



5-3-2016

A Sober Assessment of the Link Between Substance Abuse and Crime - Eliminating Drug and Alcohol Use from the Sentencing Calculus

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**A SOBER ASSESSMENT OF THE LINK BETWEEN
SUBSTANCE ABUSE AND CRIME – ELIMINATING
DRUG AND ALCOHOL USE FROM THE SENTENCING
CALCULUS**

Mirko Bagaric and Sandeep Gopalan*

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INTRODUCTION

The relevance of drug and alcohol involvement to sentencing law and practice is one of the most perplexing and unsettled areas of sentencing law and practice.¹ It is also one of the most important issues in the criminal justice system. Most crimes are committed by offenders who are substance involved, and nearly half of all crimes that are committed are done so by offenders who are intoxicated at the time of the offense. Substance involved individuals are grossly over-represented in the criminal courts. Addiction and intoxication impair sound judgment, and hence, it intuitively appears that intoxicated offenders are less culpable for their crimes. Moreover, there is often a sense that addiction and intoxication causes aberrant behavior and that curing the substance involvement will lead to more prudent (law-abiding) conduct.

Yet the damage caused by crimes committed by intoxicated and addicted offenders is not diminished because their conduct was influenced by drugs or alcohol. An individual is no less dead if he or she is killed by a drug addicted offender as opposed to another offender. The competing issues relating to the sentencing of addicted and intoxicated offenders are complex. The law regarding the relevance of substance abuse to sentencing is incoherent and confused. Every conceivable approach is supposedly tenable. Substance abuse can sometimes mitigate or aggravate penalty, and at other times it remains neutral. At other times it is neutral. There are also a number of “fine” and often seemingly contradictory principles that have been developed in this area of law.

This Article injects clarity into the manner in which the sentencing system should deal with intoxication and addiction. The most common reason that substance abuse has an impact on the sentencing calculus is because it supposedly effects the culpability of the offender. It can reduce culpability because, so the theory goes, many substance involved offenders are not fully aware of the consequences of their actions. It has also

1. The principles governing both forms of addiction are similar. See *Damiani v Western Australia* (2006) 165 A Crim R 358; [2006] WASCA 47, ¶ 2 (Austl.); *infra* Part III.

been asserted that some individuals are driven to drugs and alcohol due to difficult life circumstances and this inclines them to criminal behavior. On the other hand, substance involvement has also been held to necessitate a higher penalty² when the offender is aware that intoxication can lead to irresponsible behavior.

An evaluation of the correctness of these approaches ostensibly invites exploration into what has been proven to be thus far intractable philosophical issues of free will: the bounds of personal responsibility and determinism. The more sound approach, however, is driven by the clarity stemming from the overarching objectives of the criminal justice system. This reference point commands that the principal determinant of offense severity is dictated by the level of harm caused by the crime. The mental process and the precise causal levers that prompt an offender to commit crime are distant secondary considerations. The distorting effect that drugs and alcohol have on an individual's thinking, moral compass, and impulse control are all interesting and even compelling areas of learning. But they are largely irrelevant from the perspective of a properly designed sentencing system. In this domain, consequences, not behavioral triggers, are paramount. This clarity is a key premise in this Article.

Additionally, we examine and evaluate other reasons that have been given for incorporating substance involvement into the sentencing calculus. These include the view that it is supposedly relevant to the prospects of rehabilitation. While some programs seem to reduce the recidivism rate of substance affected offenders, other evidence suggests that overall these offenders have a significantly higher rate of reoffending than other offenders.³ From the perspective of the prospects of rehabilitation versus the higher rate of repeat offending by substance involved offenders, we effectively arrive at a "one all draw."⁴

An overarching and institutionally focused response to the problem posed by substance involved offenders suggests that substance use should not mitigate penalty.⁵ It should not

2. *See infra* Part II.

3. *See infra* Part III.

4. *See infra* Part IV.

5. *See infra* Part IV.

aggravate penalty. The *outcome* of this proposition is not nuanced or complex. It has one major advantage, however: it is doctrinally sound. There are two further considerable advantages from this approach. First, it can be effectively, readily, and transparently implemented. Second, it injects jurisprudential and normative rigor into the sentencing calculus. It corrects distortions to sentencing outcomes which stem from misguided theoretical underpinnings and unattainable sentencing objectives.

Nevertheless, it is important to give due weight to the correlation between substance use and criminal conduct. The link between substance involvement and crime should be promulgated and publicized. There are many good reasons people have for not consuming drugs and alcohol. The health reasons are generally well-known due to community education campaigns. However, the criminogenic reasons are less evident. The fact that people who take substances statistically have a much higher risk of committing crime⁶ and being sentenced to imprisonment should be promoted as an additional reason to desist from substance intake. Further, more public health funding should be devoted to alcohol and drug programs in both the general community and criminal justice settings (including imprisonment).

A limitation to the recommendations and discussion in this Article is that we do not focus on the relevance of substance involvement to capital cases. The extreme nature of the death penalty often compels different jurisprudential principles.⁷ Excluding consideration of death penalty cases does not constitute a serious limitation to this Article. The United States is the only developed nation apart from Japan that still imposes the death penalty.⁸ Moreover, not all states in America impose the death penalty⁹ and only a relatively

6. *See infra* Part II.

7. The proportionality principle derived from the Eight Amendment is, for example, applicable to the death penalty but rarely to other forms of punishment. *See generally* *Furman v. Georgia*, 408 U.S. 238 (1972); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

8. *See* Death Penalty Information Center: <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140>.

9. There are thirty-two states which still have the death penalty. States with and Without the Death Penalty, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Aug. 21, 2015).

small number of criminals are executed in the United States.¹⁰

We start in Part I by examining the extent of the connection between drugs, alcohol, and crime, and note that reliable studies establish that most individuals that commit a crime are substance involved and that nearly half of all offenders are intoxicated at the time of offending. In Part II, we analyze and critique the existing law on substance abuse and sentencing. We first consider the legal position in two jurisdictions: Australia and the United States. This approach in Australia is illuminating because the courts have more expansively discussed the doctrinal underpinnings for taking substance involvement into account in the sentencing calculus than in the United States. Australian sentencing law also has the same overarching objectives as that in the United States (namely incapacitation, general and specific deterrence, and rehabilitation).¹¹ However, unlike the United States, there remains a large degree of judicial discretion reposed in sentencing decisions and this provides a useful reference point to this discussion. Moreover, the extensive judicial examination of this issue in Australia could potentially enlighten the future direction and development of sentencing law in the United States, so far as it concerns substance involved offenders. Reform proposals are set out in Part IV of the Article.

I. THE EXTENT OF THE PROBLEM: MOST CRIMES ARE COMMITTED BY OFFENDERS WHO ARE SUBSTANCE INVOLVED

In this Article we consider the connection between illicit drugs, alcohol, and crime. This Article refers to both illicit drugs and alcohol as “substances.” The illegal nature of certain drugs sets them apart from alcohol in some respects, namely they are often more expensive than alcohol and cannot be purchased and consumed in controlled doses. Illicit drugs and alcohol both have the commonality that they can impair judgement and perception. Further, the coupling of alcohol and illicit drugs into the single generic category is consistent with

10. Since 1976, there have been 1,413 executions. Executions by Year, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last updated Aug. 13, 2015).

11. *See infra* Part II.

the approach taken in most studies and the literature examining the connection between substances and crime.¹² Accordingly, unless expressly indicated to the contrary in this Article, the term “substance” or “drug” refers to both alcohol and illicit drugs.

Ascertaining the extent to which substance use contributes to crime is complex. As noted by the Australian Institute of Criminology, in trying to ascertain the extent of crime that is drug related: “all estimates, including those presented in this study, rely on complex calculation techniques and assumptions that may not hold true in the real world.”¹³

A. *American Studies*

Despite these complexities, as noted below, numerous wide-ranging studies have been undertaken in an attempt to at least approximate the extent of the link between substance abuse and crime. A 2010 report by The National Centre on Addiction and Substance Abuse, (proclaiming to be the “most exhaustive analysis ever undertaken to identify the extent to which alcohol and other drugs are implicated in the crimes and incarceration of America’s prison population.”¹⁴) reports that 84.8% of all incarcerated offenders in United States at the time of survey (2006) were “substance involved.”¹⁵

Most of these offenders (65%) satisfied the DSM-IV medical criteria for alcohol or drug abuse and addiction.¹⁶ The report is an update of the 1998 report by the same Centre¹⁷ which showed that four out of five of America’s 1.7 million inmates (at that time) were substance involved in 1996.¹⁸ By

12. *See infra* Part III.

13. Jason Payne & Antonette Gaffney, *How Much Crime is Drug or Alcohol Related? Self-reported Attributions of Police Detainees*, 439 AUSTL. INST. OF CRIMINOLOGY 5 (2012).

14. Behind Bars II: Substance Abuse and America’s Prison Population, CASACOLUMBIA (Feb. 2010), <http://www.casacolumbia.org/addiction-research/reports/substance-abuse-prison-system-2010>. The report notes: “To conduct this study, CASA analyzed data on inmates from 11 federal sources, reviewed more than 650 articles and other publications, examined best practices in prevention and treatment for substance-involved offenders, reviewed accreditation standards and analyzed costs and benefits of treatment.” *Id.* at 1.

15. *Id.*

16. *Id.* at 1

17. *Id.*

18. CASA, Behind Bars: Substance Abuse and America’s Prison Population (1998).

the time the latter report was completed, the prison population had risen to 2.3 million and the rate of substance involved inmates had increased by approximately 5%.¹⁹ Not only is substance involvement endemic among offenders, in relative terms offenders are far more likely to use drugs than other individuals. The 2010 Report notes that inmates are seven times more likely to have a substance abuse disorder than individuals in the general population.”²⁰ A slightly greater portion of property offenders than violent offenders were substance involved (83.4% compared to 77.5%).²¹

It is worth noting that the above report gives “substance involved” a wide definition and, in particular, it does not require a causal nexus between the substance use and the crime. “Substance involved” refers to inmates who:

- had a history of using illicit drugs regularly (i.e., one or more times a week for at least a month);
- met medical criteria for a substance use disorder;
- were under the influence of alcohol or other drugs when they committed their crimes;
- had a history of alcohol treatment;
- were incarcerated for a drug law violation;
- were incarcerated for an alcohol law violation; or
- had some combination of these characteristics.²²

The breadth with which substance involvement is defined does not establish a causal connection between drug or alcohol use and the present offense. For example, the fact that an offender has previously sought alcohol treatment or at some point in his or her life used drugs during the month preceding the offense does not mean that drugs were a contributing factor to the present offense.

Despite the wide definition of substance use by the above study, the findings are in keeping with other wide-ranging

19. See *Behind Bars II*, *supra* note 14.

20. *Id.* at 3. In 2013, it was estimated that in the United States Overall, 17.3 million people had an alcohol dependency and a further 6.9 million had an illicit drug dependency. *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings*, U.S. DEP'T OF HEALTH & HUMAN SERVS., 81 (2014), available at <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

21. *Behind Bars II*, *supra* note 14, at 2.

22. *Behind Bars II*, *supra* note 14, at 3.

studies relating to the link between drugs and crime. In terms of historic drug use (i.e., drug use that significantly predated the present offense), and drug use in the month prior to the offending, a report by the United States Bureau of Justice Studies also notes a strong association between substance use and crime. The Bureau of Justice Studies report notes:

In 1991, 60% of federal prisoners reported prior drug use, compared to 79% of state prisoners. In 1997 this gap in prior drug use was narrowed, as the percentage of federal inmates reporting past drug use rose to 73%, compared to 83% of state inmates. By 2004 this gap was almost closed, as state prisoner reports of lifetime drug use stayed at 83%, while federal inmates rose to 79%. . . . Although the proportion of federal prisoners held for drug offenses dropped from 63% in 1997 to 55% in 2004, the percentage of all federal inmates who reported using drugs in the month before the offense rose from 45% to 50%.²³

A more illuminating and telling statistic regarding the connection between substance use and crime is the percentage of offenders who were under the influence of drugs or alcohol at the time of the crime (as opposed to those that used drugs in some defined period prior to the offending). According to the 2010 study conducted by the National Centre on Addiction and Substance Abuse, the figure was 42.8%.²⁴ This is slightly higher than the survey data from the Bureau of Justice Statistics, which still reports that a high number of offenders are intoxicated at the time of offending. This data states: "In the 2004 Survey of Inmates in State and Federal Correctional Facilities, 32% of state prisoners and 26% of federal prisoners said they had committed their current offense while under the influence of drugs."²⁵

The Bureau of Justice Statistics also surveyed victims of violent offenses regarding their perception of the state of offenders. According to the National Crime Victimization Survey (NCVS), the portion of victims who stated that they believed the offender was substance affected at the time of the offense is similar to the frequency reported by offenders:

23. Jennifer C. Karberg & Christopher J. Mumola, *Drug Use and Dependence, State and Federal Prisoners, 2004*, BUREAU OF JUSTICE STATISTICS (Oct. 11, 2006), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=778>.

24. Behind Bars II, *supra* note 14, at 11.

25. Karberg *supra* note 23.

In 2007, there were 5.2 million violent victimizations of residents age 12 or older. Victims of violence were asked to describe whether they perceived the offender to have been drinking or using drugs.²⁶ About 26% of the victims of violence reported that the offender was using drugs or alcohol.²⁷

Another close correlation between crime and drugs or alcohol arises when the offense is committed in order to purchase drugs. The 2010 Report by the National Centre on Addiction and Substance Abuse states that 15% of offenders committed crime to obtain money to buy drugs.²⁸ This figure is nearly identical to data reported by the Bureau of Justice Statistics which states that 17% of state inmates and 18% of federal inmates committed their offenses to obtain money to purchase drugs.²⁹

B. Australian Studies

The empirical evidence from Australia regarding the link between drugs and crime is similar to that in the United States. The most recent wide-ranging Australian study was undertaken by the Australian Institute of Criminology. The study focused on self-reported causes of crime.³⁰ The study consisted of 1,884 detainees who were interviewed in 2009.³¹ Thus, the study was undertaken at the time of arrest. The results of the Australian Institute of Criminology Australian study were in keeping with a study published in 2008, which asked detainees to report on not only the specific offenses for which they were detained, but also on all the offenses within the proceeding twelve months.³²

Most of the detainees (1,631, or 88%) reported using drugs in the 30 days prior to arrest (the number using illegal drugs was 1,113, and alcohol 1,376).³³ Similar to the situation in the

26. *Id.*

27. *Id.*

28. Behind Bars II', *supra* note 14, at 11.

29. Karberg *supra* note 23.

30. *See* Payne, *supra* note 13.

31. *Id.* at 1.

