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OUR MORAL OBLIGATION: THE MESSAGE MASSACHUSETTS CAN SEND TO SEXUAL AND PHYSICAL CHILD ABUSERS

MISAEAL CARLOS SANCHEZ*

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I. INTRODUCTION

In February 2005, John Couey kidnapped nine year-old Jessica Lunsford from her home.¹ After leading Jessica into his mobile home, Couey proceeded to rape her and keep her in his bed until morning.² When the authorities knocked at his door as a part of a massive search party to locate Jessica, Couey hid Jessica in a closet of his mobile home.³ As Couey stated in his confession to authorities, “[f]or some reason, they came to our house but they didn’t come in and search, but I wished they would have cause [sic] they would have found her, but they didn’t.”⁴ Couey later went on to bury Jessica alive, but not before tying her up and placing her in a plastic bag.⁵ This is the story of Jessica Lunsford, but this tragedy is not the sole legacy attributed to her name.

Legislators in nearly every state responded to this horrible crime by passing laws with harsher punishment for criminals who sexually abuse children.⁶

¹ *Drifter Says He Held Girl Three Days*, CNN (June 24, 2005, 11:11 AM), <http://www.cnn.com/2005/LAW/06/23/lunsford.report/index.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ ALA. CODE § 13A-5-6 (2005) (imposing twenty-year mandatory minimum for felony sex crimes against children); ALASKA STAT. § 12.55.125 (2006) (raising sentencing ranges for sex crimes against children); ARK. CODE ANN. § 5-14-103 (2006) (mandating twenty-five year mandatory minimum for raping a thirteen year old child); CAL. PENAL CODE § 269 (West 2006) (imposing fifteen-year mandatory minimum for having sex with a thirteen year old child); CONN. GEN. STAT. ANN. § 53a-70c (West 2007) (imposing twenty-five year mandatory minimum for aggravated sexual assault of a child younger than thirteen years old); DEL. CODE ANN. tit. 11, § 4205A (West 2006) (imposing twenty-five year mandatory minimum for raping a child younger than fourteen years old); GA. CODE ANN. § 16-5-21 (West 2006) (mandating twenty-five year mandatory minimum for sexually assaulting a child younger than fourteen years old); IDAHO CODE ANN. § 19-2520G (West 2013) (imposing fifteen-year mandatory minimum for child abuse crimes that require sex offender registration); 730 ILL. COMP. STAT. ANN. 5/12-14.1 (West 2008) (mandating six-year mandatory minimum for predatory sexual assault of a child younger than thirteen years old); IND. CODE ANN. § 35-50-2-4 (West 2005) (imposing twenty-year mandatory minimum for class A felony sex crimes with deadly force against a child); KAN. STAT. ANN. § 21-4643 (West 2006) (imposing twenty-five-year mandatory minimum for several different sex offenses against a child younger than fourteen years old); KY. REV. STAT. ANN. § 532.080 (West 2006) (passing twenty-year mandatory minimum for a persistent class A felony sex offender); LA. STAT. ANN. § 14:78.1 (2006) (imposing twenty-five-year mandatory minimum for several sex crimes against a child younger than thirteen years old); ME. REV. STAT. ANN. tit. 17-A, § 253 (2006) (mandating four-year mandatory minimum for gross sexual assault against a child younger than twelve years old); MD. CODE ANN., CRIM. LAW § 3-305 (West 2006) (imposing twenty-five-year mandatory minimum for raping a child younger than thirteen

Since its inception in Florida eleven years ago, statutes like the Jessica Lunsford Act have been enacted in forty-six states.⁷ Among the various provisions

