

**MITIGATING THE CRIME THAT IS THE OVER-
IMPRISONMENT OF WOMEN: WHY ORANGE SHOULD
NOT BE THE NEW BLACK**

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INTRODUCTION

When police investigate the next mass shooting, child murder, rape, or terrorist event in the United States, with only the barest possible risk of error, they can reduce their suspect list by 50.8%.¹ The culprit will not be a woman.² The police can focus their investigative efforts solely on men. Males and females behave fundamentally differently when it comes to crime. Women are responsible for only a small portion of total crime—in the range of 20%.³ This is despite the fact that they comprise slightly more than half of the population.⁴ Further, men almost exclusively commit the sort of crimes that profoundly damage people and communities.⁵ On average, females commit fewer violent and sexual crimes, and are much less prone to using weapons to achieve their criminal objectives.⁶

The contrast between male and female offending patterns is so stark that humans can be divided into two forms when it comes to criminal behavior: those that commit serious offenses, and those who do not. Scholars have accurately noted that “[g]ender is the single best predictor of criminal behavior: men commit more crime, and women commit less. This distinction holds throughout history, for all societies, for all groups, and for nearly every crime category.”⁷

While female offenders generally receive less serious sanctions than men, courts still sentence many females to prison—which is the harshest sanction in our system of law (with the obvious exception of the death penalty).⁸ Currently, there are over 200,000 women behind bars in the

1. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/00> (last updated July 1, 2015). Males comprise 49.2% of the United States’ inmate population. *Id.*

2. See Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N.Y. TIMES (Dec. 4, 2015), http://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html?_r=0 (reporting that evidence regarding a female mass-shooter led investigators to classify an attack as an act of terrorism).

3. See *infra* Part I.B (describing the percentages of female defendants charged with a range of different crimes).

4. *Quick Facts*, *supra* note 1.

5. U.S. DEPT. OF JUSTICE, BUREAU JUSTICE STATISTICS, VIOLENT CRIME 3–4 (1994).

6. *Id.*

7. Emilie Allan & Darrell Steffensmeier, *Gender and Crime - Similarities in Male and Female Offending Rates and Patterns, Differences Between Male and Female Offending Patterns*, NET INDUS., <http://law.jrank.org/pages/1256/Gender-Crime.html> (last visited Apr. 25, 2017).

8. This Article does not examine the appropriateness of the death penalty for female offenders for two reasons. First, only a very small number of females have been executed in the United States. In total, only 15 women have been executed since the Supreme Court lifted the ban on capital punishment in 1976. See Sebastian Murdock, *15 Women Have Now Been Executed in The United States Since 1976*, HUFFINGTON POST (Sep. 19, 2014, 11:49 AM), http://www.huffingtonpost.com.au/2014/02/05/suzanne-basso-execution-14_n_4733400.html?ir=Australia (citing the number of women sentenced to the death

United States.⁹ The problem is getting worse. The female incarceration rate in the United States is approximately eight times higher than it was for most of the 20th century.¹⁰ During the past four decades, females are the fastest growing portion of the prison population.¹¹ This demonstrates a grotesque failing in policy development and implementation.

The extent of the problem in the United States becomes even more acute compared to the global landscape. Thirty percent of all incarcerated women in the world are in the United States, despite only 5% of the world's female population living in the United States.¹² Additionally, across the globe, the 25 jurisdictions with the highest rates of incarcerated women are all American states.¹³ Thailand, at number 26, is the first non-U.S. jurisdiction to appear on this high-end list, followed closely at number 27 by the United States itself.¹⁴ The next 17 jurisdictions are also American states.¹⁵

penalty since 1976). Moreover, excluding consideration of death penalty cases does not constitute a significant limitation to this Article. The United States is the only developed nation, apart from Japan, that still imposes the death penalty. D.MCN., *The Death Penalty In Japan: Hanging Tough*, ECONOMIST (Sept. 30, 2014), <http://www.economist.com/blogs/banyan/2014/09/death-penalty-japan>. Moreover, not all states in America impose the death penalty and only a relatively small number of criminals are executed in the United States. There are 31 states that still have the death penalty. *States with and Without Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Apr. 25, 2017). Since 1976, there have been 1,419 executions in total. *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last updated Jan. 9, 2017). Note that the federal government also still has the death penalty. Second, the extreme nature of the death penalty often compels different jurisprudential principles. For example, courts have applied the prohibition against cruel and unusual punishment sparingly in the sentencing domain. To the extent courts apply it in this area, it has been mainly in relation to proscribing the death penalty to certain forms of crimes (non-homicide offenses). See *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008) (explaining the evolving standards for the constitutional prohibition against cruel and unusual punishment). In relation to non-capital sentences, the Supreme Court has endorsed the concept of proportionality as being a constraint on the level of punishment. However, the Supreme Court has not developed the concept with any degree of precision, and invokes it only to prohibit sanctions that contain gross disproportionality. See *Donna Lee, Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 533–44 (2008) (analyzing Supreme Court precedent on proportionality in non-capital sentences).

9. See *infra* Part II and note 37 (discussing the number and demographics of incarcerated women).

10. Aleks Kajstura & Russ Immarigeon, *States of Women's Incarceration: The Global Context*, PRISON POL'Y INITIATIVE, <http://www.prisonpolicy.org/global/women/> (last visited Apr. 25, 2017).

11. Dan Moshenberg, *The Growth of Women's Incarceration in the United States*, WOMEN IN AND BEYOND THE GLOB. (May 1, 2014), <http://www.womeninandbeyond.org/?p=13371>.

12. Kajstura & Immarigeon, *supra* note 10. See also *U.S.: Home to 30% of the World's Incarcerated Women*, CRIME REPORT (Nov. 27, 2015), <http://thecrimereport.org/2015/11/27/2015-11-us-home-to-30-of-the-worlds-incarcerated-women/> (discussing the Prison Policy Initiative report finding that 30% of all incarcerated women are in the United States).

13. Kajstura & Immarigeon, *supra* note 10.

14. *Id.*

15. Kajstura & Immarigeon, *supra* note 10.

In this Article, we suggest that there should be a fundamental reassessment of the approach to sentencing women. The default position is that no woman should be imprisoned. This presumption should be displaced only in cases of the most serious forms of offending, namely serious sexual and violent crime.¹⁶

There are a number of theories explaining why women are more law-abiding than men.¹⁷ None of these are definitive.¹⁸ However, what is incontestable is that females commit far less total crime than men, and even commit less serious crime.¹⁹ This undeniable difference between men and women shows the need for a new approach to dealing with female offenders. To be clear, this Article argues that women should generally receive more lenient penalties than men because they are normally more law-abiding, even when they commit the same crimes as men.²⁰

The reforms proposed in this Article are necessary and justifiable as a result of the different crimes that women normally commit and several other important differences between male and female offenders. First, women reoffend less frequently than men.²¹ Second, the impact of imprisonment on women is generally more damaging than on men.²² A long term of imprisonment to a woman can effectively negate her right to procreation.²³ In the case of men, typically the same sanction is merely a

16. See *infra* Part IV (providing further discussion and reasons for why we define sexual and violent crime as the most serious form of crime).

17. See, e.g., Katharine Quarmby, *Why Are We Shocked When Women Commit Violent Crimes?*, INDEPENDENT (May 30, 2016), <http://www.independent.co.uk/news/science/archaeology/features/some-women-do-kill-abuse-and-torture-a7056136.html> (criticizing the notion that women are “hard-wired” against committing violent acts); *Hormones Play Dual Role in Unethical Behavior*, NEWS MED. (July 19, 2016), <http://www.news-medical.net/news/20150729/Hormones-play-dual-role-in-unethical-behavior.aspx> (finding that elevated levels of testosterone lead to both unethical behavior and risk-taking behaviors with diminished fear of punishment).

18. See *infra* Part II.C (identifying that no specific factor makes women more law-abiding).

19. U.S. DEPT. OF JUST., *supra* note 5, at 3.

20. This recommendation is in contrast to current sentencing orthodoxy, which suggests that gender should be irrelevant to sentencing. U.S. SENTENCING GUIDELINES MANUAL § 5H intro. cmt. (U.S. SENTENCING COMM’N 2015)

21. JESSICA ZHANG & ANDREW WEBSTER, AUSTRAL. BUREAU OF STATISTICS, AN ANALYSIS OF REPEAT IMPRISONMENT TRENDS IN AUSTRALIA USING PRISONER CENSUS DATA FROM 1994 TO 2007, at 17 (2010), [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/\\$File/1351055031_aug%202010.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf).

22. See Patricia M. Wald, *Why Focus on Women Offenders?*, 16 CRIM. JUST. 10, 11–12 (2001) (demonstrating that women are typically the primary caretakers of children and their removal typically leaves the children in the care of the state, which imposes greater deprivations on women than on men).

23. Sarah L. Dunn, *The “Art” Of Procreation: Why Assisted Reproduction Technology Allows For The Preservation Of Female Prisoners’ Right To Procreate*, 70 FORDHAM L. REV. 2561, 2564 (2002).

suspension of this right. Women also suffer more while they are imprisoned.²⁴ They are more likely to have mental health issues (which makes it more difficult for them to cope with incarceration) and to be victims of sexual abuse.²⁵ Third, women perform a greater portion of the nurturing and benevolent acts in society than men.²⁶ Removing them from society often has a devastating impact on their children, relatives, and other dependents.²⁷ This disruption should be minimized. Fourth, a significant portion of female offenders have been the victim of child sexual abuse.²⁸ This increases the likelihood that they will engage in criminal conduct.²⁹ In short, we suggest that gender, like youthfulness, should be a per se established and powerful mitigating consideration.³⁰

This Article addresses obvious counterarguments to this proposal. While principles of proportionality³¹ and equality³² support the view that men and women who commit the same crime should receive the same penalty, these principles do not entail that women should normally be subjected to the same severity of sanctions as men. Proportionality is an important sentencing consideration. In fact, it is the fulcrum upon which all sentences should be determined.³³ However, it is not a determinative consideration when it comes to prescribing the appropriate penalty. The

24. See *infra* Part II.C (arguing that women should receive a sentencing discount because the impact of imprisonment on them is more severe than men).

25. See *infra* Part II.C (identifying that incarcerated women experience more abuse and mental health problems than incarcerated men).

26. See *infra* Part II.D (discussing how family and community are harmed more when female members are imprisoned versus their male counterparts).

27. See *infra* Part II.D (establishing that not only imprisoned women suffer as a result of their incarceration).

28. Cathy McDaniels-Wilson & Joanne Belknap, *The Extensive Sexual Violation and Sexual Abuse Histories of Incarcerated Women*, 14 VIOLENCE AGAINST WOMEN 1090, 1118 (2008).

29. See MARY STATHOPOULOS & ANTONIA QUADARA, CORRECTIVE SERVS. NSW WOMEN'S ADVISORY COUNCIL, WOMEN AS OFFENDERS, WOMEN AS VICTIMS: THE ROLE OF CORRECTIONS IN SUPPORTING WOMEN WITH HISTORIES OF SEXUAL ABUSE 5 (2014), <http://www.correctiveservices.justice.nsw.gov.au/Documents/women-as-offenders-women-as-victims-the-role-of-corrections-in-supporting-women-with-histories-of-sexual-assault.pdf> (reporting that women with a history of sexual abuse represent a significant proportion of incarcerated women).

30. See *infra* Part III (summarizing the primary arguments supporting this conclusion).

31. See *infra* Part IV (discussing arguments against lesser punishment for women in terms of proportionality and equality and whether women will be used as instruments to commit crimes due to the expectation of less jail time).

32. This is the principle that the hardship imposed by the sanction should be commensurate to the seriousness of the crime. See *infra* Part II.B (discussing how these principles support this conclusion).

33. See Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169, 171 (2016) (asserting that proportionality should be the guiding determinant in sentencing determinations).

sentences of women should be discounted relative to that of most men who commit the same crime because of the four differences mentioned above: (1) women present a lower risk of reoffending; (2) prison impacts them more severely; (3) imprisoning women normally has harmful effects on their dependents or other relatives; and (4) many female offenders were sexually victimized as children. The principle of equality requires the sentencing calculus to incorporate these considerations instead of simply comparing different situational settings. Thus, there is no validity to the assertion that the reforms this Article suggests will violate the proportionality principle or discrimination norms.

Further, implementing changes to the sentencing system that will benefit women does not necessarily prejudice men. In fact, it will have the opposite effect. The analysis and conclusions in this Article will prompt a reassessment of all sentencing principles for all nonviolent and non-sexual crimes. Logically, men who commit crimes of this nature (nearly 50% of male inmates) will receive more lenient sanctions.³⁴

Another possible objection to the recommendations in this Article is that these recommendations will result in women committing more crime because they either reduce the deterrent effect of criminal sanctions or men will use women as instruments to complete men's criminal objectives. We negate these counters; the empirical data does not establish a link between lower crime and higher penalties, and there is no evidence to suggest that male criminals commonly use female agents to commit their crimes.³⁵

Part I of this Article examines the data on female offending and sentencing patterns. It also provides an overview of possible reasons for the differences between male and female offending patterns. Part II sets out four reasons why females should receive more lenient sentences. Part III sets out in detail the way to reform the sentencing system to properly accommodate female offenders. Part IV addresses the counterarguments to foreseeable criticisms of the reforms this Article proposes. Part V discusses the implications that our proposals have for male offenders.

While this Article focuses on female offending and sentencing, it is relevant to the entirety of sentencing law and practice. The United States is experiencing an incarceration crisis.³⁶ More than two million Americans are

34. See *infra* Part V (discussing this recommendation).

35. Raymond Bonner & Ford Fessenden, *Absence of Executions: A Special Report; States with No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES (Sept. 22, 2000), <http://www.nytimes.com/2000/09/22/us/absence-executions-special-report-states-with-no-death-penalty-share-lower.html>.

36. See Bagaric & Gopalan, *supra* note 33, at 170 (discussing that America must reduce its ever-growing prison population to alleviate the "crisis" of incarceration).

in federal prisons, state prisons, and local jails.³⁷ This is an imprisonment rate of over 700 out of 100,000 adults. This rate has increased more than four-fold over the past 40 years.³⁸ The United States now has the highest incarceration rate in the developed world,³⁹ and by a considerable margin. The imprisonment rate in most developed countries is five to ten times less than in the United States.⁴⁰ Moreover, this rate is six times the rate of a typical nation in the Organization for Economic Co-Operation and Development (OECD).⁴¹ There are wide-ranging calls to implement measures to reduce imprisonment numbers.⁴² However, no one has offered

37. The exact number of prisoners is 2,145,100. *Highest to Lowest – Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited Apr. 25, 2017). See also E. ANN CARSON & DANIELA GOLINELLI, U.S. DEPT. OF JUST., PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 1 (2013), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf> (stating the number of prisoners in the United States).

38. JEREMY TRAVIS ET AL., NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES 2 (2014).

39. *Criminal Justice Facts*, SENTENCING PROJECT, <http://www.sentencingproject.org/criminal-justice-facts/> (last visited Apr. 25, 2017). See also Nick Wing, *Here Are All of the Nations that Incarcerate More of Their Population than the U.S.*, HUFFINGTON POST (Aug. 13, 2013, 8:21 AM), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html (discussing the high incarceration rate in the United States compared to other countries). Current incarceration rates are historically and comparatively unprecedented. The United States has the highest incarceration rates in the world, reaching extraordinary absolute levels in the most recent two decades. See TRAVIS ET AL., *supra* note 38, at 68 (stating that U.S. incarceration rates are the highest in the world and have been increasing since the 1970s).

40. TRAVIS ET AL., *supra* note 38, at 2.

41. MELISSA S. KEARNEY ET AL., HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 10 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/v8_THP_10CrimeFacts.pdf. Rates in the OECD range from 47 to 266 per 100,000 adult population. *Id.* See also Wing, *supra* note 39 (explaining that “[a]t 716 per 100,000 people in 2013, according to the International Centre for Prison Studies, the U.S. tops every other nation in the world. Among OECD countries, the competition isn’t even close — Israel comes in second, at 223 per 100,000.”).

42. Wing, *supra* note 39. See also Remarks by Sally Quillian, U.S. Deputy Attorney General, on Criminal Justice Reform to Colombia Law School (Oct. 29, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-criminal-justice-reform> (arguing for a change in the justice system); Andrea Jones, *The Nation’s Shame: The Injustice of Mandatory Minimums*, ROLLING STONE (Oct. 7, 2014), <http://www.rollingstone.com/politics/news/the-nations-shame-the-injustice-of-mandatory-minimums-20141007> (describing an act that proposes mandatory sentencing minimums); Editorial, *Toward Saner, More Effective Prison Sentences*, N.Y. TIMES (Oct. 3, 2015), <https://www.nytimes.com/2015/10/04/opinion/sunday/toward-saner-more-effective-prison-sentences.html?%20r=0>; Ken Cuccinelli, *Criminal Justice Reform: Conservative States Have a Record of Success. So Why Ignore it?*, FOX NEWS (Nov. 5, 2015), <http://www.foxnews.com/opinion/2015/11/05/critics-federal-criminal-justice-reform-ignore-decade-long-success-in-conservative-states.html> (discussing the reduction of incarceration rates); Sabrina Siddiqui, *‘An Injustice System’: Obama’s Prison Tour Latest in Late-Term Reform Agenda*, GUARDIAN (Jul. 17 2015, 6:43 PM), <http://www.theguardian.com/us-news/2015/jul/16/barack-obama-prison-tour-criminal-justice-race-reform> (suggesting several alternatives to imprisonment).

a principled solution. This Article shines a spotlight on reasons why many women inmates should not be in prison. The jurisprudential and empirical rationales underpinning this reform apply to all offenders, thereby also leading to recommendations that will greatly reduce male incarceration numbers.

This Article considers offending patterns, sentencing principles, and incarceration levels in the United States and Australia. As this Article discusses below, the Australian perspective can be potentially illuminating for several reasons.⁴³ First, it supports the proposition that women commit far less crime than men, and in particular, far less serious crime. The similarities between female offending patterns in the two countries are striking. Secondly, unlike the United States, Australian sentencing courts have a higher degree of discretion. Despite this flexibility, female incarceration levels in Australia are no lower than in the United States. This suggests that the solution to reducing female incarceration involves express statutory rules, as opposed to enhancing judicial sentencing discretion. Conferring more sentencing discretion on judges is not the solution—or even part of the answer. This realization is cardinal to the recommendations this Article makes in Part III.

Previous research examined gender differences in sentencing and offending patterns.⁴⁴ This Article expands on the research and literature in

43. See *infra* Part II.B (discussing female offending patterns); Part I.B (comparing female offending patterns in Australia to the United States).

