

# Articles

## MODERN SENTENCING MITIGATION

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**ABSTRACT**—Sentencing has become the most important part of a criminal case. Over the past century, criminal trials have given way almost entirely to pleas. Once 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 that 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 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.<sup>1</sup> Then, after she slipped in the shower and broke her tailbone, she was prescribed hydrocodone—a common opioid—to manage her pain.<sup>2</sup> Her use quickly turned into addiction. She worked for a doctor who—once the prescription lapsed—allowed her to write her own thirty-pill prescriptions for the drug.<sup>3</sup> She started small, but at the height of her addiction was taking sixty to eighty pills per day, an amount that could easily kill a person who had not built up such a tolerance.<sup>4</sup> “[E]very[] day I woke up, . . . the first thing on my mind was how do I not have to feel like I am about to die.”<sup>5</sup>

<sup>1</sup> Transcript of Sent’g Hearing at 14, 28, 32, *United States v. Freeman*, 992 F.3d 268 (4th Cir. 2021) (No. 17-CR-79).

<sup>2</sup> *Freeman*, 992 F.3d at 271.

<sup>3</sup> *Id.*

<sup>4</sup> Transcript of Sent’g Hearing, *supra* note 1, at 14, 27.

<sup>5</sup> *Id.* at 28.

While Freeman initially took all of her pills herself, it was not long before she was selling them to support her habit.<sup>6</sup> She began printing duplicate prescriptions for other patients who had been prescribed opioids.<sup>7</sup> After filling the prescriptions, she would take half the pills herself and sell the rest—below market rate—to an acquaintance.<sup>8</sup> Eventually, the DEA learned about the fake prescriptions, and Freeman was arrested and prosecuted federally.<sup>9</sup> Based in part on the number of pills she had sold over a period of years, she faced an exceptionally high Sentencing Guideline range: 210–240 months’ imprisonment.<sup>10</sup> Freeman argued that she should be sentenced below that range because her drug addiction was a mitigating circumstance that reduced her culpability.<sup>11</sup> 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.<sup>12</sup>

The judge was unpersuaded: he sentenced Freeman to 210 months’ imprisonment.<sup>13</sup> She appealed and achieved an extraordinarily unusual result: the Fourth Circuit vacated her sentence, holding that “the district court failed to seriously consider Freeman’s addiction as mitigating.”<sup>14</sup> 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.<sup>15</sup> 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 vacated as substantively unreasonable.<sup>16</sup>

But was the district judge’s decision *not* to more strongly weigh Freeman’s mitigating addiction evidence remarkable as well? The Guidelines largely advise judges not to consider mitigating factors like the ones in *Freeman*.<sup>17</sup> But the federal sentencing statute, in contrast, permits judges to weigh extremely broad factors such as the “nature and circumstances of the offense” and the “history and characteristics” of the

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<sup>6</sup> *Freeman*, 992 F.3d at 271–72; Transcript of Sent’g Hearing, *supra* note 1, at 27–28.

<sup>7</sup> *Freeman*, 992 F.3d at 271.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 272; *id.* at 293 (Quattlebaum, J., dissenting).

<sup>10</sup> *Id.* at 286 (Quattlebaum, J., dissenting).

<sup>11</sup> *Id.* at 283–84.

<sup>12</sup> Transcript of Sent’g Hearing, *supra* note 1, at 13–18.

<sup>13</sup> *Freeman*, 992 F.3d at 274.

<sup>14</sup> *Id.* at 280–81.

<sup>15</sup> *Id.* at 280. The court also identified other mitigating circumstances that influenced its decision, including the fact that Freeman’s sentence was higher than those of other similarly situated defendants and that there were no identifiable victims of the offense. *Id.* at 280–81.

<sup>16</sup> *Id.* at 281 (Quattlebaum, J., dissenting).

<sup>17</sup> U.S. SENT’G GUIDELINES MANUAL § 5H1.4 (U.S. SENT’G COMM’N 2018).

defendant in deciding whether to impose a within-Guideline sentence.<sup>18</sup> 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—such as a difficult upbringing or evidence of Freeman's good character or remorse—differently? What about mitigating aspects of the crime itself, such as 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 noncapital 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 noncapital 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 that mitigation is a significant 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 suggest that mitigation may be important to judges' sentencing decisions, both the Guidelines and procedural rules and doctrines minimize mitigation, failing to encourage either defense attorneys or 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 and why sentencing memoranda may be so influential in judges' sentencing decisions. 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

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<sup>18</sup> 18 U.S.C. § 3553(a)(1).

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 such as plea hearings provide judges with 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. 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 such as 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.<sup>19</sup>

In Part II, I analyze the limited, preexisting empirical research on the types of mitigating factors that might impact a judge's sentencing decision. 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 they also have some inconsistent results and do not 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 sixteen different common categories of mitigation and systematically parsed and coded each type to identify relationships between the extent of presentation of each category (measured by number of words) 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.

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<sup>19</sup> *United States v. Booker*, 543 U.S. 220, 249 (2005) (quoting 18 U.S.C. § 3553(a)(1)).

Part V reports the results from my study. I find broad support for the notion that mitigation is critically important at sentencing, 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. 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 most strongly associated with reduced sentences.

In Part VI, I discuss the legal and policy implications of my results. While mitigation appears to influence judges' decisions, current procedural structures do not encourage significant mitigation in most cases. 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 noncapital 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 cases involving 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 growing 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 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.<sup>20</sup> Between 2017 and 2018, only about 2% of federal felony cases resulted in trials, and state courts had only slightly higher rates.<sup>21</sup> 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.”<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> Before a suspect is arrested, a prosecutor may present a criminal complaint to the court seeking an arrest warrant.<sup>25</sup> The complaint is one of the most detailed documents describing the circumstances of the alleged offense and characteristics of the defendant

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<sup>20</sup> See, e.g., 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.”).

<sup>21</sup> ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS 2018, at tbl.D-4, [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d4\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf) [<https://perma.cc/XS8K-3A27>]; *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.”).

<sup>22</sup> *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (first quoting *Lafler*, 566 U.S. at 170; and then quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

<sup>23</sup> ADMIN. OFF. OF THE U.S. CTS., *supra* note 21, tbl.D-4 (reporting just 320 federal trial acquittals against 1,559 federal trial convictions in the year ending September 30, 2018).

<sup>24</sup> I focus primarily on the federal system here because this project uses federal sentencing memoranda as a data set, so my description of the underlying federal procedure is most relevant to the conclusions I make. But while state systems have many 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 NEAL B. KAUDER & BRIAN J. OSTROM, NAT’L CTR. FOR STATE CTS., STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 1–27 (2008) (outlining state sentencing structures).

<sup>25</sup> See FED. R. CRIM. P. 3.



(such as any criminal history).<sup>26</sup> But the complaint is reviewed by a magistrate judge, before the district judge is assigned.<sup>27</sup> 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.<sup>28</sup>

The magistrate judge's primary role continues after arrest. In felony cases, the magistrate judge 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.<sup>29</sup> That hearing involves a detailed discussion of both "the nature and circumstances of the offense charged" and "the history and characteristics" of the defendant.<sup>30</sup> 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 judge) to secure an indictment, but that testimony is outside of the view of the court and is typically never revealed to the district judge.<sup>31</sup> And after the prosecution secures an indictment, the defendant is entitled to an arraignment in open court at which the magistrate judge ensures the defendant has received a copy of the indictment and reviews it with the defendant.<sup>32</sup> 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 the district judge who oversees its later elements, including

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<sup>26</sup> Although the Federal Rules of Criminal Procedure only require that a complaint be a "statement of the essential facts" of the charge, *id.*, the extent of these essential facts can be quite lengthy. *See, e.g.*, Complaint, United States v. Santos, No. 10-mj-30457 (E.D. Mich. Oct. 29, 2010) (describing, across forty pages, the contents of 105 separate phone conversations associated with a conspiracy to distribute marijuana and cocaine).

<sup>27</sup> FED. R. CRIM. P. 3 ("[The complaint] must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.").

<sup>28</sup> *Id.* r. 41(b)–(e) (describing the magistrate judge as the arbiter of federal search warrants).

<sup>29</sup> *Id.* r. 5(d)(3); 18 U.S.C. § 3142 (outlining statutory rules for release or detention of a defendant pending trial).

<sup>30</sup> 18 U.S.C. § 3142(g) (noting that 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").

<sup>31</sup> *See* U.S. CONST. amend. V (requiring presentment or indictment by a grand jury for "capital, or otherwise infamous crime[s]"); FED. R. CRIM. P. 6(d); *see also* Charging, OFF. OF U.S. ATT'YS, <https://www.justice.gov/usao/justice-101/charging> [<https://perma.cc/FC36-543G>] (describing grand jury process).

<sup>32</sup> FED. R. CRIM. P. 10.

sentencing.<sup>33</sup> 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.<sup>34</sup> If the defendant pleads guilty, the *only* hearing that the district judge must necessarily conduct prior to sentencing is a plea hearing.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> 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

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<sup>33</sup> See PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM 22–30 (2014), <https://www.fedbar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2.pdf> [<https://perma.cc/RCN6-A9ES>] (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 (1927); MICH. CT. R. 6.008 (1985) (stating that “[t]he 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”).

<sup>34</sup> See FED. R. CRIM. P. 10–12 (outlining no hearings as a matter of course between arraignment and a plea hearing).

<sup>35</sup> See *id.* r. 11(b)(1) (“Before the court accepts a plea of guilty[,] . . . the court must address the defendant personally in open court.”).

<sup>36</sup> *Id.* r. 11(b)(1)–(2).

<sup>37</sup> See *id.* r. 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.”).

<sup>38</sup> See *generally* FED. R. CRIM. P. 12(b)(3) (outlining various pretrial motions).

(PSR) with information about the offense and the defendant.<sup>39</sup> Second, the parties file briefs—typically called “sentencing memoranda”—arguing their positions.<sup>40</sup>

Once judges have this information, they have significant discretion in 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.<sup>41</sup> 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.<sup>42</sup> All convictions—whether involving a mandatory sentence or not—result in the calculation of a Sentencing Guideline range for the judge to consider.<sup>43</sup> But after the Supreme Court’s landmark decision in *United States v. Booker* in 2005,<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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).<sup>47</sup> Indeed, in the 2016 fiscal year, 49% of federal sentences were below the bottom of the Guideline range.<sup>48</sup>

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<sup>39</sup> *Id.* r. 32(d).

<sup>40</sup> See *infra* notes 58–63.

<sup>41</sup> See, e.g., 18 U.S.C. § 924(a)(2) (providing a ten-year statutory maximum penalty—but no mandatory minimum penalty—for most federal firearms offenses); 21 U.S.C. § 841(b)(1)(C) (providing the same for drug trafficking offenses not reaching certain quantities and not resulting in death).

<sup>42</sup> U.S. SENT’G 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 a mandatory minimum penalty).

<sup>43</sup> U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A(5), introductory cmt. (U.S. SENT’G COMM’N 2018).

<sup>44</sup> 543 U.S. 220, 245 (2005).

<sup>45</sup> *Gall v. United States*, 552 U.S. 38, 49–50 (2007); see also *Booker*, 543 U.S. at 245 (revising the Guidelines and making them “effectively advisory”).

<sup>46</sup> See U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A(4)(b), introductory cmt.

<sup>47</sup> For a helpful discussion of the difference between a departure and a variance, see *United States v. Grams*, 566 F.3d 683, 686–87 (6th Cir. 2009).

<sup>48</sup> U.S. SENT’G 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> [<https://perma.cc/9ZL4-N2WK>].

Judges' sentencing discretion is enhanced by the fact that they can consider almost *any* evidence at sentencing.<sup>49</sup> The Federal Rules of Evidence do not apply.<sup>50</sup> 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 history and characteristics of the defendant" and the need "to reflect the seriousness of the offense"), most evidence will bear on those considerations.<sup>51</sup>

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.<sup>52</sup> 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 the judge improperly weighed the sentencing factors outlined in § 3553(a).<sup>53</sup> This same standard of review applies "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range."<sup>54</sup> And because the § 3553(a) factors are so broad, judges' sentences are very rarely reversed for substantive unreasonableness.<sup>55</sup> 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 presentencing 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

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<sup>49</sup> 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 . . .").

<sup>50</sup> FED. R. EVID. 1101(d). There is one exception: evidentiary rules protecting privileges do apply.

<sup>51</sup> 18 U.S.C. § 3553(a).

<sup>52</sup> *Gall v. United States*, 552 U.S. 38, 51 (2007).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 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").

the case.<sup>56</sup> 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.<sup>57</sup> How? By presenting mitigating evidence to the judge asserting why the defendant should be given a lower sentence. In the next Section, I explore the framework of mitigation in sentencing today, focusing on the way mitigation is presented to the judge and the kinds of mitigation that are relevant.

### 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.<sup>58</sup> 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 include information about the defendant’s family background, upbringing, history of physical or mental illness, drug use, and a variety of other characteristics.<sup>59</sup> 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.<sup>60</sup> The officer provides that report to the parties and the judge.<sup>61</sup> 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.

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<sup>56</sup> As U.S. District Judge Robert Conrad has put it, “Once viewed as ‘trial judges,’ federal district judges are increasingly seen as ‘sentencing judges.’” Conrad & Clements, *supra* note 20, at 102. I note, however, that plea bargaining is also extremely influential in determining both criminal liability and the ultimate sentence, which I explore in more detail below. *Infra* notes 345–348.

<sup>57</sup> Conrad & Clements, *supra* note 20, 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).

<sup>58</sup> See FED. R. CRIM. P. 32(c).

<sup>59</sup> *Id.* r. 32(d)(2)(A); Rita v. United States, 551 U.S. 338, 342 (2007).

<sup>60</sup> FED. R. CRIM. P. 32(e)(1). PSRs are confidential and are not made a part of the public record. See, e.g., Standing Order 2015-02 (D. Md. Feb. 5, 2015), <https://www.mdd.uscourts.gov/sites/mdd/files/2015-02.pdf> [<https://perma.cc/29WH-49RV>] (“[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. U.S. SENT’G COMM’N, *Sample Presentence Report* (2009), <https://www.icpsr.umich.edu/summerprog/2009/nijworkshop/PSRDrugScenario.pdf> [<https://perma.cc/VM3J-RUHY>].

<sup>61</sup> FED. R. CRIM. P. 32(g).

The second mechanism by which the judge receives prehearing 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).<sup>62</sup> 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.<sup>63</sup>

Because there are 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 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 authority for what can be considered mitigating? A brief look at the history of sentencing law is instructive in understanding the current framework.

Before 1987, 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

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<sup>62</sup> See *infra* note 217 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.” Victoria A. Roberts, *Practice Guidelines, Special Notes—Criminal Cases*, U.S. DIST. CT. E.D. MICH., <https://www.mied.uscourts.gov/altindex.cfm?pagefunction=pgToPDFAll&judgeID=19> [https://perma.cc/FSA6-WA9S].

