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Normalizing the Consideration of Adverse Childhood Experiences in Federal Sentencing Determinations

Kristen M. Kinneary

NORMALIZING THE CONSIDERATION OF ADVERSE CHILDHOOD EXPERIENCES IN FEDERAL SENTENCING DETERMINATIONS

INTRODUCTION

Beaten a lot. Hands burned. Made to kneel on rice. Struck with extension cords. This was the unfortunate upbringing of Jorge Rivera, which one sentencing judge deemed to be only "ordinary" childhood abuse not worthy of consideration during his sentencing.[1] Cases like Jorge Rivera's are unfortunately common because of an incoherent federal sentencing system, which has failed to evolve to reflect what we now know about the significant relationship between childhood trauma, tendencies for criminal behavior, and reduced culpability. But sentencing has profound impacts on a defendant's life, whether through the loss of their personal liberty or through collateral consequences, and deficiencies in the current system cannot continue to be overlooked. This Comment aims to show how explicit consideration of Adverse Childhood Experiences within the United States Sentencing Guidelines Manual could result in a more coherent system by providing for improved individualistic and humanistic determinations and giving judges more guidance on how a defendant's childhood trauma should factor into sentencing.

Part I of this Comment begins by defining Adverse Childhood Experiences, as a term-of-art, and discussing empirical reports that study the effects of Adverse Childhood Experiences on human health and behavior. Then, it looks at how the study of Adverse Childhood Experiences applies within the criminal justice system. Next, part II examines the history of the United States Sentencing Guidelines Manual, the overarching purposes of sentencing, and the limitations of the current federal sentencing system. Part III of this Comment analyzes several examples of federal case law that highlight deficiencies in the system, which could be minimized through the consideration of Adverse Childhood Experiences in sentencing determinations. Finally, Part IV

[1] *See* U.S. v. Rivera, 192 F.3d 81, 86 (2d Cir. 1999).

proposes an amendment to § 5H1.12 of the United States Sentencing Guidelines Manual, which currently restricts a sentencing court from considering an offender's "lack of guidance as a youth" as the basis for a departure. This part suggests that allowing for the consideration of Adverse Childhood Experiences as a general exception to this rule will result in more consistent and just sentencing outcomes, which will better align with the United States Sentencing Commission's purposes and goals. Part IV concludes by urging the United States Sentencing Commission to take active steps to normalize the consideration of Adverse Childhood Experiences in federal sentencing determinations.

I. ADVERSE CHILDHOOD EXPERIENCES

The study of Adverse Childhood Experiences ("ACEs") has grown exponentially over the past two decades. Currently, there are over 500 articles that discuss ACEs and their effects in numerous different areas of study, including "epidemiology, neurobiology, and biomedical and epigenetic consequences of toxic stress."[2] Utilization of ACEs in a criminal justice context, however, is still a developing concept. This part will begin by defining "Adverse Childhood Experiences" as a term-of-art. Then, it will consider empirical reports that study the effects of ACEs on an individual's heath and behavior. Last, this part will discuss the relevancy of ACEs within the criminal justice system. The purpose of this part is not only to foster an understanding of ACEs through discussion of the ample studies already performed, but also to call attention to gaps in research particularly related the effects of ACEs on adult criminal offenders.

[2] Jan Jeske & Mary Louis Klas, *Adverse Childhood Experiences: Implications for Family Law Practice and the Family Court System*, 50 FAM. L.Q. 123, 126–27 (2016).

A. *What Are Adverse Childhood Experiences?*

ACEs are potentially traumatic events that an individual experiences before the age of eighteen.[3] They are commonly identified by some variation of the following seven categories: (1) psychological abuse; (2) physical abuse; (3) sexual abuse; (4) witnessing violence against the mother; (5) living with household members who were substance abusers; (6) living with household members who were mentally ill or suicidal; (7) and living with household members who were ever imprisoned.[4] While it is unfortunately well known that there have always been adolescents who suffer through them, the practice of categorizing and studying the health and behavioral effects of these experiences as "Adverse Childhood Experiences" is largely a twenty-first century phenomena.

B. *CDC-Kaiser Study*

The first and most influential report on ACEs was a collaborative study conducted in 1998 by the Centers for Disease Control and Prevention and the Kaiser Permanente healthcare company (the "CDC-Kaiser Study" or the "Study").[5] The CDC-Kaiser Study examined the prevalence of ACEs in over 13,000 middle-class adult Californians insured by Kaiser Permanente from 1995 to 1997.[6] The Study was conducted based off self-completed questionnaires, which identified the following as categories of ACES: (1) psychological abuse; (2) physical abuse; (3) sexual abuse; (4) witnessing violence against the mother; (5) living with household members who were

[3] *Preventing Adverse Childhood Experiences*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last updated April 6, 2021), https://www.cdc.gov/violenceprevention/aces/fastfact.html.
[4] *See* Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many Leading Causes of Death in Adults*, 14 AM. J. OF PREVENTIVE MED. 245, 245 (1998). Although subsequent studies have identified other categories of ACEs, the nuances of what events should be considered as ACEs is beyond the scope of this Comment. This purpose of this Comment is to more generally advocate for the consideration of ACEs during sentencing. *See, e.g.*, Melissa T. Merrick et al., *Prevalence of Adverse Childhood Experiences from the Behavioral Risk Factor Surveillance System in 23 States*, 172 JAMA PEDIATRICS 1038, 1038 (2018) (including "parental separation or divorce" as an eighth category); Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. OF JUV. JUST. 1, 1 (2014) (including "emotional neglect," "physical neglect," and "parental separation or divorce" as three additional categories of ACEs).
[5] Felitti et al., *supra* note 4.
[6] *Id.*

substance abusers; (6) living with household members who were mentally ill or suicidal; (7) and living with household members who were ever imprisoned.[7] An individual's score was determined using the "total number of reported ACEs measured in a binary, yes/no fashion. For example, a positive response to a question on sexual abuse would score 1 point, whether there were one or 100 incidents."[8] The Study then compared the number of ACEs per individual to their level of adult risky behavior, health status, and disease.[9]

The CDC-Kaiser Study uncovered a strong correlation between the presence of ACEs during adolescence and "multiple factors for several of the leading causes of death in adults."[10] Additionally, it revealed a compounding effect, such that if a person reported exposure to one category of ACEs, they more than likely reported exposure to others.[11] In fact, "[f]or persons reporting any single category of exposure, the probability of exposure to any additional category ranged from 65%–93% (median: 80%); similarly, the probability of ≥ 2 additional exposures ranged from 40%–74% (median: 54.5%)."[12] The Study also found, perhaps unsurprisingly, that as the number of ACEs reported increased, so did the likelihood for negative effects on the individual's health.[13] For example, as compared to persons who reported no ACEs, persons who reported four or more categories had "4- to 12-fold increased health risks for alcoholism, drug abuse, depression, and suicide attempt; a 2- to 4-fold increase in smoking, poor self-rated health, ≥ 50 sexual intercourse partners, and sexually transmitted disease; and a 1.4- to 1.6-fold increase in physical inactivity and sever obesity."[14] Accordingly, the presence of ACEs is significantly linked to numerous negative physical and mental conditions as well as to risky behavior in