44. The topic of gender sentencing received most scholarly attention approximately 20 years ago and was the subject of a symposium. Symposium, *Gender and Sentencing*, 8 FED. SENT'G REP. 129 (1995). However, despite a considerable degree of scholarly analysis during the period, there was no meaningful legal progress made in clarifying the extent (if any) to which gender should impact sentencing outcomes. See KATHLEEN DALY, GENDER, CRIME, AND PUNISHMENT (1994), for other literature in the area. See also REGINA GRAYCAR & JENNY MORGAN, THE HIDDEN GENDER OF LAW 28–30 (2d ed. 2002) (discussing gender inequality in the legal system); THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN'S INCARCERATION 4 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/The-Changing-Racial-Dynamics-of-Womens-Incarceration.pdf> (discussing incarceration rates among various races of women between 2000 and 2009); VICTORIAN SENTENCING ADVISORY COUNCIL, GENDER DIFFERENCES IN SENTENCING OUTCOMES 56 (2010), <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Gender%20Differences%20in%20Sentencing%20Outcomes.pdf> (discussing the differences in incarceration rates between men and women in Victoria); Nicholas O. Alozie & C. Wayne Johnston, *Probing the Limits of the Female Advantage in Criminal Processing: Pretrial Diversion of Drug Offenders in an Urban Country*, 21 JUST. SYS. J. 239, 239 (2000) (analyzing research on differences in gender sentencing); JOANNE BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE 99–100 (3d ed. 2007) (showing the statistics of women committing specific crimes compared to men); Keith Crew, *Sex Differences in Criminal Sentencing: Chivalry or Patriarchy?*, 8 JUST. Q. 59, 59 (1991) (comparing the effects of legal and non-legal variables on prison sentences for men and women); Debra Curran, *Judicial Discretion and Defendant's Sex*, 21 CRIMINOLOGY 41, 44–45 (1983) (analyzing judicial treatment differences relating to gender in criminal offenders); Kathleen Daly, *Gender and Sentencing: What We Know and Don't Know from Empirical Research*, 8 FED. SENT'G REP. 163, 165 (1995) [hereinafter Daly, *Gender and Sentencing*] (reviewing judicial paternalism and lenient treatment of women); Kathleen Daly & Michael Tonry, *Gender, Race and Sentencing*, 22 CRIME & JUST. 201, 206

this area by proposing clear reforms to the sentencing system, which will lower female prison numbers. This Article also extends the rationales from this research to the entire sentencing system, logically leading to recommendations that will also reduce male incarceration levels.

I. FEMALE OFFENDING PATTERNS AND INCARCERATION TRENDS: WOMEN COMMIT MUCH LESS CRIME AND EVEN LESS SERIOUS CRIME, YET THEIR INCARCERATION RATE IS INCREASING

A. The Situation in the United States

Women comprise slightly more than half of the population in both the United States⁴⁵ and Australia.⁴⁶ Yet, when it comes to committing crime, they are grossly underrepresented.⁴⁷

A United States Department of Justice Survey examining felony convictions in the 75 largest counties between 1990 and 2009 showed that females comprised 17% of all felony defendants.⁴⁸ Further, men commit the more serious forms of arrest charges⁴⁹ and 86% of all violent matters (i.e., murder, rape, robbery, and assault).⁵⁰ Narrowed down further to the most

(1997); Barbara A. Koons-Witt, *The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines*, 40 CRIMINOLOGY 297, 297 (2002) (discussing importance of gender disparity in criminal sentencing); Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 127 (2010) (discussing whether race and gender should play a role in sentencing decisions); Elizabeth F. Moulds, *Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System*, 31 WESTERN POL. Q. 416, 416 (1978) (identifying a wide range of research on women in the criminal justice system); Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 183 (1994) (evaluating the impact of sentencing reform on female offenders); Cassia Spohn & Dawn Beichner, *Is Preferential Treatment of Female Offenders a Thing of the Past? A Multisite Study of Gender, Race and Imprisonment*, 11 CRIM. JUST. POL'Y REV. 149, 155 (2000) (examining gender differences in sentencing).

45. The exact figure is 50.8%. *Quick Facts*, *supra* note 1.

46. The exact figure is 50.2%. *Australian Demographic Statistics, June 2015*, AUSTL. BUREAU STAT. (Dec. 17, 2016).

47. WORLD PRISON BRIEF, *supra* note 37. See also *United States Incarceration Rates By Sex*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/graphs/genderinc.html> (last visited Apr. 25, 2017) (reporting that the incarceration rate for women in the United States is 126 per 100,000); *Gender Indicators, Australia, Jan 2012*, AUSTRL. BUREAU OF STATISTICS (July 2, 2012) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by+Subject/4125.0~Jan+2012~Main+Features~Imprisonment+rates~5210> (reporting that the incarceration rate for women in Australia is 25.2 per 100,000).

48. This was an increase from 14% in 1990. See BRIAN A. REAVES, U.S. DEPT. OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 1 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> (reporting that between 1990 and 2009 “[t]he percentage of female defendants rose from 14% to 17%”).

49. We define serious offenses as sexual and violent offenses. See *infra* Part I.A (discussing the violent crime rates between 1973 and 1992). See also U.S. DEPT. OF JUST., *supra* note 5, at 4.

50. U.S. DEPT. OF JUST., *supra* note 5, at 4.

serious offenses, females are even less represented. Men commit more than 90% of all murders, and 100% of all rapes.⁵¹ By contrast, females commonly commit less serious crimes.⁵² Thus, we see that the only felonies in which women are significantly represented are property offenses, especially forgery and fraud—the only crimes where women commit more than 30% of the total offenses of that type.⁵³ A similar pattern occurs in relation to federal offenses. In 2013, women comprised 13.3% of the offender population (of the total 80,035 cases).⁵⁴ Females were mainly sentenced for drug trafficking (33.7%), fraud (23.9%), and immigration offenses (14.3%).⁵⁵

More broadly, there is a general dichotomy between female and male offending patterns. More than half of all men (54%) are in prison for violent offenses; compared to only 37% of women.⁵⁶ Females are mainly in prison for property (28%), drug (24%), and public order offenses (9%).⁵⁷

Despite the low participation of women in crime, their incarceration numbers are increasing. Over a 30-year period, the rate of increase is staggering. From 1980 to 2010, the number of females in prison in the United States rose from 15,118 to 112,797.⁵⁸ This is an increase of approximately 650%, which means that female incarceration grew at nearly 1.5 times the rate of male imprisonment.⁵⁹

Female imprisonment continues to grow. The most recent report by the United States Department of Justice, Bureau of Justice Statistics, shows that in 2013, women comprised 14% of the total local jail population (an increase from 11% in 2000).⁶⁰ Thus, in 2013, there were 102,400 women in

51. Rounded to the nearest 0.5%. U.S. DEPT. OF JUST., *SEX OFFENSES AND OFFENDERS*, at v (1997), <https://bjs.gov/content/pub/pdf/SOO.PDF>.

52. *Id.*

53. See REAVES, *supra* note 48, at 6 (reporting that women commit 23% of property crimes overall, and 34% and 37% of Forgery and Fraud, respectively).

54. U.S. SENTENCING COMM'N, *QUICK FACTS: WOMEN IN THE FEDERAL OFFENDER POPULATION 1* (2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Female_Offenders.pdf.

55. *Id.*

56. THE SENTENCING PROJECT, *FACT SHEET: INCARCERATED WOMEN AND GIRLS 4* (2015), http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf.

57. *Id.*

58. *Incarceration and Women*, CTR. FOR PRISONER HEALTH AND HUMAN RIGHTS, <http://www.prisonerhealth.org/educational-resources/factsheets-2/incarceration-and-women/> (last visited Apr. 25, 2017).

59. See THE SENTENCING PROJECT, *supra* note 56, at 1. See also Moshenberg, *supra* note 11 (noting that, “[t]he past three to four decades have seen rapid growth in women’s incarceration rates—a rise of 646 percent since 1980 compared with a 419 percent rise for men”).

60. LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEPT. OF JUST., *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013*, at 2 (2014),

local jails.⁶¹ An additional 112,900 women were in state and federal prisons.⁶² This constituted 3.1% of all prisoners.⁶³ This has increased since 2000, when females comprised 6.7% of the state and federal population.⁶⁴ Thus, the reality is that the number and percentage of women in the correctional system is growing, and at a faster rate than men.

Moreover, women are far more likely to be imprisoned for nonviolent offenses. “Compared with men, women are sentenced more often to prison for nonviolent crimes: about 55[%] of women sentenced to prison have committed property or drug crimes as compared with about 35[%] of male prisoners.”⁶⁵ The “war on drugs” policies, which commenced about 45 years ago and increased penalties for drug crimes, adversely impacted female offenders.⁶⁶ In 1986, only 12% of women in state prisons were sentenced for drug offenses.⁶⁷ This increased to 25.7% by 2009.⁶⁸

B. Similar Female Offending and Incarceration Patterns in Australia

Similar female offending and incarceration patterns exist in Australia. The most recent sentencing statistics relating to offenders appearing in Australian courts show that for the 2014–2015 financial year, females comprised 22% of all defendants who appeared in criminal courts.⁶⁹ This is higher than the rate in the United States. However, this figure includes all crimes, including traffic and regulatory offenses.⁷⁰ When it comes to more serious crimes, female involvement drops considerably. Females comprised slightly less than 13% of all defendants in the Higher Courts.⁷¹ Further, when it comes to the most serious offenses, females are even less

<https://www.bjs.gov/content/pub/pdf/cpus13.pdf> (finding also that in 2013, the total number of prisoners in local jails was 731,200, while the total number in state and federal prisons was 1,574,700).

61. *Id.* at 6.

62. *Id.*

63. *Id.* at 6.

64. The total number of females in state and federal prisons in 2000 was 93,200, and there were 1,301,000 males. *Id.* at 6.

65. TRAVIS ET AL., *supra* note 38, at 170 (citation omitted).

66. THE SENTENCING PROJECT, *supra* note 44, at 5.

67. *Id.*

68. *Id.*

69. There were 131,486 female defendants finalized and 448,594 males. *Criminal Courts, Australia, 2014–15*, AUSTL. BUREAU OF STATISTICS (Mar. 1, 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2014-15~Main%20Features~Finalised%20defendants~3>.

70. *Id.*

71. *Id.* There were 15,222 defendants dealt with in the Higher Courts (including organizations); from 2013 there has been an overall increase in the number of female defendants over the number of male defendants. “The number of females increased by 3% (or 3,683) while the number of males increased by 1% (or 4,865).” *Id.*

represented. They commit virtually no sexual offenses.⁷² Females constitute 10.4% of all defendants whose most serious crimes are homicide or a related offense.⁷³ However, the number of females charged with such offenses is low, given that only 241 women committed these types of offenses in total.⁷⁴ Women committed less serious forms of crime, including fraud and related offenses (27%), theft and related offenses (15%), and traffic and vehicle regulatory offenses (7%).⁷⁵

When it comes to prison numbers, women are sentenced to prison less than men. They constitute approximately 8% of all prisoners.⁷⁶ However, the total number of female prisoners has grown considerably over the past decade. In 2005, there were 1,734 female prisoners (which amounted to 6.8% of all prisoners).⁷⁷ The total number of female prisoners in June 2015 was 37,791, of whom 2,591 were female.⁷⁸ This amounts to 7.6% of the total prison population.

The most recent information relating to offense types for which prisoners are incarcerated is from a year earlier (June 30, 2014). The number of female prisoners was 2,591.⁷⁹ These figures are illuminating. They show that 9.3% of females were in prison for homicide and related offenses.⁸⁰ The majority of women (more than 60%) were in jail for nonviolent and non-sexual offenses, with the most common offenses being: unlawful entry (9.5%); theft (7.8%); fraud and deception offenses (7.8%); drug offenses (17%); and offenses against justice procedures (11%).⁸¹ By

72. Rounded to the nearest 0.5%. *Id.* (demonstrating that the majority of female offenses are traffic and theft related).

73. Rounded to the nearest 0.5%. *Id.* tbl. 5.

74. *Prisoners in Australia, 2014*, AUSTL. BUREAU OF STATISTICS (Nov. 12, 2014), <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02014?> (go to Table 1 in the data cube at this website).

75. *Id.*

76. *Prisoners in Australia, 2016*, AUSTL. BUREAU OF STATISTICS (Aug. 12, 2016), <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>. The number of prisoners in total in Australia in September 2016 was 33,005, of whom 12,559 were female. *Id.* This has exponentially increased since 2002, when there were only 1,484 female prisoners in Australia. AUSTL. BUREAU OF STATISTICS, *PRISONERS IN AUSTRALIA, 2012*, at 9 (2013), [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/24B61FAA213E5470CA257B3C000DCF8A/\\$File/45170_2012reissue.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/24B61FAA213E5470CA257B3C000DCF8A/$File/45170_2012reissue.pdf).

77. *Prisoners in Australia, 2014*, AUSTL. BUREAU OF STATISTICS (Dec. 11, 2015), <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02014?> (reporting that in June 2015, the male imprisonment rate was 367 per 100,000, whereas for females it was 30 per 100,000).

78. *Id.*

79. *Id.*

80. *Id.* tbl. 4.

81. *Id.*

contrast, the majority of males were in prison for either acts of violence or sexual offenses.⁸²

There is also a fundamental distinction between the manner in which male and female prisoners are categorized in Australia. One-third of male prisoners are classified as minimum security,⁸³ whereas 40% of female prisoners have this classification.⁸⁴

Thus, in the United States and Australia, women commit far less crime, and even far less serious crime compared to men. For this reason, female incarceration levels should be considerably lower than that of males—and they are. Female imprisonment is less than 10% of the overall imprisonment rate in both countries.⁸⁵ This disparity should be higher. This can be achieved by the adoption of two main reforms. First, recognizing the additional mitigating factors that apply to women. Second, introducing a reform that only serious sexual and violent offenders should be imprisoned. The next section focuses on the first reform, starting with a brief explanation of some of the possible reasons for the differences in male and female offending patterns.

C. Interlude—Speculation as to Why Women Commit Less Crime and Why Even Serious Crimes Females Commit Are Not as Bad

This Article does not establish the exact reasons for the differences between male and female offending patterns because the evidence indicates that these patterns are entrenched. Moreover, as it transpires, there are no firm reasons to explain this phenomenon. However, for the sake of completeness, it is illuminating to set out key reasons for these differences. While research findings relating to the reasons for the gender differences are not definitive, there are three broad explanations, which at least partly explain why women commit less crime. They are divided into the following categories: (1) biological, (2) psychological, and (3) sociological.

A person's natural inclination or predisposition to act in a certain way is closely tied to his or her hormones.⁸⁶ Thus, from the biological perspective, there are innate differences between men and women that potentially explain different offending patterns. Men are naturally more

82. The figure was approximately 55%. *Id.*

83. The rest are either maximum or medium security (a small portion—less than 3%—are also unclassified). *Id.* tbl. 31.

84. *Id.*

85. *See supra* Part II.B (identifying this similar rate).

86. Daniel Goleman, *Aggression in Men: Hormone Levels Are a Key*, N.Y. TIMES (July 17, 1990), <http://www.nytimes.com/1990/07/17/science/aggression-in-men-hormone-levels-are-a-key.html?pagewanted=all>.

competitive, domineering, and physically aggressive than women.⁸⁷ The hormone that has the most significant impact in producing such characteristics in males is testosterone.⁸⁸ This is an androgen, meaning a male sex hormone, that it is primarily responsible for stimulating the development of male characteristics.⁸⁹

Testosterone is an extremely powerful hormone that also has the ability to influence behavior.⁹⁰ A recent study by A. Gray found that men who had higher levels of testosterone and related hormones had personalities that were “dominant with some aggressive behavior,” controlling, and freely expressive of anger.⁹¹ In a separate study, the same researcher analyzed testosterone levels in the saliva of 692 adult male prisoners.⁹² This research found that the testosterone levels of those inmates who had committed crimes of a sexual and violent nature were higher than those who had committed property or drug crimes.⁹³ Further, inmates with higher levels of testosterone were found more likely to disobey prison rules, particularly those regarding confrontation.⁹⁴

Although females also produce testosterone, the significant disparity in the levels found in each sex indicates its influence. An adult male’s testosterone levels are about ten times higher than an adult female’s.⁹⁵ In fact, the highest testosterone level that a female will reach in her lifetime is equal to a male’s testosterone level that would be considered in the “low range.”⁹⁶ Thus, the influence of testosterone on behavior is significantly greater in males. Not surprisingly, researchers also discovered that women prisoners who had higher levels of testosterone were more likely to engage in aggressive behavior while in prison.⁹⁷

At the physical level, testosterone also has masculinizing effects on males, such as developing strength and muscle mass-qualities that are often

87. See LARRY J. SIEGEL, *CRIMINOLOGY: THEORIES, PATTERNS, AND TYPOLOGIES* 53–54 (2013) (discussing behavioral differences between men and women and identifying potential biological and cultural causes).

88. A. Gray et al., *The Relation Between Dominance, Anger, and Hormones in Normally Aging Men: Results from the Massachusetts Male Aging Study*, 53 *PSYCHOSOMATIC MED.* 375, 380–81 (1991).

89. Sally Robertson, *What is Testosterone?*, *NEWS MED.* (Jan. 13, 2016), <http://www.news-medical.net/health/What-is-Testosterone.aspx>.

90. Gray et al., *supra* note 88, at 380.

91. *Id.* at 375, 380.

92. James M. Dabbs Jr. et al., *Testosterone, Crime, and Misbehavior Among 692 Male Prison Inmates*, 18 *PERSONALITY & INDIVIDUAL DIFFERENCES* 627, 627–28 (1995).

93. *Id.* at 630.

94. *Id.*

95. Goleman, *supra* note 86.

96. *Id.*

97. James M. Dabbs Jr. & Marian F. Hargrove, *Age, Testosterone and Behavior Among Female Prison Inmates*, 59 *PSYCHOSOMATIC MED.* 477, 478 (1997).

necessary—or at least useful—for carrying out many crimes.⁹⁸ By contrast, females are generally smaller and weaker in strength due to the low levels of testosterone that they produce.⁹⁹ In fact, society sometimes perceives women to be incapable of committing many crimes, particularly those that require strength and are of a violent nature.¹⁰⁰ This perception further blunts a woman's willingness to engage in criminal activity.¹⁰¹ This may explain why females commit less frequent and less serious crimes.¹⁰²

The second broad explanation as to why women commit less crime is due to purported psychological differences. Some researchers have hypothesized that there are important cognitive differences between males and females that influence the inclination toward anti-social behavior.¹⁰³ These cognitive differences are apparent at a young age. In general, girls are more empathetic and sensitive than boys, and hence are better equipped to understand the feelings and sentiments of other people.¹⁰⁴ This enables them to have a better grasp of the potential pain and suffering that another person might experience, and thus makes it less likely that they will act in a way that causes distress or injury to others.¹⁰⁵

Furthermore, girls generally have superior communication skills, which allow them to talk through difficult issues, negotiate, and find points of compromise.¹⁰⁶ Boys on the other hand, while having superior visual-spatial abilities, have lower levels of empathy, and therefore a reduced ability to understand the suffering of others.¹⁰⁷ This makes them more likely to act in a way that disregards the interests of others and inclines them toward anti-social behavior.¹⁰⁸

These psychological differences heavily influence both the rate and patterns of female offending. In particular, this partly explains the fact that females mostly commit property offences.¹⁰⁹ These offences typically do

98. Robertson, *supra* note 89.

99. *Id.* (suggesting lower levels of testosterone in women would cause lower lean muscle mass).

100. See Quarmby, *supra* note 17 (discussing the disconnect between societal views of females and the fact of violent female crime).

101. Jennifer Schwartz & Darrell Steffensmeier, *The Nature of Female Offending: Patterns and Explanation*, in *FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS* 62 (Ruth T. Zaplin ed., 2d ed. 2008).

102. *Id.*

103. *Id.* at 61.

104. *Id.*

105. *Id.*

106. SIEGEL, *supra* note 87, at 53–54.

107. *Id.* at 54.

108. *Id.*

109. *Id.* at 53.

not involve weapons, are non-confrontational, and do not violate the physical or sexual integrity of others.

The third broad explanation for the gender gap in male and female offending rates relates to sociological differences. Societal stereotypes and expectations of females are relatively strict. Females are expected to be well-behaved, nurturing, and empathetic.¹¹⁰ The female stereotype is the antithesis of the violent individual who engages in criminal activity. On the other hand, the separation between stereotypical male qualities, and those which are manifest from many forms of criminal behavior, is not so clear-cut.¹¹¹ Interestingly, it has even been suggested that females who do commit crime have deviated from these gender expectations, and do not possess such typical female qualities.¹¹²

Research also suggests that the different constructions of masculinity and femininity play a prominent role in the sociological differences of men and women. Masculinity has previously been defined as the “approved way of being an adult male,”¹¹³ and generally is the idea that “constant self-presentation occurs throughout every social interaction in which a man is involved.”¹¹⁴ The underlying goal in this self-presentation of masculinity is the assertion of power and dominance in order to maintain, advance, or seek social status.¹¹⁵ Thus, this underlying objective and construction of masculinity can ultimately increase the likelihood of a male becoming violent or aggressive and engaging in crime.¹¹⁶ While males assert their masculinity in a social setting to merely maintain status, females are far less likely to be motivated by the same underlying goal of power and dominance.

