RECOGNIZING SIGNIFICANT ENVIRONMENTAL DEPRIVATION AS A MITIGATING FACTOR IN THE FEDERAL SENTENCING SYSTEM:

Some Lessons from Commonwealth Jurisdictions

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Abstract

The environment in which an individual lives inevitably influences the life they lead. Although many social scientists, legal scholars, and judges accept that severe environmental deprivation can reduce culpability for criminal offending, sentencing outcomes in the federal system often fail to reflect this. This occurs because deprivation is not consistently recognized as a mitigating factor in non-capital cases.

Over the past fifty years, scholars have mounted a sustained effort to develop a mitigating factor that recognizes environmental deprivation experienced by defendants. On the whole, these efforts have been unsuccessful at the federal level, and have failed to gain traction among courts or legislatures. Somewhat surprisingly, none of the voluminous scholarship looks beyond the United States. This is unfortunate.

Over the past two decades, legislatures and courts in Canada, Australia, and New Zealand have successfully developed the mitigating factor that scholars have long been seeking. Each of these jurisdictions has developed a regime for obtaining valuable information about a defendant's background and presenting it to the sentencing judge. If the judge considers that the defendant's experience of severe environmental deprivation reduced their culpability, their sentence will be reduced accordingly.

The experiences of these Commonwealth jurisdictions are instructive and may help pave the way toward judicial or legislative recognition of severe environmental deprivation as a mitigating factor in the United States. Observing it operating successfully overseas may provide legitimacy to this mitigating factor and also assuage concerns that it might open the floodgates or undermine the criminal justice system.

With reference to the experiences in these Commonwealth jurisdictions, this article proposes a framework for obtaining information about a defendant's background and provides a legally defined standard for determining when a sentencing reduction will be appropriate.

About the Author

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Introduction

The environment in which an individual lives inevitably influences the life they lead. Although many social scientists, legal scholars, and judges accept that severe environmental deprivation can reduce culpability for criminal offenses, sentencing outcomes often fail to reflect this. In the federal sentencing system, severe environmental deprivation is not consistently recognized as a mitigating factor in non-capital cases. This leads to sentences that fail to adequately recognize the culpability of the defendant. At the same time, it has created a doctrinally incoherent system that produces inconsistent sentencing outcomes.

Over the past fifty years, scholars have mounted a sustained effort to develop a mitigating factor that recognizes environmental deprivation experienced by defendants. Some of the proposed formulations include: physical and sexual abuse,[1] trauma,[2] adverse childhood experiences,[3] severe environmental deprivation,[4] and rotten social background.[5] These efforts have been largely unsuccessful and have failed to gain traction among courts or legislatures.[6]

Surprisingly, none of the voluminous scholarship looks beyond the United States. This is unfortunate, as several comparable jurisdictions have successfully developed the mitigating factor that scholars have long been seeking. Over the past two decades, legislatures and courts in Canada, Australia, and New Zealand[7] have developed a regime for obtaining valuable information about a defendant's background and presenting it to the sentencing judge. If the judge considers that the defendant's experience of severe environmental deprivation reduced their culpability, their sentence will be reduced accordingly.

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1. Mirko Bagaric, Gabrielle Wolf & Peter Isham, *Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse*, 30 Stan. L. & Pol'y Rev. 1, 41 (2019) [hereinafter Bagaric and others, *Trauma and Sentencing*].
2. Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 Am. J. Crim. L. 1 (2018) [hereinafter Gohara, *Defense of the Injured*].
3. Kristen M. Kinneary, *Normalizing the Consideration of Adverse Childhood Experiences in Federal Sentencing Determinations*, eRepository Seton Hall Univ. (2022) https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2286&context=student_scholarship.
4. Emad H. Atiq & Erin L. Miller, *The Limits of Law in the Evaluation of Mitigating Evidence*, 45 Am. J. Crim. L. 167 (2018).
5. Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 Law & Ineq. 9 (1985) [hereinafter Delgado, *Rotten Social Background*].
6. Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 Ala. Civ. Rts. & Civ. Liberties L. Rev. 80 (2011); Elisabeth W. Lambert, *A Way Out of the "Rotten Social Background" Stalemate: "Scarcity" and Stephen Morse's Proposed Generic Partial Excuse*, 21 Univ. Pa. J. L. & Soc. Change 297 (2018).
7. This paper refers to these jurisdictions collectively as the "Commonwealth jurisdictions."

The experiences of these Commonwealth jurisdictions are instructive and may help pave the way towards judicial or legislative recognition of severe environmental deprivation as a mitigating factor in the United States. Observing it operating successfully overseas may provide some legitimacy to this mitigating factor and also assuage concerns that it might open the floodgates or undermine the criminal justice system.

This article begins by exploring the rich literature about the impact of deprivation on neurological and social development. While only scratching the surface, it presents the widely accepted proposition that severe environmental deprivation can reduce culpability for criminal offending. Next, it reviews the legal landscape in the United States and concludes that the current state of the federal sentencing law permits courts to recognize severe environmental deprivation as a mitigating factor. It then addresses the more difficult question: how? Two essential components are identified and addressed. First, information of the defendant's deprivation must be obtained and brought before the sentencing judge. Second, a clearly articulated legal standard must inform the sentencing judge whether a sentencing reduction is appropriate.

Learning from the experiences of the Commonwealth jurisdictions, this article concludes by sketching out how this might look in the federal sentencing system. The proposal can be summarized as follows:

> If the sentencing judge has a reasonable basis to believe that the defendant has a history of deprivation which is not adequately recorded in the pre-sentence report, they may order a "study of the defendant" pursuant to Rule 32(d)(2)(A) of the Federal Rules of Criminal Procedure. This study will be conducted by a qualified member of the defendant's community who will interview the defendant and provide a report canvassing the defendant's personal and inter-generational background. It will also explain how any experiences of deprivation may have affected their life and informed their culpability for the offending. Equipped with this information, the judge will grant a sentencing reduction if the defendant experienced severe environmental deprivation that reduce their culpability for the offending. The precise quantum will depend on the extent to which the deprivation diminished the defendant's culpability.

Much of this proposal has already been implemented in the Commonwealth jurisdictions and it is time that the United States followed suit.

I. Severe Environmental Deprivation as a Mitigating Factor at Sentencing

A mitigating factor is a consideration that reduces a defendant's culpability and justifies a more lenient sentence. Although they often have a profound impact on the defendant's final sentence, there is no standard definition of what ought to qualify as a mitigating factor.[8] This

8. Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When It Comes to Punishing Criminals*, 62 Buff. L. Rev. 1159 (2014) [hereinafter Bagaric, *Mitigation and Aggravation*]. Courts in Australia

article makes the case for recognizing "severe environmental deprivation" as a stand-alone mitigating factor in the federal sentencing system. Although it focuses on the federal system, the arguments apply with equal force to the states.

Severe environmental deprivation describes the pervasive disadvantages that many defendants suffer throughout their lives. It can include a raft of experiences, including: poverty,[9] child abuse,[10] neglect,[11] immersion in a culture of violence,[12] physical or sexual abuse,[13] squalor,[14] abandonment,[15] sub-standard education,[16] poor childhood nutrition,[17] and inadequate access to health care.[18]

Social scientists widely accept that severe environmental deprivation inhibits the development of key behavioral capacities, including those critical to pro-social decision-making.[19] An environment of deprivation can also provide an individual with a much greater opportunity to criminally offend.[20] On these bases, many legal scholars argue that deprivation can reduce culpability for criminal offending.[21] This article builds off this work and, with reference to the experiences in Commonwealth jurisdictions, attempts to sketch the way towards implementation.

One initial clarification is necessary. Mitigation is never a complete excuse for crime. Recognizing severe environmental deprivation as a mitigating factor does not suggest that all people from a deprived background will break the law, nor does it mean that all those from privileged

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recognize hundreds of aggravating and mitigating factors, whereas in the United States courts only recognize a few dozen.

9. Atiq & Miller, *supra* note 4, at 169.
10. *Id.*
11. *Id.*
12. *Id.* at 183.
13. Bagaric and others, *Trauma and Sentencing*, *supra* note 1.
14. Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 Cap. Def. J. 327, 327 (2002).
15. *Id.*
16. Richard Delgado, *The Wretched of the Earth*, Ala. Civ. Rts. & Civ. Liberties L. Rev. 1, 10 (2011) [hereinafter Delgado, *The Wretched of the Earth*].
17. *Id.*
18. *Id.*
19. Craig Haney *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 Hofstra. L. Rev. 835, 856–57 (2008).
20. *See* Thomas M. Scanlon, Moral Dimensions: Permissibility, Meaning, Blame 204–05 (2010); *see also* H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of the Law 35–40 (1968); *Id.* at 15 ("The special features of mitigation are that a good reason for administering a less severe penalty is made out if the situation or mental state of the convicted criminal is such that he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been impaired or weakened otherwise than by his own action, so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally").
21. *See* Delgado, *Rotten Social Background*, *supra* note 5; *see also* Atiq & Miller, *supra* note 4; Kinneary, *supra* note 3.

backgrounds will follow it.[22] It simply acknowledges that severe environmental deprivation can reduce culpability for criminal offending and, when it does, the defendant's final sentence should reflect this.

A. *Origins of Deprivation as a Mitigating Factor*

In the colonial period of the United States, sentencing judges enjoyed very little discretion, as sentences were fixed by statute.[23] This custom soon yielded as Congress "delegated discretion to individual judges" to determine sentences within broad sentencing ranges.[24] Judges routinely considered all information—aggravating and mitigating—and it was widely understood that the final punishment should "fit the offender and not merely the crime."[25]

In 1973, Judge David Bazelon first raised the possibility that extreme poverty—or a "rotten social background"—might justify a defense for criminal offending. In a dissenting opinion in *United States v. Alexander*, Judge Bazelon concluded that the trial judge had erred by instructing the jury to disregard testimony about the defendant's social and economic background.[26] He later developed these views in two articles published in the Southern California Law Review.[27]

After a decade of dormancy, Professor Richard Delgado revived this theory in his seminal article entitled *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*. Delgado comprehensively reviewed the social science literature on environmental criminogenesis and explored the various forms a defense might take. Although he concluded that a deprived background could not justify a full legal defense, he proposed that evidence of severe environmental deprivation should be "admissible during sentencing as a special circumstance which made conforming to the law especially difficult to the particular defendant."[28] When this is shown, he argued, "the sentence should be reduced accordingly."[29] This was the birth of severe environmental deprivation as a mitigating factor.

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22. Delgado, *Rotten Social Background*, *supra* note 5, at 10.
23. William W. Wilkins Jr & John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63 (1993) [hereinafter Wilkins & Steer, *Role of Sentencing Guidelines*].
24. William W. Wilkins Jr, Phyllis J. Newton, & John R. Steer, *The Sentencing Reform Act 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 Crim. L. Forum. 355, 356 (1991).
25. Williams v. New York, 337 U.S. 241, 247 (1949).
26. United States v. Alexander, 471 F.2d 923, 957–65 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).
27. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. Cal. L. rev. 385, 401–02 (1976); David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. Cal. L. rev. 1269 (1976).
28. Delgado, *Rotten Social Background*, *supra* note 5, at 78.
29. *Id.*

In the decades since, dozens of law review articles have supported Delgado's proposal.[30] Regrettably, this groundswell of academic support has failed to translate into any real-world reforms.[31] Perhaps this is not surprising. Courts are innately conservative institutions, "especially with respect to criminal innovations."[32] They affect change "only when necessary and through the least dramatic means" and are particularly sensitive to potential community backlash.[33]

Today, strong academic support for Professor Delgado's proposal remains.[34] To effectively implement a mitigating factor of this nature, two components are needed. First, the sentencing judge must receive relevant information about the defendant's background of deprivation. Second, the law must permit the judge to recognize severe environmental deprivation as a mitigating factor and provide a defined legal standard for determining when a sentencing reduction will be appropriate. The following sections explore these two components.

B. *Sentencing Judges Should Receive Information About the Defendant's Background of Deprivation*

Receiving the fullest information about the defendant's "life and characteristics" is "highly relevant—if not essential—to the selection of an appropriate sentence."[35] As a general proposition, the better the information, the better equipped the judge will be to determine the appropriate sentence. At the same time, it will also improve the defendant's sense of procedural fairness.

1. Substantive Fairness

In the criminal justice system, no one should be punished without first having the opportunity to argue the issue of their culpability.[36] Consideration of an individual's background is "elementary to fair and proportionate sentencing."[37] Without a proper understanding of this background, the judge is incapable of imposing a sentence that fits both the offense and the offender.

30. *See*, *e.g.* Elisabeth W. Lambert, *A Way Out of the "Rotten Social Background" Stalemate: "Scarcity" and Stephen Morse's Proposed Generic Partial Excuse*, 21 Univ. Pa. J. L. & Soc. Change 297 (2018); Gohara, *Defense of the Injured*, *supra* note 2; Kinneary, *supra* note 3; Atiq & Miller, *supra* note 4; Miriam Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 Am. J. Crim. L. 41, 44 (2013) [hereinafter Gohara, *Grace Notes*].
31. Taslitz, *supra* note 6, at 80.
32. Delgado, *Rotten Social Background*, *supra* note 5, at 37.
33. *Id.* at 37–38.
34. *See* Atiq & Miller, *supra* note 4.
35. Pepper v. United States, 562 U.S. 476, 488 (2011).
36. Herbert Packer, The Limits of the Criminal Sanction 133, 169 (1968).
37. Gohara, *Grace Notes*, *supra* note 30, at 44.