[7] *Id*.
[8] Baglivio et al., *supra* note 4, at 1–2.
[9] Felitti et al., *supra* note 4.
[10] *Id*. (including "ischemic heart disease, cancer, chronic lung disease, skeletal fractures, and liver disease" as conditions significantly related to the presence of ACEs).
[11] *Id*. at 249.
[12] *Id*.
[13] *Id*. at 245.
[14] *Id*.

adulthood.[15] Thus, even though the CDC-Kaiser Study was conducted within a medical context, it is relevant within the context of criminal justice because it shows that some people really are the product of the environment in which they grew up.[16]

C. *Effect of ACEs on Adult Criminality*

Since 1998, numerous reports have subsequently replicated the findings of the CDC-Kaiser Study,[17] but as the ACE phenomenon continues to grow, scholars are shifting focus from looking at ACEs via a public health and medical standpoint to studying their effects on individual social behavior. Most relevant to the discussion of criminal sentencing, several studies have shown a strong correlation between the presence of ACEs and adult criminality.[18] Although research on this issue is still generally lacking, and many more studies should be conducted to highlight the significance of the issue, the existing reports clearly support the conclusion that adults who were abused or neglected as children are significantly more likely to be arrested as an adult—for both violent and non-violent crimes—than those who were not.[19] For example, in a 1999 study of adult inmates and probationers, "12% of males and 25% of females reported child physical abuse, while

[15] Felitti et al., *supra* note 4, at 245.

[16] Since the CDC-Kaiser Study, research on ACEs has expanded exponentially and scholars have begun narrowing in on the varying effects of ACEs on different social, economic, and racial communities. For example, a 2018 study, which included the largest and most diverse sample in an ACEs study to date (215,157 respondents from twenty-three states), found that respondents identifying as multiracial, bisexual, and/or unable to work generally reported the highest levels of ACE exposure. *See* Merrick et al., *supra* note 4, at 1042. While it is important to any study of ACEs to keep in mind the disparate effects that these experiences will have on different communities, a deeper discussion of this issue is outside the scope of this Comment.

[17] *See generally* Baglivio et al., *supra* note 4; Merrick et al., *supra* note 4.

[18] *See* Diana J. English et al., *Childhood Victimization and Delinquency, Adult Criminality, and Violent Criminal Behavior: A Replication and Extension* 1, 33–34 (NAT'L CRIM. JUSTICE REFERENCE SERV. 2002) (finding "abused and neglected youth were 2.7 times more likely to be arrested for a violent crime as an adult (23% versus 8.7%)"); *see also* James Topitzes et al., *From Child Maltreatment to Violent Offending: An Examination of Mixed-Gender and Gender Specific Models*, 27 J. INTERPERSONAL VIOLENCE 2322, 2334 (2012) (concluding childhood maltreatment leads to "significantly higher rates of offending across all adult and lifetime indicators of violence. . . . [M]altreatment victims [are] over twice as likely as their nonmaltreated counterparts to have any recorded violent offense," and they are "significantly more likely to be convicted of one or more adult non-violent . . . or violent . . . weapons charges").

[19] *See* English et al., *supra* note 18 (finding "abused and neglected youth were 2.7 times more likely to be arrested for a violent crime as an adult (23% versus 8.7%)"); *see also* Topitzes et al., *supra* note 18 (finding childhood maltreatment leads to "significantly higher rates of offending across all adult and lifetime indicators of violence. . . . [M]altreatment victims [are] over twice as likely as their nonmaltreated counterparts to have any recorded violent offense," and they are "significantly more likely to be convicted of one or more adult non-violent . . . or violent . . . weapons charges").

5% of males and 26% of females reported sexual molestation."[20] Another study revealed that "[b]eing abused or neglected as a child increased the likelihood of arrest as a juvenile by 59 percent, as an adult by 28 percent, and for a violent crime by 30 percent."[21]

These studies demonstrate that trauma from ACEs does not simply go away once an individual turns eighteen-years-old.[22] Rather, "adults who survive early lifetime brutality remain yoked to their formative experiences."[23] Because juveniles exposed to ACEs are prone to risky, and perhaps dangerous or illegal behavior,[24] it is logical that these individuals would continue to be so prone into and throughout adulthood. More empirical research should be conducted to document the effects of ACEs, specifically looking at adults within the criminal justice system, to allow policymakers, judges, prosecutors, and defense counsel to make more informed decisions relating to adults who have suffered ACEs.[25] That being said, the existing studies has established significant enough of a correlation between the presence of ACEs and adult criminality such that policymakers should not wait to start implementing the of the consideration of ACEs into the adult criminal justice system.

II. INTRODUCTION TO THE FEDERAL SENTENCING GUIDELINES

[20] Jill Levenson, *Adverse Childhood Experiences and Subsequent Substance Abuse in a Sample of Sexual Offenders: Implications for Treatment and Prevention*, 11 VICTIMS AND OFFENDERS 199, 202 (2015).
[21] Cathy S. Wisdom & Michael G. Maxfield, *An Update on the "Cycle of Violence",* in NAT'L INST. OF JUSTICE RESEARCH IN BRIEF 1 (U.S. DEPT. OF JUSTICE 2001).
[22] *See, e.g.*, Vincent J. Felitti, *The Relation Between Adverse Childhood Experiences and Adult Health: Turning Gold into Lead*, 6 PERMANENT J. 44, 44 (2002) (referencing the CDC-Kaiser Study and commenting, "[T]he time factors in the study make it clear that time does *not* heal some of the adverse experiences we found so common in the childhoods of a large population of middle-aged, middle-class Americans. One doesn't 'just get over' some things"); Mitzi Baker, *Undoing the Harm of Childhood Trauma and Adversity*, UNIVERSITY OF CALIFORNIA SAN FRANCISCO (Oct. 15, 2016), https://www.ucsf.edu/news/2016/10/404446/undoing-harm-childhood-trauma-and-adversity ("Children do not outgrow the impact of ACEs.").
[23] Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 15 (2018).
[24] *See, e.g.*, *Effects*, THE NAT'L CHILD TRAUMATIC STRESS NETWORK, https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects (stating that "complexly traumatized children" are more likely to "engage in illegal activities, such as alcohol and substance use, assaulting others, stealing, running away, and/or prostitution," and, therefore, they are more likely to enter the juvenile justice system as a result) [hereinafter *Effects*].
[25] It is also worth noting that there is significantly less research that connects some ACEs, such as growing up with a parent with mental illness, to adult criminality. Researchers should expand the scope of their work to further solidify theories linking all categories of ACEs to adult criminality.

