions like how charging decisions are made, let alone how mitigating information affects prosecutors' plea offers or

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[307] *See, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM, 127–34 (2017); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1204 (2020); Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 SOUTHERN CALIF. L. REV. __ (2021).

[308] PFAFF, *supra* note 307, at 157–59; Baughman & Wright, *supra* note 307.

[309] *See supra* Part I.A.

[310] FED. R. CRIM. P. 11(c)(1) (permitting plea agreement to specify that prosecutor will "not bring, or will move to dismiss, other charges," "recommend . . . that a particular sentence or sentencing range is appropriate," or that the parties "agree that a specific sentence or sentencing range is the appropriate disposition of the case," which "binds the court once the court accepts the plea agreement").

[311] *Id.*

[312] *See* Baughman & Wright, *supra* note 307 (describing that "the public cannot monitor" the plea bargaining process, as it happens outside of the judicial context).

[313] *See supra* Figure 2.

sentencing recommendations.[314] The limited experimental data we do have suggests that there is significant variability in how prosecutors make charging decisions, which implies there is likely to be similar variability in how they make plea offers or arrive at sentencing recommendations.[315]

There are reasons, however, to expect that mitigation will impact prosecutors' plea and sentencing decisions. Traditionally, the Department of Justice maintained a policy in which prosecutors were required to "charge and pursue the most serious, readily provable offense or offenses that [were] supported by the facts of the case."[316] During the Obama administration, however, federal policy allowed significantly more leeway to consider individual characteristics of defendants. Recognizing that "equal justice depends on individualized justice," prosecutors were instructed to make an "individualized assessment" of a variety of factors, including the offense conduct, defendant's criminal history, circumstances leading to the commission of the offense, and the needs of the community in deciding how to charge cases, what plea terms to offer, and what sentence to request.[317] Other guidance specifically permitted prosecutors to consider "case-specific aggravating and mitigating factors" in determining whether to seek particular sentencing enhancements.[318] Though those policies were rescinded under the Trump administration, they have largely been reinstated in the Biden administration.[319] And

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[314] *See, e.g.*, Baughman & Wright, *supra* note 307. Some newly elected state prosecutors are implementing policies to make their decisions more transparent, which will allow scholars to study their decisions. For example, in Washtenaw County in Michigan, Eli Savit has announced a "prosecutor transparency project" with the ACLU and faculty at the University of Michigan to collect and analyze data about charging decisions, plea bargaining, and disparities in outcomes across a variety of factors. Washtenaw County Office of the Prosecuting Attorney, *Prosecutor Transparency Project: Preliminary Scope of Work and Workflow*, 1–2 (2021), https://www.washtenaw.org/DocumentCenter/View/19100/Prosecutor-Transparency-Project---Preliminary-Scope-of-Work.

[315] Baughman & Wright, *supra* note 307.

[316] John Ashcroft, *Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing*, OFFICE OF THE ATTORNEY GENERAL, http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (September 22, 2003).

[317] Eric Holder, *Department Policy on Charging and Sentencing*, OFFICE OF THE ATTORNEY GENERAL, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf (May 19, 2010).

[318] Eric Holder, *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases*, OFFICE OF THE ATTORNEY GENERAL, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf (August 12, 2013).

[319] Monty Wilkinson, *Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing*, OFFICE OF THE ATTORNEY GENERAL, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf (January 29, 2021). A recent empirical project demonstrated that these policies had significant and intricate effects on federal sentences. *See* Mona Lynch et al., *Prosecutors,*

the transition toward an increased willingness to consider individual defendants' circumstances is even more pronounced in some state systems. Recently, as a number of progressive local prosecutors have taken office in major cities around the country,[320] they have instituted similar policies to allow prosecutors to consider individual mitigating circumstances in charging and plea negotiations.[321]

Given these changes toward receptiveness to mitigation, and my data indicating that mitigating evidence can have a powerful effect on a defendant's perceived culpability, there is little reason *not* to present mitigation to prosecutors early in a case. Moreover, if an attorney is likely to investigate and present mitigation at the sentencing phase of the case—especially if the law moves toward requiring it as I argue that it should—presenting it earlier to the prosecutor may not even require additional resources, but instead just require those resources to be used earlier in the case. Yet it appears likely that prosecutors do not receive mitigation in many cases.

What are some possible remedies? A comprehensive one would be to encourage the prosecutor and defense attorney to meet and confer to discuss mitigating circumstances, either through broadly applicable procedural rules or individual judges' practice guidelines. Some jurisdictions have analogous requirements in the civil context. For example, California permits judges to set mandatory settlement conferences in civil cases, at which the parties are required to submit good faith settlement offers and provide a statement identifying "facts and law pertinent to the issues of liability and damages involved in the case."[322] Likewise, some federal courts require parties in civil cases to meet and confer regarding settlement prior to any pretrial conference.[323] Courts could adopt similar rules in the criminal context, requiring the parties to meet and confer prior to the pretrial conference. While the current procedural rules may limit the extent to which the court could require the parties to discuss mitigating circumstances specifically, the rules could at least

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Court Communities, and Policy Change: The Impact of Internal DOJ Reforms on Federal Prosecutorial Practices, 2021 CRIMINOLOGY 1, 27 (2021).

[320] Bellin, *supra* note 307, at 1205–08; Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 142–25 (2021) (describing a "[r]ecent . . . surge in DA candidates branding themselves (or embracing the mantle of) 'progressive prosecutors'").

[321] For example, in Washtenaw County in Michigan, Eli Savit has implemented a juvenile charging policy that considers several mitigating factors to consider in deciding whether to file charges, including age and whether the defendant has a "diagnosed disability or behavioral disorder." Washtenaw County Office of the Prosecuting Attorney, *Policy Directive 2021-11: Policy Regarding Juvenile Charging*, 1–7 (2021), https://www.washtenaw.org/DocumentCenter/View/19298/Juvenile-Charging-Policy. Likewise, Rachel Rollins—the district attorney in Suffolk County, Massachusetts, and one of the earliest and most prominent outwardly progressive prosecutors—released an in-depth policy memo describing a number of mitigating circumstances that prosecutors in her office should consider throughout the case, particularly noting that "[s]ubstance use disorder, poverty, mental illness, and the behaviors that often result from them, should never serve as a justification for incarceration." SUFFOLK CTY. DIST. ATTORNEY, THE RACHAEL ROLLINS POLICY MEMO 37 (Mar. 2019).

[322] CAL. R. CT. 3.1380(c)(4).

[323] *See, e.g.*, E.D. Mich. Local Rule 16.2, *available at* https://www.mied.uscourts.gov/PDFFIles/localRulesPackage.pdf.

facilitate those conversations through a required in-person meeting, with mitigation as one possible topic of discussion at that meeting.[324]

Of course, changes to procedural rules can be complex, difficult, and slow. But other types of reform could happen more rapidly. If progressive prosecutors believe that early presentation of mitigating evidence would impact their plea offers or sentencing recommendations, they could simply encourage it, either internally by communicating with public defenders' offices, or externally by releasing a policy statement welcoming the early presentation of comprehensive mitigation.

Last, similar to solving the problems of ineffective assistance and presentation of neuroscience mitigation, ABA guidance could help. The current guidance requires only that defense attorneys "gather and submit to the . . . prosecution . . . as much mitigating information relevant to sentencing as reasonably possible."[325] That guidance could be far more detailed, specifying the kinds of mitigation that should normally be presented and explaining that mitigation should be presented both to encourage reasonable plea negotiation and to attempt to persuade the prosecution to recommend a lesser sentence.