32. T. Makkai & J. Temple, *Drugs and Crime: Calculating Attributable Fractions*, in COUNTING THE COST: ESTIMATES OF THE SOCIAL COSTS OF DRUG ABUSE IN AUSTRALIA IN 2005–2006 (D. Collins & H Lapsley eds., 2008).

33. Payne, *supra* note 13. Many detainees used both drugs and alcohol, and thus, the combined figure (2,489) is more than the total number of detainees

United States, the rate of substance abuse among offenders in Australia is far higher than the general community.³⁴

According to the Australian Institute of Criminology report, approximately half of all detainees (45%) attributed their offending to either drug or alcohol use, or both.³⁵ The drug-crime attribution for alcohol was 30%, while for illegal drugs it was 19%³⁶ (with heroin having the highest attribution level—54% of users³⁷—and LSD had the lowest attribution level—9%³⁸). For offenders who attributed their offending to illicit drug use, 25% stated they committed the crime to get money to purchase drugs; 40% stated that they were intoxicated at the time of the offense; 20% stated they were “hanging out for drugs”; and 38% gave other reasons.³⁹ The same questions were not asked of those who attributed their offending to alcohol—it was assumed that the majority of crime which was attributed to alcohol was on the basis that the offender was intoxicated.⁴⁰

In total, the detainees were charged with 4,237 offenses, including: 753 violent offenses, 867 property offenses, and 896 relating to a breach of justice order.⁴¹ In all, 48% of the offenses were said to be attributable to either drug or alcohol use.⁴² Most detainees (52%) who were charged with property offenses attributed their crimes to drugs (37%) or alcohol (21%)⁴³; while a slightly lower portion (42%) of violent offenders attributed

(1,631).

34. 2007 *National Drug Strategy Household Survey: Detailed Findings*, AUSTRALIAN INST. OF HEALTH & WELFARE (Dec. 18, 2008), <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442459906>.

35. Payne, *supra* note 13.

36. Payne, *supra* note 13.

37. Payne, *supra* note 13, at 3. Only 11.4% of the sample used heroin in the past 30 days.

38. Payne, *supra* note 13, at 3. Only 2.3% of the sample used LSD in the previous 30 days.

39. Payne, *supra* note 13, at 4. The figures do not equate to 100 because some interviewees gave more than one answer.

40. Payne, *supra* note 13, at 4.

41. Payne, *supra* note 13, at 4.

42. Payne, *supra* note 13. This figure is different to the number of detainees that were substance involved (45%) because some detainees were charged with more than one offense.

43. Payne, *supra* note 13. The combined total of drugs and alcohol does not equate to the whole because some offenders attributed their offending to both substances.

their crimes to drugs (12%) or alcohol (34%).⁴⁴

The profiles of the individuals who are the subjects of the key reports above vary slightly. The United States data relates to inmates (i.e., convicted offenders), whereas the Australian data refers to individuals who have been charged with offenses. However, in real terms the cohorts are similar, given that in Australia more than 90% of charged offenders are found guilty.⁴⁵ Accordingly, in light of the large number of individuals involved in the respective studies and the fact that the studies relate to two different countries, three reasonably conclusive observations can be made regarding the link between substances and crime:

- The majority of criminal offenders are substance involved;
- A large portion of offenders (over 30%) commit their offense while under the influence of alcohol or illicit drugs at time of the offense; and
- Nearly 20% of offenders commit crime to purchase drugs.

II. THE CURRENT STATE OF THE LAW

We now analyze the manner in which sentencing law currently deals with the substance involved offenders. In doing so, we first discuss the situation in Australia, given that it is in this jurisdiction that the issue has been subject to the greatest amount of judicial discussion and evaluation.

A. *Substantive Involvement and Australian Sentencing Law*

1. *Overview of Australian Sentencing Law and Practice*

Prior to examining the relevance of intoxication to sentencing, we first provide an overview of the sentencing

44. Payne, *supra* note 13, at 45. The combined total of drugs and alcohol does not equate to the whole because some offenders attributed their offending to both substances.

45. MIRKO BAGARIC & RICHARD EDNEY, AUSTRALIAN SENTENCING: PRINCIPLES AND PRACTICE (2d ed. 2014).

regime in Australia. Sentencing law differs in each Australian jurisdiction (the six states, Northern Territory, the Australian Capital Territory, and the Federal jurisdiction).⁴⁶ However, there is considerable convergence in relation to a number of key areas.⁴⁷ All Australian jurisdictions pursue the same fundamental objectives of sentencing, in the form of incapacitation (also referred to as community protection), general deterrence, specific deterrence, rehabilitation, and retribution.⁴⁸

By contrast to the sentencing system in the United States,⁴⁹ a distinctive aspect of the Australian sentencing system is that courts normally have a wider discretion regarding choice of penalty.⁵⁰ Fixed penalties for serious offenses in Australia are rare.⁵¹ The reasoning process that judges undertake in making sentencing decisions is known as the “instinctive synthesis.”⁵² This is a mechanism whereby sentencers make a decision regarding all of the considerations that are relevant to sentencing and then give due weight to each of them (and, in the process, incorporate considerations that incline to a heavier penalty and offset against them factors that favor a lesser penalty) and then set a precise penalty.⁵³ “The hallmark of this process is that it does not require (nor permit) judges to set out with any particularity the weight (in mathematical terms) accorded to any particular consideration.”⁵⁴ Patent subjectivity is incorporated into the sentencing calculus. Current orthodoxy maintains that there is no single correct sentence⁵⁵ and that the “instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ.”⁵⁶ Under this model, courts can impose a sentence within an “available range” of penalties.

46. *Id.*

47. *Id.*

48. *Id.*

49. *See infra* Part II.B.

50. *Id.*

51. *Id.*

52. The term originates from the decision in *R v Williscroft* (1975) VR 292 (Austl.).

53. *R v Williscroft* (1975) VR 292.

54. Mirko Bagaric, *Sentencing: From Vagueness To Arbitrariness—The Need to Abolish the Stain that is the Instinctive Synthesis in Australian Sentencing* 38 UNIV. OF NEW SOUTH WALES L.J. 76. (2015) .

55. *Markarian v The Queen* (2005) HCA 25, ¶27, ¶133.

56. *Hudson v The Queen* (2010) 205 A Crim R 199, 206.

The spectrum of this range is not clearly defined.

Some degree of predictability⁵⁷ is injected into the sentencing system by the fact that the proportionality principle is adopted in all jurisdictions.⁵⁸ This is the main determinant of sentence type and severity. A clear statement of the principle is provided by the High Court of Australia in *Hoare v The Queen*, where the Court stated: “[A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances.”⁵⁹

Another defining aspect of Australian sentencing law is the large number of considerations (more than 200) that can either mitigate or aggravate penalty.⁶⁰ There are four categories of mitigating factors.⁶¹ The first are those relating to the offender’s response to a charge and include pleading guilty⁶² and remorse.⁶³ The second category consists of factors that relate to the circumstances of the offense and which contribute to, and to some extent explain, the offending. These include mental impairment⁶⁴ and provocation.⁶⁵ The third category relates to matters that are personal to the offender, such as youth,⁶⁶ and good prospects of rehabilitation.⁶⁷ The impact of the sanction is the fourth broad type of mitigating factor, and includes considerations such as onerous prison

57. However, as noted below the level of predictability is relatively minor. See Bagaric, *supra* note 54, at 77.

58. BAGARIC & EDNEY, *supra* note 45.

59. *Hoare v The Queen* (1989) 167 CLR 348, 354.

60. Compare JOANNA SHAPLAND, BETWEEN CONVICTION AND SENTENCE: THE PROCESS OF MITIGATION 43 (1981) (identifying 229 factors), with LA TROBE UNIV., GUILTY, YOUR WORSHIP: A STUDY OF VICTORIA’S MAGISTRATES’ COURTS (1980) (identifying 292 relevant sentencing factors’).

61. See VICTORIAN SENTENCING COMMITTEE REPORT, SENTENCING 359–60 (1988).

62. See *Cameron v The Queen* (2002) 209 CLR 339 (Austl.).

63. *R v Whyte* (2004) 7 VR 397; *Barbaro v The Queen* (2012) VSCA 288; *Phillips v The Queen* (2012) VSCA 140.

64. See *R v Tsiaras* (1996) 1 VR 398; see also *Muldrock v The Queen* (2011) 244 CLR 120; *R v Verdins* (2007) 16 VR 269.

65. *Va v The Queen* (2011) VSCA 426.

66. *R v Neilson* (2011) QCA 369; *R v Kuzmanovski; Ex parte Attorney-General (Qld)* (2012) QCA 19.

67. *R v Osenkowski* (1982) 30 SASR 212; *R v. Skilbeck* (2010) SASCFC 35; *Elyard v The Queen* (2006) NSWCCA 43.

conditions,⁶⁸ and public opprobrium.⁶⁹ Additionally, there are also a large number of aggravating factors, including: prior criminal record,⁷⁰ high level of planning,⁷¹ offending committed while on bail,⁷² and breach of trust.⁷³

The obscure nature of the proportionality principle,⁷⁴ the large number of aggravating and mitigating considerations, and the fact that judges do not indicate the weight or emphasis accorded to each consideration are the key reasons that sentencing in Australia remains unpredictable and inconsistent.⁷⁵ The largely unfettered discretionary nature of Australian sentencing calculus is similar to the uncontrolled sentencing process used in parts of the United States fifty years ago, which led Justice Marvel Frankel to describe the system as lawless.⁷⁶ In a similar vein, in *Mistretta v. United States* it was noted that indeterminate sentencing had been criticised for producing “‘shameful’ consequences . . . [in the form of a] . . . great variation among sentences imposed by different judges upon similarly situated offenders . . . [and] . . . uncertainty as to the time the offender would spend in prison.”⁷⁷ The fact that sentencing principles in Australia are not densely prescribed by statute provides the opportunity and catalyst for extensive judicial development and analysis of sentencing concepts. This includes the role that alcohol and illicit drug⁷⁸ involvement should have in sentencing.

68. *Western Australia v O’Kane* (2011) WASCA 24; *R v Puc* (2008) VSCA 159; *Tognolini v The Queen* (2012) VSCA 311.

69. *Ryan v The Queen* (2001) 206 CLR 267.

70. *Field v The Queen* (2011) NSWCCA 13; *Saunders v The Queen* (2010) VSCA 93.

71. *R v Yildiz* (2006) 160 A Crim R 218; *R v Douglas* (2004) 146 A Crim R 590.

72. *R v Gray* (1977) VR 225; *R v Basso* (1999) 108 A Crim R 392; *R v AD* (2008) NSWCCA 289.

73. *Director of Public Prosecutions v Truong* (2004) VSCA 172; *Carreras v The Queen* (1992) 60 A Crim R 402; *Attorney-General v Saunders* (2000) TASSC 22; *Hill v The Queen* (1999) TASSC 29; *R v Ottobriano* (1999) WASCA 207; *R v Black* (2002) WASCA 26.

74. See Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing* (2013) 25 NEW ZEALAND UNIV. L. REV. 411 (2013).

75. BAGARIC & EDNEY, *supra* note 45.

76. Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972). For a critique of Frankel’s impact, see Lynn Adelman & Jon Dietrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239 (2008).

77. *Mistretta v. United States*, 488 U.S. 361, 366 (1989).

78. The principles governing both forms of substances are similar. See

This issue is marked by a high degree of uncertainty in terms of identification of the relevant theoretical principles and even more so when it comes to operationalizing any principles. In more understated terms, the Court of Criminal Appeal of New South Wales recently in *Kukovec v R* stated: “the relevance of drug addiction in a sentencing exercise is a matter of some complexity.”⁷⁹ There are authorities which support every possible outcome regarding the impact that substance involvement should have on sentencing. Sometimes it has been held to be neutral (i.e., of no relevance), and at other times it has been considered either an aggravating or mitigating consideration. Thus, we see that in *R v Koumis & Ors* it was stated that addiction is not of inherent relevance to sentencing:

Drug addiction is not of itself a factor that necessarily calls for a lesser sentence than would otherwise be appropriate. The sentence to be fixed has to reflect the seriousness of the crime of trafficking in substantial quantities of a drug of dependence. Denunciation and general deterrence assume particular importance as the purposes to be effectuated by the sentence. Generally speaking, addiction and any consequential impairment of judgment, will not have any significant mitigatory effect upon those sentencing considerations.⁸⁰

By contrast, in *Vozlic v The Queen*, the same Court noted that “[a] fact such as drug addiction is a circumstance of the offender which will often have an intrinsic relevance in the sentencing process.”⁸¹

2. *The Relevance of Substance Involvement to Sentencing in Australia*

We now consider in greater detail all of the ways in which substance involvement can impact sentencing. We start with an examination of the case law suggesting it should have no impact, and then consider the circumstances in which it has been held to aggravate penalty. We then consider cases that

Damiani v Western Australia (2006) 165 A Crim R 358 ; [2006] WASCA 47, [2].

79. [2014] NSWCCA 308, [30]; see also *Trajkovski v The Queen* (2011) VSCA 170.

80. *R v Koumis & Ors* (2008) VSCA 84, [53]; see also *R v SK* (2009) NSWCCA 21.

81. *Vozlic v The Queen* (2013) VSCA 113, [26].

suggest that substance involvement can be a mitigating factor.

It is desirable to commence this part of the discussion by considering the authorities which suggest that substance involvement should not impact penalty. It is in this context that the relevance of substance abuse to sentencing has been considered most thoroughly. A major theme is the extent to which substance abuse can impact on the culpability of an offender. Key to this analysis is supposedly the degree of choice the offender had in taking drugs or alcohol. To this end, there are four broad situations in which substance abuse can be potentially relevant to sentencing:

- (i) The choice to initially commence using drugs;
- (ii) Succumbing to a craving to continue to use drugs;
- (iii) Committing a crime to feed a drug craving (for example, selling drugs to pay for a drug habit); and
- (iv) Committing a crime while under the influence of drugs, which impairs the judgement of the offender (for example, assaulting a victim as a result of a minor provocation).

The above four considerations were considered in the landmark decision of *R v Henry*,⁸² where the New South Wales Court of Criminal Appeal issued a guideline judgment in respect of the offense of armed robbery.⁸³ One of the issues raised was the relevance of drug addiction to sentencing armed robbers. In this case, the offender was addicted to drugs and committed the crime to raise money to feed his drug habit.⁸⁴ The majority of the Court held that the offender's drug habit did not justify a reduced (or increased) sentence. In particular, Spigelman CJ held that committing an armed robbery to obtain funds to fund a drug addiction is not mitigatory.⁸⁵

82. (1999) 46 NSWLR 346; 106 A Crim R 149.