Research also indicates that these societal expectations and gender roles, which heavily shape the behavior of an individual, are not intrinsic, but rather learned, particularly through parental reinforcement during

110. See Quarmby, *supra* note 17 (contradicting stereotypes of the female role).

111. Schwartz & Steffensmeier, *supra* note 101, at 61.

112. SIEGEL, *supra* note 87, at 53. See also Clifford Krauss, *The Nation: Women Doing Crime, Women Doing Time*, N.Y. TIMES (July 3, 1994), <http://www.nytimes.com/1994/07/03/weekinreview/the-nation-women-doing-crime-women-doing-time.html>.

113. BARI R. FLOWERS, MALE CRIME AND DEVIANCE: EXPLORING ITS CAUSES, DYNAMICS AND NATURE 32 (2003) (quoting DAVID D. GILMORE, MANHOOD IN THE MAKING: CULTURAL CONCEPTS OF MASCULINITY 1 (1990)).

114. Jessie L. Krienert, *Masculinity and Crime: A Quantitative Exploration of Messerschmidt's Hypothesis*, ELECTRONIC J. SOC. (2003), https://www.sociology.org/content/vol7.2/01_krienert.html (discussing the impact of hegemonic masculinity as the defining view of masculinity, even if it is not displayed by the majority of men).

115. SIEGEL, *supra* note 87, at 53.

116. *Id.* See FLOWERS, *supra* note 113, at 37, for a further discussion regarding crime and masculinity theories.

childhood and adolescence.¹¹⁷ In simple terms, boys are raised to be rough and tough, and encouraged to be dominant and aggressive, thereby instilling the concept of masculinity from a young age.¹¹⁸ In contrast, girls are raised under greater supervision, with an emphasis placed on familial and relational responsibilities, and are taught to refrain from aggression.¹¹⁹

Further, the desire to form and maintain relationships and protect emotional concerns more heavily motivate women, reinforcing the psychology differences between genders.¹²⁰ To this end, scholars have noted that: “Compared to men, women are more likely to refrain from crime due to concern for others. This may result from gender differences in moral development and from socialization toward greater empathy, sensitivity to the needs of others, and fear of separation from loved ones.”¹²¹

These sociological differences inhibit a woman’s willingness and desire to engage in harmful and violent behavior,¹²² while males’ socially adapted behaviors are closely associated with criminal activity.

Society cannot overlook the fact that women sometimes do commit even the most serious forms of crime. Research shows that the general offending patterns differ, even when it comes to homicide offenses—the most damaging form of crime. For instance, men commit nearly all homicides that involve victims who are not known to the offender.¹²³ By contrast, women usually commit homicides against their domestic partners in the context of ongoing domestic violence.¹²⁴ Self-defense, fear, or depression drive female violence.¹²⁵ For this reason, “few women are repeat violent offenders.”¹²⁶

117. Robin McKie, *Male and Female Ability Differences Down to Socialization, Not Genetics*, GUARDIAN (Aug. 14, 2010), <https://www.theguardian.com/world/2010/aug/15/girls-boys-think-same-way>.

118. SIEGEL, *supra* note 87, at 53–54.

119. Schwartz & Steffensmeier, *supra* note 101, at 61–62.

120. *Id.* at 61.

121. *Id.* (citation omitted) (“This predisposition toward an ‘ethic of care’ restrains women from violence and other behavior that may injure others or cause emotional hurt to those they love.”).

122. FLOWERS, *supra* note 113, at 37.

123. See VICKIE JENSEN, WHY WOMEN KILL: HOMICIDE AND GENDER EQUALITY 70 (2001) (reporting that women commit 6.9% of stranger homicides to create the inference that men commit 93.1% of stranger homicides).

124. VICTORIAN SENTENCING ADVISORY COUNCIL, *supra* note 44, at 20.

125. Suzanne C. Swan et al., *A Review of Research on Women’s Use of Violence with Male Intimate Partners*, 23 VIOLENCE & VICTIMS 301, 308, 310 (2008).

126. Mary Stathopoulos et al., *Addressing Women’s Victimisation Histories in Custodial Settings*, ACSSA ISSUES, Dec. 2012, at 1, 7.

Comparing the reasons why women and men kill differently, research suggests that the answer lies within one main difference: motivation.¹²⁷ Gender norms, coupled with biological, psychological, and sociological differences, all contribute to gender differences in criminal motivation.¹²⁸ Men and women differ in their risk-taking preferences.¹²⁹ In contrast, the desire to protect loved ones or to sustain relationships motivates women to take greater risks.¹³⁰ Moreover, although women are not necessarily less risk-oriented than men, they are more likely to take into account risk levels and the likelihood of shame, an assessment of costs versus benefits of the crime being committed.¹³¹ Women are also less prone to lawbreaking.¹³²

For example, women motivated by a deep sense of fear are more likely to commit the crime of spousal murder.¹³³ Even then, women appear to require a greater level of provocation before they reach the point that they are willing to commit murder, and are thus likely to have exhausted other alternatives prior to killing.¹³⁴ On the other hand, husbands who murder their wives are rarely in fear of their lives.¹³⁵

All killings are serious crimes because they involve the destruction of human life. However, females commit a less serious type of killing than men commit. Killings motivated by a history of violence or mistreatment are unjustifiable, but they involve a lower degree of culpability than those that are grounded in revenge, jealousy, or greed. Moreover, these killings do not invoke a sense of fear or insecurity in the broader community because these targeted killings are against a backdrop of domestic mistreatment. Put simply, people fear criminals who kill at random;¹³⁶ they do not fear women whose sole focus of aggression is a partner who physically mistreated her.

It follows from the above that men and women differ when it comes to criminal activity. The consistent theme is that males are more likely to commit crime than females. In particular, it is incontestable that men commit a far higher portion of serious sexual and violent offenses than women. This fact provides a basis for sentencing women more leniently.

127. Schwartz & Steffensmeier, *supra* note 101, at 63.

128. *Id.*

129. Christine R. Harris et al., *Gender Differences in Risk Assessment: Why do Women Take Fewer Risks than Men?*, 1 JUDGMENT & DECISION MAKING 1, 48, 51 (2006).

130. Schwartz & Steffensmeier, *supra* note 101, at 63–64 (referring to these factors as “context,” which refers to the circumstances and characteristics of a particular criminal act).

131. *Id.* at 58.

132. *Id.*

133. *Id.* at 64.

134. *Id.*

135. *Id.*

136. Hence the reason that terrorism causes a large degree of community unrest.

We now examine other reasons that justify further leniency for women in the sentencing realm.

II. FOUR REASONS FOR SENTENCING WOMEN LESS HARSHLY

Four reasons justify sentencing leniency for women. Before establishing these reasons, we provide an overview of the nature and scope of mitigating factors in sentencing.

A. Mitigation in Sentencing

In order to understand the role of mitigation in sentencing, it is necessary to understand the framework of the sentencing system. Sentencing is the forum in which the community acts in its most punitive manner against its fellow citizens.¹³⁷ Typically, the main objectives of the sentencing system¹³⁸ are general deterrence,¹³⁹ specific deterrence,¹⁴⁰ incapacitation,¹⁴¹ and rehabilitation.¹⁴² Criminal sanctions normally involve the deliberate infliction of suffering and pain, including penalties in the form of imprisonment, probation, and monetary fines.¹⁴³ The seriousness of the crime significantly impacts which sanction the legal system applies¹⁴⁴ The court or legislature can set the choice of penalty for a crime. In the past few decades the United States has seen a move to an increasing use of fixed or presumptive minimum penalties, which involve the legislature prescribing defined penalty ranges to courts for a range of criminal offenses.¹⁴⁵ The penalties are invariably severe. As noted by Michael Tonry:

Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime

137. See Katie Long, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 188 (1995) (reporting on an era of increased community input and involvement in sentencing, calling for more accountability and tougher penalties).

138. U.S. SENTENCING GUIDELINES MANUAL § 1A (U.S. SENTENCING COMM'N 2015).

139. Which is the theory that there is a connection between the crime rate and sentence severity.

140. Which is the theory that harsher sanctions will dissuade offenders from reoffending.

141. This is the theory that confining offenders will protect the community.

142. This is the theory that the sentencing system can illicit positive attitudinal reform in offenders, which will reduce the rate of reoffending.

143. The extent of the hardship obviously varies considerably, ranging from capital punishment to far softer sanctions, such as probation and fines.

144. U.S. SENTENCING GUIDELINES MANUAL § 5A intro. cmt. (U.S. SENTENCING COMM'N 2015).

145. Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 514 (2014).

sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), LWOP [life without parole] laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe “career criminal,” “dangerous offender,” and “sexual predator” laws. These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.¹⁴⁶

Presumptive penalties exist in some form in all U.S. states.¹⁴⁷ Typically, fixed penalty grids take into account two main variables: (1) the nature of the offense; and (2) the offender’s prior criminal history score.¹⁴⁸ These considerations map into a prescriptive penalty range. The United States Sentencing Commission Guidelines Manual contains the most extensively influential fixed penalty laws.¹⁴⁹

Two main considerations determine the range of sentencing for an offense in the Federal Sentencing Guideline system. The first is the offense level, which entails an assessment of the seriousness of the offense (this often includes a number of variables and, depending on the offense, can include the nature of any injury caused or monetary amount involved).¹⁵⁰ The second is the offender’s criminal history score, which takes into account the seriousness of the past offenses and the elapsed time since the prior offending. These two calculations then operate to prescribe a

146. *Id.* (internal citations omitted).

147. See CONNIE DE LA VEGA ET AL., CTR. FOR LAW & GLOB. JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 46–47 (2012), <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf> (noting that 137 of 168 surveyed countries had some form of minimum penalties but none of the others were as wide-ranging or severe as in the United States); Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 37 OHIO ST. J. CRIM. L. 37, 40 (2006) (“Over the last half-century, sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of rules.”).

148. BRIAN J. OSTROM, ET AL., NAT’L CTR. FOR STATE COURTS, ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES 1 (2008), <http://www.ncsc.org/~media/Microsites/Files/CSI/Assessing%20Consistency.ashx>.

149. U.S. SENTENCING GUIDELINES MANUAL § 5A. See Amy Baron-Evans & Jennifer Niles Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines’ Prohibitions and Restrictions on Mitigating Factors*, in LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION, at iii (Amy Baron-Evans & Paul Hofer eds., 2011), https://www.fd.org/pdf_lib/WS2011_06/Litigating_Mitigating_Factors.pdf. See also Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 193 (2009) (referring to the United States Sentencing Guidelines Manual’s high level of influence and providing an analysis and criticism of the Guidelines).

150. U.S. SENTENCING GUIDELINES MANUAL § 5H1.9.

sentencing range.¹⁵¹ Thus, for example, an offense at level 20, for an offender with a criminal history score of four, five, or six, has a sentencing range of 41 to 51 months; an offense at level 36, for an offender with a criminal history score of four, five, or six, has a sentencing range of 235 to 293 months.¹⁵²

While criminal history score and offense severity are cardinal sentencing considerations, they do not exhaust all of the matters that influence the penalty. The Federal Sentencing Guidelines also expressly set out over three dozen mitigating or aggravating considerations that can affect penalty,¹⁵³ and also set out several considerations that should not have an impact on penalty.¹⁵⁴ To determine the appropriate penalty, the courts can factor in a number of mitigating and aggravating considerations. They come in two main forms: adjustments and departures.¹⁵⁵ Adjustments are defined considerations that increase or decrease a penalty by a designated amount.¹⁵⁶ For example, demonstrating remorse can decrease a penalty by up to two levels, which can increase to three levels if it is accompanied by an early guilty plea.¹⁵⁷ The main adjustments relate to the characteristics of the offender. The other main category of aggravating and mitigating considerations is known as a departure.¹⁵⁸ If a departure applies, the court can more readily impose a sentence outside the applicable guideline range. Moreover, the Federal Sentencing Guidelines permit, in rare instances, considerations that are not expressly set out to justify departing from the guideline range.¹⁵⁹ This means that the range of

151. *Id.* at § 4A1.2 cmt. 3(A).

152. *Id.* at § 5A cmt.

153. There are no standard definitions of what constitute aggravating or mitigating factors. However, as a matter of principle, an aggravating factor is a consideration that is not contained within the elements of the offense that makes the offense worse or otherwise justifies a heavier penalty. A mitigating factor is a consideration that justifies a more lenient penalty. *Marker v The Queen* [2002] WASCA ¶ 22 (Austl.).

154. See Baron-Evans & Coffin, *supra* note 149, at 2–6 (providing a historical overview of the development of aggravating and mitigating considerations in the Guidelines).

155. U.S. SENTENCING GUIDELINES MANUAL § 1A.

156. *Id.* at § 3B1.2 cmt. 3(A).

157. Compare *id.* § 3E1.1 (indicating a decrease in sentencing level if the defendant accepts responsibility for the offense), with § 5K2.0(d)(4) (“The defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense . . . i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court.”). See also *id.* § 6B1.2 (Standards for Acceptance of Plea Agreement).

158. *Id.* at § 5K2.0.

159. See *id.* (identifying that a court may depart from the guidelines based on other considerations if doing so would support the objectives outlined in 18 U.S.C. § 355(a)(2)). See also *Pepper v. United States*, 562 U.S. 476, 481 (2011) (holding that the District Court did not need to apply

aggravating and mitigating considerations set out in the Federal Sentencing Guidelines is not exhaustive. The Federal Sentencing Guidelines require courts to state the reason for departing from applicable guideline range.¹⁶⁰

In Australia, the situation is more expansive as far as the number and range of aggravating and mitigating considerations are concerned.¹⁶¹ Sentencing in each of the nine Australian jurisdictions (i.e., the six states, the Northern Territory, the Australian Capital Territory, and the Federal jurisdiction) applies through a combination of legislation and the common law. While sentencing law differs in each Australian jurisdiction, considerable convergence exists in key areas. For the purposes of this Article, the important point regarding Australian sentencing is that judges possess the discretionary power to process potentially hundreds of aggravating and mitigating considerations. In contrast to the United States, fixed penalties for serious offenses in Australia are rare.¹⁶² The overarching methodology and conceptual approach that sentencing judges undertake in Australia in making sentencing decisions is the same in each jurisdiction. This approach is known as “instinctive synthesis.”¹⁶³ The process of instinctive synthesis is a mechanism whereby sentencers do not set a precise penalty, but give due weight to each consideration (and, in the process, incorporate considerations that incline to a heavier penalty and offset against those factors that favor a lesser penalty), and then set a precise penalty.¹⁶⁴ This process’s hallmark is that it does not require (nor permit) judges to set out with any specificity the weight (in mathematical terms) accorded to any particular consideration.¹⁶⁵ A global judgment is made without recourse to a stepwise process that demarcates the precise considerations that influence the judgment.

The instinctive synthesis approach to sentencing facilitates the development of a large number of aggravating and mitigating

the departure set out in the Federal Sentencing Guidelines); *Gall v. United States*, 552 U.S. 38, 46 (2007) (noting that a district judge may only depart from the guidelines after serious thought and must provide a clear explanation for any departures).

160. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(e) (requiring courts to provide specific reasons for departing from the guidelines).

161. *Sentencing Process*, SENTENCING ADVISORY COUNCIL, <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-law-victoria> (last visited Apr. 25, 2017).

162. An example is people smuggling offenses. See *Migration Act 1958* (Cth) ss 233(A)–233(C) (Austl.) (granting the courts broad discretion in determining the penalties of a smuggling offense).

163. *R v Williscroft* [1975] VR 292, 300 (Austl.).

164. *Id.*

165. See *infra* Part IV, for a discussion of minor exceptions.

considerations. The considerations stem mainly from the common law and continually evolve. There are between 200 and 300 such factors.¹⁶⁶

The United States and Australia have a well-established notion of aggravating and mitigating factors. However, there is no clear doctrinal theory or pragmatic uniformity regarding the exact nature of these considerations, or the extent to which they should impact penalty.¹⁶⁷ The lack of doctrinal clarity and convergence regarding aggravating and mitigating considerations does not negate the capacity for individually established or logically sound factors to influence the direction of sentencing outcomes.

To this end, there are a number of mitigating considerations that weigh strongly in favor of leniency towards female offenders. In short, courts should sentence women less harshly than men because four mitigating considerations apply more commonly to them: (1) women have better prospects of rehabilitation; (2) they suffer extra hardship in the incarceration setting; (3) imprisoning women causes a greater level of disruption to the lives of others; and (4) a significant portion of female inmates have experienced sexual trauma as children, which in turn diminishes their criminal culpability.¹⁶⁸ We now expand on these considerations.

B. Women Reoffend Less Frequently—Better Prospects of Rehabilitation

The first mitigating factor that applies more commonly to women is good prospects of rehabilitation.¹⁶⁹ The objective of rehabilitation is to induce attitudinal reform in offenders so that they desist from committing crime.¹⁷⁰ There is doubt in the criminal justice system's effectiveness at eliciting internal behavioral reform in offenders. Between 1960 and 1974, Robert Martison conducted extensive research, which concluded that

166. Roger Douglas identified 292 relevant sentencing favors in a study of Victoria Magistrates' Courts. ROGER DOUGLAS, *GUILTY YOUR WORSHIP: A STUDY OF VICTORIA'S MAGISTRATES' COURTS* 62 (1980).

167. Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 *BUFF. L. REV.* 1159, 1159 (2014).

168. See Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, in *GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS* 11–19 (Barbara E. Bloom ed., 2013) (describing the different factors that impact women's incarceration and rehabilitation).

169. This is a well-established mitigating factor. See MIRKO BAGARIC & RICHARD EDNEY, *AUSTRALIAN SENTENCING: PRINCIPLES AND PRACTICE* 190–93 (2007) (discussing the prospects of rehabilitation as a mitigating consideration for sentencing).

170. Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 *CRIM. L.J.* 159, 160 (2012).

empirical studies could not link reduced recidivism to rehabilitative programs.¹⁷¹ The panel of the National Research Council in the United States, several years after this work, also noted that there were no significant differences between the subsequent recidivism rates of offenders, regardless of the form of punishment. The Council concluded that, “[t]his suggests that neither rehabilitative nor criminogenic effects operate very strongly.”¹⁷² However, recent evidence is generally more positive. While there are no programs developed to successfully reduce reoffending for all types of offenders, a number of more recent studies have noted some success for treatments and programs focusing on substance-involved offenders.¹⁷³

No evidence exists to suggest that female offenders respond better than male offenders to treatment programs from the rehabilitative perspective. However, while accurately identifying the likelihood of any particular female reoffending is not possible, we do know that women generally recidivate less than their male counterparts.¹⁷⁴

The Bureau of Justice Statistics proves the most recent wide-ranging data.¹⁷⁵ The study tracked 404,638 prisoners in 30 American states following release from prison in 2005.¹⁷⁶ The study noted that within three years after release, 69% of male inmates had been arrested at least once.¹⁷⁷ This compared to only 58.5% of female inmates.¹⁷⁸ This ten-point difference was relatively constant regarding re-arrest rates following a year after release (45% males; 34% females) and five years post-release (78% males; 68% females).¹⁷⁹ The median number of arrests for females over a five-year period was 1.0, whereas for males it was more than 50% higher—

171. See Robert M. Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) (claiming that the cumulative result of his research is that prisons have no rehabilitative effect on prisoners).

172. See DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 66 (Alfred Blumstein et al. eds., 1978) (analyzing the incapacitative effect).

173. See Elizabeth Drake et al., *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, 4 VICTIMS & OFFENDERS 170, 170–71 (2009) (describing Washington’s program focused on substance abuse).