<sup>63</sup> 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' sentencing memoranda and meeting with the probation officer to discuss the PSR.

determined when prisoners were released.<sup>64</sup> This was standard for the day: in 1970, every state also had a similar indeterminate system.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

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, gender, and other inappropriate characteristics.<sup>68</sup> Eventually, these concerns culminated in the Sentencing Reform Act of 1984.<sup>69</sup> Among a number of substantive changes,

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<sup>64</sup> See Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169–70 (1995); U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 1 (2018); *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

<sup>65</sup> Tonry, *supra* note 64, at 169.

<sup>66</sup> 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) (noting the “vast and virtually unlimited discretion” that existed in sentencing for the first seventy-five years of the twentieth century); 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).

<sup>67</sup> See 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.”).

<sup>68</sup> See, e.g., Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 54 (1972) (discussing the harms that come from “unbounded discretion” in indeterminate sentencing schemes); MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 23–25 (1972) (highlighting how judicial bias and idiosyncratic differences among judges lead to dramatically different sentencing outcomes for defendants in an indeterminate regime); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895 (1990) (pointing to studies from as early as 1933 that found an “offender’s race, sex, religion, income, education, occupation and other status characteristics . . . influence[d] judicial outcomes” in sentencing). For a detailed discussion of this period of sentencing reform, see Berman, *supra* note 66, at 26–41.

<sup>69</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551–3742); 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 & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 38–77 (1998).

the Act abolished the federal parole system, enacted the federal sentencing statute now codified as 18 U.S.C. § 3553, established the U.S. Sentencing Commission, and required that sentences fall within the Sentencing Guidelines that were later promulgated by the Commission.<sup>70</sup> 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.<sup>71</sup>

The Guidelines provided (and still provide) the first source of authority on mitigation 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.”<sup>72</sup> The Commission did this in several ways. First, it made the defendant’s criminal history a central part of the Guideline calculation.<sup>73</sup> 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 dependence), and prior military service.<sup>74</sup> But most other individual characteristics outlined in the Sentencing Reform Act “are *not* ordinarily relevant in determining whether a departure is warranted.”<sup>75</sup> 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

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<sup>70</sup> Summary: *H.R.5773 - Sentencing Reform Act of 1984*, CONGRESS.GOV, <https://www.congress.gov/bill/98th-congress/house-bill/5773> [<https://perma.cc/W2L3-NTTS>]; see also 28 U.S.C. § 991 (establishing the U.S. Sentencing Commission); 18 U.S.C. § 3553 (codifying the federal sentencing statute).

<sup>71</sup> Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 170–72 (2016).

<sup>72</sup> 28 U.S.C. § 994(d). For a discussion of the Guidelines’ implementation of this directive, see generally U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (U.S. SENT’G COMM’N 2021) (describing the relevance of certain offender characteristics in sentencing).

<sup>73</sup> See generally U.S. SENT’G GUIDELINES MANUAL § 4A1.1 (outlining methods of quantifying each defendant’s criminal history, resulting in a criminal history category that adjusts the applicable Sentencing Guideline range).

<sup>74</sup> *Id.* ch. 5, pt. H, introductory cmt.; see also *id.* §§ 5H1.1, .3–.4, .11.

<sup>75</sup> *Id.* § 5H1.2 (emphasis added); see also *id.* §§ 5H1.5–.7, .11–.12.



itself,<sup>76</sup> and (2) the defendant's criminal history score.<sup>77</sup> As other scholars have noted, the Guidelines function to "significantly restrict[] the role of mitigation at sentencing."<sup>78</sup>

Does this render individualized mitigation at sentencing largely irrelevant in the federal system? For a period, it did.<sup>79</sup> Until 2005, the Guidelines were "mandatory and binding on all judges," and their sentences had to follow the Guidelines' provisions.<sup>80</sup> 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.<sup>81</sup> 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 the Sixth Amendment requires that any facts increasing the statutory penalty for a crime must be found by a jury beyond a reasonable doubt,<sup>82</sup> the Supreme Court held in *United States v. Booker* that the mandatory Guideline scheme outlined in the Sentencing Reform Act

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<sup>76</sup> See *id.* ch. 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).

<sup>77</sup> See generally *id.* ch. 4 (providing "points" for prior convictions of various severities, which are then totaled to place each defendant in a criminal history "category," which affects the final Guideline range).

<sup>78</sup> Hessick & Berman, *supra* note 71, at 172; Berman, *supra* note 67, 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 66, at 46–49 (describing the Commission's view that sentencing departures based on mitigating factors should be "rare"); Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1111 (2008) ("Trial judges have occasionally reduced a defendant's sentence on the basis of prior good actions that are unrelated to the conviction, such as military service or charitable work. Such decisions, however, have met resistance from the U.S. Sentencing Commission and federal appellate courts . . .").

<sup>79</sup> See Hessick & Berman, *supra* note 71, at 172–73 (describing the limited state of mitigation at sentencing leading up to *United States v. Booker*).

<sup>80</sup> *United States v. Booker*, 543 U.S. 220, 233 (2005).

<sup>81</sup> 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.").

<sup>82</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (noting that the lone exception is the fact of a prior conviction, which may itself increase the statutory penalty without being proved to a jury); *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004) (applying rule to mandatory state sentencing guideline scheme).

violated the constitutional requirement.<sup>83</sup> The Court's remedy was to strike the provisions of the Sentencing Reform Act that made the Guidelines mandatory, thus making them "effectively advisory."<sup>84</sup>

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).<sup>85</sup> 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—the ones most commonly referenced at sentencing<sup>86</sup>—are "the nature and circumstances of the offense" and "the history and characteristics of the defendant."<sup>87</sup> While potential mitigation such as 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."<sup>88</sup> 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.<sup>89</sup>

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.<sup>90</sup> First, Supreme Court jurisprudence has increasingly recognized that individual defendant characteristics are critical to sentencing. Even before *Booker*, the Supreme

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<sup>83</sup> *Booker*, 543 U.S. at 243–44. As the Court explained, judge-found facts that raise a mandatory sentencing guideline scheme are no less constitutionally problematic than judge-found facts that raise a statutory penalty. *Id.* at 232–33.

<sup>84</sup> *Id.* at 245.

<sup>85</sup> 18 U.S.C. § 3553(a), (a)(4).

<sup>86</sup> See *infra* Section III.A.

<sup>87</sup> 18 U.S.C. § 3553(a)(1).

<sup>88</sup> 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." (citation omitted)).

<sup>89</sup> 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 67, 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.").

<sup>90</sup> See, e.g., Berman, *supra* note 67, at 289–91 (noting that recent Supreme Court cases have given federal judges authority to consider these mitigating characteristics and explaining how state sentencing guidelines take these characteristics into account).

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.”<sup>91</sup> 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.”<sup>92</sup> The Court has also recognized that modern neuroscience indicates that 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.”<sup>93</sup>

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.<sup>94</sup> 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 individual circumstances.<sup>95</sup>

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

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<sup>91</sup> *Koon v. United States*, 518 U.S. 81, 113 (1996).

<sup>92</sup> *Pepper v. United States*, 562 U.S. 476, 488 (2011) (alterations in original).

<sup>93</sup> 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)).

<sup>94</sup> Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/9HDB-J2SA>] (outlining the bill as identifying “criminal justice reform as a rare space for bipartisan consensus and cooperation in a fractured national political environment”).

<sup>95</sup> First Step Act of 2018, Pub. L. No. 115-391, §§ 101–102, 401–404, 603 132 Stat. 5194, 5195–96, 5208, 5220–22, 5238 (codified in scattered sections of 18 U.S.C. and 21 U.S.C.).

abuse or mental health disorders, or who are likely to age out of crime.<sup>96</sup> And while social reforms are separate from judicial decisions, they can be a guidepost for future sentencing behavior and demonstrate shifting views toward sentencing. In short, there appears to have been a broad shift away from the rigid sentencing policy developed in the 1980s toward a modern approach of greater individualization and consideration of each defendant's personal characteristics.

We have now reviewed the two main sources of authority for what can be considered mitigating at sentencing: 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.<sup>97</sup>

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

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<sup>96</sup> BOBBY SCOTT & JASON LEWIS, THE SAFE, ACCOUNTABLE, FAIR, AND EFFECTIVE (SAFE) JUSTICE ACT, <https://bobbyscott.house.gov/sites/bobbyscott.house.gov/files/SAFE%20Justice%20Act%20Fact%20Sheet.pdf> [<https://perma.cc/D8RN-LQF7>]; see also *The Biden Plan for Strengthening America's Commitment to Justice*, JOEBIDEN.COM, <https://joebiden.com/justice/> [<https://perma.cc/BRB6-VN7W>] (endorsing the 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*, U.S. DEP'T OF JUST., <https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative> [<https://perma.cc/CU4Y-HN7U>]. Other jurisdictions, such as the United Kingdom, have explicitly recognized ethnic disparities in sentencing and instructed judges to consider those potential disparities. See *Sentencing Guidelines for Firearms Offences Published*, SENT'G COUNCIL (Dec. 9, 2020), <https://www.sentencingcouncil.org.uk/news/item/sentencing-guidelines-for-firearms-offences-published/> [<https://perma.cc/SC8P-VL4Z>].

<sup>97</sup> E.g., HAW. REV. STAT. § 706-606 (2021) (tracking majority of federal language); N.J. STAT. ANN. § 2C:44-1a(1)–(2) (West 2021) (providing a 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 a list of sentencing factors and permitting judges 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) (2021) (providing a catchall authorization to depart from the guideline range for “[a]ny other compelling reason”); ALASKA STAT. § 12.55.155 (2020) (outlining an extensive list of more than fifty potential aggravating and mitigating factors).

problems of the Guideline system,<sup>98</sup> statutory mandatory sentences,<sup>99</sup> theories of punishment underlying sentencing generally,<sup>100</sup> and constitutional considerations in sentencing.<sup>101</sup> Mitigation has been a greater focus of the literature in the capital sentencing context.<sup>102</sup> 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.”<sup>103</sup> As a result, enormous resources are typically devoted to the mitigation process in capital cases.<sup>104</sup> Moreover, capital cases compose only a tiny fraction of all criminal cases.<sup>105</sup> 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 noncapital cases by identifying prominent categories of

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<sup>98</sup> E.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8–31 (1988) (explaining the compromises in the Guidelines and the structural reasons that lead to them).

<sup>99</sup> 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, 201–02 (2019) (explaining how “imprecise” mandatory minimum sentence regimes have inadvertently swept up many noncareer criminals).

<sup>100</sup> E.g., Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 1 (2006) (explaining the variance in U.S. sentencing policy throughout the past 120 years due to the popularity of different theories of punishment).

<sup>101</sup> E.g., William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 781 (2006) (arguing that central problems in sentencing are “more the consequences of constitutional regulation than justifications for it”).

<sup>102</sup> E.g., Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 WASH. U. L. REV. 581, 583 (2012) (presenting empirical research suggesting that methods used to collect mitigation evidence and present it to juries are deeply flawed); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 835–37 (2008) (juxtaposing the lack of mitigation evidence in three pivotal death penalty cases in the last half century with the Supreme Court’s advancing understanding of the nature and centrality of capital mitigation); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1150 (1991) (examining *Lockett*’s requirement that the sentencer be allowed to consider all mitigating evidence calling for a sentence less than death, Justice Antonin Scalia’s argument for overruling *Lockett* in *Walton v. Arizona*, and the Court’s recent cases involving *Lockett* issues).

<sup>103</sup> *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

<sup>104</sup> See Hughes, *supra* note 102, at 608–27 (providing interview data on capital mitigation specialists’ experiences).

<sup>105</sup> See Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1070 (2009).

mitigating factors.<sup>106</sup> 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 rules and examining judge and layperson intuition about mitigation.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

Other scholars have identified overlapping—though not identical—potential mitigating factors. Paul Robinson, Sean Jackowitz, and Daniel Bartels 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.<sup>110</sup> 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.<sup>111</sup>

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 and emotional conditions; physical condition,

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<sup>106</sup> See, e.g., Hessick & Berman, *supra* note 71, at 185–201 (identifying “consensus” mitigating factors); Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 740–42 (2012) (discussing eighteen “extralegal punishment factors” influencing sentencing); MITIGATION AND AGGRAVATION AT SENTENCING (Julian V. Roberts ed., 2011) (discussing mitigation from several angles, but focusing primarily on the United Kingdom); Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 65–70 (2013) (discussing common mitigating factors in capital cases and arguing for their use in noncapital settings).

<sup>107</sup> Hessick & Berman, *supra* note 71, at 185–87.

<sup>108</sup> *Id.* at 187.

<sup>109</sup> *Id.* at 188–201.

<sup>110</sup> Robinson et al., *supra* note 106, at 740–41.

<sup>111</sup> *Id.* at 743–66.

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 perceived greater harm; coercion and duress; diminished capacity; voluntary disclosure of the offense; and aberrant behavior.<sup>112</sup> While the Guidelines function largely to *restrict* these factors as considerations for a Guidelines departure,<sup>113</sup> 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.”<sup>114</sup> The former category is offense focused and independent of the person who committed the offense. Factors described by Hessick and Berman such as the role of others in the offense and the harm caused by the defendant fit in this category.<sup>115</sup> 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 and 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 and his coauthors’ “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.<sup>116</sup>

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<sup>112</sup> U.S. SENT’G GUIDELINES MANUAL §§ 5H1.1–.12, 5K2.10–.13, .16, .20 (U.S. SENT’G COMM’N 2021).

<sup>113</sup> See *supra* notes 76–81 and accompanying text.

<sup>114</sup> See, e.g., Berman, *supra* note 67, at 277–78 (dividing sentencing considerations between “offense conduct and offender characteristics”); CAL. R. CT. 4.421, 4.423 (separating aggravating and mitigating factors into “factors relating to the crime” and “factors relating to the defendant”).

<sup>115</sup> Hessick & Berman, *supra* note 71, at 191–95.

<sup>116</sup> 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 106, at 60.

In Section 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?

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 Article, I report the results of the first such study in American cases.<sup>117</sup> But there is a second way, which has been explored in a small literature: indirectly measuring 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 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.<sup>118</sup> The commission contacted 942 federal judges and surveyed them via email on a number of topics, including the relevance of each of twenty-six mitigating factors outlined in Chapters 5H and 5K of the Guidelines.<sup>119</sup> Judges were presented with each potential mitigating factor and asked to indicate whether the factor was “Ordinarily Relevant” or “Never Relevant” to determinations of whether to grant a variance or departure.<sup>120</sup> 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,

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<sup>117</sup> See *infra* Parts III–V.

<sup>118</sup> U.S. SENT’G COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at 2 (2010) [hereinafter U.S. SENT’G COMM’N, 2010 JUDGES SURVEY].

<sup>119</sup> *Id.* at 2–4, tbl.13. The factors were entirely derived from the Guidelines’ policy statements described *supra* note 112.