83. A guideline judgment is a sentencing decision which purposively sets out for other courts the main considerations which are relevant in ascertaining an appropriate penalty for a particular crime or the circumstances in which it is appropriate to impose a certain type of sanction.

84. *R v Henry* (1999) 46 NSWLR 346, 347.

85. *See also, Johan v R* (2015) NSWCCA 58. As discussed below, this is in contrast to where an offender sells drugs to feed a drug habit, in which case drug use is often regarded as a mitigating consideration. The contrast is made out in *R v Bouchard* (1996) 84 A Crim R 499, at 501 in the following terms: 'it may be conceded that it [addiction] is a relevant and sometimes very significant factor in sentencing that an offender engaged in trafficking, especially at 'street level', in order to gain the wherewithal to satisfy his own craving, rather than as a non-

In reaching this conclusion, Spigelman CJ had regard to the neurobiological evidence regarding the causes and realities of substance use.⁸⁶ Spigelman CJ concluded that at the key different stages of the substance abuse cycle, individuals have genuine choices regarding their actions.⁸⁷ These choices may not always be completely free; however, he noted that this is a reality that relates to many personal choices.⁸⁸ People, on his assessment, need to take full moral and legal ownership for all of their actions which they perform pursuant to a substantial degree of choice. This, he suggested, was the situation in relation to all aspects of the drug-offending cycle. Spigelman CJ stated:

The authorities are against the proposition that drug addiction should, of itself, be accepted as a mitigating factor. There is authority that where the original addiction was not a willed act, that may be taken into account by way of mitigation. The authority does not go beyond. . . . It was submitted that the degree of moral culpability of a particular offender is diminished by addiction. Evidence was put before the Court that there is, at least in some cases, a genetic predisposition to addiction and that addiction generally is not simply a state of mind but has a neurobiological or physiological base. It was put that an addict's decision to perform a criminal act was not "a completely free choice". In my opinion drug addicts who commit crime should not be added to the list of victims. Their degree of moral culpability will vary, just as it varies for individuals who are not affected by addiction. There are a number of aspects of the relationship between drug addiction and crime which indicate that moral choices are made. First is the original decision to experiment with drugs which, in the usual case, is a completely free choice. The addictive quality of drugs, together with the anti-social behaviour which so commonly results from addiction, is so widely known that persons who choose a course of addiction must be treated as choosing its consequences. Secondly, the submissions in this Court were in error in identifying the relevant conduct as the craving associated with

user acting purely for reasons of greed and in callous disregard of the grave harm that offense does to its victims. But it is quite unsafe, in my opinion, to reason from cases concerning narcotics to a case of armed robbery."

86. *Henry* (1999) 46 NSWLR 346, [200].

87. *Id.* at 197-210.

88. *Id.* at 197.

withdrawal. The material presented to the Court did not suggest that the choice faced by addicts was between this negative feeling and the need for money to allay it. Rather the choice may often be the desire for the positive feeling said to be associated with a drug induced euphoria. The desire to bring about that state of “well-being” is, relevantly, a moral choice. Thirdly, nothing in either the process of addiction or its neuro-biological and physiological basis, leads ineluctably to the commission of crime, let alone the commission of crimes of violence against persons, such as armed robbery. Not all persons who suffer from addiction behave in this way. Those that do so, make a choice. . . . There is no warrant, in my opinion, to assess a crime induced by a need for funds to feed a drug addiction, as being lower in the scale of moral culpability than other perceived requirements for money.⁸⁹

Simpson J in *R v Henry* took a different (minority dissenting) view regarding the reality of choice experienced by many offenders who have substance abuse problems.⁹⁰ In relation to the decision to start using drugs (or alcohol), she takes the view that this is often a symptom of an underlying problem, and hence, the choice is far from free. Simpson J states:

In the worst, or least forgivable, cases it may have its origins in arrogance, in an antipathetical attitude to the laws of society, or in weakness of character. In other cases, I have no doubt, it has its origins in social disadvantage, poverty, emotional, financial, or social deprivation, poor educational achievement, unemployment, and the despair and loss of self-worth that can result from these circumstances or any combination of them. In this court one sometimes sees cases in which drug taking stems from sexual assault or exploitation, sometimes committed when the person who turns to drugs, and who comes before the court, is very young, and sometimes the precipitating events have occurred many years before. Drug addiction is not always the disease; it is, as often as not, a symptom of

89. *Id.* at 194-202. The position of Spigelman CJ is echoed by Wood CJ, “[t]here remains for every offender a choice between reform and recidivism, and the problem is better addressed by the development of adequate programs and rehabilitation options within the prison environment, than it is by a significant change in sentencing policy.” *Henry*, at [267].

90. *Id.* at 332-56.

social disease.⁹¹

She adds: “Drug addicts do not come to their addiction from a social or environmental vacuum. This court should not close its eyes to the multifarious circumstances of disadvantage and deprivation that frequently precede and precipitate a descent into illegal drug use.”⁹²

Further, she states that the concept of choice is even less apt regarding the decision to continue to use drugs:

Nor can I accept that the exercise of free choice in the use of drugs is always of equal dimensions. It is not every decision to use drugs that can properly or fairly be characterized as a decision made in the exercise of free choice. The will of an individual can be overborne, or undermined, not only by acts of another person, but also the pressure of circumstances. I do not accept that most drug offenders are truly exercising free will when they choose the degradation, despair, criminality and cycle of imprisonment that can follow the initial use of illegal drugs. The circumstances that propel the offender to use of drugs are often, if not usually, beyond his or her control. They may or may not be combined with a vulnerable personality or even a weakness of character. Many drug offenders have not had the life experiences or the normal developmental path that permit a conclusion that the decision to take drugs was a decision made in the exercise of a free choice in the sense in which that phrase is ordinarily understood.⁹³

Thus, neither the majority nor minority in *Henry* take issue with the link between crime, drugs, and alcohol. The key difference relates to the notion of choice, and the extent to which the choice to use drugs, and continue with their use is “free.”

In order to fully understand this contrast, it is important to note that there is a distinction in the criminal law between responsibility and culpability. The concept of responsibility is binary. Individuals are criminally responsible for a crime if they have committed the actus reus of the offense, have the relevant mens rea, and there is no applicable defense.⁹⁴ To

91. *Id.* at 336.

92. *Henry* (1999) 46 NSWLR 346, 337.

93. *Id.* at 338.

94. KEN J. ARENSEN ET AL., AUSTRALIAN CRIMINAL LAW IN THE COMMON LAW JURISDICTIONS (4th ed., 2015); MARKUS DUBBER & MARK KELMAN, AMERICAN CRIMINAL LAW (2d ed., 2009).

satisfy the mens rea requirement, it is necessary for offenders to intend to commit the crime or act recklessly in relation to its occurrence. Some defenses are grounded in the absence of free will, with duress being the clearest example.⁹⁵ If mens rea and actus reus are established, and an offender cannot establish a defense, he or she will be *responsible* for the crime.

Unlike responsibility, *culpability* comes in degrees. It relates to the level of moral and legal blameworthiness of an offender. This is a concept that is often invoked in sentencing law.⁹⁶ Considerations that often are thought to diminish culpability include: youth of the offender, and lack of planning.⁹⁷ Moreover, a diminished level of freedom or choice is normally associated with reduced culpability, thus mental illness and diminished cognitive culpability are often associated with reduced culpability.⁹⁸

The debate between Simpson J and Spigelman CJ does not (if the words of Simpson J are taken literally) relate to a matter of degree of choice or culpability. Simpson J goes so far as stating that some substance abused offenders have their will overborne, in a similar way to that which occurs as a result of pressure by another person⁹⁹. Simpson J is, in effect, of the view that the path chosen by some substance abused offenders is so lacking in autonomous choice that they are not responsible for their actions, in the same way that individuals who commit crimes under coercion are not guilty. Spigelman CJ, on the other hand, believes that diminution of choice is so minor that it does not relevantly diminish the level of blame, even for sentencing purposes. Thus, we see that their Honours

95. For a discussion of the elements of duress, see Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. Crim. L. & Criminology 575 (2011).

96. BAGARIC & EDNEY, *supra* note 45.

97. BAGARIC & EDNEY, *supra* note 45.

98. For a discussion of this, see STANFORD LAW SCHOOL, WHEN DID PRISONS BECOME ACCEPTABLE MENTAL HEALTHCARE FACILITIES?, 2 (2014); Note, *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250 (2015); *Developments in the Law: The Law of Mental Illness*, 121 HARV. L. REV. 1114 (2008); E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147 (2013); Ian Freckelton, *Sentencing Offenders with Impaired Mental Functioning* R v Verdins, Buckley and Vo, 14 PSYCHIATRY PSYCHOL., & L. 359 (2007); James Ogloff et al., *Psychiatric Symptoms and Histories among People Detained in Police Cells*, 46 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 871 (2011).

99. *R v Henry* (1999) 46 NSWLR 346, 338.

take a vastly different approach to the considerations that effect drug and alcohol use, and ultimately the ramifications this has for sentencing. In Part III of this Article, we analyze and critique these approaches.

Before doing so, it should be noted that more recently, it has been confirmed that armed robberies committed to feed a drug problem do not merit less punishment than armed robberies committed for other reasons. In *R v Omar*, the Court stated:

[I]t would involve an exercise in irresponsibility on the part of the Court, if it were understood as a message that committing the crime of armed robbery to feed a drug habit is less deserving of censure than would otherwise be the case. The legislature has, by the heavy maximum penalty prescribed for armed robbery, spoken clearly in relation to this offense. Drug dependent persons should not be encouraged, as a class, to think that they are free to engage in serious criminal conduct of whatever kind with impunity, or with any hope of favourable treatment because they are able to show that they needed money through their addiction. In summary, I see no reason to depart from the planks of punishment, retribution and rehabilitation that underlie the sentencing process generally, and that permit of individualised sentencing by reference to the objective and subjective circumstances of each case.¹⁰⁰

This is in contrast to a drug trafficking offense. It has been held that drug addicts who sell drugs solely to feed their habit should receive a lower penalty than offenders who sell drugs solely for greed.¹⁰¹ Further, it has been noted that it is unclear whether this is because of an absence of an aggravating factor, or because trafficking for addictive reasons is itself mitigatory.¹⁰²

Substance involvement is, on occasion, treated as an aggravating consideration.¹⁰³ This is most commonly the case when the offender has knowledge that intoxication may lead to criminal behavior. The level of the awareness that an offender is required to have that intoxication could result in criminal

100. [2015] NSWCCA 67, [274]-[276].

101. *R v Koumis & Ors* (2008) VSCA 84.

102. *Id.* at 51; *see also Vozlic v The Queen* [2013] VSCA 113; *R v Nagy* [1992] 1 VR 637.

103. *See e.g., R v Fletcher-Jones* (1994) 75 A Crim R 381, 386-88; *R v Groom* (1999) 2 VR 159, 164; *R v Gordon* (1994) 71 A Crim R 459.

behavior is unclear. It is not a matter that has been extensively discussed by the authorities. However, to the extent that the issue has been canvassed, it seems that the standard is readily satisfied—previous offending or inappropriate behavior while intoxicated on any substance would seem to suffice.

In *R v Martin*, the court sentenced an offender for a murder committed while he was under the influence of amphetamines.¹⁰⁴ In rejecting the submission that the use of drugs was mitigating, and finding the opposite—that it was an aggravating factor—the Court set out the relevant principle in the following manner:

Voluntary ingestion of drugs should be approached no differently from intoxication, in our view. The critical question will be what the probable consequences of the ingestion of the particular drug by the particular offender were, and whether the offender foresaw those consequences. . . . For these reasons, we agree with the sentencing judge that the applicant's drug-induced psychosis was an aggravating factor. The contention that his self-induced psychotic state was a mitigating factor cannot be sustained. His moral culpability is the greater because of his foreknowledge of the likely consequences of his continued drug-taking, and his decision to continue doing so, even when he was experiencing paranoid delusions. In this sense, there is an important element of deliberateness or premeditation about the course of conduct on which the applicant embarked, which ultimately caused the death of an innocent man.¹⁰⁵

In *Damiani v Western Australia*, the court stated that “self-induced addiction at an age of rational choice establishes moral culpability for the predictable consequences of that choice.”¹⁰⁶ In *R v Robazzini*,¹⁰⁷ the appellant pleaded guilty to a number of violent offenses committed while he was under the influence of drugs and alcohol.¹⁰⁸ The Court held intoxication

104. *R v Martin* (2007) VSCA 291.

105. *Id.* 30, 53. See also, *R v McCullagh* (2003) 141 A Crim R 150, 158; *R v Currie* (1988) 33 A Crim R 7, 9; *Baumer v The Queen* (1987) 27 A Crim R 143; *R v Laffey* [1998] 1 VR 155.

106. (2006) 165 A Crim R 358, 3

107. (2010) VSCA 8.

108. *Id.* at 1–2.

was an aggravating factor.¹⁰⁹ In doing so, it rejected a submission that the consumption of drugs and alcohol can only be aggravating if the offender previously offended while under the influence of the same substance. The Court stated:

If a person acts violently after taking a legal or illicit drug for the first time, he may be unaware of the effect that the drug may have on him, so that his drug use should not be taken into account as an aggravating factor. In this case however, the appellant had used a number of different drugs for many years. He was well aware that they had a disinhibiting effect on him. His moral culpability is not reduced because the “cocktail” he took before he committed these offenses was not precisely the same as the different mixtures of drugs he may have taken on other occasions when he acted violently.¹¹⁰

Thus, the test that must be satisfied in order for substance involvement to be an aggravating factor is broad. It seems to be capable of being established even if there is a single instance of prior criminal behavior while the offender was affected by drugs or alcohol. The type of substance in question does not need to be identical to that which previously underpinned or coincided with the criminal behavior, and it seems that there does not need to be a close similarity between the respective crimes.¹¹¹ The test would seem to have an objective and subjective component: the offender must have actually committed a crime while previously being drug or alcohol affected, and must also be aware of this event.¹¹²

Substance abuse can also be aggravating in more narrow circumstances. For example, it has been held that intoxication is also aggravating where it makes the offense more frightening for the victim.¹¹³ Addiction can also increase sentence because it increases the risk of recidivism. As noted by Wood CJ at Common Law in *R v Henry*, substance abuse can: “impact upon the prospects of recidivism/rehabilitation, in

109. *Id.* at 60.

110. *Id.*

111. See *Edwards v the Queen* (2011) VSCA 87 at 5; *R v Dosen* (2012) VSCA 307 at 6.

112. The clearest instance of this is where the offender consumes drugs or alcohol and knew of its effect on him or her. See *R v Fletcher-Jones* (1994) 75 A Crim R 381; *R v Hay* (2007) VSCA 147 at 18.