CONCLUSION

We are at a critical period in criminal justice policy. The public is more aware than ever about the myriad problems in the system: hostile police–community relationships; mass incarceration; systemically unequal racial treatment. And there is rare bipartisan support from legislatures toward addressing some of those issues—

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[324] The extent to which the court could require the parties to discuss mitigation or engage in plea negotiations, at least in federal cases, is limited by Federal Rule of Criminal Procedure 11(c)(1), as noted *supra* note 311. While it is not entirely clear that this rule would prohibit a meet-and-confer requirement regarding plea negotiations, some courts have interpreted the rule broadly as an "unambiguous mandate" that "prohibits the participation of the judge in plea negotiations under *any* circumstances." United States v. Corbitt, 996 F.2d 1132, 1135 (11th Cir. 1993). The reason for the rule is that "judicial intervention may coerce the defendant into an involuntary plea that he would not otherwise enter." United States v. Werker, 535 F.2d 198, 202 (2d Cir. 1976). But simply requiring the parties to meet and confer prior to the plea hearing—with mitigating circumstances as one possible point of discussion—would likely not run afoul of the rule, and would encourage attorneys to discuss mitigation more than they currently do. And a number of states also allow for limited judicial involvement in plea negotiations. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 238 (2006). Florida's model includes a presentation involving the judge in which the prosecution presents a summary of its facts of the case, whereas the defense responds "with his or her own interpretation of the facts, with information on mitigating facts and with a request for a more lenient disposition." *Id.* at 241–42. For a helpful review of the history of the limited judicial role in plea bargaining, *see* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1228 (2016). And for an interview-based account of the many ways state judges intervene in plea negotiations, *see* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

[325] ABA Standards for Criminal Justice 4-8.3 (2015).

particularly overly restrictive sentencing policies. In some ways, the data I report here are very encouraging toward progress. My data imply that mitigation matters in judges' sentencing decisions; that the relationship between mitigation and sentencing makes sense of the experimental and survey literature; and that judges are engaging in a careful, modern consideration of mitigation by recognizing how personal characteristics and circumstances influence culpability and how evidence and data should impact the weight of mitigation, beyond what the Sentencing Guidelines provide.

But the data are also discouraging in the systemic flaws that they highlight. They imply that identifying and presenting mitigation is among the most important parts of a criminal case, and yet defendants have almost no procedural protections to ensure that step happens effectively. To the extent the system even requires a thorough investigation, it does not enforce it through the requirements of effective assistance of counsel. It does not allow for the most complete examination into health mitigation, which appears especially crucial. It does not encourage prosecutors to consider mitigation in making their extremely consequential decisions. And the Guidelines do not provide reasonable standards for judges to follow in weighing mitigation, leading judges to simply sentence outside the Guideline range, reducing transparency and uniformity.

All of these problems are at least partly solvable, either through modifications to procedural rules, amendments to ABA guidance and the Sentencing Guidelines, or policy decisions taken by prosecutors' and defenders' offices. Until there is support for reforms like these, there will likely continue to be wide variation in the amount and quality of mitigation presented from case to case, likely leading to unjust disparity among defendants. My hope is that the data reported in this Article provide a first step toward advocating for these reforms, and encourage greater recognition of the importance of mitigation at sentencing.

APPENDIX A. PRIMARY INDEPENDENT VARIABLES AND CORRESPONDING RELIABILITY SCORES

Independent Variable	**Smith Index**
Relative Seriousness	.90
Relative Culpability	.89
Victim Harm—Minimizing	.90
Victim Harm—Acknowledging	.96
Remorse—Supported	.95
Remorse—Unsupported	.92
Historical Trauma	.94
Character	.86
General Family Background	.78
Collateral Consequences	.95
Health—Supported	.90
Health—Unsupported	.97
Age	.96
Deterrence	.88
Incapacitation	.77
Rehabilitation	.55

APPENDIX B. WORD COUNTS (AND STANDARD DEVIATIONS) AND PROPORTIONS OF ALL VARIABLES

Independent Variable	Average Word Count	Frequency of Use
Relative Seriousness	489.07 (625.89)	88%
Relative Culpability	172.24 (349.59)	38%
Victim Harm—Minimizing	22.51 (95.48)	13%
Victim Harm—Acknowledging	4.07 (15.48)	9%
Remorse—Supported	40.40 (122.66)	16%
Remorse—Unsupported	32.79 (83.77)	35%
Offense Mitigation Total	**761.09 (791.30)**	**97%**
Historical Trauma	199.59 (313.88)	61%
Character	336.11 (501.44)	77%
General Family Background	54.83 (109.81)	38%
Collateral Consequences	86.18 (177.06)	41%
Health—Supported	197.94 (409.29)	35%
Health—Unsupported	30.51 (73.96)	22%
Age	26.66 (95.66)	23%
Personal Mitigation Total	**935.11 (928.25)**	**94%**
Deterrence	82.33 (175.51)	39%
Incapacitation	26.75 (78.08)	21%
Rehabilitation	70.06 (119.37)	45%
Theories of Punishment Total	**179.85 (263.27)**	**62%**

BRAIN LESSONS

Brain Lessons: "Tappers" and the Curse of Knowledge

by Jules Epstein

Why don't those darned jurors hear what I am telling them? Or, asked differently, what did that lawyer mean by giving such an incoherent opening statement – didn't they realize that details were missing? The answer is that the opening statement may been 'internally coherent but externally incoherent.' And how this can occur is best understood by learning about the "tappers" research

That phrase – internally coherent but externally incoherent – is one this author generated after reading an opening statement from a Pennsylvania criminal trial. There was a hint of a story, but new names and seemingly disconnected events were thrust at the jury in a way that no one who had yet to read the discovery could grasp.

How could the presenter be so unaware of the failure to communicate? The answer comes from the 1990 "tappers" study. A Stanford University graduate student, Elizabeth Newton, asked study participants to think of a well-known song and tap out the rhythm to that song on a table-top. For each tapper, a separate participant had to listen to the taps and 'name that tune.' [Try this – take the song "Happy Birthday" and tap out its rhythm as you sing it to yourself.]

Not surprisingly, out of 120 tapped songs, only three were correctly identified. But Newton focused on the tappers' expectations – and they predicted a 50% success rate for their listeners. What was the take-away? The tappers had the knowledge of the song in their heads, 'heard' it as they tapped, and attributed that knowledge to their listeners.

That type of cognitive processing and its consequences have been labeled "the curse of knowledge." It afflicts legal writing (and writing in other contexts – *see* ***The Source of Bad Writing; The 'curse of knowledge' leads writers to assume their readers know everything they know,*** Pinker, Steven . Wall Street Journal (Online); New York, N.Y. [New York, N.Y]25 Sep 2014)). It even impedes medical diagnosis and treatment. J. Howard, ***The Curse of Knowledge*****,** Chapter 9 in COGNITIVE ERRORS AND DIAGNOSTIC MISTAKES (Springer 2019). And research continues to affirm the phenomenon. Damen *et al.*, ***Can the curse of knowing be lifted? The influence of explicit perspective-focus instructions on readers' perspective-taking.*** Journal of Experimental Psychology: Learning, Memory, and Cognition, Vol 46(8), Aug, 2020. pp. 1407-1423. Ultimately, it is core to modern persuasion theory across all domains, a point driven home by Chip and Dan Heath in MADE TO STICK (Random House 2007).

Little has been written about this specific to courtroom advocacy. One article identifies how this works [or causes failure] at trial:

By the time a case reaches a jury, the trial team is waist-deep in depositions, evidence, and briefs, which have been collected over a course of months or even years. The attorneys have thought through a plethora of conceivable issues that could arise at trial and have formulated responses. The case is engrained in their minds and, consequently, they can overestimate the ease with which jurors will understand their case. Attorneys have the benefit and the limitation of

knowing too much about the case and the law, often resulting in too many layers of assumptions and presumptions about the messages sent to jurors.

O'Toole, Boyd and Prosise, THE ANATOMY OF A MEDICAL MALPRACTICE VERDICT, 70 Mont. L. Rev. 57, 61 (Winter 2009). The authors diagnose this as having a presenter who is sender-based rather than audience-based. *Id.*, 60.

Can the curse of knowledge be overcome? The first (necessary but not sufficient) step is to remember that what is needed is a "concrete" story. Beyond that, however, the research by Damen offers little hope in terms of going it alone – trying to make oneself 'hear' as the uninitiated would is a difficult task, although one advocate has urged a weekend of forgetting about the case and then returning to it anew, which he promises offers a fresh understanding of what jurors might need to know. Perdue, SYMPOSIUM: THE "BEST OF" LITIGATION UPDATE 2017: PERSUADING THE NEXT GEN JURY (OR ANY GEN FOR THAT MATTER), 79 The Advocate 203, 209 (2017). [In a subsequent article, Perdue suggests that lawyers also reimagine their case after jury selection has occurred, as knowledge of juror backgrounds and interests can inform how best to present the information. Perdue, SYMPOSIUM: EFFECTIVE TRIAL ADVOCACY: PRESENTING EVIDENCE WITH AN EYE TOWARD YOUR JURY, 90 The Advocate 44 (Spring 2020).]