<sup>120</sup> U.S. SENT’G COMM’N, 2010 JUDGES SURVEY, *supra* note 118, at 2–4, 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.*



and diminished capacity.<sup>121</sup> 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.<sup>122</sup>

Just below that, about 75% of judges indicated that two mitigating factors related to *remorse* were typically relevant to variance or departure considerations: voluntary disclosure of the offense and exceptional efforts to fulfill restitution obligations.<sup>123</sup> 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 employment record (65%); stress related to military service (64%); prior good works (62%); and civic, charitable, or public service (60%).<sup>124</sup> Last, the majority of judges found that the defendant's *age* (67%) and *family ties and responsibilities* (62%) were typically relevant to the variance or departure decision.<sup>125</sup>

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 having a *disadvantaged upbringing* (50%) were less favored.<sup>126</sup> Likewise, judges considered certain *addictions*, such as drug or alcohol dependence and gambling addictions, less relevant (49%, 47%, and 39%, respectively).<sup>127</sup>

While the 2010 survey is the most recent and comprehensive examination into federal judges' views on 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.<sup>128</sup> In one open-ended question asking judges to state challenges to the Guidelines, the single most given answer was judicial discretion, with respondents feeling that "the sentencing Judge should be

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<sup>121</sup> *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. *See id.* at 2–4.

<sup>122</sup> *Id.* tbl.13. Emotional condition was considered relevant by 60% of judges, and physical condition by 64%. *Id.*

<sup>123</sup> *Id.*; see also Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 148 (2015) (noting that judges who believed remorse to be legally relevant in criminal justice thought "it was pertinent primarily at arraignment and sentencing").

<sup>124</sup> U.S. SENT'G COMM'N, 2010 JUDGES SURVEY, *supra* note 118, tbl.13.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> U.S. SENT'G COMM'N, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES, at ES-1 (2003).

given more opportunity to take into account the personal characteristics of the defendants.”<sup>129</sup> This mirrored the results of the 2010 survey in which judges indicated that many defendants’ personal characteristics were ordinarily relevant in sentencing.<sup>130</sup> Likewise, the 2003 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.<sup>131</sup> 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.<sup>132</sup> Other results tended to align with judges’ responses in the 2010 survey as well: 59% of judges said that family ties or responsibilities should be given greater weight, and at least 45% of judges responded that age, employment record, prior good works, and emotional conditions also stood out as categories that should be given greater emphasis.<sup>133</sup>

Second, in 2014, Federal District Judge Mark Bennett and Ira Robbins 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.<sup>134</sup> 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.<sup>135</sup> Importantly, though, the survey did not directly ask about the impact of health- or addiction-related evidence during allocution, unlike the Sentencing Commission surveys.<sup>136</sup>

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<sup>129</sup> *Id.* at III-24. I note that this response was given by circuit judges rather than district court judges. *Id.* Notably, when the same question was presented to district court judges, their second-most-given answer was judicial discretion. This response trailed closely behind the most given answer, drug policy. *Id.* at II-25.

<sup>130</sup> See *supra* notes 121–127 and accompanying text.

<sup>131</sup> U.S. SENT’G COMM’N, *supra* note 128, at B-8.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> 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, 745–47 (2014).

<sup>135</sup> *Id.* at 752–53.

<sup>136</sup> *Id.* at 793–94 tbls.18a & 18b. One other notable survey, conducted by Stephen Garvey as part of the Capital Juror 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, such as mental disabilities or other diminished capacity, was reported as the strongest mitigating factor after lingering doubt over the defendant’s guilt. *Id.* at 1559 tbl.4, 1564–65. Childhood trauma and other unfortunate circumstances for the defendant also tended to mitigate, as did youthfulness at the time of the crime. *Id.* I also note one U.K.

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—such as 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 comprehensive—was conducted by Robinson, Jackowitz, and Bartels. Robinson and his coauthors provided lay 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.<sup>137</sup> The participants first read baseline scenarios—in which no mitigating or aggravating facts were present—and assigned sentences.<sup>138</sup> Then, the participants read the same vignettes, some with mitigating facts included, and were asked whether the new facts influenced their sentences.<sup>139</sup>

Because of the number of factors tested (eighteen) across five separate crime vignettes,<sup>140</sup> the results were complex, but three broad trends emerged. First, mitigation related to “true remorse,” when the defendant has expressed

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study that straddled the line between a survey and observational research about mitigation. Jessica Jacobson and Mike Hough observed over 100 sentencings in U.K. 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*, *supra* note 106, at 146, 146–50. They also attempted to code for whether the mitigation had an impact on sentencing based on the qualitative wording of the argument and judges' statements, concluding that personal mitigation was critical to a number of reduced sentences. *Id.* at 148–52.

<sup>137</sup> Robinson et al., *supra* note 106, at 774–75.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 774–78.

<sup>140</sup> *Id.* at 774–75, 777–78.

presumptively valid remorse or *demonstrated* remorse by providing compensation to victims, caused the greatest reductions in sentences.<sup>141</sup> Interestingly, however, similar mitigation when 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.<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup>

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.<sup>145</sup> They diverge, however, on the issue of character. Judges reported character to be among the most important kinds 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.<sup>146</sup> As in the Robinson study, participants were presented with vignettes of committed crimes and asked to assign an appropriate prison term.<sup>147</sup> 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.<sup>148</sup> The presence of several of the psychiatric illnesses significantly decreased the amount of punishment

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<sup>141</sup> *Id.* at 782–83 tbls.5 & 6.

<sup>142</sup> *Id.*

<sup>143</sup> *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, 181–85 (1979) (measuring the effects of collateral consequences on punishment).

<sup>144</sup> Robinson et al., *supra* note 106, at 782–83 tbls.5 & 6.

<sup>145</sup> Robinson and his coauthors 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. PSYCH. 75, 86–87 (2004) (finding reduced punishment for both old and young offenders as compared to middle-aged offenders).

<sup>146</sup> Colleen M. Berryessa, *The Effects of Psychiatric and "Biological" Labels on Lay Sentencing and Punishment Decisions*, 14 J. EXPERIMENTAL CRIMINOLOGY 241, 252–54 (2018). Of course, the presence of a biological basis was not mitigating across all illnesses. *Id.* at 253. Nevertheless, the author concluded that the “data do support some experiments on lay sentencing views reporting that biological explanations for psychiatric illnesses can mitigate perceptions of dangerousness and endorsed prison time.” *Id.* at 254.

<sup>147</sup> *Id.* at 244–45.

<sup>148</sup> *Id.* at 244.

that participants assigned to the offender, and that reduction was more pronounced for two of the illnesses when participants were told that it had a biological basis.<sup>149</sup> While the results varied by illness, they imply that laypeople may judge individuals to be less culpable for their crimes when knowing they suffer from illnesses that affect their judgment, especially when those illnesses are thought of as biological.<sup>150</sup>

Both the judicial surveys and the Robinson study indicate that true remorse may be a powerful mitigating factor as well.<sup>151</sup> 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.<sup>152</sup> However, at least one study has indicated that bare emotional expressions of remorse—without any evidence to support them—are not mitigating.<sup>153</sup>

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 the Robinson study. Generally, the psychological literature implies that character mitigation should have at least some influence on 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).<sup>154</sup> When the participants were told that the person had done good acts earlier in the day (such as being polite, acting honestly, or helping others), the person was seen

<sup>149</sup> *Id.* at 247–48 tbls.1 & 2.

<sup>150</sup> Berryessa's data are also in line with prior similar research. *See, e.g.,* Lisa G. Aspinwall, Teneille R. Brown & James Tabery, *The Double-Edged Sword: Does Biomechanism Increase or Decrease Judges' Sentencing of Psychopaths?*, 337 *SCIENCE* 846, 847 (2012) (finding that evidence that a defendant's psychopathy had a biological basis was mitigating); Michelle E. Barnett, Stanley L. Brodsky & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 *BEHAV. SCI. & L.* 751, 764 (2004) (conducting a similar vignette experiment, and finding that presentation of mitigating mental illness reduced the likelihood of a death sentence by nearly half).

<sup>151</sup> *See supra* notes 123, 141 and accompanying text.

<sup>152</sup> *See, e.g.,* Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity and Expectancies About Repeating a Transgression*, 22 *BASIC & APPLIED SOC. PSYCH.* 291, 293–95 (2000) (finding that when remorse was shown, participants perceived higher moral character, sympathy, forgiveness, and absence of punishment).

<sup>153</sup> Alayna Jehle, Monica K. Miller & Markus Kemmelmeier, *The Influence of Accounts and Remorse on Mock Jurors' Judgments of Offenders*, 33 *LAW & HUM. BEHAV.* 393, 396–401 (2009).

<sup>154</sup> Mark D. Alicke & Ethan Zell, *Social Attractiveness and Blame*, 39 *J. APPLIED SOC. PSYCH.* 2089, 2093–2100 (2009).

as less blameworthy for the later bad act, and in some cases, less causally responsible for it.<sup>155</sup> Other studies have found similar results.<sup>156</sup> 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 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.<sup>157</sup> 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

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<sup>155</sup> *Id.* at 2095–96, 2100.

<sup>156</sup> See, e.g., Nona J. Barnett & Hubert S. Feild, *Character of the Defendant and Length of Sentence in Rape and Burglary Crimes*, 104 J. SOC. PSYCH. 271, 275 (1978) (finding the social attractiveness of a defendant can decrease mock jurors' sentences "depending upon the nature of the crime"); Harold Sigall & David Landy, *Effects of the Defendant's Character and Suffering on Juridic Judgment: A Replication and Clarification*, 88 J. SOC. PSYCH. 149, 150 (1972) (finding that socially attractive defendants are viewed more positively and receive shorter sentences than socially unattractive defendants).

<sup>157</sup> See, e.g., Barbara O'Brien, Samuel R. Sommers & Phoebe C. Ellsworth, *Ask and What Shall Ye Receive? A Guide for Using and Interpreting What Jurors Tell Us*, 14 U. PA. J.L. & SOC. CHANGE 201, 204–07 (2011) (describing problems with using subjective self-report data in the 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. PSYCH. 448, 450–60 (1982) (noting that judges' self-reports are only moderately accurate at estimating actual influences on their judgments).

statistically testing how the mitigation arguments predict sentencing decisions.

### III. METHOD

#### A. Identifying Categories of Mitigation

I sought to categorize mitigation both with *specificity*—that is, separating 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;<sup>158</sup> and (3) a pilot sample of fifty 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.”<sup>159</sup> 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.<sup>160</sup> Second, *personal mitigation* relates to the defendant as a person and how his “history and characteristics” affect his culpability.<sup>161</sup> 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

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<sup>158</sup> The most comprehensive sources on this—and the ones on which I primarily relied—were Hessick & Berman, *supra* note 71, and Robinson et al., *supra* note 106. But there were others as well. See, e.g., Shapland, *supra* note 116, at 68 (listing factors).

<sup>159</sup> 18 U.S.C. § 3553(a)(1).

<sup>160</sup> See *infra* notes 164–176 and accompanying text.

<sup>161</sup> See *infra* notes 179–205 and accompanying text.

the theory of punishment underlying the sentence. In such *theories-of-punishment discussions*, attorneys make arguments about *why* the offense and personal mitigation should affect the sentence, including the need to deter, incapacitate, and rehabilitate.<sup>162</sup>

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.<sup>163</sup> I describe each of the mitigating factors below and summarize them in Table 1.

TABLE 1: MITIGATION FACTORS AND CATEGORIES

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

## 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

<sup>162</sup> See Defendant's Sentencing Position at 7–9, *United States v. Faal*, No. 15-00028 (D. Minn. Apr. 27, 2016) [hereinafter *Faal Sentencing Memo*]; Defendant's Sentencing Memorandum at 7–9, *United States v. Gonzalez Martinez*, No. 18-CR-20008-002 (W.D. Ark. Mar. 26, 2019) [hereinafter *Gonzalez Martinez Sentencing Memo*].

<sup>163</sup> The coding rubric is on file with the author.



defining how dangerous, broad in scope, or otherwise serious the offense was.<sup>164</sup> 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 the offense.”<sup>165</sup> 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.<sup>166</sup> Others have identified this category as significant for mitigation as well: in Hessick and Berman’s taxonomy, it falls under “Harm Caused by the Defendant.”<sup>167</sup>

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

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<sup>164</sup> 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. *See* U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(1)–(2), (10) (U.S. SENT’G COMM’N 2021).

<sup>165</sup> 18 U.S.C. § 3553(a)(1), (2)(A).

<sup>166</sup> *See* Gonzalez Martinez Sentencing Memo, *supra* note 162, at 4–5; Defendant’s Sentencing Memorandum at 2, United States v. Conway, No. 18-CR-183 (N.D. Ill. June 12, 2019) [hereinafter Conway Sentencing Memo]; Sentencing Memorandum at 8, United States v. Jones, No. 17-CR-456 (N.D. Ohio May 8, 2018) [hereinafter Jones Sentencing Memo].

<sup>167</sup> *See* Hessick & Berman, *supra* note 71, at 194–95. Some of the state statutes identified by Hessick and Berman covered broad mitigating factors accounting for the relative seriousness of the offense. *See, e.g.,* ALASKA STAT. § 12.55.155(d)(9) (2020) (“[T]he conduct constituting the offense was among the least serious conduct included in the definition of the offense . . .”).

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.”<sup>168</sup> 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 and Berman’s review as the “Role of Others in the Defendant’s Crime.”<sup>169</sup>

*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 they included it under their “Harm Caused by the Defendant” consensus factor.<sup>170</sup> 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.<sup>171</sup>

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.

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<sup>168</sup> 18 U.S.C. § 3553(a)(6).

<sup>169</sup> Hessick & Berman, *supra* note 71, at 191–93. I note that Hessick and 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. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/D3M4-3LEG>] (showing that, in 2020, well over half of state prisoners were incarcerated for violent crimes, while only 13,000 of 226,000—about 6%—of federal prisoners were incarcerated for violent crimes). 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.

<sup>170</sup> Hessick & Berman, *supra* note 71, at 194–95; see, e.g., IDAHO CODE § 19-2521(2)(a) (2021) (“The defendant’s criminal conduct neither caused nor threatened harm . . . .”); 730 ILL. COMP. STAT. 5/5-5-3.1(a)(1) (2022) (“The defendant’s criminal conduct neither caused nor threatened serious physical harm to another.”).

<sup>171</sup> See Sawyer & Wagner, *supra* note 169.

*d. Remorse (supported or unsupported)*

A defendant's remorse is one of the most prominent mitigating factors in the prior literature.<sup>172</sup> Robinson and his coauthors 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.<sup>173</sup> The judicial surveys identified *actions* associated with remorse—voluntary disclosure of the offense and efforts to make victims whole—as powerful mitigators as well.<sup>174</sup> Likewise, Hessick and Berman identified making victims whole as a consensus mitigating factor.<sup>175</sup> Unsurprisingly, expressions of remorse were common as mitigation in the pilot sentencing memoranda as well.

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 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, which led to a difference in the effectiveness of remorse as a mitigator.<sup>176</sup>

To reflect that difference in this study, this project coded expressions of remorse into two separate categories based on objective criteria: one in which the defendant presented supporting evidence—such as specific acts relating to the offense that indicate contrition—and one in which 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

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<sup>172</sup> 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 of which focus on the offense itself. This is in contrast with personal mitigation, which focuses on the defendant separately from the crime. But importantly, whether remorse is placed as offense mitigation or personal mitigation does not materially affect the results reported below.