Regrettably, this is largely how the federal sentencing system operates. Relying predominantly on pre-sentence reports, vital information about the defendant's background often does not make it to the judge.[38] As a result, thousands of people are collectively sentenced to thousands of years of prison each year by judges who know "very little, if anything, about their backgrounds, including factors that should be considered in any just assessment of their blameworthiness."[39] Obtaining and presenting information about the defendant's unique history of deprivation helps bridge the "empathy gap,"[40] and encourages judge to pay "closer attention to the human beings whose lives they are being asked to shut away."[41]

One notable exception is capital cases. In such cases, information about the defendant's background is routinely provided as the Supreme Court has recognized the "inescapable salience" of this information to the assessment of their moral culpability.[42] To provide the sentencing judge with a complete picture of this history, the defense will regularly assemble a "mitigation team", including a designated "mitigation specialist" to compile a comprehensive social history and identify mitigating themes.[43] Non-capital defendants have no such right, and so this information is seldom presented to the sentencing judge.

The Supreme Court has justified this distinction on the basis that "death is different,"[44] but many scholars argue that "there is simply no principled reason" why this information should not be presented to courts sentencing people for non-capital offenses.[45] Indeed, the very same experiences—poverty, abuse, family violence, addiction, and trauma—equally afflict the lives of non-capital defendants.[46] The consideration of severe environmental deprivation during sentencing is thus "ripe for extension."[47] As Professor Delgado said, "the best reason for a

38. *Id.* at 46 – 47.
39. *Id.* at 47.
40. David Cole, *Turning The Corner On Mass Incarceration?*, 9 Ohio St. J. Crim. L. 27, 40 (2011).
41. Gohara, *Grace Notes*, *supra* note 30, at 48.
42. Gohara, *Defense of the Injured*, *supra* note 2, at 44; *see also* Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).
43. Gohara, *Defense of the Injured*, *supra* note 2, at 37.
44. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Williams v. Taylor 529 U.S. 362 (2000).
45. Gohara, *Defense of the Injured*, *supra* note 2, at 44. *See also* Craig Haney, *Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners,"* 114 W. Va. L. Rev. 373 (2012); Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion under Determinate Sentencing*, 62 Fla. L. Rev. 1037, 1050 (2010); Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and The Case for Uniformity*, 107 Mich. L. Rev. 1145 (2009).
46. Gohara, *Defense of the Injured*, *supra* note 2, at 46.
47. *Id.* at 44.

defense acknowledging a rotten social background is that it is unfair to ignore it."[48]

2. Procedural Fairness

Americans are "highly sensitive to the processes of procedural fairness."[49] A perception of unfair or unequal treatment is the "single most important source of popular dissatisfaction with the American legal system."[50] Time and again, studies have found that most people care more about the treatment they receive in court than they do about winning or losing the particular case.[51] Defendants "never forget" how the court system "made them feel."[52]

A key component of fairness is having a voice.[53] The current sentencing process silences the defendant's voice, as they are deprived of the opportunity to tell their story. As a result, judges routinely impose life-changing (and often life-destroying) sentences onto individuals without knowing who they are, what they have been through, and how their particular experiences may have influenced their culpability. By contrast, if the defendant is given an opportunity to tell their story, they are more likely to feel as though they have been seen, heard, and understood. This sense of fairness will be improved even further if the sentencing judge demonstrates a thoughtful understanding of the defendant's history and how it relates to the offending.

To be sure, this does not suggest that a defendant will be happy with the sentence they receive, just because the judge heard about their personal background.[54] However, it does mean that their sense of procedural fairness will likely increase, as will their view of the judge, the court, and the justice system generally.[55]

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48. Delgado, *Rotten Social Background*, *supra* note 5, at 79.
49. Kevin Burke & Steve Leben, *Procedural Fairness*: *A Key Ingredient in Public Satisfaction*, 44 Ct. Rev. 4 (2007).
50. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 Law & Soc'y Rev. 513, 517 (2003).
51. Kevin Burke & Steve Leben, *supra* note 49, at 1 (citing Jerald Greenburg, *Determinants of Perceived Fairness of Performance Evaluations*, 71 J. Appl. Pysch. 340 (1986); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. Pers. Soc. Pysch. 850 (1994); Kees Van den Bos et al., *Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 J. Pers. & Soc. Pysch. 1493 (1998); and Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, *in* 30 Crime And Justice: A Review Of Research 283, 300 (Michael Tonry ed., 2003)).
52. Maya Angelou, quoted in *A Conversation with Dr. Maya Angelou*, Beautifully Said Magazine, (July 4, 2012) https://bsmandmedia.com/a-conversation-with-dr-maya-angelou.
53. *Id.*
54. *Id.*
55. *Id.*

3. Federal Sentencing Law in The United States Permits Judges to Receive Information About a Defendant's History of Deprivation

Information about relevant mitigating factors ordinarily comes to the attention of the judge through a pre-sentence report.[56] The purpose of a pre-sentence report is to:

a) allow the defendant to present mitigating circumstances;
b) permit the defendant to present personal characteristics to enable the sentencing court to craft an individualized sentence; and
c) preserve the appearance of fairness in the criminal justice system.[57]

Among other things, pre-sentence reports must contain information about the defendant's history and characteristics.[58] However, there are inherent limitations regarding the breadth and depth of information that pre-sentence reports contain. Understandably, many defendants harbor distrust of the government.[59] This distrust may cause them to withhold sensitive information from the probation officer preparing the report, whom they may view as an agent of the state. As discussed in greater detail below, Canada and New Zealand have established a regime that provides defendants with reports prepared by qualified members of their own community. In both jurisdictions, this has greatly enhanced the quality and quantity of information received by sentencing courts. Taking just one example from New Zealand, the sentencing judge in *Green v Police* praised the report and said:

> I have read the cultural report very carefully and more than once . . . I am impressed by its realism but also by the fact that, perhaps for the first time, Mr Green engaged with the report writer in a way that became meaningful for him. From this engagement it seems Mr Green has gained clarity and insight into how he comes to be where he is today.[60]

In the United States, a federal court may order a "study of the defendant" if it desires more information than provided in the pre-sentence report.[61] This study is to be conducted in the community by a qualified consultant. Courts have previously used this provision to obtain more information about defendants' addiction,[62] psychiatric condition,[63] cancer

56. In capital cases, however, defense counsel will routinely assemble a "mitigation team" to obtain and present mitigatory evidence during sentencing. *See* Gohara, *Defense of the Injured*, *supra* note 2, at 37.
57. United States v. Ward, 732 F.3d 175, 181 (3d Cir. 2013).
58. Fed. R. Crim P. 32(d)(2)(A).
59. Pew Research Center, Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role (2022).
60. *Green v Police* [2019] NZHC 2565 at [28] (N.Z.).
61. 18 U.S.C. § 3552(b).
62. United States v. Mosley, 277 F. Supp. 3d 1294, 11297 (M.D. Ala. 2017).
63. United States v. Perez-Rives, 2018 U.S. Dist. LEXIS 41473 (M.D. Ala. Mar. 14, 2018).

diagnosis,[64] and trauma.[65] For example, in *United States v. Kimbrough*, the Court held that a mental health evaluation should be ordered when there is a reasonable basis to believe that a defendant's mental condition contributed to their offending. This was necessary, among other reasons, to help the court determine whether the defendant's mental health condition mitigated their culpability.[66] In *United States v. Haggard*, the Court applied the same reasoning to trauma, as the defendant had suffered "staggering traumas of abandonment and homelessness as a child."[67]

These cases indicate that, in cases where the pre-sentence report does not adequately capture the defendant's experiences of deprivation, the court may order a study to be conducted by a qualified member of the defendant's community. This article recommends using this provision to provide the court with a state-funded and independent report outlining the defendant's history of deprivation and how that history contributed to their offending. The practical contours of this recommendation are outlined below.

C. *Severe Environmental Deprivation Should Be a Mitigating Factor at Sentencing*

Providing judges with information about the defendant's history of deprivation is only half the job. The law must also permit sentencing judges to recognize the mitigatory effect of severe environmental deprivation.

Every valid theory of punishment requires an analysis of proportionality.[68] This requires an assessment of both the circumstances of the offending and the culpability of the offender.[69] Determining culpability is "not just a matter of establishing what the offender did"—it must be assessed by reference to the particular offender and their unique background.[70]

Social scientists consider the correlation between severe environmental deprivation and criminal offending to be "axiomatic."[71] Extensive empirical research shows that experiences of deprivation alter the neurological development of an individual in a variety of ways, many of which

64. United States v. Gaskin, 2014 U.S. Dist. LEXIS 28707 (M.D. Ala. Mar. 16, 2014).
65. United States v. Haggard, 2019 U.S. Dist. LEXIS 32829 (M.D. Ala. Mar. 1, 2019).
66. United States v. Kimbrough, 2018 U.S Dist. LEXIS 26336 (M.D. Ala. Feb. 20, 2018).
67. *Haggard*, 2019 U.S. Dist. LEXIS 32829, at *3..
68. Gohara, *supra* note 2, at 9.
69. *Id.*, at 8 (citing Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 73 (2005); H. L. A Hart, Punishment and Responsibility: Essays in the Philosophy of the Law 25 (1968); Lockyer v. Andrade, 538 U.S. 63, 71 (2003)).
70. *Berkland v R* [2022] NZSC 143 at 91 (N.Z.).
71. Haney, *supra* note 19, at 856–57.

make them more likely to criminally offend.[72] Thus, severe environmental deprivation is itself criminogenic.[73]

Severe environmental deprivation can impair the development of key behavioral capacities, which are critical to pro-social decision-making.[74] These include the "capacity to empathize with others" as well as capacities for self-regulation such as "impulse control and anger management."[75] This can inhibit basic executive brain function, which impacts an individual's ability to consider and evaluate the consequences of their actions.[76]

Children who have been subject to regular threats, violence, and deprivation are more likely to develop a "survival-first" mindset—a "persistent physical and mental state of high alert" that "subverts the more relaxed states that are required for positive pro-social emotions and sophisticated reasoning."[77] The effect of this is that "adults with histories of childhood deprivation and maltreatment are almost twice as likely to have been incarcerated than those without such histories and significantly more likely to have been arrested for a violent crime."[78]

Despite this empirical evidence, there remains stiff resistance to recognizing severe environmental deprivation as a mitigating factor.[79] This is largely fueled by two common misconceptions; that such a discount is "unworkable" and that it would increase crime. Both of these misconceptions appear initially compelling, especially to pragmatic judges and politically motivated legislators, but both are ultimately flawed.

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72. Atiq & Miller, *supra* note 4, at 181.
73. Delgado, *The Wretched of the Earth, supra* note 16, at 8.
74. Thomas Keenan, Subhadra Evans, et al., An Introduction to Child Development 297–98 (2009).
75. *Id.*
76. Atiq & Miller, *supra* note 4, at 181 (citing Tina Malti & Sophia F. Ongley, *On Moral Reasoning and Relationship with Moral Emotions*, in Handbook Of Moral Development Research, 166–169, 171–172 (Melanie Killen & Judith G Smetana eds, 2 ed., 2014)).
77. Atiq & Miller, *supra* note 4, at 181–182.
78. Izabela Milaniak & Cathy Spatz Widon, *Does Abuse and Neglect Increase Risk for Perpetration of Violence Inside and Outside the Home?*, 5 Physical Violence 246, 252 (2015); *see* Hyunzee Jung et al., *Does Child Maltreatment Predict Adult Crime? Reexamining the Question in a Prospective Study of Gender Difference, Education, and Martial Status*, 30 J. Interpersonal Violence 2238 (2015.
79. Nathaniel Branden, *Free Will, Moral Responsibility and the Law*, 42 S. Cal. L. Rev. 264 (1974) (saying that the child who is brought up in a ghetto and later becomes a criminal is accountable because the child "allowed himself to be shaped by his environment"); *see* Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. Cal. L. Rev. 1247 (1976); Stephen J. Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. Cal. L. Rev 1275 (1976); Michael S. Moore, *Causation and the Excuses*, 73 S. Cal. L. Rev 1091 (1985).

1. The Practical Difficulties of a Severe Environmental Deprivation Are Not Insurmountable

According to some scholars, including those sympathetic to individuals who have experienced deprivation, the practical hurdles of recognizing severe environmental deprivation as a mitigating factor are simply too great.[80] In particular, they point to the perennial risk of a "slippery slope", and the problem of "proof."[81]

These arguments seem to ignore the experiences in the Commonwealth jurisdiction, where similar practical difficulties and penological tensions "have been calibrated with a degree of success."[82] With some growing pains along the way, Canada, Australia, and New Zealand have developed a regime for obtaining information about the defendant's background and articulated a judicially enforceable standard for determining when a sentencing reduction will be appropriate. These experiences are explained more fully below and inform the final proposal that this article provides.