But there are remedies once the presenter is aware of the risk – and the simplest/best is to find a test audience. Give the opening to an audience with no familiarity with the case, and then test whether the story landed by asking for it to be told back to you – or pepper the audience with questions that can be answered only if 'your' story became theirs.

The same is true in appellate advocacy. Share the statement of facts with someone and then see if that reader can make sense of your legal arguments or needs more information.

Until lawyers become audience-based and aware of their 'tapper' proclivities we will have presentations that are externally incoherent. [For a quick "tapper" tutorial for your advocacy students, show them the youtube video https://www.youtube.com/watch?v=rPAryjQs-Pw

BRAIN LESSONS: NEGOTIATING ERRORS: WHEN THE "ADVERSARIAL MINDSET" HURTS MORE THAN HELPS

by Jules Epstein

Too often, the mindset in negotiating is completely adversarial – we are good, they are bad; we are right, they are wrong; we are just and they are unjust; and, perhaps most perniciously, we are reasonable and they are not and will not be so.

Even Ronald Reagan didn't posture in this way – his famous cry was "trust but verify." New research suggests a modification of that principle when conducting negotiations.

The American Psychological Association's *Psychology, Public Policy and Law* is publishing "The Adversarial Mindset" by Simon, Ahn, Stenstrom and Read (2020). The authors begin by surveying the literature on negotiating and identify three controlling principles:

- The "myside bias," the tendency to view a case and a position not objectively but through a more-favorable-than-justified lens. [In the world of trials, we sometimes call this "trial psychosis," a delusional belief that the case is a winner despite devastating adverse proof.] What comes with this is what the authors describe as an "unfavorable perception of one's counterpart."
- The "otherside bias," the assumption we make that our counterpart will not see things objectively but will construe the evidence and justness of the cause in a skewed manner. Accompanying this is the belief that your opponent begins from a point where they view you negatively.
- "Conflict and escalation." Where myside and otherside bias prevail, parties may tend to escalate conflict due to inaccurate perceptions rather than tend toward "de-escation through cooperative behavior."

To test these propositions, the authors conducted a series of tests, with individuals assigned to be an advocate on one or the other side in a dispute or to be the neutral third party advisor, a person directed to present the decisionmaker/arbitrator with a fair rendering of the facts that "do justice to both parties." All three roles received the same factual background, facts intended to be decidedly circumstantial and ambiguous. The dispute was over whether an employee had stolen money.

Each participant ultimately rated the strength of the facts *and* judged how the opponent would likely view them. Role mattered – those assigned to the employee's side viewed the facts more favorably than those assigned to represent the employer, with the neutral advisor coming down somewhere in the middle.

This is not all that was shown. Each adversary was asked to estimate how the opposing advocate viewed the evidence and over-estimated how badly the opponent would view the case. Put more simply, if one party represented the employee, that person over-estimated how the other side [the employer's representative] would view the proof supporting guilt.

This was but one of the two studies the authors did, with the second largely confirming the first. The concern they identify is that when we view our opponents as more judgmental and less objective, escalatory tendencies emerge.

This summary just skims the surface. The details of each experiment are revealing; and the authors frame this as proving "coherence based reasoning,' *i.e.*, that the otherside and myside biases cohere to impact the judgments each adversary made. At the same time, there was some awareness of the likelihood that the 'impartial' mediator would more fairly assess the case's strengths and weaknesses, taken by the authors as proof that there might be some self-awareness of the biases that afflict the adversaries' judgment.

What are some of the upshots? The authors note the important role of mediators in asking each side to list the weaknesses in its position, a first step toward tempering views and avoiding escalation. They also found some reason to be optimistic:

Notwithstanding the wide and deep spreading of bias throughout the participants' mental model of the case, our participants were considerably less biased when asked to assess how a neutral authority figure would view the case. In other words, our participants were cognizant of the fact that not everyone would share their view of the situation. It follows that they were to some degree aware that they were operating under the influence of bias. This partial awareness could provide an opening to bring adversaries to transcend their biased views, question their escalatory impulses, and seek cooperative solutions.

For those of us who teach negotiating and mediation, this and similar research is critical as it shows the need to educate our students to look at the case through the other party's eye and needs, and not start from a position of absolute distrust.

The Adversarial Mindset will be published this year in *Psychology, Public Policy and Law*, https://psycnet.apa.org/PsycARTICLES/journal/law/26/1 It can also be found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3573099

Thanks go to author Dan Simon for his presentation on this research at a faculty colloquium at Temple Beasley School of Law. For related research, see the March 27, 2020 New York Times article "In Negotiations, Givers Are Smarter Than Takers," explaining how giving the opposing side something that it needs may lead to more successful negotiations. https://www.nytimes.com/2020/03/27/smarter-living/negotiation-tips-giver-taker.html?referringSource=articleShare

BRAIN LESSONS: EXPERTS ARE NOT IMMUNE FROM COGNITIVE BIASES

by Jules Epstein

It may be silly but bears repeating – experts are people too, subject to a variety of influences that may distort their thinking, approach and conclusions without realizing this is occurring. This understanding of expert non-neutrality is nothing new – the 2009 report STRENGTHENING FORENSIC SCIENCE – A PATH FORWARD emphasized this.

Some initial and striking research has uncovered the effects of some biases in forensic science procedures, but much more must be done to understand the sources of bias and to develop countermeasures…The traps created by such biases can be very subtle, and typically one is not aware that his or her judgment is being affected…Decisions regarding what analyses need to be performed and in what order also can be influenced by bias and ultimately have the potential to skew results.

Id., 184-185. And the audience for expert testimony – often, the courts – is sometime oblivious to this as well. This arises from the perception of neutrality and objectivity that understandably comes along with the entry of science into the courtroom.

A new article offers a comprehensive paradigm for grasping and potentially responding to expert bias. "Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias" (Anal. Chem. 2020, 92, 7998−8004, available at https://pubs.acs.org/doi/10.1021/acs.analchem.0c00704) is among the latest from researcher and cognitive psychologist Dr. Itiel Dror.

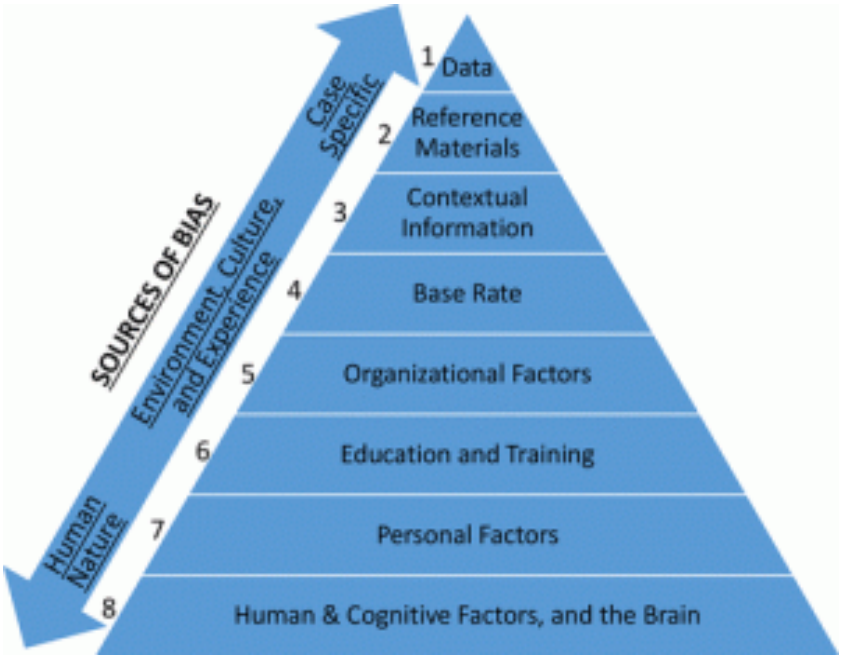
Dror begins with his list of prevalent fallacies, ones he has identified in years of studying and training experts and the consumers of expert knowledge – judges and lawyers:

- Bias is a problem only with "corrupt and unscrupulous individuals" and thus is a matter of personal integrity.
- Bias occurs only among the "bad apples" of the community, people who have yet or do not care to learn "how to do their job properly."
- There is no bias as experts are immune as long as they perform competently and with integrity.
- When forensic analysis is based on the use of technology, instrumentation or other non-human machinery there can be no bias.
- The "blind spot" phenomenon of seeing other experts as being biased but not oneself.
- What Dror calls "Illusion of Control: 'I am aware that bias impacts me, and therefore, I can control and counter its affect. I can overcome bias by mere willpower.'"