113. *R v Groom* (1998) VSCA 146, 24, citing *R v Sewell* (1981) 29 S.A.S.R. 12 at 14–15.

which respect it may on occasions prove to be a two-edged sword.”¹¹⁴

Another way in which substance involvement can relate to sentencing is by reducing the penalty. It has been held that it can have this effect for a variety of reasons. The first is where it reduces the culpability of the offender because, for example, it supposedly caused the offender to act out of character.¹¹⁵ In order it to have this effect, the onus is on the offender to establish that he or she did not know that intoxication might lead to criminal conduct. In *Vergados v The Queen*, the Court stated:

If the respondent was aware that by taking the drug, his judgment would be so affected that he would behave irrationally or that it would affect his ability to exercise control, his self-induced mental state would not constitute a mitigating circumstance. It was for the respondent to establish on the balance of probabilities that he did not know that the drug would have such effects.¹¹⁶

Substance abuse can also reduce the penalty where it directly impacts on other recognized sentencing variables which can mitigate sentence. It can do this in several ways. First, it can be relevant to the degree of planning; which is in fact ultimately relevant to culpability. In *Arbili v. The Queen*, Schmidt J (with whom Hulme J agreed) stated:

114. *R v Henry* (1999) NSWCCA 111 [273]; see also *R v McKee* [2003] VSCA 16, at [13]; *R v Hammond* [1996] QCA 508; (1997) 2 Qd R 195, 199–200. The possible relevance of addiction to rehabilitation is considered below. See *Damiani v Western Australia* (2006) 165 A Crim R 358; [2006] WASCA 47 at 3, where it was stated: “intoxication or addiction will be weighed against the other relevant mitigating and aggravating circumstances, such as danger to the community and prospects of rehabilitation (*Channon v The Queen* (1978) 33 FLR 433; 20 ALR 1, per Brennan J at [5] and Deane J at [21]; *Veen v The Queen* (No 2) (1987) 164 CLR 465; [1988] HCA 14 at 476).” The fact that an offender suffers from alcoholism does not justify the imposition of a term of imprisonment for the sole purpose that rehabilitation will be more likely to occur in a custodial setting.”

115. In *Morrison v The Queen* (2012) VSCA 222 at 17, it was held that alcohol abuse may be mitigating where the offender has no previous indication that it may cause him or her to engage in criminal conduct. Zelling, J in *R v Sewell* (1981) 5 A Crim R 204, at 207, stated: “. . . [A] person under the influence of liquor who is otherwise of blameless character may do something which is quite out of character and the liquor may be both an explanation and a factor in mitigation, but in other cases it may swing the penalty towards deterrence.” See *XY v R* [2007] NSWCCA 72, [28]-[29].

116. (2011) VSCA 438, 47, citing *Director of Public Prosecutions v Aryanitidis* (2008) VSCA 189, 29; see also *Mune v The Queen* (2011) VSCA 231, 32.

This court has said on countless occasions that addiction to heroin is not to be considered as a factor for the reduction of what would otherwise be an appropriate sentence for the nature of the offenses which have been committed. It serves, however, to provide an explanation for the commission of the offenses Drug addiction is one of the circumstances of a particular offense that is relevant to the sentencing exercise. It may, for example, be pertinent to the issue of impulsiveness/planning or to the weight to be given to rehabilitation in a particular case.¹¹⁷

As noted in *Morrison*, addiction can also mitigate penalty on the basis of rehabilitation.¹¹⁸ However, in order to do so, there must be “strong evidence of real progress towards actual rehabilitation.”¹¹⁹ In *R v. Proom*, Doyle CJ stated:

Addiction to drugs may indicate that assurances by an offender of a desire to be rehabilitated are unreliable, or must at least be treated with caution, and sadly may mean that even a genuine wish to rehabilitate may have to be treated with caution. In the worst case, if there is no reason to think that the addiction will be broken, there will be no basis for leniency by reference to the prospect of rehabilitation.¹²⁰

Drug influenced offending can also be mitigating if the offense is committed while an offender experiences a psychotic reaction while trying to withdraw from drugs.¹²¹

There are also a number of authorities suggesting that substance involvement can be mitigatory where it was not willed (i.e., there were other circumstances inclining an individual to escape the realities of his or her life) and drugs or alcohol played a role in the commission of a crime. In *Brown v The Queen*, a thirty-one year old accused who had a long criminal history pled guilty to breaking and entering, and drug trafficking offenses.¹²² He grew up in a violent household and

117. [2012] NSWCCA 48, 173-74 (quoting *R v Valentini* (1989) 46 A Crim R 23 at 25); see also *Waters v Regina* [2007] NSWCCA 219 at [37], where lack of planning was a mitigating factor for an intoxicated offender.

118. See *Morrison v The Queen* (2012) VSCA 222, 20.

119. *Brown v The Queen* [2014] NSWCCA 335, 29, citing Simpson J in *R v Henry* (1999) NSWCCA 111 at 244.

120. [2003] SASC 88, [50].

121. *R v Sebalj* (2006) VSCA 106 at [15]; see also *R v Robazzini* (2010) VSCA 8 at [61].

122. [2014] NSWCCA 335 at [2].

commenced using drugs at the age of about nine or ten.¹²³ He was using drugs at the time of these offenses, although at the time of sentencing he was drug free.¹²⁴ In mitigating the sentence, the Court endorsed the observation of Wood CJ at CL in *R v. Henry*, which stipulated the drug offending can be relevant to offender's culpability by:

suggest[ing] that the addiction was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example where it arose as the result of the medical prescription of potentially addictive drugs following injury, illness, or surgery (*cf Hodge* Court of Criminal Appeal New South Wales 2 November 1993; and *Talbot*); or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment or choice was incomplete. . .¹²⁵

However, this principle is not consistently applied. In *Avdic v The Queen*, the Court sentenced a twenty-six year old pregnant woman for armed robberies she committed while under the influence of drugs.¹²⁶ She resorted to using drugs to deal with the mental suffering stemming from sexual abuse she experienced when she only fifteen years of age.¹²⁷ The court accepted that it was a result of this traumatic event that the offender starting using drugs, and that this resulted in her moral compass being distorted.¹²⁸ The offender was drug free at the time of sentencing and the Court accepted that she had reasonable prospects of rehabilitation. No mitigation was accorded for the fact that the drug abuse stemmed from what was described as a "gross physical assault."¹²⁹

This is in contrast to the more recent decision of *El-Ahmad v. The Queen*, where the court provided a sentencing discount to a substance addicted offender convicted of drug trafficking. The offender had been addicted to drugs at an early age as a result of the trauma of being forced into an arranged (abusive)

123. *Id.* at 10–11.

124. *Id.* at 12–13.

125. [1999] NSWCCA 111 at [273].

126. [2012] VSCA 172 at [2].

127. *Id.* at 11.

128. *Id.* at 11.

129. *Id.* at 10.

marriage.¹³⁰ The applicant sold drugs in order to give her the means to acquire drugs to feed her own addiction.¹³¹ The court held:

The applicant has a number of features of her subjective case that demanded some amelioration of her sentence. Counsel pointed to her “really parlous start to life”, undergoing an arranged marriage at the age of 13 to a close relative who was physically and verbally abusive and introduced her to drugs. Although her drug addiction cannot be regarded in any way as an excuse for her crimes the fact that it had its origins in such circumstances in her teenage years is of some significance: *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346 at [273](c) (Wood CJ at CL). True it is that she eschewed the opportunity for rehabilitation under the Drug Court program and that it is an aggravating feature that her offenses were committed whilst she was on that and other forms of conditional liberty. But in my view the overall subjective case for the applicant is one that justifies a measure of leniency that could not ordinarily be extended in a case involving flagrant and serious involvement in drug supply.¹³²

Where addiction to drugs or alcohol is for medicinal purposes and this contributes to the commission of offense, the courts will normally mitigate the penalty.¹³³

B. Substance Involvement and United States Sentencing

1. Overview of United States Sentencing Law and Practice

As is the case in Australia, each state in the United States and the federal jurisdiction has its separate sentencing system.¹³⁴ Each system has distinctive features, but there are important over-arching commonalities of sentencing throughout the United States. At the broadest level, the main objectives of sentencing are uniform and are the same as those

130. *El Ahmad v R* [2015] NSWCCA 65 at 19 .

131. *Id.* at 17.

132. *Id.* at 73.

133. *Talbot v R* (1992) 59 A Crim R 383; *see also* JUDICIAL COLLEGE OF VICTORIA, VICTORIAN SENTENCING MANUAL 10.10.1.4 (2015), *available at* <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#6189.htm>.

134. Sentencing (and, more generally, criminal law) in the United States is mainly the province of states. *See United States v. Morrison*, 529 U.S. 598, 613 (2000) (citing *U.S. v. Lopez* 514 U.S. 549, 564 (1995)).

found in Australia, namely: community protection (also known as incapacitation), general deterrence, specific deterrence, rehabilitation, and retribution.¹³⁵ While the objectives are relatively uniform, they are not equal in weight. Community protection has been the overwhelming aim of sentencing in the United States over the past forty years.¹³⁶

The goal of community protection has been most markedly pursued through the enactment of prescriptive sentencing laws, which significantly limited judicial discretion.¹³⁷ Fixed, minimum, or presumptive penalties¹³⁸ now apply (to varying degrees) in jurisdictions in the United States.¹³⁹ Prescribed penalties are typically set out in sentencing grids, which normally use criminal history scores¹⁴⁰ and offense seriousness to calculate the appropriate penalty. The penalties prescribed in the grids have been heavily criticized for being too harsh. Typical of this sentiment is the following observation by Michael Tonry:

Anyone who works in or has over time observed the American criminal justice system can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and

135. See United State Supreme Court, *U.S. Sentencing Comm'n, United States Sentencing Commission Guidelines Manual*, <http://www.ussc.gov/guidelines-manual/2014/2014-ussc-guidelines-manual>, (last visited Feb. 11, 2015) [hereinafter U.S. SENTENCING COMM'N].

136. NATIONAL RESEARCH COUNCIL, *THE GROWTH OF THE INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES* 9 (Jeremy Travis et al. eds., 2014).

137. *Id.* at 3. As noted by William W. Berry III, “Prior to 1984, federal judges possessed discretion that was virtually “unfettered” in determining sentences, guided only by broad sentence ranges provided by federal criminal statutes. The Sentencing Reform Act of 1984 (the “Act”) moved the sentencing regime almost completely to the other extreme, implementing a system of mandatory guidelines that severely limited the discretion of the sentencing judge.” William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and its Progeny*, 40 CONN. L. REV. 631, 633 (2008).

138. For the purposes of clarity, these both come under the terminology of fixed or standard penalties in this Article.

139. They are also one of the key distinguishing aspects of the United States’ sentencing system compared to that of Australia (and most other sentencing systems in the world). See UNIV. OF SAN FRANCISCO SCHOOL OF LAW, CENTRE FOR LAW AND GLOBAL JUSTICE, *CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT* 46-47 (2012), available at <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf> (noting that 137 of 168 surveyed countries had some form of minimum penalties but none were as wide-ranging or severe as in the United States).

140. This is based mainly on the number, seriousness, and age of the prior convictions.

the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), life-without-possibility-of-parole laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by “career criminal,” “dangerous offender,” and “sexual predator” laws (Tonry 2013). These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment (Travis and Western 2014, chap. 3).¹⁴¹

It has been contended that none of these policies leading to the increase in fixed penalties emanated from a clear theoretical foundation, but rather stemmed from “back-of-an-envelope calculations and collective intuitive judgements [sic].”¹⁴² In a similar vein, Berman and Bibas stated, “[o]ver the last half-century, sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of rules.”¹⁴³

The most extensively analyzed prescribed penalty laws are found in the United States Sentencing Commission Guidelines Manual (“Federal Sentencing Guidelines”).¹⁴⁴ These Guidelines are important because of the large number of offenders sentenced under this system and the significant doctrinal influence they have exerted at the state level.¹⁴⁵ Accordingly, to the extent that this Article analyzes United States sentencing law, the main focus is on the federal jurisdiction.

Like most grid sentencing systems, the key considerations

141. Michael Tonry, *Remodeling American Sentencing: A Blueprint for Moving Past Mass Incarceration*, CRIMINOLOGY & PUB. POL’Y (Forthcoming MINNESOTA LEGAL STUDIES RESEARCH PAPER NO. 14–26).

142. Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, in PREVIOUS CONVICTIONS AT SENTENCING 91 (Julian V. Roberts & Andrew von Hirsch eds., 2010). For further criticism of the Guidelines, see James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?* 4 HARV. L. & POL’Y REV. 173 (2010); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005).

143. Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 37 OHIO ST. J. CRIM. L. 37, 40 (2006).

144. U.S. SENTENCING COMM’N, *supra* note 135, at 394.

145. See Berman & Bibas, *supra* note 143, at 38. There are more than 200,000 federal prisoners. See E. Ann Carson, *Prisoners in 2013*, BJS.GOV, <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5109> (last updated Sept. 30, 2014).

that determine the nature of the penalty are the perceived severity of the offense and the criminal history of the offender.¹⁴⁶ Prior convictions can have a considerable impact on penalty, and in some cases lead to an approximate doubling of the sentence. For example, an offense at level fifteen¹⁴⁷ in the Federal Sentencing Guidelines carries a presumptive penalty for a first offender of imprisonment for eighteen to twenty-four months, which increases to forty-one to fifty-one months for an offender with thirteen or more criminal history points.¹⁴⁸ For an offense at level thirty-five, a first offender has a guideline penalty range of 168-210 months, which increases to 292-365 months for an offender with the highest criminal history score.¹⁴⁹ Thus, an extensive bad criminal history can add 155 months (more than twelve years) to a jail term.

Following the U.S. Supreme Court decision of *United States v. Booker*,¹⁵⁰ the Guidelines are no longer mandatory; rather they are effectively advisory in character.¹⁵¹ Recent

146. See Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?* 88 B.U. L. REV. 1109, 1109 (2008).

147. U.S. SENTENCING COMM'N, *supra* note 135, at 50. The offense levels range from 1 (least serious) to 43 (most serious). *Id.*

148. *Id.* at 399. The criminal history score ranges from 0 to 13 or more (worst offending record). *Id.*

149. *Id.*

150. *U.S. v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Supreme Court held that aspects of the guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial. *Id.*; see also *Pepper v. United States*, 131 S. Ct. 1229, 1236 (2011) (“[W]hen a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence [that may] support a downward variance from the now-advisory Federal Sentencing Guidelines range”); *Irizarry v. United States*, 128 S. Ct. 2198, 2203 (2008) (“there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a)”); see also *Greenlaw v. United States*, 554 U.S. 237 (2008); see also *Gall v. United States*, 552 U.S. 38 (2007) (“[W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard”); see also *Rita v. United States*, 551 U.S. 338, 339 (2007) (holding that federal appellate court may apply presumption of reasonableness to district court sentence that is within properly calculated Sentencing Guidelines range).