years old); MICH. COMP. LAWS ANN. § 750.520b (West 2006) (imposing mandatory minimum for “any term of years” for first degree criminal sexual conduct with a child younger than thirteen years old); MISS. CODE ANN. § 97-3-101 (West 2006) (mandating twenty-year mandatory minimum for sexually battering a child younger than fourteen years old); MO. ANN. STAT. § 566.032 (West 2006) (imposing five-year mandatory minimum for raping a child younger than fourteen years old); MONT. CODE ANN. § 45-5-625 (West 2005) (imposing ten-year mandatory minimum for sexual crimes against a child younger than sixteen years old); NEB. REV. STAT. ANN. § 28-319.01 (West 2006) (mandating fifteen-year mandatory minimum for a first degree sexual assault against a child younger than twelve years old); NEV. REV. STAT. ANN. § 200.366 (West 2007) (imposing mandatory life imprisonment for sex crimes against a child younger than sixteen years old); N.H. REV. STAT. ANN. § 651:6 (2006) (mandating twenty-five year mandatory minimum for first degree sexual assault against a child younger than thirteen years old); N.C. GEN. STAT. ANN. § 14-27.2A (West 2008) (imposing twenty-five-year mandatory minimum for sexual crimes against a child younger than thirteen years old); N.D. CENT. CODE ANN. § 12.1-20-03 (West 2007) (mandating twenty-year mandatory minimum for sexual crimes against a child younger than fifteen years old); OHIO REV. CODE ANN. § 2971.03 (West 2007) (imposing twenty-five-year mandatory minimum for raping a child younger than thirteen years old); OKLA. STAT. ANN. tit. 21, § 1123 (West 2007) (imposing twenty-five-year mandatory minimum for sexual crimes against a child younger than twelve years old); OR. REV. STAT. ANN. § 137.700 (West 2005) (imposing one-hundred-month mandatory minimum for first degree sexual crimes against a child younger than twelve years old); 42 PA. STAT. AND CONS. STAT. ANN. § 9718.2 (West 2006) (mandating twenty-five-year mandatory minimum for sexual crimes against a child younger than eighteen years old); 11 R.I. GEN. LAWS ANN. § 11-37-8.2 (West 2006) (imposing twenty-five-year mandatory minimum for first degree molestation crimes against a child); S.C. CODE ANN. § 16-3-655 (2006) (imposing twenty-five-year mandatory minimum for sexual crimes against a child younger than eleven years old); S.D. CODIFIED LAWS § 22-22-1.2 (2006) (imposing ten-year minimum for raping a child younger than thirteen years old); TENN. CODE ANN. § 39-13-522 (West 2007) (imposing twenty-five-year mandatory minimum for raping a child younger than thirteen years old); TEX. PENAL CODE ANN. § 22.021 (West 2007) (imposing twenty-five-year mandatory minimum for sexual crimes with a deadly weapon against a child younger than fourteen years old); UTAH CODE ANN. § 76-5-402.1 (West 2008) (mandating twenty-five-year mandatory minimum for sexual crimes against a child younger than fourteen years old); VT. STAT. ANN. tit. 13, § 3253 (West 2006) (imposing ten-year mandatory minimum for sexually assaulting a child younger than thirteen years old); VA. CODE ANN. § 18.2-61 (West 2006) (imposing twenty-five-year mandatory minimum for sexual crimes against a child younger than thirteen years old while committing several other crimes); WASH. REV. CODE ANN. § 9.94A.712 (West 2006) (imposing twenty-five-year mandatory minimum for raping a child younger than fifteen years old); W. VA. CODE ANN. § 61-8B-3 (West 2006) (imposing twenty-five-year mandatory minimum for first degree sexual crimes against a child younger than twelve years old); WIS. STAT. ANN. § 939.616 (West 2006) (mandating twenty-five-year mandatory minimum for sexual crimes against a child younger than thirteen years old).

⁷ Nancy F. Munoz, Letter to the Editor, *N.J. Now has Strong Law Against Sexual Predators*, TIMES TRENTON (June 5, 2014, 2:19 PM), <http://www.nj.com/opinion/index.ssf/>

of the Jessica Lunsford Act and its progeny, the most significant aspect is the imposition of mandatory minimum sentences for child sex offenders.⁸ Child abuse warrants a mandatory minimum prison sentence because it is a socially abhorrent crime that affects the collective conscious of a community.

This Note will advocate for the implementation of mandatory minimum sentences for both sexual and physical child abuse crimes in Massachusetts. Part II.A discusses the history of mandatory minimum sentences in the United States. Part II.B explores the severe impact that sexual and physical abuse can have on children. Part II.C differentiates between the dangers and risks to children by comparing the two most prevalent types of abusers. Part II.D delineates the concerns and risks of recidivism rates among child abuse offenders. Part II.E introduces various theories of punishment that bear a relation to mandatory minimum sentences. Part II.F raises current criticisms directed at the use of mandatory minimum sentences. Part II.G juxtaposes different legislative actions regarding physical and sexual child abuse in several states across the United States and foreign countries, with current actions in the state of Massachusetts. Part III.A argues that retributive justice is one of multiple potential theories of punishment that aligns with mandatory minimums. Part III.B contends that physical child abuse crimes should warrant the same manner of punishment as child sex crimes. Part III.C explains why certain abuses would not fit within this proposed legislative action. Part III.D reasons that Massachusetts should incorporate factors that other states have relied on in adopting mandatory minimums for child abuse crimes. Finally, Part IV addresses concerns over the context such arguments place upon child corporal punishment and emotional abuse.

II. BACKGROUND

A. *A Brief History of Mandatory Minimum Sentences*

The normative standard sentencing practices during the foundational period of the United States did not include mandatory minimum sentencing guidelines unless they were violent crimes such as murder and piracy.⁹ Sentencing guidelines set appropriate sentences that a convicted criminal is able to receive, and they are based on the crime along with any relevant factors.¹⁰ For the majority of the nation's existence, the trial judge retained absolute discretion during criminal sentencing.¹¹ Trial judges made the ultimate decision as to whether a

2014/06/times_of_trenton_letters_to_the_editor_-_june_5.html [hereinafter Munoz] (publishing letter from Republican Representative Munoz of the 21st District in the New Jersey General Assembly).

⁸ *Id.*; 2005 Fla. Laws ch. 28.

⁹ Maggie E. Harris, *The Cost of Mandatory Minimum Sentences*, 14 FLA. COASTAL L. REV. 419, 423 (2013).