174. ZHANG & WEBSTER, *supra* note 21, at 17.

175. See generally MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> (compiling data on recidivism around the United States).

176. *Id.* at 1.

177. *Id.* at 11.

178. *Id.*

179. *Id.*

1.6.¹⁸⁰ In relation to both cohorts, recidivism levels were the highest for property offenders.¹⁸¹

In a more recent study of recidivism rates (from 2003 to 2010), the Florida Department of Corrections noted an even wider disparity between male and female reoffending rates. Three years after release, males reoffended at nearly double the rate of females (34% to 19%).¹⁸²

Similar distinctions in recidivism rates exist in Australia. The most wide-ranging study of the trajectory of offenders in Australia was undertaken by the Australian Bureau of Statistics and released in August 2010, in a report titled, *An Analysis of Repeat Imprisonment Trends in Australia Using Prisoner Census Data from 1994 to 2007*.¹⁸³

The report is based on a fourteen-year longitudinal study for the period of July 1, 1994 to June 30, 2007.¹⁸⁴ The study grouped prisoners into two cohorts.¹⁸⁵ The first consisted of those released between July 1, 1994 and June 30, 1997, and consisted of 28,584 people.¹⁸⁶ The second cohort of prisoners was released between July 1, 2001 and June 30, 2004, and consisted of 26,700 people.¹⁸⁷ The study compared recidivism rates from both cohorts within three years of release.¹⁸⁸ The Australian Bureau of Statistics also examined the ten-year reimprisonment rate for the earlier cohort.¹⁸⁹

The report noted that for the 1994 to 1997 cohort, about 20% returned to prison within two years; 25% returned to prison within three years, and 40% returned by the end of the ten-year survey period.¹⁹⁰ A surprising finding was that prisoners released in the later cohort were more likely to return to prison than the earlier cohort over an equivalent three-year follow-

180. *Id.*

181. *Id.*

182. *Recidivism Rates and Gender for Inmates Released 2003-2010*, FLA. DEP'T OF CORRECTIONS, <http://www.dc.state.fl.us/pub/recidivism/2011/gender.html> (last visited Apr. 25, 2017). As an explanation the report hypothesized:

Overall, the male and female release populations look slightly different. While the average time served for males is 38 months, the average time served for females is only 24 months. Approximately 29% of the female releases have some type of supervision to follow while 35% of the males do. These factors and others may explain some of the differences in the recidivism rate for males and females.

Id.

183. ZHANG & WEBSTER, *supra* note 21, at 17.

184. *Id.* at 2, 10.

185. *Id.* at 16.

186. *Id.* at 10.

187. *Id.* at ii, 11.

188. *Id.* at ii.

189. *Id.*

190. *Id.* at 16.

up period.¹⁹¹ The reimprisonment rate for the latter cohort was 17% higher than for the earlier one—the rate for 1994 to 1997 was 25.1%, compared to 29.5% for the 2001 to 2004 cohort.¹⁹²

When the recidivism rate is broken down according to gender, the most illuminating observation relates to the study of the first cohort tracked for ten years (given that this is the longest reference point). The study notes that ten years after release, the reimprisonment rate for men was 40%, while for women it was only 31%.¹⁹³ Moreover, for both of the three-year cohorts and the ten-year cohort, the odds of reimprisonment for male inmates were about 1.4 times that of female inmates.¹⁹⁴ As in the United States, the offenders who most commonly reoffended (from all cohorts) were property offenders.¹⁹⁵

Thus, these studies demonstrate that female offenders reoffend less than male offenders. This fact is in relation to all offenses, including serious offenses. This distinction should logically be factored into the sentencing calculus by providing a sentencing discount to females, commensurate with their lower reoffending rate.¹⁹⁶ This is a crude approach because it does not take into account the particular types of female offenders that are less likely to reoffend. However, the law by its nature (including sentencing law) makes generalizations that apply to all of society. Research cannot possibly predict with any reasonable degree of confidence offenders who will reoffend and those who will not.¹⁹⁷ Accordingly, the best support comes from wide-ranging statistical data regarding the different male and female reoffending patterns into the sentencing calculus.

191. *Id.* at 27. See also *infra* Part IV (discussing these implications).

192. ZHANG & WEBSTER, *supra* note 21, at 25. More recent data, however, indicates that the imprisonment rate is, in fact, even higher. A report by the Australian Government Productivity Commission showed that 40% of prisoners released in 2010 returned to prison within two years. See MINISTRY OF JUSTICE, BREAKING THE CYCLE: EFFECTIVE PUNISHMENT, REHABILITATION AND SENTENCING OF OFFENDERS 44 (2010).

193. ZHANG & WEBSTER, *supra* note 21, at 17. See also *Australian Social Trends, Mar 2010*, AUSTL. BUREAU OF STATISTICS (Mar. 16, 2010), <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Mar+2010#box> (identifying similar results).

194. ZHANG & WEBSTER, *supra* note 21, at 23.

195. *Recidivism*, U.S. DEPT. OF JUSTICE, <https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx#noteReferrel> (last visited Apr. 25, 2017).

196. See Phyllis J. Newton et al., *Gender, Individuality and the Federal Sentencing Guidelines*, 8 FED. SENT'G REP. 148, 151–52 (1995) (arguing for different but equal sentencing standards); Wald, *supra* note 22, at 12 (“No one disputes that women offenders as a group simply do not present the same degree of danger to the community that male offenders as a group do.”).

197. See, e.g., Mirko Bagaric & Theo Alexander, *First-time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing*, 78 ALB. L. REV. 397, 441 (2015) (indicating a lack of empirical data supporting the recidivism rate).

C. Women Suffer More as a Result of Prison than Men

The second reason that women should receive a sentencing discount is because the impact of imprisonment on them is generally more severe. These additional hardships include the higher likelihood of being subjected to violence and a reduced chance of being able to exercise the right to procreation.¹⁹⁸ Before setting out in detail the additional burdens that females experience in prison, we first explain why these forms of suffering should factor into sentencing determinations.

Sentencing generally involves the infliction of punishment.¹⁹⁹ There is no clear definition of punishment. Of the available definitions that have been advanced, the least expansive and most persuasive is the view that punishment is a hardship or deprivation: the taking away of something of value for a wrong that has been committed.²⁰⁰

In evaluating the nature and extent of punishment, it is necessary to factor in the actual impact of the hardship on the offender. In relation to imprisonment, the most obvious and deliberate form of deprivation is the loss of liberty. However, there are also a number of other hardships that often arise as a result of incarceration. Sentencing calibrations should incorporate additional unintended but real burdens on a certain category of offender, either directly or indirectly. The view that punishment includes incidental suffering admittedly evinces a liberal approach to the nature of punishment, given that courts do not need to intentionally impose the hardship. However, in principle, punishment should consider incidental hardships, especially those that are common and foreseeable.

Certainly, courts in Australia have accepted that an offender's incidental suffering can provide a basis for offsetting or reducing the need for formal punishment. Thus, courts take into account an offender's injuries to mitigate the punishment that the offender experiences.²⁰¹ These injuries

198. See e.g., Joanna Grossman, *Do Prisoners Have a Constitutional Right to Procreate via FedEx?*, FINDLAW (Nov. 20, 2001), <http://supreme.findlaw.com/legal-commentary/do-prisoners-have-a-constitutional-right-to-procreate-via-fedex.html> (stating that although the Ninth Circuit Court of Appeals determined that men could procreate, it would be unlikely for women to achieve the same right); Nancy Wolff et al., *Sexual Violence Inside Prison: Rates of Victimization*, 83 J. URB. HEALTH 835, 844 (2006) (finding that women were more likely than men to experience sexual violence while incarcerated); Dunn, *supra* note 23, at 2564 (contending that female prisoners do not receive the same rights and privileges as male prisoners).

199. MIRKO BAGARIC, PUNISHMENT & SENTENCING: A RATIONAL APPROACH 163 (2001).

200. *Id.* at 38.

201. Mirko Bagaric et al., *The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders*, 39 UNIV. NEW S. WALES L.J 47, 51–53, 56 (2016).

include public humiliation²⁰² and reduced employment prospects.²⁰³ Further, particularly harsh prison conditions can mitigate penalties.²⁰⁴ These incidental or additional hardships can offset the need for a fully proportionate penalty because they are a component of the net punishment that the offender experiences. As noted by Kolber:

For a purported justification of punishment to be successful, it must take account of offenders' negative subjective experiences or else be vulnerable to the charge that it fails to justify the full magnitude of the punishments we impose. While some theorists purport to hold objective accounts of punishment that ignore offenders' subjective experiences, such theories are doomed to fail. By ignoring subjective experience, they cannot justify the amount of distress that punishment inflicts on offenders, and so they cannot justify punishment more generally.²⁰⁵

This approach should consider the additional burdens that females often endure in a prison setting. The main criterion regarding penalty severity is the extent to which the penalty sets back the interests and flourishing of offenders. Prison is damaging because human beings have an innate desire for freedom and the capacity to shape their activities and lives according to their preferences. However, certain people find this experience more burdensome than others. Female offenders are one such cohort.

Women normally suffer more in prison than men for several reasons. Women more frequently have their sexual autonomy violated by prison staff and other prisoners.²⁰⁶ At least 15% of incarcerated females in the

202. See *Ryan v The Queen* [2001] HCA 21, ¶¶ 52, 55 (Austl.) (discussing factors that may mitigate a sentence on remand).

203. BAGARIC, *supra* note 199, at 57.

204. Mirko Bagaric et al., *(Particularly) Burdensome Prison Time Should Reduce Imprisonment Length – and Not Merely in Theory*, 38 MELB. U. L. REV. 409, 434 (2014).

205. Kolber, *supra* note 149, at 184.

206. Women prisoners also are more likely to be the targets of sexual abuse by staff. Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 45, 45 (2007). Specifically, female victims of sexual coercion and assault in prison are much more likely than their male counterparts to report that the perpetrators were staff members. See, e.g., Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. INTERPERSONAL VIOLENCE 1591, 1591 (2006) (observing this phenomenon in a study of 382 men and 51 women); TRAVIS ET AL., *supra* note 38, at 171 (“Beck finds that of all reported staff sexual misconduct in prison, three-quarters involved staff victimizing women prisoners.”) (internal citation omitted).

United States are sexually assaulted in prison by staff or other inmates.²⁰⁷ The rate of female sexual victimization in prison far exceeds that of males: “although women comprise only 7[%] of the state prison population, they comprise 46[%] of sexual abuse victims.”²⁰⁸ Another report observed that “[f]emale prisoners were more than three times as likely to be victims of sexual abuse as male prisoners.”²⁰⁹

There are three other reasons that many women prisoners find the experience of imprisonment more burdensome than men. First, women have far higher rates of mental illness than male inmates.²¹⁰ Reports show that in 2004 about three-quarters of women in U.S. state prisons had symptoms of a current mental health problem, as opposed to 55% of men.²¹¹ These figures resemble those noted by the Bureau of Justice Statistics study, which observed that half of prison inmates had mental health problems, but that the problem was more widespread in the female population.²¹² Specifically, “[a]n estimated 73% of females in State prisons, compared to 55% of male inmates, had a mental health problem. In Federal prisons, the rate was 61% of females compared to 44% of males; and in local jails, 75% of females compared to 63% of male inmates.”²¹³

Similar patterns exist in Australia. A wide-ranging study in 2010 found that 31% of prison entrants reported that they were experiencing a mental health disorder, which is approximately 2.5 times higher than the general

207. Christina Piccora, *Female Inmates and Sexual Assault*, JURIST (Sept. 15, 2014, 7:00 PM), www.jurist.org/dataline/2014/09/christina-piccora-female-inmates.php.

208. *Id.*

209. Terry Frieden, *Study Finds Nearly 1 in 10 State Prisoners Is Sexually Abused While Incarcerated*, CNN (May 18, 2012, 8:30 PM), <http://edition.cnn.com/2012/05/17/us/us-state-prisons-abuse/>. See also Mary Stathopoulos et al., *supra* note 126, at 4 (finding “that 59% [of women] had experienced some form of sexual coercion or violence”); ALLEN J. BECK ET AL., U.S. DEPT. OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES 2011–12, at 17 (2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (noting that the rate of inmate-on-inmate sexual victimization of female inmates in state prisons was 6.9%, compared to 1.7% for males in the preceding 12-month period). The respective female and male sexual victimization statistics in jails were 3.6% and 1.4%. *Id.* at 18.

210. The rate is also much higher than the general population, where the prevalence of mental illness is approximately 11% overall (12% female and 9% male). DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEPT. OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3–4 (2006), <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>. See also Mary Stathopoulos et al., *supra* note 126, at 7 (observing that female offenders show higher levels of serious mental illness than male offenders).

211. Moshenberg, *supra* note 11.

212. JAMES & GLAZE, *supra* note 210, at 1, 4.

213. *Id.* at 4 (internal citation omitted).

population.²¹⁴ The rate of mental disorder among women was 41%, compared to 30% for men.²¹⁵

Prisoners with mental illness find prison more difficult partly because the prisons reduce the quality of available healthcare.²¹⁶ Additionally, the intrinsic restrictions in a prison environment make coping more difficult.²¹⁷ Inmates with a mental disorder are approximately 1.6 times more likely to be physically assaulted by other inmates and 1.2 times more likely to be assaulted by staff than inmates without a mental disorder.²¹⁸ One study also revealed that inmates with a mental illness were more than 70% more likely to be subjected to sexual victimization than other prisoners (15.1%, as opposed to 8.9%).²¹⁹ Because prisoners with mental health issues are less adept at coping with prison stressors, they tend to breach the prison rules more regularly than other prisoners.²²⁰ As a result of this phenomenon, the prison takes disciplinary actions, including placing the prisoners in solitary confinement and taking away good-time credits.²²¹

Second, women find prison more burdensome because they are more profoundly affected by the loss of familial contact than men.²²² As noted by Ward and Kassenbaum's 2009 ethnographic study of a women's prison:

[A]lthough women were subjected to virtually the same pains and deprivations of imprisonment as men (albeit with less pressing threats of victimization by other inmates), they felt the

214. AUSTRAL. INST. OF HEALTH & WELFARE, THE MENTAL HEALTH OF PRISON ENTRANTS IN AUSTRALIA 2 (2012), <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422198&libID=10737422198>.

215. *Id.* at 6. In another report it is noted that "[a]lmost half of prison entrants (49%) reported having been told by a health professional that they have a mental health disorder, and more than 1 in 4 (27%) reported currently being on medication for a mental health disorder." *Mental Health of Prison Entrants*, AUSTRAL. INST. OF HEALTH & WELFARE, <http://www.aihw.gov.au/prisoner-health/mental-health/> (last visited Apr. 25, 2017).

216. See SASHA ABRAMSKY ET AL., HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 94–127 (Joseph Saunders & James Ross eds., 2003), <https://www.hrw.org/reports/2003/usa1003/usa1003.pdf> (detailing inadequacies in the prison system regarding mentally ill prisoners).

217. See Dion G. Gee & James R.P. Ogloff, *Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface*, 21 PSYCHIATRY PSYCHOL. & L. 46, 58–59 (2014) (discussing the burden of incarceration on offenders with psychiatric illnesses or mental disorders).

218. E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 163–64 (2013).

219. *Id.* at 166.

220. Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 391, 396 (2006).

221. Johnston, *supra* note 218, at 170.

222. TRAVIS ET AL., *supra* note 38, at 171.

loss of familial roles and affectional relationships much more acutely and adapted to the prison environment in ways that reflected this.²²³

Third, incarceration violates the right of women to exercise their right to procreation more so than men.²²⁴ Women have a finite period in which they can have children. Age does not meaningfully diminish a man's capacity to have children.²²⁵ The United States Supreme Court has recognized that the right to procreate is a fundamental right, which "cannot be seriously questioned."²²⁶ Admittedly, the scope and content of the right is unclear. As noted by Carter Dillard:

There is a common thread in the ways U.S. constitutional law, international law sources, and Lockean natural law treat the procreative right. Despite suggestions in all of those sources of a broad right, when analyzed more closely these authorities merely provide for a right to continue the species, a right to perpetuate the race and have offspring, and the right to simply found a family, respectively. They recognize a special right, necessary for the continuation of society, and qualified by societal interests and the interests of prospective children.²²⁷

The leading authority on the existence of a legally protected procreation right is *Skinner v. Oklahoma ex rel. Williamson*.²²⁸ In this case, the Supreme Court held that a law which permitted that the sterilization of offenders convicted of three or more "felonies involving moral turpitude" was unconstitutional because it violated the equal protection clause.²²⁹ In

223. *Id.*

224. *Id.*

225. In contrast, most females are infertile in their mid 40s. AM. SOC'Y FOR REPROD. MED., AGE AND FERTILITY: A GUIDE FOR PATIENTS 4 (2012), http://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/Age_and_Fertility.pdf.

226. Johnson C. Montgomery, *The Population Explosion and United States Law*, 22 HASTINGS L.J. 629, 629 (1971). See also Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1296 (1980) (discussing the effect of the right to procreate on Supreme Court rulings).

227. Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 10–11 (2007).

228. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). See also Elaine E. Sutherland, *Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?*, 82 OR. L. REV. 1033, 1037 (2003) (describing *Skinner* as "[o]ne of the earliest and, certainly, most dramatic cases to address the issue of convicted criminals and procreative freedom").

229. *Skinner*, 316 U.S. at 536, 541.

doing so, the Court stated: “[t]his case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.”²³⁰ The Court added:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.²³¹

Further, in *Cleveland Board of Education v. LaFleur*, the Supreme Court struck down regulations compelling teachers to take unpaid leave five months before the expected date of childbirth on the grounds that they violated the Fifth and Fourteenth Amendment Due Process provisions.²³²

The right to procreate, like all rights, is not absolute.²³³ In fact, the Supreme Court has upheld laws that forcibly sterilize certain mentally ill and disabled people.²³⁴ Subsequent to *Skinner*, a number of cases have considered the procreation rights of prisoners and offenders. While all of these cases endorsed the fundamental right to procreate, the courts have placed legitimate restrictions on this right due to the nature of incarceration and the objectives of probation. In *Gerber II*, the Ninth Circuit held that prisons can limit procreation rights, and, in particular, that conjugal visits and childbirth could be defeated as a result of incarceration.²³⁵ Similarly, in

230. *Id.* at 536.

231. *Id.* at 541. *See also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (discussing the fundamental right to marry).

232. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 636, 644, 648.

233. This is in line with the recent comments in *Obergefell*. The majority stated that: “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, ‘has not been reduced to any formula.’” *Obergefell*, 135 S. Ct. at 2598 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). “Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.” *Id.*

234. *See Skinner*, 316 U.S. at 536 (citing Oklahoma state law providing for forced sterilization). *See also* *Buck v. Bell*, 274 U.S. 200, 205 (1927) (referencing a Virginia law permitting the sterilization of mentally handicapped individuals); Dillard, *supra* note 227, at 21 (recognizing the traditional authority of the courts to permit sterilizing the “mentally ill and disabled,” even without explicit statutory authority).

235. *Gerber v. Hickman*, 291 F.3d 617, 620–23 (9th Cir. 2002) (holding that “the right to procreate while in prison is fundamentally inconsistent with incarceration”).

Goodwin v. Turner, the Eighth Circuit held that the right to procreate did not permit an inmate to send a sperm sample to his wife.²³⁶ The Eighth Circuit felt that this restriction reasonably stemmed from the objectives of imprisonment.²³⁷

Thus, courts in some circumstances have curtailed the right to procreation—but this does not detract from the existence of the right or its importance. Wisconsin Supreme Court Justice Rebecca Bradley recognized this point in her forceful dissent, stating:

I begin by emphasizing the right that is at issue: the right to have children. The majority acknowledges this right, but certainly does not convey its significance and preeminence. The right to have children is a basic human right and an aspect of the fundamental liberty which the Constitution jealously guards for all Americans The United States Supreme Court has described the right to have children as a “basic liberty” that is “fundamental to the very existence and survival of the [human] race.” The right is embodied in the sphere of personal privacy protected from unjustified governmental intrusion by the Due Process Clause of the Fourteenth Amendment.²³⁸

As Justice Bradley noted, the Supreme Court recognizes the fundamental right to procreate.²³⁹ It is an interest that is cardinal to individual flourishing. Denial of this right is a significant deprivation. The fact that the right to procreate can, in limited circumstances, be curtailed does not undermine the importance of the interest, or imply that the loss of the right is not a considerable hardship.