The list is not just anecdotal; for each, Dror identifies confirming sources.

Why is understanding of the fallacies essential? Without having them as a starting point, experts will be blinded to their own limitations, and those who retain, rely on or challenge experts will be unable to critically assess their work.

Dror offers more. Having identified the fallacies that impede fair assessment of whether a particular expert's approach or conclusion was hindered by biases, he then identifies eight forms of bias to test for. This is his illustration.



The article walks the reader through how each level has a risk of biasing the examination and/or the resulting decision.

- The case specific circumstances, such as the data/material being examined, the reference material [e.g. a "target suspect" whose features can affect what is being looked for in a crime scene sample or a latent print], and contextual domain irrelevant information.
- Environment, culture and experience include base rate [e.g. what the 'normal' conclusion is when finding certain features], organizational factors such as "allegiance effect" and "myside bias,' and education and training that may predispose an examiner to look at evidence from only one or limited perspectives.
- Human nature is the last confounding source of bias, ranging from the purely individualistic motivation and belief system to the general aspects of decision-making such as top-down thinking.

To keep these from merely being labels, Dror provides illustrations. How might reference materials bias? "[T]his source of bias is not limited to circumstances that have a "target" suspect per se, but can also arise from pre-existing templates and patterns, such as in the interpretation of blood pattern analysis or a crime scene. It can even impact what color is observed."

Contextual information can have its own ramifications.

In toxicology, for example, contextual information can bias testing strategies. Consider, for instance, when a post-mortem case is provided with contextual informant, such as "drug overdose" or/and that "the deceased was a known to have a history of heroin use." Such information can impact the established testing strategies, such as to go straight to the confirmation and quantification of a limited range of opiate-type drugs (morphine, codeine, 6-monoacetylmorphine, and other heroin markers), without running the other standard testing, such as an immunoassay or looking for other opioids that may have been present (e.g., fentanyl). Hence, the contextual information caused a confirmation bias approach and deviation from the standard testing and screening protocols.

So, too, can "base rate," illustrated by an example from forensic pathology. If there is a hanging that results in cerebral hypoxia, that correlates primarily with suicide; and if there is strangulation resulting in the same condition it correlate highly with homicide. But occasionally there can be homicides by hanging; and failure to consider this can skew not only the ultimate determination but "other stages of the analysis, even the sampling and data collection, as well as detection of relevant marks, items, or signals, or even verification."

Are there solutions or at least mitigating steps to take? Some are clear – preventing exposure to domain irrelevant material, using "linear sequential unmasking" – and others are more difficult, as they involve overcoming defensiveness on the part of examiners that bias is not a problem *for them*. But without a fundamental understanding of bias and its sources and a corresponding system for checking and correcting for bias, the risk of error in core forensic analysis will persist.

BRAIN LESSONS: DEMEANOR AND MASKED WITNESSES

by Jules Epstein

Do mask-wearing witnesses deprive criminal defendants of their right of Confrontation? Does impairing the ability of jurors and lawyers to fully assess 'demeanor' result in less reliable trials? Can jury selection be fair of prospective jurors' faces are covered? Or is this all a Shakespearean "much ado about nothing" because we – the great majority of lawyers and judges – can't detect deception with any degree of reliability and often no better than chance?

To answer this we first need to distinguish between demeanor as a general 'early warning system,' a tool for discerning that a particular question has hit the witness or prospective juror emotionally and thus warrants some follow-up; and the more discrete claim that facial gestures and responses can reveal deception. Rarely does that distinction come through in the law; and rarer still are the lawyers who grasp the difference.

Historically, with no basis in science, it was believed that seeing the speaker was and is critical to judging veracity. 125 years ago, the Court explained that it is essential that "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-243 U.S. 1895).

That view persisted in the canons on Evidence.

Wigmore notes that, in addition to cross-examination — "the essential purpose of confrontation" — there is a "secondary and dispensable element [of the right:] . . . the presence of the witness before the tribunal so that his **demeanor** while testifying may furnish such evidence of his credibility as can be gathered therefrom. . . . [This principle] is satisfied if the *witness*, throughout the material part of his testimony, is *before the tribunal* where his demeanor can be adequately observed."

Coy v. Iowa, 487 U.S. 1012, 1029 (U.S. 1988)(dissenting opinion).

Jurors are so instructed. Typical is the Third Circuit instruction on judging credibility, which tells jurors to

"decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gave, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection…

In deciding what to believe, you may consider a number of factors:

…

(3) The witness' appearance, behavior, and manner while testifying;

Yet examining a witness' face is not the legal essential it appears to be, a point made first by those cases that approve the seating of blind jurors. As one court explained, "[w]ith respect to the prospective juror challenged as visually impaired, although we recognize that sight is a factor in testing the credibility of a witness we reject the defendant's contention that the juror would be unable to properly evaluate the credibility of the witnesses." People v. Pagan, 191 A.D.2d 651, 651, 595 N.Y.S.2d 486, 487, 1993 N.Y. App. Div. LEXIS 2652, *3 (N.Y. App. Div. 2d Dep't March 22, 1993).

And what of science? Myths about detecting lies persist. As one 2017 article in Psychology Today professed

we can be aware of certain behaviors and characteristics that tell us that others may be lying, such as:

-
  - Changes in vocal pitch.
  - Unusual blinking or fidgeting.
  - The use of fewer first-person words such as "I."
  - A decreased tendency to use emotional words, such as *hurt* or *angry*.
  - Difficulty making eye contact when speaking, or shifty eyes.
  - The use of self-soothing techniques such as ear tugging, neck touching, collar pulling, or mouth covering.
  - Inconsistent gestures or facial expressions that contrast with message content.

Raab, *7 Signs That Someone's Lying to You* (June 2017) https://www.psychologytoday.com/us/blog/the-empowerment-diary/201706/7-signs-someones-lying-you (last visited July 14, 2020). Raab offers no citation/sourcing for this list.

That absence of supporting authority should not be surprising. As reported in 2018, a review of research studies showed that "people can distinguish a lie from the truth about 54 percent of the time, just slightly better than if they had guessed." Schaarschmidt, *The Art of Lying*, Scientific American (July 11, 2018) https://www.scientificamerican.com/article/the-art-of-lying/ (last visited July 14, 2020).

Why? As one article explains

In the courtroom, stereotypes can be hazardous for lawyers and their clients. Some common myths about nonverbal behavior produce misleading clues and lead juries to think witnesses are lying when they're not. These clues include avoiding eye contact and movements such as scratching, picking, crossing one's arms, or tapping the foot. Most people believe lack of eye contact or shifting eyes is a clue to deceit. It is unreliable.

Cynthia Cohen, *Demeanor, Deception and Credibility in Witnesses* (ABA presentation 2013) http://pgil.pk/wp-content/uploads/2014/04/33_demeanor_deception.authcheckdam.pdf (last visited July 18, 2020).

Joe Navarro, a former FBI agent in the Bureau's Behavioral Analysis Program, wrote in 2018 that "we need to stop associating behaviors indicative of psychological discomfort with deception and acknowledge them purely for what they are: signs of stress, anxiety, apprehension, despair, suspicion, tension, concern, nervousness, etc., but not deception." Navarro, *The End of Detecting Deception*, Psychology Today (July 2018) https://www.psychologytoday.com/us/blog/spycatcher/201807/the-end-detecting-deception (last visited July 18, 2020).