¹⁰ *Sentencing Guidelines*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹¹ *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

criminal sentence fit the offense committed, and whether the offender deserved that punishment.¹² Regardless of the trial judge's decision, in order to sentence a criminal within the guidelines, the jury or the judge had to find beyond a reasonable doubt any and all facts to support the sentence ordered.¹³ Naturally, one problem this created was a great disparity in sentencing.¹⁴ In time, the disparity increased with the creation of the parole system, which was meant to aid in the "regime of indeterminate prison sentencing."¹⁵

Nineteenth century penologist Zebulon Brockway introduced the parole system that began reformatory movements throughout the country.¹⁶ The reformatory movement began with twelve states, expanding on Brockway's model by 1901 and was ultimately incorporated into the parole system in every state by the 1950s.¹⁷ Parole is a system in which prisoners are released from prison early and are allowed to complete the remainder of their sentence in the community under the supervision of the parole board.¹⁸ The parole board is a government entity that determines the guidelines for a prisoner's release.¹⁹ Historically, the federal judiciary expressed its discretion not only in the means and methods of punishment, but also whether parole was required.²⁰ Parole officers are ultimately tasked with deciding this next form of sentencing and become the "guidance and control" over parolees.²¹

Under the Constitution, the power to dictate criminal sentencing is not delegated to any particular branch of government.²² Throughout time, the United States' criminal sentencing bred disparities that can be attributed to the legislature (for crafting wide-ranging penal codes), the judiciary (for ruling differently on similarly fact-based cases), or the executive branch (for determining when parole would occur).²³ Congress set minimums and maximums for particular crimes but gave the judiciary the power to cast decisions within that range.²⁴ Judges then issued sentences they believed were appropriate within the parame-

¹² *Id.*

¹³ *Commonwealth v. Denehy*, 2 N.E.3d 161, 173 (Mass. 2014).

¹⁴ *Mistretta*, 488 U.S. at 384.

¹⁵ Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993) (discussing how parole was introduced into the federal system in 1910).

¹⁶ Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 980–82 (2013).

¹⁷ *Id.* at 982–83.

¹⁸ *Commonwealth v. Cole*, 10 N.E.3d 1081, 1086 (Mass. 2014).

¹⁹ *Parole Board*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁰ *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

²¹ *Id.*

²² *Id.* at 364.

²³ *Id.* at 365.

²⁴ Stith & Koh, *supra* note 15, at 225.

ters issued by the legislature.²⁵ In *Mistretta v. United States*, Justice Blackmun wrote that sentencing guidelines are constitutional and that there is no separation of powers violation when Congress creates mandatory minimum sentences.²⁶ Justice Blackmun illustrates the indeterminate-sentencing system as, "Congress defin[ing] the maximum, the judge impos[ing] a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determining the actual duration of imprisonment."²⁷

The earliest form of mandatory sentencing was the death penalty for capital crimes, but afterwards mandatory minimum sentences began to also apply to other politically visible crimes.²⁸ Legislatures have since established mandatory minimums as a moral response to nationally visible crimes.²⁹ In the 1980s certain federal crimes became highly visible to the public eye and warranted mandatory minimum punishments.³⁰ These crimes included felonies committed with firearms and narcotics-related offenses.³¹ At the state level, legislatures created mandatory minimums that mirrored penalties for federal offenses such as drug trafficking.³²

B. *Child Abuse*

A revolutionary change in mentality towards the treatment of children came almost forty years ago.³³ But it was not until 1990 that the U.S. Advisory Board on Child Abuse and Neglect issued a report calling the state of child maltreatment a national emergency.³⁴ While the exact figures on child abuse can never truly be known due to practical difficulties in reporting, some information does exist and will be explored in the following subsections.³⁵

²⁵ *Mistretta*, 488 U.S. at 365.

²⁶ *Id.* at 412.

²⁷ *Id.* at 365.

²⁸ Stith & Koh, *supra* note 15, at 225 n.7.

²⁹ *Id.*

³⁰ *Id.* at 259.

³¹ *Id.* (imposing harsh mandatory minimums under the Armed Career Criminal Act of 1982 and Anti-Drug Abuse Act of 1986).

³² 1988 Mass. Legis. Serv. 276-77 (West) (Legislation that created mandatory minimums for cocaine trafficking in Massachusetts).

³³ Karla-Dee Clark, *Innocent Victims and Blind Justice: Children's Rights to be Free from Child Sexual Abuse*, 7 N.Y.L. SCH. J. HUM. RTS. 214, 223 (1990) ("It was not until the 1960's that formal protection of abused children began to take form. In the mid 1970's the first concerted efforts on behalf of sexually abused children were initiated and in the 1980's, the number of reported cases steadily increased.").

³⁴ U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES xxi (1995).

³⁵ OLA W. BARNETT ET AL., FAMILY VIOLENCE ACROSS THE LIFESPAN: AN INTRODUCTION 146 (1997).