Thus, women who are imprisoned generally experience more suffering than men. Sanctions imposed on women should account for the additional burden stemming from the greater incidence of mental health problems, the increased risk of sexual abuse, and the encroachment on the right to procreate. Part III of this Article sets out the exact manner in which this should occur.

236. *Goodwin v. Turner*, 908 F.2d 1395, 1396 (8th Cir. 1990).

237. See Adam M. Breault, “*Onan’s Transgression:*” *The Continuing Legal Battle Over Prisoners’ Procreation Rights*, 66 ALB. L. REV. 289, 289 (2002) (explaining “the right to procreate was ‘fundamentally inconsistent with incarceration’”) (quoting *Gerber*, 291 F.3d at 623).

238. *State v. Oakley*, 2001 WI App 103, ¶¶ 40, 44, 245 Wis. 2d 447, 481–83, 629 N.W.2d 200, 216 (Bradley, J., dissenting) (internal citations omitted) (quoting *Skinner*, 316 U.S. at 541).

239. *Skinner*, 316 U.S. at 541 (applying strict scrutiny to sterilization laws).

D. Other People Are Harmed More When Females Are Imprisoned

The third reason that women who commit the same crimes as men should often receive lower penalties is that imprisoning females can have a damaging effect on other people and, in particular, their relatives and dependents. As previously discussed, people who have dependents should generally receive discounted sentences.²⁴⁰ Though many male offenders also have dependents, this is more common with female offenders, and the type and level of dependence is normally not as deep with male offenders.²⁴¹ These observations are elaborated here.

Nearly all individuals are interconnected with other people. There is enormous diversity in the types of connections that individuals have and the number of people with whom they are connected. Nonetheless, certain connections are demonstrably more profound and important than others. In some situations, an individual's life can become so interconnected with others that others become dependent on that individual. A dependency occurs when one person's flourishing is significantly and negatively impacted if the relationship is severed.²⁴² There are numerous forms of dependence, but the most established and deepest form is the bond between parent and child.

Parental incarceration has a damaging impact on children.²⁴³ A recent report by David Murphey and P. Mae Cooper shows that more than five million children in the United States have had at least one parent in prison at some point.²⁴⁴ The report states that after factoring in the effects of other variables, such as income and race, parental incarceration is associated with:

[A] higher number of other major, potentially traumatic life events—stressors that are most damaging when they are cumulative; more emotional difficulties, low school

240. Bagaric & Alexander, *supra* note 197, at 398–99. See also Emily W. Andersen, “Not Ordinarily Relevant:” *Bringing Family Responsibilities to the Federal Sentencing Table*, 56 B.C. L. REV. 1501, 1532 (2015) (discussing the psychological impacts of incarceration on the inmate's dependents); Michael Tonry, *The Fog Around Cost-Benefit Studies of Crime and Punishment May Finally Be Clearing: Prisoners and Their Kids Suffer Too*, 14 CRIMINOLOGY & PUB. POL'Y 583, 660 (2015) (discussing tangible impacts of incarceration on the inmate's dependents).

241. CHRISTOPHER J. MUMOLA, U.S. DEPT. OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000), <https://www.bjs.gov/content/pub/pdf/iptc.pdf>.

242. See Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 N.Z.U. L. REV. 411, 414 (2013), for a discussion about the meaning of flourishing.

243. DAVID MURPHEY & P. MAE COOPER, PARENTS BEHIND BARS: WHAT HAPPENS TO THEIR CHILDREN? 2–3 (2015), <http://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>.

244. *Id.*

engagement, and more problems in school, among children aged 6 to 11; and a greater likelihood of problems in school among older youth (12 to 17), as well as less parental monitoring.²⁴⁵

The above information applies to all offenders with children, including males. But the reality is that it applies more commonly and acutely in relation to women. There are a number of reasons for this. First, far more female offenders have children than do male offenders: 65% of females in state prisons have young children, compared to 55% of males.²⁴⁶ Second, more female inmates lived with their children prior to incarceration than male inmates. Nearly two-thirds of mothers in state prisons lived with their children before they were sent to prison, compared to less than 50% of fathers.²⁴⁷ The National Research Council reports that in the month before arrest, 42% of female offenders were living with their children in single-parent households.²⁴⁸ The corresponding figure for male offenders was less than half this number—17%.²⁴⁹

In relation to two-parent households, while men typically provide most of the financial support, research shows that mothers are more important to children's flourishing than fathers. Murphey and Cooper report that: "[m]aternal incarceration can be especially hard on a child, because mothers are more likely to have been the primary caregiver."²⁵⁰ These trends are even more acute in Australia, where studies of two states indicate that approximately 85% of incarcerated women are parents.²⁵¹ Imprisoning these women destroys the family unit by removing the children from their only parent.²⁵²

Finally, in relation to other forms of dependency, the majority of carers are female. A Public Policy Institute report notes that in the twelve months prior to the study, 43.5 million adults in the United States provided unpaid care to another person.²⁵³ Approximately 60% of the carers were female.²⁵⁴

245. *Id.* at 2.

246. MUMOLA, *supra* note 241, at 2.

247. *Id.* at 4.

248. TRAVIS ET AL., *supra* note 38, at 171.

249. *Id.* See also VICTORIAN SENTENCING ADVISORY COUNCIL, *supra* note 44, at 56 (noting that incarcerated women in Victoria are more likely to be the primary caregiver for children than men).

250. MURPHEY & COOPER, *supra* note 243, at 2.

251. Ann Farrell, *Mothers Offending Against Their Role: An Australian Experience*, 9 WOMEN & CRIM. JUST. 47, 56 (1998).

252. Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 177 (1996).

253. AARP & PUB. POL'Y INST., CAREGIVING IN THE U.S. 6 (2015), <http://www.aarp.org/content/dam/aarp/ppi/2015/caregiving-in-the-united-states-2015-report-revised.pdf>.

254. *Id.*

Moreover, higher-hour caregivers (i.e., those who provide care for 21 or more hours weekly)²⁵⁵ were mainly female (62%).²⁵⁶ The average age of the care recipient is 69.4 years old,²⁵⁷ and the average duration of caregiving is four years.²⁵⁸ The average age of the carer is 49.2 years old.²⁵⁹ Studies on caregiving show that the value of informal care provided by women in the United States to relatives and others (such as friends and neighbors) is estimated at between \$148 billion to \$188 billion annually.²⁶⁰

In short, females perform far more of the nurturing and benevolent responsibilities in society. For this reason, their absence is felt more acutely than that of males, and thus women should receive reduced prison terms.²⁶¹

On the other hand, the doctrinal perspective argues that suffering external to the offender (experienced by his or her dependents) should not be factored into sentencing considerations since incarceration invariably separates family and friends.²⁶² However, this argument fails for two reasons. First, ignoring the impact of incarceration on dependents infringes on the right to a family. The right to a family has been one of the less

255. *Id.*

256. *Id.* at 16.

257. *Id.* at 7.

258. *Id.* at 21.

259. *Id.* at 18.

260. *Women and Caregiving: Facts and Figures*, FAMILY CAREGIVER ALL. (Dec. 31, 2003), <https://www.caregiver.org/women-and-caregiving-facts-and-figures>. Similar patterns of female-orientated caregiving exist in Australia where: “in 2015 there were 2.7 million unpaid carers in Australia . . . [and] [m]ore than two thirds of primary carers are female.” *Statistics*, CARERS AUSTRAL., <http://www.carersaustralia.com.au/about-carers/statistics/> (last visited Apr. 25, 2017).

261. Some earlier research into the reason for the disparity between male and female sentences indicated that, effectively, courts were already discounting sentences for female offenders with familial responsibilities. See e.g., Daly, *Gender and Sentencing*, *supra* note 44, at 163 (finding court personnel assume familial defendants are better probation risks and are concerned with breaking up families); Daly & Tonry, *supra* note 44, at 232 (reviewing literature discussing the impact of female incarceration on families); Kathleen Daly, *Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment*, 66 SOC. FORCES 152, 168 (1988) (finding courts accord greater lenience to familial women because of the gender divisions in work and family life); Kathleen Daly, *Structure and Practice of Familial-Based Justice in a Criminal Court*, 21 L. & SOC’Y REV. 267, 279–80 (1987) (detailing court officials’ heightened concern for child welfare in sentencing considerations for familial women). But see Spohn & Beichner, *supra* note 44, at 155 (finding that in some circumstances female offenders receive more lenient judicial treatment). The comments of Daly are supported by research undertaken by Jill K. Doerner. Jill K. Doerner, *Explaining the Gender Gap in Sentencing Outcomes: An Investigation of Differential Treatment in U.S. Federal Courts* 21–24 (May 2009) (unpublished Ph.D. dissertation, Bowling Green State University), https://etd.ohiolink.edu/rws_etd/document/get/bgsu1237482038/inline. See also Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, (Univ. Mich. Law & Econ., Working Paper No. 12-2018, 2012), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1164&context=law_econ_current (examining gender disparities in federal criminal cases).

262. *Markovic v The Queen* (2010) 200 A Crim R ¶ 10 (Austl.).

commonly litigated human rights in the United States, and hence, there is little developed jurisprudence regarding its meaning and scope. However, it expressly includes the right to found a family and thus implies the right to live in a familial structure.²⁶³ Imprisoning a family member—especially the member who is the principal caregiver for the family—places at risk the integrity, flourishing, and, sometimes, the viability of the family as a unit.

The right to a family, like all rights, is not absolute and must yield to more important rights and the common good.²⁶⁴ Thus, it is not a categorical argument against imprisoning offenders with dependents. Nevertheless, it is a reason to reduce the severity of the sanctions for this cohort of offenders.

Mitigation for dependency can also be supported by the principle that the innocent should not be punished. This principle is not only widely accepted and weighty, it is also seemingly clear-cut in that it has few exceptions or qualifications. The proscription applies most strongly to people who have committed no crime yet are subjected to criminal sanctions. The principle has been most dramatically illustrated in the context of punishment that is deliberately inflicted on people known to be innocent. As H. J. McCloskey famously reflected:²⁶⁵

Suppose a sheriff were faced with the choice either of framing [an African American] for a rape which had aroused white hostility to [African Americans] (this particular [African American] being believed to be guilty) and thus preventing serious anti-[African American] riots which would probably lead to loss of life, or of allowing the riots to occur. If he were an act

263. The right to a family is enshrined in a number of international and domestic law legal instruments. Article 17 of the International Covenant on Civil and Political Rights provides: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.” International Covenant on Civil and Political Rights art. 17, Mar. 23, 1976, 999 U.N.T.S. I-14668, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>. Article 23 of the same instrument states: “1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses.” *Id.* at art. 23.

264. Mirko Bagaric, *A Utilitarian Argument: Laying The Foundation for a Coherent System Of Law*, 10 OTAGO L. REV. 163, 172 (2002).

265. Two other examples of punishing the innocent are: (1) punishing people for strict liability offenses; and (2) punishing someone more severely than is commensurate with the seriousness of the offense. R.A. DUFF, TRIALS & PUNISHMENTS 154–55 (1986).

utilitarian he would be committed to framing the [African American].²⁶⁶

The principle against punishing the innocent is so powerful that it is one of the reasons utilitarianism has fallen out of favor—any theory that commits us to such heinous outcomes must be flawed.²⁶⁷ This principle extends not only to punishing accused persons that are known to be innocent, but also to those that the system does not know to be innocent—that is, to all wrongful convictions.²⁶⁸ The principle that innocents should not be punished should also apply to hardship indirectly inflicted on individuals closely associated with incarcerated persons.

Pain occasioned to the offender's dependents is arguably even more in line with the doctrinal view of punishment than incidental punishments (such as being subjected to sexual abuse while in prison), given that it is readily foreseeable at sentencing. Logically, the dependent's pain should operate to mitigate the offender's penalty on the basis of this extended approach to the concept of punishment.²⁶⁹ Of course, logical progressions are only as strong as their founding principles. As noted above, the suggestion that incidental harm suffered by offenders is a form of punishment is contestable. However, even if the logic breaks down, the ideal behind it can be persuasively recast. Recasting the principle from "innocents should not be punished" into "innocents should not suffer" circumvents the stricture possibly associated with the concept of punishment, without meaningfully eroding the appeal and persuasiveness of the principle.

It is clear that dependents of offenders are innocent.²⁷⁰ It is also clear that they suffer if the offender is imprisoned. The only way to ameliorate this suffering is to not imprison the offender or reduce the length of the sentence.²⁷¹ We now examine the final reason that justifies mitigating the penalties of many female offenders.

266. HENRY JOHN McCLOSKEY, *META-ETHICS AND NORMATIVE ETHICS* 180–81 (1969).

267. See Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 133 (2000) (asserting utilitarianism had fallen out of favor because it includes the possibility of punishing the innocent).

268. Hence establishment of organizations such as the Bluhm Legal Clinic, Center on Wrongful Convictions. See generally *Center on Wrongful Convictions*, BLUHM LEGAL CLINIC, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/> (last visited Apr. 25, 2017) (cataloguing exonerations of wrongfully convicted persons).

269. However, the weight that should be applied to the operation of this principle is diluted by the level of indirectness of the imposition.

270. This of course assumes that they did not participate in the offense.

271. See, e.g., Julian Abele Cook, Jr., *Gender and Sentencing: Family Responsibility and Dependent Relationship Factors*, 8 FED. SENT'G REP. 145, 147 (1995) (arguing that including gender as

E. Women Offenders Are Often the Victims of Child Sexual Abuse

There is a strong link between adverse life experiences (such as deprived social background) and crime.²⁷² One of the most damaging life events is being sexually victimized, and its impact is most severe when the victim is a child.²⁷³ Female inmates are grossly overrepresented in child sexual victimization statistics.²⁷⁴

A United States Department of Justice study found that between 23% and 37% of female prisoners reported they had been physically or sexually abused prior to the age of eighteen.²⁷⁵ This compared with 6% to 14% of male offenders.²⁷⁶ Focusing solely on sexual abuse, the proportion of female inmates who had been abused prior to the age of eighteen ranged from 15% (federal inmates) to 26% (state inmates), compared with 2% and 5% for males, respectively.²⁷⁷ The ratio of prior abuse experienced by female prisoners was much greater than that of the general community. In fact, female prisoners are three to four times more likely than the general female population to have been abused.²⁷⁸ By contrast, males in prison were only twice as likely to have been abused.²⁷⁹

The study also revealed a clear link between past abuse and violent crime. The report noted that, “[34%] of abused women and 21% of women not abused were in prison for a violent offense.”²⁸⁰ Thus, past abuse

a factor in federal sentencing would improve the administration of justice); Weinstein, *supra* note 252, at 176 (suggesting alternative methods of punishment for parental offenders to minimize the adverse effect on children); Patricia M. Wald, “What About the Kids?:” *Parenting Issues in Sentencing*, 8 FED. SENT’G REP. 137, 139 (1995) (observing the irony that our leaders speak of family values, yet refuse to allow parenting as a sentencing consideration).

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

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

274. CAROLINE WOLF HARLOW, U.S. DEPT. OF JUSTICE, *PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS I* (1999), <https://www.prearesourcecenter.org/sites/default/files/library/priorabuserportedbyinmatesandprobationers.pdf>.

275. *Id.* (showing the rates of females being abused at any time during their lives were 40% to 57%).

276. *Id.* (showing the rates of males abused is 7% to 16% any time before sentence).

277. *Id.*

278. *Id.* (showing the rate was 12% to 17% in the general female population).

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

280. *Id.* at 3.

resulted in more than a 50% increase in the likelihood of imprisonment for a violent offense.²⁸¹

The number of female offenders that were the victim of childhood sexual abuse in the above study is strikingly high. But it is at the low end of estimates reported in other studies. A more recent wide-ranging survey of the extent of sexual abuse experienced by inmates showed that more than half reported being sexually abused as a child.²⁸²

Australian studies also indicate that well over 50% of female prisoners were subjected to sexual abuse when they were children.²⁸³ A recent Australian report notes:

Relatively little research has been undertaken in Australia to measure the prevalence of child sexual abuse and other forms of victimisation specifically among female prisoners—and, as above, statistics may be problematic due to underreporting. The research that has been done indicates prevalence figures of between 57% and 90%. In a 2008 study of the sexual health and behaviour of 199 female prisoners in NSW, Richters et al. found that 59% had experienced some form of sexual coercion or violence. In this sample of women, re-victimisation was common: one-third of women said they had experienced sexual coercion between three and nine times, and a further 13% said it had occurred more than ten times.²⁸⁴

Again, this is much higher than the incidence of sexual abuse in the general population.²⁸⁵ Similarly to the United States, Australian survey data is not precise. However, it indicates that approximately one in four women have been the victim of childhood sexual abuse.²⁸⁶

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

282. McDaniels-Wilson & Belknap, *supra* note 28, 1118–19 (2008). See also *R v Benbrika & Ors* (2008) 182 A Crim R 205, ¶ 30 (Austl.) (noting that severe restrictions included locking inmates in their cells for 23 hours a day).

283. Mary Stathopoulos et al., *supra* note 126, at 5.

284. *Id.* at 4–5 (internal citation omitted). See also WENDY LOXLEY & KERRY ADAMS, AUSTRALIAN INST. OF CRIMINOLOGY, WOMEN, DRUG USE AND CRIME: FINDINGS FROM THE DRUG USE MONITORING IN AUSTRALIA PROGRAM 3 (2009), http://www.aic.gov.au/media_library/publications/rpp/99/rpp099.pdf (finding that many incarcerated females suffered past physical and sexual abuse).

285. Mary Stathopoulos et al., *supra* note 126, at 4.

286. Gavin Andrews et al., *Child Sexual Abuse Revisited*, 176 MED. J. AUST. 458, 459 (2002). See also Deborah Scott, AUSTRALIAN INST. OF FAMILY STUDS., *The Prevalence of Child Abuse and Neglect*

Thus, there is a strong correlation between female inmates and childhood sexual abuse. The fact that an offender has been subjected to traumatic events or an otherwise troubled upbringing does not necessarily mean that he or she should be treated differently for sentencing purposes. The sentencing process is not an appropriate vehicle for dispensing empathy or attempting to cure the unfortunate personal events of the past. In order for a matter to be taken into account for sentencing purposes, it must be logically relevant to a sentencing objective, or a justifiable aggravating or mitigating factor. There is one: the concept of culpability, which in fact has a role in both the framework of the substantive criminal law and sentencing.

By its nature, criminal law focuses on prohibiting the commission of harmful acts to individuals or the community. Criminal law is society's strongest form of condemnation and the medium through which we act most coercively against individuals.²⁸⁷ In the end, criminal law aims to prohibit and punish conduct that harms others' interests.²⁸⁸ While focused principally on preventing bad acts, mental states play a role in substantive criminal law.²⁸⁹ Thus, as a general rule, criminal liability only attaches to behavior that is intentional, reckless, or (in some instances) negligent.²⁹⁰ Moreover, many forms of crime are broken down according to the mental state of the offender. For example, if one intentionally ends another's life, it is "murder." On the other hand, if one ended another's life accidentally, it is "manslaughter."

Culpability is also relevant at the sentencing stage. Thus, we see that offenders who are mentally impaired or under the influence of drugs often qualify for a sentencing discount.²⁹¹ For similar reasons, offenders who have previously been subjected to traumatic life experiences, especially in their childhood, may also qualify for a sentencing discount. This is because evidence suggests that childhood trauma has a criminogenic effect.