<sup>173</sup> Robinson et al., *supra* note 106, at 743–47.

<sup>174</sup> U.S. SENT'G COMM'N, 2010 JUDGES SURVEY, *supra* note 118, tbl.13.

<sup>175</sup> See Hessick & Berman, *supra* note 71, at 193–94.

<sup>176</sup> See *supra* notes 141–142 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, 350–56 (2018).

descriptions 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 "[l]ack 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.<sup>177</sup> 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.<sup>178</sup> 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 that the defendant is more than just the 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.<sup>179</sup> Nevertheless, judges routinely consider these factors in determining whether to grant a variance. This is borne out in the literature: in the 2010 survey, a number of different character-related mitigating categories were ordinarily relevant to over 60% of judges' variance and departure determinations;<sup>180</sup> Hessick and Berman's "Recidivism" category includes a number of mitigating factors related to

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<sup>177</sup> U.S. SENT'G GUIDELINES MANUAL § 5H1.12 (U.S. SENT'G COMM'N 2021).

<sup>178</sup> U.S. SENT'G COMM'N, 2010 JUDGES SURVEY, *supra* note 118, tbl.13.

<sup>179</sup> U.S. SENT'G GUIDELINES MANUAL § 5H1.2, .5, .11.

<sup>180</sup> See *supra* note 124 and accompanying text. As with remorse, there are potential bias-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, 370–74 (2019) (describing biases impacting character judgment).

prior criminal history and character;<sup>181</sup> and Robinson and his coauthors' "Offender Status" categories were comprised of character-related mitigation.<sup>182</sup> 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."<sup>183</sup> 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,<sup>184</sup> the Guidelines also recognize that, in limited circumstances, a defendant's criminal history category may overrepresent his true criminal past.<sup>185</sup> And even where that guidance does not apply, a judge may vary from the Guideline range based on the defendant's limited criminal past.<sup>186</sup>

*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 systems. These descriptions typically operated as a general background to humanize the defendant as a real person with real personal connections.<sup>187</sup> There is no 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,<sup>188</sup> but 62% of judges in the 2010 survey said they were ordinarily relevant to their departure or variance considerations.<sup>189</sup> To capture the limited discussion of general family and social background in the pilot memoranda, the coding scheme limited this category to simple

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<sup>181</sup> Hessick & Berman, *supra* note 71, at 197–99.

<sup>182</sup> Robinson et al., *supra* note 106, at 751–58.

<sup>183</sup> *E.g.*, Letter from Jennifer E. Willis, Assistant Fed. Def., Fed. Defs. of N.Y., to Hon. Alvin K. Hellerstein, U.S. Dist. J., S.D.N.Y. 9 (Oct. 7, 2016) (on file with journal) ("Mr. Hunte has never lived a life of excess or luxury. He has provided his family with a comfortable and modest life in the middle class.").

<sup>184</sup> U.S. SENT'G GUIDELINES MANUAL § 4A1.1, ch. 5, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2018).

<sup>185</sup> *See id.* § 4A1.3(b)(1).

<sup>186</sup> *See* 18 U.S.C. § 3553(a)(1) (permitting judges to consider "the history and characteristics of the defendant" generally).

<sup>187</sup> *See* Faal Sentencing Memo, *supra* note 162, at 3–4; Gonzalez Martinez Sentencing Memo, *supra* note 162, at 5–6; Defendant's Sentencing Memorandum at 8, United States v. Rouswell, No. CR 17-409-SVW (C.D. Cal. July 2, 2018) [hereinafter Rouswell Sentencing Memo].

<sup>188</sup> U.S. SENT'G GUIDELINES MANUAL § 5H1.6.

<sup>189</sup> U.S. SENT'G COMM'N, 2010 JUDGES SURVEY, *supra* note 118, tbl.13.

descriptions of the defendant's family and social background that did not fall 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.<sup>190</sup> Defendants may discuss the fact that they will lose employment or 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,<sup>191</sup> but mention of collateral-consequences mitigation was common in the pilot memoranda.<sup>192</sup> Likewise, Hessick and Berman identified a similar factor—“hardship”—as one of their consensus mitigating factors;<sup>193</sup> Robinson and his coauthors tested it as “Special Hardship from Punishment” and “Hardship for Offender’s Family or Other Third Parties,”<sup>194</sup> and the judicial surveys indicated that judges consider family ties—which come with attendant collateral consequences—as often relevant.<sup>195</sup>

*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.<sup>196</sup> But judges in the 2010 survey reported viewing certain types of health mitigation—particularly mental health—as very relevant,<sup>197</sup> and experiments likewise imply that it is a relevant mitigator.<sup>198</sup>

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<sup>190</sup> For discussion of collateral consequences in the sentencing mitigation context, see Chin, *supra* note 49, at 250–52.

<sup>191</sup> U.S. SENT’G GUIDELINES MANUAL § 5H1.6.

<sup>192</sup> See Faal Sentencing Memo, *supra* note 162, at 10–13; Rouswell Sentencing Memo, *supra* note 187, at 10; Defendant Adil Mohammed Khan’s Sentencing Memorandum at 12–13, *United States v. Khan*, No. 18-CR-203-3 (N.D. Ill. Jan. 28, 2020) [hereinafter Khan Sentencing Memo].

<sup>193</sup> Hessick & Berman, *supra* note 71, at 200–01.

<sup>194</sup> Robinson et al., *supra* note 106, at 760–62.

<sup>195</sup> U.S. SENT’G COMM’N, 2010 JUDGES SURVEY, *supra* note 118, tbl.13.

<sup>196</sup> U.S. SENT’G GUIDELINES MANUAL § 5H1.3–4.

<sup>197</sup> See *supra* notes 121–122 and accompanying text.

<sup>198</sup> See *supra* notes 146–150 and accompanying text.

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 of historical trauma, character mitigation, and family circumstances was rarely accompanied by specific evidence.<sup>199</sup> 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.<sup>200</sup>

Evidence can come in a variety of 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."<sup>201</sup> Robinson and his coauthors and Hessick and Berman also identified age as a relevant mitigating circumstance.<sup>202</sup> Age-based mitigating arguments were common in the pilot memoranda, including arguments both that a defendant's elderly status was

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<sup>199</sup> See Conway Sentencing Memo, *supra* note 166, at 2; Jones Sentencing Memo, *supra* note 166, at 8; Defendant's Sentencing Memorandum at 5, *United States v. Howard*, No. 17CR00077 (N.D. Ohio Oct. 17, 2017).

<sup>200</sup> See, e.g., Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 67 (2012) ("Concerns about fraud and malingering . . . surround claims of mental disorders and PTSD.").

<sup>201</sup> U.S. SENT'G GUIDELINES MANUAL § 5H1.1.

<sup>202</sup> Robinson et al., *supra* note 106, at 763–64; Hessick & Berman, *supra* note 71, at 195–96 (describing youthful age as a component of the "defendant's culpability" consensus factor).

mitigating and that a defendant's youthful age rendered him less culpable.<sup>203</sup> Both types of arguments have support in the legal framework. The Guidelines' discussion of age primarily focuses on old age as a mitigator.<sup>204</sup> And the U.S. Supreme Court has described how young criminal defendants often have not reached full cognitive development, implying reduced culpability for their criminal conduct.<sup>205</sup>

### 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 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.<sup>206</sup> Instead, 18 U.S.C. § 3553(a)(2) outlines different goals of punishment that judges must consider in sentencing, such as deterrence,<sup>207</sup> incapacitation,<sup>208</sup> and rehabilitation.<sup>209</sup> In the pilot memoranda, attorneys frequently provided short, cabined discussions explicitly referencing and discussing one or more of the § 3553(a)(2) categories.<sup>210</sup> 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.

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<sup>203</sup> See Sentencing Memorandum on Behalf of Sonja Emery and Request for Downward Departure at 21, *United States v. Emery*, No. 18-cr-20240 (E.D. Mich. Oct. 12, 2020) [hereinafter *Emery Sentencing Memo*].

<sup>204</sup> U.S. SENT'G 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 might be equally efficient . . .").

<sup>205</sup> *Graham v. Florida*, 560 U.S. 48, 68 (2010); see also *Miller v. Alabama*, 567 U.S. 460, 472 (2012) (citing Supreme Court precedent emphasizing that the characteristics of youth "diminish the penological justifications for imposing the harshest sentences on juvenile offenders").

<sup>206</sup> Hessick & Berman, *supra* note 71, at 170–72.

<sup>207</sup> 18 U.S.C. § 3553(a)(2)(B) (requiring judges to consider "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct").

<sup>208</sup> *Id.* § 3553(a)(2)(C) (requiring judges to consider "the need for the sentence imposed . . . to protect the public from further crimes of the defendant").

<sup>209</sup> *Id.* § 3553(a)(2)(D) (requiring judges 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 is so subjective. Thus, I did not code for discussion under § 3553(a)(2)(A).

<sup>210</sup> See Gonzalez Martinez Sentencing Memo, *supra* note 162, at 6–11; Rouswell Sentencing Memo, *supra* note 187, at 12–14; Conway Sentencing Memo, *supra* note 166, at 2–3.



#### 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 it typically announces the range on the record at the sentencing hearing.<sup>211</sup> 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 unavailable, I consulted other portions of the record to identify the Guideline range, such as the parties' sentencing memoranda or the plea agreement.<sup>212</sup> Identifying the sentence is more straightforward: the judge must include it in the judgment.<sup>213</sup> When there were multiple counts of conviction, I calculated the total sentence by combining sentences ordered to be served concurrently and adding sentences to be served consecutively.<sup>214</sup> 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.<sup>215</sup> 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

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<sup>211</sup> 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").

<sup>212</sup> In seventeen 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. For examples of similar problems from the pilot sample, see *Khan Sentencing Memo*, *supra* note 192, at 4–9; *Jones Sentencing Memo*, *supra* note 166, at 2–6; and *Emery Sentencing Memo*, *supra* note 203, at 2–9. I removed such cases from the sample and replaced them with other cases from the same district and year.

<sup>213</sup> FED. R. CRIM. P. 32(k)(1).

<sup>214</sup> 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.

<sup>215</sup> 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 297–299 and accompanying text.

numbers of criminal cases.<sup>216</sup> Using the weighting variable to determine how many cases to select from each district,<sup>217</sup> 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.<sup>218</sup>

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 all cases with the following characteristics, and replaced them from the same year and district using the same random selection described above<sup>219</sup>:

- Cases in which the government recommended that the defendant receive a downward departure for “substantial assistance to authorities” under U.S. Sentencing Guideline § 5K1.1, which can blunt the impact of other mitigation.<sup>220</sup>

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<sup>216</sup> To do this, I took data from the U.S. Courts, which tracks the total number of criminal cases filed nationally in federal district courts, and calculated a weighting variable based on the share of all criminal cases heard in each district between 2015 and 2018. *See, e.g.*, ADMIN. OFF. OF THE U.S. CTS., *supra* note 21, tbl.D-3, [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d3\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d3_0930.2018.pdf) [<https://perma.cc/VW9Y-YXSJ>] (providing an example of the caseload data produced by U.S. courts). For all docket caseload data, see *Caseload Statistics Data Tables*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> [<https://perma.cc/JV7W-S6V2>].

<sup>217</sup> I identified twenty 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 308 and accompanying text.

<sup>218</sup> 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) (noting sample size of 431 cases); 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, 14 (1977). But to do a power analysis, one typically needs to be able to estimate the strength of the effect being studied based on prior research. *See id.* at 14–15. That was not feasible here, given the novelty of this study.

<sup>219</sup> This method is similar to the one taken by the Sentencing Commission in analyzing sentencing data more broadly. *See* U.S. SENT’G COMM’N, *THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING: FEDERAL SENTENCING OUTCOMES, 2005–2017*, at 14 (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214\\_Guidelines-Influence-Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf) [<https://perma.cc/JP24-DVLJ>] (describing exclusions in its study).

<sup>220</sup> I removed 17 cases from the sample on this basis.

- Cases involving plea agreements with a set, agreed-upon sentence, eliminating the judicial discretion of interest here.<sup>221</sup>
- Cases in which the top or bottom of the Guideline range was restricted by a mandatory minimum or statutory maximum sentence, limiting the judge's sentencing discretion.<sup>222</sup>
- 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.<sup>223</sup>
- Sentences that were reversed on appeal, which are difficult to assess because there have been multiple sentencing proceedings.<sup>224</sup>
- Cases involving an upper Guideline range of life imprisonment, which makes it difficult to calculate the midpoint of the range.<sup>225</sup>
- Cases in which the judge gave a probationary sentence, which makes it difficult to calculate the sentence as a proportion of the midpoint of the Guideline range.<sup>226</sup>

### C. Coding Methods and Intercoder Reliability Check

Most of the primary independent 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

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<sup>221</sup> 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, 849–50 (2018).

<sup>222</sup> 21 cases.

<sup>223</sup> 12 cases.

<sup>224</sup> 2 cases.

<sup>225</sup> 6 cases.

<sup>226</sup> 11 cases.

the reliability of coding for each of the independent variables.<sup>227</sup> After coding, I evaluated reliability using the Smith index<sup>228</sup>—calculated by taking twice the number of agreements in a category and dividing by the sum of the frequency that each rater used that category.<sup>229</sup> The reliability ranged from 0.97 to 0.55 (and above 0.76 in all categories but one), averaging 0.88 across all variables.<sup>230</sup> In general, reliability indicators at the levels achieved here are viewed as having either “Almost Perfect” reliability (above 0.80) or “Substantial” reliability (between 0.61 and 0.80).<sup>231</sup>

#### IV. HYPOTHESES

The experimental and survey data described in Part II allow us to make predictions about how mitigation might impact sentencing in real cases. In this Part, I briefly describe five hypotheses based on those data.

***Hypothesis 1:** Increases in the amount of mitigation presented in sentencing 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.<sup>232</sup> 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.<sup>233</sup> 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

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<sup>227</sup> 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 218, at 101 (reporting that only 14% of reviewed coding projects contained reliability testing).

<sup>228</sup> Charles P. Smith, *Content Analysis and Narrative Analysis*, in HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY 313, 325 (Harry T. Reis & Charles M. Judd eds., 2000).

<sup>229</sup> 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 40 words. Thus, under the Smith index, the reliability for such a scenario would be  $(40 * 2) / (60 + 60) = 0.67$ .

<sup>230</sup> For the complete data, see *infra* Table A1.

<sup>231</sup> See, e.g., Hall & Wright, *supra* note 218, at 115–16 (describing the approach to classifying reliability measures, though noting differences in consensus on this point); J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159, 165 (1977) (classifying kappa statistics between 0.61 and 0.80 as “Substantial” and between 0.81 and 1.00 as “Almost Perfect,” though noting the arbitrary nature of these benchmarks).

<sup>232</sup> See *supra* Section II.B.

<sup>233</sup> See *supra* Section II.A.

expected that judges would impose lower sentences (relative to the midpoint of the Guideline range) as the amount of mitigation presented increased (operationalized by the number of words devoted to mitigation in each sentencing memorandum).