2. A Severe Environmental Deprivation Discount Will Not Increase Crime

The second misconception is that reducing sentences for severely deprived offenders will give them a "license to commit crime."[83] However, recent empirical studies suggest that neither specific nor general deterrence work, and there is "no connection between harsher penalties and crime reduction."[84] Accordingly, recognizing severe environmental deprivation will not "lead to a higher likelihood of other individuals committing crime."[85] To the contrary, obtaining and recognizing the defendant's history of deprivation will help explain how that history influenced their behavior.[86] This insight may help interrupt the cycle of violence by identifying the root causes of criminogenic behavior and providing individuals with ameliorative treatment.[87]

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80. *See* Packer, *supra* note 36, at 133; Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. Cal. L. Rev. 514, 520 (1968); Stephen J. Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 Ala. Civ. Rts. & Civ. Liberties L. Rev. 147 (2011).
81. Packer, *supra* note 36, at 133.
82. Bagaric and others, *Trauma and Sentencing, supra* note 1, at 41.
83. *Id.* at 44.
84. *Id.*, at 43 (citing Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 Am. Crim. L.J. 159, 159 (2012)).
85. *Id.* at 44.
86. Gohara, *Defense of the Injured, supra* note 2, at 8.
87. *Id.*

D. *The Federal Sentencing System Fails to Adequately Recognize Severe Environmental Deprivation*

Federal judges frequently recognize the link between environmental deprivation and criminal offending. Many accept that such experiences may reduce an individual's legal culpability, including the Supreme Court. In *California v. Brown*, Justice O'Connor said that "defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be *less culpable* than defendants who have no such excuse." (emphasis added)[88] And in *Santosky v. Kramer*, Justice Rehnquist commented that a "stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being."[89]

Yet, as this section explains, the federal sentencing system lacks an accepted framework for considering defendants' experiences of severe environmental deprivation as a mitigating factor. This article focuses on the federal system for two reasons. First, the federal criminal justice system is the largest single system by inmate count in the United States. Thus, any positive reforms will have the greatest impact if they occur at the federal level. Second, the federal system has considerable doctrinal influence at the state level.[90] History demonstrates that changes to the federal system "affect the whole criminal justice system" and help "[set] the national tone."[91] As Ames Grawert observed, "[w]ithout a strong national movement, the bold reforms needed at the state and local level cannot emerge."[92] And without doubt, bold reforms are needed.

1. The Federal Sentencing System

The current federal sentencing system emerged from the landmark Sentencing Reform Act of 1984 (SRA). The SRA was passed to combat perceived sentencing inconsistencies imposed by judges, who each possessed and applied different penal philosophies.[93] Before its enactment, Senator Edward Kennedy described sentencing in federal courts as a "game of chance,"[94] which he labeled a "national scandal."[95]

88. *California v. Brown* 479 U.S. 538, 545 (1987). *See also Roper v. Simmons* 543 U.S. 551, 567 (2005); *Graham v. Florida* 560 U.S. 48, 70 (2010); *Miller v. Alabama* 567 U.S. 460, 472–474 (2012).
89. *Santosky v. Kramer* 455 U.S. 745, 788–789 (1982).
90. Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio. St. J. Of. Crim. L. 37, 40–41 (2006).
91. Ames C. Grawert et al., *A Federal Agenda to Reduce Mass Incarceration*, The Brennan Center for Justice, 1 (2017).
92. *Ibid.*
93. Wilkins and Steer, *supra* note 23, at 63–64.
94. Edward Kennedy, *Criminal Sentencing: A Game of Chance*, 60 Judicature 208, 210 (1976).
95. Edward Kennedy, *Introduction: Symposium on Sentencing*, 7 Hofstra. L. Rev. 1, 3 (1978).

a. Sentencing Guidelines

The SRA sought to eradicate disparities by instructing judges to follow prescribed sentencing guidelines ("the Guidelines"). These guidelines were drafted and published by the newly established United States Sentencing Commission.[96] Under the Guidelines, the range of applicable sentences is determined by reference to two main considerations: first, the seriousness of the offense, and second, the offender's criminal history score.[97] These two considerations then prescribe a sentencing range.[98]

Courts may consider a number of aggravating and mitigating factors, which may be applied in three ways: "Adjustment," "Departure," and "Variance." Adjustments are defined as considerations that increase or decrease the sentence by a specified amount.[99] Departures are statutorily authorized and allow a judge to impose a sentence outside the applicable range.[100] Variances are not subject to the Guideline analysis and preserve the judge's 'ultimate ability" to impose, a sentence that it views as "sufficient, but not greater than necessary to serve the goals of sentencing.", regardless of the applicable guideline range.[101]

The SRA requires the Guidelines to be "entirely neutral" as to race, sex, national origin, creed, and socio-economic status.[102] Rather than being "neutral", the Guidelines go further by expressly prohibiting courts from considering these factors.[103] Some commentators argue that this blanket prohibition misinterpreted the SRA's intention. They say that neutrality was to "guard against the inappropriate use of incarceration for defendants who lacked the advantages of education, employment, and stabilizing ties" and that Congress never advised the Commission to "place any factors off limits as a basis for leniency."[104]

For their first 30 years, the Guidelines were interpreted to be binding—judges were required to comply with the Guidelines when imposing sentences. As a result, most judges felt compelled to ignore the mitigatory impact of severe environmental deprivation, even when it plainly

96. The Commission is an "independent commission in the judicial branch" tasked with developing "sentencing policies and practices for the federal criminal justice system." *See* Wilkins and Steer, *supra* note 23, at 66, citing 28 U.S.C § 991(b) (1988).
97. Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing*, 19 Mich. J. Race & L. 349, at 361–67 (2014) [hereinafter Bagaric, *Arbitrariness to Coherency*]. The criminal history score is based on the seriousness of the past offenses and the time that has elapsed since the previous offending.
98. *Ibid.*
99. 28 U.S.C. § 5K2.0(a)(B). *See* U.S. Sentencing Commission, United States Sentencing Commission Guidelines Manual, 452 (2013).
100. U.S. Sent'g Comm'n, Primer: Departures and Variances, 5 (2019).
101. *Id.* at 42.
102. 28 U.S.C. § 994(d).
103. U.S. Sent'g Comm'n, Guidelines Manual § 3E1.1, 466 (Nov. 2023), § 5H1.10 (Socio-economic status); § 5H1.12 (Lack of guidance).
104. 28 U.S.C. § 994(e); S. Rep. No. 98–225, at 172–75 (1983).

reduced the defendant's culpability.[105] Some judges were content to do so, reasoning that the ubiquity of disadvantage in defendants' lives provided "little basis for differentiation among them."[106]

b. Sentencing Guidelines After Booker

The legal status of the Guidelines changed dramatically in 2005. In *Booker v. United States*, the Supreme Court held that the mandatory provisions of the SRA were unconstitutional, thus making them "effectively advisory."[107]

After *Booker*, the Supreme Court issued a steady stream of decisions handing discretion back to sentencing judges.[108] These decisions "revitalized individualized sentencing"[109] by reaffirming that the sentence should "fit the offender and not merely the crime."[110] To this end, the Court confirmed that judges must always consider the "history and characteristics of the defendant" before imposing a sentence.[111]

In appropriate cases, judges may now "impose a non-Guideline sentence based on a disagreement with the Commission's views," particularly when the Commission's views "rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."[112]

Reflecting on these decisions, commentators have said that there should be "no question that judges not only may, but *must*, consider all mitigating factors brought to their attention by the defendant in determining an appropriate sentence."[113] This is a positive development and opens the door for properly recognizing severe environmental deprivation as a mitigating factor.

c. Sentencing Guidelines and Severe Environmental Deprivation

For decades, the Policy Manual of the Guidelines has expressly advised judges that "socio-economic status" and "lack of guidance as a youth and similar circumstances" are "not relevant" when determining

105. *See* Gohara, *Defense of the Injured*, *supra* note 2, at 26–28. (citing *United States v. Deigert*, 916 F.2d 916, 918–919 (4th Cir. 1990); *United States v. Vela*, 927 F.2d 197, 200 (5th Cir. 1991); *United States v. Pullen*, 89 F.3d 368, 371–72 (7th Ci. 1996)).
106. *United States v. Vela*, 927 F.2d 197, 199–200 (5th Cir. 1991).
107. *Booker v. United States*, 543 U.S. 220, 245 (2005).
108. *See Pepper v United States*, 562 U.S. 476 (2011); *Rita v United States* 551 U.S 338 (2007); *Gall v United States* 552 U.S 38 (2007).
109. Gohara, *Grace Notes*, *supra* note 30, at 45.
110. *Pepper*, 562 U.S. at 488.
111. 18 U.S.C. § 3553(a)(1). The full list of mandatory considerations are: (1) the nature and circumstances of the offense; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for; (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.
112. *Pepper*, 562 U.S. at 501.
113. Amy Baron-Evans & Paul Hofer, *Litigating Mitigating Factors: Departures, Variances, and Alternatives to Incarceration*, 5 (2010).

the appropriate sentence.[114] But since *Booker*, studies show that judges have become more comfortable disregarding the Guidelines and imposing sentences below the recommended range.[115]

When a judge imposes a sentence below the recommended range, the SRA requires them to state the reason for doing so.[116] Currently, there is not a uniformly accepted "reason" that judges provide when they vary downward to recognize severe environmental deprivation. Instead, they adopt a range of different approaches. This occurs because judges lack authoritative guidance about whether deprivation is a legitimate mitigating factor and, if it is, when it will justify a sentencing reduction.

This absence of guidance has created a doctrinally incoherent system that produces inconsistent sentencing outcomes. Different judges use the information about defendants' history of deprivation in different ways. Some will take this information and assess whether it justifies a downward variance to reflect a "lack of guidance as a youth."[117] Others will use it when broadly assessing the "history and characteristics of the defendant."[118] Others still will refuse to accept that severe environmental deprivation is a mitigating factor at all.[119] Each of these approaches is equally available under the existing law. However, having these different approaches co-exist simultaneously is not satisfactory, as similarly situated defendants are subjected to different legal standards. This undermines the basic precept that "the law should be the same for everyone."[120]

Under the first of these approaches, the judge will grant a downward variance to recognize the defendant's "lack of guidance as a youth" or "tragic or troubled childhood." This mitigatory ground first emerged in *United States v. Floyd*, where the Ninth Circuit upheld a sentence below the applicable guidelines because the defendant had experienced very little guidance as a youth.[121] Directly responding to this decision, the Sentencing Commission swiftly prohibited downward departures for

114. U.S. Sent'g Comm'n, Guidelines Manual § 3E1.1, 473 (Nov. 2023), § 5H1.10 (Socio-economic status); § 5H1.12 (Lack of guidance).
115. Avi Muller, *From ACEs to Fetal Trauma: How Slippery is Slope of Discretionary Sentencing Factors?*, 51 Seton Hall L. R. 1389, 1394–95 (2021).
116. U.S. Sent'g Comm'n, Guidelines Manual § 3E1.1 (Nov. 2023), § 5K2.0(e).
117. *United States v. Floyd*, 956 F.2d 203, 1099 (9th Cir. 1991); *United States v. Bettin*, No.CR17–093-BLG- SPW, 2019 WL 3778461, at *2 (D. Mont. Aug. 12, 2019).
118. *United States v. McBride*, 511 F.3d 1293, 1297 (11th Cir. 2007); *United States v. Carpenter*, 803 F.3d 1224, 1231 (11th Cir. 2015).
119. *See United States v. Vela*, 927 F.2d 197, 199 (5th Cir. 1991) (Childhood abuse and neglect are often present in the lives of criminals. They always affect their mental and emotional condition. We simply cannot agree, therefore, that these are the kinds of considerations which warrant substantial reductions in guidelines sentences.). *See also United States v. Deigert*, 916 F.2d, 918–19 (4th Cir. 1990); *United States v. Pullen*, 89 F.3d 368, 371–72 (7th Cir. 1996).
120. Jeremy Waldron, The Rule of Law, *The Stanford Encyclopaedia of Philosophy* (Summer 2020 Edition), Edward N. Zalta (ed.). And indeed, one of the core statutory requirements of federal sentencing under 18 U.S.C. § 3553(a)(6).
121. *Floyd*, 945 F.2d 1096 (9th Cir. 1991).

offenders who experienced a "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing."[122]

However, since the Guidelines became advisory, some judges have begun using it as a mitigatory factor once again. In 2021, "lack of youthful guidance/tragic or troubled childhood" was cited as a reason for sentencing below the guideline range 520 times, or in 1.2 percent of all cases.[123] In practice, this mitigatory factor is used as a catch-all to encompass any adverse experiences from the defendant's background. This is undesirable for two reasons. First, it requires judges to disregard the Commission's guidance, which expressly states that such factors cannot form the basis of a downward variance. Second, it is fatally imprecise, which causes inconsistencies. The relevant case law does not define what constitutes a "tragic" or "troubled" childhood, which are both subjective terms.[124] Nor does it provide a legally defined standard to determine when a defendant's tragic or troubled childhood will justify a sentencing reduction. Without any guidance, judges are left to decide whether a departure is appropriate based on their own particular penological and philosophical inclinations. These inconsistencies are exacerbated by the fact that not all judges recognize this mitigating factor.[125]

The second approach involves judges recognizing a defendant's history of severe environmental deprivation by issuing a downward variance. This approach is grounded under 18 U.S.C. § 3553(a)(1), which requires consideration of "the history and characteristics of the defendant." The Commission has attempted to minimize this practice, advising judges that they "should not give them excessive weight." [126] This approach is similarly imperfect—its nebulous nature provides judges no guidance about when the history and characteristics of the defendant will justify a sentencing reduction.

Four cases demonstrate the consequences of these inconsistent approaches. Two involved methamphetamine offending and two involved child pornography. The four defendants suffered from varying levels of deprivation, but all four judges used that information differently and, as a result, reached a different outcome.