(2013), www.aifs.gov.au/cfca/pubs/factsheets/a144254/index.html (reporting on child abuse statistics in Australia).

287. ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 17 (4th ed. 2003).

288. Harm is the main reason for the prohibition of certain conduct, as assumed in Jan Gorecki's argument for decriminalizing certain "victimless" acts (e.g., homosexuality). JAN GORECKI, *A THEORY OF CRIMINAL JUSTICE* 33–38 (1979).

289. *Id.*

290. ASHWORTH, *supra* note 287, at 87.

291. See Mirko Bagaric, *A Rational (Unapologetically Pragmatic) Approach to Dealing With The Irrational – The Sentencing of Offenders With Mental Disorders*, 29 HARV. HUM. RTS. J. 1, 32 (2016) (discussing mental health issues and substance dependence as mitigating factors resulting in lighter sentences).

As noted previously, an individual's experiences, especially early in life, have a profound impact on the decisions, choices, and actions they perform. As Craig Haney has observed:

[R]esearch confirms that traumas experienced earlier in someone's life—whether caused by structural forces like poverty and the effects of racial discrimination, or more direct forms of maltreatment like parental abuse and neglect—can be deeply “criminogenic” (that is, persons exposed to them have a higher probability of subsequently engaging in crime).²⁹²

The reasons for the link between childhood sexual abuse and the commission of crime are not clear; however, it has been noted that:

The clinical literature on child sexual abuse and cumulative harm has found that early onset lifecourse victimization results in complex mental health problems that profoundly affect self-regulation, healthy attachments, and cognitive and neurological development. Although it is not possible to suggest a causal link between a history of sexual [victimization], such a history and its effects appear to be central features of women's pathways into offending, their experiences of custody, and their capacity to engage in rehabilitation programs. For female offenders with CSA [child sexual abuse] histories, “complex trauma” emerged as a key lens through which to view their needs – as both victims and offenders.²⁹³

Ultimately, the reason that offenders who were victims of sexual abuse are less culpable is because that experience limits their personal choices in a manner that inclines them toward crime.²⁹⁴ People have free will. Even the deterministic theory of human action accepts that there is a role for moral and legal responsibility.²⁹⁵ Yet, there are degrees of freedom.²⁹⁶ For this reason, when choice is limited to a profound degree, it can constitute a

292. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 857 (2008).

293. STATHOPOULOS & QUADARA, *supra* note 29, at 4.

294. See, e.g., Gilman, *supra* note 272, at 531 (2013) (explaining that courts may accept the poverty defense and that sexual abuse is one of many factors comes with it).

295. See Robert Young, *The Implications of Determinism*, in A COMPANION TO ETHICS 535 (Peter Singer ed., 1991) (“But if determinism is true, it seems no-one can do otherwise and so no-one can be morally responsible for any decisions or actions.”).

296. See H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 158, 177–81 (2d ed. 2008) (exploring whether all criminals can truly choose not to commit a crime).

defense to crime, as in the recognized defenses of necessity or duress. It is the capacity of childhood sexual abuse to limit choice that makes sexually traumatized individuals less culpable when they commit crime.

The Federal Sentencing Guidelines endorse this approach in relation to offenders who have had a difficult and disadvantaged upbringing. The Guidelines expressly allow for a departure from a guideline-specific sentence upon finding a “[l]ack of guidance as a youth and similar circumstances.”²⁹⁷ This phrase has not been exhaustively defined. However, as noted by Amy Baron-Evans, it does have an empirical basis:

Child abuse and neglect can cause chemical changes in the brain and nervous system. Studies involving abused and neglected children show that “abused individuals were 1.8 times more likely to be arrested for a juvenile offense, 1.5 times more likely to be arrested as an adult, and 1.35 times [more] likely to be arrested for a violent crime.” Studies also show that abuse can be in the form of neglect only and “need not involve actual physical injury to do lasting damage to the developing brain.”²⁹⁸

While the exact pathway between childhood sexual abuse and adult offending is not fully understood, the two events are linked. Statistically, victims of child sexual abuse are far more likely to commit crime. Although statistics cannot predetermine the criminal outcomes of abuse, this trend indicates that it is more difficult for adults who were abused as children to avoid committing crimes. Thus, they are less culpable when they do transgress. This should be reflected in a sentencing discount.

F. Analogy Between Discount for Youth and Gender

The argument for reducing female sentences is enhanced by examining the manner in which youthfulness is handled in sentencing. The suggested approach to conferring sentencing reductions to female offenders is similar to that which is taken in relation to youthful offenders. Youth is a standalone mitigating factor in most jurisdictions.²⁹⁹ Amy Baron-Evans and Paul Hofer note that there are a number of reasons for this, mainly: (1) young people are less culpable because their capacity for judgment is

297. U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (U.S. SENTENCING COMM’N 2015).

298. Baron-Evans & Coffin, *supra* note 149, at 80–81 (internal citation omitted) (quoting Debra Niehoff, *Ties that Bind: Family Relationships, Biology, and the Law*, 56 DEPAUL L. REV. 847, 849 (2007)).

299. Pursuant to the federal guidelines, it is incorporated into the departure based on age. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1.

diminished; and (2), they have better prospects of rehabilitation.³⁰⁰ Baron-Evans and Hofer state:

Current scientific research on brain development demonstrates that the region of the brain governing judgment, reasoning, impulse control, and the ability to accurately assess risks and foresee consequences is not fully formed until the early to mid-twenties. Research shows that adolescents and youths are more susceptible to peer pressure to engage in risky behavior than adults age 24 and older. And research shows that the young have a unique capacity to reform. In short, adolescents and young adults are less culpable for their actions, and their tendency to engage in illegal activity is short-lived. “The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”³⁰¹

In Australia, youth operates in a similar manner. It is an established mitigating factor in sentencing and one that is often accorded significant weight.³⁰² This underlying justification for such a policy position is predicated on the idea that the offender’s immaturity prevents him or her from appreciating the extent and nature of criminality involved in his or her

300. Baron-Evans & Coffin, *supra* note 149, at 63–64.

301. *Id.* at 59–60 (internal citations omitted) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

302. *Azzopardi v The Queen* (2011) 219 A Crim R 369, ¶ 34 (Austl.).

There are a number of considerations which underlie the general primacy of an offender’s youth as a sentencing consideration. Firstly, young offenders being immature are therefore “more prone to ill-considered or rash decisions[.]” They “may lack the degree of insight, judgment and self-control that is possessed by an adult[.]” They may not fully appreciate the nature, seriousness and consequences of their criminal conduct.

Id. ¶ 34 (internal footnotes omitted) (first quoting *R v McGaffin* (2010) 206 A Crim R ¶ 69 (Austl.); then quoting *Director of Public Prosecutions (Vic) v TY [No 3]* (2007) 18 VR 241, 242 (Austl.)). See also *R v Martin* [1973] VR 854 (Austl.) (considering the defendant’s youth and immaturity during sentencing); *R v GDP* (1991) 53 A Crim R 112, 116 (Austl.) (declining to send a youthful defendant back into custody due to mitigating rehabilitative measures he had been taking); *R v Bell* [1999] VSCA 223, ¶ 14 (Austl.) (explaining that youth is a discretionary mitigating factor in sentencing); *R v Phung* (2003) 141 A Crim R 311, ¶¶ 43–44, 47 (Austl.) (reducing an applicant’s sentence because the trial judge did not consider the applicant’s youth as a factor in rehabilitation); *R v Dullroy* [2005] QCA 219, ¶ 52 (Austl.) (recognizing that younger individuals may have a greater potential for rehabilitation); *R v Wyley* [2009] VSCA 17 (observing that the law considers maturity when sentencing youthful offenders); *Lee v Regina* [2011] NSWCCA 169, ¶¶ 44–45 (Austl.) (holding that “[i]t is also necessary to have regard to the fact that the applicant was youthful at the time of the offence, having turned 18 years only 4 months earlier. . . . [S]ome allowance must be made for immaturity and the importance of rehabilitation”); see generally BAGARIC & EDNEY, *supra* note 169, at 162 (discussing youthful offender’s inability to “appreciate the extent and nature of criminality involved in their conduct”).

conduct.³⁰³ Mitigation of punishment is justified because youths do not have the same ability as adults to weigh the considerations involved in committing a crime.³⁰⁴ Youthful offenders are also more likely to respond favorably to rehabilitative interventions.³⁰⁵ By factoring in immaturity, courts can soften and ameliorate the punitive dimension of criminal law in sentencing youthful offenders.

So far as mitigation in sentencing is concerned, the analogy with female and youthful offenders is powerful. Like youths, female offenders have a higher capacity to reform than males. Furthermore, female offenders are less culpable given their often traumatic backgrounds. In fact, the argument for mitigating females' sentences is even stronger than for youthful offenders' sentences: more people suffer from female incarceration because of the nurturing roles they perform. Thus, consistency with established sentencing law supports the argument that female offenders should be dealt with more leniently than male offenders.

III. A DOCTRINALLY SOUND FEMALE SENTENCING PROCESS

The issue then becomes how leniently women should be treated when it comes to sentencing and how this should be calibrated. In order to unpack this, the four mitigating factors should be examined separately to determine the circumstances in which they should apply and the weight that they should be accorded.

Mitigating factors operate in two broad ways. Some factors, such as youth, operate on all offenders with that particular trait.³⁰⁶ The defining feature of these factors is that it is not reasonably tenable to identify which

303. Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 1005 (2008). See also *R v WKR* (1993) 32 NSWLR 447, 449 (Austl.) (discussing the general principles behind affording leniency to children in criminal proceedings); *R v Hearne* (2001) 124 A Crim R 451, ¶26 (Austl.) (subordinating the interests of punishment to those of rehabilitation); *MS2 v The Queen* [2005] NSWCCA 397, ¶¶ 14, 16, 21–23, 66–67 (Austl.) (unanimously agreeing that assailants' attack was the product of immaturity, warranting mitigation in sentencing).

304. BAGARIC & EDNEY, *supra* note 169, at 162.

305. “[C]ourts ‘recognize the potential for young offenders to be redeemed and rehabilitated[.]’ This potential exists because young offenders are typically still in a stage of mental and emotional development and may be more open to influences designed to positively change their behaviour than adults who have established patterns of anti-social behaviour. No doubt because of this potential, it has been stated that the rehabilitation of young offenders, ‘is one of the great objectives of the criminal law[.]’” *Azopardi v The Queen* (2011) 219 A Crim R 369, ¶35 (Austl.) (internal footnotes omitted) (first quoting *R v McGaffin* (2010) 206 A Crim R 188, ¶69 (Austl.); then quoting *R v Tran* (2002) 129 A Crim R 214, 219 (Austl.)).

306. See *infra* Part IV.A (discussing factors that impact all offenders with that trait regardless of gender).

members of the class of offenders have the trait that satisfies the rationale for the mitigation. For example, in the case of young offenders, a major reason for according mitigation is because they have good prospects of rehabilitation.³⁰⁷ However, it is not possible to establish which young offenders are more capable of rehabilitation than others; and hence, all youthful offenders qualify for the discount.

The same reasoning applies to female offenders. Women reoffend at lower rates than men, but it is not possible to identify at the sentencing stage which women in particular are especially unlikely to reoffend.³⁰⁸ Therefore, this discount should apply to all women.

The same rationale applies because of the greater burden prison places on women. Women suffer more in prison than men, but one cannot determine which particular woman experiences this greater suffering. Hence, this mitigatory factor should apply to all female offenders.

However, mitigating and aggravating considerations do not apply in a general manner. Rather, they need to be established by reference to the particular facts of the case. Examples of this are military service and a record of prior good works.³⁰⁹ The same applies to discounts concerning child sexual trauma and dependency by others. These are objective, backward-looking considerations. While they apply to most female offenders, there are substantial portions of such offenders to whom these factors are inapplicable. Most importantly, these are not speculative considerations. They are capable of being established by relatively straightforward evidence. Thus, these two considerations should only mitigate penalties when they are established on the facts of the case.

The next issue is how much weight each of the mitigating factors should receive. As noted in Part II, there are two broad factors that determine the degree of sentencing mitigation. First, a precise mathematical figure can be set. This can either be an exact figure or a designated range. The Federal Sentencing Guidelines adopted a designated range for many of its mitigating factors.³¹⁰

The alternative approach is to allow courts to determine the weight that should be accorded to aggravating and mitigating considerations. As noted above, this is the approach that Australia adopted.³¹¹ There is no practical

307. *See supra* Part II.F (discussing rehabilitation prospects in the context of youth).

308. *See supra* Part II.B (identifying that there is no evidence to suggest that female offenders respond better to treatment programs from the rehabilitative perspective than males, but also observing that women have lower recidivism rates).

309. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (U.S. SENTENCING COMM'N 2015).

310. *Id.* § 5K1.1 cmt.

311. *Pesa v The Queen* [2012] VSCA 109, ¶ 22 (Austl.).

way to prevent courts from giving, say, 2% or 40% weight to a particular consideration, such as remorse or good criminal history,³¹² in order to mitigate a penalty, or an aggravating factor such as prior criminality, to increase the penalty.³¹³ As noted in *DPP v Terrick*: “The proposition that too much — or too little — weight was given to a particular sentencing factor is almost always untestable. This is so because quantitative significance is not to be assigned to individual considerations.”³¹⁴

The approach in Australia is unsound. To achieve consistency and transparency in sentencing, it is important to assign weight to each of the considerations.³¹⁵ There is no accepted theory regarding the respective weight of aggravating or mitigating factors, and the exact weight accorded to the considerations involves a degree of approximation.³¹⁶ However, this is more desirable than leaving the matters to the discretion of individual sentencing judges.³¹⁷ Assigning weight would also allow for informed revision of any sentence if practice uncovers errors or unintended consequences. Prescribing that considerations are relevant to sentencing without assigning a priority ranking to them or a standardized weight results in unacceptably broad judicial discretion, which makes the entire process too opaque. This type of process leads to what Justice Marvel Frankel described as a lawless system,³¹⁸ of the type that now exists in

312. See *CD v The Queen* [2013] VSCA 95, for an example of where a considerable amount of weight was given to remorse. “If there is evidence of remorse, and if that remorse is genuine, it is a very important element in the exercise of the sentencing discretion. Remorse of this kind indicates realistic prospects of rehabilitation and a reduced need for specific deterrence.” *Id.* ¶ 36.

313. The amount of weight given to a sentencing factor is only erroneous if it results in a sentence being manifestly excessive or inadequate. *DPP (Vic) v Terrick* (2009) 197 A Crim R 474, ¶ 5 (Austl.).

314. *Id.* In *Pesa v The Queen*, the Court expanded on this, observing that, in regards to weight, “the ultimate sentencing decision is entirely opaque. While the sentencing reasons record the judge’s consideration of the various matters relevant to sentence, the sentencing decision itself is a conclusion arrived at by the process of intuitive synthesis, without the attribution of weight to any individual factor.” *Pesa v The Queen* [2012] VSCA 109, ¶ 10 (Austl.).

315. See Mirko Bagaric, *Sentencing: From Vagueness To Arbitrariness: The Need to Abolish the Stain that is the Instinctive Synthesis in Australian Sentencing*, 38 UNSW L.J. 76, 77 (2015) (finding that sentencing needs “consistency, predictability and transparency”).

316. In an empirical study of mitigating factors based on interviews, sentencers note that those accorded the most weight are: clinical depression, support from victim’s family, drug treatment, remorse, regret, and moment of madness; while those with lesser weight are: partner and children, illiterate, and abused as a child. Jessica Jacobson & Mike Hough, *Personal Mitigation in England and Wales*, in *MITIGATION & AGGRAVATION AT SENTENCING* 146, 152–53 (Julian V. Roberts ed., 2011).

317. Bagaric, *supra* note 315, at 77.

318. MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 8 (1973). See Lynn Adelman & Jon Dietrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239 (2008), for a critique of Frankel’s approach.

Australia and similar to that which operated in the United States approximately 50 years ago.³¹⁹

In 2014, Mirko Bagaric proposed such a scheme for a range of aggravating and mitigating factors.³²⁰ Consistent with that analysis, women should receive a 20% penalty reduction because of their reduced risk of reoffending. They would also receive a 50% reduction because of the extra burden of imprisonment. For reasons set out above, these considerations should apply to all female offenders.

When several mitigating factors apply, they should not operate in a simple cumulative manner. Otherwise, a combination of mitigating factors could potentially amount to a discount of 100% or more. Instead, the discounts should be applied individually to the sentence. Applying the above two discounts means that all females should receive a 60% sentencing discount, i.e. the contracted sentence is now 40% of the original sentence.

In addition to the two general factors that apply to all female offenders, some women would qualify for additional discounts. Women who have been the victim of childhood sexual abuse should receive a further 25% discount and women who have dependents should receive an additional 20% reduction. This comes off the remaining contracted sentence of 40%. Thus, the total potential discount for female offenders is 76%.

The ultimate discount (between 60% and 76%) may not only reduce the length of a prison term, but may also affect the decision of whether to imprison the offender in the first place. In real terms, the discount is easier to calculate when it comes to reducing the length of a prison term. In such instances, all that is needed is to make a simple mathematical adjustment by reducing the prison term by the discount.

The process is more obscure when it comes to determining its effect on the in- versus out-of-prison decision—there is no clear method for determining the substitution of sanctions.³²¹ For example, it is not clear what magnitude of fine or length of probation is equivalent to a day in

319. See *Mistretta v. United States*, 488 U.S. 361, 366 (1989) (noting that indeterminate sentencing had been criticized for producing “two ‘unjust[ified]’ and ‘shameful’ consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison.”) (internal citation omitted).

320. Bagaric, *supra* note 167, at 1233–35.

321. See Andrew von Hirsch et al., *Punishments in the Community and the Principles of Desert*, 20 RUT. L.J. 595, 603–04 (1989), for a discussion regarding the interchangeability of sanctions. Contrary to my proposal (and that of von Hirsch), Morris suggests that equivalence of severity is not a prerequisite to interchangeability of sanction; all that is needed is that both sanctions serve the same or appropriate penological purposes. NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 178–209 (1982) (discussing the appropriate balance of punishment and penological purposes).

prison in terms of sanction severity. Also, there is no bright-line rule to determine the level of seriousness that an offense must reach before a term of prison is appropriate. The uncertainty associated with these issues highlights the need for precise mathematical weightings to be assigned to mitigating factors. In this way, the sentencing calculus involves at least some certainty. This added precision will compel courts to consider the real necessity of imprisonment for all crimes, which would otherwise attract a relatively short prison term (say, one to three years). If these mitigatory allowances are applied accurately, the outcome will be a considerable reduction in the female prison population.

The reduction in female incarceration levels will be even greater than is manifest from granting the above discounts. The reason for this stems from the difference in offense types generally committed by men and women. As discussed in Part II, men generally commit a far higher portion of violent offenses than women, and they also commit virtually all sexual offenses.³²² This has considerable significance given that studies show that these are the most serious types of crimes, at least in terms of the impact that they have on victims.

Empirical data shows that serious sexual and violent offenses often have profoundly damaging impacts on the victims. The best information available suggests that victims of crime suffer considerably—in fact, more than is manifest from the obvious and direct effects of crime.

Rochelle Hanson, Genelle Sawyer, Angela Begle, and Grace Hubel reviewed the existing literature regarding the effects of violent and sexual crimes on key quality of life indices.³²³ The crimes examined included rape, sexual assault, aggravated assault, and intimate partner violence.³²⁴ The key quality of life indicia examined were: role function (capacity to perform parenting and intimate relationships and to function in the social and occupational domains), reported levels of life satisfaction and well-being, and social-material conditions (physical and mental health).³²⁵ The report demonstrated that many victims suffered considerably across a range of measures, even long after the relevant crimes occurred.³²⁶

322. See *infra* Part II.C (discussing the fact that men tend to commit more violent crime than women, and the factors that may lead to this behavioral difference).

323. Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189, 189 (2010).

324. *Id.*

325. *Id.* at 190.

326. *Id.* at 190–94.

The report concluded:

In sum, findings from the well-established literature on general trauma and the emerging research on crime victimization indicate significant functional impact on the quality of life for victims. However, more research is necessary to understand the mechanisms of these relationships and differences among types of crime victimization, gender, and racial/ethnic groups.³²⁷

Findings suggest that victims of violent crime and sexual crime, in particular, have difficulty being involved in intimate relationships,³²⁸ and have diminished parenting skills.³²⁹ They also exhibit lower levels of success in employment settings, which especially applies to victims who had been abused by their partners, and higher levels of unemployment.³³⁰ Additionally, they have high levels of direct medical costs associated with the violent crime, with an average of \$24,353 for an assault requiring hospitalization.³³¹

Similarly, Chester L. Britt, in a study examining the effects of violent and property crime on the health of 2,430 respondents noted that, “[v]ictims of violent crime reported lower levels of perceived health and physical well being, controlling for measures of injury and for sociodemographic characteristics.”³³² These findings were not confined to violent crime. Victims of property crime also reported reduced levels of perceived well-being, but it was less profound than in the case of violent crime.³³³

It is clear that serious sexual and violent offenses often devastate the lives of victims, providing a powerful argument for the imposition of stern punishment for the perpetrators of such crimes.³³⁴ However, different considerations apply in relation to other offense types, such as property, fraud, immigration, and even drug offenses. As one of us has argued

327. *Id.* at 194–95.

328. *Id.* at 191.

329. *Id.* at 190.

330. *Id.* at 191.

331. *Id.* at 193. (reporting average medical costs of this type to be \$24,353 as of 2001).

332. Chester L. Britt, *Health Consequences of Criminal Victimization*, 8 INT’L REV. VICTIMOLOGY 63, 63 (2001).

333. *Id.* at 69–70. *See also* Adriaan JM Denkers & Frans Willem Winkel, *Crime Victims’ Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT’L REV. VICTIMOLOGY 141, 141 (1998) (presenting research that victims of violent crimes experience more psychological distress than those of property crimes).

334. Bagaric, *supra* note 242, at 438.

previously, in most circumstances these crimes should be dealt with by using non-prison punishment.³³⁵

The fact that drug offenses, for example, have been punished too severely in the past few decades in the United States has been acknowledged recently with an unprecedented reduction in the Federal Sentencing Guideline range for nonviolent drug offenses.³³⁶ In April 2014, the United States Sentencing Commission voted to reduce the sentencing guideline level for most federal drug trafficking offenses.³³⁷ These changes will apply retroactively, meaning that over 46,000 prisoners are eligible to have their cases reviewed for a penalty reduction.³³⁸ The average penalty reduction is likely to be two years and one month, resulting in a savings of approximately 80,000 prison bed years (one bed year is equivalent to a prisoner being in jail for one year).³³⁹ The first tranche of these prisoners, totaling 6,000, were released in late 2015.³⁴⁰ Further, the Sentencing Reform and Corrections Act of 2015 aims to implement a number of other

335. *Id.*

336. The law was passed with a majority of 59% of voters in favor. See Kristina Davis, *Calif Cuts Penalties for Small Drug Crimes*, SAN DIEGO UNION-TRIB. (Nov. 4, 2014, 8:04 PM), <http://www.sandiegouniontribune.com/news/elections/sdut-prop-47-misdemeanor-law-vote-election-drug-2014nov04-story.html> (reporting that a similar law passed in California by referendum with 59% of voters in favor). See also News Release, U.S. Sentencing Comm'n, U.S. Sentencing Comm'n Votes to Reduce Drug Trafficking Sentences (Apr. 10, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf (acknowledging policy strategy of lowering drug offense sentencing in order to reduce prison overcrowding).

337. News Release, U.S. Sentencing Comm'n, *supra* note 336.

338. News Release, U.S. Sentencing Comm'n, U.S. Sentencing Comm'n Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences (Jun. 18, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf. The first tranche of these prisoners (totaling approximately 6,000 in number) were released in October 2015. Sarah Horwitz, *Justice Department Set to Free 6,000 Prisoners, Largest One-Time Release*, WASH. POST (Oct. 6, 2015), https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html. See also Erik Eckholm, *Thousands Start Life Anew With Early Prison Releases*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/us/with-early-release-thousands-of-inmates-are-adjusting-to-freedom.html> (“Over the next few years, as a result of an across-the-board adjustment of federal drug penalties by the United States Sentencing Commission, tens of thousands more inmates may benefit from reductions in their terms, and new sentences will be somewhat shorter than they were in recent decades.”).

339. Mirko Bagaric, *Prisons Policy Is Turning Australia into the Second Nation of Captives*, CONVERSATION (Apr. 9, 2015, 4:41 PM), <http://theconversation.com/prisons-policy-is-turning-australia-into-the-second-nation-of-captives-38842>.

340. Horwitz, *supra* note 338.

measures that will reduce prison numbers, including reduced sentences for drug offenders.³⁴¹

The default assumption should be that only offenders who have committed serious violent and sexual offenses should be subjected to a term of imprisonment. Pragmatically, this means that less than 20% of female offenders should be candidates for any imprisonment. This, along with better prison behavior, lower recidivism rates, and mitigation at between 60% and 76% means that much less than 20% of female offenders will be imprisoned. And, for those that are imprisoned, the prison terms will be considerably shorter. The discount seems ostensibly considerable, but that is not a reason to reject the proposal. Rather, it highlights the extent to which the current system is disfigured, and the pressing need for wide-ranging reform.³⁴²

IV. NEGATING COUNTERARGUMENTS TO LESS PUNISHMENT FOR FEMALES

A. Proportionality and Equality

From a crude perspective, there is little question that fewer women should be imprisoned than men. This is because, as we have seen, they commit far less crime than men, and when it comes to serious crime, they are even less represented.³⁴³ This explains the reason for the overall lower levels of female incarceration. However, the argument in this Article goes further than that in terms of female sentencing leniency. Women who commit the same, and even more serious crimes as men should also receive less severe sanctions.

341. See *Basic Elements of Sentencing Reform and Corrections Act of 2015*, SENTENCING LAW & POLICY (Oct. 1, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/basic-elements-of-sentencing-reform-and-corrections-act-of-2015.html, for a summary of the provisions. This law was lauded in the New York Times. Editorial, *Toward Saner, More Effective Prison Sentences*, N.Y. TIMES (Oct. 3, 2015), http://www.nytimes.com/2015/10/04/opinion/sunday/toward-saner-more-effective-prison-sentences.html?_r=0.

342. Moreover, one study has indicated that the current discount accorded to female offenders is in the order of 60%, and that women are twice as likely to avoid imprisonment. Starr, *supra* note 261, at 11.

343. See *infra* Part I (establishing that women commit significantly fewer crimes than men in Australia and the United States).

It is difficult to ascertain whether current practices result in women receiving lower sentences. This stems in part from the complexity of finding offenders who are identically situated in all relevant respects (including all possible aggravating and mitigating factors) apart from gender. Moreover, gender is often subtly incorporated into many sentencing considerations. As noted by Judith Resnik:

Because gender is reflected in occupational status, role in offenses, and a host of other variables, it is difficult to determine what, if any, effects gender has, qua gender. As [Kathleen Daly] puts it, “[m]ost sentencing criteria are, in fact, gender-linked.” The federal sentencing guidelines do not assume women are the “presumptive subjects” of sentencing; instead the prevailing assumption is that men are defendants. Norms of so-called “neutrality” are not in practice neutral because women and men are not currently similarly situated outside the criminal justice system. Daly finds that, while women and men are treated similarly in some respects, women and men with obligations of care for others (“familied women” and “familied men”) are not treated similarly.³⁴⁴

However, to the extent that such studies have been undertaken, it appears that the sentencing considerations treat women more leniently.³⁴⁵ Studies focusing on sentences handed down pursuant to the United States Federal Sentencing Guidelines indicate that women receive sentences that are 10% to 30% more lenient than their male counterparts.³⁴⁶ However,

344. Judith Resnik, *Sentencing Women*, 8 FED. SENT’G REP. 134, 134 (1995).

345. See e.g., Barbara A. Koons-Witt et al., *Gender and Sentencing Outcomes in South Carolina: Examining the Interactions with Race, Age, and Offense Type*, 25 CRIM. JUST. POL’Y REV. 299, 300 (2014) (confirming that among multiple studies females had more lenient sentences); Spohn & Beichner, *supra* note 44, at 178 (finding in some circumstances that female offenders received a more lenient judicial treatment). *But see* Kathleen Daly, *Neither Conflict nor Labeling nor Paternalism Will Suffice: Intersections of Race, Ethnicity, Gender, and Family in Criminal Court Decisions*, 35 CRIME & DELINQUENCY 136, 160 (1989) (concluding that a higher leniency in the sentencing of women is likely due to a stronger familial connection). Daly states, “[f]amilial paternalism more accurately explains family- and gender-based disparities in sentencing than existing social control arguments, and it is distinguished from female paternalism, which is based on the view that women, as the ‘weaker sex,’ are subject to greater court protection than men before the criminal court.” Kathleen Daly, *Structure and Practice of Familial-Based Justice in a Criminal Court*, 21 L. & SOC’Y REV. 267, 267 (1978). See also Kathleen Daly, *Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing*, 3 GENDER & SOCIETY 9, 9 (1989) (arguing that the gender differences in sentencing are not significant when the familial roles of women are taken into account).

346. For example, one study found that found that in three US District Courts: “female offenders received sentences that were approximately ten months shorter than the sentences imposed on similarly situated male offenders. Females also were significantly more likely than males to receive a

some studies have indicated that guideline penalty systems have reduced the sentencing disparities between men and women.³⁴⁷

downward departure for providing substantial assistance, and those who did received bigger sentence discounts than their male counterparts.” Ann Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERKELEY J. CRIM. L. 43, 73 (2006). See also U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS 23 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf (comparing disparities in sentence length by gender and ethnicity); Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUDS. 57, 62 (2005) (comparing gender-based disparity in sentencing to racial-based disparity); Alozie & Johnston, *supra* note 44, at 240 (identifying theories for why male offenders are processed and sanctioned more harshly than women); Gayle Bickle & Ruth D. Peterson, *The Impact of Gender-Based Family Roles on Criminal Sentencing*, 38 SOC. PROB. 372, 372 (1991) (reporting that 20 years of research has concluded that women consistently receive more lenient sentences than men); Koons-Witt, *supra* note 44, at 297 n.1 (mentioning studies that do not show the same lenient sentencing attitudes towards women); Nagel & Johnson, *supra* note 44, at 194 (explaining that leniency for female offenders is disappearing). There are a number of explanations that have been advanced for this. None have been proven and hence are not further explored here, but for the sake of completeness, the explanations are summarized as follows:

The theoretical explanations for gender disparity in sentencing revolve around three themes. The first theme, and the one most commonly found in early studies of gender and sentencing outcomes, is that the more lenient treatment of women is due to either paternalism or chivalry on the part of the largely male judiciary. Judicial paternalism posits that judges (as well as other court officials such as prosecutors and probation officers) view females as weak and in need of protection from the harsh environments of jails and prisons The second theme in the research on gender disparity in sentencing is the use of what [Kathleen] Daly calls ‘multifactor explanations.’ Some researchers add other factors to the paternalism/chivalry explanations mentioned above, suggesting, for example, that judges’ views of offender dangerousness and blameworthiness are linked to race, ethnicity, age, and gender. Using the ‘focal concerns’ perspective, these researchers argue that females receive less severe sentences than males because they are viewed by judges as less dangerous, less threatening, and more amenable to rehabilitations The third theme found in the theoretical explanations for gender disparity in sentencing is what Daly refers to as ‘social control arguments.’ Through her review of the early literature, Daly found that this argument takes one of two forms. The more common argument is that women have more forms of informal social control in their lives than men; as a result, they are less in need of the formal social control provided by the criminal justice system. Women are more likely than men to depend on and value relationships with family members and friends; these relationships, in turn, serve as informal social controls which reduce the need for formal social control through incarceration. The second type of social control argument contends that incarceration is used less often for females, not because of their dependency on others, but because of the dependency and interest *men* have in keeping women in their ‘familial labor’ roles.

Stacey & Spohn, *supra* note 347, at 49–51 (internal footnotes omitted).

347. Daly & Tonry, *supra* note 44, at 206. See also Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the*

This conclusion is by no means definitive. A study by the Victorian Sentencing Advisory Council, which included comparing sentences imposed on male and female offenders, showed that while men normally received heavier penalties than women,³⁴⁸ this was not the case with certain types of homicide offenses. The study examined three homicide offenses: murder, manslaughter, and causing death by driving.³⁴⁹ It showed that for murder and manslaughter offenses, men were more likely to be imprisoned, but that women were more likely to be imprisoned for death by driving.³⁵⁰ Moreover, when women were imprisoned for these offenses, they received longer terms, except for manslaughter.³⁵¹

Irrespective of current practices, we argue that women who commit the same crimes as men should receive a reduced sentence. This is likely to be because it violates the principle of proportionality and the ideal of equality.

The principle of proportionality is the view that the hardship imposed by the punishment should match the severity of the crime.³⁵² Equality requires the same treatment of equally situated individuals.³⁵³ It has been

Federal Sentencing Guidelines, 20 PEPP. L. REV. 905, 931–32 (1993) (indicating that women receive lower penalties than men in criminal sentencing); Susan Roxburgh, *Gender, Crime, and Punishment: Is Justice Blind, or Are Men and Women Offenders Treated Differently by the Courts?*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 193, 194 (1996) (reviewing KATHLEEN DALY, *GENDER, CRIME, AND PUNISHMENT* (1994)); Spohn & Beichner, *supra* note 44, at 178 (indicating that minority men receive harsher penalties than non-minority men).

348. The average length of imprisonment for men sentenced in the Higher Courts was 62.2 months, while for women it was 50.4 months (i.e., a difference of approximately 25%). VICTORIAN SENTENCING ADVISORY COUNCIL, *supra* note 44, at 14.

349. *Id.* at 20.

350. The respective rates at which men and women imprisoned for the three offenses are: murder (93.8% versus 75%); manslaughter (90.8% versus 72.0%) and culpable driving causing death (78% versus 90.6%). *Id.* at 20.

351. The respective average length of imprisonment for men and women imprisoned for the three offences are: murder (210.1 months versus 212.4 months); manslaughter (89.4 months versus 70.7 months); and culpable driving causing death (73.4 months for men and 72.6 for women). *Id.* at 21. But most of the data on this matter is crude, as the report notes:

However, the operational data from the courts cannot provide information on the nature of the offending other than the type of offence; it remains unclear whether men's and women's offending differs *within* each type of offence. That is, without knowing the details of the case it is impossible to know if, for example, an assault committed by a woman is less serious in terms of the harm caused or the offender's culpability than is the same offence committed by a man. To consider this issue requires a more detailed analysis of sentencing for specific cases. Such an analysis is presented later in this report.

Id. at 36.

352. *Hoare v The Queen* (1989) 167 CLR 348, ¶ 9 (Austl.). See also Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1836 (2012) (discussing that a period of mandatory sentencing should not be disproportionate to the crime itself).

353. See *Equality*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining equality as, "[t]he quality, state, or condition of being equal").

suggested that the concept of equality has been one of the key reasons that has underpinned higher prison numbers. As noted by Stephanie S. Covington and Barbara E. Bloom, the perceived need to treat women equally seems to have at least partly caused the recent increase in female incarceration levels:

As mentioned, the current model of justice—called the “equalization” approach—emphasizes parity and then utilizes a male standard. Therefore, increased incarceration of women takes the place of alternatives to prison. “Gender-blind” mandatory sentencing statutes, particularly for drug law violations, contribute to the rising numbers of women in prison. This is what Lahey calls “equality with a vengeance.” Under the male model of justice, the ideal may be fair treatment.³⁵⁴

On closer reflection, neither proportionalism nor the equality argument justify imposing the same punishment on women when they commit the same crimes as men. Both genders should be treated equally and receive the same sentence to the extent that they are *similarly situated*. But in defining the similarities between respective individuals in the sentencing context, the relevant considerations extend beyond those that relate to the nature of the offense, the level of harm caused to the victim, and the extent of planning that was involved. All relevant integers must be factored into the equation.

From the sentencing perspective, it is clear that proportionality is important to determining how much punishment is appropriate. But it is hardly the only consideration. As we have seen, there are numerous aggravating and mitigating considerations that also impact the appropriate penalty.³⁵⁵ The four mitigating factors that we have identified above (lower recidivism rates, greater burden of imprisonment, more detrimental impact on others, and a history of child sexual victimization) apply more commonly to women. This explains and justifies why female offenders who commit the same crime as males should get a lower penalty.

354. Covington & Bloom, *supra* note 168, at 6–7 (internal citations omitted) (quoting Kathleen A. Lahey, *Until Women Themselves Have Told All That They Have to Tell*, 22 OSGODE HALL L.J. 519 (1985)) (discussing attempts to achieve gender equality in sentencing). *See also* Byrne Hessick, *supra* note 44, at 137 (claiming that the increase in sentencing has been a result of modern sentencing policies for women and minorities).

355. There are no standard definitions of what constitute aggravating or mitigating factors. However, as a matter of principle, an aggravating factor is a consideration that is not contained within the elements of the offense, which makes the offense worse, or otherwise justifies a heavier penalty. A mitigating factor is a consideration that justifies a more lenient penalty. *Marker v The Queen* [2002] WASCA ¶¶ 22 (Austl.).

The same observation is relevant when negating the argument from the equality perspective. A proper application of this principle requires all relevant differences to be incorporated into the analysis. The principle of equal treatment requires that like cases should be treated alike and unlike cases must not be treated differently.³⁵⁶ The core of the principle of equality is distinguishing between relevant and irrelevant differences.³⁵⁷ This is context-sensitive. In sentencing, relevant and irrelevant differences are determined by considering relevant sentencing principles and practices. Further, the equality argument is debunked by the reality that sentencing is not a zero-sum game.³⁵⁸ That certain offenders receive a shorter sentence does not mean that others receive a harsher sentence.

Apart from the proportionality principle, the other main factors that influence penalty are considerations that aggravate or mitigate the level of punishment that is appropriate. Applying relevant aggravating and mitigating considerations frequently demonstrates that there are nearly always considerable relevant differences between male and female offenders, which favor more lenient sentences for women. Thus, arguments based on proportionality and equality cannot justify the same or similar penalties for male and female offenders who commit the same offense.

B. Women Will Not Be Used as Instruments to Commit Crime or Commit More Crime Due to Lower Penalties

A counter to the proposal to reduce the harshness of penalties for female offenders is that lower penalties will result in more crime. Logically, there are two reasons that can be advanced to support this proposition. First, if the prospect of harsh penalties for women committing crime is diminished, they are likely to offend more frequently because the deterrent impact of criminal sanctions would be largely nonexistent. This argument invokes the theory of general deterrence, which is the view that there is a

356. See e.g., INTERIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW: HANDBOOK FOR PRACTITIONERS 18 (2011), <http://www.interights.org/handbook/index.html> (discussing the equality principle); BETH GAZE & MELINDA JONES, LAW, LIBERTY, AND AUSTRALIAN DEMOCRACY 416 (1990) (discussing the impact of “indirect discrimination” on women); Louis Katzner, *Is the Favoring of Women and Blacks in Employment and Educational Opportunities Justified?*, in PHIL. OF LAW 468, 468 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991) (discussing appropriate applications of reverse discrimination); Sacha Prechal, *Combating Indirect Discrimination in the Community Law Context*, 1 LEGAL ISSUES EUR. INTEGRATION 81, 83–84 (1993) (setting parameters for the indirect discrimination test).