151. Consequently, District Courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. See 18 U.S.C. §§ 3553(a)(4), (5); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Rita*, 127 S. Ct. at 2465 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines

decisions have also held that the imposition of a sentence about the statutory maximum based on facts other than a prior conviction is violative of the Sixth Amendment unless it is based on facts found by the jury or admitted by the defendant.¹⁵² Nevertheless, the guideline range remains a very influential sentencing reference point. Until recently, sentences within guidelines were still the norm.¹⁵³ In 2014, for the first time Federal Courts imposed more sentences that were outside the Guidelines than sentences that were within them.¹⁵⁴ The margin is small (54% to 46%), but it does reflect a trend by the judiciary to view the Guidelines with less stricture than previously.¹⁵⁵

range); *Gall*, 552 U.S. at 48 (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). See *Rita*, 551 U.S. at 350-51. See also, *Gall v. United States*, 552 U.S. 38 (2007) (“A district judge must consider the extent of any departure from the Guidelines and must explain the appropriateness of an unusually lenient or harsh sentence with sufficient justifications. An appellate court may take the degree of variance into account and consider the extent of a deviation from the Guidelines, but it may not require ‘extraordinary’ circumstances or employ a rigid mathematical formula using a departure’s percentage as the standard for determining the strength of the justification required for a specific sentence.”)

152. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see also *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that the “statutory maximum” is the maximum sentence that may be imposed solely on the basis of the facts found by the jury verdict or admitted by the defendant); see also *Alleynes v. United States*, 133 S. Ct. 2151, 2162 (2013).

153. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); see also Amy Baron Evans & Jennifer Niles Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines’ Prohibitions and Restrictions on Mitigating Factors*, FD.ORG https://www.fd.org/docs/select-topics—sentencing/no_more_math_without_subtraction.pdf (Nov. 1, 2010). For a discussion regarding the potential of mitigating factors to have a greater role in federal sentencing, see William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in MITIGATION AND AGGRAVATION AT SENTENCING 2471 (Julian V. Roberts ed., 2011).

154. U.S. SENTENCING COMM’N, FINAL QUARTERLY DATA REPORT, FISCAL YEAR 2014 (2014), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf.

155. U.S. SENTENCING COMM’N, FINAL QUARTERLY DATA REPORT, FISCAL YEAR 2014 (2014), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf.

While criminal history score and offense severity are cardinal sentencing considerations, they do not exhaust all of the matters that influence the penalty. Courts can depart from a guideline for a number of reasons. The most wide-ranging is 18 U.S.C. § 3553, which, in relevant part, states:

(a) Factors to be Considered in Imposing a Sentence—The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed:
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . .¹⁵⁶

The Guidelines expressly set out over three dozen considerations that can affect the penalty.¹⁵⁷ They also prescribe several considerations that should not have an impact on penalty.¹⁵⁸ In order to determine the appropriate guideline penalty, the courts may factor in a number of mitigating and aggravating considerations. They come in two main forms: adjustments and departures.

“Adjustments” are considerations that increase or decrease penalty by a designated amount.¹⁵⁹ For example, a demonstration of remorse can result in a decrease of penalty

156. For a discussion of the operation of this provision, see Berry, *supra* note 153, at 2471; Evans & Coffins, *supra* note 153.

157. *Id.*

158. For an historical overview of the development of aggravating and mitigating considerations in the Guidelines, see Evans & Coffins, *supra* note 153, at 2–6.

159. These are set out in Chapter 3 of the U.S. Sentencing Guidelines. U.S. SENTENCING COMM’N, *supra* note 135 at 341.

by up to two levels; it can increase to three levels if it is accompanied by an early guilty plea.¹⁶⁰ The other main category of aggravating and mitigating considerations is known as a “departure.”¹⁶¹ If a departure is applicable, the court can more readily impose a sentence outside the applicable Guideline range.¹⁶² Moreover, as noted above pursuant to 18 U.S.C. § 3553, the Guidelines permit, in rare instances, considerations that are not set out in the Guidelines to justify departing from the range.¹⁶³ Thus, the range of aggravating and mitigating considerations set out in the Guidelines is not exhaustive. Where a court departs from the applicable range, it is required to state its reason.¹⁶⁴

C. The Relevance of Substance Involvement to United States Sentencing

Most importantly, for the purposes of this Article, the Guidelines make it clear that substance involvement should not ordinarily lead to a penalty reduction. Section 5H1.4 relevantly states:

Drug or alcohol dependence or abuse *ordinarily is not a reason for a downward departure*. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.

160. U.S. SENTENCING COMM’N, *supra* note 135, § 3E1.1. at 460 However, § 5K2.0(d)(4) provides that the court cannot depart from a guideline range as a result of “The defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreement).”

161. U.S. SENTENCING COMM’N, *supra* note 135 at 457.’

162. *Id.* at § 1A4(b).

163. *Id.* § 5K2.0(a)(2)(B); *see also* Gall v. United States, 552 U.S. 38 (2007); Pepper v. United States, 131 S. Ct. 1229, 1247 (2011).

164. U.S. SENTENCING COMM’N, *supra* note 135, § 5K2.0(e).’

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program.¹⁶⁵

This is a softening from the initial terminology employed by this section. As noted by Amy Baron-Evans and Paul Hofer, in its original form Section 5H1.4 stated that drug dependence and alcohol abuse were never a reason for imposing a sentence below the guideline range.¹⁶⁶ However, there was no proscription on these considerations justifying an above guideline sentence.

In any event, Section 5H1.4 is subject to 18 U.S.C. § 3553(a)(1). Evans and Hofer observe that:

... § 5H1.4 is not only advisory after *Booker*, but by its terms does not apply at all in determining whether to sentence outside the guideline range in any manner not designated as a “departure.” Put another way, § 3553(a) (1) requires the sentencing court to consider “the nature and circumstances of the offense and the history and characteristics of the defendant,” and the statute trumps any guideline or policy statement to the contrary. See *Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Indeed, in *Gall*, the Court made no mention of the Commission’s policy statements regarding departures, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by such policy statements.¹⁶⁷

There is no clear and established jurisprudence regarding the relevance of substance involvement which interprets and applies the above provisions. In *United States v. Perella*, District Judge Gertner noted:

165. See *id.* § 5B1.3(d)(4).

166. Amy Baron-Evans and Paul Hofer, *Litigating Mitigating Factors: Departures, variances, and Alternatives to Incarceration* (2010, revised 2011). The current wording “ordinarily is not a reason for a downward departure” was adopted in 2010. Thus, drug and alcohol dependence has been changed from “prohibited category to a discouraged category, so far as mitigation is concerned.” *Id.* at 94.

167. *Id.*

The status of being addicted has an ambiguous relationship to the defendant's culpability. It could be a mitigating factor, explaining the motivation for the crime. It could be an aggravating factor, supporting a finding of likely recidivism. Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. Cal. L.Rev. 367, 385 (1992). On the other hand, the relationship between drug rehabilitation and crime is clear. If drug addiction creates a propensity to crime, drug rehabilitation goes a long way to preventing recidivism. In fact, statistics suggest that the rate of recidivism is less for drug offenders who receive treatment while in prison or jail, and still less for those treated outside of a prison setting.¹⁶⁸

In the recent case of *United States v. Hendrickson*,¹⁶⁹ the judge reviewed scientific evidence summarizing that “addiction biologically robs drug abusers of their judgment, causing them to act impulsively and ignore the future consequences of their actions.”¹⁷⁰ For the court, the available scientific evidence raised a “fundamental issue at sentencing: culpability.”¹⁷¹ Given that section 3553(a) promotes the goal of retribution, “a criminal sentence must be directly related to the personal culpability of the criminal offender,” and “the history and characteristics of the defendant” are relevant in establishing the culpability of the offender.”¹⁷² Therefore, in dealing with an addict, the court is required to ask how addiction affects culpability.¹⁷³

The court's response was that in most cases addiction mitigates a defendant's culpability:

By physically hijacking the brain, addiction diminishes the addict's capacity to evaluate and control his or her behaviors. Rather than rationally assessing the costs of their actions, addicts are prone to act impulsively, without accurately weighing future consequences. This is certainly true for Hendrickson, whose criminal history coincides with, and directly relates to, periods of drug abuse. During allocution, . . . Hendrickson noted that “drugs clouded my mind and motivated me to do things I would never do had I

168. *United States v. Perella*, 273 F. Supp. 2d 162, 164 (D. Mass. 2003).

169. *United States v. Hendrickson*, 25 F. Supp. 3d 1166 (N.D. Iowa 2014).

170. *Id.* at 1173.

171. *Id.*

172. *Id.*

173. *Id.* at 1174 (internal citations omitted).

been sober.” Hendrickson, therefore, acknowledges that drugs diminished his capacity to make good decisions—something both defense counsel and the AUSA acknowledge, too.¹⁷⁴

The judge recognized that the Sentencing Guidelines preclude the granting of downward departures based on the offender’s voluntary use of substances. However, he negated the view that the use of substances was always voluntary: “The Guidelines . . . appear to incorporate a misinformed view of how addiction affects volition.”¹⁷⁵ Nonetheless, the court made a distinction between departures and variances and wrote that it had the discretion to grant variances.

In an interesting twist, the court analogized between youth and addiction as mitigating factors: “addiction is mitigating for much the same reasons that the United States Supreme Court has recognized youth is mitigating.”¹⁷⁶ However, addiction is not:

limitlessly mitigating. For example, addiction may not be mitigating, or may be less mitigating, where there is no nexus between the defendant’s addiction and offense; or where the defendant has had numerous opportunities for treatment and has either declined drug treatment or failed to meaningfully attempt to complete drug treatment. Also, there may be some point at which a defendant no longer gets the “benefit” of addiction-based mitigation—like the defendant who, after sentencing, repeatedly violates his or her terms of supervised release by using drugs or alcohol. Addiction could even be aggravating in certain situations. Each case must be carefully considered on its own and all of the § 3553(a) factors must be balanced.¹⁷⁷

174. *Id.* at 1174.

175. *United States v. Hendrickson*, 25 F. Supp. 3d 1166, 1174 (N.D. Iowa 2014).

176. *Id.* at 1175. (“Just as there are fundamental differences between the juvenile and adult brain, so too are there fundamental differences between the addict and non-addict brain. Because of these differences, addicts, like juveniles, tend to make “impetuous and ill-considered” decisions. Thus, for the same reasons juveniles are generally less culpable, so too are addicts.”)

177. *Id.* at 1173. On the facts, the court ruled that Hendrickson’s addiction was mitigating:

especially when considered together with Hendrickson’s youth. [He] has been addicted to drugs since he was 14 years old. He is now only 23 years old. Hendrickson has abused brain-altering drugs through most of the years during which his adolescent brain was still physically developing. As a result, Hendrickson has sadly, but predictably, made

Thereafter, the court noted that “district courts may grant addiction-based variances for defendants who are less-than-exceptional addicts[,]” and “need only ‘adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.’”¹⁷⁸ In the judge’s opinion, Hendrickson’s young age at the time he started using drugs and “how directly his criminal history is related to, and influenced by, his addiction[,]” makes the case “extraordinary.”¹⁷⁹

This case is a perfect illustration of the doctrinal incoherence and confusion surrounding the granting of mitigation in the context of substance involved offenders. As the court notes, “balancing the § 3553(a) factors requires judges ‘to weigh that which cannot be measured.’”¹⁸⁰ Indicating the level of disharmony in the case law, some courts have held that alcohol addiction is a disease, that such addiction is a “weak mitigating factor”,¹⁸¹ that rather than

poor decisions based on impulse and immaturity. Letters from Hendrickson’s family members . . . confirm this. *Id.*

178. *Id.* at 1178 (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)).

179. *Id.*

180. *Id.* at 1179 (quoting Guido Calabresi, *What Makes a Judge Great: To A. Leon Higginbotham, Jr.*, 142 U. PA. L.REV. 513, 513 (1993)) (“I acknowledge—as § 3553(a)(5) requires me to—that the Guidelines disfavor addiction-based departures. . . . Although “the Guidelines should be the starting point and the initial benchmark” for a defendant’s sentence, . . . they are ultimately “merely persuasive authority.” . . . And while I must consider Guidelines policy statements under § 3553(a)(5), they are only one of the § 3553(a) factors I must consider in deciding whether to grant a variance. Where § 3553(a)(5) weighs against addiction-based variances, § 3553(a)(1) weighs in favor of them. . . . I consider the mitigating effects of addiction under § 3553(a)(1) to far outweigh any advisory policy statements under § 3553(a)(5). I therefore conclude that Hendrickson’s history of addiction justifies a downward variance here”) (internal citations omitted). *Id.*

181. *Campbell v. Bradshaw*, 674 F.3d 578, 597–98 (2012) (“Voluntary intoxication under Ohio law is—at most—a “weak mitigating factor.” . . . To distinguish this black letter law, *Campbell* argues that he did not seek to introduce evidence of voluntary intoxication as a stand-alone factor, but rather to show its “synergistic effect” on his behavior and his resultant “rage reaction.” And he relies upon *State v. Haight*, 98 Ohio App. 3d 639, 649 (Ohio Ct. App. 1994) to show that intoxication can be given “significant” weight. But *Haight* is an intermediate appellate court decision, followed by at least eight decisions of the Ohio Supreme Court holding that voluntary intoxication merits little weight in mitigation. . . . And *Campbell* cites to no case apart from *Haight* to support his theory that intoxication should be treated with significant mitigating weight (with or without a “synergistic effect” on other factors relevant to *Campbell*’s case). Further, the Ohio Supreme Court has upheld a death sentence where the defendant consumed drugs and more alcohol than *Campbell* prior to the

being a mitigating factor it might instead be an aggravating factor,¹⁸² and alcohol and drug abuse by the offender is not a mitigating factor.¹⁸³

Survey data suggests that many judges believe substance abuse should impact sentencing. In fact 49% of judges have stated that they believe that drug dependence is “ordinarily relevant” to the reducing of a penalty and a similar portion (47%) formed the same view about alcohol dependence.¹⁸⁴ The practice, however, is to the contrary.

Drug dependence and substance abuse is not regularly cited as a reason for a reduced sentence. In 2014, sentences were handed down in 75,836 federal cases. Drug dependence or alcohol abuse was cited as a reason to impose a sentence below the guideline range under § 3553(a) in only 423 cases.¹⁸⁵ In addition to this, there were twenty-seven straight departures.¹⁸⁶ Thus, substance abuse impacts penalty in less than 1% of cases.

