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Note

Excessive Sanctions & Evolving Standards of Decency: The Mitigating Nature of Sexual Trauma for Juvenile Survivors Who Murder

*Ingrid Hofeldt**

Approximately 2,500 Americans sit behind bars serving life without parole (LWOP) sentences for murders they committed as children.¹ A huge proportion of juvenile murderers experienced horrific harms, ranging from violent abuses in their neighborhood parks to sexual abuse in the hidden corners of their homes, but lacked the tools to manage, heal, and initiate recovery from their traumas.² These youth, many of whom are now adults, received sentences that often did not account for the mitigating nature of their traumas.³

This Note will argue that juvenile murder defendants with trauma histories generally, and sexual trauma histories specifically, deserve shorter sentences given the impact of that trauma on their development. It will further argue that courts do not sufficiently consider the mitigating evidence of sexual trauma when sentencing youth for murder. Part I will examine the neurological, sociological, and psychological research on the relationship between abuse and juvenile murder, illustrating how abuse strongly correlates with violent behavior among a subset of these children. Part II will showcase the limitations of evidence at sentencing and the extent to which evidence of

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1. HUMAN RIGHTS WATCH, STATE DISTRIBUTION OF ESTIMATED 2,574 JUVENILE OFFENDERS SERVING JUVENILE LIFE WITHOUT PAROLE (2009), https://www.hrw.org/sites/default/files/related_material/JLWOP_Table_May_7_2009.pdf (data compiled between 2004 and 2009).

2. *See infra* Part I.A.

3. *See infra* Part III.

trauma actually impacts juvenile murder defendants' sentences. Part III will argue that the current framework for sentencing a population of defendants who disproportionately experience arguably mitigating circumstances serves no moral, legal, or policy purpose. This Note concludes that while courts have begun to dabble in trauma-informed sentencing, on a structural level the government must shift resources from the juvenile criminal legal system towards earlier public health interventions because these defendants' abuse histories are a public health crisis for defendants, their victims, and their communities. This reallocation is necessary to avoid committing a grave injustice against some of this country's most vulnerable youth.

I. THE PROBLEM: HOW SEXUAL ABUSE HARMS A SUBSET OF JUVENILE MURDERERS

A. THE PERNICIOUS CORRELATION BETWEEN SEXUAL TRAUMA HISTORIES AND MURDER CONVICTIONS

Numerous psychologists, psychiatrists, sociologists, and criminologists have found a strong relationship between criminal behavior and childhood trauma.⁴ Ninety-five percent of

4. ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 2 (2012), <https://www.sentencingproject.org/publications/the-lives-of-juvenile-lifers-findings-from-a-national-survey/> (reporting that 46.7% of juveniles sentenced to LWOP experienced physical abuse and 20.5% experienced sexual abuse); Yael Cannon & Andrew Hsi, *Disrupting the Path from Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach*, 43 *FORDHAM URB. L.J.* 425, 426, 448–59 (2016) (detailing how dozens of studies have shown a strong correlation between incarceration, child abuse, and other adverse childhood experiences (ACE) factors); *see also* Lauren Ashbaugh, *Child Sexual Abuse and Revictimization in Incarcerated Men and Women: Incidence and Vulnerability* 5 (Aug. 2009) (unpublished Ph.D. dissertation, University of Virginia) (on file with ProQuest) (“59% of [incarcerated males] reported experiencing sexual molestation, compared with the [5–8% of the general population].” (citing Johnson et al., *A History of Drug Use and Childhood Sexual Abuse Among Incarcerated Males in a County Jail*, 40 *SUBSTANCE USE & MISUSE* 211 (2005))); Irina Alexandrovna Komarovskaya et al., *Exploring Gender Differences in Trauma Exposure and the Emergence of Symptoms of PTSD Among Incarcerated Men and Women*, 22 *J. FORENSIC PSYCHIATRY & PSYCH.* 395, 401 tbl.1 (2011) (determining that 95% of incarcerated people have trauma histories, 21% of incarcerated men experienced sexual abuse and 84% experienced non-sexual abuse); Stacey Nofziger & Don Kurtz, *Violent Lives: A*

men⁵ incarcerated for any crime have trauma histories.⁶ Focusing on juveniles incarcerated for murder, many have Adverse Childhood Experience (ACE) scores in the highest 0.1% of society,⁷ which means they experienced traumas more numerous and severe than 99.9% of society. These adverse experiences include witnessing violence at home (79% of juvenile lifers), physical abuse (46.9% of juvenile lifers), and sexual abuse (20.5% of juvenile lifers).⁸

Examining child abuse specifically, the relationship between this particular trauma and later criminal activity remains significant. Sexual abuse has the strongest correlational effect of any trauma, with sexual abuse survivors 24.5% more likely than their non-sexually abused peers to commit non-drug crimes.⁹ Several studies have documented sexual abuse rates between 21% and 59% among incarcerated men, with reported physical abuse rates as high as 84%.¹⁰

Lifestyle Model Linking Exposure to Violence to Juvenile Violent Offending, 42 J. RSCH. CRIME & DELINQ. 3, 5 (2005) (arguing that there is a relationship between certain trauma and violent offending).

5. Regarding gender, this Note uses the languages of the studies it cites to remain consistent and accurately reflective of the content of those studies; however, many studies fail to include or record the genders of nonbinary or trans individuals, which is exclusionary and harmful to trans and nonbinary communities.

6. See Komarovskaya et al., *supra* note 4.

7. James Garbarino, *ACEs in the Criminal Justice System*, 17 ACAD. PEDIATRICS S32, S32 (2017) (“[O]nly 0.01% of Americans (1 in 1000) report an ACEs score of 8, 9, or 10. The scores reported by the last 10 killers I interviewed [who committed murder as adolescents or young adults] . . . had an average score of 8.” (footnote omitted)). See generally Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many the Leading Causes of Death in Adults*, 14 AM. J. PREVENTATIVE MED. 245, 248 (1998) (creating the category of ACEs and showing the relationship between ACEs and risk factors for the leading causes of death in adults).

8. NELLIS, *supra* note 4.

9. Janet Currie & Erdal Tekin, *Understanding the Cycle: Childhood Maltreatment and Future Crime*, 47 J. HUM. RES. 509, 529 (2012).

10. Komarovskaya et al., *supra* note 4 (reporting that 21% of incarcerated men reported sexual abuse and 84% reported non-sexual abuse histories); Bonnie E. Carlson & Michael S. Shafer, *Traumatic Histories and Stressful Life Events of Incarcerated Parents: Childhood and Adult Trauma Histories*, 90 PRISON J. 475, 476, 478, 485 (2010) (noting studies that show 16.4% of incarcerated men had experienced physical abuse and 8.8% had experienced sexual abuse also noting other studies (e.g., Johnson et al., *supra* note 4) that found physical abuse rates as high as 59%); see also Marjory Anne Henderson Marquardt, *Fallacious Reasoning: Revisiting the Roper Trilogy in Light of the*

Some researchers postulate these rates would rise even higher with proper surveying techniques and fewer social barriers to disclosure.¹¹ Men and boys cite guilt, self-blame, shame, fear of homophobia, and fear of being labeled pedophiles as barriers to disclosure of sexual trauma.¹² Additionally, society's pressure on men to embody a strong, hegemonic masculinity prevents male child sexual abuse survivors from coming forward with their experiences.¹³ These gendered barriers to disclosure illustrate the difficulty of assessing the true scope of this issue.¹⁴

At first glance, the correlation between trauma and juvenile murder convictions might appear to reflect the widespread, pernicious severity of child abuse in the United States overall; however, when flipping this coin and examining the proportion of trauma survivors who commit violent crimes, the strong association remains. Incarcerated people are more likely to have trauma histories, but people with trauma histories are also more likely to commit crimes that catalyze incarceration.¹⁵ Abused and neglected children are almost twice as likely to perpetrate violent criminal behavior, with over 50% of abuse survivors self-reporting violent actions or accruing violent criminal charges.¹⁶ Researchers tracking 900 victims of childhood abuse and neglect found that by age thirty-two, half of their sample population had committed non-traffic offenses, and 18% had committed violent

Sexual-Abuse-to-Prison Pipeline, 72 STAN. L. REV. 749, 765–66 (2020) (discussing gender disparity of sexual abuse histories in incarcerated juveniles).

11. See, e.g., Kevin M. Gorey & Donald R. Leslie, *The Prevalence of Child Sexual Abuse: Integrative Review Adjustment for Potential Response and Measurement Biases*, 21 CHILD ABUSE & NEGLECT 391, 391–96 (1997) (finding that sexual abuse rates rise significantly when researchers use broader survey language; for example, using the phrase “Someone touched my genitals when I did not want them to” instead of using the phrase “I was sexually abused”).

12. Marudan Sivagurunathan et al., *Barriers and Facilitators Affecting Self-Disclosure Among Male Survivors of Child Sexual Abuse: The Service Providers' Perspective*, 88 CHILD ABUSE & NEGLECT 455, 462 (2019).

13. *Id.* at 463.

14. *Id.*

15. Izabela Milaniak & Cathy Spatz Widom, *Does Child Abuse and Neglect Increase Risk for Perpetration of Violence Inside and Outside the Home?* 5 PSYCH. VIOLENCE 246, 252 (2015) (finding that 60% of abused children within their sample study committed violent crimes, which is consistent with similar studies that documented a range of 50–70%).