***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.<sup>234</sup> Moreover, as described above, current trends—in all three branches of government and in social reform—appear to be pushing toward more individualized sentencing.<sup>235</sup> 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, collateral consequences, and health—find support in both the survey and experimental data.<sup>236</sup>

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 their decision to vary or depart from the Guideline range more consistently than any other mitigating factor.<sup>237</sup> The experimental data likewise show powerful effects of health mitigation.<sup>238</sup> 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.

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<sup>234</sup> See *supra* Part II.

<sup>235</sup> See *supra* notes 90–96 and accompanying text.

<sup>236</sup> See *supra* notes 121–125, 141–156 and accompanying text.

<sup>237</sup> See *supra* notes 121–122, 132 and accompanying text.

<sup>238</sup> See *supra* notes 146–150 and accompanying text.

**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 and related studies imply that *showing* remorse through action, rather than just explaining it through words, is comparatively more effective.<sup>239</sup> Thus, I anticipated that evidence-based remorse mitigation would be the strongest offense mitigation factor.

**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.<sup>240</sup> I expected the data here would show a similar trend, with evidence-supported mitigation (in both categories where I measured it: remorse and health) being 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 the Appendix.<sup>241</sup> 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 sixteen mitigating factors.<sup>242</sup>

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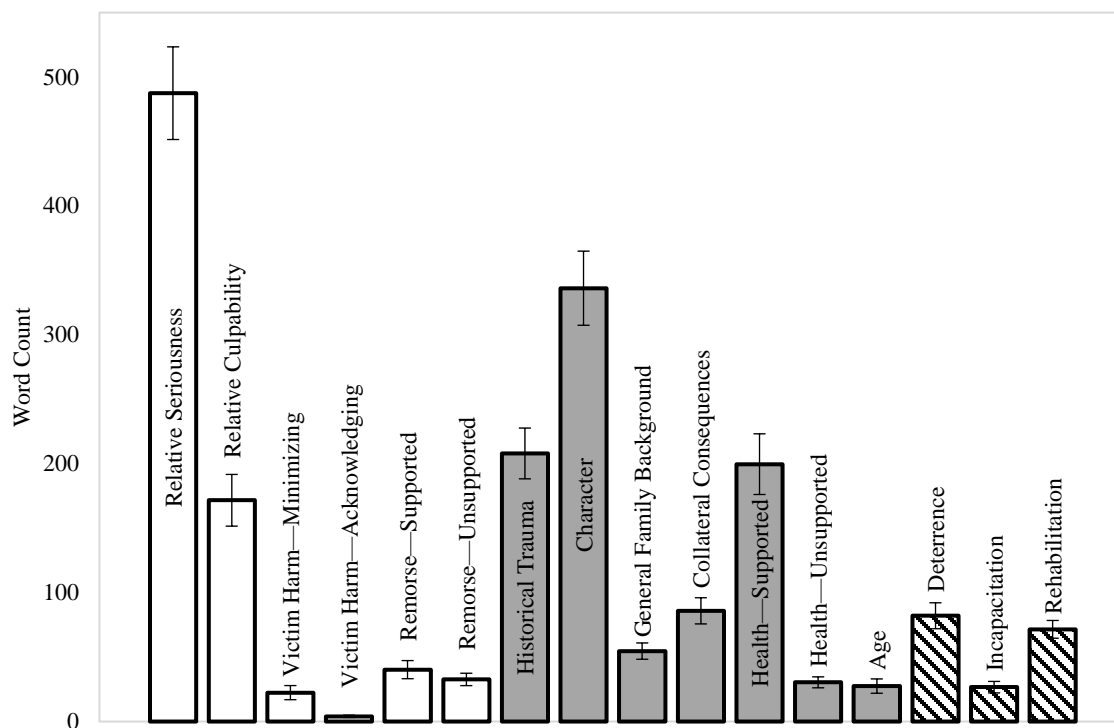
<sup>239</sup> See *supra* notes 141–142, 151–153 and accompanying text.

<sup>240</sup> See *supra* notes 123, 141–142 and accompanying text.

<sup>241</sup> *Infra* Table A2. Because not all sentencing memoranda discussed all of the mitigating factors, the Table also identifies the percentage of total sentencing memoranda that include each mitigating factor (termed “frequency of use”).

<sup>242</sup> ANOVA—standing for analysis of variance—is a statistical test that, among other uses, allows a researcher to compare the differences between the means of two or more groups and determine whether

FIGURE 1: AVERAGE WORD COUNTS OF MITIGATING FACTORS



*Note.* White bars represent offense mitigation, gray bars personal mitigation, and crosshatched bars theories-of-punishment discussion.

Unsurprisingly, I found large differences in the amount of text devoted to each factor.<sup>243</sup> Relative seriousness was the most prominent mitigating argument and differed significantly from all other arguments.<sup>244</sup> Character

those differences are statistically significant. *See* GLENN GAMST, LAWRENCE S. MEYERS & A.J. GUARINO, ANALYSIS OF VARIANCE DESIGNS: A CONCEPTUAL AND COMPUTATIONAL APPROACH WITH SPSS AND SAS § 1.1 (2008) (describing ANOVA as “a statistical technique used to evaluate the size of the difference between sets of scores”). Here, for example, the repeated measures ANOVA allows us to compare the differences between the mean word counts among the sixteen different mitigating factors in the study.

<sup>243</sup> I conducted a 16 x 1 repeated measures ANOVA to identify whether there were differences in the number of words devoted to each mitigating category. The test was highly significant.  $F(15, 4515) = 77.54, p < 0.001, \eta = 0.205$ . I conducted Tukey post hoc tests to identify differences between individual categories of mitigation.

<sup>244</sup> All  $p$ 's < 0.01.

was the next most frequent and also differed from all other arguments.<sup>245</sup> Relative culpability, historical trauma, and health (with supporting evidence) were the third most frequent.<sup>246</sup> They were followed by collateral consequences, deterrence, and rehabilitation.<sup>247</sup> 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 the Appendix. For example, general family and social background mitigation appeared in 38% of the memoranda but accounted for less than 60 words per memorandum. In contrast, health mitigation supported by evidence appeared almost as often—in 35% 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.<sup>248</sup> There were differences in overall sentence as a percentage of the midpoint of the Guideline range across crime types as well.<sup>249</sup> 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.<sup>250</sup> There were also small differences in sentence as a percentage of the midpoint of the Guideline range across circuits.<sup>251</sup> This effect was driven largely by slightly lower sentences in the Second (average sentence of 51% of the midpoint of the Guideline range),

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<sup>245</sup> All  $p$ 's < 0.01.

<sup>246</sup> The three categories differed from every other category. All  $p$ 's < 0.01. They did not differ significantly from each other. All  $p$ 's > 0.3.

<sup>247</sup> The three categories differed from every other category. All  $p$ 's < 0.05. They did not differ significantly from each other. All  $p$ 's > 0.2.

<sup>248</sup> See U.S. SENT'G COMM'N, *supra* note 219, 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). I note that the Sentencing Commission compares sentences to the bottom of the Guideline range, rather than the midpoint, as I do. But because the bottom of the Guideline range is approximately 90% of the midpoint for most Guideline ranges, a sentence that is 16.5% below the bottom of the Guideline range is close to a sentence that is 74% of the midpoint of the Guideline range. See U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2021).

<sup>249</sup> 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.  $F(5, 296) = 3.25$ ,  $p = 0.007$ ,  $\eta = 0.052$ .

<sup>250</sup> 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 < 0.1).

<sup>251</sup> I conducted an 11 x 1 one-way ANOVA to identify whether there were differences in sentences between circuits. The test was significant.  $F(10, 291) = 1.9$ ,  $p = 0.045$ ,  $\eta = 0.061$ .



Seventh (61%), and D.C. (61%) Circuits.<sup>252</sup> There were no significant differences in sentence across the four years in my sample.<sup>253</sup>

### *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 2 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  $-0.35$ .<sup>254</sup> Thus, the data support Hypothesis 1: presenting more mitigation was associated with a reduction in sentence relative to the Guideline range.

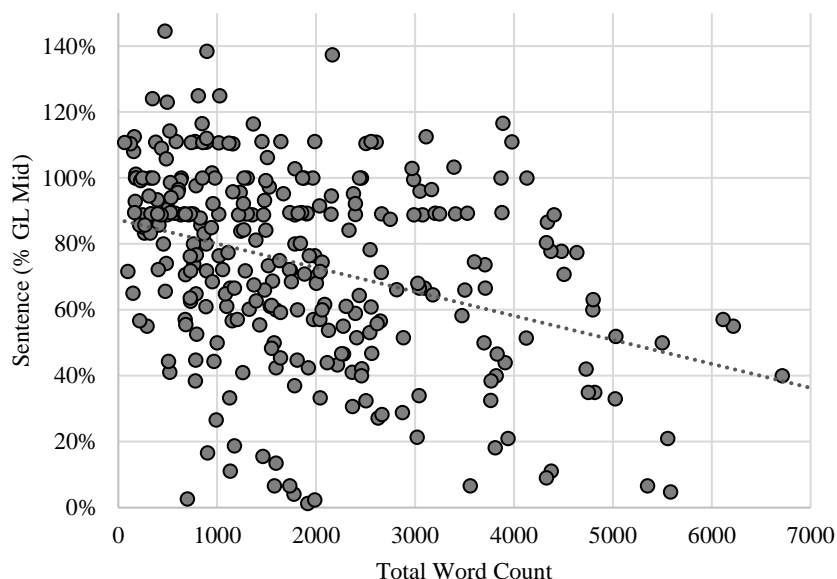
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<sup>252</sup> I tested individual differences between circuits using Tukey post hoc tests. The D.C. Circuit's sentences trended toward being lower than the First and Eighth Circuits ( $p$ 's  $< 0.1$ ); the Second Circuit's sentences trended toward being lower than all circuits other than the Seventh and D.C. Circuits (all  $p$ 's  $< 0.1$ ); 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  $< 0.1$ ).

<sup>253</sup> The result of the 4 x 1 one-way ANOVA was:  $F(3, 298) = 0.208, p = 0.891, \eta = 0.002$ .

<sup>254</sup>  $p < 0.001$ . A correlation coefficient of  $-0.35$  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) (showing that, as a general matter, a correlation coefficient of  $r = 0.1$  constitutes a weak correlation,  $r = 0.3$  constitutes a moderate correlation, and  $r = 0.5$  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.)*

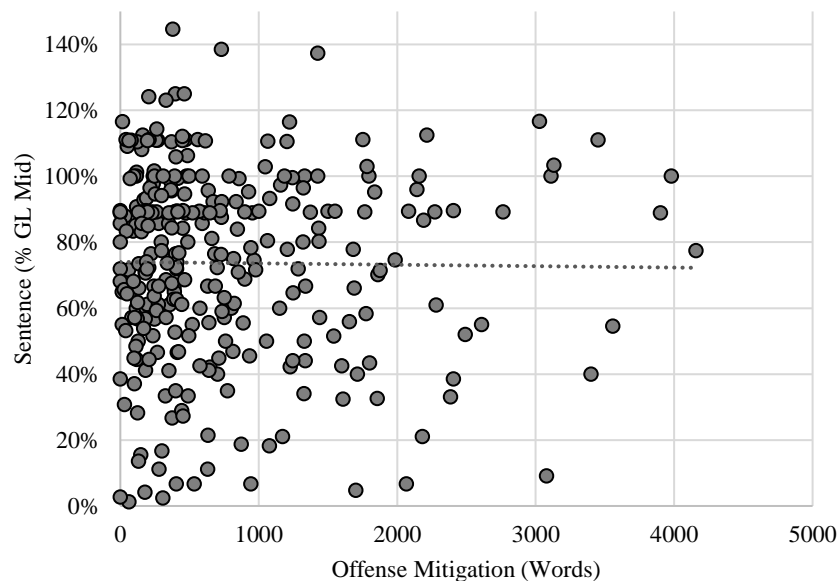
Figures 3 and 4 show the total word counts of offense mitigation and personal mitigation, respectively, plotted against sentence as a percentage of the midpoint of the Guideline range. As can be seen from the trend lines, as the amount of personal mitigation in a sentencing memo increases, the sentence 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.<sup>255</sup> Only personal mitigation significantly predicted the sentence: personal mitigation had a standardized beta weight of  $-0.485$ ,<sup>256</sup> meaning that when the amount of personal mitigation argument increases by one standard deviation, the sentence decreases by 0.485 standard

<sup>255</sup>  $F(3, 299) = 29.53, p < 0.001$ . The  $R^2$  of the model was 0.23.

<sup>256</sup>  $p < 0.001$ .

deviations.<sup>257</sup> Offense mitigation and theories-of-punishment discussion had beta weights of 0.039<sup>258</sup> and 0.014,<sup>259</sup> 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

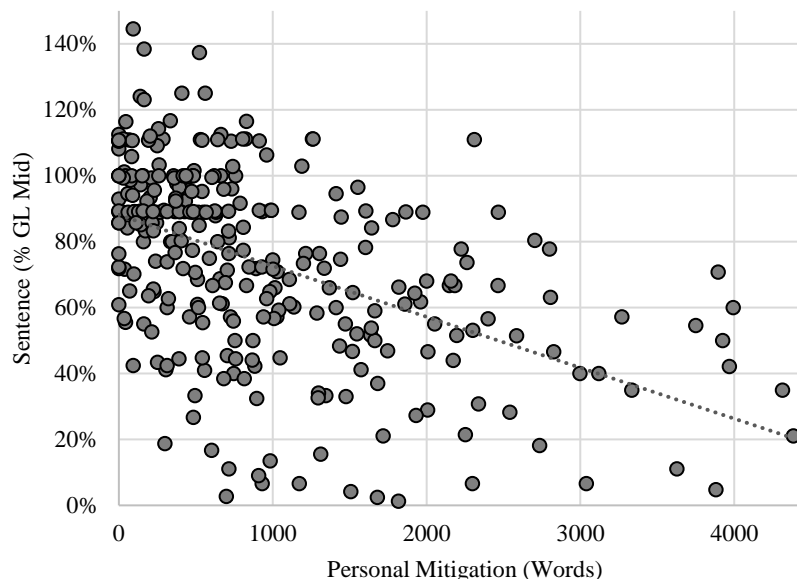


<sup>257</sup> See, e.g., PAUL D. ALLISON, *MULTIPLE REGRESSION: A PRIMER* 30 (1999) (describing standardized beta weights). The standardized beta weight can generally be treated as an estimate of the effect size of a given variable. Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars*, 80 TEMP. L. REV. 201, 230 (2007). Putting these abstract numbers to practice, say the midpoint of 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 the amount of personal mitigation presented by 928 words—one standard deviation of that statistic in my data, see *infra* Table A2—would predict a reduction in sentence of 0.485 standard deviations of the midpoint of the Guideline range. The standard deviation of that statistic in 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.

<sup>258</sup>  $p = 0.45$ .

<sup>259</sup>  $p = 0.8$ .

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 935, 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 as large as the sentencing results suggest it should be.<sup>260</sup>

***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 sixteen 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.<sup>261</sup> Table 2 outlines the relative predictive value of

<sup>260</sup> All three differences were significant at the  $p < 0.01$  level. See *infra* Table A2 for complete data.