First, the two methamphetamine cases. In *United States v. Bettin*, the defendant experienced a troubled upbringing. Recognizing his "serious lack of guidance as a youth and his addiction", the sentencing judge granted a downward departure and imposed a sentence below the advisory guideline range.[127] In *United States v. Godinez*, the defendant lost his father at

122. United States Sentencing Commission, Guidelines Manual § 5H1.12.
123. United States Sentencing Commission, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, 104 (2021).
124. Bagaric et. al., *Trauma and Sentencing*, *supra* note 1, at 24–26.
125. *See United States v. Brady*, 417 F.3d 326, 333–34 (2nd Cir. 2005); *United States v. Holtz*, 226 Fed. App'x 854, 861–62 (10th Cir. 2007).
126. *See United States v. McBride*, 511 F.3d 1293, 1298 (11th Cir. 2007); *United States v. Carpenter*, 803 F.3d 1224, 1228 (11th Cir. 2015).
127. *United States v. Bettin*, No. CR 17–093-BLG-SPW, 2019 WL 3778461 at *2 (D.

age twelve, was unable to attend school, and remained illiterate until late adolescence.[128] Because of his lack of education and marketable skills, he was easily coerced into participating in criminal activities to support his family and drug addiction. In contrast to *Bettin*, and although the sentencing took place after *Booker*, the sentencing judge refused to consider the defendant's background because "lack of guidance as a youth" is "not relevant" under the Guidelines Manual.[129] The appellate court affirmed.[130]

The two child pornography cases are more similar. Both judges considered the defendant's history under § 3553(a). While one granted a downward variance, the other did not even consider this approach.

In *United States v. McBride*, the defendant suffered a torrid history of abuse and deprivation.[131] At age two his father was murdered, his mother and uncle physically abused him and his grandfather sexually abused him for approximately ten years. Eventually, he was transferred into foster care from age twelve until adulthood. The history of consistent abuse and abandonment was "one of the worst" that the sentencing judge had ever seen. After considering this history under § 3553(a), the judge determined that a downward variance was appropriate. In *United States v. Carpenter*, the defendant pled guilty to possession of child pornography.[132] He grew up with an alcoholic mother and a physically abusive stepfather. The sentencing judge recognized that she was obliged to "consult the guidelines . . . but [was] not bound by them." The judge addressed also the defendant's severe environmental deprivation when considering "the history and characteristics of the defendant" under § 3553(a). Although the judge did not consider a downward departure or a downward variance, she concluded that the deprivation justified a sentence at the very lowest end of the applicable range.

2. Reform is Needed

The SRA was passed to achieve consistency and fairness, even if it meant sacrificing individualized sentencing. This has not happened. In fact, the current system has produced the worst of both worlds. Without advising judges when experiences of deprivation will justify a sentencing reduction, it has failed to properly recognize a sound basis for mitigation, while still producing disparate outcomes.[133] This persists even after *Booker*.[134]

The current system needs further reform. In particular, clarification is needed to confirm that severe environmental deprivation *is* a

Mont. Aug. 12, 2019).

128. *United States v. Godinez*, 474 F.3d 1039, 1043 (8th Cir. 2007).
129. *Id.* (*quoting* the Honorable Linda R. Reade, Chief Judge, United States District Court for the Northern District of Iowa)
130. *Id.* at 1043.
131. *McBride*, 511 F.3d at 1298.
132. *Carpenter*, 803 F.3d at 1228.
133. Gohara, *In Defense of the Injured*, *supra* note 2, at 29.
134. *See Brady*, 417 F.3d at 333–34; *Holtz*, 226 Fed. App'x at 861–62.

mitigating factor that requires consideration in all cases. Judges must be advised when it will justify a sentencing reduction.

The rest of this article charts the course that reform should take. With reference to the experiences in Commonwealth jurisdictions, it proposes a framework for obtaining information about a defendant's background and provides a legally defined standard for determining when a sentencing reduction will be appropriate.

This could be implemented in two ways. First, through a decision from the Supreme Court. Second, and more preferably, by amending the Guidelines. The purpose of the Sentencing Commission is to provide fair punishment. This is not possible if it continues promoting a set of guidelines that ignore the empirically recognized link between deprivation and criminal offending. Although they are now advisory, the Guidelines' prohibitions on recognizing "socio-economic status", a "lack of guidance as a youth", and "similar circumstances indicating a disadvantaged upbringing" provide an easy justification for sentencing judges to entirely ignore severe environmental deprivation in all cases. Eliminating these prohibitions will also allow judges to circumvent or disregard the Guidelines in order to reach the just and appropriate sentence.

II. Commonwealth Jurisdictions

Canada, Australia, and New Zealand each have a shameful history of colonization. All three countries have a unique Indigenous population who were systemically dispossessed of their land and witnessed the calculated destruction of their traditional social structures, culture, and language.[135] Unsurprisingly, this created an entrenched asymmetry between Indigenous populations and the settler public. For every generation since, Indigenous populations have fared worse across almost every social, economic, and health metric.[136]

This disparity is particularly pronounced in the rates of incarceration.[137] For decades, legislators and academics have attempted to reduce

135. These Indigenous populations are not a single group, but rather compromise many different groups. The collective terms for these populations are as follows: First Nations, Métis, and Inuit people are the Indigenous people of Canada; Aboriginal and Torres Strait Islander people are the Indigenous people of Australia; Māori are the Indigenous people of New Zealand.

136. *See* Public Health Agency of Canada, *Key Health Inequalities in Canada: A National Portrait*, (Pan-Canadian Public Health Network, 2018); Australian Institute of Health and Welfare, *Australia's Welfare 2021* (2021); Mason Durie, *Ngā Kāhui Pou: Launching Māori Futures* (Huia Publishers, 2003); Waitangi Tribunal, *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending* (2017).

137. *Canada*: Indigenous people make up 3 percent of national population but just over 30 percent of the prison population, *see* Benjamin Ralston, *The Gladue Principles: A Guide to the Jurisprudence*, (Indigenous Law Centre, University of Saskatchewan, 2021) at XXII; *Australia*: Aboriginal and Torres Strait Islanders make up 3.8 percent of the national population but 31 percent of the prison population, *see* Australian Bureau of Statistics, *Corrective Services, Australia*,

the alarming level of Indigenous over-incarceration.[138] So too have judges. Around twenty years ago, judges in these jurisdictions started to recognize the systemic deprivation of Indigenous communities as a mitigating factor at sentencing. The scope of this mitigating factor developed over time, driven predominantly by decisions of appellate courts. While its genesis focused on Indigenous populations, each of these Commonwealth jurisdictions now routinely grant sentencing reductions to all defendants whose history of deprivation reduced their culpability for criminal offending, regardless of their ethnicity.[139]

There is no single name for this mitigating factor. Even within each jurisdiction, courts use different terms, such as "systemic deprivation",[140] "social deprivation",[141] "cultural deprivation",[142] and "social disadvantage."[143] Nonetheless, these names are materially similar and reflect the same mitigatory considerations.

Each jurisdiction has established a regime for obtaining information about the defendant's history of deprivation and bringing it before the court. Appellate courts have also articulated and accepted an applicable legal standard for determining when a sentencing reduction will be appropriate. In both of these areas, the Commonwealth jurisdictions provide useful lessons for the United States.

III. Canada

In 1996, Canada passed a legislative amendment requiring sentencing judges to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances" with "particular attention to the circumstances of Aboriginal offenders."[144] This was an intentionally transformative provision and aimed to reduce Indigenous over-incarceration.

(September Quarter 2022); *New Zealand:* Māori make up around 16 percent of the national population but 49 percent of the prison population, *see* Department of Corrections, *Inmate Ethnicity by Institution*, (2022).

138. For legislators, see: *Canada*: An Act to Amend the Criminal Code (Sentencing) 1996, s 718(2)(e); *Australia*: Pathways To Justice–Inquiry Into The Incarceration Rate Of Aboriginal And Torres Strait Islander Peoples (Australian Law Reform Commission, 9 January 2018, Report 133); *New Zealand*: Criminal Justice Act 1986, s 15; Sentencing Act 2002, s 27. For academics, see: *Canada:* Ashley Hyatt, *Healing Through Culture for Incarcerated Aboriginal People*, 8(2) First Peoples Child & Family Review (2013); *Australia:* Stephanie Shepherd and others, *Closing the (Incarceration) Gap*, BMC Public Health, (2020); *New Zealand*: Inura Fernando, *Taniwha in the Room: Eradicating Disparities for Māori in Criminal Justice*, 24 Can. L. R. 61 (2018).
139. *Canada: R. v Jackson* (2018) ONSC 2527; *R. v Morris*, (2018) ONSC 5186; *Australia*: *R v Mansaray* [2018] NSWCCA 64; *R v Wong* [2018] NSWCCA 20; *Taysarang v R* [2017] NSWCCA 146; *R v RD* [2014] NSWCCA 103; *New Zealand*: *Berkland v R* [2022] NZSC 143.
140. *Solicitor-General v Heta* [2018] NZHC 2453, para. 28.
141. *Perkins v R* [2018] NSWCCA 62, paras. 38–39, 73.
142. *Zhang v R* [2019] NZCA 507, paras 137, 162.
143. *R v Tjami* (2000) 77 SASR 514.
144. Canada Criminal Code, R.S.C. 1985, c C-46, 718.2(e).

Three years after its enactment, the Canadian Supreme Court first considered the proper scope and application of this provision. The case, *R v Gladue*, quickly became a seminal decision across the Commonwealth jurisdictions.[145] The Court's unanimous opinion explained how information about an Indigenous defendant's background should be brought before the court and how it should be used by the sentencing judge.

A. *Obtaining Information of Deprivation*

The Court in *Gladue* made clear that is always necessary for judges to consider the defendant's personal circumstances. To that end, it was expected that defense counsel would "fulfil their role and assist the sentencing judge in this way."[146] The Court also anticipated that this valuable information would be brought through a pre-sentence report, which had long failed to adequately do so.[147]

Shortly after the Court's decision, Aboriginal Legal Services in Ontario initiated a pilot in which local community members drafted specialized reports to discuss the holistic and inter-generational background of the particular defendant, rather than risk-focused pre-sentence reports prepared by probation officers.[148] This pilot took root and evolved into what are now commonly known as "Gladue Reports."[149]

Gladue Reports provide a "tailored, comprehensive assessment of an Indigenous offender's circumstances."[150] They actively reject the "cut-and-dried Western style of rehashing an offender's criminal record and generalized family circumstances."[151] The writers often live in the same community as the defendant, which gives them special insight into their unique experiences.[152] The reports go as far back into the defendant's history as possible, which often involves reaching out to family members.[153] They explore details of the offender's background such as family violence,

145. *R v Gladue* [1999] 1 SCR 688. The catalyst for *Gladue was R v Williams* [1998] 1 SCR 1128. In *Williams*, the Supreme Court first took judicial notice of widespread bias and systemic discrimination in the criminal justice system. This set the stage for its distinct methodology for the sentencing of Indigenous people.
146. *Id.*, para. 83.
147. Several commissions and studies that addressed Indigenous over-incarceration in the lead up to the enactment of s 718.2(e) had identified the need for improvements to the pre-sentence reports used when sentencing Indigenous people, including more consistent use of these reports, the incorporation of community perspectives, and greater detail, cultural sensitivity, and attention to the other unique circumstances of Indigenous peoples.
148. Benjamin Ralston, The Gladue Principles: A Guide to the Jurisprudence, 221 (2021) [hereinafter Ralston, *Gladue Principles*].
149. *Id.* at 243.
150. *R v Ipeelee*, 2012 SCC 13, para. 60 (Can.).
151. *R v Lawson*, 2012 BCCA 508.
152. Ralston, *Gladue Principles* at 245.
153. Diedre Pullin, Untangling & Unifying Gladue: A Clear, National Approach: An Analysis on the Effectiveness of the Gladue Decision in Lowering Incarceration Rates, and How Effectiveness can be Improved 9 (Dec. 2017) (unpublished paper) (on file with ResearchGate).

history of abuse, personal and family addictions, experience with residential schools, intergenerational trauma, involvement in the child welfare system, economic situation, and conditions in their community.[154]

Although they are prepared in consultation with the defendant, Gladue Reports are still required to be balanced and objective.[155] They are not meant to convey the personal opinions of the author, nor should they strongly recommend specific sentences. They are written as a story in the words of the client and also include recommendations for programs or resources from which the client may benefit.[156]

B. *Using Information of Deprivation*

The Court in *Gladue* recognized that Indigenous defendants face unique systemic deprivation stemming from a sordid history of colonization. This often results in "low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation."[157] With this in mind, the Court instructed sentencing judges to impose sentences that properly consider "all of the surrounding circumstances regarding the offence [sic], the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person."[158]

The Supreme Court revisited the issue in *Ipeelee v R* and provided two important clarifications.[159] First, it clarified the applicable legal standard, stating that an Indigenous person's experiences of deprivation will mitigate their sentence only if they "bear on his or her culpability for the offence [sic]."[160] A causal nexus was not required. Second, the Court confirmed that this mitigating factor was applicable in all cases, regardless of the seriousness of the offense.[161]

After *Gladue*, academics, lawyers, and judges hotly debated whether this mitigating factor should apply to non-Indigenous defendants.[162] Although courts were initially resistant,[163] recent cases have shifted in