16. *Id.*

offenses.¹⁷ This relationship remains when accounting for other factors such as sex, race, and age.¹⁸

Critics could argue that these statistics reflect the strong correlation between poverty and incarceration,¹⁹ or genes passed from violent parents to their children.²⁰ For example, one could posit that an abusive parent with violent genes passed those genes to their victim, who grew into a murderer. However, multiple twin studies have documented that even when controlling for genetic and environmental factors, abused twins are more likely to develop certain mental disorders, like substance addictions.²¹ Further, one study found abused twins were significantly more likely to develop conduct disorders than their non-abused counterparts.²² Given the complexity of human development and the multiplicity of factors that influence each individual's trajectory, many remain rightly skeptical that a specific factor like abuse makes the difference in the firing of a trigger.²³ This Note does not purport to conclude that abuse causes murder; however, this strong correlation represents a

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

18. *Id.*

19. See Wes Moore, *The Links Between Mass Incarceration and Poverty*, BRENNAN CTR. FOR JUST. (Mar. 1, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/links-between-mass-incarceration-and-poverty>.

20. In other words, a critic would argue that other factors correlate with incarceration statistics and that correlation does not equal causation. See generally April Bleske-Rechek et al., *Causal Inference from Descriptions of Experimental and Non-Experimental Research: Public Understanding of Correlation-Versus-Causation*, 142 J. GEN. PSYCH. 48 *passim* (2015) (examining humans' tendency to conflate correlation with causation); Justin Peters, *When Ice Cream Sales Rise, So Do Homicides. Coincidence, or Will Your Next Cone Murder You?*, SLATE (July 9, 2013), <https://slate.com/news-and-politics/2013/07/warm-weather-homicide-rates-when-ice-cream-sales-rise-homicides-rise-coincidence.html> (providing the classic example of the correlation/causation conundrum, in which scientists discuss why murders rise when ice cream sales rise).

21. Elliot C. Nelson et al., *Childhood Sexual Abuse and Risks for Licit and Illicit Drug-Related Outcomes: A Twin Study*, 36 PSYCH. MED. 1473, 1480 (2006).

22. Stephen Dinwiddie et al., *Early Sexual Abuse and Lifetime Psychopathology: A Co-Twin Control Study*, 30 PSYCH. MED. 41, 50–51 (2000).

23. See, e.g., NATIONAL RESEARCH COUNCIL ET AL., *Making Causal Connections*, in FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT (Jack P. Shonkoff & Deborah A. Phillips eds., 2000).

concerning pattern that suggests a possible causal link, which legislators would be loath to ignore.

Additionally, certain genetic characteristics linked with the brain's ability to manage stress illuminate the previously foggy link between abuse and violence.²⁴ Thirty-four percent of boys and 15% of girls have a low-activity MAOA genotype.²⁵ The MAOA gene is located on the X chromosome and encodes an enzyme that, in turn, metabolizes neurotransmitters that are crucial to stress management.²⁶ Individuals with low-activity MAOA (and thus affected neurotransmitters) experience cognitive and emotional difficulties, heightened pressure when responding to stressful situations and increased aggression.²⁷

According to these studies, the presence of the low-activity MAOA gene may help explain why some maltreated children develop antisocial behaviors while others do not.²⁸ Researchers found that 85% of boys who have this genetic variation *and* experienced severe childhood maltreatment developed antisocial behavior.²⁹ Additionally, boys who were maltreated and had the low-activity MAOA genotype were three times as likely as non-maltreated boys with this genotype to develop a diagnosed conduct disorder and ten times more likely to receive a violent criminal conviction by age twenty-six.³⁰ While the subset of boys

24. Avshalom Caspi et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCI. 851, 851–52 (2002) (following a cohort of almost 1,000 people from childhood to adulthood); David M. Fergusson, *MAOA, Abuse Exposure and Antisocial Behaviour: 30-year Longitudinal Study*, 198 BRIT. J. PSYCHIATRY 457, 457 (2011) (replicating Caspi's study nine years later and finding the same results); J. Kim-Cohen et al., *MAOA, Maltreatment, and Gene-Environment Interaction Predicting Children's Mental Health: New Evidence and a Meta-Analysis*, 11 MOLECULAR PSYCHIATRY 903, 903–04 (2006) (determining a similar connection between the MAOA gene, abusive environments, and future criminality).

25. Kim-Cohen et al., *supra* note 24, at 905. These studies focus on boys because girls have two X chromosomes, making it impossible to determine which allele is affected, and because the girl samples sizes (i.e., those having low-MAOA) were too small to support the analyses. *Id.*; Caspi et al., *supra* note 24, at 853 n.30.

26. See Caspi et al., *supra* note 24, at 851.

27. *Id.*

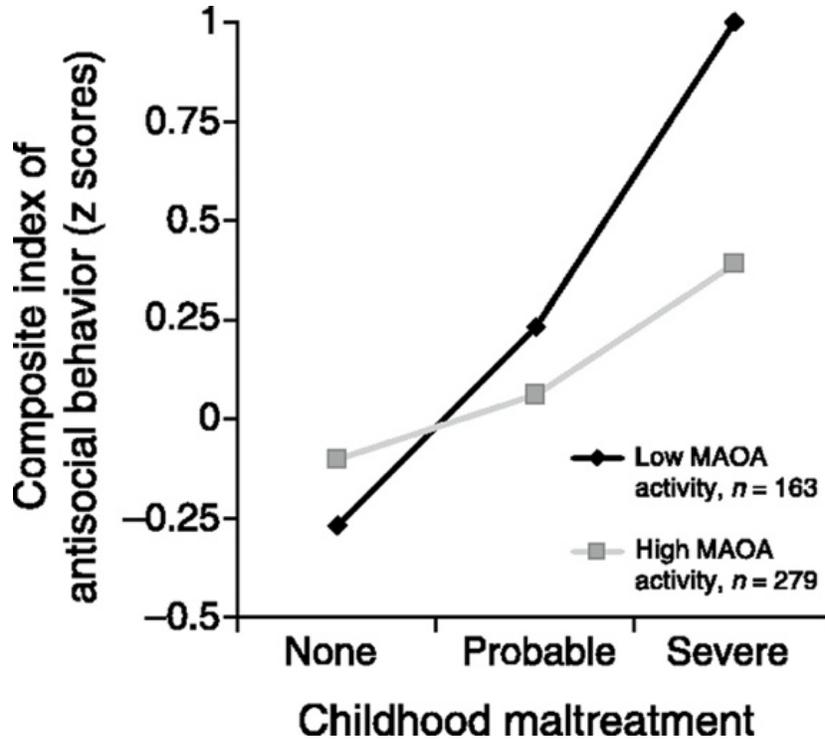
28. *E.g., id.* ("Circumstantial evidence suggests the hypothesis that childhood maltreatment predisposes most strongly to adult violence among children whose MAOA is insufficient to constrain maltreatment-induced changes to neurotransmitter systems.")

29. *Id.* at 853.

30. *Id.*

with abuse histories and the low-activity MAOA gene comprised only 12% of the study cohort, they committed 44% of the cohort's violent convictions, even when controlling for other possible contributing factors.³¹ Researchers liken the MAOA gene's impact on boys with abuse histories to the repercussions of a smoking history or a diabetes diagnosis on one's chances of contracting heart disease.³²

Figure 1³³



These patterns remain correlational and do not necessarily reflect a causal relationship; however, the strength of this

31. *Id.*

32. *See id.* & n.37 (“Nonetheless, although individuals having the combination of low-activity MAOA genotype and maltreatment were only 12% of the male birth cohort, they accounted for 44% of the cohort’s violent convictions, yielding an attributable risk fraction (11%) comparable to that of the major risk factors associated with cardiovascular disease.”).

33. *Id.* at 852 fig.1.

correlation indicates that researchers should devote further time and energy to exploring possible causality.

Critics might argue that, while many child abuse survivors murder, thousands of child abuse survivors do not murder.³⁴ Additionally, while abuse may harm children greatly, abusers do not hand each child they harm a weapon and propel them in the direction of an unwitting victim. These critics are correct that this analysis presents patterns, not definitive neurological maps demonstrating a clear trajectory from abuse to murder. However, this strong correlation, particularly considering the MAOA genotype's influence, indicates that a troubling relationship between abuse and murder exists that merits further examination. It may prove impossible to scientifically document clear causation between abuse and murder because of the complexities of research involving humans, but given the severity of abuse and the ubiquity of the correlation between abuse and murder, a *prima facie* case exists for abuse as somewhat mitigating or exculpatory. This Note does not necessarily argue for automatically freeing potentially dangerous abuse survivors from prison, pushing them back into the public. It merely argues that when present, documented, and related to the crime in question, an abuse history could serve as a reason for shortening a juvenile's LWOP sentence.