A discussion of child abuse first requires parameters to parse what is and is not defined as child abuse.³⁶ Different scholars and practitioners have posited several formulations of child abuse.³⁷ For example, one definition of physical child abuse is physical mistreatment to a point where protection from outside the family is mandated.³⁸ In some instances, formulations focus more on the specific actions of the perpetrator and less on the exact type of harm, judging between intentional and accidental conduct.³⁹ Child abuse can range from sexual and physical abuse to neglectful abuse (such as not providing children with food and clothing), to emotional and mental abuse (such as parents' actions towards their children with gender identity disorder).⁴⁰ In order to focus on better defining sexual and physical abuse, it is crucial to examine multiple state criminal statutes. Before defining these terms, it is important to first comprehend the breadth and severity of child abuse.

1. Sexual Child Abuse

The seriousness of child abuse remained relatively unknown in the U.S. until the late 1970s.⁴¹ David Finkelhor, Director of the Crimes Against Children Research Center, researched child sexual abuse from the mid 1970s to 1980s and discovered roughly a 1,060% increase in reported cases.⁴² In 1981, Finkelhor conducted a study on sexual child abuse and interviewed a considerable number of parents in the Boston metropolitan area, revealing, "[t]he public is relatively knowledgeable and concerned about the problem of sexual abuse."⁴³ However, children can suffer serious repercussions as a result of sexual abuse.⁴⁴ For instance, child victims of both sexual and physical abuse can

³⁶ DAVID G. GIL, *VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES* 5 (1970).

³⁷ *Id.* at 7.

³⁸ See, e.g., H.D. Bryant et al., *Physical Abuse of Children—An Agency Study*, 42 *CHILD WELFARE* 125, 126 (1963).

³⁹ GIL, *supra* note 36.

⁴⁰ Paul M. Ganley, *The Battered Child: Logic in Search of Law*, 9 *SAN DIEGO L. REV.* 364, 365 (1971); see also Andrew Ford, *State Child Emotional Abuse Laws: Their Failure to Protect Children with Gender Identity Disorder*, 49 *FAM. CT. REV.* 642, 642–43 (2011).

⁴¹ BARNETT ET AL., *supra* note 35, at 140.

⁴² DAVID FINKELHOR, *CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH* 1 (1984) (stating that the number of reported child sexual abuse cases rose from 1,975 to 22,918).

⁴³ Lisa R. Askowitz, *Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecution: Pennsylvania Takes it to the Extreme*, 47 *U. MIAMI L. REV.* 201, 232 (1992).

⁴⁴ BARNETT ET AL., *supra* note 35, at 146–52 (discussing various sources of reporting, including reported cases from government agencies, self-reports, and mandated reporters); Debra Todd, *Sentencing of Adult Offenders in Cases Involving Sexual Abuse of Children: Too Little, Too Late? A View from the Pennsylvania Bench*, 109 *PENN. ST. L. REV.* 487, 489–98 (2004) (“Between 1986 and 1993, the number of reported cases in fact doubled,

suffer from post-traumatic stress disorder (“PTSD”), though it is more prevalent in sexually abused children.⁴⁵ Lasting effects such as PTSD, cognitive distortions, emotional distress, an impaired sense of self, avoidant behavior, substance abuse, self-harm, and difficulties with interpersonal communications can manifest and persist throughout the child’s life.⁴⁶

The Third National Incidence Study of Child Abuse and Neglect (“NIS-3”) reported that between 1986 and 1993 the number of abused children increased by 107%, from 590,800 to 1,221,800.⁴⁷ Within the same time frame the rate of sexually abused children grew 125%, from 133,600 to 300,200.⁴⁸ NIS-3 reported these figures using an “Endangerment Standard” of calculation in order to help supplement the calculations from the “Harm Standard.”⁴⁹ The Endangerment Standard was intended to include children not originally covered by the Harm Standard by expanding certain categories of abusers in their reporting, but also maintaining that these abuse cases also meet the identical criteria within the Harm Standard.⁵⁰

Sexual abuse of children is, understatedly, a problem that continues to plague the United States.⁵¹ Although the United States has seen a substantial drop in child sexual abuse cases (around 62%), this does not eliminate the concern that this problem remains an actual issue to be addressed.⁵² Throughout the last

increasing from 1.4 million to 2.8 million; and the number of cases involving serious injuries nearly quadrupled, rising from 143,000 to almost 570,000.”).

⁴⁵ See Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 49 (1998) (explaining that in nonclinical samples sexual assault produces the highest rate of PTSD).

⁴⁶ See John N. Briere & Diana M. Elliott, *Immediate and Long-Term Impacts of Child Sexual Abuse*, 4 FUTURE CHILD. 54, 54–69 (1994).

⁴⁷ A. J. Sedlak & D. D. Broadhurst, *Executive Summary of the Third National Incidence Study of Child Abuse and Neglect*, DADSNOW.ORG (Sept. 1996), <http://www.dadsnow.org/studies/NIS3.pdf> [hereinafter *NIS-3*] (“NIS-3 provides us with important insights about the incidence and distribution of child abuse and neglect and about changes in incidence since the previous studies.”).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Child Sexual Abuse Statistics*, NAT’L CTR. FOR VICTIMS OF CRIME, <https://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> (last visited Sept. 26, 2016) [hereinafter *VICTIMS OF CRIME*] (“Studies by David Finkelhor . . . show that . . . 1 in 5 girls and 1 in 20 boys is a victim of child sexual abuse [and] [s]elf-report studies show that 20% of adult females and 5-10% of adult males recall a childhood sexual assault or sexual abuse incident.”).