Sentencing is arguably the most important part of the criminal justice sysytem—after all, it often results in the deprivation of an offender's liberty. Whether a sentence is for a period of incarceration, suspension, or probation, a sentencing determination can have a profound impact on the defendant's life not only during the period of the sentence but also for years following in the form of collateral consequences.[26] While the federal sentencing system has undergone many revisions in the past few decades, at the heart of most sentencing reform is the desire to produce what society will perceive as a just outcome. Of course, what exactly constitutes a just outcome is an entirely different question, to which there appears to be no single answer. Yet, establishing comprehensive and coherent sentencing policies seems like a good place to start. This part begins by introducing the history of sentencing practices within the United States federal courts system and the United States Sentencing Guidelines Manual (the "Guidelines"). Then, it will briefly discuss the overarching purposes of sentencing. Last, this part will identify and analyze several deficiencies in the current sentencing framework, particularly in relation to the consideration of traumatic childhood events and ACEs.

A. *Federal Sentencing: The Basics*

Sentencing in the United States' federal courts system has a long and complicated history. Before the United States Sentencing Guidelines Manual came into effect in 1987, sentencing was a highly discretionary process, and judges held virtually all the power.[27] But this type of sentencing regularly resulted in "significant sentencing disparities among similarly situated offenders."[28] Consequently, major reform began to take place in the late twentieth century in response to major

[26] *See Welcome to the NICCC*, NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/ ("Collateral consequences are legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other rights, benefits, and opportunities.").
[27] FEDERAL SENTENCING: THE BASICS 2 (U.S. SENTENCING COMM'N 2018) [hereinafter THE BASICS].
[28] Peugh v. U.S., 569 U.S. 530, 535 (2013).

criticism of the existing system.[29] Most notably, Congress passed the Sentencing Reform Act of 1984 (the "SRA"), which created the Unites States Sentencing Commission (the "Commission")—"a bipartisan expert agency located in the judicial branch," to enforce and regulate a new sentencing regime.[30] The SRA also gave the Commission the formidable task of establishing a uniform set of federal sentencing guidelines and the subsequent role of overseeing and regularly revising these guidelines.[31]

Thus, the Commission released the first *Guidelines Manual* in 1987, which contained "a detailed set of guidelines and policy statements that included a sentencing table . . . with much narrower sentencing ranges than the larger statutory sentencing ranges governing federal crimes."[32] For approximately two decades following their publication, the Guidelines were thought to impose mandatory ranges for sentences;[33] however, the Supreme Court addressed this misconception in *United States v. Booker*.[34]

In *Booker*, the Supreme Court held a sentencing court must consider the Guidelines' recommended sentencing range; nevertheless, these ranges serve only an advisory purpose and are not mandatory.[35] Accordingly, while a sentencing court must consider the Guidelines, they can "tailor the sentence in light of other statutory concerns as well."[36] The *Booker* Court also

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[29] THE BASICS, *supra* note 27.
[30] *Id.* (noting also Congress' desire to "promote transparency and proportionality in sentencing"); *see also* 28 U.S.C. § 991(a) (establishing the Commission as "an independent commission to the judicial branch"); 28 U.S.C. § 991(b)(1) (stating the purpose of the Commission is to "establish sentencing policies and practices for the Federal criminal justice system"); 28 U.S.C. § 994(a)(1) (instructing the Commission to "promulgate and distribute . . . guidelines . . . for the use of a sentencing court in determining the sentence to be imposed in a criminal case").
[31] THE BASICS, *supra* note 27.
[32] *Id.* at 3–4 (commenting that "[b]efore the initial set of guidelines was promulgated, Congress also enacted statutes creating mandatory minimum penalties for several commonly prosecuted drug-trafficking and firearms offenses and prohibiting probation for certain offenders."). It important to note the existence of statutory mandatory minimums and their inescapable effects on sentencing. That being said, mandatory minimums are a complex subject, which are outside the scope of this Comment. This Comment is confined to instances in which a sentencing judge could utilize their discretionary powers.
[33] *See, e.g.*, Apprendi v. New Jersey, 530 U.S 466 (2000).
[34] 543 U.S. 220 (2005).
[35] *Id.* at 245–46.
[36] *Id.*

established a three-step process for judges to use when determining a sentence.[37] A sentencing judge must "(1) properly determine the guidelines range, (2) determine whether to depart based on the Sentencing Commission's policy statements, and (3) determine whether to vary based on statutory factors."[38] Lastly, the *Booker* Court determined sentencing appeals would be reviewed under a standard of "unreasonableness."[39]

To determine a recommended sentencing range, the Guidelines provide essentially a grid system in which, like other grid sentencing systems, "an offender's prior convictions and the perceived severity of the crime hold the most weight in determining his or her penalty."[40] However, the Guidelines establish dozens of other considerations that can impact a sentencing determination.[41] Furthermore, the *Booker* standard has afforded sentencing judges a great degree of deference such that the sentencing judge can consider any information regarding a defendant's background, character, and conduct when imposing a sentence, particularly when considering whether to stay within or go outside of the Guidelines' recommended range.[42]

When a sentencing judge imposes a sentence outside of the Guidelines' recommended range, they do so through either a "departure" or a "variance."[43] Departures are statutorily authorized and provide for "adjustments to a sentencing range *within* the guideline system,"[44] such

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[37] Avi Muller, Comment, *From ACEs to Fetal Trauma: How Slippery is Slope of Discretionary Sentencing Factors?*, 51 Seton Hall L. Rev. 1389, 1394–95 (2021); *see* PRIMER DEPARTURES AND VARIANCES 2–3 (U.S. SENTENCING COMM'N 2019) [hereinafter PRIMER].
[38] Muller, *supra* note 37.
[39] *Booker*, 543 U.S. at 261; *see also* Rita v. U.S., 551 U.S. 338, 351 (2007) (explaining that under *Booker's* "reasonableness" standard, an appellate court will consider "whether the trial court abused its discretion"); U.S. v. Grossman, 513 F.3d 592, 595 (2008) ("[D]istrict court judges are involved in an exercise of judgment, not a ritual.").
[40] Mirko Bagaric et al., *Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse*, 30 STAN. L. & POL'Y REV. 1, 9 (2019)
[41] *Id.* at 9–10.
[42] PRIMER, *supra* note 37, at 1; *see also* 18 U.S.C. § 3661. For a brief overview of how a sentencing court determines the appropriate Guidelines range, *see generally* Muller, *supra* note 37, at 1395–96.
[43] PRIMER, *supra* note 37.
[44] *Id.* at 5 (emphasis added).

that a higher (upward departure[45]) or lower (downward departure[46]) sentence can be imposed.[47] Departures are meant to compensate for the Guidelines' general inability to consider human behavior on an individual basis, such that they are "frequently triggered by a prosecution request to reward cooperation . . . or by other factors that take the case 'outside the heartland' contemplated by the Sentencing Commission."[48] In the context of considering trauma, for example, § 5H1.3 of the Guidelines provides that mental and emotional conditions may be considered in determining whether a departure is warranted, but only to extent that such conditions are "present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[49] Additionally, § 5H1.12 provides that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantage upbringing are not relevant grounds in determining whether a departure is warranted."[50] Subsequent legislation, as well as the Commission itself, have further advised sentencing judges to use departures sparingly, and have recommended limiting departures to exceptional or atypical cases.[51]