154. Ralston, *Gladue Principles*, *supra* note 148, at 243–246.
155. Some Gladue reports have been criticized for verging on advocacy, lacking in objectivity, or taking a "cut-and-paste" approach. *See*, *R v Soloway*, 2012 ABQB 554, para. 22; *R v Land*, 2013 ONSC 6526, para. 31; *R v Taylor*, 2016 BCSC 1326, paras. 44–49; *R v Heppner*, 2017 BCSC 2433, paras. 73–75.
156. Interview by Diedre Pullin with Jonathan Rudin, Program Director of ALST at Aboriginal Legal Services Toronto (Mar. 9, 2018). The reports are also called "sacred stories." *See*, Sarah Niman *The healing power of Gladue Reports* Policy Options Politiques (May 1, 2018), https://perma.cc/P3Y6-L8UB.
157. *R v Gladue* [1999] 1 S.C.R. 688, para. 67.
158. *Id.*, para. 81.
159. *R v. Ipeelee*, [2012] 1 S.C.R. 433.
160. *Id.*, para 83.
161. *Id.*, para 84.
162. *See* Dale E Ives, *Inequality, Crime and Sentencing: Borde, Hamilton and the Relevance of Social Disadvantage in Canadian Sentencing Law*, 30 Queen's LJ 114 (2004); Sujung Lee, *Re-Evaluating Moral Culpability in the Wake of Gladue*, 78 U. Toronto. Fac. L. Rev. 109 (2020).
163. *See R v. Hamilton*, [2004] 190 O.A.C. 90 (CA)*; R v. Brissett and Francis*, 2018

favor of extending *Gladue* to all defendants.[164] This is supported by commentators who argue that a proper interpretation of *Ipeelee* dictates that "if systemic and background factors are found to have contributed to why a particular offender is before the court, then the uniqueness of those factors is relevant only to the extent that it allows the sentencing judge to fashion a truly effective sentence."[165]

IV. Australia

Like the United States, criminal law in Australia is primarily governed by individual states and territories. But unlike the United States, mitigating factors operate "relatively uniformly" throughout the country.[166]

A. *Obtaining Information of Deprivation*

For many years, judges across Australia called for better information about the social disadvantage experienced by defendants.[167] This included both information about the defendant's particular background as well as empirical information about the impact of deprivation.

Across Australia, information about a defendant's background is usually conveyed to the judge through a pre-sentence report, prepared by probation services. In some parts of the country, however, local communities prepare pre-sentence reports for Aboriginal defendants.[168] Similar to Gladue Reports, these provide "personal, family and community information, including as it relates to the offender's experiences of discrimination and government interventions, access to services and connections to culture."[169]

The quality and availability of empirical information about the impact of deprivation have been greatly improved by the creation of the "Bugmy Bar Book."[170] This initiative collates and distills authoritative research about various forms of deprivation that commonly plague defendants in

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ONSC 4957.

164. *See R v. Jackson*, 2018 ONSC 2527; *R v. Morris*, 2018 ONSC 5186.
165. *See* Lee, *supra* note 162, at 128.
166. Bagaric, *supra* note 8, at 1183.
167. J. Sophia Beckett, *The Bugmy Bar Book: Presenting Evidence Of Disadvantage and Evidence Concerning the Significance of Culture On Sentence* (2021); Hon. J. Stephen Rothman AM, Disadvantage and Crime: The Impact of *Bugmy* and *Munda* on Sentencing Aboriginal and other Offenders, Address at Public Defenders Criminal Law Conference 11 (Mar. 18, 2018) ("It is insufficient for counsel to rely on judicial officers utilising 'general knowledge' . . . [m]aterial needs to be deduced on the background of the offender being sentenced.").
168. Elena Marchetti & Thalia Anthony, Sentencing Indigenous Offenders in Canada, Australia, and New Zealand 1, 20 (Oxford Online Handbook, Oxford University Press, 2017).
169. *Id.*
170. Named after the seminal decision of the Australian High Court in *Bugmy v The Queen* (2013) 249 CLR 571.

the criminal justice system.[171] The Bugmy Bar Book is free and publicly available to assist prosecutors, defense counsel, and judges to present:[172]

a) evidence in the form of recognized studies and research concerning particular categories of disadvantage; and
b) individualized evidence pointing to material tending to establish a background of systemic deprivation.

This is an invaluable resource and ensures that sentencing judges consistently receive information demonstrating how experiences of deprivation reduce culpability for criminal offending.

B. *Using Information of Deprivation*

All states and territories recognize deprivation as a mitigating factor. As in Canada, this originated as a means to recognize the unique disadvantages faced by Aboriginal offenders.[173]

In *Bugmy v The Queen*, the Australian High Court held that any defendant may "point to material tending to establish" a background of systemic deprivation, which may mitigate their sentence because "his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way."[174] Courts now routinely apply *Bugmy* to non-Aboriginal defendants.[175]

Different states and territories have interpreted *Bugmy* differently. In particular, they disagree on whether a "causal link" ought to be required. For example, the Victoria Court of Criminal Appeals does not require such a nexus and accepts that an offender's history of deprivation will *per se* reduce their moral culpability compared with an offender who did not have that history.[176] By contrast, the Northern Territory Court of Appeals requires a "direct correlation" between the defendant's systemic

171. Beckett, *supra* note 167. To date, the topics include: foetal alcohol syndrome; childhood exposure to family violence; early exposure to drug and alcohol abuse; incarceration of parents and caregivers; interrupted school attendances and suspensions; out of home care; childhood sexual abuse; stolen generations and descendants; acquired brain injury; hearing impairment; homelessness; unemployment; cultural dispossession; social exclusion; low socio- economic status; refugee background. The publication of each chapter involves a rigorous process of review to ensure the credibility and reliability of the research included in each chapter. Each chapter is prepared by a researcher under the supervision of a senior academic or lawyer practising in criminal law from the Bar Book committee.
172. *Id.* at 21.
173. *See Neal v The Queen* (1982) 149 CLR 305; *R v Fernando* (1992) 76 A Crim R. 58.
174. *Bugmy v The Queen* (2013) 249 CLR 571, paras. 40–41.
175. *See R v El Sayah, R v Idaayen, R v Mansaray* [2018] NSWCCA 64, para. 46; *R v Wong* [2018] NSWCCA 20, para. 55; *Taysavang v R* [2017] NSWCCA 146, paras. 42–43; and *R v RD* [2014] NSWCCA 103, paras 22–24.
176. *DPP v Herrmann* [2021] VSCA 160 at [45]. There the Court said: " . . . the relevance of deprivation to sentencing does not depend on proof of such a nexus. As Victoria Legal Aid pointed out in its helpful submission as amicus curiae, "the impact of disadvantage is complex, multilayered, non-linear and not easily 'diagnosed' or measured."

deprivation and the offending.[177] In New South Wales, the Court of Criminal Appeals remains divided.[178]

So far, the High Court of Australia has declined to address these inconsistencies.[179]

V. New Zealand

Although New Zealand was the last to recognize deprivation as a mitigating factor, its jurisprudence has developed at a swift pace. In December 2022, the Supreme Court weighed in for the first time. In a powerful judgment, it comprehensively discussed how information about a defendant's background should be brought before the court and used by sentencing judges.[180]

A. *Obtaining Information of Deprivation*

New Zealand courts have a number of tools at their disposal to elucidate information relevant to the defendant's background.[181] Most notably, Section 7 of the Sentencing Act 2002 allows the defendant to provide the court with information about their personal, family, community, and cultural background and how that background may have related to the offending. Although this provision is almost four decades old, it has "only recently come into regular use."[182]

There is no rigid formula for the provision of information under s 27.[183] The original legislators envisaged an informal process which encouraged members of the defendants' community to speak (or write) directly to the court.[184] Instead, a practice has emerged in which independent report writers prepare "Section 27 Reports" traversing the defendant's background. These are available for defendants of all ethnicities, and, like Gladue Reports, they provide much greater insight than American federal pre-sentence reports.

177. *Kolaka v The Queen* [2019] NTCCA 16, para. 39.
178. Beckett, *supra* note 167. *Compare R v Wong* [2018] NSWCCA 20, para. 55; *Taysavang v R* [2017] NSWCCA 146, paras. 42–43; *R v RD* [2014] NSWCCA 103, paras. 22–24 with *Judge v R* [2018] NSWCCA 203, para. 32; *R v Irwin* [2019] NSWCCA 133, para. 116; *Hoskins v R* [2021] NSWCCA 169, para. 57.
179. The High Court declined special leave to address this question in *Perkins v The Queen* [2018] HCA Trans 267 (14 December 2018).
180. *Berkland v R* [2022] NZSC 143, para. 89.
181. Sentencing Act 2002, ss 25–27 (N.Z.); *see Berkland*, at [130]-[147].
182. *Berkland*, para. 135. Its predecessor, § 16 of the Criminal Justice Act 1985, was materially identical but almost entirely ignored. For a discussion on the underutilization of these provisions, see, Stephen O'Driscoll, *A Powerful Mitigating Tool?*, N.Z.L.J. 358 (2012); Oliver H. Fredrickson, *Getting the Most Out of s 27 of the Sentencing Act 2002*, Māori LR (2020).
183. *Berkland*, para. 141.
184. (12 June 1985) 463 NZPD 4759.

B. *Using Information of Deprivation*

In *Berkland*, the Supreme Court clarified the applicable legal standard for the deprivation mitigating factor. It confirmed that the defendant's deprivation needs not be the "proximate cause" of the offending and that a sentencing discount will be appropriate where the deprivation is a "causative contribution" to the offending.[185] Explaining this standard, the Court said:

> Contributory deprivation, including that precipitated by historical dispossession and sustained by poor educational and other intergenerational outcomes, can help to explain an offender's limited life options, poor coping skills, or other criminogenic circumstances that made the offending more likely. Where these factors do help to explain how the offender came to offend, they will amount to causative contribution and so will be relevant for the purpose of sentencing.[186]

However, the Court also said the causative contribution of deprivation may be displaced where the offending is particularly serious or "complex and orchestrated."[187] The contribution of background factors for this type of offending may be reduced and even negated and other sentencing goals, such as community protection, may become more important.[188]

VI. Designing a Mitigating Factor to Recognize Severe Environmental Deprivation in the Federal Sentencing System

Learning from these experiences in the Commonwealth jurisdictions, this final section attempts to design a mitigating factor to recognize severe environmental deprivation in the United States federal sentencing system. To do so, it proposes a framework for obtaining information about a defendant's background and putting it before the sentencing judge and also provides a legal standard to help judges determine when a sentencing reduction will be appropriate.

Finally, it addresses three additional issues that the Commonwealth jurisdictions faced during the evolution of this mitigating factor, specifically: applicability in cases of serious offending, relevance of historical deprivation, and the role of race.

A. *Naming the Mitigating Factor*

The name we give something says a lot about our attitude towards it.[189] In the United States, legal scholars faithfully latched onto the term "rotten social background" when supporting (or critiquing) Professor Delgado's proposal.[190] This is unfortunate. As Delgado himself has rec-

185. *Berkland*, para. 109.
186. *Id.*
187. *Id.* para. 111.
188. *Id.*
189. Delgado, *supra* note 16, at 7.
190. Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 Cap. Def. J. 327 (2002).

ognized, the term 'rotten social background' has a "slightly derisive or ironic ring."[191]

The full title of Delgado's seminal article was "*Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*." As such, this article adopts the term "severe environmental deprivation" as it provides a more accurate and precise description of the mitigating factor being proposed.

B. *Scope of the Mitigating Factor*

There is no consensus definition of the term "severe environmental deprivation."[192] It is necessarily an inclusive and non-exhaustive term, as is impossible to prescribe a complete list of experiences that might reduce a defendant's culpability. A defendant should not be denied a sentencing reduction simply because their particular experience didn't make 'the list'.

While such an expansive mitigating factor concerns some scholars, this concern is misplaced.[193] Demonstrating a history of severe environmental deprivation alone will not justify a sentencing discount and should not be an unduly high hurdle. As explained below, the defendant must also show that these experiences reduced their culpability for the particular offending. Restricting the mitigating factor to exclude any particular experiences serves no legitimate purpose and risks foreclosing a sentencing reduction before the judge ever reaches the fundamental assessment: did the defendant's background of deprivation reduce their culpability?

C. *Obtaining Information of Severe Environmental Deprivation*

A judge can only consider the defendant's background if they are properly informed about it. It is imperative that judges receive the best available information about the defendant's history. This enhances their ability to fashion an individualized sentence that fits the offender and not merely the crime.[194]

In the United States, this information is usually included in pre-sentence reports, but not always.[195] As mentioned above, some defendants do not feel comfortable divulging personal and intimate details to a probation officer. In appropriate cases, an additional mechanism should be available to obtain this information and present it to the sentencing judge. This article suggests establishing of a regime similar to those in Canada and New Zealand.

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191. Delgado, *supra* note 16, at 7.
192. Stephen Morse, *Severe Environmental Deprivation (Aka RSB): A Tragedy, Not a Defense*, 2 Ala. C.R. & C.L. L. Rev. 147 (2011). As Professor Morse acknowledges, this is not fatal. The law recognizes many concepts without a precise definition.
193. *Id.* These authors instead advocate for a more "tangible" concept, such as being subjected to sexual or physical abuse, which are capable of precise definitions.
194. *Pepper v. United States*, 562 U.S. 476, 488 (2011).
195. Gohara, *In Defense of the Injured*, *supra* note 2, at 30.