⁵² Erica Goode, *Researchers See Decline in Child Sexual Abuse Rate*, N.Y. TIMES (June 28, 2012), http://www.nytimes.com/2012/06/29/us/rate-of-child-sexual-abuse-on-the-decline.html?_r=0 (“The rates of child sexual abuse in the United States, while still significant and troubling, have been decreasing steadily over the last two decades by several critical measures.”).

twenty years, states have demonstrated continued concern over child abuse crimes and have addressed it with new tougher penalties, some of which include higher minimum prison terms.⁵³

The fourth, and latest, report from the National Incidence Study of Child Abuse and Neglect (“NIS-4”) recorded statistics of child abuse between 2005 and 2006 and compared them to the data from NIS-3.⁵⁴ Under the Endangerment Standard, the number of abused children decreased by 32% since the NIS-3 report.⁵⁵ While the number of children abused decreased from 1,221,800 to 835,000, NIS-4 concluded that the number of sexually abused children decreased by 40% from 300,200 to 180,500.⁵⁶ Even though the rate of sexually abused children has decreased by 47%, the resulting 180,500 abused children is still an increase compared to the 133,600 originally recorded in 1986.⁵⁷

2. Physical Child Abuse

Physical abuse is more noticeable due to the visual indicators, and accordingly it is reported more often than sexual abuse.⁵⁸ Researchers base their statistics on official estimates that come from cases reported to law enforcement and social services as well as self-reports from victims and perpetrators.⁵⁹ Researchers rely on these two methods for reporting child physical abuse cases.⁶⁰ Unfortunately, problems with reporting can occur due to a medical professional’s inexperience recognizing issues, a person’s unwillingness to believe such abuse, and a personal discontent with governmental response to cases.⁶¹

The U.S Department of Health & Human Services (HHS) reports that child physical abuse has decreased from 1992 to 2004.⁶² Consider however, that even though such a downward trend may be an indication of better prevention services, the 2008 Department of Child Services (DCS) records indicated that slightly more than three quarters of a million children in the United States are

⁵³ See David G. Savage, *Were ‘90s Laws Too Tough? Challengers Say Statutes Stemming from Crimes Against Children Went Too Far*, 88 A.B.A. J. 22, 22–24 (2002) (explaining that in the 1990s “Megan’s laws” punished sex criminals by alerting the neighborhood of their prior convictions, and “three strikes and you’re out” laws punished reoffenders with higher prison terms such as twenty-five years to life).

⁵⁴ U.S. DEP’T OF HEALTH & HUM. SERV., *FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT* 1, 3–18 (2010), http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf [hereinafter *NIS-4*].

⁵⁵ *Id.* at 7.

⁵⁶ *Id.*

⁵⁷ Compare *NIS-4*, *supra* note 54, at 7, with *NIS-3*, *supra* note 47.

⁵⁸ See Todd, *supra* note 44 (describing a national survey from 1996 that disclosed child maltreatment statistics).

⁵⁹ See BARNETT ET AL., *supra* note 35.

⁶⁰ See *id.*

⁶¹ *Id.*

⁶² *Id.*

maltreated.⁶³ DCS reported that 122,084 of these children were physically abused.⁶⁴ By 1973 Battered Child Syndrome was confirmed “as the most common cause of death among small children in the United States.”⁶⁵ The 1997 Special Report by the Bureau of Justice Statistics shows that 50% of the children admitted at emergency rooms were under five years old, and the rate of injury for children under twelve years old was 1.6 per thousand in abuse cases.⁶⁶

Under the Endangerment Standard, from NIS-3 to NIS-4, the number of physically abused children decreased by only 22%, from 614,100 to 476,600.⁶⁷ This decrease may seem small, but compared to the 97% increase in physically abused children (311,500 to 614,100) at the time of the NIS-3 report, it demonstrates progress.⁶⁸ Across the multiple departments that have produced statistics on child physical abuse (HHS, DCS, and NIS), the results have indicated that more children in the United States are abused physically than sexually.⁶⁹ Amidst the concerns about child abuse is the actual possibility that victims will become abusers themselves.⁷⁰ Some of the lasting effects of physical abuse are seen with abusive parents, who were themselves abused as children.⁷¹

Nineteenth Judicial Circuit District Attorney Randall Houston is one of the most recent advocates for tougher penalties for child abusers, following the discovery of an unresponsive four-year old child.⁷² The child was found in the backseat of the defendant’s car, having sustained lacerations to his lip and head as well as various bruises throughout his body that revealed more substantial bruising to his groin area.⁷³ District Attorney Houston is seeking for the legislature to raise the punishment for Aggravated Child Abuse for a child under six

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Jeffrey W. Kelley, *The Child Abuse Epidemic: Illinois’ Legislative Response and Some Further Suggestions*, 1974 U. ILL. L. F. 403, 403 n.1 (1974) (“This syndrome means that a child has received repeated and/or serious injuries by non-accidental means; characteristically, these injuries are inflicted by someone who is ostensibly caring for the child.”).