Sentencing law in the United States is not uniform and each state has different aggravating and mitigating factors. This includes the approach to substance involvement. The

commission of the crime, and where the defendant had also been diagnosed with alcohol dependence and a personality disorder.”)

182. *United States v. Sogan*, 388 Fed. Appx. 521, 524–25 (2010).

183. *United States v. Estrada*, 425 Fed. Appx. 390, 391 (2011) (“The district court did not fail to consider Cortez’s drug and alcohol abuse; rather, it explained that it did not regard such abuse to be a mitigating factor. Because of Cortez’s mendacity and extensive and violent criminal history, the court stated, a non-Guidelines sentence was necessary to reflect the seriousness of the offense, to promote respect for the law, to deter future criminal conduct, to protect the public from further crimes, and to provide just punishment for the offense. The district court’s reasons were adequate.”)

184. *Evans & Hofer*, *supra* note 166, at 48.

185. *2014 Sourcebook of Federal Sentencing Statistics*, UNITED STATES SENTENCING COMM’N, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/sourcebook-2014> (last visited Aug. 25, 2015) (Tables 25A & 25B). These are described as cases “Downward Departures with *Booker* and 18 U.S.C. § 3553” and consist of “cases with a sentence below the guideline range that include both a departure (see Downward Departure From Guideline Range) as well as a sentence outside the guideline system mentioning either *Booker*; 18 U.S.C. § 3553; or related factors as a reason for sentencing below the guideline range.”

186. *Id.* at Table 25A, where these cases are described as “Downward Departure From Guideline Range Downward Departure From Guideline Range” and which consist of cases “with departures below the guideline range that do not cite as a reason either *Booker*; 18 U.S.C. § 3553; or factors or reasons specifically prohibited in the provisions, policy statements, or commentary of the federal guidelines manual.”

divergence is illustrated by comparing the relevance of substance abuse to sentencing in the four largest states (California, Texas, Florida, and New York). In California, substance involvement is not of itself an aggravating¹⁸⁷ or mitigating factor.¹⁸⁸ However, under the California Rules of Court, Rule 4.423 substance involvement can indirectly be relevant to other sentencing considerations. Rule 4.423(b)(2) states, as a mitigating factor, “[t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.”¹⁸⁹ “Under the former California Rules of Court, a sentencing court could consider any mental or physical factor that, while not amounting to a defense of the crime, might serve to reduce the defendant’s culpability,”¹⁹⁰ which may be construed as the defendant being substance involved at the time of the offense.¹⁹¹

In Texas, the second largest state¹⁹², “evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including, but not limited to: the prior criminal record of the defendant, his general reputation, his character, opinion evidence and the circumstances of the offense.”¹⁹³ Further, the court violates due process of law if it assesses a predetermined sentence, “arbitrarily refuses to consider the entire punishment range, or refuses to consider mitigating evidence when determining punishment.”¹⁹⁴ Accordingly, there is some scope for incorporating substance involvement into sentencing determinations.

The third largest state,¹⁹⁵ Florida, permits departures

187. CAL. R. OF CT. 4.421.

188. CAL. R. OF CT. 4.423.

189. CAL. R. OF CT. 4.423(b)(2).

190. *Jahad*, 2011 U.S. Dist. LEXIS 33868, at 72.

191. CAL. R. OF CT. 4.423(b)(2); *Jahad v. Hernandez*, 2011 U.S. Dist. LEXIS 33868.

192. *See, e.g., Florida Passes New York to Become the Nation’s Third Most Populous State*, US CENSUS BUREAU (Dec. 23, 2014), <http://www.census.gov/newsroom/press-releases/2014/cb14-232.html>.

193. TX. CODE OF CRIM. P., Art. 37.07, § 3(a)(1).

194. *See McClenan v. State*, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983), *overruled on other grounds*, *De Leon v. Aguilar*, 127 S.W.3d 1, 5 (Tex. Crim. App. 2004); *Buerger v. State*, 60 S.W.3d 358, 364 (Tex. App., Houston 14th Dist. 2001, *pet. ref’d*); *Cole v. State*, 931 S.W.2d 578, 579–80 (Tex. App. Dallas 1995, *pet. ref’d*).

195. *See, e.g., Florida Passes New York to Become the Nation’s Third Most*

from the sentencing guidelines in certain situations but these do not extend to substance involvement. Regarding mitigating circumstances, “any downward departure from the lowest permissible sentence, as calculated by the total sentence points pursuant to Fla. Stat. § 921.0024, is prohibited unless certain circumstances justify the downward departure.”¹⁹⁶ Circumstances or factors that can be considered include, those listed in Fla. Stat. § 921.0026(2). Florida lists: “the capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired” as one of the non-exclusive mitigating factors supporting departure from the guidelines.¹⁹⁷ However, subsection (3) of the statute states, “the defendant’s substance abuse or addiction, including intoxication at the time of the offense, is not a mitigating factor under subsection (2) and does not, under any circumstances, justify a downward departure from the permissible sentencing range.”¹⁹⁸

In New York, the fourth largest state,¹⁹⁹ substance involvement is a sentencing consideration in a number of circumstances. For example, where a defendant is charged with first-degree murder, New York law recognizes, as an affirmative defense, “that ‘the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse’... and while ‘intoxication is not, as such, a defense to a criminal charge,’ in all criminal prosecutions the defendant may offer evidence of intoxication ‘whenever it is relevant to negative an element of the crime charged.’”²⁰⁰ “Under most circumstances, killings that are a product of mental or emotional disturbance, or that are committed by defendants under the influence of alcohol or

Populous State, US CENSUS BUREAU (Dec. 23, 2014), <http://www.census.gov/newsroom/press-releases/2014/cb14-232.html>.

196. FL. CRIM. PUNISHMENT CODE, available at http://www.dc.state.fl.us/pub/sen_cpcm/cpc_manual.pdf.

197. FLA. STAT. § 921.0026(2)(c).

198. FLA. STAT. § 921.0026(3).

199. See, e.g., *Florida Passes New York to Become the Nation’s Third Most Populous State*, US CENSUS BUREAU (Dec. 23, 2014), <http://www.census.gov/newsroom/press-releases/2014/cb14-232.html>.

200. James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York’s Death Penalty Legislation*, 17 Pace L. Rev. 41 (1996) (internal quotations omitted).

another drug, will not be affected by these formal rules.”²⁰¹ “New York’s mitigating factor more broadly applies when the offender was ‘under the influence’ of alcohol or another drug, and it does not require specific impairment of the defendant’s cognitive or volitional capacities.”²⁰² More specifically, for first-degree murder, mitigating factors include: “the murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution”²⁰³

D. Summary of the Relevance of Substance Involvement to Sentencing

In summary, the existing approach to the relevance of substance involvement to sentencing can be set out in the following eight propositions:

1. There is no clearly established theory or approach regarding the relevance of substance involvement to sentencing;
2. In both the United States and Australia, substance involvement can be a neutral factor, or it can increase sentence length or reduce the penalty;
3. Pursuant to the Federal Sentencing Guidelines there is considerable scope for substance involvement to mitigate penalty but this occurs in less than one percent of cases;
4. In Australia and some jurisdictions in the United States, substance involvement can aggravate penalty when an offender commits a crime while intoxicated, and it is foreseeable that this state would result in him or her committing a crime;
5. In Australia, substance involvement can also aggravate penalty where it enhances the prospect of recidivism;
6. Substance abuse can mitigate penalty where the offender sells drugs to obtain money to feed a drug habit, but there is no mitigation where the offender commits a robbery to obtain money to purchase

201. *Id.*

202. N.Y. CRIM. PROC. § 400.27(9)(e) (McKinney 1996); Acker, *supra* note 200, at 118 n.329.

203. N.Y. CRIM. PROC. §400.27 (McKinney 1996).

- drugs to sustain a drug habit;
7. In Australia and some states in the United States, intoxication also reduces penalty where it caused the offender to act out of character, or the substance abuse was supposedly not willed because the habit was in response to an unfavorable life event; and
 8. In Australia and some parts of the United States, substance involvement can also mitigate penalty when the prospects of rehabilitation are enhanced by a reduced sentence.

III. EVALUATION OF THE EXISTING LAW

As we have seen, there are no clear principles regarding the manner in which substance involvement should be incorporated into the sentencing calculus. The greatly divergent responses to the issue demonstrate a lack of doctrinal and jurisprudential clarity. This part of the Article attempts to establish clear-cut guiding principles in this area.

The starting point is to evaluate the validity of the reasons that have been provided by the courts for according substance use relevance in the sentencing calculus. We start with the supposed connection between substance involvement and culpability.

A. Drug Use as Going to Culpability is Irrelevant – Either as Mitigating or Aggravating

As noted above, substance use can lead to either increased or diminished culpability, with the sentence being increased or reduced accordingly. The main circumstance in which intoxication is regarded as increasing culpability is where the offender is aware (from previous experience) that it will increase the chance of him or her engaging in criminal conduct. Decreased culpability can occur where the offender commenced drug use for reasons that were not totally the free choice of the offender or where intoxication causes the offender to act out of character.

This area of the law is confusing and made obscure by the fact that there are a plethora of vague and unclear concepts, standards and tests. It is not clear, for example, what degree of foreseeability an offender must have in order for substance abuse to aggravate penalty based on previous misconduct while intoxicated, or what types of life events are so traumatic

that a person is supposedly compelled to commence using drugs or alcohol.

The most complex inquiry relating to the relevance of substance involvement to sentencing concerns the extent to which offenders are responsible for their use and abuse of drugs. This has resulted in fierce debate among Australian judges.²⁰⁴ Some judges have held that offenders are fully responsible for their decision to commence using drugs and ongoing choices relating to their conduct while intoxicated.²⁰⁵ By contrast, other judges have taken the diametrically opposite view, stating that drug use is often a matter compelled on offenders.²⁰⁶

Ascertaining the correct position in this regard, either generally or in relation to specific offenders, is complex because at the *scientific level* of learning and understanding the extent to which illicit drugs and alcohol actually grip and drive human behavior is not well advanced.²⁰⁷ Further, resolution of the competing approaches to substance involvement and sentencing often leads into an intellectual journey into *philosophical* theories pertaining to human free-will; the nature of self-determination and our capacity to make choices which are genuinely free and questions relating to determinism.²⁰⁸

At the extremes, there are situations when choice can be so influenced that we are sure that it is either free or not free. A person who “chooses” to commit a crime when a gun is held at his or her head is not responsible for committing the crime, but one who assaults his or her neighbor under the threat of being removed as a Facebook friend is fully responsible for the crime.²⁰⁹ But often the situation is not so clear cut. Such is the

204. See Part II(A) of this Article.

205. See Part II(A) of this Article.

206. See Part II(A) of this Article.

207. See discussion of the *Hendrickson* case, *supra* note 169.

208. For an overview of the relevant philosophical issues, see Robert Young, *The Implications of Determinism*, in *A Companion to Ethics* 534 (Peter Singer ed., 1991) (explaining that deterministic theory states that all human action is causally determined); see also Stephen J. Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 Ala. C.R. & C.L. L. Rev. 147, 149 (2011) (“[I]f causation or determinism per se were an excuse, no one would ever be responsible for any behavior.”).

209. The defence of duress is recognised in most all jurisdictions, see Alan Reed and Michael Bohlander, *General Defences in the Criminal Law: Domestic and Comparative Perspectives*, 106–07 (2014).

case relating to offenses committed by people who are intoxicated at the time of the offense.

As it transpires, both the scientific and philosophical issues are, to a large degree, a distraction in the context of the relevance of substance involvement to sentencing. This is because the variable in the sentencing calculus which these issues relate to (culpability) is not highly important.

Criminal law, by its nature, is focused on prohibiting the commission of acts which are harmful to individuals or the community more widely. Criminal law is society's strongest form of condemnation and the forum in which we act most coercively against individuals.²¹⁰ Ultimately, the criminal law aims to prohibit and punish conduct which harms the interests of others.²¹¹ It is focused on preventing bad deeds, not bad intentions or thoughts.

In order for criminal responsibility to occur, it is necessary for the inappropriate mental state to result in conduct which harms another person or the community.²¹² To the extent that mental states are relevant, it is primarily because there is generally a strong link between them and actions. Thus, some emphasis is attached to mental states by our legal system. In particular, in criminal law, a distinction is drawn between mental states in the form of intent, recklessness, and negligence.²¹³ However, these thought processes are not

210. ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 16 (2d ed., 1995); Donoso, Alfonso L (2010), *The Criminal Law of the Free Society: A Philosophical Exploration of Overcriminalization and the Limits of the Criminal Law*. PhD thesis, University of York, 2, [http://etheses.whiterose.ac.uk/1453/1/PhD Thesis.pdf](http://etheses.whiterose.ac.uk/1453/1/PhD%20Thesis.pdf) ("The criminal law is the most coercive institution of social control in the modern liberal state. It criminalizes conduct, prosecutes individuals, and treats offenders in ways that under other circumstance we would consider as serious violations of individuals' rights.").

211. See, e.g., JAN GORECKI, *A THEORY OF CRIMINAL JUSTICE* 33–38 (1979).

212. Mirko Bagaric, *Punishment and Sentencing: a Rational Approach* (2001); 1 Wharton's *Criminal Law* § 27 (15th ed.) ("In the ordinary case, an evil deed, without more, does not constitute a crime; a crime is committed only if the evil doer harbored an evil mind.").

213. See, e.g., Darryl Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 *LAW & CONTEMP. PROBS.* 109, 109 (2012). To the extent that culpability is important role in the criminal law, this is already often factored into offence classification. Thus, some offense types are broken down according to the mental state of the offender, for example whether the outcome of the crime was intended or the offender was merely reckless or negligent as to the eventual outcome. It is for this reason that, for example, murder is a more serious crime than voluntary manslaughter. However, it is important that culpability beyond offence classification should not considerably be double counted in the

intrinsically important. They are only of instrumental significance because they are regarded as inciting conduct.²¹⁴ Intent is more culpable than either recklessness or negligence, simply because intentional acts have a higher probability of achieving their stated objective than reckless or negligent acts.²¹⁵

No matter how incorrigibly wicked a person may be, or how resolutely he or she may intend that a certain harmful state of affairs should eventuate, no legal responsibility is ascribed until, and unless, such mental states are accompanied by actions.²¹⁶

Accordingly, the thought and evaluative process that culminates in committing crime is a distant second-order consideration to the level of harm that is caused by the crime. The fact that some individuals have less capacity for clear thought, and a judgment deficit, does not make their actions less harmful. Neither does it diminish their criminal responsibility—at its highest, it merely diminishes their level of blameworthiness.