<sup>261</sup>  $F(16, 285) = 8.673, p < 0.001$ . The  $R^2$  of the model was 0.33.

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.

TABLE 2: REGRESSION DATA OF MITIGATING FACTORS

Independent Variable <sup>262</sup>	Standardized Beta Weight	p-Value
Relative Seriousness	0.075	0.145
Relative Culpability	−0.020	0.691
Victim Harm—Minimizing	0.054	0.290
Victim Harm—Acknowledging	0.034	0.497
Remorse—Supported†	−0.102	0.057
Remorse—Unsupported*	0.113	0.025
Historical Trauma†	−0.099	0.060
Character**	−0.194	0.001
General Family and Social Background	−0.027	0.597
Collateral Consequences**	−0.190	0.001
Health—Supported**	−0.330	0.000
Health—Unsupported	0.057	0.263
Age	0.041	0.418
Deterrence	−0.026	0.636
Incapacitation	0.006	0.902
Rehabilitation	0.088	0.110

Four mitigating factors significantly predicted sentence at the  $p < 0.05$  level: remorse (unsupported), character, collateral consequences, and health (supported). Relating specifically to Hypothesis 3, there was a pronounced

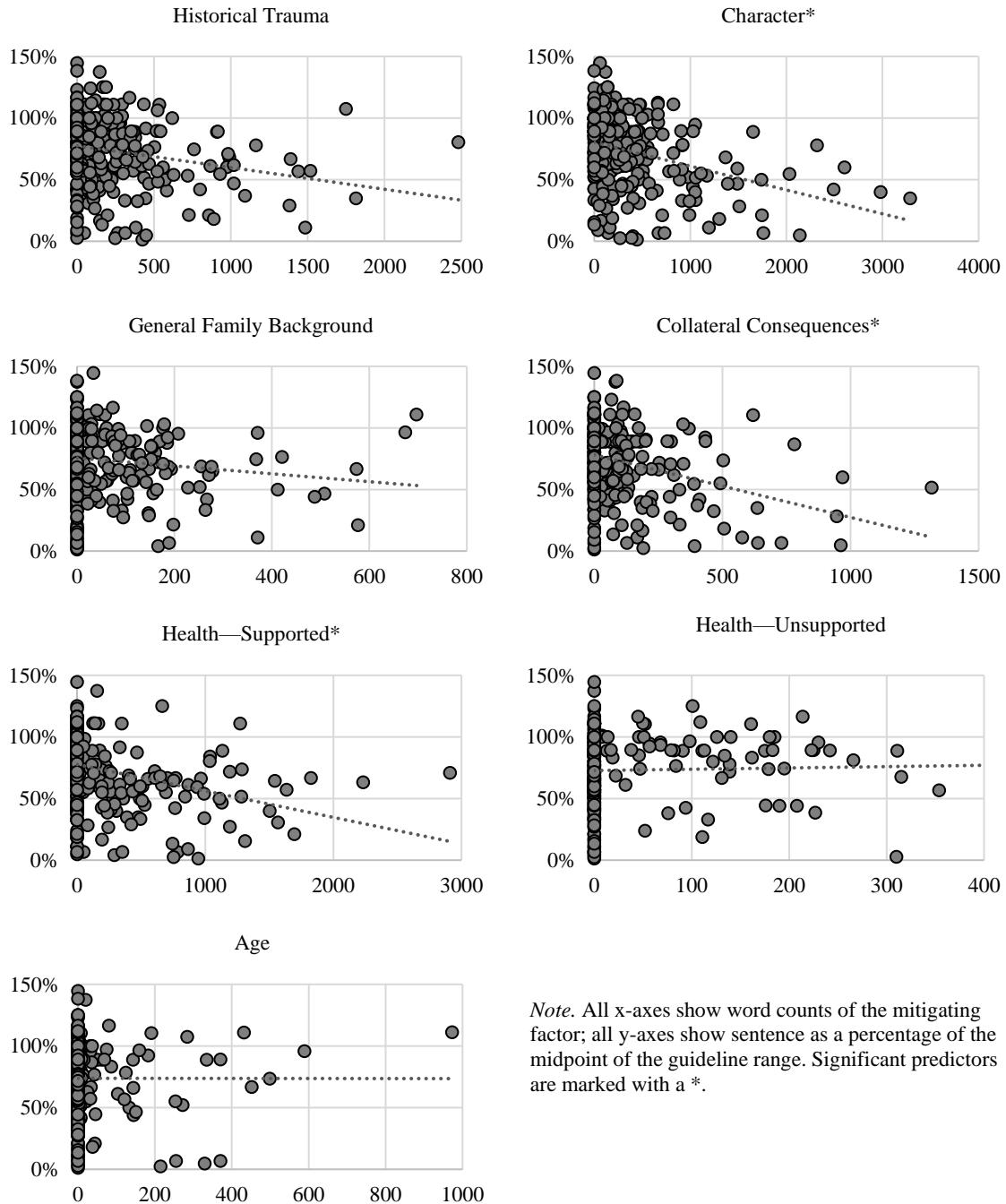
<sup>262</sup> Variables denoted by a \* are significant at the  $p < 0.05$  level; with a \*\* are significant at the  $p < 0.01$  level. Variables denoted by a † trend toward significance at the  $p < 0.05$  level. I note that these  $p$ -values are not adjusted to account for multiple comparisons. 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 sixteen 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 0.05 level. For additional information on the Bonferroni correction and its flaws in application, see Thomas V. Perneger, *What's Wrong with Bonferroni Adjustments*, 316 BRIT. MED. J. 1236 (1998).

hierarchy in the 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  $-0.33$ , 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 0.33 standard deviations (holding all other variables constant). That is a greater than 50% stronger relationship than either the character or collateral-consequences factors, which both had nearly identical beta weights of  $-0.194$  and  $-0.190$ , respectively. Historical trauma tended to predict the sentence, with a beta weight of  $-0.099$ , but was not significant at the 0.05 level.<sup>263</sup> 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 and social 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 were significant and powerful predictors of a defendant's sentence in the study.

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<sup>263</sup>  $p = 0.06$ .

FIGURE 5: PERSONAL MITIGATION FACTORS AND SENTENCE



**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.<sup>264</sup> 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.<sup>265</sup> Remorse, however, was nearly statistically significant when supported and also significantly predicted an *increased* sentence when unsupported.<sup>266</sup> I examine this relationship in more detail under the next hypothesis.

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

**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.

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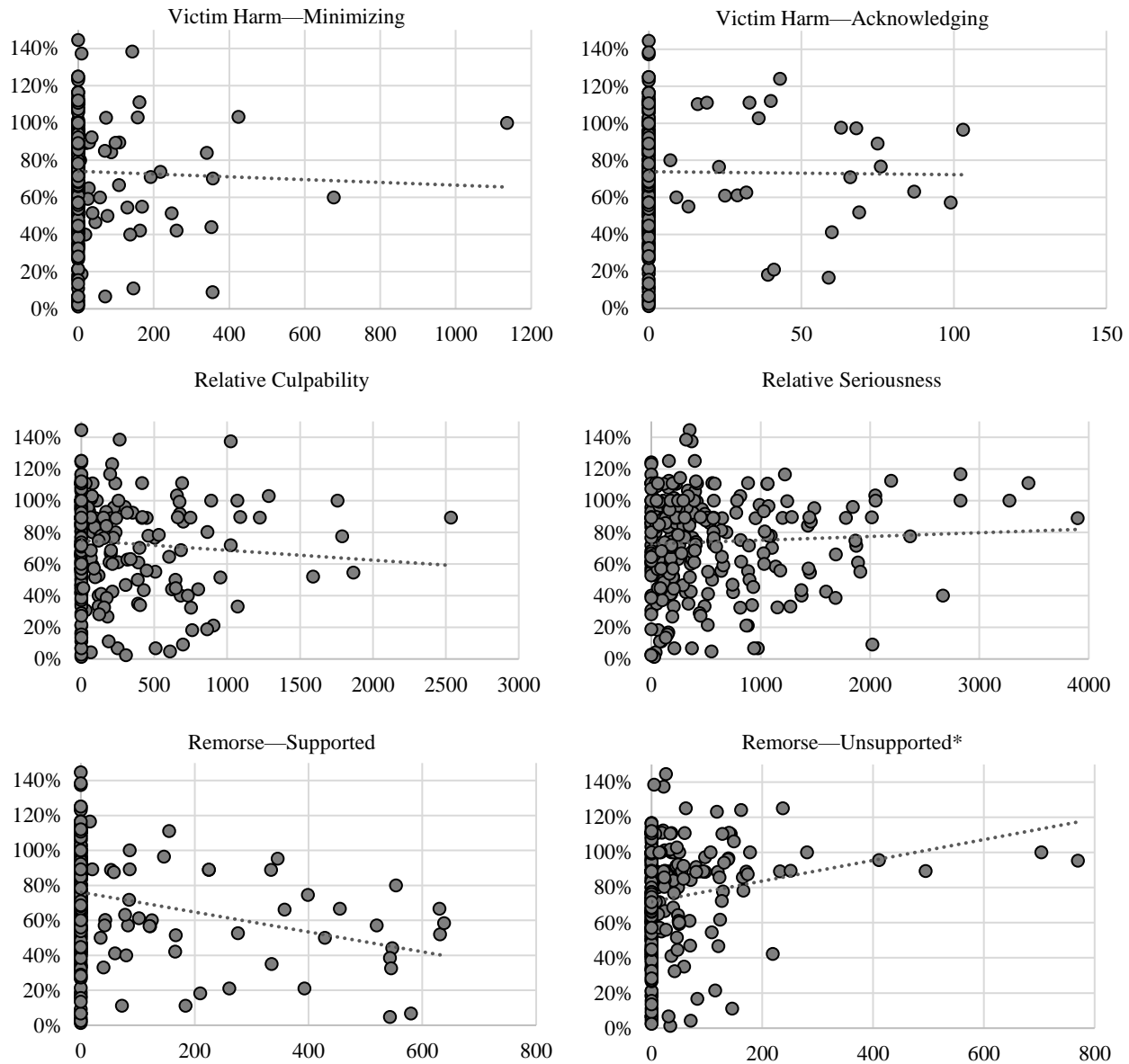
<sup>264</sup> As seen in Table 2, the standardized beta weight was  $-0.02$ ,  $p = 0.691$ .

<sup>265</sup> See *supra* Table 2.

<sup>266</sup> As seen in Table 2,  $p = 0.057$ .

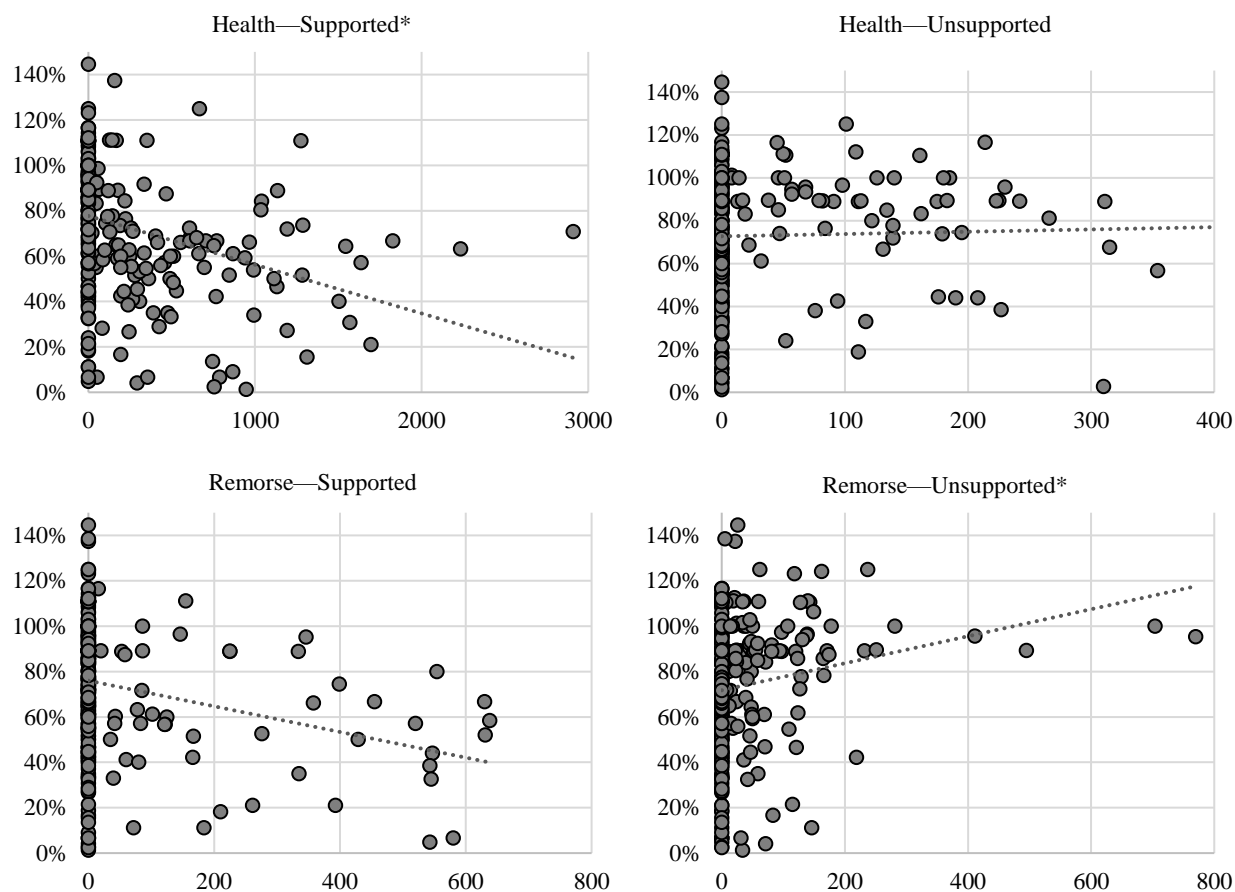


FIGURE 6: OFFENSE MITIGATION FACTORS AND SENTENCE



*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 \*.

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.<sup>267</sup> 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.<sup>268</sup>

<sup>267</sup> See *supra* Figure 6; *supra* Table 2.

<sup>268</sup> As seen in Table 2, the standardized beta weight was 0.113,  $p = 0.025$ .

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.<sup>269</sup> But when health mitigation was unsupported by evidence, it did not have a significant relationship with the sentence.<sup>270</sup> I explore the implications of both of these effects in 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 related 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.<sup>271</sup> 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.<sup>272</sup> 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 sentence.<sup>273</sup> 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

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<sup>269</sup> See *supra* Table 2.

<sup>270</sup> The standardized beta weight was 0.057,  $p = 0.263$ . See *supra* Table 2.

<sup>271</sup> 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. I discuss this in more detail *infra* notes 290–309 and accompanying text.

<sup>272</sup> 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.

<sup>273</sup> 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).