⁶⁶ BARNETT ET AL., *supra* note 35, at 147.

⁶⁷ NIS-4, *supra* note 54, at 7.

⁶⁸ NIS-3, *supra* note 47.

⁶⁹ See *supra* Part II.B.2 (Physical Child Abuse).

⁷⁰ See VICTIMS OF CRIME, *supra* note 51 (showing that 40-80% of juvenile sex offenders have themselves been victims of sexual abuse).

⁷¹ See Nancy Wright & Eric Wright, *SOS (Safeguard Our Survival): Understanding and Alleviating the Lethal Legacy of Survival-Threatening Child Abuse*, 16 AM. U. J. GENDER SOC. POL’Y & L. 1, 29 (2007) (“More recent estimates are that as many as eighty-five to ninety percent of physical child abusers were themselves physically abused as children.”).

⁷² Ebony Hall, *DA to Push for Life Sentences in Child Abuse Case*, ABC 33/40 (Dec. 14, 2015), <http://abc3340.com/news/local/da-to-push-for-life-sentences-in-child-abuse-cases>.

⁷³ *Wetumpka Man and Woman Arrested After Child Found Unresponsive in Car in FL*, WSFA (Oct. 17, 2015), <http://www.wsfa.com/story/30058587/wetumpka-man-and-woman-arrested-after-child-found-unresponsive-injured-in-car-in-fl>.

years of age from the current punishment of two to twenty years to ten to ninety-nine years in prison.⁷⁴ Houston advocates further by requesting that punishment be life imprisonment when such crimes are committed against children younger than six years old, stating, “[n]othing can erase the trauma that this child suffered, but if we can ensure that the severity of the penalty truly matches the severity of the crime, then perhaps justice can be fully obtained.”⁷⁵

a. *Child Corporal Punishment*

All fifty states in America permit the use of corporal punishment by families and the criminal law views it as “reasonable” punishment when used to discipline children.⁷⁶ One of the most popular forms of child corporal punishment is spanking, which studies have demonstrated over 90% of parents inflict on children younger than three years old.⁷⁷ While such practices fall into a category beneath what is legally considered “child abuse,” regardless of the classification, Americans have become more ambivalent about the use of corporal punishment on children.⁷⁸ The support for corporal punishment is not as overwhelming as it once was in the United States.⁷⁹

Still, many Americans continue to argue that corporal punishment is a valid child-rearing method and posit several rationales as to why the government should not intervene with family practices of child raising.⁸⁰ One such argument is the “I-was-spanked-and-I’m-okay” logic that many parents deem just.⁸¹ This rationale can be seen most recently with the famous arrest of NFL running back Adrian Peterson in 2014 for reckless or negligent injury to his four-year-old son.⁸² Peterson allegedly struck his four-year-old son multiple times with a “switch” (a tree branch) that resulted in cuts and bruises over the child’s back, legs, and private areas.⁸³ Peterson’s attorney attributed these actions to Peterson’s own upbringing, “He used the same kind of discipline with his child that

⁷⁴ Hall, *supra* note 72.

⁷⁵ *Id.*

⁷⁶ Doriane Lambelet Coleman et al., *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, 73 L. & CONTEMP. PROBS. 107, 107 (2010).

⁷⁷ Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 581 (2003).

⁷⁸ *Id.* at 581–82.

⁷⁹ *Id.* at 593 (stating that between 1974 and 1994, the number of states that banned corporal punishment in public school increased to twenty-seven).

⁸⁰ See generally *id.* at 627–35 (explaining that arguments for corporal punishment are misguided and lack credibility).

⁸¹ *Id.* at 628.

⁸² Victoria Taylor, *Discipline or Abuse? Adrian Peterson Case Reignites Corporal Punishment Debate*, N.Y. DAILY NEWS (Sept. 14, 2014), <http://www.nydailynews.com/life-style/health/adrian-peterson-case-revives-corporal-punishment-debate-article-1.1939370>.

⁸³ Eric Prisbell & Brent Schrottenboer, *Adrian Peterson Avoids Jail Time in Child Abuse Case*, USA TODAY (Nov. 4, 2014), <http://www.usatoday.com/story/sports/nfl/vikings/2014/11/04/adrian-peterson-minnesota-vikings-child-abuse-plea-deal-misdemeanor/18466197/>

he experienced as a child growing up in East Texas.”⁸⁴ In the wake of this incident, other NFL players have expressed similar rationales.⁸⁵ Christians sometimes cite biblical texts that suggest support for child corporal punishment.⁸⁶

Where corporal punishment was once considered a normative practice, it has drastically gone in the opposite direction in modern times.⁸⁷ In 1979, Sweden became the first country in the world to ban child corporal punishment, spurring several other countries to outlaw the practice absolutely.⁸⁸ As of 2014, forty-two countries around the world have banned child corporal punishment.⁸⁹ Regardless of the anecdotal or religious grounds defending corporal punishment, a majority of states have banned the use of corporal punishment on children by school employees.⁹⁰

Texas is one of nineteen states that have continued to allow school employees to “keep popping, spanking, swatting or paddling” children in their school district.⁹¹ Even though Texas has not entirely banned child corporal punishment, it is not immune to the changing cultural atmosphere surrounding it, and

(explaining that the case was settled and Peterson was ordered to pay court costs, a \$4,000 fine, and complete eighty hours of community service); Taylor, *supra* note 82.