B. TRAUMA CHANGES YOUTHS' ALREADY UNDERDEVELOPED BRAINS, EXACERBATING THEIR DIFFICULTIES WITH PROCESSING EMOTIONS AND RESPONDING TO STRESS

Now that this Note has explored the relationship between trauma and LWOP murder sentences, it will examine child abuse survivors' neurological development. Child abuse does not just create emotional pain for children but sculpts their bodies, rewires their brains, and shapes their neurological evolution

34. *E.g.*, Melanie Phillips, *Criminals Deserve Punishment, Not Excuses*, TIMES, (Sept. 17, 2019), <https://www.thetimes.co.uk/article/criminals-deserve-punishment-not-excuses-mw59jxzs> (arguing that “casting as victims of circumstances those who commit crime comes close to giving them a free pass”); *see also* ANTOINETTE KAVANAUGH & THOMAS GRISSO, EVALUATIONS FOR SENTENCING OF JUVENILES IN CRIMINAL COURT 30 (2021) (“[K]nowledge of a youth’s psychosocial immaturity . . . at the time of the offense does not mean that this condition necessarily influenced or accounted for the youth’s judgment or the act itself.”).

throughout their growth.³⁵ The success of a child's brain development directly depends on the quality of their childhood.³⁶ Rather than remaining stagnant, abused children's brains change to protect them from future abuse.³⁷ Due to "[the] interaction between nature and nurture, the brain . . . become[s] uniquely designed to support the survival of the young child in the world [they] experience[]." ³⁸ Following trauma, children become more sensitive to threats and more vulnerable to stress when faced with reminders of their abuse.³⁹ For example, trauma survivors are more likely to distrust others and interpret benign actions as aggressive threats.⁴⁰ "Fight or flight" reactive behaviors are more common among physical and sexual abuse survivors, as their brains' crisis response systems are often rewired to constant "crisis mode."⁴¹ The parts of the brain devoted to reasoning and stress management are also impacted by their exposure to violence.⁴² This impact is noteworthy because without proper development of these centers, the brain instead depends on the amygdala, which encourages emotional

35. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1011 (2003) (describing the numerous neurological and psychopathological impacts of child abuse on the brain at different ages); Terrie E. Moffitt & The Klaus-Grawe 2012 Think Tank, *Childhood Exposure to Violence and Lifelong Health: Clinical Intervention Science and Stress-Biology Research Join Forces*, 25 DEV. & PSYCHOPATHOLOGY 1619, 1625–26 (2013) (finding that child abuse survivors have IQs five points lower than non-survivors, but that gap grows to eight IQ points after twenty-five years).

36. JOHN RICH ET AL., DREXEL UNIVERSITY SCHOOL OF PUBLIC HEALTH CENTER FOR NONVIOLENCE AND SOCIAL JUSTICE, HEALING THE HURT TRAUMA: TRAUMA-INFORMED APPROACHES TO THE HEALTH OF BOYS AND YOUNG MEN OF COLOR 9 (2007), <https://unnaturalcauses.org/assets/uploads/file/HealingtheHurt-Trauma-Rich%20et%20al.pdf>.

37. *Id.*

38. Richard L. Gaskill & Bruce D. Perry, *Child Sexual Abuse, Traumatic Experiences, and Their Impact on the Developing Brain*, in HANDBOOK OF CHILD SEXUAL ABUSE: IDENTIFICATION, ASSESSMENT, AND TREATMENT 29, 31 (Paris Goodyear-Brown ed., 2012).

39. *Id.* at 33–34.

40. *Id.* at 35.

41. See Bruce D. Perry, *Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*, 3 BRAIN & MIND 79, 88–89 (2002); JOSEPH LEDOUX, SYNAPTIC SELF: HOW OUR BRAINS BECOME WHO WE ARE (2002).

42. Moffitt & The Klaus-Grawe 2012 Think Tank, *supra* note 35, at 1619.

impulsivity and violence.⁴³ Child abuse is also a major risk factor for other psychopathologies, which could further impact the brain's ability to cope with stress.⁴⁴

Frequent trauma triggers “overdevelopment of the more primitive parts of the brain,” like the amygdala, which process anger and fear.⁴⁵ However, the more sophisticated pieces of the brain devoted to reasoning and rational thought remain underdeveloped, particularly if the abuse occurred early in the victim's life.⁴⁶ This underdevelopment results in intellectual and emotional limitations to abuse survivors' brains, which is correlated with the chronic patterns of antisocial behavior and mental health issues that criminal psychiatrists frequently associate with the risk of murdering.⁴⁷ While children frequently bounce back easily from physical injuries and illnesses, with unscarred features, unbroken limbs and stronger immune systems, they do not recover from emotional traumas as easily or fully.

Through neuroimaging, neurologists have determined that violent adults have the same brain abnormalities as adult survivors of child abuse, with the same regions underdeveloped or overutilized.⁴⁸ This correlation does not indicate that child abuse causes the reduced prefrontal cortexes in violent adults but shows that the brains of child abuse survivors post-trauma resemble the brains of violent adults. This pattern does not prove that violent adults experienced trauma or abuse as

43. Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 834–40 (2013) (describing numerous research studies that contend that from a psychosocial perspective, emerging adults between the ages of 18 and 25 engage in risky behavior at a level comparable to juveniles).

44. Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 343–44 (1992); Richard Dembo et al., *Physical Abuse, Sexual Victimization and Illicit Drug Use: A Structural Analysis Among High Risk Adolescents*, 10 J. ADOLESCENCE 13 (1987).

45. JAMES GARBARINO, MILLER'S CHILDREN: WHY GIVING TEENAGE KILLERS A SECOND CHANCE MATTERS FOR ALL OF US 23 (2018).

46. Perry, *supra* note 41, at 87.

47. Susan L. Andersen et al., *Preliminary Evidence for Sensitive Periods in the Effect of Childhood Sexual Abuse on Regional Brain Development*, 20 J. NEUROPSYCHIATRY CLIN. NEUROSCIENCES 292 (2008); Moffitt & The Klaus-Grawe 2012 Think Tank, *supra* note 35 (showing that researchers consistently find these same typical patterns of neurological development post trauma in sexual abuse survivors).

48. See Perry, *supra* note 41, at 92–94.

children, but it shows that the same pernicious correlations discussed earlier hold equally true via brain scans and criminological research.

One feature does profoundly and definitively influence the brain of each juvenile who murders: their youth.⁴⁹ All juveniles who commit murder naturally do so as juveniles. Youths' adolescent brains already make them more prone to impulsive and violent behavior.⁵⁰ During adolescence, the human body develops the parts of the brain that assist in stress management and cognitive processing.⁵¹ Scholars liken the development of these parts of the brain to remodeling one's kitchen: while someone remodels their kitchen they cannot necessarily cook as their refrigerator, oven, or stove may be unavailable.⁵² Similarly, when juveniles' brain centers related to reasoning develop, those centers become less usable.⁵³ As a result, the emotions juveniles experience feel particularly acute; however, juveniles lack the capacity to reason in stressful situations as swiftly or thoroughly as adults.⁵⁴ These gaps in brain function intersect with the neurological vulnerabilities of juvenile abuse survivors.⁵⁵ Child abuse survivors experience these same acute adolescent emotions but augmented by the overdevelopment of the more primitive and reactive parts of the brain.⁵⁶ Emotional processing, which already proves difficult for growing adolescents, is even more challenging for adolescent abuse survivors.

Zooming out from the brain, these structural changes within juveniles' brains impact how they engage with the world. John

49. See Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 555–56 (2017); Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60, 61 (2001); INST. OF MED. & NAT'L RECH. COUNCIL, *THE SCIENCE OF ADOLESCENT RISK-TAKING: WORKSHOP REPORT 48–49* (2011).

50. See Dahl, *supra* note 49.

51. GARBARINO, *supra* note 45, at 28 (citing research that juveniles' nucleus accumbens and frontal lobe are still developing throughout their teenage years).

52. See RICH ET AL., *supra* note 36, at 10 (“Because the cortex is under construction, teens use more primitive parts of the brain (limbic) to manage their emotions, and thus are more likely to react versus think and to operate from their gut response versus reasoning.”).

53. See *id.*

54. Dahl, *supra* note 49, at 61–62.

55. See GARBARINO, *supra* note 45, at 30–34.

56. *Id.*

Rich, an adolescent neuroscientist, explains how his clients who have experienced intense trauma “are not likely to have learned effective communication skills, nor can they easily engage in conflict management because of chronic difficulties with emotional management.”⁵⁷ As a result, they often act out their emotional pain through violence, which is corroborated by research linking sexual abuse and aggressive behavior.⁵⁸ These neurological underdevelopments show how a young abuse survivor’s toolbox for processing emotions and dealing with high-stress situations is limited compared to an adult or non-survivor’s toolbox. These brain changes do not necessarily transform youth into violent automatons, lashing out randomly against unsuspecting victims, resulting in preordained and fated murders; however, regardless of whether abuse functions as a “but-for” cause of a survivor’s pulling of a trigger or wielding of a knife, it certainly suggests that the strong neurological patterns associated with abuse negatively affect an individual’s ability to cope with stressful and dangerous situations.

C. THE VAST MAJORITY OF YOUTH THIS PROBLEM IMPLICATES ARE YOUTH THAT SOCIETY ALREADY NEGLECTS: YOUNG MEN OF COLOR FROM POOR COMMUNITIES

While girls and nonbinary children are more likely to experience sexual abuse than boys,⁵⁹ boys (those who primarily face murder charges) are sexually abused nationally at alarming rates ranging from 4% to 20%.⁶⁰ Boys who experience sexual abuse are frequently the most neglected boys facing the greatest

57. RICH ET AL., *supra* note 36, at 21–22.

58. *Id.*; Patricia K. Kerig, *Polyvictimization and Girls’ Involvement in the Juvenile Justice System: Investigating Gender-Differentiated Patterns of Risk, Recidivism, and Resilience*, 33 J. INTERPERSONAL VIOLENCE 789 (2018); Patricia K. Kerig & Stephen P. Becker, *Trauma and Girls’ Delinquency*, in DELINQUENT GIRLS: CONTEXT, RELATIONSHIPS, AND ADAPTION 119 (2012).