One of the principal researches on lying and deception is Professor Paul Ekman. In the2001 edition of his book TELLING LIES (Norton 2001) he explains that while it might be possible to detect deception by spending hours studying a speaker's facial movements, "people who view the videotapes just once [in the experiment where ground truth is known]…do little better than chance in identifying who is lying or telling the truth." TELLING LIES, 331.

Ekman does promote trainings in discerning and understanding "micro-expressions," expressions that flit across the face and disappear within a fraction of a second. He maintains that these fleeting signs may show "two messages- what the liar wants to show and what the liar wants to conceal." https://www.paulekman.com/deception/deception-detection/ (last visited July 18, 2020). Yet even with the study of micro-expressions he is cautious, noting the need to have a baseline of the person's emotions to know when there is a deviation; "a single micro expression or flash of leakage does not offer conclusive proof of lying[;]" and "it is impossible for *anyone* to perfect the art of lie detection. Instead, he advocates that with more skills and data we can make determinations with greater certainty, though it's important to remember that we can never know with 100% accuracy whether or not someone is lying." *Id.*

If masks impede anything, it is in catching reactions – a juror's grimace or smile may reveal that a specific item of proof or argument landed well, poorly or otherwise raises concerns. One approach might be to provide clear face shields or transparent face masks for jurors; but again that is not to detect deception but to 'take the juror's temperature.'

So what does this mean if witnesses or prospective jurors are masked? While there may be support in the law for a challenge to the practice, particularly in criminal cases, there is little science to back it up. And some research suggests that having faces covered might *increase* deception detection.

In her new and important article *Unmasking Demeanor* (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3610460&download=yes , Professor Julia Simon-Kerr debunks the demeanor-as-deception-tool argument and demonstrates how it is racially and culturally normed and biased. She then reports on the 2016 experiments detailed in Leach *et al*, *Less is more? Detecting lies in veiled witnesses*. *Law and Human Behavior, 40*(4), 401–410 (2016). The study showed that "participants were more accurate when witnesses wore niqabs than when witnesses did not wear veils; observers were more accurate at detecting deception in witnesses who wore niqabs or hijabs than those who did not veil. Discrimination between lie- and truth-tellers was no better than guessing in the latter group, replicating previous finding." *Id.*, at 407. Recognition of this research may also have the salutary purpose of confirming the right of Muslim women to testify veiled – by realizing that the veil does not

inhibit a fair determination of credibility, it permits a class of witnesses to testify in religious garb that leaves them more comfortable rather than unveiled and as a result ill-at-ease, a condition that might make the witnesses appear to be deceptive when they are not.

Simon-Kerr concludes with this observation: "mask(s)…may direct our attention to the more tangible and demonstrably useful factual information on offer at a trial or hearing." *Unmasking Demeanor,* 18. Public health and the 'search for the truth' are not incompatible.

BRAIN LESSONS: SELECTIVELY APPLYING SCIENCE

by Jules Epstein

Given that the Rules of Evidence were developed without regard to, or prior to the development of, principles of cognitive science, one might expect courts to use scientific research to mediate those rules and, especially, to inform the exercise of discretion. But as two divergent lines of cases show, although each involves how a visual occurrence in the courtroom might impact jury decision-making, the turn to science is selective if not random.

Let us start with shackling criminal defendants. This act has been condemned as a matter of constitutional law since 1970, in part because "it [is] possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant…" Illinois v. Allen, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061 (U.S. 1970). That tentative statement became an affirmative assessment by 2005. "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process…" Deck v. Missouri, 544 U.S. 622, 630, 125 S. Ct. 2007, 2013 (U.S. 2005).

The science behind the assertion made in *Deck* was recently relied on came in a federal habeas proceeding where the issue was whether the defendant was injured by being shackled, *i.e.*, whether seeing a murder defendant in chains "had a substantial and injurious effect or influence in determining the jury's verdict[,]" the *Brecht* standard for post-conviction relief. The appellate court's assessment here had to be made in light of post-conviction protestations of there being no impact coming from testimony of the actual jurors.

Several jurors recalled at the evidentiary hearing that they had thought Davenport might be dangerous when they saw him in shackles. Another juror recalled that she was sitting closest to Davenport when he testified and a fellow juror had asked her if that made her nervous. She also recalled that there were more guards when Davenport testified because he was not in shackles. But the jurors who testified that they saw Davenport's shackles also all said that they believed shackling was routine practice given that he was on trial for murder or because he was in pre-trial incarceration***. Every juror asked also testified that Davenport's shackling did not affect their deliberations.***

Davenport v. MacLaren, 964 F.3d 448, 453 6th Cir. 2020)(emphasis added)

Rejecting the jurors' self-professed impartiality, the majority in *Davenport* first turned to a generalized repudiation of the 'trust me' testimony.

If a practice "'involves such a probability that prejudice will result that it is deemed inherently lacking in due process,'" like shackling a defendant without case-specific reasons, "little stock need be placed in jurors' claims to the contrary. Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused."

964 F.3d at 466 (citation omitted). Importantly for this article, the majority then turned to what it called "voluminous" social science to support this determination, concluding that "[t]his research

suggests that the shackling of Davenport, a 6'5″ tall black man weighing approximately 300 pounds, would tend to "prime" racialized presumptions of dangerousness and guilt." *Id.*, at 466 n.13. Because the jury decision at issue -whether the crime was first or second degree murder- was not a slam dunk,' one, the prejudice could not be ignored.

Intriguingly, the research cited by the majority was not shackling-specific, but instead dealt with the general problem of associating race with criminality, what the majority summarized as "implicit associations between Black and Guilty." *Id.*, at 466 n.13. Yet when confronted with a type of proof where research has shown a clear biasing effect, courts have uniformly ignored the social science. The is the case with the use of slow-motion video replay.

First, the research. Repeated studies have shown that slowing down a video when it is played to a decision-maker – be it a juror or, as in one study, experienced soccer referees – increases the perceiver's assessment that conduct was intentional.

A main characteristic of slow motion is that it affects the impressions of the duration over which real-time events unfold. As suggested by Caruso et al., the temporal modulation of the dynamics creates the perception that the offender has much more time to contemplate his action than he actually does. Therefore, physical contacts and violent actions might be perceived more intentionally and seriously. Indeed, we hypothesized that slow-motion replays could disrupt normal perception of causality, which in turn could influence the perceived duration of the event.

Spitz, J., Moors, P., Wagemans, J. *et al.* The impact of video speed on the decision-making process of sports officials. *Cogn. Research* **3,** 16 (2018). https://doi.org/10.1186/s41235-018-0105-8 (last visited September 4, 2020). An additional concern arises if the video is played in slow motion more than once. "If viewers' perceptions adjust such that slow motion appears normal to them after extended viewing, then it is possible that viewers' perceptions of the amount of time that subjects in video had to act and their evaluations of how intentional the subject's actions were would also intensify with repeat viewings." NOTE: THE NOISY "SILENT WITNESS": THE MISPERCEPTION AND MISUSE OF CRIMINAL VIDEO EVIDENCE, 94 Ind. L.J. 1651, 1675 (2019).

The impact of repeated viewing is not cured by reminding jurors that they are watching an altered version of the events.

[P]articipants reported similar results even when they were informed, by way of a timer in the video, exactly how much the video had been slowed. And, perhaps most surprising of all, viewers who watched a **slow**–**motion video** continued to report a higher degree of **intent** even after they watched the regular speed video: "allowing viewers to see both regular speed and slow motion replay mitigates the bias, but does not eliminate it."

Stoughton, POLICE BODY-WORN CAMERAS , 96 N.C.L. Rev. 1363, 1413 (June, 2018).

Yet how have courts responded? Uniformly by rejecting challenges to slow-motion replay. A LEXIS search of "slow w/2 motion w/3 video w/12 intent! or prejudic!" (last run September 4, 2020) produced eleven decisions at both the state and federal level. Of those addressing

admissibility, none found an abuse of discretion; and disconcertingly not one cited to or otherwise acknolwedged the research on the distorting impact slow-motion replay generates.