⁸⁴ Taylor, *supra* note 82.

⁸⁵ See *id.* (“‘What’s child abuse in 2014 was normal in the 80s where I grew up and also with people in my age range,’ former New England Patriots receiver Donte Stallworth tweeted ‘When I was kid got so many whoopins I can’t even count!’ New Orleans Saints running back Mark Ingram tweeted Friday.”).

⁸⁶ See, e.g., Pollard, *supra* note 77, at 579–83 (stating that several parts of the Old Testament can be interpreted as advocating for child corporal punishment); *Proverbs* 23:13–14 (King James) (“Withhold not correction from the child: for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell.”); Melanie Eversley, *Pope Says Spanking OK with Conditions*, USA TODAY (Feb. 6, 2015), <http://www.usatoday.com/story/news/2015/02/05/pope-francis-spanking/22958757/> (“Pope Francis says that spanking is OK as long as it preserves the dignity of the child and is not done in the face.”).

⁸⁷ See Pollard, *supra* note 77, at 579–83 (demonstrating that by 1993 only 19% of parents used spanking as a form of punishment).

⁸⁸ See *id.* at 587 (“[T]he following countries have outlawed, by statute or court decision, child corporal punishment in all forms: Finland, Norway, Austria, Cyprus, Italy, Croatia, Latvia, the United Kingdom, Denmark, Israel, and Germany.”); Benjamin Shmueli, *Who’s Afraid of Banning Corporal Punishment? A Comparative View on Current and Desirable Models*, 26 PENN. ST. INT’L L. REV. 57, 109–10 (2007).

⁸⁹ Denis Fitzgerald, *The 42 Countries That Have Banned Corporal Punishment*, UN TRIBUNE (Nov. 20, 2014), <http://untribune.com/42-countries-banned-corporal-punishment/>.

⁹⁰ See Mark Collette, *Texas Holds Tight to Tradition on Corporal Punishment*, HOUSTON CHRONICLE (Nov. 14, 2014), <http://www.houstonchronicle.com/news/education/article/Texas-holds-tight-to-tradition-on-corporal-5893764.php#photo-6899137> (explaining that only nineteen states still give codified approval of corporal punishment to school employees).

⁹¹ *Id.*

the practice has decreased 80% in Texas between 2001-2012.⁹² Although many Texas school districts have chosen to reduce their use of corporal discipline—in part due to the fear of possible liability should the discipline become abuse—30,000 students were physically punished during the 2011-2012 school year.⁹³ Parental support for corporal punishment impeded the state from passing a statewide ban for the last twenty years.⁹⁴ Along with the dangers presented, researchers believe that corporal punishment causes severe emotional injury.⁹⁵ Recent research into the practices of child corporal punishment has revealed different levels of physical and social harms as a result, which include: “(1) aggression/antisocial behavior, (2) cognitive/intellectual damage, (3) psychological/psychiatric problems, (4) damage to the parent-child relationship, and (5) the potential for spanking to escalate into child abuse.”⁹⁶

3. Emotional Abuse

Emotional abuse is a problem affecting many children in America, and several states have passed legislation to address it.⁹⁷ While statistics reported may not be wholly accurate, the NIS-3 study reported that the number of emotionally neglected children nearly tripled between 1985 and 1993, from 203,000–584,100.⁹⁸ Even more concerning was the NIS-4 report that concluded that the number of emotionally neglected children had actually doubled between 1993 and 2006, making it the only form of abuse to have increased, while physical and sexual abuse have decreased.⁹⁹ As of 2006, the number of emotionally neglected children across the country was 1,173,800.¹⁰⁰ State legislatures have attempted to address emotional abuse by passing statutes that criminalize it, but critics question the effectiveness of those statutes.¹⁰¹

Some academics refer to emotional abuse interchangeably with emotional

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ Pollard, *supra* note 77, at 648; *NIS-3*, *supra* note 47; *NIS-4*, *supra* note 54, at 7.

⁹⁶ Pollard, *supra* note 77, at 602.

⁹⁷ *NIS-4*, *supra* note 54, at 7 (noting that three million children per year experienced Endangerment Standard maltreatment and one third of those experienced emotional abuse); Sana Loue, *Redefining the Emotional and Psychological Abuse and Maltreatment of Children*, 26 J. LEGAL MED. 311, 322–24 (2005) (comparing Utah, Alabama, and Florida statutes defining “abuse”).

⁹⁸ *NIS-3*, *supra* note 47.

⁹⁹ *NIS-4*, *supra* note 54, at 7.