59. DARKNESS TO LIGHT (D2L), CHILD SEXUAL ABUSE STATISTICS 1, http://www.d2l.org/wp-content/uploads/2017/01/all_statistics_20150619.pdf, (last visited Nov. 24, 2021).

60. *Id.* (stating that one in twenty-five boys experience sexual abuse); *Facts and Stats About Child Sexual Abuse*, LAUREN’S KIDS, <https://laurenskids.org/awareness/about-faqs/facts-and-stats/> (last visited Nov. 24, 2021) (stating that one in five boys experience sexual abuse); *Child Sexual Abuse Statistics*, NAT’L CTR. FOR VICTIMS OF CRIMES, <https://victimsofcrime.org/child-sexual-abuse-statistics/> (last visited Nov. 24, 2021) (finding that 5% of boys are sexually abused while 5–10% of males self-report childhood sexual abuse as adults).

challenges both structurally and within their homes.⁶¹ Children who live outside of two-parent homes and/or within homes with frequent violence are sexually abused at higher rates than children living in two-parent homes free from violence.⁶² These correlations are unsurprising given that perpetrators report that they search for victims from unstable homes.⁶³

Children from the most marginalized and under-resourced communities also experience abuse at higher rates. Foster children are ten times more likely to experience sexual abuse,⁶⁴ while children from lower socioeconomic strata⁶⁵ and children with disabilities are three times more likely.⁶⁶ Boys of color in particular face higher rates of abuse.⁶⁷ African American boys have a substantiated rate of maltreatment nearly 250% that of white children.⁶⁸ Additionally, American Indian/Alaska Native youth and multi-racial youth are nearly twice as likely to be sexually abused as their white counterparts.⁶⁹

Juvenile LWOPers are also disproportionately children of color. Eighty percent of youth sentenced to life are youth of color, with over 50% identifying as African American.⁷⁰ In Alabama, Louisiana, Mississippi, and Virginia, over 80% of juvenile LWOPers are African American.⁷¹ Before Texas abolished juvenile life without parole, 100% of juveniles serving life

61. See NAT'L CTR. FOR VICTIMS OF CRIMES, *supra* note 60.

62. *Id.* (“Children who do not live with both parents as well as children living in homes marked by parental discord, divorce, or domestic violence have a higher risk of being sexually abused.”); DARKNESS TO LIGHT (D2L), *supra* note 59 (identifying foster status, single parenthood, and not living with both parents as risk factors for sexual abuse).

63. See DARKNESS TO LIGHT (D2L), *supra* note 59, at 4.

64. *Id.*

65. *Id.*

66. *Sexual Abuse*, DISABILITY JUSTICE, <https://disabilityjustice.org/sexual-abuse/#:~:text=People%20with%20disabilities%20are%20sexually%20rate%20of%20people%20without%20disabilities.&text=83%25%20of%20women%20with%20disabilities,sexually%20assaulted%20in%20their%20lives> (last visited Nov. 24, 2021).

67. RICH ET AL., *supra* note 36, at 45.

68. *Id.* at 50 (“African American children have a rate of substantiated maltreatment . . . nearly 2.5 times that for white children.”).

69. *Child Maltreatment*, CHILD TRENDS, <https://www.childtrends.org/indicators/child-maltreatment> (last visited Nov. 24, 2021).

70. THE SENTENCING PROJECT, YOUTH SENTENCED TO LIFE IMPRISONMENT 3 (Oct. 8, 2019), <https://www.sentencingproject.org/publications/youth-sentenced-life-imprisonment/>.

71. *Id.*

sentences were black.⁷² Additionally, the FBI reports that 74% of youth convicted of murder in North Carolina between 1994 and 2016 were black.⁷³

These rates are noteworthy because they show how these issues do not impact the U.S. population equally but more commonly affect communities who historically experience higher rates of poverty, incarceration, and trauma.

II. THE AVAILABILITY OF EVIDENCE OF SEXUAL TRAUMA DURING SENTENCING

Now that this Note has discussed how abuse impacts juveniles who murder, it will examine what happens to these juveniles during sentencing. Part II will analyze the extent to which this neurological research on trauma impacts youths' sentences. Just because this research on sexual trauma exists does not necessarily indicate that courts can legally use it, have access to it, or choose to incorporate it into their sentencing decisions.

A. WHAT JUDGES CONSIDER: A PUNITIVE SOCIAL CLIMATE, RESTRICTIVE STATE SENTENCING STATUTES, AND A HAZY SUPREME COURT DIRECTIVE

In the 1970's and 1980's, the national culture around the juvenile criminal legal system shifted from rehabilitative to punitive.⁷⁴ School shootings and widespread media messaging around juvenile "super-predators"⁷⁵ incited a moral panic and emboldened lawmakers to pass harsh juvenile sentencing

72. Ben Finholt et al., *Juvenile Life Without Parole in North Carolina*, 110 J. CRIM. L. & CRIMINOLOGY 141, 158 (2020).

73. *Id.* at 159.

74. Sara E. Fiorillo, *Mitigating After Miller: Legislative Considerations and Remedies for the Future of Juvenile Sentencing*, 93 B.U. L. REV. 2095, 2100–01 & n.33 (2013) (describing how fears of the "super-predator" led states to overwhelmingly enact policies "that 'adultified' juvenile offenders and focused on punitive, rather than rehabilitative, measures," which led to a rise in incarcerated juveniles and increasingly severe sentences); see Vincent Schiraldi, *Media Exaggerate Scope of Country's Juvenile Crime*, TAMPA BAY TIMES (Sept. 26, 2005), <https://www.tampabay.com/archive/2000/01/30/media-exaggerate-scope-of-country-s-juvenile-crime/> ("They're the predators out there. They're not children anymore. They're the most violent criminals on the face of the Earth" (quoting U.S. Representative Bill McCollum (R-Fla.))); see also *Kent v. United States*, 383 U.S. 541, 554–55 (1966) (explaining how the role of juvenile courts is to act in a parental capacity).

75. Fiorillo, *supra* note 74, at 2100.

laws.⁷⁶ Courts transitioned from a rehabilitative approach to juvenile sentencing towards a punitive approach, which treated children as smaller adults rather than beings in the process of maturing.⁷⁷

During this time period, many states passed harsh juvenile sentencing statutes which mandated lengthy minimum sentences for children.⁷⁸ These laws reflected state legislatures' general abhorrence for specific crimes and support for long criminal sentences.⁷⁹ By 1994, all states established at least one mandatory minimum sentencing law.⁸⁰ Some of these laws apply to juvenile crimes, while others apply to adult crimes, but nonetheless the laws are triggered when juveniles are tried and sentenced as adults.⁸¹ These laws form the bedrock of judges' ability to sentence. Even if a judge wants to impose a less lengthy sentence for a defendant with compelling mitigating circumstances, these laws bar that possibility.

In 2012, the Supreme Court issued a pivotal ruling that shifted the landscape for juvenile sentencing.⁸² It declared that “[t]he concept of proportionality [regarding punishment for crime] is central to the Eighth Amendment.”⁸³ This concept of proportionality is viewed “less through a historical prism than according to ‘the evolving standards of decency that mark the progress of a maturing society.’”⁸⁴ In *Miller v. Alabama*, the

76. Peter J. Benekos & Alida V. Merlo, *Juvenile Justice: The Legacy of Punitive Policy*, 6 YOUTH VIOLENCE & JUV. JUST. 28, 28 (2008) (“School shootings like those that were widely publicized in the 1997-98 academic year continue to garner headlines and to create fear that supports reactive policies.”); Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 FUTURE CHILD., no. 2, 2008, at 15, 15.

77. Fiorillo, *supra* note 74 at 2100–01. See generally Phil Edwards, *Why Babies in Medieval Paintings Look Like Ugly Old Men*, VOX (July 28, 2015), <https://www.vox.com/2015/7/8/8908825/ugly-medieval-babies>.

78. Alison Powers, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 251–54 (2009). See generally Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691 (2010) (outlining the history of sentencing in the American criminal legal system).

79. Powers, *supra* note 78, at 252.

80. *Id.*

81. See *id.* at 253.

82. *Miller v. Alabama*, 567 U.S. 460, 470, 489 (2012) (striking down all state laws that require an LWOP sentence for a juvenile).

83. *Id.* at 469.

84. *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

Supreme Court decided that the Eighth Amendment prohibits statutes which proscribe LWOP sentences for juveniles, and the Court later required resentencing or the institution of parole hearings for those sentenced to LWOP before the *Miller* decision.⁸⁵ Through *Miller* and its companion cases, the Supreme Court shielded children from facing death and lengthy terms of imprisonment,⁸⁶ while reflecting changing ideology in the United States about juvenile punishment and rehabilitation.⁸⁷ In *Miller*, the Supreme Court declared in dicta that juveniles deserve sentences that account for their: 1) lower capacity for decision making, and 2) dependency on negative influences such as family environment and abuse history, among other factors.⁸⁸ These considerations directly implicate the sexual abuse discussed in Part I.