Some of these decisions may be proper, especially where slow motion was necessary to permit a better view of the perpetrator's face and therefore allow the jury to determine the identity of the perpetrator or otherwise assess whether certain conduct actually occurred such as whether a knife was used in a stabbing rather than slashing fashion. But time and again the courts also talk of the need to prove intentionality, and then add reasoning that is a- or anti-scientific. Such sentiments include the following:

- we find that the probative value of the slow motion footage outweighed any potential for prejudice, particularly given that: the jury was first shown the scenes at normal speed, which allowed it to see the true timing of the events as they transpired; the slow motion footage was clearly marked as such; and the trial court specifically instructed the jury regarding both the purposes for which it was to consider the video footage and the fact that ***it should not allow the video to inflame their passions against Appellant***.Commonwealth v. Cash, 635 Pa. 451, 478, 137 A.3d 1262, 1277 (Pa. 2016)(emphasis added)
- "As for the prejudicial effect of admitting the slow motion video, the court noted that [t]he jury obviously understood the tape was being played in slow motion rather than in real time," given that they "saw the tape played at regular speed, twice…"Jones v. Fisher, 2013 U.S. Dist. LEXIS 184948, *29-30 (E.D. Pa. 2013)(internal quotation marks omitted)
- We have previously approved of a district court's decision to send tape recordings and a tape player into the jury room during deliberations, and in that situation jurors could replay the tapes as often—or as slowly—as they likedUnited States v. Plato, 629 F.3d 646, 652 (7th 2010)

These may be well-intentioned jurists, but these are *ipsi dixit* statements of how jurors will be impacted.

What is to be made of these disparate treatments of psychological research? There is no clear answer. The problem in the slow-motion cases may have been that of counsel who failed to brief the relevant research, or the need for clarity on issues such as facial identification may have dwarfed any concern over the risks in assessing intentionality. And is the shackling decision a product of its time, coming in an era of great concern over racism and implicit bias, concerns not necessarily or as manifestly implicated in the slow-motion cases?

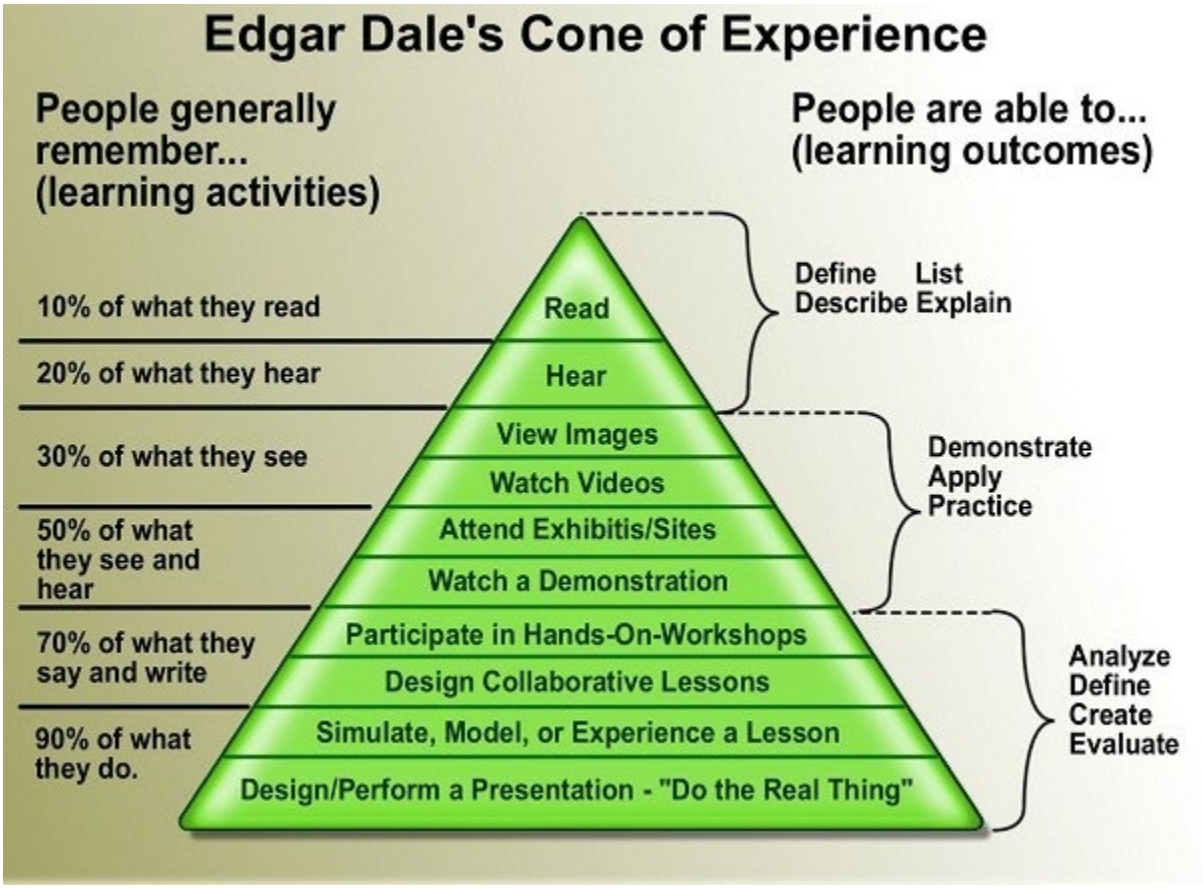
Whatever the reason, the lesson is the same. On a variety of issues of courtroom conduct and evidence, cognitive psychology and social science research should give judges pause before determining how a trial will proceed. The failure of advocates to proffer such findings and the absence of discussion of them in judicial opinions raises concerns over the reliability of adjudications and whether evidentiary rulings are really just gut-checks based on old tropes.

BRAIN LESSON: IS A PICTURE INDEED WORTH THE PROVERBIAL THOUSAND WORDS?

Jules Epstein

I believe in data. I use data when teaching trial advocacy; and when there are no supporting data for a thesis (think, for example, of the claim that 80% of trials are decided at the end of the opening statements) I debunk the claim. We propagate too many myths as if they are eternal truths. But now I find I may have been guilty of committing that sin when discussing the power of visual imagery.

Here's how. For years I have relied on visuals such as the one pictured here to support the claim that a visual 'cements' a memory into place and is retained much more than when information is received only aurally:



This chart is actually conservative – it posits that we retain 50% of what is being presented when words are combined with pictures, while some claim the retention rate is 60%.

This was truth – with numbers – until I read Subramony *et al*, The Mythical Retention Chart and the Corruption of Dale's Cone of Experience, Educational Technology , November-December 2014, Vol. 54, No. 6 (November December 2014), pp. 6-16. How was I wrong?

The authors became history sleuths. They carefully trace back the lineage of this claim and find that there is no foundational research supporting it. Put more simply, someone wrote about this and

then a later writer assumed there were substantiating data. Indeed, there was some research to the contrary. Here is a sampling of what data-based research demonstrated:

> When Fleming (1987) summarized findings about learning from visual displays, he concluded that: • "Realism per se is not necessarily a virtue in instruction" (p. 242).
>
> • "Pictures and words can be reciprocally beneficial; words can delimit and interpret pictures and pictures help define, exemplify, and make memorable words" (p. 242). But as Gagné and Glaser (1987) added: "However, it is not clear that adding images to material that is otherwise semantically well organized is always of benefit to retention..." (p. 60)
>
> When Barron (2004) summarized findings on learn- ing from audio sources, she concluded that:
>
> • In terms of short-term memory "audio informa tion. ..is recalled better than the same information presented visually." (p. 958)
>
> • In terms of long-term memory, "studies have produced conflicting results." (p. 958)
>
> • "It seems evident that there are many variables that influence optimal combinations of audio and visual information, including the type and complexity of the information, the attributes of the target audience, and the level of redundancy." (p. 962)

Mythical Retention, 9. Subramony and colleagues conclude as follows:

> [W]e have shown that the canonical American version of the retention chart data may be attributed, very tentatively, to Paul J. Phillips, but it cannot be demonstrated that Phillips based these generalizations on any body of scientifically conducted research. Further, there is no conceivable sort of scientifically conducted research that could yield the neatly rounded increments found…

Mythical Retention, 13.