In contrast to departures, a variance is not subject to the Guidelines analysis.[52] A variance "occurs when a judge imposes a sentence above or below the otherwise properly calculated final

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[45] *Id.* at 6 ("An upward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." (quotation omitted)).
[46] *Id.* at 8 ("[A] downward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history of the likelihood that the defendant will commit other crimes." (quotation omitted) (alteration in original omitted)).
[47] *Id.* at 5–8.
[48] U.S. v. Rangel, 697 F.3d 795, 801 (9th Cir. 2012) (citing U.S. v. Cruz-Perez, 567 F.3d 1142, 1146 (9th Cir. 2009)); *see also* PRIMER, *supra* note 37, at 5.
[49] U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (U.S. SENTENCING COMM'N 2018) [hereinafter USSG]. A departure on this ground, however, is discouraged, and a causal connection between the condition and the criminal conduct must be established. *See* PRIMER, *supra* note 37, at 34–35.
[50] USSG, *supra* note 49, at § 5H1.12.
[51] PRIMER, *supra* note 37, at 5–6; *see, e.g.*, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 109-21, title IV § 401 (2003) (instructing the Commission to "ensure that the incidence of downward departures are substantially reduced").
[52] PRIMER, *supra* note 37, at 34–35.

sentencing range based on application of the other statutory factors in 18 U.S.C. § 3553(a)."[53] This distinction between departures and variances sometimes leads to a judge issuing a variance and a departure within the same sentence.[54] The ability for a sentencing court to vary is important because it preserves the court's "ultimate ability to impose, regardless of what the guideline range is found to be, a sentence that it views is 'sufficient, but not greater than necessary' to serve the goals of sentencing."[55]

B. *Goals of Sentencing*

One's perception of the purpose of sentencing likely depends on what theory of punishment they ascribe to: retribution, deterrence, incapacitation, or rehabilitation.[56] 18 U.S.C. § 3553(a), however, suggests that that consideration of all four theories is necessary to achieve a just result. For example, the statute instructs a sentencing court consider, amongst other things, the need for the sentence imposed (1) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; (2) "to afford adequate deterrence to criminal conduct"; (3) to protect the public from further crimes of the defendant"; and (4) "to provide the defendant with needed educational or vocational training, medical care, or other correctional

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[53] *Id.* 18 U.S.C. § 3553(a) lists the following factors to be considered by the sentencing judge: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the need for the sentence imposed"; (3) "the kinds of sentences available"; (4) "the kinds of sentence and the sentencing range established"; (5) "any pertinent policy statement"; (6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victims of the offense."

[54] PRIMER, *supra* note 37, at 43; *see, e.g.*, U.S. v. Fumo, 655 F.3d 288, 317 (3d Cir. 2011) ("Although a departure or a variance could, in the end, lead to the same outcome . . . it is important for sentencing courts to distinguish between the two, as departures are subject to different requirements than variances.").

[55] PRIMER, *supra* note 37, at 43 (quoting 18 U.S.C. § 3553(a)).

[56] *See* Graham v. Florida, 560 U.S. 48, 71 (2010) (referring to "retribution, deterrence, incapacitation, and rehabilitation" interchangeably as "penological justifications" and "goals of penal sanctions"); *accord* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, "LEGAL PUNISHMENT" (2001) (revised July 18, 2017), https://plato.stanford.edu/entries/legal-punishment/ (defining "retribution" as justifying punishment as an "intrinsically appropriate, because deserved, response to wrongdoing," and "incapacitation" as justifying punishment as a means to preempt an offender's future choices by incapacitating them); Anthony Ellis, *A Deterrence Theory of Punishment*, 53 PHIL. Q. 337, 337 (2003) (defining "deterrence" as justifying punishment "as a means to discourage others from committing similar crimes"); Francis T. Cullen & Paul Gendreau, *Assessing Correctional Policy Practice, and Prospects*, 3 CRIM. JUST. 109, 112 (2000), https://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn34984-v3-109-175-eng.pdf (defining "rehabilitation" as justifying punishment as a means to "make the offender less likely to break the law in the future").

treatment in the most effective manner."[57] Yet, issuing a sentence to align with one, or even all four theories, is not enough to justify its imposition. "Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered."[58] Thus, sentencing courts are increasingly trying to consider more humanistic factors in sentencing determinations, particularly traumatic childhood events that may have had lasting effects on the individual offender.

C. *The Guidelines' Limitations*

The current sentencing framework that is applied in the federal courts system does not adequately account for ACEs and their lasting physical and psychological impact on adult offenders. Take, for example, the apparent inconsistencies between several of the Guidelines' sections discussed above. First, § 5H1.3 states that "mental and emotional conditions are not *ordinarily* relevant in determining whether a sentence should be outside the applicable guideline range, *except* as provided in" subpart 5K2.[59] Then, subpart 5K2 provides that diminished mental capacity *may* be a basis for downward departure *but only* in certain instances.[60] The Guidelines, however, do not provide any explanation as to what constitutes such "certain instances." Furthermore, it is generally established outside of the Guidelines that traumatic childhood events could result in an individual, whether in adolescence or adulthood, experiencing negative mental and emotional conditions.[61] Yet § 5H1.12—which provides that "lack of guidance as a youth" cannot form the basis for a departure—seems to shut the door on considering these events.[62]

[57] 18 U.S.C. § 3553(a)(2).
[58] Graham v. Florida, 560 U.S. 48, 72 (2010); *see also* 18 U.S.C. § 3553(a) (stating a sentence should be "sufficient, but not greater than necessary").
[59] USSG, *supra* note 49, at § 5H1.3 (emphasis added).
[60] *Id.* at § 5K2.13.
[61] *See, e.g.*, *Effects*, *supra* note 24.
[62] USSG, *supra* note 49, at § 5H1.12.

This interplay between different sections of the Guidelines is confusing and has constructed high hurdles for judges who want to consider traumatic childhood events to issue a downward departure. Consequently, sentencing courts have gone to great lengths, even prior to *Booker*, to effectively amend § 5H1.12 through precedent to create an exception for cases where the offender suffered "extreme childhood abuse." For example, in *United States v. Pullen*, the Seventh Circuit noted:

> [S]ection 5H1.3 has the weasel word "ordinarily," implying that in an extraordinary case a mental or emotional condition might warrant a lighter sentence even if it did not fit the express exception in 5K2.13. And the "similar circumstances" to which section 5H1.12 refers might not be thought to encompass childhood sexual abuse by a parent, which is not all that similar to the sort of parental neglect, rather than abuse, conjured up by the term "lack of guidance."[63]

This push to consider childhood abuse in sentencing is likely the result of sentencing judges acknowledging the profound impacts that trauma can have on an individual through childhood and into adulthood and recognizing that imposing a sentence within the Guidelines' range may be "grossly disproportionate" given the offender's reduced culpability. However, this framework for issuing departures based on "extreme childhood abuse" neglects consideration other ACEs, such as growing up with a parent who was incarcerated or with a parent who was a substance abuser, that have been similarly linked to negative health outcomes and risky behavior in adulthood.[64]

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[63] U.S. v. Pullen, 89 F.3d 368, 371 (7th Cir. 1996); *see also* U.S. v. Walter, 256 F.3d 891, 895 (9th Cir. 2001) (limiting the consideration of the psychological effects of childhood abuse to instances where such abuse was "extraordinary"); U.S. v. Rivera, 192 F.3d 81, 85 (2d Cir. 1999) (recognizing that "abuse suffered during childhood--at some level of severity--can impair a person's mental and emotion conditions," but inadvertently setting a seemingly high standard for what that level is).