85. *Montgomery v. Louisiana*, 577 U.S. 190, 212–13 (2016) (explaining that states can simply permit offenders to be considered for parole in order to comply with the new rule created by *Miller*).

86. *Miller*, 567 U.S. at 470, 489; *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (finding the juvenile death penalty unconstitutional); *Graham v. Florida*, 560 U.S. 48, 74–75 (2010) (declaring juvenile LWOP sentences for non-homicide crimes unconstitutional); JOSH ROVNER, THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW (last updated May 2021), <https://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf> (noting that a decline has occurred in the sentencing of juveniles to LWOP, although no exact statistic exists and that in a small fraction of cases juveniles with existing LWOP sentences were released post-*Montgomery*).

87. *Miller*, 567 U.S. 460; *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (finding the juvenile death penalty unconstitutional); *Graham v. Florida*, 560 U.S. 48, 74–75, 82 (2010) (declaring juvenile LWOP sentences for non-homicide crimes unconstitutional); ROVNER, *supra* note 86 (noting a decline in the sentencing of juveniles to LWOP, although no exact statistic exists and that in a small fraction of cases juveniles with existing LWOP sentences were released post-*Montgomery*); *see also* Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1789 (2016) (discussing the importance of *Miller* and the shift it made “in juvenile justice policy and practice.”).

88. *Miller*, 567 U.S. at 472, 476–79 (“[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender’s blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.” (internal citations and quotation marks omitted)).

Despite the pivotal shift *Miller* suggested, its directives have proven difficult for lower courts to implement.⁸⁹ While *Miller* requires that courts *consider* the *Miller* factors when sentencing juveniles, it does not require courts to weigh these factors efficaciously or in the context of sound scientific or sociological research.⁹⁰ *Miller* does not proscribe which studies a court should read, how courts should assess juveniles' home environments, whether courts should conduct psychological tests on juvenile defendants, or how to marry research to an individual's circumstances. No one mandates that defense attorneys introduce evidence related to the *Miller* factors or that judges attend trainings on *Miller*, so these factors are assessed in an ad hoc, inconsistent manner across fifty states with vastly different laws on juvenile sentencing.⁹¹

While *Miller* struck down state laws that *mandated* the imposition of an LWOP sentence, it did not remove judges' discretion to *choose* to sentence a juvenile to LWOP.⁹² Despite the *Miller* ruling, many courts across the United States still sentence juveniles to LWOP (or effectively the equivalent of LWOP).⁹³ Post-*Miller*, twenty-five states still allow LWOP sentences for juveniles,⁹⁴ because the *Miller* court did not prohibit juvenile LWOP sentences but rather prohibited sentencing statutes that *require* juvenile LWOP sentences for particular crimes.⁹⁵ Even when courts do not impose juvenile LWOP sentences, they frequently enforce lengthy sentences of

89. Drinan, *supra* note 87, at 1816–17.

90. Tiffani Darden, *Known Unknowns: Legislating for a Juvenile's Reformatory Uncertainty*, 97 NEB. L. REV. 334 (2018).

91. Ioana Tchoukleva, Note, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post Miller v. Alabama*, 4 CAL. L. REV. CIR. 92, 92–93 (2013) (explaining that state legislatures can “fashion rules that seemingly conform to . . . *Miller*” but nonetheless “juveniles can still be sentenced to . . . (LWOP) on a discretionary basis”).

92. *Id.*

93. See Mike Wiser, *Branstad Commutes Life Sentences for 38 Iowa Juvenile Murderers*, GAZETTE (July 16, 2012), <https://www.thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers> (describing how a governor commuted thirty-eight life sentences to terms of sixty years, effectively a life sentence for those offenders).

94. ROVNER, *supra* note 86, at 4.

95. *Id.* at 3.

several decades.⁹⁶ While wrinkling its nose at lengthy juvenile sentences, the *Miller* court did not entirely bar LWOP sentences or establish mandatory minimum sentences guiding courts towards more moderate sentence lengths.⁹⁷

Additionally, multiple states have mandatory or permissive transfer laws—established during the “tough on crime” period of the late twentieth century—which require or allow prosecutors to try juveniles as young as fourteen as adults.⁹⁸ When juveniles are tried as adults, the *Miller* protections no longer apply, which is effectively a pathway around the *Miller* mandates.⁹⁹ Pennsylvania, which holds the largest population of juvenile “lifers” in the country, requires that youth charged with murder face those charges in adult court and, upon conviction, receive LWOP sentences.¹⁰⁰ However, because this murder statute applies to adults and not to children, it does not technically violate *Miller*.

These sentencing laws often require judges to sentence juvenile defendants without consideration of their age or life circumstances,¹⁰¹ meaning that defendants cannot even introduce the evidence of their life circumstances that the Supreme Court recommended in *Miller*. Even the most radically rehabilitative judges cannot grant lenient sentences without the information to base those lenient sentences on. Mandatory transfer laws work against the inclusion of mitigating evidence by providing prosecutors with an opportunity to try juveniles

96. See, e.g., *United States v. Sparks*, 941 F.3d 748 (5th Cir. 2019) (upholding the thirty-five-year sentence of a gang member who had been molested between the ages of seven and nine, physically abused throughout his childhood, and suffered from PTSD (*Sparks v. United States*, No. W-99-CR-070-3, 2018 WL 1415775, at *6–7 (W.D. Tex. Mar. 19, 2018)); *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (holding that the lower court erred in sentencing the juvenile defendant to a sentence of 52.5 years, which though technically not an LWOP sentence, still prompted the need for the *Miller* sentencing guidelines); *People v. Gutierrez*, 58 Cal. 4th 1354, 1361, 1391–92 (2014) (remanding an LWOP sentence but sustaining the constitutionality of the California statute that allowed an LWOP sentence).

97. See *Miller v. Alabama*, 567 U.S. 460, 470 (2012).

98. *Scott & Steinberg*, *supra* note 76, at 17; see also *Kent v. United States*, 383 U.S. 541, 541 (1966) (establishing that juveniles can be transferred to adult courts).

99. See *Tchoukleva*, *supra* note 91, at 94, 99 (observing that 200,000 children are prosecuted in adult courts annually and that at the time *Miller* was decided 2,500 juveniles were sentenced to LWOP).

100. *NELLIS*, *supra* note 4, at 3.

101. *Id.*

under statutes that require or allow LWOP sentences *and* prohibiting judges from considering the mitigating evidence *Miller* recommends.¹⁰²

Further, juveniles who fear losing at trial often accept plea agreements rather than risking LWOP sentences.¹⁰³ When defendants accept plea agreements, they never have an opportunity to introduce mitigating evidence before a judge. For these youth, their sentences illuminate this bargaining process based on conviction and sentencing rates that may or may not reflect any mitigating circumstances.¹⁰⁴

Strong evidence exists that the imposition of juvenile LWOP sentences is not based on the findings of “moral culpability” the Supreme Court deemed necessary¹⁰⁵ but instead upon the state and county in which a crime occurs.¹⁰⁶ Nine states, including multiple with mandatory transfer statutes, impose over 80% of juvenile LWOP sentences nationwide.¹⁰⁷ Within these states, specific counties can account for a large proportion of juvenile LWOP sentences. For example, eleven of North Carolina’s one hundred counties account for 61% of juvenile LWOP sentences.¹⁰⁸ The District Attorney for the county of Mecklenberg sought LWOP in every single juvenile LWOP resentencing case,¹⁰⁹ despite the Supreme Court’s instruction that judges should impose juvenile LWOP infrequently and only when the defendant exhibits “irreparable corruption.”¹¹⁰

102. *See id* at 6.

103. *See* Finholt et al., *supra* note 72, at 157–58.

104. *Id.*

105. *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

106. *See* Finholt et al., *supra* note 72, at 144–45.

107. *Id.* at 145 & n.17 (listing California, Florida, Illinois, Louisiana, Michigan, Mississippi, Missouri, North Carolina, and Pennsylvania).

108. *Id.* at 160.

109. *Id.* at 167.

110. *Miller*, 567 U.S. at 479–80 (“[A]ppropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”); *see also* *United States v. Briones*, 929 F.3d 1057 (9th Cir. 2019) (“The district court’s statement that it considered some factors in ‘mitigation’ suggests that the district court applied the Guidelines and began with a presumption that LWOP would be appropriate. As we have explained, however, a sentencing court may not presume the propriety of a Guidelines sentence, particularly in juvenile LWOP cases after *Miller*.” (internal citation omitted)).

B. MITIGATING EVIDENCE IS OFTEN UNAVAILABLE TO JUDGES
DUE TO LACK OF RESEARCH AND FUNDING FOR PSYCHOLOGICAL
EVALUATIONS

Even when mandatory transfer laws and high mandatory minimums do not apply to juvenile LWOP defendants, the necessary psychological evaluations and applicable research prove costly, unavailable, and difficult to assess; therefore, mitigating evidence often goes unconsidered.¹¹¹ Researchers wonder to what extent judges have the necessary training to properly read scientific evidence, assess its efficacy, and weigh its impact appropriately.¹¹² Judges could have robust training in research methodology, statistics, and the scientific method, or no training at all.¹¹³ Further, if judges have questions regarding the validity of scientific evidence, the courts generally lack the resources to determine its efficacy.¹¹⁴ Even if the courts had the legislative green light to consider research and clinical evaluations, faced no procedural red tape to integrating it into their sentencing decisions, and were properly influenced by mitigating evidence of trauma and child abuse, without proper

111. See Philip C. O'Donnell, *The Role of Psychosocial Risk Factors and Mental Health Needs in Juvenile Sentencing Decisions* 105 (Aug. 2007) (unpublished Ph.D. dissertation, Loyola University Chicago) (on file with ProQuest) (evaluating the extent to which judges weigh clinical evaluations when sentencing juveniles).