Therefore, while intoxication and addiction can vary considerably in nature, intensity, and impact,²¹⁷ given that ultimately the thought process that underpins a crime is not a cardinal consideration so far as the criminal law is concerned, there is limited utility in trying to ascertain precisely the degree and nature of the level of intoxication and the way in which curtails genuinely free decision-making. Culpability (as opposed to responsibility) is only a minor consideration in criminal law, so it is not highly productive to inquire deeply

determination of the ultimate penalty.

214. *See id.* at 109–10.

215. *See, e.g., id.* (discussing “proportionate culpability”).

216. The key exception to this is the law relating to attempted criminal offenses. However, even here the degree of intrusion into the principle that intentions are per se irrelevant is marginal. For liability to occur, it is necessary for the offender to possess the requisite mental state, and to perform actions which constitute a substantial step towards completing the offense. For an overview, see *Mail and Wire Fraud: An Abridged Overview of Federal Criminal Law*, CONG. RESEARCH SERV., 10 (July 21, 2011), available at <https://www.fas.org/sgp/crs/misc/R41931.pdf>. Another exception is the offense of conspiracy, but again this also requires the commission of overt acts—though they need to constitute the completed offense. *See id.*

217. *See* Jamie Walvisch, *Sentencing Offenders with Impaired Mental Functioning: Developing Australia’s “Most Sophisticated and Subtle” Analysis*, 17 PSYCHOL., PSYCHIATRY & L. 1, 5 (2010).

into how any individual fares against this standard. In crude terms, culpability is only an approximately 10 to 25% variable consideration in the evaluation of the seriousness of a crime.²¹⁸ This, of course, is not a totally insignificant consideration and could in some cases mean the difference between a short term of imprisonment, lesser sanction (such as probation), or a reduction of months or years of a prison sentence.

However, in order to enliven the culpability element, it is necessary to establish (as opposed to simply theorizing)²¹⁹ that substance involvement either increases or decreases personal blameworthiness.²²⁰ It is here that the argument again falls short.

The most compelling argument for conferring a discount to substance involved offenders is when the offender commenced using substances in response to a life trauma. There is an instinctive sympathy that is accorded to people that have experienced and suffered tragic events. However, this should not necessarily lead to a discounted sentence. There are an infinite number and type of events that cause distress to people. The impact of the events is determined by the objective deprivation involved and the level of resilience of the individual. The trajectory of the response to the trauma that follows the event does not have a defined path. Painful life experiences do not foreclose choice. Certainly, negative life events can incline people towards self-destructive behavior, including an increased tendency to consume drugs and alcohol,²²¹ but for most people hardship is dealt with by other means.²²² It can even inspire some people to greater efforts and higher achievements. Most people who experience trauma in their lives do not resort to substances to assist them to cope with it.²²³ And certainly, there is no scientific evidence that life

218. See Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 NEW ZEALAND UNIV. L. REV. 411 (2013).

219. In any legal proceeding, including sentencing proceedings, the obligation is on the party to ascertain a proposition to establish its validity.

220. Or that it is relevant to some other sentencing objective, such as rehabilitation—this is discussed shortly.

221. See, e.g., *Making the Connection: Trauma and Substance Abuse*, THE NAT'L CHILD TRAUMATIC STRESS NETWORK (June 2008), available at http://www.nctsn.org/sites/default/files/assets/pdfs/SAToolkit_1.pdf.

222. As noted above, most people do not have substance abuse problems.

223. See generally Lamya Khoury et al., *Substance use, Childhood Traumatic Experience, and Posttraumatic Stress Disorder in an Urban Civilian Population*,

trauma invariably leads to substance abuse.²²⁴

Once people start using drugs, developments in neuroscience suggest that the addiction is stronger than may have initially been thought. It is well-established that the brain becomes dependent on drugs, such that stopping drug use can cause severe negative effects. Emerging evidence suggests that cravings do not stem merely from a desire to avoid the physical effects of withdrawal, but instead the brain becomes dependent on chemicals which are contained in the drug.²²⁵ “It is precisely because the brain chemistry changes that it is so challenging for an addict to stop using drugs.”²²⁶ Further, addiction to drugs results in diminished inhibition and ability to control impulses.²²⁷ While it is now clear that addiction has both physical and cerebral effects, the science in this area is not fully developed, and certainly there is no compelling evidence to suggest that drug users are driven to crime with a strong degree of inevitability. For individuals that commence using substances, the choice remains of how this use will impact their conduct. It can be self-regarding or harmful to others. To this end, at the extremes is the individual who drinks him or herself to sleep every night, and the person who commits armed robberies to feed a heroin habit. Accordingly, the nexus between substance abuse and crime, while statistically meaningful, is not automated or pre-determined and does not undercut the fact that all persons have a genuine choice regarding the decision to commence substance use. Thus, the scientific point of reference does not compel mitigation for substance involved offenders.

The weakness of the proposition that addicted offenders who sell drugs to sustain their habit should get a discount is

27 DEPRESSION AND ANXIETY (2010).

224. TRAUMA AND SUBSTANCE ABUSE: CAUSES, CONSEQUENCES, AND TREATMENT OF COMORBID DISORDERS (Pamela Brown & Paige Quimette eds., 2003).

225. David Eagleman et al., *Why Neuroscience Matters for Rational Drug Policy*, 11 MINN. J.L. SCI. & TECH. 7, 17 (2010).

226. Roger Przybylski, *Correctional and Sentencing Reform for Drug Offenders*, COLORADO CRIM. JUSTICE REFORM COALITION 15 (Sept. 2009), available at http://ccjrc.org/pdf/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf; *Drugs, Brains and Behavior, The Science of Addiction*, NATIONAL INSTITUTE OF HEALTH, <http://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/preface> (last updated July 2014).

227. Przybylski, *supra* note 226, at 15.

supported by the fact that a discount is not accorded to addicts who commit other forms of crime, such as robbery, in order to feed their habit. If addiction to drugs should partially excuse behavior designed to sustain the habit, it should apply to all forms of conduct, not just to drug related crime.

The upshot of this is that existing mitigation that is sometimes accorded to substance involved offenders on the basis of reduced culpability should be abolished. This applies most clearly in circumstances where the offender commits an offense while intoxicated and supposedly acts out of character. It also applies when offenders commit crime in order to feed a drug habit. The one category of people who are not responsible for their substance choices is children. They should be given considerable mitigation for their substance involved actions.²²⁸ This principle and approach is already accommodated within the sentencing law of most jurisdictions, whereby rehabilitation is the principal objective of sentencing,²²⁹ and does not have implications for the sentencing of adults.

It follows that there is no clear-cut basis for asserting that the circumstances relating to substance involvement are so powerful or directive so as to either negate any genuine level of choice, or to make criminal behavior very likely. The current state of learning regarding the impact of illicit drugs and alcohol is too embryonic for firm conclusions to be made regarding the extent to which substances influence decision-making; and especially the extent to which orthodox understandings of free-will should be revisited or revised. Thus, issues of culpability should be eliminated from the sentencing inquiry so far as substance involvement is concerned.

While substance involvement should not mitigate penalty, neither should it aggravate the sanction. The principle that intoxication should increase penalty where it was foreseeable that the offender may act inappropriately while intoxicated is, as we have seen, poorly developed and unclear in its scope. The principle is also doctrinally flawed. The motivations and reasons for committing crime are infinite, and intoxication can be one trigger. Others include anger, greed, revenge, lust, or

228. The science relating to the lack of formation of the child brain is discussed in *Roper v. Simmons*, 543 U.S. 551 (2005).

229. BAGARIC & EDNEY, *supra* note 45.

sheer opportunism or malice. All of these motivations are negative sentiments. They are negative because they sometimes result in individuals performing harmful acts. There is no tenable way to rank these negative sentiments. They are all regrettable. For example, a rape stemming from sheer lust is no more or less bad than one that is alcohol fueled. Sure, intoxication may cause some offenders to commit more extreme forms of crime, but so too can other motivators such as revenge and rage. In each case, the cardinal determinant of offense severity is the harm caused by the crime. The view that intoxicated criminal acts are worse than other forms of crime requires courts to engage in an impossible and non-existent comparison and ranking of the degrees of inappropriateness associated with mental states that underpin criminal acts. This approach should be rejected.

B. Substance Involvement, Rehabilitation, and Recidivism

Rehabilitation is the process of inducing internal attitudinal reform in offenders so they become more law-abiding.²³⁰ It is normally regarded as a basis for reducing penalty severity.²³¹ Intuitively, intoxicated offenders seem more salvageable than other offenders. In simplistic terms, the view is that if the offender is taken away from the drink or drug then he or she will reform. In order for this objective to mitigate penalty, it must be established that there are effective and efficient programs which reduce recidivism rates for substance involved offenders.

The effectiveness of the criminal justice system to elicit internal behavioral reform in offenders is much in doubt. Following extensive research conducted between 1960 and 1974, Robert Martinson, in an influential article, concluded that empirical studies had not established that any rehabilitative programs had worked in reducing recidivism.²³² The Panel of the National Research Council in the United States, several years after this work, also noted that there were

230. Theo Alexander & Mirko Bagaric, *Specific Deterrence Doesn't Work, Rehabilitation Might and What it Means for Sentencing* 35 CRIM. L.J. 159 (2012).

231. *Id.*

232. R. M. Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INT. 22, 25 (1974).

no significant differences between the subsequent recidivism rates of offenders regardless of the form of punishment. They concluded, “[t]his suggests that neither rehabilitative nor criminogenic effects operate very strongly.”²³³

Recent evidence is generally more positive. While there are currently no programs developed that successfully reduce reoffending for all types of offenses, a number of more recent studies have noted some success in relation to treatments and programs focusing on substance involved offenders.²³⁴

The Federal Bureau of Prisons Annual Report on Substance Abuse Treatment Programs for the 2012 fiscal year states that its drug treatment programs are designed to accord with the best evidence-based practices.²³⁵ They are broadly divided into residential based treatments (i.e., for inmates) and non-residential treatments.²³⁶ The Report notes that an analysis of the residential program revealed that the recidivism rate for offenders that completed the program was 15% less compared to inmates who did not complete the program.²³⁷ Slightly higher levels of success were observed in relation to female offenders. The report, in relevant part, states:

male participants were 16% less likely to recidivate and 15% less likely to relapse than similarly-situated inmates who do not participate in residential drug abuse treatment for up to 3 years after release. The analysis also found that female inmates who participate in [the treatment program] are 18% less likely to recidivate than similarly situated female inmates who do not participate in treatment.²³⁸

The success of substance abuse interventions in the criminal justice system is also illustrated by the workings of drug courts. They were first established in Florida in 1989 and

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

234. For an overview, see Elizabeth Drake et al., *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, WASH. ST. INST. FOR PUB. POL’Y (2009).

235. THE FED. BUREAU OF PRISONS ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS FISCAL YEAR 2012, REPORT TO THE JUDICIARY COMM. UNITED STATES CONG. (Dec. 2012). https://www.bop.gov/inmates/custody_and_care/docs/annual_report_fy_2012.pdf (Last visited 23 July 2015).

236. *Id.* at 3.

237. *Id.* at 7.

238. *Id.* at 7; see also FY 2014 PERFORMANCE BUDGET: SALARIES AND EXPENSES, U.S. DEPT OF JUSTICE 29 (2014).

now there are over 2,000 drug courts in the United States, operating in every state.²³⁹ The jurisdiction of drug courts is generally confined to defendants who are substance involved at the time of the offense and are charged with drug possession or other non-violent offenses.²⁴⁰ For some drug courts it is also a requirement that defendants do not have a conviction for an earlier violent offense.²⁴¹ The normal sanction imposed by a drug court is a treatment program which lasts between six to twelve months and part of the program requires offenders to remain drug free.²⁴² Offenders who do not successfully complete the program face the prospect of imprisonment.²⁴³ A recent wide-ranging analysis of the outcomes from drug courts notes the following positive outcomes:

- an analysis of research findings from 76 drug courts found a 10% reduction in re-arrest;
- an analysis of 30 drug court evaluations found an average 13% decline in the rate of reconvictions for a new offense;
- a meta-analysis of 57 studies estimated that participation in a drug court program would produce an 8% decline in crime relative to no treatment; and
- a Government Accountability Office report found that 13 of 17 courts reporting on post-program recidivism measured reductions between 4 and 25 percentage points in rearrests and reconvictions.²⁴⁴

While these figures are ostensibly impressive, there is a need to approach them with some caution, given that the offender cohort derives from a relatively small category of offending types and does not include the most serious type of offenders.²⁴⁵

Australian studies have noted similar, albeit guarded,

239. *Behind Bars II supra* note 14, at 80.

240. Ryan S. King & Jill Pasquarella, *Drug Courts: A Review of the Evidence*, The Sentencing PROJECT 3 (Apr. 2009). http://www.sentencingproject.org/doc/dp_drugcourts.pdf.

241. *Id.*

242. *Id.* at 4.

243. *Id.*

244. *Id.* at 5 ; see *Behind Bars II, supra* note 14, at 80-81; Elizabeth Drake et al., *supra* note 234 (noting that drug courts reduce the recidivism of offenders by about 8.7%).

245. See King & Pasquarella, *supra* note 240, at 7.

success regarding drug and alcohol treatment programs. The most recent wide-ranging Australian study regarding the effectiveness of rehabilitation is a report by Karen Heseltine, Andrew Day, and Rick Sarre for the Australian Institute of Criminology, published in 2011.²⁴⁶ The report focused on changes and improvements to prison based correction rehabilitation programs in the custodial environment since 2004, when the previous report was issued.²⁴⁷

The report by Heseltine et al., while unable to evaluate the effectiveness of rehabilitation programs currently operating in Australian prisons, summarized recent cross-jurisdictional studies into the effectiveness of certain rehabilitation programs.²⁴⁸ It noted that while there were mixed results, there were some programs that reported positive outcomes.²⁴⁹ This included drug and alcohol programs which have been shown to be effective at reducing substance abuse and reoffending.²⁵⁰

This assessment is consistent with the findings of Ojmarrh Mitchell, David B. Wilson, and Doris L. MacKenzie, who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison.²⁵¹ The studies they focused on related to drug users and compared reoffending patterns of offenders who completed a drug rehabilitation program with those who did not complete a program, or completed only a minimum program between the years 1980 and 2004.²⁵² They analyzed sixty-six studies in total. The report concluded, “overall, this meta-analytic synthesis of evaluations of incarceration based drug treatment programs found that such programs are modestly effective in reducing recidivism.”²⁵³ Moreover, it noted that programs that dealt

246. See generally Karen Heseltine et al., *Prison-based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia*, 112 AIC REPORTS RESEARCH & PUB. POLY SERIES (2011). http://www.aic.gov.au/media_library/publications/rpp/112/rpp112.pdf

247. *Id.* at 2.

248. *Id.*

249. *Id.* at ix, x.

250. *Id.* at 27.