This would allow the sentencing judge to order an additional "study of the defendant" if they believe that the pre-sentence report does not adequately canvass the defendant's history of deprivation.[196] This study would be conducted by a state-funded, independent, and qualified consultant.[197] The consultant would not be associated with the Federal Bureau of Prisons, but instead with the court. They would meet with the defendant and, if necessary, their family, and prepare a report. For convenience, this article uses names this a "Personal Background Report." This report would traverse the defendant's personal and inter-generational history, focusing particularly on any experiences of deprivation and how they may have affected the defendant's culpability.

To supplement this, the Sentencing Commission (or an alternative institution) should also compile a resource akin to Australia's Bugmy Bar Book. This will provide defense counsel, report writers, and judges with contemporary empirical information about the impact of common experiences of environmental deprivation. Brought together into a single, digestible report, sentencing judges would have a rich wellspring of information upon which to determine the final sentence.

Without doubt, it will take more time to obtain, present, and consider this new information. This will impact judicial and prosecutorial resources, and to be successful, it would require widespread buy-in from all actors in the court process, including defense lawyers, prosecutors, judges, and probation officers. It would also require significant up-front state investment. But this would be worthwhile. Personal Background Reports would enable judges to better determine the defendant's culpability and determine the most appropriate sentence. In addition, the "high fiscal and incalculable social cost of overly harsh incarceration is well-documented."[198] This proposal aims to lessen that institutional toll.

1. Implementation

Guided by the lessons learned in the Commonwealth jurisdictions, the following paragraphs will more comprehensively outline the contours of this proposal.

a. Availability of Personal Background Reports

Given the scarcity of resources, the availability of a Personal Background Report will be necessarily limited. It is not feasible to interview and prepare a report for every defendant. The ultimate decision should rest with the sentencing judge. If the judge believes that the defendant has a history of deprivation and desires more information than provided in the pre-sentence report, they may order a Personal Background Report.[199] This decision will depend on a number of factors, including:

196. 18 U.S.C. § 3552(b) (2023).
197. *Id.* § 3552(b).
198. Gohara, *Grace Notes*, *supra* note 30, at 49.
199. *Compare United States v. Kimbrough*, No. 2:07cr260-MHT, 2018 U.S Dist. LEXIS 26336 (M.D. Ala. Feb. 20, 2018), *with United States v. Haggard*, No.

the likely sentence the defendant will receive, the quality of information already included in the pre-sentence report, and the type of information expected to be included in the Personal Background Report.

Personal Background Reports should be state-funded and readily available to defendants across the country. Experiences in Canada demonstrate the detrimental consequences of insufficient state investment. Despite being "indispensable" to sentencing judges, the utility of Gladue Reports has been significantly curtailed by a lack of resources.[200] In some parts of Canada, Gladue Reports are barely available at all.[201] And across the country, the growing demand is not adequately met by trained writers, causing many commentators and judges to comment that more federal and provincial funding and training is necessary.[202]

b. Who Will Write The Reports

This regime will require the establishment of a pool of independent and state-funded report writers, as in Canada and New Zealand. The precise arrangements (for example remuneration, requisite qualifications etc.) will depend on the needs of the particular jurisdiction.

The value of a Personal Background Report lies in its ability to provide the sentencing judge with information about the defendant that might otherwise be missed in the pre-sentence report. If the government imposes overly restrictive criteria to determine who may write these reports, it may well exclude people who are capable of elucidating this information.[203] Yet, there must be some criteria—report writers must be reputable, competent, and sufficiently connected with the defendant's community. To strike a balance, Canada and New Zealand provide a range of guiding principles, which are equally applicable in the United States.[204] With these principles in mind, individuals who prepare Personal Background Reports should generally have:

g) An understanding of the defendant's community.
h) An understanding of the defendant's culture and values of that culture.

2:18cr333-MHT, 2019 U.S. Dist. LEXIS 32829 (M.D. Ala. Mar. 1, 2019).

200. *R v Ipeelee*, [2012] 1 S.C.R. 433 (Can.).

201. Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, Ipeelee *and the Duty to Resist*, 51:2 UBC. L. R. at 587–88 (2018).

202. Sarah Niman, *The healing power of Gladue Reports*, Policy Options Politiques, (May 1, 2018), https://policyoptions.irpp.org/magazines/may-2018/the-healing-power-of-gladue-reports [https://perma.cc/S3NH-S2Q5]. As noted therein "Many . . . clients wind up paying for the Gladue reports out of pocket. If there was pre-federal and provincial funding for Gladue report writers in both private and public sectors, lawyers could avoid hiring a writer from another jurisdiction, which would add more delays and costs to the already lengthy criminal trial process, and fewer forego the Gladue report altogether." *See also*: David Milward & Debra Parker, *Gladue: Beyond Myth and Towards Implementation in Manitoba*, 35(1) Man. L.J. 84 (2012).

203. For example, requiring the report-writer to have a university degree.

204. *Canada:* Ralston, *Gladue Principles*, *supra* note 148, at 89. *New Zealand:* Written Answer to Question to Minister of Justice, Andrew Little. 12 February 2020. [https://perma.cc/N7PM-YNV9].

i) An ability to be empathetic and professional.
j) An ability to prepare a report in the required timeframe.
k) An ability to meet the requirements of the brief, provided by the judge seeking the report.
l) An ability to communicate with the parties as required.

Miriam Gohara proposes an alternative approach. In her academic writing, she has suggested that defense lawyers could investigate and present mitigatory information about the defendant's history.[205] While defense lawyers should be encouraged to obtain and present this information wherever possible, this can be done more effectively and efficiently by an independent report writer. An independent report writer has four advantages over defense counsel.

First, it provides better quality information. Obtaining sensitive information about experiences of past deprivation requires completing the "holy trinity" of mitigation: collection of records; in-person, one-on-one witness interviews with a range of people familiar with the defendant's life experiences; and expert assistance.[206] In reality, defense lawyers seldom have the time to remain up-to-date with the relevant social science literature, nor are they always capable of building the interpersonal connection necessary to discuss sensitive and often traumatic issues with their clients. By contrast, an experienced and appropriately qualified report writer can be specifically selected to match the social and cultural background of the particular defendant. This will improve the level of comfort and, in turn, the candor of the defendant. Report writers are intended to be entirely removed from law enforcement—they are not probation officers or lawyers; they are members of the defendant's community. This helps them build genuine rapport with the defendant and understand their unique background.

Second, the information will be presented to the court with a degree of impartiality, removed from the adversarial arena. While report writers work closely with defendants, their reports are expected to be accurate and impartial.[207] As a result, judges will be more comfortable relying on its contents and not second-guess its veracity.

Third, it will improve consistency. If properly operationalized, report writers will receive training and follow uniform best practice guidelines. This will improve the effectiveness and efficiency of the reports, as judges will quickly become familiar with their form and substance.

Fourth, it will avoid passing this burden onto public defenders, who already are already over-worked and under-resourced. In many jurisdictions,

205. Gohara, *In Defense of the Injured*, *supra* note 2, at 65. Gohara states that "sentencers will continue to lack a meaningful opportunity to consider the relevance of mitigating factors unless noncapital defense lawyers uncover them, corroborate them, and explain their impact on clients' lives. Only after defense lawyers insist on mitigation's consideration will courts routinely begin to accept its salience to any just sentencing."
206. *Id.* at 37.
207. Ralston, *supra* note 148, at 244.

the caseloads of public defenders often exceed 100 clients at a time.[208] It is "difficult to imagine" these attorneys having the time or resources to provide additional investigation into the background of each client.[209]

c. Process

Report writers will gather the necessary information by meeting with and interviewing the defendant. In Canada, report writers are encouraged to interview through a trauma-informed lens and create a non-judgmental space for the defendant to share their "sacred story."[210] The defendant should be treated with dignity and respect and, when appropriate, have their resilience and successes commended.[211] In appropriate cases, the report writer will also meet with the defendant's family members.

After conducting the interviews, the report writer will prepare a neutral document that communicates the defendant's life experiences. Defense counsel should remain involved in this process and, where necessary, "verify, supplement, or challenge information" in any report.[212]

d. Content of Reports

Although the content of a Personal Background Report will depend on the particular defendant and their unique background, each report should contain certain irreducible elements. It should canvass the defendant's life history, focusing on any experiences of environmental deprivation and also any inter-generational deprivation. The primary purpose of a Personal Background Report should be to assist the judge in determining whether the defendant's history of deprivation justifies a sentencing reduction."[213]

In Canada, there is a wealth of guidance for individuals preparing Gladue Reports.[214] For example, the Legal Services Society recently published the second edition of its *Gladue Report Guide: How to prepare and write a Gladue Report* which includes a template for writing Gladue Reports.

Similarly, in New Zealand, the Supreme Court recently commented that these reports should include:

a) the writer's knowledge of the defendant's background and their offending;

208. Gohara, *Grace Notes*, *supra* note 30, at 72.
209. *Id.*
210. Marie-Andrée Denis-Boileau, *Best Practices for Writing Gladue Reports and Understanding Gladue Principles*, (Legal Services Society British Columbia 2021) at 71.
211. *Id.* at 33.
212. Gohara, *Grace Notes*, *supra* note 30, at 60.
213. *Berkland v R* [2022] NZSC 143, para. 105.
214. *See* Marie-Andrée Denis-Boileau & Joleen Steininger, *Gladue Report Guide: How to prepare and write a Gladue Report*, (Legal Services Society, 2022); Benjamin A. Ralston, *The Gladue Principles: A Guide to the Jurisprudence* (Law Foundation of British Columbia, 2022); Marie-Andrée Denis-Boileau, *supra* note 210 at 87.

b) the extent of their engagement with the offender and their family for the purposes of compiling the report, and whether the report is supported by the family;
c) the specific background of the offender including socio-economic context, educational qualifications, and cultural context—if Māori, the defendant's marae,[215] hapū[216] and iwi[217] and extent of connection with them (if the offender does not know, the report writer should find out through their own networks);
d) family history, including economic, cultural, and social circumstances;
e) any relevant comments or insights about the offender's circumstances and the drivers of their offending provided by family or wider community spokespeople;
f) information about relevant historical sources of offending which may help establish a causative contribution to the offending, for example, if the offender is Māori, a summary of the colonial experience of their iwi.[218]

This material from the Commonwealth jurisdictions will be helpful for writers of Personal Background Report. However, if this proposal is adopted, the Sentencing Commission (or any alternative institution) should provide equivalent guidance for the United States context.

In addition, report writers should have access to a resource akin to the Bugmy Bar Book in Australia. This will ensure that the Personal Background Report also authoritative research about the impact of the particular deprivation that the defendant experienced.

2. Benefits of Personal Background Reports

Establishing a regime of Personal Background Reports has two additional benefits: it gives the defendant an opportunity to heal and provides an economic benefit to the state.

a. Providing an Opportunity to Heal

Contemporary social scientists accept that there is a correlation between trauma and criminal offenses.[219] Nevertheless, our system continues to sentence deprived defendants without giving them an opportunity to explore and address their experiences of trauma.

The preparation of a report exploring the defendant's severe environmental deprivation provides that opportunity. It is a difficult process of reckoning for the defendant, but one that provides great value. Often for the first time,[220] they are required to sit down, discuss their past

215. Māori word meaning tribal meeting house.
216. Māori word meaning sub-tribe.
217. Māori word meaning tribe.
218. *Berkland*, para. 143.
219. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 Hofstra L. Rev. 835, 856–57 (2008).
220. *See* Oliver Fredrickson, *Systemic Deprivation Discounts and Section 27: Progress*

trauma, and think about how their own victimization has influenced their behavior.[221] Professor Delgado vividly illustrates this using a hypothetical offender named Rashon:

> At a minimum, we ought to permit Rashon, through his counsel, to tell his story. Perhaps hearing about the dispiriting circumstances of his upbringing and the near-total absence of community and parental supports that society provided him with during his critical years will prompt us to resolve to build a better society. Perhaps it will make Rashon feel better - at least someone listened to his story, heard what kind of life he led before his crime . . . Perhaps he will gain a degree of self-understanding. Perhaps he will resolve to lead a better life once he gets out of jail. Perhaps he will seek to re-enter life a second time, seeking out experiences, an education, a loving partner, a stable neighborhood like the ones he never had.[222]

Through the process of being interviewed and later reading their "sacred story," Canadian defendants often realize their worth after a life of feeling marginalized and oppressed.[223] They are given "ownership of their story, including responsibility for their actions."[224] After the report is completed, the defendant comes away with "a sense of place in their community, ancestry, and nation."[225]

The same is true in New Zealand. In *Green v Police*, the sentencing judge noted that:

> . . . perhaps for the first time, Mr Green engaged with the report writer in a way that became meaningful for him. From this engagement it seems Mr Green has gained clarity and insight into how he comes to be where he is today.[226]

The possibilities for healing go beyond mere introspection. The report also provides an invaluable resource for courts and correctional officials to identify the root causes of the defendant's criminogenic behavior and provide tailored rehabilitative treatment.[227] If the report reveals inter-generational alcohol abuse, mental illness, or cultural dislocation, this can be reflected in the sentence imposed and the manner in which it is administered.

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but not Perfect, Māori L. Rev. (2020), citing *Green v Police* [2019] NZHC 2565, para. 28 (N.Z.); *R v Kahia* [2019] NZHC 1021, para. 22 (N.Z.); *R v Cullen* [2019] NZHC 2088, para. 58 (N.Z.).