112. Colleen M. Berryessa, *Potential Impact of Research on Adolescent Development on Juvenile Judge Decision-Making*, 69 JUV. & FAM. CT. J., no. 3, 2018, at 19, 21 (discussing researchers' concerns that judges cannot weigh scientific data; "[T]here are concerns that judges may not be able to understand the weight and importance of such research and how it actually relates to demonstrated behavior when using such information in their decision-making; this could lead to disparate case outcomes even when the presented research is similar in cases."); Paul C. Giannelli, *Forensic Science: Daubert's Failure*, 68 CASE W. RES. L. REV. 869, 937 (2018) ("[T]he judiciary's failure to fulfill its gatekeeper role can be traced back to its refusal to demand and properly evaluate foundational research."); see David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional, and Rhetorical—and Not Just the Methodological—Aspects of Science*, 45 B.C. L. REV. 1, 35–37 (2003) (explaining the risk of complete deference to scientific evidence and the risk of unnecessary and unfounded critiques of evidence); Owen D. Jones et al., *Neuroscientists in Court*, 14 NATURE REV. NEUROSCIENCE 730, 733–34 (2013) (asserting that the structural differences between neurological inquiries and legal inquiries make it difficult for judges and lawyers to utilize neurological evidence).

113. See Berryessa, *supra* note 112.

114. See Giannelli, *supra* note 112, at 939 ("Only the federal government has the resources to fund the needed independent research.").

scientific evidence and the knowledge of how to weigh it, the guidance provided by *Miller* proves effectively useless.

Even when judges have the statutory capacity to consider mitigating evidence of trauma and child abuse, judges can only consider those resources if they have access to them.¹¹⁵ Reports indicate that “a substantial proportion of [juveniles] never undergo a comprehensive psychological evaluation [prior to sentencing] because of a lack of time, resources, and effective screening tools.”¹¹⁶ Researchers have questioned and critiqued the legal system’s referral process for clinical evaluations and the validity of those evaluations when they do occur.¹¹⁷ When judges attempt to order psychological testing or referral to a psychiatric placement rather than incarceration, the legal system often lacks the funding to fulfill those requests.¹¹⁸ As one commentator noted, relying on work by Jenny Carrol, an expert in juvenile criminal law: “[L]ocating a neuroscientist or psychologist with specialized understanding of the behavioral implications of childhood sexual abuse is a daunting [and expensive] task.”¹¹⁹ While findings indicate that judges may feel swayed by clinical recommendations and psychological research, without that research or those recommendations, even the most passionately trauma-focused judges cannot consider such evidence.¹²⁰ The *Miller* court asked that judges consider scientific evidence about youth psychology and neuroscience

115. See O’Donnell, *supra* note 111, at 105 (discussing the large number of youths that do not receive a psychological evaluation).

116. *Id.*

117. See, e.g., *id.* (discussing the lack of psychological examinations that are administered and questioning whether the information used for decisions is valid).

118. *Id.* at 104–05.

119. Marjory Anne Henderson Marquardt, *Fallacious Reasoning: Revisiting the Roper Trilogy in Light of the Sexual-Abuse-to-Prison Pipeline*, 72 STAN. L. REV. 749, 781 (2020) (citing Jenny E. Carroll, *The Problem with Inference and Juvenile Defendants*, 45 FLA. ST. U. L. REV. 1, 52 (2017) (“In many jurisdictions, the prospect of locating an expert and persuading her to testify may be a daunting proposition. Not only may the neuroscientist not be available in the community . . . , but funds for the expert may not be available, particularly for indigent defendants.”)).

120. See Richard E. Redding & Kirsten Brooke Hensel, *Knowledgeable Judges Make a Difference: Judicial Beliefs Affect Juvenile Court Transfer Decisions*, 62 JUV. & FAM. CT. J. 15, 21 (2011) (studying how judicial beliefs about transfers, and the availability of research findings on the counter-deterrent effects of transfer, influence judges’ transfer decisions).

when sentencing but failed to effectively hammer out the mechanics.¹²¹

A juvenile with an abuse history and a murder charge faces multiple hurdles to the proper introduction of evidence of that trauma. That juvenile could enter a courtroom in a state in which a mandatory transfer law propels them into adult court, or they could remain in a juvenile courtroom.¹²² Their defense attorney could introduce evidence at the sentencing stage related to their past abuse, or they could fail to include that evidence.¹²³ Additionally, the juvenile's court could have the resources to conduct a psychological evaluation, or it could lack those resources.¹²⁴ The statute under which that juvenile faces charges could establish a strict, lengthy minimum sentence, or no minimum sentence at all.¹²⁵ Their judge could be well-versed in sound sociological and neurological research on trauma, or unexposed to any research whatsoever.¹²⁶ That judge could be profoundly influenced by mitigating evidence, or find it unrelated to the matter at hand.¹²⁷ Furthermore, the judge could experience profound uncertainty, stuck between sentencing norms, state laws allowing for lengthy sentences, and a Supreme Court directive compelling them to engage in trauma-informed sentencing but providing few concrete metrics to guide them.

121. See *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (“[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”).

122. See Tchoukleva, *supra* note 91, at 94 & n.7 (identifying “statutory exclusion laws”—“which require that charges against juveniles be filed in adult court based solely on the nature of the offense”—as one of the primary methods by which juveniles are tried as adults).

123. See O'Donnell, *supra* note 111, at 50 (“[C]linicians evaluate juveniles after a formal finding of guilt, but prior to sentencing or when an initial sentence must be modified Any party involved in the proceedings can request a clinical evaluation . . .”).

124. *Id.* at 105.

125. See Benekos & Merlo, *supra* note 76, at 42–43 (discussing the differences in state juvenile sentencing standards).

126. See Berryessa, *supra* note 112, at 21 (discussing the possibility of some juvenile judges being exposed to research on trauma and the chances judges in general are influenced by such research).

127. *Id.*

III. COURTS SHOULD CONSIDER CHILD ABUSE AS A MITIGATING FACTOR WHEN SENTENCING JUVENILES FOR MURDER

This Note argues that courts should weigh child abuse as a mitigating factor when sentencing juveniles. Mitigation is not an excuse but rather judicial leniency granted when the defendant in question “deserve[s] less punishment than a typical offender.”¹²⁸ Because of the *Miller* directive, and based on both major philosophies of punishment, the imposition of LWOP and even lengthy decades-long sentences proves immoral and ineffective.

A. THE SUPREME COURT SET THE LEGAL PRECEDENT THAT CHILDREN’S TRAUMA HISTORIES DESERVE CONSIDERATION AT SENTENCING AND AFFIRMED THAT CHILDREN ARE NEUROLOGICALLY DIFFERENT

As discussed in Part II, through *Miller* the Supreme Court indicated a shift in juvenile sentencing practices from punitive to rehabilitative, and from offense-focused to individual defendant-focused.¹²⁹ Because the Supreme Court included its guidelines for sentencing juveniles in dicta, it is lawful for judges to neglect to consider mitigating evidence of brain development or trauma histories; however, it would be legally consistent with the philosophy of juvenile criminal law that the Supreme Court signaled in *Miller* for judges to deny transfer requests from prosecutors and try juveniles as juveniles whenever possible.¹³⁰ A more holistic sentencing approach would certainly not violate the law and would keep lower courts moving in the same direction as the highest court in the land.¹³¹

Notably, the Court established multiple factors courts should consider when sentencing juveniles, including their: 1) lower capacity for decision making; and 2) familial and life circumstances.¹³² The Court referenced numerous neurological,

128. Scott & Steinberg, *supra* note 76, at 19.

129. See *supra* Part II.A; see also Drinan, *supra* note 87, at 1789 (“*Miller* was a revolutionary decision and . . . it portends a tremendous shift in juvenile justice policy and practice.”).

130. See *Miller v. Alabama*, 567 U.S. 460, 472 (2012) (discussing, in dicta, the additional factors that should be considered in juvenile sentencing).

131. See Drinan, *supra* note 87, at 1827–28 (arguing for the adoption of youth as a mitigating factor).

132. *Miller*, 567 U.S. at 472, 477.

psychiatric, and medical sources that show a recognition of children as growing, evolving beings with fundamental cognitive differences from adults, which shield them from culpability as fully matured adults.¹³³ Multiple scholars have questioned the logical consistency and constitutionality of imposing LWOP sentences on juveniles through permissive juvenile LWOP statutes or through transfer laws post-*Miller*.¹³⁴ Trial judges eschew *Miller* when they fail to consider relevant mitigating evidence or do not weigh it effectively. From a legal perspective, courts should truly follow the Supreme Court's lead—and *Miller* dicta—integrating the *Miller* factors into their sentencing decisions.