[64] *See infra* Part I. This is not to say however, that judges have never considered "lack of guidance" as significant in determining a sentence. In fact, more and more judges are issuing downward departures on this ground despite the Guidelines' prohibition on doing so, but it is still far from the norm. *See, e.g.*, U.S. v. Bettin, No. CR 17-093-BLG-SPW, 2019 WL 3778461, at *2 (D. Mont. Aug. 12, 2019) (issuing a downward departure based largely on the offender's "serious lack of guidance as a youth"); AMY BARON-EVANS & JENNIFER NILES COFFIN, NO MORE MATH WITHOUT SUBTRACTION: DECONSTRUCTING THE GUIDELINES' PROHIBITIONS AND RESTRICTIONS ON MITIGATING FACTORS 150 (2010), https://fln.fd.org/files/training/no-more-mathwithout-subtraction.pdf ("After Booker, there is no longer any need to show extreme abuse or neglect to avoid the prohibitions of § 5H1.12, and courts have begun to consider disadvantaged youth or lack of guidance as a youth as a factor for sentencing below the guideline range.").

The incoherency is further exaggerated when the Guidelines are compared with statutory instructions to sentencing courts. Particularly, 18 U.S.C. § 3661 provides, "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Similarly, 18 U.S.C. § 3553(a)(1) instructs a sentencing court to look at the "history and characteristics of the defendant."[65] These statutes are often cited when a sentencing court issues a variance that would otherwise be prohibited as a departure based on provisions of the Guidelines. Thus, they support the conclusion that the Guidelines do not address all factors that sentencing courts find important in issuing a just sentencing determination. This is particularly so when studies suggest that variance away from, rather than adherence to, the Guidelines' recommended range has become the norm.[66] This evidences the need to amend the current sentencing framework to align with how the rules and regulations are actually being applied by sentencing courts.

III. ACEs AND CURRENT CASE LAW

Supreme Court Justice Sandra Day O'Connor said it best in her concurrence in the 1987 case of *California v. Brown*: "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[67] Although the Commission has

[65] In full, 18 U.S.C. § 3553(a) instructs the sentencing court to consider: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the need for the sentence imposed"; (3) "the kinds of sentences available"; (4) "the kinds of sentence and the sentencing range established"; (5) "any pertinent policy statement"; (6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victims of the offense." Yet, § 3553(a)(1) is most significant to the discussion of considering ACEs, and is, therefore, focused on for the purposes of this Comment.

[66] *See* Muller, *supra* note 37, at 1399 ("In 2018, 51% of sentences were within the Guidelines range, 2.6% above the range, and a total of 46.5% below the range. Of those sentences below the Guidelines range, 26.5% were government sponsored, and 20% were non-government sponsored.").

[67] 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

attempted to control the sentencing process through the issuance of the Guidelines, studies show that judges have become more comfortable with issuing sentences outside of, particularly below, the Guidelines' recommended range since *Booker*.[68] These studies highlight two things: First, that judges are likely happy to have their discretion back. Second, there are obvious flaws in the Guidelines that, in many cases, would lead to unjust results if the Guidelines' recommended ranges were strictly followed. This is significant because judges appear to be more and more likely to consider childhood trauma in their sentencing decisions. For example, one survey of district judges on the Guidelines represented that over 60% of the judges polled "believe more emphasis should be placed on mental conditions when determining sentences."[69]

This section will start by presenting federal cases in which the offender's childhood trauma was discussed by the sentencing court. Then, it will analyze those cases to draw attention to the existing deficencies in the current sentencing framework and it will begin to introduce how consideration of ACEs could address those deficiencies.

A. *Case Studies*

In *United States v. McBride*, the Eleventh Circuit affirmed a downward variance, which reduced a defendant's sentence to nearly half of the Guidelines' recommended range.[70] The court did this after the sentencing judge found the defendant's history of consistent abuse and abandonment by his family to be one of the worst that the court had ever seen.[71] In that case, the defendant was charged with distributing child pornography—he was found with 981 images and

[68] *See* Muller, *supra* note 37, at 1399 ("In 2018, 51% of sentences were within the Guidelines range, 2.6% above the range, and a total of 46.5% below the range. Of those sentences below the Guidelines range, 26.5% were government sponsored, and 20% were non-government sponsored."); *see generally* U.S. SENTENCING COMMISSION FINAL QUARTERLY DATA REPORT (U.S. SENTENCING COMM'N 2006); U.S. SENTENCING COMMISSION FINAL QUARTERLY DATA REPORT (U.S. SENTENCING COMM'N 2018).
[69] U.S. SENTENCING COMM'N'S SURVEY OF ARTICLE III JUDGES, app. B, B-8 (U.S. SENTENCING COMM'N 2002), https://www.ussc.gov/sites/default/files/pdf/research-andpublications/research-projects-and-surveys/surveys/20021202_Judge_Survey.pdf.
[70] 511 F.3d 1293, 1298 (11th Cir. 2007).
[71] *Id*.

45 videos of child pornography in his home.[72] In the Presentence Investigation Report ("PSI"), the probation officer calculated the Guidelines' recommended range as 151 to 168 months' imprisonment.[73] Further, "[t]he offense carried a statutory maximum sentence of 20 years' imprisonment and a minimum sentence of 5 years' imprisonment," as well as the maximum term of supervised release being life, with the minimum set at two years.[74]

In making its sentencing determination, however, the sentencing court used 18 U.S.C. § 3553(a) to consider many details of the defendant's personal history—including that his father was murdered when the defendant was only two years old, "his mother and uncle physically abused him, his grandfather sexually abused him" for approximately ten years, and he was transferred in and out of foster care from the age of twelve until adulthood.[75] The sentencing court determined that these traumatic events warranted a downward variance and imposed a sentence of "84 months' imprisonment followed by a ten-year period of supervised release," because the defendant could then benefit from participation in a sexual treatment program.[76] The Eleventh Circuit affirmed, finding that this sentence was not substantively unreasonable and the sentencing court did not commit clear error in placing such weight on the defendant's history in issuing a sentence considerably less than the recommended range.[77]