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; or 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.<sup>274</sup>

*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 discussion, only personal mitigation significantly predicted the deviation of the sentence from the midpoint of the Guideline range.<sup>275</sup> 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.”<sup>276</sup> 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.<sup>277</sup> 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 fifteen years, moving from a restrictive, offense-centric Guideline scheme<sup>278</sup> to a more flexible, individualized approach, closer to the nature of sentencing

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<sup>274</sup> *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 . . . .’” (quoting 18 U.S.C. § 3553(a))); *see also* Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 49 (“The parsimony principle . . . calls for the imposition of the least punitive or burdensome punishment that will achieve valid social purposes.”).

<sup>275</sup> *See supra* notes 255–260 and accompanying text.

<sup>276</sup> *See* U.S. SENT'G COMM'N, *supra* note 128, at III-24.

<sup>277</sup> *See supra* notes 118–127 and accompanying text.

<sup>278</sup> *See, e.g.*, Berman, *supra* note 67, 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”).

prior to the Sentencing Reform Act of 1984.<sup>279</sup> It also highlights the fact that, because the Guidelines minimize 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.<sup>280</sup>

*Third, evidence-supported 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 evidence-supported 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.<sup>281</sup> 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 supported health mitigation presented would correspond with a 5-month decrease in sentence.<sup>282</sup> That is a striking relationship and makes sense of the data examined in Part II. Judges in the 2010 survey ranked mental condition,

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<sup>279</sup> 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 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 a defendant with the highest amounts to a 700% increase in Guideline range. U.S. SENT’G GUIDELINES MANUAL § 5A (U.S. SENT’G COMM’N 2021). 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. In my data, attorneys spent, on average, 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.

<sup>280</sup> *United States v. Lacy*, 99 F. Supp. 2d 108, 112 (D. Mass. 2000) (“[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.”).

<sup>281</sup> See *supra* notes 261–263 and accompanying text.

<sup>282</sup> For a fuller explanation of the calculation involved to convert a beta weight to a predicted sentencing value, see *supra* note 257. I note one limitation to this illustration: at some point, the linear relationship between the amount of mitigation presented and the sentence imposed is likely to give way to diminishing returns.

emotional condition, physical condition, and diminished capacity all 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.<sup>283</sup> The data also align with an increasing understanding that 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.<sup>284</sup> 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 often go untreated in that population.<sup>285</sup> Judges thus have a front-row seat to the vicious cycle of mental illness, addiction, and crime. 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.<sup>286</sup>

*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 were very nearly significant predictors of 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

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<sup>283</sup> See *supra* notes 121, 146–150 and accompanying text.

<sup>284</sup> See, e.g., E. Lea Johnston & Conor P. Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685, 687–90 (2017) (noting the diminished culpability of mentally ill offenders in the context of mental health courts' sentencing severity); 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) (describing the various ways in which prisoners with mental illness suffer harm during incarceration).

<sup>285</sup> See, e.g., E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 517 (2019) (noting that “roughly 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/> [<https://perma.cc/47Y2-LLN9>] (describing frequent mental health issues in prisons).

<sup>286</sup> 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 and 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.

of their families, and genuine expressions of regret for committing the crime.<sup>287</sup>

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 on separating genuine mitigation from unsupported allegation.

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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;<sup>288</sup> 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.<sup>289</sup>

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<sup>287</sup> See Berman, *supra* note 67, 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”).

<sup>288</sup> See, e.g., Jesse Cheng, *Compassionate Capital Mitigation*, 18 OHIO ST. J. CRIM. L. 351, 357–58 (2020) (describing mitigation in terms of how choices and circumstances throughout a defendant's life impact how he came to view committing a crime as a realistic option).

<sup>289</sup> 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: SENT'G § 6A.05 cmt. e (AM. L. INST., Proposed Final Draft 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 the 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 CRIM. JUST.: SENT'G § 18-3.2(a) (AM. BAR ASS'N 1994) (“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: SENT'G § 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, such as deterrence and incapacitation, only when “reasonably feasible” within the boundaries of proportionality). Mitigation is

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,<sup>290</sup> and mitigation is very likely no different. Courts and commentators have long noted that some of the mitigating factors I study here could disproportionately benefit wealthy, white defendants.<sup>291</sup> 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 to have been able to document their problems.<sup>292</sup> 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

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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 HARV. J. ON LEGIS. 219, 222–24 (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 Article, 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 perspective of proportionality, but the presence of health-related mitigation—such as addiction or mental illness—might undercut an incapacitation-based argument for reduced punishment, as the defendant's addiction or mental illness might *increase* his risk of recidivism.

<sup>290</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 97–139 (2010) (describing disparate impacts of criminal justice policies on communities of color); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22 (2012) (describing racial disparity in prison); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 102–03 (2015) (finding racial disparities increased following the Supreme Court's decision in *Booker*).

<sup>291</sup> See, e.g., Hessick, *supra* note 78, at 1159 n.265 (collecting cases); Hessick & Berman, *supra* note 71, at 215–17 (noting that traditional mitigating factors can disproportionately benefit wealthy, white defendants while cautioning against complete exclusion of these factors from consideration); Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1256 (2014) (noting that increased judicial discretion may cause “judges to give undue leniency to criminals of their own class”).

<sup>292</sup> See generally M.N. Oliver, *Racial Health Inequalities in the USA: The Role of Social Class*, 122 PUB. HEALTH 1440, 1441 (2008) (describing how socioeconomic status aggravates racial disparities in health outcomes).



race- and class-based bias in the way the judge interprets it.<sup>293</sup> 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.<sup>294</sup> And other important mitigating factors, such as remorse and collateral consequences, may have less predictable patterns.<sup>295</sup>

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 socioeconomic 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.

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.<sup>296</sup> 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.<sup>297</sup> In contrast, about 40% of economic crime offenders were white, and 36% were Black.<sup>298</sup> 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,<sup>299</sup> whereas it had only a marginally significant relationship with sentence when crime type was not

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<sup>293</sup> See Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221–26 (2009) (discussing how implicit biases may affect the judgment of trial judges).

<sup>294</sup> See Andrea L. Roberts, Stephen E. Gilman, Joshua Breslau, Naomi Breslau & Karestan C. Koenen, *Race/Ethnic Differences in Exposure to Traumatic Events, Development of Post-Traumatic Stress Disorder, and Treatment-Seeking for Post-Traumatic Stress Disorder in the United States*, 41 PSYCH. MED. 71, 74–79 (Jan. 2011).

<sup>295</sup> Cf. Hanan, *supra* note 176, at 304–08 (describing ways in which judgments of remorse are subject to systematic cognitive bias).

<sup>296</sup> See *supra* note 249 and accompanying text.

<sup>297</sup> U.S. SENT'G COMM'N, FISCAL YEAR 2018 OVERVIEW OF FEDERAL CRIMINAL CASES 18 (2018), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf) [https://perma.cc/BS46-AJFV].

<sup>298</sup> *Id.* at 20.

<sup>299</sup>  $p < 0.02$ .

controlled for.<sup>300</sup> In other words, the results largely do not change when holding crime type constant. Thus, to the extent that crime type is a proxy for race, unaccounted-for racial differences associated with crime type were not the actual cause for the variation in sentencing outcomes that I observed. And while crime type 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 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, such as race, gender, and socioeconomic status.<sup>301</sup> 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 socioeconomic 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.<sup>302</sup>

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 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

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<sup>300</sup>  $p = 0.06$ .

<sup>301</sup> The problem of the potential impact of uncontrolled variables like these is often called “endogeneity.” *E.g.*, Roger D. Blair & Christine Piette Durrance, *Licensing Health Care Professionals, State Action and Antitrust Policy*, 100 IOWA L. REV. 1943, 1953 n.41 (2015) (noting that “[a]n endogenous variable is one that is correlated with the error term,” which is the unexplained variance in the model).

<sup>302</sup> 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.

department's interview with the defendant, and the defense attorney is present for that interview and has a significant role in crafting the PSR.<sup>303</sup> 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. It largely does not matter to the conclusions drawn here: 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 from 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 our measurement comes from the sentencing memorandum or the PSR: mitigation influenced the sentence.<sup>304</sup>

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.<sup>305</sup> 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 for 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

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<sup>303</sup> See *supra* notes 58–60 and accompanying text; FED. R. CRIM. P. 32(e)–(f).

<sup>304</sup> I note one other question that my data leave unanswered: if mitigation is influencing sentencing as I theorize here, is that influence 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. To the extent that mitigation's influence is contingent upon defendants having mitigating circumstances to raise, this places a limit on how much mitigation a defense counsel can effectively include. However, it does not impact the importance of defense counsel unearthing as many mitigating circumstances through investigation as possible, or of reforms to facilitate investigation and presentation of mitigation. See *infra* Section VI.B.

<sup>305</sup> See *supra* Section II.B.

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.<sup>306</sup> And fourth, judges did not find 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.<sup>307</sup>

There is also some inherent sampling bias in the cases that I collected. 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 in which a defendant cooperated with the government leading to a government request for a reduction in sentence.<sup>308</sup> 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, such as health

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<sup>306</sup> See, e.g., Hall & Wright, *supra* note 218, 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, 1205 (2011) (using word counts as a proxy 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, Steven D. Penrod, Christina A. Studebaker, Matthew T. Huss & Kevin M. O’Neil, *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCH., 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, Renée M. Tobin, Audra E. Massey & Jennifer A. Anderson, *Measuring Emotional Expression with the Linguistic Inquiry and Word Count*, 120 AM. J. PSYCH. 263, 266–67 (2007) (measuring participants’ emotional reactions by how frequently they use certain “positive” and “negative” words); Robert A. Josephs, R. Brian Giesler & David H. Silvera, *Judgment by Quantity*, 123 J. EXPERIMENTAL PSYCH.: GEN. 21, 22 (1994) (using page quantity rather than word counts).

<sup>307</sup> See *supra* Table 2.

<sup>308</sup> See *supra* notes 220–226 and accompanying text.

conditions.<sup>309</sup> 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 into 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

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.”<sup>310</sup>

That right extends to sentencing.<sup>311</sup> In capital cases—in which 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 nondeath sentence.<sup>312</sup> But in noncapital cases, what constitutes effective assistance at sentencing is far less clear.<sup>313</sup> Before *Booker*, the Supreme Court held that failing to raise a legitimate challenge to the Guideline range was prejudicial and ineffective.<sup>314</sup> The Court has not squarely readdressed that issue since *Booker* rendered the

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<sup>309</sup> See generally *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–99 (1978) (recognizing that the common law right of public access to court documents is not absolute considering case-specific competing factors); *United States v. Harris*, 890 F.3d 480, 492 (4th Cir. 2018) (identifying protection of physical and psychological well-being as a legitimate interest in sealing records).

<sup>310</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>311</sup> E.g., *id.* (“The same principle applies to a capital sentencing proceeding . . .”); see also *Glover v. United States*, 531 U.S. 198, 200 (2001) (applying the *Strickland* test in a noncapital felony case).

<sup>312</sup> See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 533–34 (2003) (defining the *Strickland* standard for investigating mitigation). For a full discussion of the requirements of investigating and presenting mitigation in capital cases, see Gohara, *supra* note 106, at 54–57.

<sup>313</sup> *Strickland* itself implied that the standard at a typical felony sentencing may be less stringent than in the capital context. 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.”).

<sup>314</sup> *Glover*, 531 U.S. at 199–200.

Guidelines advisory,<sup>315</sup> and while some lower courts have found ineffective assistance based on advisory Guideline errors, those cases are infrequent.<sup>316</sup> 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 noncapital felony sentencing is not necessarily ineffective.<sup>317</sup> And those cases often contain language implying the near impossibility that a defendant could show his counsel was ineffective on that ground. For example, in one bank robbery case in which the defendant's history of mental illness went unrepresented, 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."<sup>318</sup>

When *Strickland v. Washington* was decided in 1984 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.<sup>319</sup> And

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<sup>315</sup> 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.

<sup>316</sup> See, e.g., *United States v. Curtis*, 360 F. App'x 413, 414–15 (4th Cir. 2010) (holding that the failure to object to improperly calculated Guideline range amounted to ineffective assistance); *United States v. Daily*, No. 03-381-1, 2011 WL 3920260, at \*2 (D. Minn. Sept. 7, 2011) (holding that counsel's failure to raise the Guideline range calculation error deprived the defendant of his Sixth Amendment right).

<sup>317</sup> See, e.g., *United States v. Israel*, No. 17-10948, 2020 WL 7658421, at \*26 (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." (alterations in original) (quoting *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997))); *Rodriguez v. United States*, No. 08-CV-21-T-27TBM, 2010 WL 1790430, at \*5 (M.D. Fla. May 4, 2010) (holding that counsel's alleged omission of mitigating circumstances did not render assistance ineffective); *Luellen v. United States*, No. 08cr102, 2011 WL 4565348, at \*5 (E.D. Va. Sept. 28, 2011) (holding that a decision concerning whether to present a mitigating witness was strategic and therefore not ineffective); *United States v. Perrigo-Haddon*, 221 F. App'x 619, 621 (9th Cir. 2007) (suggesting certain mitigating evidence "was not particularly important or material").

<sup>318</sup> *Israel*, 2020 WL 7658421, at \*11 (alterations in original) (quoting *Rector*, 120 F.3d at 564).

<sup>319</sup> Hessick, *supra* note 105, at 1105–06.

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 with certainty in their individual 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.<sup>320</sup> That is exactly the type of injustice that ineffective assistance 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

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<sup>320</sup> 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.”

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).

counsel's failure to investigate mitigating circumstances.<sup>321</sup> Adopting this requirement for noncapital 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.<sup>322</sup> 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.<sup>323</sup> But a review of the cases indicates that virtually no noncapital cases have applied a mitigation-investigation requirement.<sup>324</sup>

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 (ABA's) Standards for Criminal Justice, which the Supreme Court has referenced as a "guide[] to determining what is reasonable" conduct under the *Strickland* standard.<sup>325</sup> While the ABA guidance for

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<sup>321</sup> See, e.g., *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (holding that, in the 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 (2000) (ruling that 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").

<sup>322</sup> See, e.g., Gohara, *supra* note 106, 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, 22–24 (2019) (arguing for broad application of Eighth Amendment principles that currently require individualized sentencing only in capital cases).

<sup>323</sup> Indeed, current American Bar Association standards require defense attorneys to investigate, at least summarily. STANDARDS FOR CRIM. JUST.: DEF. FUNCTION § 4-8.3(d) (AM. BAR ASS'N 2017) ("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 105, at 1110–11; Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 959–60 (2003) (outlining the requirement for participation of mitigation specialist in capital cases). For a discussion of how a failure to investigate mitigation may trigger a rebuttable presumption of inadequate performance, see Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1635–36 (2020).

<sup>324</sup> For example, I conducted a Westlaw search containing the terms, "mitigate! & reasonabl! /s invest!," which yielded only capital cases applying the requirement. See *supra* note 317 (collecting cases).