251. Ojmarrh Mitchell et al., *The Effectiveness of Incarceration-Based Drug Treatment on Criminal Behaviour: A Systematic Review*, 8 CRIME & JUSTICE (2012).

252. *Id.*

253. *Id.* at 17.

with the multiple problems of drug users (termed therapeutic communities) were the most successful, whereas there was no evidence to support good outcomes associated with “boot camp” programs.²⁵⁴

Thus, appropriately adapted programs can reduce the reoffending rate of some substance involved offenders. But this does not provide a basis for reducing the severity of the penalties imposed on such offenders. There are two reasons. First, the effectiveness of rehabilitation programs is similar whether administered in a custodial setting or outside the confines of prison walls.²⁵⁵

Second, while rehabilitation works in relation to some substance involved offenders, it is ineffective in relation to most of them—as we have seen it does not work in relation to most of such offenders. This is especially pertinent given that substance involved offenders have a considerably higher recidivism rate than other offenders. In one wide-ranging study, it was noted that slightly more than half (52%) of substance involved inmates in the United States have been incarcerated previously, compared to less than one-third (31%) of inmates who are not substance involved.²⁵⁶

Thus, substance involved offenders reoffend at nearly double the rate of other offenders. This fact significantly undermines the argument in favor of reducing the penalties for this cohort of offenders in order to pursue the objective of rehabilitation.

While some treatment programs are effective at reducing the recidivism rate of substance involved offenders, this observation largely loses its significance once it is noted that overall substance involved offenders have a far higher recidivism—offenders who are not substance involved are far less likely to reoffend even if one takes into account the success of drug and alcohol treatment programs. In crude terms, given that substance involved offenders are twice as likely to reoffend, a 20% reduction in their reoffending level still makes

254. *Id.* at 6.

255. Karen Heseltine et al., *supra* note 246; *Behind Bars II*, *supra* note 14, at 85 (noting that there are even higher levels of success with prison-based substance abuse treatments and after care programs in Delaware, California and Illinois).

256. *Behind Bars II*, *supra* note 14, at 5 ; *see also* Elizabeth Drake et al., *supra* note 234.

them a far higher risk to the community than other offending. The risk that a substance involved offender presents to the community following the successful completion of a rehabilitation program is often still higher than that presented by a non-substance involved offender.

Accordingly, none of the orthodox or existing reasons that have been offered for factoring in substance involvement into the sentencing calculus are persuasive. This does not, however, entail that the link between substance involvement and crime should be ignored. We now discuss the appropriate response.

IV. REFORM PROPOSAL

Before setting out reform proposals, we provide a brief overview of the above discussion and analysis. There is a strong connection between substance involvement and offending. Most people who commit crimes are substance involved, and nearly half of offenders are intoxicated at the time of the offense. Additionally, nearly one-fifth of crimes are committed in order to obtain money or property to feed a drug habit. Given the statistical link between alcohol, illicit drugs, and crime, there is a tendency to incorporate this into the sentencing calculus, either by punishing substance involved offenders more harshly because of the predictability between substance use and crime, or punishing them less because substances supposedly reduce culpability. The prospect of rehabilitating substance involved offenders is also sometimes provided as a reason mitigating the penalties of such offenders. Doctrinal clarity and the relevant empirical evidence suggest, however, that generally no accommodation should be made for substance involvement in the sentencing calculus.

It is undeniable that there is a strong link between substance involvement and criminal offending. But a statistical association between two matters does not necessitate a response. There is a stronger link between gender and crime than drugs and crime. Males comprise more than 90% of all detainees in United States prisons and hence are grossly represented in the criminal justice statistics.²⁵⁷ Yet there is nothing to suggest that being a male should mitigate

257. See E. Ann Carson, *supra* note 145 at 2.

(or aggravate) penalty. Statistical links are no more than that: numbers establishing an association between events and circumstances. Once the link is established, it is important to analyze with reference to the relevant doctrinal and scientific principles in the field whether any response is appropriate in relation to the link. And it is from this perspective that the link between sentencing and substance involvement evaporates.

As we have seen, the ultimate objective of criminal law is to prevent, or at least reduce, harmful acts being committed. The operative and core focus is on actions. Actions are important because they have consequences. Thoughts and motivations are only relevant to the extent that they result in actions. It is for this reason that in defining and calibrating the matters that are relevant to sentencing, considerations relating to the mental state of the offender are relatively minor considerations. Substance abuse impacts an individual's thoughts, but has only an indirect connection to his or her acts. Accordingly, substance involvement can, at most, engage with a consideration which is a relatively minor variable in the sentencing calculus. As it transpires, this variable is not enlivened at all, given that there is no clear-cut basis for increasing or decreasing the culpability of an offender on the basis of substance involvement.

In particular, substance involvement should not aggravate penalty. While there is an increased likelihood of crime being committed due to substance involvement, the extent of the increase is not so significant to warrant a higher penalty. Further, a drug influenced crime is no more inherently blameworthy than crime committed for other reasons. In some cases, drug-affected crime might lead to a more serious instance of a crime than other forms of the same offense (for example the offender may act more violently). But if this does occur, there is ample scope to aggravate penalty on the basis of existing sentencing principles (for example, the principle of proportionality which matches the hardship of the sanction to the seriousness of the offense).²⁵⁸

The objective of rehabilitation is the strongest argument for factoring in substance involvement into sentencing

258. JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION* (2004).

considerations. There is evidence that some rehabilitation programs are successful at treating drug use and minimizing recidivism. However, most of these programs can be delivered without a meaningfully reduced degree of success in the prison setting, and hence, rehabilitation is not a powerful reason for reducing prison terms or opting for sanctions other than imprisonment for substance involved offenders.

Given that substance involved offenders have a greater rate of recidivism (even if one takes into account the rate of success of rehabilitation programs), an argument could be made in support of harsher penalties for these offenders. However, this approach is unsound because it violates the principle that people should be punished for their (present) crimes and cannot be punished again for earlier crimes.²⁵⁹ The only viable exception to this is the objective of community protection. Offenders who present a grave danger to the community should be incarcerated for longer periods to afford greater protection to the community.²⁶⁰ However, this applies only in relation to crimes which significantly damage the lives and interests of victims and any increase in penalty severity must be commensurate with the increased risk of reoffending. Balancing these considerations, one of us has previously suggested that repeat serious sexual and violent offenders should receive a recidivist loading in the order of 20% to 50%.²⁶¹ However, this is irrespective of substance involvement.²⁶² Apart from this, no further penalty enhancement is appropriate for recidivists.

Ultimately, there is no rational basis for incorporating substance involvement into the sentencing calculus. Decoupling sentencing and substance use would make sentencing more transparent and predictable. Most of all, it is the doctrinally correct approach.

Yet it would be unsound to ignore the general link between

259. Mirko Bagaric, *The Punishment Should Fit the Crime—Not The Prior Convictions of The Person that Committed The Crime: An Argument For Less Impact Being Accorded to Previous Convictions in Sentencing* 51 SAN DIEGO L. REV. 343 (2014).

260. *Id.*

261. Mirko Bagaric, *The Punishment Should Fit the Crime—Not The Prior Convictions of The Person that Committed The Crime: An Argument For Less Impact Being Accorded to Previous Convictions in Sentencing* 51 SAN DIEGO L. REV. 343 (2014).

262. *See id.*

crime and substances and alcohol. The link needs to be acknowledged and acted upon in at least two ways. The first is from an educational perspective. Public education campaigns have been held in many parts of the world, including the United States and Australia, regarding the health dangers associated with the use of drugs and alcohol.²⁶³ This provides people with a strong reason to not use or, at least in the case of alcohol, over-use these substances. The education campaign regarding the negative effects of substances should be buttressed by information regarding the link between substances and involvement in crime. The fact that many drug and alcohol users end up in hospital is well-known. And that many of them wind up in prison should be equally well-known. This is especially the case given that the harms of imprisonment extend well beyond period of confinement.

Imprisonment has an adverse effect on well-being measures after the conclusion of the sentence, even to the point of significantly reducing life expectancy. A study which examined the fifteen and a half year survival rate of 23,510 ex-prisoners in the U.S. state of Georgia, found much higher mortality rates for ex-prisoners than for the rest of the population.²⁶⁴ There were 2,650 deaths in total, which was a 43% higher mortality rate than normally expected (799 more ex-prisoners died than expected).²⁶⁵ The main causes for the increased mortality rates were: homicide, transportation accidents, accidental poisoning (which included drug overdoses), and suicide.²⁶⁶ Moreover, prior imprisonment has a profound impact on economic opportunity because it leads to diminished employment opportunities and reduced lifetime earnings of up to 40%.²⁶⁷

The most significant reform that should occur to deal with the link between drugs, alcohol, and crime is the increased availability and systematization of treatment for people who

263. See here: <http://www.samhsa.gov/capt/tools-learning-resources/prevention-media-campaigns>

264. Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. OF EPIDEMIOLOGY 479 (2010).

265. *Id.*

266. *Id.*

267. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 13 (2010).

have substance problems. There is a present and vast unmet need for programs to treat substance involved people, both within the general community and in prisons.²⁶⁸ The report by the National Center on Addiction and Substance Abuse notes:

Of the 1.5 million inmates with substance use disorders in 2006, CASA estimates that only 163,196 (11.2%) received any type of professional treatment, including treatment in a residential facility or unit (7.1%), professional counselling (5.2%) or pharmacological therapy such as methadone, antabuse or naltrexone (0.2%). Less than 1% (0.9%) received detoxification services. Inmates were likeliest to receive the adjunct services of mutual support/peer counselling (22.7%) or education (14.2%).²⁶⁹

Thus, the gap between the prevalence of substance abuse and the availability of treatment is profound. Treatment programs should be made available to all prisoners, as well as to substance addicts within the general community. It has been established that even in purely dollar terms, the return on investment would be considerable. Estimates suggest that every dollar spent on drug treatment programs can yield a saving of up to \$7 in crime, incarceration, and healthcare

268. *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings*, U.S. DEPT OF HEALTH & HUMAN SERVS., 94-95 (2014) states:

In 2013, among the 20.2 million persons aged 12 or older who were classified as needing substance use treatment but not receiving treatment at a specialty facility in the past year, 908,000 persons (4.5%) reported that they perceived a need for treatment for their illicit drug or alcohol use problem (Figure 7.10). Of these 908,000 persons who felt they needed treatment but did not receive treatment in 2013, 316,000 (34.8%) reported that they made an effort to get treatment, and 592,000 (65.2%) reported making no effort to get treatment.

Another report states: "In 2004, about 642,000 State prisoners were drug dependent or abusing in the year before their admission to prison. An estimated 258,900 of these inmates (or 40%) had taken part in some type of drug abuse program (table 10). These inmates were more than twice as likely to report participation in self help or peer counselling groups and education programs (35%) than to receive drug treatment from a trained professional (15%). In Federal prison, a higher percentage of drug dependent or abusing inmates (49%) reported taking part in some type of drug abuse programs. Nearly 1 in 3 took part in drug abuse education classes, and 1 in 5 had participated in self-help or peer counselling groups. Overall, 17% took part in drug treatment programs with a trained professional, and 41% had participated in other drug abuse programs." Jennifer Karberg & Christopher Mumola, *Drug Use and Dependence, State and Federal Prisoners, 2004*, U.S. DEPT OF JUSTICE 9 (2004)

269. *Behind Bars II*, *supra* note 14, at 40, Table 5.1.

costs.²⁷⁰

CONCLUSION

The connection between drug use and crime is profound. Many offenders are under the influence or effect of illicit drugs or alcohol at the time of offending. And most offenders have a substance abuse problem at the time they commit an offense. Moreover, the rate of substance abuse use by criminals greatly exceeds that of the rest of the community. While the association between illicit drugs and alcohol is clear, the impact that this has, and should have, in determining the appropriate penalty for offenders is obscure. Substance involvement has been held to increase penalty. On other occasions it is neutral, and at times it has decreased penalty.

The doctrinally correct approach to dealing with substance involvement in the sentencing calculus has been distorted by a number of considerations. Principally, it has not been established against the backdrop of the framework of criminal law in general, and in particular, the appropriate objectives of sentencing. The main purpose of criminal law is to prevent and punish bad deeds; namely conduct which damages the interests of individuals and the wider community. Drug induced crime causes no less harm than crime committed by drug-free offenders. An offender's exact level of blameworthiness for the crime is a relatively minor consideration in ascertaining crime severity—it is a distant second to the consequences stemming from the criminal act. This leaves only a small amount of room for substance use to mitigate sentence. However, even within this small margin of possible adjustment to sentence, there is no basis for altering the sentencing of drug affected offenders. Substance involvement should not increase penalty from the reference point of culpability. Even if the offender is aware that drug or alcohol use may increase the likelihood of offending, this is no more blameworthy than other triggers of crime such as greed, anger, or revenge. Mitigation founded on considerations

270. *Principles of Drug Abuse Treatment for Criminal Justice Populations—A Research-Based Guide*, NAT'L INST. OF HEALTH, <http://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations/principles> (last updated Apr. 2014); See Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project; Does Substance Abuse Treatment "Pay for Itself?"*, 41 HEALTH SERVS. RESEARCH 192 (2006).

relating to culpability for drug involved offenders should not be accorded given that there is a meaningful degree of choice exercised by offenders in either deciding to initially commence using substances, or continuing to persist with the use of illicit drugs or alcohol.

The strongest basis for reducing the severity of sentences for drug involved offenders is because, ostensibly, this could improve the rehabilitation prospects of offenders. However, this justification fails for two reasons. First, to the extent that rehabilitative programs are effective, their success is not meaningfully diminished by the fact they are delivered in the prison setting. Thus, the objective of rehabilitation does not necessarily lighten penalties. Rather it provides a reason for ensuring that whatever penalty is imposed, should be coupled with a condition that the offender undergo a mandatory drug treatment program. The arguments in favor of reducing penalty for considerations of mitigation are even more definitively negated by the fact that most drug involved offenders are not rehabilitated, and in fact have a higher recidivism rate than other offenders.

The solution to dealing with drug involved offending in the sentencing calculus is to ignore it. This will inject clarity and doctrinal coherence into the sentencing system. It will also make the system fairer. There is a need to respond to the link between substance involvement and crime. However, the response is not via the sentencing system. The first response is to have a wide-ranging and systematic community education campaign regarding the link between drugs, alcohol, and crime. This will provide people with an additional reason to avoid falling into substance use and abuse. In addition to this, it is important that there are greater resources devoted to drug and alcohol treatment. All substance involved offenders should have access to such programs, in both the prison setting and the general community. The provision of such services should in fact be made available to all people in the community who have a substance dependency problem. Though this would require an additional significant public health investment, the return on investment would considerably exceed the cost.