Several years later in *United States v. Carpenter*, the Eleventh Circuit heard another case on appeal in which the sentencing court considered the defendant's own abuse as a child in making its sentencing determination—including that the defendant grew up with an alcoholic mother and a physically abusive stepfather.[78] In *Carpenter*, however, the sentencing court did not vary or

[72] *Id.* at 1295.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 1295–96.
[76] *McBride*, 511 F.3d at 1296.
[77] *Id.* at 1298.
[78] 803 F.3d 1224, 1233 (11th Cir. 2015).

depart from the recommended range, but instead used the defendant's own abuse to justify imposing the very lowest end of the recommended range.[79] The Eleventh Circuit again affirmed the sentencing court's decision as reasonable.[80]

The Ninth Circuit has also addressed the significance of childhood trauma in sentencing determinations. For example, in *United States v. Walter*, the Ninth Circuit reversed a district court's sentencing determination where the district court did not sufficiently consider the defendant's childhood abuse.[81] In that case, the defendant sent a threatening letter to then-President Clinton and signed the name of an individual on whom he wished to get revenge.[82] "The guidelines under which [the defendant] was sentenced set[] forth a range from 41–51 months."[83] The defendant argued that he should receive a downward departure based on his extraordinary history of childhood abuse, either independently or under § 5K2.13 for diminished capacity.[84] The district court denied a downward departure on either ground and imposed a 41-month sentence.[85]

On appeal, the Ninth Circuit looked to § 5K2.13 for guidance. While it recognized that this section generally prohibited consideration of mental and emotional conditions, and that the court previously held this section generally includes "the impact of child abuse on the offender," the Ninth Circuit determined that the defendant's history of abuse was extraordinary and warranted downward departure under this provision.[86] Particularly, the court considered "[t]he combination of brutal beatings by [the defendant's] father, the introduction of drugs and alcohol by his mother,

[79] *Id.* at 1230–32.
[80] *Id.*
[81] 256 F.3d 891, 895 (9th Cir. 2001).
[82] *Id.* at 893.
[83] *Id.* at 893 n.1.
[84] *Id.* at 893.
[85] *Id.* at 894 ("The [district] court refused to grant a downward departure on the grounds of childhood abuse because when [the defendant] was thirteen years old, he struck back, knocking his father down when the latter attempted to assault him. This suggested to the court that 'he was able to fend for himself.'").
[86] *Id.* at 895.

and, most seriously, the sexual abuse he faced at the hands of his cousin."[87] Accordingly, the Ninth Circuit reversed and remanded, ordering the district court to conduct an evidentiary hearing to properly consider the defendant's claims of childhood abuse.[88]

As a final example,[89] it is important to note a case in which an offender's upbringing seems to have been inadequately considered. In *United States v. Rivera*, the Second Circuit heard an appeal from a defendant who was convicted of conspiracy to distribute narcotics.[90] The defendant appealed his sentence arguing that the district court erred by "failing to depart downward from the Sentencing Guidelines range by reason of [the defendant's] violent and tumultuous childhood."[91] The defendant based his appeal on § 5K2.13, arguing that this section permitted a downward departure in instances of childhood abuse such as that which he suffered. He had set forth evidence that "he was born of a familial rape . . . he spent time in foster homes . . . and his stepfather was killed when [the defendant] was eight."[92] The district court, however, determined that these facts evidenced only that the defendant suffered lack of guidance as a youth, a consideration which § 5H1.12 prohibited.[93] The defendant also presented evidence that reported he was badly beaten as a child, and that he "[had] his hands burned, [was] made to kneel on rice in the corner, and [was] struck with extension cords."[94] The district court was also not persuaded that these incidents arose

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[87] *Walter*, 256 F.3d at 895 (disagreeing also with the district court's finding that Walter's defense against his father in away casted doubt on his abuse).
[88] *Id.*
[89] For more examples, see generally U.S. v. Sawyer, 907 F.3d 121, 123 (2d Cir. 2018) (reversing a sentence of 30 years' imprisonment after finding that the sentence was "shockingly high given [the defendant's] harrowing upbringing and comparatively low danger to the community," but affirming a 25-year sentence); U.S. v. Phillips, 461 F. App'x 135, 141 (3d Cir. 2012) (refraining from imposing an upward variance during sentencing, despite the defendant being eligible for one, because of the extreme abuse the defendant suffered as a child); U.S. v. Bettin, No. CR 17-093-BLG-SPW, 2019 WL 3778461, at *2 (D. Mont. Aug. 12, 2019) (exemplifying a case where a decreased sentence was issued based, in part, on "serious lack of guidance as a youth"). *But see* U.S. v. Godinez, 474 F.3d 1039, 1043 (8th Cir. 2007) (upholding the denial of a downward departure, which was sought based on facts including that the defendant "lost his father at the age of twelve, was unable to attend school, and remained illiterate until late adolescence" because the court found those life circumstances were not unusual).
[90] 192 F.3d 81, 83 (2d Cir. 1999).
[91] *Id.* (quotation omitted).
[92] *Id.* at 86.
[93] *Id.*
[94] *Id.* (quotation omitted).

to the level of extraordinary abuse that could be assumed to cause mental or emotional pathology that would warrant a departure under § 5K2.13.[95]

Last, in deciding to affirm the district court's sentencing determination, the Second Circuit commented on the prevalence of histories of child abuse in the lives of criminal defendants, such that it would be impractical to issue decreased sentences in each and every case.[96] Although the Second Circuit declined to set a standard for determining at what point "extraordinary" childhood abuse exists (such that it would warrant a downward departure), it held that the defendant presented no such case.[97]

B. *What Do These Cases Show?*

Existing case law demonstrates that the current federal sentencing framework is deficient, particularly when applied to offenders who have suffered what are now coined as ACs. It seems apparent that sentencing judges across all circuits are generally comfortable exercising their discretion and straying from the Guidelines' recommend range to consider childhood trauma as a significant mitigating factor. Yet, the aforementioned cases also exemplify that there are significant discrepancies between how different courts view and categorize childhood trauma. For example, while the Eight Circuit has refused to allow a downward departure where the offender "lost his father at the age of twelve, was unable to attend school, and remained illiterate until late adolescence,"[98] other courts may allow such a departure if they recognize general "lack of guidance as a youth" as a sufficient mitigating factor.[99]

In the context of ACEs more specifically, there are apparent inconsistencies amongst judges as to what constitutes childhood abuse. By drawing a line at "extraordinary abuse," the

[95] *Id.*
[96] *Rivera*, 192 F.3d at 86.
[97] *Id.*
[98] *Godinez*, 474 F.3d at 1043.
[99] *See, e.g.*, *Bettin*, No. CR 17-093-BLG-SPW, 2019 WL 3778461, at *2 (exemplifying a case where a decreased sentence was issued based, in part, on "serious lack of guidance as a youth").

negative implication is that there is such thing as "ordinary abuse." Perhaps, neglect may even fall into this category of "ordinary abuse."[100] However, drawing the line here too quickly disregards studies that have included childhood emotional and physical neglect as ACEs, and that have found such neglect to result in serious negative health and behavioral consequences.[101] Accordingly, apparent deficiencies in the Guidelines, federal sentencing statutes, and in case law, all support the conclusion that explicitly providing for the consideration of ACEs into a sentencing determination would lead to fairer and more consistent sentencing outcomes.