357. MIRKO BAGARIC ET AL., AUSTRALIAN HUMAN RIGHTS LAW ¶ 10-030 (2011).

358. Baron-Evans & Coffin, *supra* note 149, at 141–42.

connection between the threat of criminal sanctions and the incidence of crime.³⁵⁹

There are two forms of general deterrence. Marginal general deterrence is the view that there is a connection between more severe penalties and lower crime because potential offenders are dissuaded from committing crime by the prospect of a harsh sentence.³⁶⁰ Common sense suggests that there is merit in this theory, because most people's actions are influenced by a cost-benefit analysis of the likely impact of their behavior.³⁶¹ However, the appeal of marginal general deterrence is debunked by extensive empirical studies, which consistently show that there is no link between harsh penalties and lower crime.³⁶² In the most recent wide-ranging analysis of relevant literature on the efficacy of harsh criminal sanctions in reducing crime, the U.S. National Academy of Sciences notes:

The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous

359. See NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60–61 (1969), for an overview of the literature. See also Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUDS. 303, 303 (2005) (explaining that deterrence and severe punishment are statistically connected); Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 J. APPLIED ECON. 569, 569 (2001) (asserting that because of decline in homicides during the period that executions were conducted, that executions have a deterrent effect); John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 108 (1994) (discussing the impact of capital punishment on the incidence of crime); Dieter Dölling et al., *Is Deterrence Effective? Results of Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL'Y RES. 201, 222–23 (2009) (evaluating studies about the deterrence effect); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 181 (2003) (“The reduction of crime through general deterrence is based on a perceptual theory: the behavior of a person is hypothesized to be related to the severity of sentences because he or she knows—or perceives—the sanctions to have a certain level of magnitude.”); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPS. 163, 177–78 (2004) (examining deterrence as one of several factors reducing crime); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 167 (2004) (examining the deterrent effect of capital punishment); TRAVIS ET AL., *supra* note 38, at 90 (concluding that there is insufficient evidence to show that harsher punishments increase deterrence).

360. See Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work – and What it Means for Sentencing*, 35 CRIM. L.J. 269, 270 (2010) (distinguishing marginal deterrence from absolute general deterrence).

361. See *id.* at 277–78 (identifying that there are many other reasons why an individual may or may not commit a crime beyond the factors that fit into a clean cost-benefit analysis).

362. Dölling et al., *supra* note 359, at 210, 222–23.

offenders, are an inefficient approach to preventing crime by incapacitation.³⁶³

It follows that any argument that invokes marginal deterrence as its key premise should be disregarded. If the severity of prospective penalties for female offenders is softened, women will not reassess the potential costs and benefits of committing crime and decide to commit more crime.³⁶⁴

Deterrence does however work in a more limited sense. In the absence of the threat of *any* punishment for criminal conduct, crime would escalate. Thus, general deterrence works in the absolute sense: there is *a connection* between the existence of some form of criminal sanction and criminal conduct. This is known as the theory of absolute general deterrence.³⁶⁵ In order to achieve this goal, the hardship must be something that people would seek to avoid, such as a fine or probation.³⁶⁶ Importantly, there is no need to impose a particularly onerous penalty.³⁶⁷ Given this, it follows that general deterrence does not justify frequent or longer imprisonment for women.

Another argument that women will commit more crime if their penalties are reduced is that male offenders will use women to effectuate their own criminal objectives. The argument goes that women could be persuaded (for reasons such as loyalty to men) to commit crimes because they have less to lose if they are apprehended. Any apparent appeal of this argument is undermined by analogies between existing classes of people already subject to differing sentencing standards and by the scope of existing laws regarding criminal liability.

In both the United States and Australia, there are vast differences in the way criminal law treats youth and adult offenders. Children under a certain age (generally ranging from six to ten years), or lacking mental capacity beyond a minimum threshold level, are not criminally responsible for their actions.³⁶⁸ Despite this, it is extremely rare for parents (who normally have more influence over their children than their wives or female partners) to

363. JEREMY TRAVIS ET AL., *supra* note 38, at 5.

364. Bagaric & Alexander, *supra* note 360, at 277–78.

365. Bagaric & Alexander, *supra* note 197, at 442.

366. Bagaric & Alexander, *supra* note 361, at 279.

367. *Id.*

368. DON CIPRIANI, CHILDREN'S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: A GLOBAL PERSPECTIVE 221–22 (2009) (highlighting that in the United States, 19 states have a minimum age before children can be liable for a crime. The lowest is six (North Carolina). The highest is ten years (Wisconsin). There are 32 states that do not have a minimum age, but in these states a child can only be liable if they satisfy a mental capacity test.). In Australia, no child can be convicted of a crime if they are less than ten years of age. SIMON BRONITT & BERNADETTE MCSHERRY, PRINCIPLES OF CRIMINAL LAW 172–73 (3d ed. 2010).

instruct their children to commit crimes. By way of further example, as we have seen, in some jurisdictions in the United States and the federal realm, offenders with prior convictions receive vastly higher penalties than offenders with no prior criminal history.³⁶⁹ Despite this, there is no systematic practice of offenders with long criminal histories using people without a criminal past to enact their criminal desires.

In addition to this, the scope of criminal responsibility extends not only to people that actually commit the crime but also to those that aid, abet, counsel, procure, or induce a crime. Further, parties who incite the commission of crime are liable for the maximum penalty attributable to the offense.³⁷⁰ It follows that it would be functionally pointless for men to incite women to commit criminal acts on their behalf in the expectation that women will receive a more lenient disposition.

V. IMPLICATIONS FOR MEN

This Article is principally focused on the inappropriate manner in which the sentencing system deals with female offenders, which we have argued results in the unjustified detention of large numbers of women. To support this conclusion, we have invoked normative standards and empirical data. The normative standards are universalizable.³⁷¹ Moral principles by their nature apply equally to similarly situated individuals.³⁷² In applying these normative principles we have also cited empirical data relating to issues such as the impact of imprisonment on women, the consequences of incarceration on others, and the differential impact of certain forms of crime on victims. This has resulted in recommendations to reduce the rate of female incarceration. The considerations and principles

369. Lisa Lockwood, *Where are the Parents? Parental Criminal Responsibility For the Acts of Children*, 30 GOLDEN GATE U. L. REV. 497, 557 (2000). See also *Ewing v. California*, 538 U.S. 11, 20 (2002) (finding that a Californian “three strikes” law did not violate the Eighth Amendment).

370. See e.g., JOHN M. SCHEB & JOHN M. SCHEB II, CRIMINAL LAW 116–84 (6th ed. 2011) (outlining the crime of solicitation).

371. A judgment is *universalizable* if the acceptance of it in a particular situation entails that one is logically committed to accepting the same judgment in all other situations, unless there is a relevant difference. Thus, to state that normative judgments are universal entails that whenever one judges a certain action or thing (situation) as having a particular moral status, then one is logically committed to the same judgment about any relevantly similar action or situation. It has been suggested that numerical differences are irrelevant. This refers to specific descriptions of the person, relation, or situation. Thus, the fact that the judgment relates to a particular person (such as John Smith), place (such as Melbourne), or relation (John’s mother), is irrelevant. Also irrelevant are generic differences, tastes, preferences, and desires. See generally J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 83–102 (1977) (discussing the author’s concept of “universalization” defined as the comparison of moral factors that are “relevantly similar”).

372. *Id.* at 85.

that favor less severe penalties for many female offenders are not necessarily gender-specific. Several of them also apply, albeit often not as acutely and powerfully, to male offenders. Their application to male offenders has considerable ramifications for the incarceration levels of men.³⁷³

The finding that should most heavily impact incarceration levels is the relative severity of different forms of criminal offenses. The impact of a violent offense, drug crime, or fraud is the same whether it is committed by a man or woman. As we have seen, crime varies considerably in terms of its impact on victims, with sexual and violent crime typically having the most damaging effect. This has led to the suggestion that we should in fact have a bifurcated system of sentencing. In this system, most sexual and violent offenders would receive prison terms, but the commission of other types of offenses should be dealt with by way of other sanctions. For example, with a fine, probation, or the introduction of new sanctions, such as electronic (GPS) monitoring.³⁷⁴

As we have seen, male inmates are imprisoned for a considerably higher portion of sexual and violent offenses than females, yet in absolute terms, many more male inmates are imprisoned for other types of offenses.³⁷⁵ The sentencing system would be conceptually more sound if sentences for all non-sexual and nonviolent offenses were considerably lowered. This approach is gaining momentum at the United States federal level with the retrospective reduction in penalties for nonviolent drug offenders.³⁷⁶ However, there is a pressing need to expand this reform process and significantly reduce the weight given in sentencing to many criminal acts.³⁷⁷

Many male offenders should also receive a reduced sentence for all offense types, due to several of the mitigating factors that have been identified above, though especially applicable to women, which the current sentencing system does not sufficiently recognize. The first of these relates to the notion of dependency. Females, as we have seen, are more commonly

373. *See also* Starr, *supra* note 261, at 17 (noting that standards that apply to women in sentencing should also apply to men).

374. Mirko Bagaric & Sandeep Gopalan, *Progressive Alternatives to Imprisonment in an Increasingly Punitive (and Self-Defeating) Society*, 40 SEATTLE U. L. REV. 57, 61 (2015).

375. *See infra* Part I.A (discussing the fact that male inmates are more likely to have been convicted for committing a violent crime).

376. *See* News Release, U.S. Sentencing Comm'n, *supra* note 336 (indicating a shift in federal policy toward increasing sentences for violent and sexual crimes, while reducing sentences for crimes like drug offenses).

377. *See also* Bagaric & Gopalan, *supra* note 33, at 171 (discussing the need for appropriate sentencing calibration across crimes and genders).

the primary caregiver for children.³⁷⁸ However, when it comes to financial contribution to a family, a considerably higher portion of providers are males. The imprisonment of the main financial provider can have a severe impact on the rest of the family.³⁷⁹ Men who are in this position should also receive a 20% sentencing reduction.³⁸⁰

Women generally find prison more burdensome than men, for reasons set out in Part II. However, many male inmates are placed in exceedingly burdensome prison conditions, which far exceed the deprivations stemming from conventional prison conditions. The harshest prison conditions are those found in super-maximum prisons.³⁸¹ These normally consist of “jails within prisons.”³⁸² There is no uniformity to such conditions but, in general, they involve “incarcerating inmates under highly isolated conditions with severely limited access to programs, exercise, staff or other inmates.”³⁸³

It is generally accepted that the first super-maximum prison was the “Rock Fortress” Alcatraz in San Francisco Bay, which was operated by the U.S. Federal Bureau of Prisons from 1934 until its closure in 1963.³⁸⁴ Super-maximum prisons are now part of the landscape in a large number of countries, including the United States and Australia.³⁸⁵ There is no consistency regarding the exact daily regimes of prisoners, but it can include being locked in their cells for up to 23 hours per day.³⁸⁶ When prisoners are out of their cell they move to what is, in effect, no more than another (larger) cell where they normally have contact with no more than

378. See *infra* Part II.D (discussing male and female family roles).

379. *Id.*

380. See *infra* Part II (discussing sentencing discount options for male and female offenders).

381. See generally JEFFREY IAN ROSS, *THE GLOBALIZATION OF THE SUPERMAX PRISON* (2013) (discussing issues such as the spread of supermax prisons, the invention of supermax prisons in the United States, and the impact of supermax prisons in Australia).

382. CHASE RIVELAND, U.S. DEPT. OF JUSTICE, *SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 1* (1999), <https://s3.amazonaws.com/static.nicic.gov/Library/014937.pdf>.

383. *Id.* They have also been defined as:

a free-standing facility, or a distinct unit within a facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated [T]heir behavior can only be controlled by separation, restricted movement, and limited direct access to staff and other inmates.

Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 *PUNISHMENT & SOC'Y* 163, 170 (1999).

384. *Id.* at 166.

385. See Ross, *supra* note 381, at 1–23, 95–110, for a discussion of the supermax prison operations in the United States and Australia.

386. See *R v Benbrika & Ors* (2008) 182 A Crim R 205, ¶ 30 (Austl.) (describing time spent by prisoners in their cells each day).

one other prisoner.³⁸⁷ Inmates often do not have access to fresh air, direct sunlight, or educational facilities, and have limited visiting rights and access to communications facilities.³⁸⁸ Some regimes are less restrictive but always involve being warehoused in a concrete room, where time spent out of a cell is, in effect, spent in a slightly larger concrete cell. Offenders who are imprisoned in such conditions should receive a considerable penalty reduction—in the order of 50% for each period that they are detained in such conditions.³⁸⁹

It is not clear how many or what portion of prisoners are confined in super-maximum prisons given that there is no clear definition of such conditions. However, the U.S. Department of Justice, Bureau of Justice Statistics, has compiled statistics on the number of inmates that are held in administrative segregation or solitary confinement. Data from 2011 to 2012 shows that nearly 20% of all prison inmates and approximately 18% of jail inmates spent time in such conditions during that period.³⁹⁰ In relative terms the number of male and female inmates who spent time in what is termed “restrictive housing” was approximately the same.³⁹¹ All offenders who spend time in such conditions should receive a penalty reduction for the relevant period. In relative terms this applies to males and females equally, but in absolute terms, the reduction would apply to far more males, given that they constitute the majority of all inmates.³⁹²

387. See Liz Hobday, *High-Security Prison ‘Driving Remand Prisoners Mad’*, ABC NEWS (Sept. 22, 2009, 12:19 AM), <http://www.abc.net.au/news/2009-09-22/high-security-prison-driving-remand-prisoners-mad/1437474> (reporting that prisoners are kept in cells 23 hours per day and are allowed no human interaction).

388. MICHAEL WALTON & PAULINE WRIGHT, NEW S. WALES COUNCIL FOR CIVIL LIBERTIES INQUIRY INTO ISSUES RELATING TO THE OPERATIONS AND MANAGEMENT OF THE NSW DEPARTMENT OF CORRECTIVE SERVICES 2 (2006), https://d3n8a8pro7vnmx.cloudfront.net/nswccl/pages/601/attachments/original/1418076466/2006_submission_NSW_department_of_corrective_services.pdf?1418076466. See also David Brown, *The Effect of Terrorism and Terrorist Trails on Australian Prison Regimes*, in PROCEEDINGS OF THE 2ND AUSTL. & N.Z. CRITICAL CRIMINOLOGY CONF. 61, 65 (Chris Cunneen & Michael Slater eds., 2008) (reporting inmate conditions).

389. This limb of the proportionality principle is also reflected in the view that sanctions should be structured so that they have the same impact on offenders who are deserving of the same punishment. As noted by Andrew Ashworth, the need for equal impact of sanctions minimally entails that, “the system should strive to avoid grossly unequal impacts on offenders.” ANDREW ASHWORTH, *SENTENCING & CRIMINAL JUSTICE* 79–80 (2d ed. 1995). A 50% reduction is the amount that has been previously accorded by Australian courts for harsh prison conditions. Bagarie et al., *supra* note 204, at 436.

390. ALLEN J. BECK, U.S. DEPT. OF JUSTICE, *USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–2012*, at 1 (2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

391. *Id.* at 4 (finding that, in relation to prison inmates, the respective portions were female 20.4%; male 17.9%; and in jails 17.4% for each cohort).

392. See *infra* Part II (discussing the factors in women that lead to the disparate impact of restrictive housing based on gender: women experience lower rates of incarceration and respond better

Further, males who can establish that they have a mental illness (which would make prison more burdensome) or who were sexually abused as a child should also receive a sentencing reduction of the same magnitude as similarly situated female offenders.³⁹³ Thus, it follows that the above discussion has profound implications for men because they need to be treated the same as women to the extent that they are similarly situated. The most significant ramifications of sentencing for males are:

- Most male offenders who do not commit serious sexual or violent offenses should generally not be imprisoned;
- Male offenders who experience harsh prison time should receive a considerable reduction; and
- Male offenders who have dependents should receive a considerable reduction.

CONCLUSION

When it comes to committing crime, the human species is divided into two categories: women and men. Women commit far less crime. In particular, they commit far less serious crime than men. This difference to some extent is reflected in the fact that women are imprisoned at lower rates than men. However, the disparity in incarceration levels is disproportionate. It does not properly take into account mitigating factors that apply more commonly and acutely to women. There are four reasons that women should be treated more leniently than men who commit the same offense.

First, women re-offend at considerably lower rates than male offenders.³⁹⁴ This makes women less of an ongoing risk to the community. Second, women are generally far more burdened by imprisonment than males.³⁹⁵ For instance, women are at a higher risk of sexual assault, have higher rates of mental illness, and lengthy prison terms can curtail their right to procreation. Third, women generally play a more nurturing role in the community, and hence, their incarceration may damage others more

to rehabilitation; and the impact on families when women are incarcerated is more severe. Further, men have a higher recidivism rate, and do not respond as negatively to restrictive housing as women.).

393. See *infra* Part II.C (discussing the fact that inmates with mental illnesses suffer more due to decreased access to adequate health care).

394. FLA. DEP'T OF CORRECTIONS, *supra* note 182.

395. See *infra* Part II.C (discussing the negative impacts of incarceration on women).

than the incarceration of men does.³⁹⁶ Fourth, a large number of female offenders were sexually abused when they were children, which increases the likelihood that they will commit criminal offenses.³⁹⁷

These four considerations operate cumulatively to explain and justify the need for considerable sentence reductions to be conferred upon female offenders. This reduction applies to the threshold decision of whether imprisonment is a necessary sanction in the first place, and then, if so, to the secondary decision regarding the length of the term. Operationalizing this reduction will lead to a considerable decrease in the female incarceration rate. This will result in a more humane sentencing system and potentially save the community billions of dollars in the form of a reduced corrections budget. It will also reduce the level of disruption to many families.

Just as importantly, there are likely to be no disadvantages of imprisoning fewer women. Mostly, women do not commit the type of offenses that significantly damage the lives of others—and in the rare cases that they do, they are less likely than men to recidivate.³⁹⁸

Arguments of proportionality or equality cannot justify men and women receiving the same punishments for the same crimes. This is because women and men are differently placed, in a profound way, when it comes to the considerations that inform sentencing determinations. Thus, the four mitigating considerations that are identified above apply more commonly to women and justify treating them differently.

The recommendations in this Article will vastly improve the situation for male offenders. Given the cost and harshness of imprisonment, it should be a penalty of last resort. The sentencing system should only impose imprisonment on offenders who commit acts which seriously damage victims or the broader community. This is essentially confined to serious sexual and violent offenses. Nearly 50% of inmates are sentenced for other types of crime, such as property, fraud, and drug offenses.³⁹⁹ Penalties for these crimes need to be recalibrated. The default position is that sentencing options other than imprisonment should be meted out for these types of offenders. It would not reduce community safety, and would certainly result in considerable fiscal savings that could be applied to productive social services, such as health and education.

396. *See id.* (discussing how family and community are harmed more when female members are imprisoned versus their male counterparts).

397. HARLOW, *supra* note 274.

398. ZHANG & WEBSTER, *supra* note 21, at 49.

399. *Criminal Courts*, *supra* note 69.

Further, many male offenders should receive less harsh penalties mainly because some of the mitigating factors examined in this Article also apply to them, and the current sentencing calculus does not accord these factors sufficient weight. Sentencing determinations should include the incidental hardships imprisoned male offenders sustain, such as the risk of physical and sexual abuse. Moreover, sentencing calculations should reduce the penalties for males who have dependents to ameliorate the potential damage caused to others.

Ultimately, society should only use prisons to segregate those from the rest of the community who present a risk to our safety or who have committed deeds so damaging that they can only be met with a punishment that profoundly damages them. Women rarely fit these criteria. Men fill these parameters far less than is currently accepted. Focusing on the gratuitous and pointless imprisonment of most female inmates will hopefully lead to more sensible and principled sentencing outcomes for the entire community.