<sup>325</sup> *Strickland*, 466 U.S. at 688; see also *Williams*, 529 U.S. at 396 (citing the ABA's Standards when finding that counsel did not thoroughly investigate mitigation); *Rompilla v. Beard*, 545 U.S. 374, 387



noncapital 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,”<sup>326</sup> 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.”<sup>327</sup> Criminal justice would be better served by explicitly articulating similar requirements in all felony cases, in which 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.<sup>328</sup> 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 on 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.<sup>329</sup>

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

One of the most striking effects this study revealed is that health is the strongest potential mitigator when sufficiently supported by evidence in the record—associated with a 50% greater reduction in sentence than any other

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(2005) (highlighting the clear language of the ABA’s Standards, often relied upon by the Court for what is reasonable); Hessick, *supra* note 105, at 1075 (referencing *Strickland*’s reliance on the ABA’s Standards).

<sup>326</sup> STANDARDS FOR CRIM. JUST.: DEF. FUNCTION § 4-8.3(d).

<sup>327</sup> Am. Bar Ass’n, *supra* note 323, at 1022–23; *see also* Gohara, *supra* note 106, 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.”).

<sup>328</sup> *See* Gohara, *supra* note 106, at 70–73.

<sup>329</sup> *See id.* at 48–49. For a helpful examination into the role of mitigation specialists, albeit in the death penalty context, *see* generally Hughes, *supra* note 102, and *see* Am. Bar Ass’n, *supra* note 323, at 959–60 (describing the role of a mitigation specialist).

mitigator.<sup>330</sup> 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 and anecdotal observations.<sup>331</sup>

Thus, explaining to the judge that a defendant has significant, documented health problems—especially mental health problems—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.<sup>332</sup> 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.<sup>333</sup> In a recent study, Deborah Denno

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<sup>330</sup> See *supra* notes 261–263 and accompanying text.

<sup>331</sup> See *supra* notes 121–122 and accompanying text.

<sup>332</sup> See, e.g., *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (finding counsel's investigation to be unreasonable in large part due to the failure to uncover any evidence of Porter's mental health); *Wiggins v. Smith*, 539 U.S. 510, 537 (2003) ("Wiggins' sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.").

<sup>333</sup> See, e.g., Nita A. Farahany, *Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis*, 2 J.L. & BIOSCIENCES 485 (2015) (analyzing judicial opinions regarding the use of neurological and behavioral genetic evidence in favor of criminal defendants); Judith G. Edersheim, Rebecca Weintraub Brendel & Bruce H. Price, *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) (finding that neuroscience evidence tends to be used in favor of criminal defendants, rather than wielded as a sword against them); Shelly Batts, *Brain Lesions and Their Implications in Criminal Responsibility*, 27 BEHAV. SCIS. & L. 261, 261–65 (2009) (discussing the impact of neuroimaging in determining legally relevant mental disorders); Eyal Aharoni, Chadd Funk, Walter Sinnott-Armstrong & Michael Gazzaniga, *Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience*, 1124 ANNALS N.Y. ACAD. SCIS. 145 (2008) (identifying how neurological evidence and technology can probe for criminal responsibility); Michael S. Pardo & Dennis Patterson, *Philosophical Foundations of Law and Neuroscience*, 2010 U. ILL. L. REV. 1211, 1231–35 (describing how neurology relates to criminal law doctrines such as *actus reus* and *mens rea*). For a more general examination into the emerging field of law & neuroscience, including the potential for neuroimaging techniques to provide mitigation, see OWEN D. JONES, JEFFREY D. SCHALL & FRANCIS X. SHEN, *LAW AND NEUROSCIENCE* 1–67 (2014).

identified over 500 cases during a twenty-year period—most of them capital cases—in which neuroscience evidence was used either to show mitigating mental health circumstances, or that a defense attorney was ineffective in failing to present such mitigation.<sup>334</sup> Some of the 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.”<sup>335</sup> 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.”<sup>336</sup>

Mitigating neuroscience evidence is common in capital cases but not in routine felony cases.<sup>337</sup> 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.<sup>338</sup> And while capital defendants may have greater rates of mental illness or other potentially mitigating health circumstances than defendants in noncapital 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 many defendants in all types of felony

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<sup>334</sup> Denno, *supra* note 333, at 501–11.

<sup>335</sup> *Id.* at 515–17 (discussing *Simmons v. State*, 105 So. 3d 475, 505 (Fla. 2012)).

<sup>336</sup> *Id.* at 544.

<sup>337</sup> Over two-thirds of the cases Denno found were capital cases. *Id.* at 501–02. And those rare noncapital cases in which 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) (noting that neuroscience mitigation evidence was 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 (2016) (noting neuroscience’s use primarily in “very serious cases”).

<sup>338</sup> Donald & Bakies, *supra* note 337, 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 Consideration of Behavioral Genetics Evidence in Criminal Cases: Results of a Longitudinal Study*, 2011 *MICH. ST. L. REV.* 967, 976–79 (describing how genetic evidence can contribute to mitigation).

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.<sup>339</sup> 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 nonsentencing context: competency.<sup>340</sup> When either the 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.<sup>341</sup> 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.<sup>342</sup> 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,”<sup>343</sup> and an array of recent research indicates that

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<sup>339</sup> See, e.g., James N. Bow, Michael C. Gottlieb & Dianna Gould-Saltman, *Attorneys’ Beliefs and Opinions About Child Custody Evaluations*, 49 FAM. CT. REV. 301, 307 (2011) (noting practitioners citing cost concerns with psychological evaluations in the child custody context).

<sup>340</sup> Denno, *supra* note 333, at 510 n.112 (“Examples of these mental health defenses include . . . incompetency to stand trial.”).

<sup>341</sup> 18 U.S.C. § 4241(a).

<sup>342</sup> *United States v. Jackson*, 815 F. App’x 398, 402 (11th Cir. 2020).

<sup>343</sup> U.S. SENT’G GUIDELINES MANUAL § 5H1.3 (U.S. SENT’G COMM’N 2021).

mental health issues are pervasive in the criminal justice system and have complex interactions with crime.<sup>344</sup>

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 decision-making. But there is another decision-maker 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, and what sentence to recommend to the judge if the case results in a conviction.<sup>345</sup> Prosecutors carry out these tasks with almost complete discretion and little requirement to report the reasons for their decisions.<sup>346</sup> While there is a compelling case that sentencing is a critical part of the criminal justice process,<sup>347</sup> charging 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

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<sup>344</sup> See Johnston, *supra* note 285, at 517–23 (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).

<sup>345</sup> See, e.g., JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 127–34 (2017) (describing the power of prosecutors, including “unreviewable ability to decide whether to file charges”); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1204 (2020) (describing consensus that prosecutors are “the most powerful officials in the criminal justice system” (quoting ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007))); Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1127–29 (2021) (outlining the power associated with prosecutorial discretion).

<sup>346</sup> PFAFF, *supra* note 345, at 157–59; Baughman & Wright, *supra* note 345, at 1127–29.

<sup>347</sup> See *supra* Section I.A.

bypass the sentencing process when the parties agree to a particular sentence.<sup>348</sup> And even after conviction, prosecutors have a role in crafting the sentence by making a sentencing recommendation to the judge.<sup>349</sup> 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 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 "participat[ing]" in plea negotiations.<sup>350</sup> Of course, defense counsel is always free to contact the prosecution and present mitigation in the plea-bargaining process. But it is unclear how often this happens in practice.<sup>351</sup> Given the wide variability in the amount of mitigation presented in sentencing memoranda,<sup>352</sup> 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 decision-making. Prosecutors are extremely difficult to study because they do not release information about their decisions—we know very little about even core prosecutorial functions, such as how charging decisions are made, let alone how mitigating information affects prosecutors' plea offers or sentencing recommendations.<sup>353</sup> The limited experimental data we do have suggests that

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<sup>348</sup> FED. R. CRIM. P. 11(c)(1) (permitting plea agreements to specify that the prosecutor will "not bring, or will move to dismiss, other charges," or will "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").

<sup>349</sup> See, e.g., United States' Sentencing Memorandum and Motion for Downward Departure from Guideline Sentencing Range, *United States v. Naaman*, No. 08-246, 2011 WL 13079247, at \*3, \*6 (D.D.C. Jan. 22, 2011) (noting the Guidelines' recommended sentencing range and advocating for a reduced sentence because of defendant's cooperation with the government).

<sup>350</sup> FED. R. CRIM. P. 11(c)(1).

<sup>351</sup> See Baughman & Wright, *supra* note 345, at 1136 (noting that plea bargaining is difficult to monitor or control through the democratic process, as it "often takes place in private meetings").

<sup>352</sup> See *supra* Figure 2.

<sup>353</sup> See, e.g., Baughman & Wright, *supra* note 345, at 1130–31 (noting the lack of data on prosecutorial decision-making). Some newly elected state prosecutors are implementing policies to make

there is significant variability in how prosecutors make charging decisions,<sup>354</sup> which implies there is likely to be similar variability in how they make plea offers or arrive at sentencing recommendations.

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."<sup>355</sup> 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.<sup>356</sup> Other guidance specifically permitted prosecutors to consider "case-specific aggravating or mitigating factors" in determining whether to seek particular sentencing enhancements.<sup>357</sup> Though those policies were rescinded under the Trump Administration, they have largely been reinstated in the Biden Administration.<sup>358</sup> And the transition toward an increased willingness to consider individual defendants' circumstances is even more pronounced in

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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 CNTY. OFF. OF THE PROSECUTING ATT'Y, 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> [https://perma.cc/FJ9G-G976].

<sup>354</sup> Baughman & Wright, *supra* note 345, at 1158–64.

<sup>355</sup> Memorandum from John Ashcroft, Att'y Gen., to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm) [https://perma.cc/HNN8-5XJ9].

<sup>356</sup> Memorandum from Eric Holder, Att'y Gen., to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [https://perma.cc/GH7X-HASW].

<sup>357</sup> Memorandum from Eric Holder, Att'y Gen., to the U.S. Att'ys & Assistant Att'y Gen. for the Crim. Div., Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [https://perma.cc/638U-FQJH].

<sup>358</sup> Memorandum from Monty Wilkinson, Acting Att'y Gen., to All Federal Prosecutors, Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing (Jan. 29, 2021), <https://www.justice.gov/ag/page/file/1362411/download> [https://perma.cc/SG5B-URRH]. A recent empirical project demonstrated that these policies had significant and intricate effects on federal sentences. See Mona Lynch, Matt Bamo & Marisa Omori, *Prosecutors, Court Communities, and Policy Change: The Impact of Internal DOJ Reforms on Federal Prosecutorial Practices*, 59 CRIMINOLOGY 480, 506, 510–11 (2021).

some state systems. Recently, as a number of progressive local prosecutors have taken office in major cities around the country,<sup>359</sup> they have instituted similar policies to allow prosecutors to consider individual mitigating circumstances in charging and plea negotiations.<sup>360</sup>

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."<sup>361</sup> Likewise, some federal courts require parties in civil cases to meet and confer regarding settlement prior to any pretrial conference.<sup>362</sup> Courts could adopt similar rules in the criminal context,

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<sup>359</sup> Bellin, *supra* note 345, at 1205–07; Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1422 (2021) (describing a "[r]ecent . . . surge in DA candidates branding themselves (or embracing the mantle of) 'progressive prosecutors'").

<sup>360</sup> 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 CNTY. OFF. OF THE PROSECUTING ATT'Y, POLICY DIRECTIVE 2021-11: POLICY REGARDING JUVENILE CHARGING 1–7 (2021), <https://www.washtenaw.org/DocumentCenter/View/19298/Juvenile-Charging-Policy> [<https://perma.cc/6RPK-3D4H>]. Likewise, Rachel Rollins—once the district attorney in Suffolk County, Massachusetts and now the U.S. Attorney for the District of 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." RACHAEL ROLLINS, THE RACHAEL ROLLINS POLICY MEMO 37 (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [<https://perma.cc/Y4HQ-R28L>].

<sup>361</sup> CAL. R. CT. 3.1380(c)(4).

<sup>362</sup> See, e.g., E.D. MICH. R. 16.2(a), (b)(12), <https://www.mied.uscourts.gov/PDFFiles/localRulesPackage.pdf> [<https://perma.cc/75RS-NNDK>].



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 facilitate those conversations through a required in-person meeting, with mitigation as one possible topic of discussion at that meeting.<sup>363</sup>

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 the problems related to ineffective assistance claims 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."<sup>364</sup> 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.

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<sup>363</sup> 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 348. 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) (quoting *United States v. Bruce*, 976 F.2d 552, 558 (9th Cir. 1992)). 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. COMPAR. 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 242. 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 (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, 337–56 (2016).

<sup>364</sup> STANDARDS FOR CRIM. JUST.: DEF. FUNCTION § 4-8.3(d) (AM. BAR ASS'N 2017).

## CONCLUSION

We are at a critical period in criminal justice policy. The public is more aware than ever about the myriad of 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—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 given 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 facilitate a thorough 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 made by prosecutors’ and public 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 disparities 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: ADDITIONAL SUPPORTING DATA

TABLE A1: PRIMARY INDEPENDENT VARIABLES AND  
CORRESPONDING RELIABILITY SCORES

<b>Independent Variable</b>	<b>Smith Index</b>
Relative Seriousness	0.90
Relative Culpability	0.89
Victim Harm—Minimizing	0.90
Victim Harm—Acknowledging	0.96
Remorse—Supported	0.95
Remorse—Unsupported	0.92
Historical Trauma	0.94
Character	0.86
General Family and Social Background	0.78
Collateral Consequences	0.95
Health—Supported	0.90
Health—Unsupported	0.97
Age	0.96
Deterrence	0.88
Incapacitation	0.77
Rehabilitation	0.55

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TABLE A2: WORD COUNTS (AND STANDARD DEVIATIONS)  
AND PROPORTIONS OF ALL VARIABLES<sup>365</sup>

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%
<b>Offense Mitigation Total</b>	<b>761.09 (791.30)</b>	<b>97%</b>
Historical Trauma	199.59 (313.88)	61%
Character	336.11 (501.44)	77%
General Family and Social 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%
<b>Personal Mitigation Total</b>	<b>935.11 (928.25)</b>	<b>94%</b>
Deterrence	82.33 (175.51)	39%
Incapacitation	26.75 (78.08)	21%
Rehabilitation	70.06 (119.37)	45%
<b>Theories-of-Punishment Total</b>	<b>179.85 (263.27)</b>	<b>62%</b>

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<sup>365</sup> Average word counts per memorandum were calculated by dividing the total number of words dedicated to each factor by the total number of memoranda in the sample.

TABLE A3: REGRESSION DATA OF MITIGATING FACTORS, CONTROLLING FOR CRIME TYPE

<b>Independent Variable</b>	<b>Standardized Beta Weight</b>	<b>p-Value</b>
Relative Seriousness	0.095	0.066
Relative Culpability	−0.012	0.812
Victim Harm—Minimizing	0.049	0.349
Victim Harm—Acknowledging	0.055	0.284
Remorse—Supported	−0.103	0.054
Remorse—Unsupported	0.107	0.035
Historical Trauma	−0.122	0.020
Character	−0.189	0.001
General Family and Social Background	−0.035	0.501
Collateral Consequences	−0.177	0.003
Health—Supported	−0.332	0.000
Health—Unsupported	0.051	0.312
Age	0.038	0.441
Deterrence	0.004	0.949
Incapacitation	0.012	0.820
Rehabilitation	0.073	0.181