IV. ADDING IN ACES

As a result of the incoherency in the way sentencing courts consider an offender's childhood trauma, the federal sentencing regime appears to be reverting to a fully discretionary process, such as it was prior to the SRA. However, as has already been discovered, fully discretionary processes come with significant downfalls, such as inconsistency and unpredictable outcomes. To prevent revision back to an ineffective system, it is necessary to achieve doctrinal coherency between the Guidelines and the statutory sentencing framework. This part seeks to address how this can be accomplished within the context of ACEs by making two recommendations. First, this part will propose amending § 5H1.12 to permit the consideration of ACEs as grounds for a departure. It will suggest that this amendment would result in more consistent and just sentencing outcomes that will better align with the Commission's stated

[100] *See, e.g.*, *Rivera*, 192 F.3d at 86 (declining to find the defendant's abuse as a child to be a "significant and mitigating factor in his subsequent behavior and poor exercise of judgment" because "as much could be said of every criminal defendant who has suffered abuse as a child, or corporal punishment at the hands of benighted parents").

[101] *See, e.g.*, Baglivio et al., *supra* note 4, at 1 (including "emotional neglect" and "physical neglect" as categories of ACEs); *See* English et al., *supra* note 18, at 33–34 (finding "abused *and* neglected youth were 2.7 times more likely to be arrested for a violent crime as an adult (23% versus 8.7%)" (emphasis added)); Wisdom & Maxfield, *supra* note 21, at 1 ("Being abused *or* neglected as a child increased the likelihood of arrest as a juvenile by 59 percent, as an adult by 28 percent, and for a violent crime by 30 percent." (emphasis added)).

purposes and goals. Then, this part will urge the Commission to take active steps aimed at normalizing the consideration of ACEs in federal sentencing determinations.

A. *Amending § 5H1.12 to Create and Exception for ACEs*

As a first step to addressing the Guidelines' defectiveness with respect to addressing an offender's childhood trauma, the Commission should amend § 5H1.12—which currently provides that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted"—to include an exception for ACEs.[102] Such an amendment may look like the following:

> Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted except as provided for by this section. Except, the presence of Adverse Childhood Experiences may be relevant in determining whether a departure is warranted.
>
> The following are recognized as Adverse Childhood Experiences to be considered: (1) psychological abuse; (2) physical abuse; (3) sexual abuse; (4) violence against mother; (5) living with household members who were substance abusers; (6) living with household members who were mentally ill or suicidal; (7) and living with household members who were ever imprisoned.

Amending § 5H1.12 to permit consideration of ACEs in determining whether a departure is warranted would promote the Commission's stated purposes and goals, ultimately resulting in a more coherent sentencing framework. First, as previously discussed, the SRA originally tasked the Commission with establishing a set of uniform sentencing guidelines in attempt to reduce inconsistent determinations.[103] However, a significant number of federal judgements appear to disagree with the Guidelines as they are currently written, particularly in the context of considering an offender's childhood trauma. For example, a 2010 survey from the Commission of federal judges revealed that approximately 49% of judges believe that lack of guidance as a youth "should

[102] USSG, *supra* note 49, at § 5H1.12.
[103] THE BASICS, *supra* note 27 (noting Congress' desire to "promote transparency and proportionality in sentencing"); *see infra* Part II.A.

be ordinarily relevant to the determination of a sentence outside the guideline range."[104] Consequently, sentencing courts are increasingly resorting to other means to issue the sentence that they ultimately feel fairly considers the offender's background—either through mixing and matching other provisions of the Guidelines or through issuance of a variance based on § 3661 or § 3553(a)(1).[105] Because judges are taking different incoherent approaches, inconsistent sentences are still being issued.

Take, for example, two of the cases discussed above, both within the Eleventh Circuit: *United States v. McBride*[106] and *United States v. Carpenter*.[107] In *McBride*, the defendant evidenced that his mother and uncle physically abused him, and that his grandfather sexually abused for approximately ten years[108]—both unfortunate circumstances would certainly constitute ACEs. The sentencing judge in that case decided to utilize his discretion to issue a downward variance based off 18 U.S.C. § 3553(a).[109] As a result, the defendant's sentence was reduced to nearly half of the Guidelines' recommended range. The defendant in *Carpenter* was similarly victimized by a physically abusive stepfather[110]—another circumstance that would constitute an ACE. The sentencing court in *Carpenter*, however, determined that such abuse did not warrant departure and it additionally chose not to vary.[111] Instead, the defendant was sentenced within the Guideline's range.[112]

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

[105] *See, e.g.*, U.S. v. McBride, 511 F.3d 1293, 1298 (11th Cir. 2007) (affirming a downward variance issued based on consideration of the defendant's history of consistent childhood abuse and abandonment by his family); U.S. v. Walter, 256 F.3d 891, 895 (reversing a sentencing determination because the district court did not adequately consider the defendant's childhood abuse under § 5K2.13).

[106] 511 F.3d 1293 (11 Cir. 2007).

[107] 803 F.3d 1224 (11 Cir. 2105).

[108] *McBride*, 511 F.3d at 1295–1296.

[109] *Id.* 1298.

[110] *Carpenter*, 803 F.3d at 1233.

[111] *Id.* at 1230–32.

[112] *Id.*

This disparity in sentencing could be reduced if the Commission amended § 5H1.12 to permit consideration of ACEs in determining whether a departure is warranted. This is because judges who want to issue a lighter sentence due to the defendant's childhood or apparent reduced culpability, would have a direct provision to cite to in doing so. To the extent that sentencing courts are simply maneuvering around § 5H1.12 to achieve the desired sentence, a more coherent sentencing framework could achieve by providing further guidance on what constitutes mere "lack of guidance" versus something more serious that should be considered as mitigating against culpability, such as ACEs. Furthermore, because sentencing determinations are reviewed based on an abuse of discretion standard, it is conceivable that judges, such as the judge in *Carpenter*, may be hesitant to issuance a variance where ACEs are not explicitly defined as a mitigating factor. If judges could cite to a specific provision in the Guidelines allowing for the consideration of ACEs, it is less likely that their sentencing determination would be overturned.