State legislatures have also indicated a shift away from punitive sentencing and ignoring the circumstances of the defendant.¹³⁵ Multiple states have reduced recommended juvenile sentences or abolished punitive juvenile justice laws.¹³⁶ For example, Connecticut eliminated juvenile transfer laws and Colorado repealed all laws allowing for juvenile LWOP sentences.¹³⁷ These states' tinkering with their juvenile justice statutes represents a recognition that punitive policies may not serve society's interests. In addition to the Supreme Court's indication of support for shorter juvenile sentences and Congress's repositioning of the purposes of juvenile sentencing,

133. *Id.*; see also *Roper v. Simmons*, 543 U.S. 551, 566 (2005) (discussing the slow movement away from the juvenile death penalty); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (discussing why a juvenile's actions cannot be as morally reprehensible as an adult's).

134. See Tchoukleva, *supra* note 91, at 93 (“[S]tates are free to fashion rules that seemingly conform to the decision in *Miller* while undermining its reasoning and end goals.”); Drinan, *supra* note 87, at 1818 (“Of the 13 states that have passed legislation in response to *Miller*, nine still permit juvenile LWOP, and none set[s] an alternative minimum sentence at less than 25 years.”); see also NELLIS, *supra* note 4, at 30 (“The Supreme Court is now taking up the issue again and will soon consider the constitutionality of applying [juvenile] [LWOP] sentences to very young offenders convicted of homicide in situations where the sentence was mandatorily applied as well as situations where the convicted offender was not the principal actor.”).

135. See Scott & Steinberg, *supra* note 76, at 28–29 (discussing the recent trend away from punitive juvenile sentencing).

136. *Id.*

137. *Id.* at 29.

the public has likewise indicated support for rehabilitative sentences that account for children's youth.¹³⁸

B. UNDER THE RETRIBUTIVE THEORY OF PUNISHMENT,
SENTENCING CHILDREN WITH TRAUMA HISTORIES TO LENGTHY
SENTENCES IS MORALLY QUESTIONABLE

From the dawn of the American legal system through the end of the nineteenth century, the courts primarily sentenced under a retributivist model, dishing out each defendant's "just deserts": an eye for an eye and a life for a life, with each defendant's sentence reflecting their relative blameworthiness.¹³⁹ For example, a murder committed while someone sleepwalked would not deserve the death penalty or long imprisonment because the defendant did not consciously intend to murder anyone and therefore deserved a more lenient punishment.¹⁴⁰ In contrast, someone who knowingly and maliciously takes the life of another would deserve the death penalty.¹⁴¹

The advent of neurolaw in the late twentieth century called into question commonly held assumptions about culpability.¹⁴² Neurodeterminism, a theory promulgated by Joshua Greene and Jonathan Cohen, holds that individuals' actions and behaviors are caused by neural processes rather than free will.¹⁴³ Under

138. See Riane M. Bolin et al., *Americans' Opinions on Juvenile Justice: Preferred Aims, Beliefs About Juveniles, and Blended Sentencing*, 67 CRIME & DELINQ. 262, 264–65 (2021) (explaining that most people see rehabilitation as the main goal of the criminal legal system, but also support punitive measures to deter juveniles).

139. See Gertner, *supra* note 78, 692–94 (discussing the use of retributive justice in colonial courts through the end of the 18th century); Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 398–99 (1979) (defining and explaining retributivism).

140. See *King v. Cogdon* (Vict. 1950) (Austl.) (finding a mother not guilty for murdering her daughter while sleepwalking), *quoted in* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 229–30 (2017).

141. See Pugsley, *supra* note 139, at 399 (explaining how punishment is determined under a retributivist theory of punishment).

142. Azim F. Shariff et al., *Free Will and Punishment: A Mechanistic View of Human Nature Reduces Retribution*, 25 PSYCH. SCI. 1563, 1563–68 (2014) (finding that learning about neural bases of human behavior reduced people's support for retributive punishment).

143. See Iskra Fileva & Jonathan Tresan, *Will Retributivism Die and Will Neuroscience Kill It?* 34–35 COGNITIVE SYS. RSCH. 54, 55–56 (2015).

this philosophy, the legal system's entire approach to distributing justice based on accountability is inherently flawed:

Following the logic of Greene and Cohen, the harm-producing forces of cause and effect can be seen to pass through the wrongdoer's sensory, neural and motor systems in much the same way that, on a simpler level, the electrical force of lightning can pass through a tree, shattering a branch which then falls on a person sheltering beneath. No one would blame the tree just because a causal chain of destructive forces happened to pass through it. And so, one may ask, why should we blame a person who is unlucky enough to become a conduit for a causal chain of harm-producing forces that originated elsewhere?¹⁴⁴

On the other side of the debate sits Stephen Morse, a neuro-skeptic, who holds that neuroscientific developments do not dispel the existence of the mind or free will.¹⁴⁵ Professor Morse explains that the legal system does not require the defendant's actions to fall under their control, only that they committed the crime with the requisite knowledge of their actions.¹⁴⁶ Therefore, a child with a trauma history who experiences a "fight or flight" reaction and pulls the trigger is still culpable even if their actions were predetermined by their brain chemistry, because they pulled the trigger with the knowledge that gunshots can cause death. Greene and Cohen decry this approach as "folk psychology" embedded in society's misconceptions of free will within a deterministic world.¹⁴⁷

Professor Morse poses that "[d]espite the astonishing advances in neuroimaging and other neuroscientific methods," the legal system still lacks the "sophisticated causal knowledge of how the brain enables the mind . . ."¹⁴⁸ While Greene and Cohen interpret existing evidence as pointing towards a deterministic brain, Morse argues against altering the legal

144. John A. Humbach, *Neuroscience, Justice and the "Mental Causation" Fallacy*, 11 WASH. U. JURIS. REV. 191, 210–11 (2019); see also Adam J. Kolber, *Will There Be a Neurolaw Revolution?*, 89 IND. L.J. 807, 809 (2014) ("If we are mechanisms—like clocks that tick but have no moral agency—we arguably cannot be responsible at all.").

145. Stephen J. Morse, *Law, Responsibility, and the Sciences of the Brain/Mind*, in THE OXFORD HANDBOOK OF LAW, REGULATION AND TECHNOLOGY 153, 155, 167–69 (Roger Brownsword et. al. eds., 2017).

146. Humbach, *supra* note 144, at 208–09 (discussing Professor Morse's "neuroskepticism").

147. Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 1775, 1782–83 (2004).

148. Morse, *supra* note 145, at 164.

system without understanding more about “brain-mind and brain-mind-action connections.”¹⁴⁹

The field of neurolaw has also examined juvenile neurological research specifically. Given developments in neurologists’ understanding of brain development, many neurolaw experts are calling for an end to mandatory transfer laws.¹⁵⁰ Scholars argue that while much about the brain remains unknown, “[t]he scientific research on brain development is sufficiently compelling . . . to require us to reconsider our views on juvenile punishment as it is morally wrong and scientifically unsound to hold juveniles to the same degree of responsibility as adults who commit similar offen[s]es.”¹⁵¹

Under Greene and Cohen’s philosophical approach, juveniles with abuse histories who murder, along with most criminals, would not be culpable for their actions.¹⁵² Children have no control over whether they face abuse, and whether that abuse re-sculpts their growing brains in ways that make them more likely to make rash decisions, distrust others, and murder.¹⁵³ The fault does not lie with the juvenile but rather with their biology and their abusers’ decisions. Juveniles do not make a conscious choice to grow an unfortunate genotype but rather display its impact unknowingly. Under the retributivist sentencing theory, it appears morally problematic to sentence juveniles with abuse histories to lengthy sentences because they had no control over the circumstances that led to their brain chemistry that encouraged them to pull the trigger.¹⁵⁴

Applying Stephen Morse’s neuro-skeptic framework to the same issue, a slightly different but compatible result emerges.¹⁵⁵

149. Humbach, *supra* note 144, at 203 (quoting Professor Morse).

150. *See, e.g.*, Greene & Cohen, *supra* note 147.

151. KATHERINE H. FEDERLE & PAUL SKENDELAS, THINKING LIKE A CHILD: LEGAL IMPLICATIONS OF RECENT DEVELOPMENTS IN BRAIN RESEARCH FOR JUVENILE OFFENDERS, in *LAW, MIND AND BRAIN* 199, 213–14 (2009); *see also* Francis X. Shen, *Legislating Neuroscience: The Case of Juvenile Justice*, 46 *LOY. L.A. L. REV.* 985, 1003–04 (2013) (discussing that, while courts have generally declined to consider neurolaw evidence, multiple state and local legislatures have begun discussing neuroscience in the context of juvenile justice, resulting in variety of related bills); Francis X. Shen, *Neurolegislation: How U.S. Legislators Are Using Brain Science*, 29 *HARV. J.L. & TECH.* 495, 514 & fig.2 (2016).

152. *See supra* Part I.B.

153. *See id.*

154. *See id.*

155. *See generally* Morse, *supra* note 145.

Stephen Morse would likely assert that juveniles with abuse histories who murder are still responsible for their actions because some amount of free will and moral cognition of their wrongdoing existed when they acted.¹⁵⁶ However, the *Miller* framework of mitigation is not inconsistent with neuro-skeptics' position. Under *Miller* juveniles remain legally culpable for their crimes, but the neurological impact of their trauma history serves as mitigating evidence at sentencing given the severity of the risk factor of sexual trauma. This model is therefore consistent, if not directly compatible with, a neuro-skeptic's position.¹⁵⁷

Ultimately, neurolaw and *Miller's* promise of mitigation for familial and psychological circumstances threaten to burst the foundation of the criminal legal system apart.¹⁵⁸ If everyone is a victim of their circumstances and brain chemistry, can anyone be culpable for the crimes they commit? If trauma and abuse histories serve as mitigating evidence, should most defendants receive reduced sentences? While this author would argue that most incarcerated people deserve increased psychological treatment and reduced sentences, this Note specifically focuses on juvenile abuse survivors who serve as an illustrative example of the larger issue of the connection between trauma and criminal legal involvement.