221. Gohara, *supra* note 2, at 8.
222. Delgado, *supra* note 16, at 22.
223. Sarah Niman, *The Healing Power of Gladue Reports*, Policy Options Politiques (May 1, 2018), https://policyoptions.irpp.org/magazines/may-2018/the-healing-power-of-gladue-reports [https://perma.cc/6JSX-E62K].
224. *Ibid.*
225. *Ibid. See also* Bryan Eneas, *A Gladue Report Changed His Life. Like Many Other Marginalized Offenders, He Didn't Know It Was His Right*, Canadian Broadcasting Corp. (Feb. 6, 2018, 1:00 AM), https://www.cbc.ca/news/canada/saskatchewan/gladue-writing-team-reconciliation-justice-system-1.6325968 [https://perma.cc/HF8V-XU8Q].
226. *Green v Police* [2019] NZHC 2565, para. 28 (N.Z.).
227. Gohara, *supra* note 2, at 8.

These reports provide an opportunity to meaningfully help the defendant and interrupt the cycle of violence.[228] Fundamentally, the hope is that the defendant is better, not worse off, once their sentence is completed.[229]

b. Personal Background Reports are Economically Beneficial

Although certainly not their primary purpose, these reports also save the government money.

In New Zealand, for example, reports cost around $2,000 to $5,000NZD to prepare.[230] The exact price will reflect the seriousness of the offense—as more serious cases will ordinarily permit greater resources—and the complexity of the defendant's background. By comparison, it costs $150,000NZD to keep an individual in prison for one year, not to mention the significant social and emotional consequences of keeping them away from their community.[231] If a report reduces a defendant's prison sentence in excess of just *one month*, it actually saves the government money. This occurs in the vast majority of cases. In some cases, sentences have been reduced by a year or more.[232] In others, the report justified a sentence of home detention rather than imprisonment.[233]

The same is true in Canada.[234] The Legal Services Society of British Columbia has commented that Gladue Reports are cost-effective, as the research confirms that defendants with a Gladue Report receive fewer and shorter jail sentences[235] and have lower rates of recidivism.[236]

Despite this reality, commentators have still complained about the cost of these reports.[237] Not only do these complaints ignore the immense moral, social, and legal benefits already mentioned, they are simply incorrect.

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228. *Ibid.*
229. *Ibid.*
230. Deena Coster, *Cultural Report Costs Nearly Double Since 2020, With Bill Topping $5.9m*, Stuff (Aug. 24, 2022, 4:55 PM), https://www.stuff.co.nz/national/crime/129648119/cultural-report-costs-nearly-double-since-2020-with-bill-topping-59m [https://perma.cc/WC93-XKVR].
231. Similarly, in Canada, the British Columbia Legal Services Society's evaluation of *Gladue* report pilot project revealed that Indigenous offenders with a *Gladue* report received significantly fewer and shorter jail sentences.
232. *See R v Lavakula* [2019] NZHC 2516 (N.Z.).
233. *See R v Takamore* [2019] NZHC 2315, para. 9 (N.Z.); *R v Nepia* [2019] NZHC 1932, para. 9 (N.Z.); *T v R* [2019] NZCA 13 (N.Z.).
234. *Gladue Rights Research Database Free and Open*, Law Society of Saskatchewan (June 21, 2019), https://www.lawsociety.sk.ca/online-services/gladue-rights-research-database-free-and-open [https://perma.cc/GJA8-PCCV].
235. Legal Services Society of British Columbia, *Gladue Report Disbursement: Final Evaluation* 22–23 (2013).
236. Council of Yukon First Nations, Yukon Gladue: Research & Resource Identification Project 8 (2015).
237. For commentary in New Zealand, *see* Rod Vaughn, *Costs Balloon for Offenders' Cultural Reports*, Auckland District Law Society (Apr. 16, 2021) https://adls.org.nz/Story?Action=View&Story_id=318; Coster, *supra* note 230.

D. *Using Information of Severe Environmental Deprivation*

Severe environmental deprivation alone does not justify a sentencing reduction. Instead, the judge must determine whether the defendant's experiences of deprivation reduced their culpability for the offending. Making this determination requires a defined legal standard.

1. Legal Standard

A clearly articulated and uniformly accepted legal standard is fundamental to the proper application of a mitigating factor. It is not enough to simply pronounce that severe environmental deprivation is a mitigating factor—judges must be informed as to when a defendant's history of deprivation will justify a sentencing reduction. Without an accepted standard, the law will be doctrinally incoherent and inconsistently applied.

The proper formulation of this standard has been a vexing issue across the Commonwealth jurisdictions. Initially, each jurisdiction required a causal nexus between the defendant's deprivation and the offense. This has now been roundly rejected, and for good reason.

a. Rejecting a Causal Nexus Requirement

In *Gladue*, the origin case for deprivation discounts, the Canadian Supreme Court never mentioned a "causal nexus" requirement. Instead, lower courts interposed it, requiring defendants to demonstrate a strict causal link between the deprivation and the offense. In doing so, these courts "significantly curtailed the scope and potential remedial impact" of the mitigating factor, "thwarting what was originally envisioned."[238] The Supreme Court later rejected this practice, explaining that a causal nexus imposed an unnecessary evidentiary burden on the defendant which would be "extremely difficult to ever establish," as the interconnections are "simply too complex."[239]

New Zealand courts followed a similar path. Initially, courts adopted variations of the causal requirement, such as "causative link",[240] "causal nexus",[241] "demonstrative nexus",[242] and "causative contribution",[243] without explaining whether there was a material difference between them. Unsurprisingly, this produced a raft of inconsistent decisions.[244]

238. *R. v. Ipeelee* [2012] 1 S.R.C 433, para. 80 (Can.).
239. *Id.* at 83.
240. *See Wineera v. R* [2021] NZHC 900 at [34] (N.Z.); *Miller v. R* [2021] 1104 at [39] and [46] (N.Z.); *Mau v. R* [2021] NZHC 1290 at [20] (N.Z.).
241. *See Hammond v. R* [2021] NZHC 1064 (N.Z.); *James v. R* [2020] NZHC 2134 at [18] (N.Z.).
242. *See Zhang v. R* [2019] NZCA 507 at [162] (N.Z.); *Campbell v. R* [2020] NZCA 631 at [43] (N.Z.).
243. *See Carr v. R* [2020] NZCA 357 at [65] (N.Z.); *Cooper v. R* [2020] NZCA 510 at [18] (N.Z.).
244. *Compare R v. Patangata* [2019] NZHC 744 at [41] (N.Z.); *R v. Carr* [2019] NZHC 2335 at [72]–[74] (N.Z.); *R v. D* [2018] NZHC 2690 at [27] (N.Z.); *R v. Jury* [2020] NZHC 2618 at [57] (N.Z.), *and Keenan-Fry v. R* [2021] NZHC 562 at [81]–[85] (N.Z.), *with R v. Rakuraku* [2014] NZHC 3270 at [60]–[63] (N.Z.);

In *Berkland v R*, the New Zealand Supreme Court similarly rejected the strict causal requirement and instead adopted a "causative contribution" standard.[245] This confirms that the defendant's deprivation need not be the "proximate cause" of the offending and that a discount will be appropriate where the deprivation "causatively contributed" to the offending.[246]

These experiences demonstrate the shortcomings of a strict causal requirement. Not only is it doctrinally unjustifiable, but it has proved to be ultimately an unworkable standard. Some judges required a direct causal link[247] while others were willing to draw inferences and apply a less exacting standard.[248] As a result, it routinely produced unjust and inconsistent outcomes.

In the United States, capital cases provide a useful analog and indicate that a causal requirement would be equally flawed here.

b. Capital Cases

The United States Supreme Court has repeatedly emphasized that a sentencing court must "consider" a defendant's history of deprivation during the penalty phase of capital trials.[249] But lower courts have struggled to articulate a standard for the necessary level of "consideration."

Initially, one approach was to assess whether there was a "causal nexus" between the defendant's deprivation and the offending.[250] Without a sufficient nexus, the court would assign the defendant's background "little to no mitigating weight."[251] But, like in the Commonwealth jurisdictions, the application of the causal nexus standard was woefully inconsistent.

On one hand, some judges purported to apply it, but instead just emphasized the need for individual responsibility and imposed an insurmountably high bar.[252] For example, in *Thompson v. Alabama*, the Court preached that:

Solicitor-General v. Heta [2018] NZHC 2453 at [64]–[67] (N.Z.); *Mau v. R* [2021] NZCA 106 at [23]–[25] (N.Z.); *Poi v. R* [2020] NZCA 312 at [56]–[60] (N.Z.).

245. *Berkland v. R* [2022] NZSC 183 at [109] (N.Z.). This standard was originally employed in *Carr v. R* [2020] NZCA 357 at [65] and [71] (N.Z.).

246. *Berkland v. R* [2022] NZSC 183 at [109] (N.Z.).

247. Canada: R. v. Willier, [2010] 2 S.C.R. 429 (Can.); R. v. Guimond, [2014] 313 Man. R. 2d 262, para. 52 (Can.); R. v. Schmidt-Mosseau, [2015] 320 Man. R. 2d 104, para. 34 (Can.); R. v. Long, [2014] ONSC 38, 2014 Carswell Ont 900; New Zealand: *R v. Patangata* [2019] NZHC 744 at [34] (N.Z.); *R v. Carr* [2019] NZHC 2335 at [65] (N.Z.); *R v. D* [2018] NZHC 2690 at [27]–[28] (N.Z.); *R v. Jury* [2020] NZHC 2618 at [56] (N.Z.); *Keenan-Fry v. R* [2021] NZHC 562 at [75]–[76] (N.Z.).

248. *R v. Rakuraku* [2014] NZHC 3270 at [58] (N.Z.); *Solicitor-General v. Heta* [2018] NZHC 2453 at [64]–[65] (N.Z.); *Mau v. R* [2021] NZCA 106 at [33] (N.Z.); *Poi v. R* [2020] NZCA 312 at [49] (N.Z.).

249. Atiq & Miller, *supra* note 4, at 201. *See also* Eddings v. Oklahoma, 455 U.S. 104, 113 (1982); Smith v. Texas, 543 U.S. 37, 45 (2004); Tennard v. Dretke, 542 U.S. 274, 276 (2004).

250. *See, e.g.*, State v. Prince, 250 P.3d 1145, 1170 (Ariz. 2011) (*en banc*).

251. *Id.*

252. *See* Phillips v. State, 287 So.3 d 1063, 1176–77 (Ala. Crim. App. 2015); Stanley v. State, 143 So. 3d 230, 330–32 (Ala. Crim. App. 2011).

> [T]he necessity for every person being morally responsible for his or own actions causes these environmental factors which are offered as mitigation to appear weak . . . The argument that when a bad social environment produces bad people, that fact should in some way mitigate the punishment for those bad people, leads ultimately to the absurd conclusion that only people who come for an impeccable social background deserve the death penalty if they commit capital murder.[253]

At the same time, other judges adopted a more realistic standard. This provided that a defendant's deprivation diminished their culpability when it had an effect or impact on their behavior at the time of the crime.[254] The Supreme Court addressed the causal nexus requirement in *Tennard v Dretke*.[255] The Court described it as "a test we never countenanced and now have unequivocally rejected."

No matter where is implemented, the causal nexus requirement is fatally flawed. It forces judges to conduct intellectual acrobatics to draw a causal link between the offending conduct and experiences that occurred years, if not decades, earlier. This is a futile task. It also provides no substantive guidance and invites judges to substitute their own decision-making, as these cases illustrate. Some judges will insist there is no link, and emphasize the importance of individual autonomy. Others will look deeper and, like most social scientists, identify the link (albeit indirect) between deprivation and criminal offending.

c. Culpability Prevails

The Commonwealth jurisdictions[256] have now embraced a "reduced culpability" analysis to determine whether a sentencing reduction is appropriate.[257] Although each jurisdiction articulates it slightly differently, this analysis predominantly turns on whether the defendant's experiences of systemic deprivation were "tied in some way" to the offending, so as to reduce their culpability.[258] If so, a sentencing reduction will be justified. If the United States recognizes severe environmental deprivation as a mitigating factor, it should adopt the more principled and workable "reduced culpability" standard.

This holistic test requires thoughtful judicial evaluation, which inevitably raises concerns about judicial inconsistencies. However, a fear of inconsistent sentences does not justify ignoring the mitigating impact of severe environmental deprivation altogether. This would only guarantee sentences that fail to accurately reflect the defendant's actual culpability. Put simply, sentencing parity is not more important than sentencing precision.

253. Thompson v. State, 153 So. 3d 84, 85 (Ala. Crim. App. 2012).
254. *See* Poyson v. Ryan, 743 F.3d 1185, 1193 (9th Cir. 2013).
255. Tennard v. Dretke, 542 U.S. 274, 287 (2004).
256. Except the Northern Territory in Australia, *see Kolaka v R* [2019] NTCCA 16 (Austl.).
257. R. v. Ipeelee [2012] 1 S.R.C 433, 436 (Can.).
258. *Id.* at [83]; *Berkland v. R* [2022] NZSC 183 at [83] (N.Z.).

d. Quantum of Sentencing Reduction

The exact quantum of the sentencing reduction will also depend on the particular case. The discount needs to be sizeable enough to reflect the defendant's diminished culpability relative to other offenders, but "not so significant as to render the penalty grossly disproportionate to the seriousness of the offense."[259] There is no magic formula for this—it too requires judicial evaluation and careful comparison with similar cases. In the Commonwealth jurisdictions, discounts generally range from 5–30 percent, depending on the severity of the deprivation and the extent to which it reduced the defendant's culpability.[260]

Concerns about inconsistencies can be partially assuaged by ensuring that judges each receive high-quality information about the defendant's background and empirical information about the particular disadvantages they faced. This will reduce the likelihood of inconsistent sentences, as all judges will make the culpability assessment based on the same material and with reference to the same body of case law.