Second, in addition to promoting a uniform sentencing practice, the Commission is also under a duty to regularly revise the Guidelines to ensure that the "sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing."[113] As discussed above, the purposes of sentencing include the need for the sentence imposed (1) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; (2) "to afford adequate deterrence to criminal conduct"; (3) to protect the public from further crimes of the defendant"; and (4) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[114] Yet, providing "just punishment for the offense" is not possible if the Commission continues promoting a set of guidelines that do not sufficiently account for individualized human considerations. "A key consideration that underpins the criminal law and sentencing is culpability. In order for individuals

[113] 28 U.S.C. § 991(b).
[114] 18 U.S.C. § 3553(a)(2); *see infra* Part II.B.

to be culpable for their behavior, they need to be responsible for it, which assumes a capacity to make decisions that do not violate the criminal law."[115] However, ACEs "that delay or interfere with the development of sound cognitive or emotional judgment militate against the capacity for individuals to make prudent choices."[116] Therefore, ACEs should be explicitly recognized within the Guidelines as warranting a departure.

For example, the decision in *United States v. Rivera* seems starkly unsatisfactory. Had the sentencing judge in that case been given more explicit guidance, it is more than possible that they would have considered a defendant who, as a child, was badly beaten, "[had] his hands burned, [was] made to kneel on rice in the corner, and [was] struck with extension cords," to have suffered ACEs. The proposed amendment could potentially relieve some of the harsh responsibility placed on sentencing judges to determine what constitutes "extraordinary" child abuse allowing for a departure under § 5K2.13.[117]

Importantly, *Rivera* also highlights the fact that just like a sentencing court has the discretion to consider a defendant's background and the presence of ACEs based off 18 U.S.C. § 3661 or 18 U.S.C. § 3553(a), it also has the discretion not to do so. While amending § 5H1.12 to allow the consideration of ACEs will not change the advisory nature of the Guidelines, adding an explicit requirement that the sentencing judge at least consider ACEs may encourage more judges to depart based off their presence. It may also alleviate the burden of judges to decide whether they want to go "off the books" and utilize discretion, particularly in a system where a judge who utilizes too much discretion is not always looked upon favorably.

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[115] Bagaric et al., *supra* note 40, at 3; *see also* California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.").

[116] *Id.*

[117] 192 F.3d 81, 86 (2d Cir. 1999) (quotation omitted) (noting also that the defendant was born of a familial rape, spent time in foster homes, and that the defendant's stepfather was killed when the defendant was eight).

Considering the presence of ACEs as legally relevant in a sentencing determination could also reduce recidivism rates and lead to more effective possibilities of rehabilitation. While a larger discussion of recidivism rates and rehabilitation efforts is outside the scope of this Comment, it is worth briefly noting how consideration of ACEs may fit into that discussion. Particularly, studies are starting to be performed within the context of the juvenile justice system, which may be helpful by analogy. For example, a 2015 study found that adolescents "who reported a greater number of ACEs were significantly more likely to be re-arrested earlier in the follow-up period."[118] This finding was true for all genders and races.[119] Nonetheless, the authors of the study noted a concerning lack of research on this relationship, but stated the ACEs studies that have been performed support to the connection.[120] Research addressing this relationship in the context of adult offenders is even slimer and is in need of more consideration; however, the research that has been completed draws similar conclusions.[121] Thus, it is likely that further research would only cement the correlation between increased presence of ACEs and higher recidivism rates.

Furthermore, because of the relationship between ACEs and the likelihood for risky behavior in adulthood, it would be beneficial for any rehabilitation service to account for the offenders' trauma—whether rehabilitation is attempted during incarceration or after release. First, "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," a sentencing court needs to approach the offender as an individual; this includes taking his background and upbringing into consideration. Additionally, cases such as *United States v. McBride*, exemplify how consideration of ACEs in

[118] *See* Kevin T. Wolff, Michael T. Baglivio & Alex R. Piquero, *The Relationship Between Adverse Childhood Experiences and Recidivism in a Sample of Juvenile Offenders in Community-Based Treatment*, 6 INT'L J. OFFENDER THERAPY AND COMP. CRIMINOLOGY 1210, 1225 (2017).
[119] *Id.* at 1231.
[120] *Id.* at 1214.
[121] See *infra* Part I.C.

sentencing could lead to reduced sentences, which in turn could provide the defendant with an opportunity to participate in treatment programs following their period of incarceration.[122]

Although the Commission's two goals—allowing for a more humanistic approach to sentencing while also providing uniformity—may appear to be in conflict, the proposed amendment offers a solution that could effectively achieve both.

B. *The Commission's Continuing Duties*

In addition to adopting the proposed amendment to § 5H1.12, the Commission should take several active steps to normalize the consideration of ACEs in sentencing. First, the Commission will need to begin by deciding what conditions constitute ACEs, such that they should be included in the proposed amendment. By amending § 5H1.12 to provide for ACEs rather than "trauma" more generally, the Commission would be increasing coherency between the Guidelines and the statutory sentencing framework without being too obscure. Although the seven categories listed in the proposed amendment are the most seminal categories,[123] the Commission should confirm that these categories will be inclusive enough to align with the purposes of sentencing and to reduce inconsistent sentencing. While requiring the Commission to set definite categories within an amended § 5H1.12 may lead to the exclusion of conditions that some research may consider as ACEs, such as physical or emotional neglect, this is an unfortunate, but necessary consequence to achieve more uniformity. Additionally, even with the amendment, the Guidelines will continue to serve only an advisory purpose and a sentencing court may continue to consider other traumatic experiences under their discretion.

ACEs in and of themselves, however, can be seen as transitional categories—what constitutes physical abuse to one, may not to another. Accordingly, once the Commission

[122] *McBride*, 511 F.3d. at 1296.
[123] *See* Felitti et al., *supra* note 4.

determines the categories to be included, it must also construct definitions for each category. For example, to provide guidance on what constitutes physical abuse, the Commission might look at case law in which a parent is charged or convicted for being abusive to their child and construct a definition based on a common standard. As another example, the Commission might determine that the threshold for living with a mentally ill parent can only be reached where that parent has been professionally diagnosed with a recognized illness. The Commission must do this, again, to limit any potential obscurity—particularly given that a limitation to ACEs is that they are largely self-reported.

Last, the Commission should stay up to date on new empirical research on ACEs to ensure the amended § 5H1.12 remains effective. Because the ACEs phenomenon is largely a twenty-first century creation, and much more research on the subject can be anticipated, the Commission may need to make further amendments to § 5H1.12 in the future. With this, however, the Commission will need to balance making further amendments to align with the current research and ensuring that sentencing courts are provided with predictable and thoroughly considered guidelines.[124]

V. CONCLUSION

There is ample evidence to suggest that ACEs are not only a relevant consideration for equitable and consistent sentencing determinations, but also a necessary consideration. The current federal sentencing process, consisting of the Guidelines, statutes, and court precedent, is incoherent and sentencing determinations are beginning to look as they did prior to the SRA—unfair and unpredictable. Amending the Guidelines to permit consideration of ACEs in sentencing determinations would begin to resolve this incoherency and it would add legitimacy to the sentencing process by acknowledging the largely undeniable relationship between childhood

[124] *C.f.* Bagaric et al., *supra* note 40, at 8 (noting the significant influence that the Guidelines have on how many States structure their sentencing frameworks).

trauma, adult criminality, and reduced culpability. While the stakes of sentencing are so high, a deficient system cannot persist.