Is there no value to using visuals? Of course there will be. Using a visual ensures that the audience – in our instance jurors – have a shared image of what the presenter is detailing in words. Visuals may simplify story-telling. They avoid monotony and can be used to reinitiate primacy. And when "cueing" occurs, *i.e.*, using a change in voice and a pointer or other tool to highlight a specific aspect of a visual, viewers "spent more time attending to the relevant portion of the graphic and performed better on posttests…" Xie *et al*, Coordinating Visual and Auditory Cueing in Multimedia Learning, Journal of Educational Psychology, 2019, Vol. 111, No. 2, 235–255.

So I will continue to emphasize the utility of visuals and use authors such as Edward Tufte and books like *Performance Zen* to assist me in choice and design. But I will not teach again using that cute pyramid or its arbitrary claims of 50% or 60% retention. I might wish that the numbers were correct, and I might intuit that they may be right in degree if not in proportion – but the science and data are just not there.

BRAIN LESSONS: A COUPLES-ONLY DANCE

by Grant Rost

We have all seen it. We have all seen the lawyer or the student so involved with her notes or his script that they seem to have uncoupled from the courtroom itself. I take that moment to study the faces of the jury. What are they doing while the scribe at the podium has a private waltz with his scribblings? In most instances, I see that the jury has also uncoupled. Cognitive science has shown that the advocate here has not simply made a misstep with her dancing partner, but has missed the opportunity for the most amazing kind of dance: a cognitive coupling.[1] A brain waltz taking place between two or more people.

The brain science behind "cognitive coupling" has been around for more than a decade, but the phenomenon might be new to you and is almost certain to be new to your students or the other trial warriors you work with. Cognitive coupling is an electrical waltz between the brains of a speaker and listener—a fascinating Rogers and Astaire unison of brain activity shared when two people are truly involved in that phenomenon we so dismissively call "communication." Let us break down the science a little more from just one important study on the subject.

To study brain activity in both a speaker and listener, researchers recorded a subject telling a story that was personal to her and told without direction.[2] While her voice was recorded, researchers also recorded her brain activity by fMRI. This recorded story was then played for other subjects while their brains were being scanned by fMRI for processing activity. As a control, they had someone tell a story in Russian and played that story for English speakers who knew no Russian at all. I have spoiled the ending already, haven't I? The brain activity seen in the speaker, after a short processing delay, was ***mirrored*** in the listener. When non-Russian speakers listened to the Russian storyteller, there was none of this mirrored coupling at all. To tie up the loose ends that could account for the mirrored brain activity, the researchers had enough data to conclude that the speaker's brain activity was not the result of hearing herself speak her own story.[3]

It gets better though. The easier the communication was to understand, the delay between the speaker and listener's mirrored brain activity shortened toward synchronicity. Even better: When the listener could predict where the speaker was going, the ***listener's*** brain activity would "predict" the brain activity of the speaker. The speaker's brain would then mirror the activity of the listener's "prediction." Researchers next compared the brain activities of the various listeners in the study against one another and found that those, too, synced up in a marvelous dance.[4]

So, why should this matter to trial lawyers or trial advocacy professors and students? It is the difference, as I see it, between communicating and communion. I can communicate and yet completely fail at communion—the latter being quite simply defined as "sharing." In fact, the researchers concluded that the stronger the cognitive coupling activity between speaker and

listener, “the better the understanding” of the story being told.[5] How beautiful! I often share the science of cognitive coupling with my students to refocus their goals in trial. It cannot all be about the words on the paper. It cannot be all about conveying the content we are certain will make or break our proof. Our goal should be a connection at the electrical level, where jury and advocate swing, and mirror, and move, and predict, and dance the dance—all while opposing counsel sits and broods on the bleachers at the side of the gymnasium, wondering how he might cut in.

[1] Also referred to as neural coupling or brain synchronization, among other similar names.

[2] Greg J. Stephens et al., *Speaker-Listener Neural Coupling Underlies Successful Communication*, 107 Proceedings Of The National Academy Of Sciences Of The United States Of America, no. 32, 2010, at 14425, https://doi.org/10.1073/pnas.1008662107

[3] *Id.* at 14427

[4] *Id.* at 14426

[5] *Id.* at 14427

Brain Lessons: How We Make an Appearance

by Grant Rost

With Valentine's Day less than a week away, I am again trying to become a better, more romantic version of myself. It is the season for it. It started me thinking about poetry and, specifically, Shakespearean sonnets and the works of Lord Byron. The most famous poems from the two authors both start with the beauty of their respective muses. Shakespeare asks, "shall I compare thee to a summer's day? Thou art more lovely and more temperate…"[1] Byron, perhaps finding the beauty of a summer's day too small, likens the beauty of his love to the whole doggone universe. He says, "She walks in beauty, like the night / Of cloudless climes and starry skies, / And all that's best of dark and bright /Meet in her aspect and her eyes; / Thus mellowed to that tender light / Which heaven to gaudy day denies."[2] So long as attractiveness has existed, we've been enamored with it—written poems and songs about it. It should come as little surprise then just how obsessed our brains are with human appearances in general and beauty in particular. But, oh! It doth ensnare. The silk we find in skin. The call of raven hair! Unfortunately, there is very little that is romantic or poetic about how the unconscious brain processes human appearance.

With a more objective eye, I wanted to take another look this month at our old friend the "halo effect." As part of our blog series, I've written about the halo effect before; in particular, how mock jurors placed inordinate amounts of trust in drug-sniffing dogs and the effects of attractiveness on sentencing. As a refresher, the halo effect is a cognitive short-cut in which a particular characteristic—usually a positive trait, but not always—is irrelevantly extended to other judgments one makes about the person "wearing" the halo. This time around, my purpose is a little different. While I will touch on some research about how human beings process physical appearance, I wish this month to pose some larger questions on which to meditate.

Let me begin with a confession. Shortly before I was to represent a criminal defendant accused of imposing himself on one of his employees, I made him cut his hair. To be precise, I made him cut off the tail of his mullet. You see, that longer tail of hair, when coupled with his curly salt-and-pepper locks, made him look a little too much like Joey Buttafuoco. For our younger readers, you may have to Google that one. At the time of the trial, however, I didn't want to risk any association with the notorious philanderer. We have all done this, haven't we? We have all altered the appearance of at least one of our clients before trial. The prosecutor in the above case was apparently reading from the same script. My client's accuser appeared in court dressed in white and only two of the more than dozen piercings she had in her nose, eyebrows, lips, and ears remained. At that point, I had not read any research on how appearance affects opinions, judgments, and verdicts. I wonder now whether the prosecutor was studied up on the subject. It is worth noting here just a few findings from this vast body of research.

One study found that people generally hold to a set of stereotypical physical traits which they believe attach to criminals: tall, thin, male, dark hair, dark clothes, and beady eyes.[3] In

another, participants sorting faces based upon a hypothetical "more-criminal" or "less-criminal" measure were surprisingly in sync with their estimations on what criminals and non-criminals look like.[4] In a different study, participants assigning sentences to white defendants punished them more severely than black defendants for white-collar crimes and punished black defendants more severely than white defendants for violent crimes.[5] In a non-legal but related study, voters were found to infer the personality traits of a candidate based on the candidate's physical appearance and the *inferred* traits actually influenced later voting decisions.[6]

As a teacher of advocates, I am constantly stressing to my students how important authenticity is. I tell them not to try to create a courtroom persona that is different from the person they are outside of the courtroom. I encourage them to banish from their voice boxes the sounds of the Telepromptered speechmaker and the cajoling lilt of the car salesman. Yet in what seems a stunning bit of hypocrisy on my part, I've essentially said to my clients whom I asked to change, "The real, authentic me! But not for thee!" I'm not the least bit kidding when I say I still feel torn about these choices. There is, naturally, the larger part of me that believes I *should* try to overcome whatever irrelevancy jurors will irrelevantly and prejudicially use against my client because of their own unconscious biases. And it is from this internal rift that springs the real questions that I wish to pose, rhetorically, in this blog: what should we teach our students about this sort of client "prep" and how do we prepare our students for the unconscious minds of their clients' jurors? What, if anything, is the limiting principle we teach our students on whether they alter their client's appearance or not?