As always, appellate review will be available. If the trial court failed to award a discount despite clear evidence that the defendant's experiences of deprivation reduced their culpability, this can be corrected on appeal.[261]

2. Additional Considerations

The Commonwealth courts also grappled with other discrete issues which helped define the contours of the mitigating factor. Again, these experiences offer useful lessons to courts in the United States.

a. Serious Offending

Some commentators[262] and courts[263] argue that courts should not recognize the mitigatory impact of deprivation in cases of serious offending. Two main rationales underpin this. First, in cases involving violent, sexual, or drug offending, the sentencing principles of denunciation and

259. Bagaric et al., *Trauma and Sentencing*, *supra* note 1, at 41.

260. *See, e.g.*, *Phillips v The Queen* (2012) VSCA 140 ¶ 42 n.38 (Austl.) (saying that the " . . . extent of the discount varies between jurisdictions. In NSW it appears to be in the order of 20–25%; in WA, 30–35%; 25% in SA and 10–33% in NZ.").

261. 18 U.S.C. § 3742.

262. *See* Bagaric et al., *Trauma and Sentencing*, *supra* note 1, at 50 (The authors of this article argue for a sentencing discount to recognize childhood physical and sexual abuse but limit its scope to cases where: (i) the offender has not committed a violent or sexual offense and application of risk assessment tools indicates that there is no risk of him or her re-offending by committing such a crime in the foreseeable future; or (ii) the offender has committed a violent or sexual offense, but application of the risk assessment tools indicates that the offender has a strong likelihood of rehabilitation).

263. *See* Canada: R. v. Pelly (2006), 210 C.C.C. (3d) 416 (Can.); R. v. Gopher [2006] 5 W.W.R. 659 (Can.); Australia*: Veen v Queen [No. 2]* (1988) 164 CLR 465 (Austl.); *Munda v Western Australia* [2013] HCA 38 (Austl.); New Zealand: *R v. Arona* [2018] NZCA 427 (N.Z.); *R v. Carr* [2019] NZHC 2335 (N.Z.); *R v. Duff* [2018] NZHC 2690 (N.Z.).

deterrence assume greater prominence and a discounted sentence may jeopardize community safety.[264] Second, orchestrated and premeditated offenses are "likely to involve careful assessment of the risks of detection and therefore increased agency." The relevance of deprivation may therefore be significantly reduced or even negated.[265]

In the early days, courts in the Commonwealth jurisdictions adopted this reasoning and refused to award a sentencing reduction in "particularly serious" cases, even if there was evidence that systemic deprivation had reduced the defendant's culpability.[266] But now, most courts have rejected this blunt categorial approach, recognizing that there is "no legal basis for the judicial creation" of a category of offenses which are outside the purview of the mitigating factor to recognize severe environmental deprivation.[267]

The particular crime a person commits does not affect whether or not their culpability was reduced by systemic deprivation. Ignoring their reduced culpability undermines the principle of individualized justice, which requires that like cases be treated alike but, importantly, if there are relevant differences, due allowances should be made for them.[268] As the saying goes, "there is no greater inequality than the equal treatment of unequals."[269]

Without proper statutory guidance, there is also an inherent amorphousness with this exception, as there is no legal test or statutory direction for determining what offending is "serious."[270] The same is true in the United States. Allowing judges to pick and choose when the offense is "too serious" to recognize severe environmental deprivation almost guarantees inconsistencies. Indeed, this is exactly what happened in New Zealand. In the early days, some judges refused to award a sentencing reduction to where the offense was "particularly serious" while, at the same time, others continued to award such discounts for even the most serious offending.[271]

264. *See* Bagaric etl al., *Trauma and Sentencing*, *supra* note 1.
265. *Berkland v. R* [2022] NZSC 143 at [131] (N.Z.).
266. Canada: R. v. Pelly (2006), 210 C.C.C. 3d 416, para. 54 (Can.); R. v. Gopher, [2006] 5 W.W.R. 659 (Can.);. Australia*: Veen v Queen [No. 2]* (1988) 164 CLR 465 (Austl.); *Munda v Western Australia* [2013] HCA 38 (Austl.); *New Zealand*: *R v. Arona* [2018] NZCA 427 (N.Z.); *R v. Carr* [2019] NZHC 2335 (N.Z.); *R v. Duff* [2018] NZHC 2690 (N.Z.).
267. R. v. Wells, [2000] S.C.R. 207, para. 45 (Can.) (citing R. v. McDonnell, [1997] 1 S.C.R. 948, at 32–33 (Can.)).
268. *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ) (Austl.) (citing *Lowe v The Queen* (1984) 154 CLR 606, 610–11 (Austl.)). This reflects the Aristotelian principle of equality: "alike should be treated alike, while things that are unalike should be treated unalike to in proportion to their unalikeness." *See* Aristotle, The Nichomachean Ethics 1131a-31b (W. D. Ross trans., 1925).
269. *See* Dennis v. United States, 339 U.S. 162, 184 (1950).
270. R. v. Ipeelee [2012] 1 S.R.C 433, para. 86 (Can.) (citing Renee Pelletier, *The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons*, 39 Osgoode Hall L.J. 469, 479 (2001).
271. Oliver Fredrickson, *Systemic Deprivation Discounts and Section 27: Progress but*

Recognizing this, courts have adopted a more nuanced approach. The Canadian Supreme Court has emphasized that a defendant's experiences of deprivation will always be relevant, regardless of the offense.[272] While in Australia and New Zealand, the courts have said that in serious cases a discount might be "tempered" to recognize the competing principles of denunciation, deterrence, and community protection.[273]

The United States should follow suit. While the seriousness of the offense might temper the extent of any discount, that is a different proposition from saying there should be no allowance at all. Such an assessment will depend on the facts of the case.[274] If the defendant has shown that their experiences of deprivation diminished their culpability for the offending, their sentence should reflect this.

b. Historical Deprivation

For some, it might be difficult to accept that experiences of deprivation could impact an individual's culpability for criminal offending that occurred years—if not decades—later. But many studies confirm that the impact of severe environmental deprivation does not simply go away once an individual turns eighteen years old.[275] Rather, "adults who survive early lifetime brutality remain yoked to their formative experiences."[276]

The Commonwealth jurisdictions have recognized this. Most pointedly, in *Bugmy*, the High Court of Australia said that the effects of profound childhood deprivation "do not diminish with the passage of time."[277] Rather, they leave their "mark on a person throughout life."[278] In addition, these experiences compromise the "person's capacity to learn from experience."[279]

The availability of a discount should not depend on the time elapsed since the defendant's experiences of deprivation. Instead, the same analysis should occur: "did the experiences of severe environmental deprivation reduce the defendant's culpability for the particular offending?." As always, this analysis will be informed by comprehensive

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Not Perfect, Māori L. Rev. (2020). *Compare R v. Arona* [2018] NZCA 427 (N.Z.); *R v. Carr* [2019] NZHC 2335 (N.Z.), *and R v. Duff* [2018] NZHC 2690 (N.Z.), *with Carroll v. R* [2019] NZCA 172 (N.Z.); *R v. Nepia* [2019] NZHC 1932 (N.Z.); *R v. Beattie* [2019] NZHC 3108 (N.Z.).

272. R. v. Ipeelee, [2012] 1 S.C.R. 433, para. 84 (Can.).

273. *See* Australia: *Veen v The Queen [No. 2]* (1988) 164 CLR 465 (Austl.); *IS v R* [2017] NSWCCA 116 ¶ 65 (Austl.); New Zealand: *Berkland v. R* [2022] NZSC 143 at [111] (N.Z.); *Carr v. R* [2021] NZCA 357 (N.Z.); *R v. Kea* [2021] NZHC 2753 (N.Z.); *R v. Nuku* [2021] NZHC 410 (N.Z.); *R v. Williams* [2020] NZHC 3104 (N.Z.).

274. *Carr v. R* [2021] NZCA 357 at [65] (N.Z.).

275. *See* Vincent J. Felitti, *The Relation Between Adverse Childhood Experiences and Adult Health: Turning Gold into Lead*, 6 Permanente J. 44 (2002).

276. Gohara, *Defense of the Injured*, *supra* note 2, at 15.

277. *Bugmy v The Queen* (2013) 249 CLR 571 ¶ 44 (Austl.).

278. *Id. See also Neal v The Queen* (1982) 149 CLR 305, 326 (Austl.).

279. Debra Umberson et al., *Social Relationships and Health Behavior Across Life Course*, 36 Ann. Rev. Socio. 139 (2010).

information about the defendant's personal background and more generalized empirical research about how those experiences may have affected their culpability.

c. Role of Race

As mentioned, the current deprivation mitigating factor initially developed to recognize the systemic disadvantages of Indigenous offenders in Commonwealth jurisdictions. Although it was never a "race-based discount," the courts readily acknowledged the unique factors that existed only by reason of the defendants' status as an Indigenous individual.[280] This included experiences such as land dispossession, targeted government discrimination, forced assimilation, and loss of land, culture, and social structures.

In each of the Commonwealth jurisdictions, courts have been prepared to assume that modern systemic deprivation suffered by Indigenous populations is "the result of colonial dispossession."[281] Making this point, the New Zealand Supreme Court said that, as a "general proposition, historical dispossession of tribal capital and autonomy did indeed "result" in Māori social, cultural, and economic poverty in its new urbanized setting in the latter part of the 20th century."[282] That, in turn, has driven disproportionate rates of offending and incarceration.

Like the Commonwealth jurisdictions, the United States has a troubled history, marred by colonization, slavery, and racial persecution. Many races have suffered at the hands of the government, notably Native Americans,[283] African Americans,[284] and Hispanics.[285] Like the Indigenous populations in the Commonwealth jurisdictions, this history has led to disproportionate rates of systemic deprivation among these groups.[286] And like the Indigenous populations, the effect of this deprivation has been consistently disproportionate rates of offending and even further

280. Canada: R. v. Gladue, [1999] 1 S.C.R. 688 (Can.); Australia: *Neal v The Queen* (1982) 149 CLR 305 (Austl.); New Zealand: *Solicitor-General v. Heta* [2018] NZHC 2453 at [33] (N.Z.).

281. *See* Canada: R. v. Ipeelee, [2012] 1 S.C.R. 433 (Can.); Australia: *DPP (Vic) v Herrmann* [2021] VSCA 160 (Austl.); *R v Millwood* [2012] NSWCCA 2 (Austl.); New Zealand: *Berkland v. R* [2022] NZSC 143 (N.Z.).

282. *Berkland v. R* [2022] NZSC 143 at [123] (N.Z.) (citing Alan Ward, *National Overview Volume i: Waitangi Tribunal Rangahaua Whanui Series* (Waitangi Tribunal, 1997)).

283. *See* Roxanne Dunbar-Ortiz, An Indigenous Peoples' History of the United States (2014).

284. *See* Paul Ortiz, An African American And Latnix History of the United States (Beacon Press, 2018); Carol Anderson, White Rage (2016).

285. *See* Paul Ortiz, An African American And Latnix History Of The United States, (Beacon Press, 2018).

286. U.S. Census Bureau, Current Population Survey: 1960 to 2020 Annual Social and Economic Supplement (CPS ASEC), https://www.census.gov/content/dam/Census/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019-figure-1.jpg [https://perma.cc/V6FZ-7JLZ].

disproportionate rates of incarceration.[287] That is why judges "need to know" about this history.[288]

An assessment of culpability must properly recognize this history. Did the defendant's intergenerational history of slavery, land dispossession, residential schools, or segregation contribute to their systemic deprivation and consequently reduce their culpability? Given the sobering recency of some of these events, it is not hard to imagine cases where this will occur. A failure to properly recognize this would be to sentence the defendant as someone other than themselves.[289] Not only would it offend the principle of individual justice, but it would also fail to identify the underlying reasons for their offending.[290]

Conclusion

For decades, scholars have argued that severe environmental deprivation should be recognized as a mitigating factor at sentencing. But very little of this scholarship has discussed *how* this should be done, and none of it has reviewed the equivalent experiences in comparable jurisdictions.

The United States does not need to reinvent the wheel. Three comparable jurisdictions—each with similar criminal justice systems—have all acknowledged the mitigatory impact of environmental deprivation and developed a framework to ensure that sentences adequately reflect this. Now is the time for this reform to occur in the United States. Individualized sentencing is "resurging" and the Supreme Court's emphasis that an individual's unique background is "as important as the crime itself should serve as a clarion call for institutional change."[291]

This Article responds to this call by providing a roadmap for courts and legislators to implement a mitigating factor to recognize severe environmental deprivation. This will help judges to impose sentences that adequately reflect the defendant's culpability.

287. E. Ann Carson, U.S. Dep't of Just., Prisoners in 2019 (Oct. 2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf [https://perma.cc/HB45-TMVG].
288. *Berkland v. R* [2022] NZSC 143 at [126] (N.Z.).
289. *R v Fuller-Cust* [2002] 6 VR 496 at [79] (Austl.).
290. *Id.* at 79.
291. Gohara, *Grace Notes*, *supra* note 30, at 85.