C. UNDER A UTILITARIAN THEORY OF PUNISHMENT, INCARCERATING JUVENILE ABUSE SURVIVORS FOR DECADES SERVES LITTLE PURPOSE

Under the Utilitarian theory of punishment, the needs of society determine a defendant's punishment.¹⁵⁹ Under a pure utilitarian approach, if a defendant showed no chance of recidivism, they need not face punishment at all.¹⁶⁰ Alternatively, a defendant brought in on minor jaywalking charges who the court knew would murder hundreds upon their release should remain incarcerated.¹⁶¹ Based on this theory,

156. *See id.*

157. *See id.*

158. Kolber, *supra* note 144, at 808.

159. Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 567 (2003).

160. *See id.* at 590–91 (discussing utilitarianism and criminal history).

161. *See id.*

incapacitating juvenile murder defendants is only morally correct until they pose a diminished threat to society.¹⁶²

Because juvenile murder defendants, particularly those with trauma histories, show potential for rehabilitation, long-term incarceration appears ineffective and morally questionable under this theory.¹⁶³ Generally, youth are more responsive to rehabilitation and treatment than older people, meaning juvenile LWOPers as a class are likely more receptive to rehabilitation than older incarcerated people.¹⁶⁴ Additionally, as years in prison pass, juvenile LWOPers receive fewer disciplinary infractions,¹⁶⁵ suggesting a reduction in violent behaviors. This pattern is noteworthy as disciplinary records strongly predict recidivism.¹⁶⁶

A significant body of research demonstrates how community programming within schools and juvenile detention centers can reduce juvenile crime.¹⁶⁷ Robert Zagar, an influential criminologist, conducted a study identifying high-risk youth in Chicago, many with trauma histories, with a greater likelihood of committing murders.¹⁶⁸ When he provided a subset of hundreds of these youth with interventions in the forms of counseling, education, and programming, the murder rate within this group fell by 47% compared to those who did not participate in the program.¹⁶⁹ Additionally, studies have suggested that nurse home visiting programs can reduce the rate

162. *See id.*

163. Irving R. Kaufman, *Sentencing: The Judge's Problem*, ATLANTIC MONTHLY, Jan. 1960 [<https://web.archive.org/web/20170910220243/https://www.theatlantic.com/past/docs/unbound/flashbks/death/kaufman.htm>]. *See generally* O'Donnell, *supra* note 111 (explaining the effectiveness of individual, group, and family therapy, community-based treatments, and mentorship).

164. *See* O'Donnell, *supra* note 111, at 7–8.

165. NELLIS, *supra* note 4, at 4.

166. Colby Lynne Valentine, *Unraveling the Age, Prison Misconduct, and Recidivism Relationship*, 170 (2012) (Ph.D dissertation, Florida State University College of Criminology and Criminal Justice).

167. Scott & Steinberg, *supra* note 76, at 27 (“A substantial body of research over past fifteen years . . . show[s] that many juvenile programs, in both community and institutional settings, can substantially reduce crime . . . by 20–30 percent.”).

168. Robert Zagar et al., *Delinquency Best Treatments: How to Divert Youths from Violence While Saving Lives and Detention Costs*, 31 BEHAVIORAL SCI. & L. 381, 384 (2013) (reporting a recidivism rate of 12% within treatment programs by psychologist Mark Lipsey); *see* GARBARINO, *supra* note 45, at 10.

169. GARBARINO, *supra* note 45, at 10.

of substantiated child abuse and neglect by 50%.¹⁷⁰ While this rehabilitation occurred before any potential crimes, it reflects the malleability and potential for change among high-risk youth from under-resourced communities. Further, researchers have found that the risk of recidivism increases with longer sentences,¹⁷¹ showing that shorter sentences could serve a utilitarian purpose better than lengthy sentences or LWOP sentences.¹⁷²

Additionally, violent offenders incarcerated for crimes like homicide recidivate at lower rates than nonviolent offenders.¹⁷³ Studies of recidivism rates nationwide and in specific states have shown that homicide offenders recidivate at a lower rate than offenders of almost any other serious crime.¹⁷⁴ In a twenty-year study of released murderers in California, only 1% were arrested for new crimes, none for murder.¹⁷⁵ Multiple studies have confirmed that a released homicide offender has a 1% chance of ever killing again.¹⁷⁶ This research indicates that

170. Janet Currie & Erdal Tekin, *Understanding the Cycle: Childhood Maltreatment and Future Crime*, 47 J. HUM. RES. 509, 535 (2012) (citing Olds et al., *Prenatal and Infancy Home Visitation by Nurses: Recent Findings*, 9 FUTURE CHILD., no. 1, 1999, at 44).

171. See, e.g., Thomas Orsagh & Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. QUANTITATIVE CRIMINOLOGY 155, 167 (1988) (“For some offense classes, recidivism rates will be reduced by shortening the period of confinement.”).

172. See *id.* (“As the sentence becomes longer, expected legitimate earnings and employment opportunities decrease because of the loss of contact with the job market, expected earnings and employment in illegitimate activity increase . . . , and the distaste or unwillingness to engage in 8 hours per day, 5 days per week work activity increases as one becomes accustomed to the inactivity of prison life. All of these effects enhance post[-]prison criminal propensities.”).

173. See Marieke Liem, *Homicide Offender Recidivism: A Review of the Literature*, 18 AGGRESSION & VIOLENT BEHAV. 19, 21 (2013); see also WASHINGTON STATE SENTENCING GUIDELINES COMMISSION, RECIDIVISM OF ADULT FELONS: 2007, at 2 tbl.2 (Apr. 2008), https://www.cfc.wa.gov/PublicationSentencing/Recidivism/Adult_Recidivism_FY2007.pdf.

174. Liem, *supra* note 173.

175. Stephanie Slifer, *Once a Criminal, Always a Criminal?*, CBS NEWS (Apr. 23, 2014), <https://www.cbsnews.com/news/once-a-criminal-always-a-criminal/>.

176. Dana Goldstein, *The Misleading Math of ‘Recidivism’*, MARSHALL PROJECT (Dec. 4, 2014), <https://www.themarshallproject.org/2014/12/04/the-misleading-math-of-recidivism> (citing PATRICK A LANGAN ET AL., U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 (June 2002), <https://bjs.ojp.gov/content/pub/pdf/rpr94.pdf>).

regardless of the rehabilitative potential of each juvenile LWOPer, their chances of re-offending as a group are statistically quite low,¹⁷⁷ indicating that lengthy sentences serve little utilitarian purpose for juvenile LWOPers.

Separate from any concern for these juveniles themselves, shorter sentences and earlier public health interventions would serve society's financial and safety interests better than lengthy incarceration.¹⁷⁸ Studies have shown rehabilitative potential for juveniles with abuse histories who engage in violence; however, not all of them have access to the educational programming, counseling, and community-based interventions that prove effective at diminishing violent behavior.¹⁷⁹ Scholars estimate that "crime induced by maltreatment" costs society between \$6.4 and \$55 billion yearly,¹⁸⁰ costs which legislatures could proactively funnel into the community-based interventions discussed above. By funding earlier interventions, society could be spared emotional costs of loss of life and financial costs of adjudication and lengthy incarceration.¹⁸¹

IV. CONCLUSION

Currently, about 2,500 individuals sit behind bars who received LWOP sentences as children,¹⁸² yet the proportion of these individuals with abuse histories experienced increased societal and neurological barriers to peacefully integrating into society.¹⁸³ This abuse should mitigate their sentences based on both prominent theories of punishment and the legal rationale behind the Supreme Court's *Miller* decision; however, due to mandatory transfer laws and lack of funding, this mitigating evidence often remains unheard.¹⁸⁴ A disparity exists between the values the Supreme Court has espoused regarding juvenile sentencing and the way those values are implemented by trial courts at sentencing.¹⁸⁵

177. *Id.*

178. O'Donnell, *supra* note 111; see NELLIS, *supra* note 4, at 2–4.

179. NELLIS, *supra* note 4, at 4.

180. Currie & Tekin, *supra* note 170, at 535.

181. Zagar, *supra* note 168, at 381.

182. HUMAN RIGHTS WATCH, *supra* note 1.

183. *See supra* Part I.B.

184. *See supra* Part II.A.

185. *See supra* Part II.A.

Earlier interventions must exist to treat these children before they murder. Without a shift in the current system, children with abuse histories will continue to engage in violence, harm victims and their families, and be funneled into a costly system designed to punish rather than heal.

This Note prompts a broader question: to what degree do circumstances outside of individuals' control impact whether they commit crimes? Do these circumstances change their culpability? While sexual abuse represents one of the stronger correlations between a trauma and later criminality, that association holds true for childhood poverty, child neglect, parental incarceration, and witnessing violence, among other traumas. How should our legislatures, courts, and society reckon with the emerging neurological data on trauma given the difficulty of assessing causality? This Note unfortunately does not provide an answer to those questions but urges us all to begin asking them.