In Sonnet 148, Shakespeare elegantly poses questions about whether his eyes see what is true about another or if his judgment "censures falsely what [my eyes] see aright?"[7] To the extent he landed on unconscious bias in the late 1500's, he must be the sage we often find him to be. If it is proper or traditional to makes wishes on Valentine's Day, and I hope it is, then I have this one to share with you: My wish, dear friends and readers, is that we may get to gather in person again soon to discuss these questions and the host of the others we think upon as teachers and zealous advocates.

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[1] William Shakespeare, Sonnet 18, in William Shakespeare: Complete Poems 133 (1993).

[2] Lord George Byron, She Walks in Beauty, in The Book of Living Verse 251 (Louis Untermeyer ed., 1945).

[3] See generally, D. J. Devine & D. E. Caughlin, Do They Matter? A Meta-Analytic Investigation of Individual Characteristics and Guilt Judgments, 20 Psych. Pub. Pol'y & L. 109 (2014).

[4] See generally, Alvin G. Goldstein et al., Facial Stereotypes of Good Guys and Bad Guys: A Replication and Extension, 22 Bull. Psychonomic Soc'y 549 (1984).

[5] See generally, Randall A. Gordon et al., Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions, 128 J. Soc. Psych. 191 (1988).

[6] See generally, Christopher Y. Olivola & Alexander Todorov, Elected in 100 milliseconds: Appearance-Based Trait Inferences and Voting, 34 J. Nonverbal Behav. 83 (2010).

[7] William Shakespeare, Sonnet 148, in William Shakespeare: Complete Poems 198 (1993).

BRAIN LESSONS: A DOG IS A JUROR'S BEST FRIEND

by Grant Rost

In honor of national Adopt-A-Dog and Adopt-a-Shelter-Dog month, we will look at an interesting study on drug-dog evidence and mock-juror decision making, examining whether jurors would credit the alert of a drug-sniffing dog as a *sufficient condition* for guilt in a trafficking case. The researchers in this study tested how much credit mock jurors would give to the alert of a drug-sniffing dog in a drug-trafficking case where no drugs were ever discovered and the only evidence of their presence was testimony that a drug-sniffing dog had alerted on the defendant's automobile. Lisa Lit et al., *Perceived infallibility of detection dog evidence: implications for juror decision-making* (2019), *available at* https://doi.org/10.1080/1478601X.2018.1561450. For just a word on the legal backdrop of this kind of evidence, the United States Supreme Court has approved of the admissibility of drug-dog alerts—though admissibility of that evidence is not without qualification. *Florida v. Harris,* 568 U.S. 237 (2013).

The researchers provided the subjects with a summary of testimony showing that a drug-sniffing dog alerted on the defendant's car, though no drugs were ever found. The dog's alert was used to gain a warrant for defendant's house where police found only a large sum of stashed money. Subjects were asked, among a host of other questions, whether the defendant was guilty of drug trafficking, how confident they were in their verdict, and how confident they were that a drug-dog alert indicated the presence of drugs. Lit, et al, *supra* at 194.

Though a majority of the mock-jurors issued a not guilty verdict, 33.5% of the 554 participants voted to convict the defendant for drug trafficking even though no drugs were ever found in the defendant's car or house. *Id*. Furthermore, "Participants assigning a guilty verdict were more likely to indicate high levels of confidence in their verdict (70% or higher) than those assigning a verdict of not guilty [statistics omitted]." *Id*. at 197. 80% of all participants either agreed or strongly agreed that a drug-dog's alert at a location where no drugs were found simply meant that drugs were present at some point, even though such alerts could result from dog or handler errors. *Id*. at 195, 197. If the reader has pondered the so-called "halo effect" before—the human tendency to like or dislike, credit or discredit a person based on who they are or how they are perceived—it is likely you have never considered any powers a dog's halo might have.

You may or may not know that the origin of the famous phrase "a dog is a man's best friend" is traced back to a rather rousing closing argument offered up by George Vest in a small Missouri courtroom in 1870. Vest's soaring oratory on the plaintiff's deceased dog is worth a trial lawyer's read. Though Vest says that dogs are faithful, unselfish, and noble, we humans appear willing to also credit them with honesty, accuracy, and forensic reliability.

BRAIN LESSONS: THE MECHANICS OF STRONG BUT FALSE MEMORIES

by Grant Rost

In the time-bending blockbuster *Inception*, Leonardo DiCaprio's character devises an elaborate method of mental manipulation: implanting an idea in another person's head so that the recipient actually believes the idea is his own.[1] The reality of implanted ideas is nearly as strange as this movie. I would guess that lawyers are generally suspicious of witnesses' memories—and rightly so—but perhaps most lawyers aren't aware of just how easily memories can be manipulated. Could a person, for instance, be made to believe she had committed a significant crime? An assault? How about assault with a weapon?

An article I read recently neatly summarizes the work of some of the noted researchers in this area of memory manipulation.[2] Through interviews, these researchers have convinced regular, healthy-minded people that they had committed a criminal assault, among other crimes.[3] None of this is likely to surprise the criminal defense lawyers in the room. However, I don't want them to leave now thinking we're going to rehash what should be fairly common knowledge in the bar, so we'll dive deeper. The theoretical brain mechanics behind this sort of manipulation is the subject of this month's blog.

A false memory, as it turns out, has its own locus in the brain. When scientists watch a false memory light up an fMRI, they see blood flowing strongly in the frontoparietal region of the brain—the area scientists associate with our sense of familiarity. Real memory, however, lights up the hippocampus.[4] It's this strength of the familiar with the actual that makes false memories so easy to come by. Researchers call this close link the Deese-Roediger-McDermott paradigm. The DRM paradigm is easy to explain. Suppose I gave you a list of words to memorize and all the words had a theme: bat, ball, glove, pitch, base, dugout, catcher, etc. The paradigm suggests that there's a good chance you'll recall, with some confidence, that the words hit or strike were on the list.[5] They clearly were not. Memories of events are also thematic.

To explain the DRM paradigm, researchers have proposed a system of memory called "fuzzy trace theory." Within "fuzzy trace theory" is the proposal that human beings have two kinds of memory: verbatim and gist. Verbatim is quick, easily recalled detail. I can clearly remember the name "Jules Epstein" as matching the bright, smiling fellow who helms Temple's advocacy program and the listserv that delivered this blog post. Having seen him recently, I can describe, with detail, what he looks like. Where I get "fuzzy" is in the gist memory of how, precisely, we came upon the idea of this blog—apart from the fact that Jules said to me something akin to, "Let's write a blog!" I have some ideas of how our conversation about this blog went and I could probably spin you a yarn on how it all transpired. Gist memory, says the researchers, has a "much more powerful influence after a delay" and, thus, we rely more on gist memory as we age.[6] All isn't a total loss with age, however. We become "meaning makers" and work in these familiar associations of memories. Though we are likely to insert words into a list that

weren't there, we are, with age, more likely to remember the *whole* list—so our accuracy suffers, but we're at least still in the game.[7]

And, so, with the spark of a refreshed memory, I now remember how Jules and I came upon the idea for this blog. He struck up a brief conversation with me on an overseas plane flight headed to Los Angeles. Our flight attendant in first class had poured me a glass of water. Feeling rather tired after just a few sips, I dozed off and had a very long, hard sleep with vivid dreams that my father had one last wish for me…

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[1] Inception (Warner Bros. Pictures 2010).

[2] Lindsay Dodgson, Our Brains Sometimes Create 'False Memories' – But Science Suggests We Could Be Better Off This Way, BUSINESS INSIDER INDIA (Dec. 19, 2017, 2:06 PM), https://www.businessinsider.in/our-brains-sometimes-create-false-memories-but-science-suggests-we-could-be-better-off-this-way/articleshow/62132822.cms.

[3] *E.g.,* Julia Shaw & Stephen Porter, *Constructing Rich False Memories of Committing Crime*, 26 Psychological Science Mar. 1, 2015, at 291.

[4] Dodgson, *supra* note 2.

[5] *Id.*

[6] *Id.*

[7] *Id.*