¹⁰⁰ *Id.*

¹⁰¹ Sonia Renee Martin, *A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167, 183–84 (1996) (criticizing different state statutes for tying emotional harm to a sustained physical injury, not providing judges enough guidance and too much discretion, or going so far as to require proof that emotional harm has been sustained, such as by proving lowered intellectual function).

neglect or psychological abuse.¹⁰² Others distinguish emotional abuse and emotional neglect and measure them with different standards.¹⁰³ Clearly, the term “emotional abuse” is very difficult to define.¹⁰⁴ Some studies define emotional abuse as “close confinement, verbal or emotional assault, and other or unknown abuse.”¹⁰⁵ The definition can even include “inadequate nurturance or affection, chronic or extreme spouse abuse, permitted drug or alcohol abuse, permitted other maladaptive behavior, refusal of psychological care, a delay or failure of psychological care, and other inattention to emotional needs.”¹⁰⁶ Emotional abuse is often considered the most harmful form of abuse, yet is also the most difficult to detect.¹⁰⁷

Emotional abuse is the hardest to detect because, unlike physical and sexual abuse, it can leave no immediately identifiable marks.¹⁰⁸ Existing state statutes that reference “mental harm,” such as those in Utah and Alabama, have neither properly defined the term nor instructed judges on how to identify it.¹⁰⁹ Alabama’s current statute includes “mental injury” within its definition of “abuse” but provides no guidance on what constitutes mental injury, only providing examples of sexual abuse and exploitation.¹¹⁰ California’s emotional abuse

¹⁰² J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change*, 51 STAN. L. REV. 1665, 1665–68 (1999) (referring to abuse and/or neglect).

¹⁰³ Loue, *supra* note 97, at 312.

¹⁰⁴ See *id.* at 311–15; see also Shull, *supra* note 102, at 1665–68 (“I will not attempt to provide a cogent definition because I do not believe there is one, nor should there be one.”).

¹⁰⁵ Loue, *supra* note 97, at 312.

¹⁰⁶ *Id.*; Martin, *supra* note 101, at 181 (“Psychological research has uncovered that the failure to provide adequate nurturing to a child through emotional support can cause serious problems in adolescent children, including: depression, low self-esteem, suicidal tendencies, and substance abuse.”); Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL’Y & L. 247, 264 (2011) (“Apart from possible physical abuse, studies show that children who witness abuse are at higher risk for a wide range of behavioral, emotional, and intellectual problems.”).

¹⁰⁷ Loue, *supra* note 97, at 311.

¹⁰⁸ Martin, *supra* note 101, at 181.

¹⁰⁹ Loue, *supra* note 97, at 322; UTAH CODE ANN. § 78A-6-105 (West 2016) (current statute does not list mental or emotional harm under its definition of abuse and only includes “(i) nonaccidental harm of a child; (ii) threatened harm of a child; (iii) sexual exploitation; (iv) sexual abuse; or (v) human trafficking of a child in violation of Section 76-5-308.5”).

¹¹⁰ ALA. CODE § 26-14-1 (2016) (“(1) ABUSE. Harm or threatened harm to a child’s health or welfare. Harm or threatened harm to a child’s health or welfare can occur through nonaccidental physical or mental injury, sexual abuse or attempted sexual abuse, or sexual exploitation or attempted sexual exploitation. ‘Sexual abuse’ includes the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct or any simulation of the conduct for the purpose of producing any visual depiction of the conduct; or the rape, moles-

statute only imposes a penalty for emotional abuse if the actor simultaneously inflicts physical harm, ultimately influencing judges not to find emotional abuse if the actor did not also engage in physical abuse.¹¹¹ Courts in Massachusetts and Florida have demonstrated a willingness to uphold emotional abuse statutes, but not without countervailing factors.¹¹² A Massachusetts court upheld a child abuse conviction on abusive words alone, while the Supreme Court of Florida upheld a felony conviction against challenges that the language of “mental injury” was too vague.¹¹³

Vague definitions of abuse are present throughout federal and state law.¹¹⁴ The genuine possibility exists that not all abused children grow up feeling equally affected because other networks and experiences in their lives helped them cope.¹¹⁵ Unlike physical and sexual abuse, the harm from emotional abuse is not always quantifiable.¹¹⁶ Data about emotional abuse is scarce, but it appears that rates for emotional abuse vary greatly between states.¹¹⁷

C. *Personal Relationships vs. Stranger Relationships*

While many child victims are either unwilling or unable to disclose the identity of their abusers, statistics indicate that over 50% of abusers are the victims’ relatives.¹¹⁸ The greatest risks of harm to child victims of abuse are those with

tation, prostitution, or other form of sexual exploitation of children, or incest with children as those acts are defined by Alabama law. ‘Sexual exploitation’ includes allowing, permitting, or encouraging a child to engage in prostitution and allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child for commercial purposes.”).

¹¹¹ See Love, *supra* note 97, at 327.

¹¹² See Pollard, *supra* note 77, at 648–52 (finding emotional abuse based solely on words, but not based solely on evidence of subabusive parental corporal punishment).

¹¹³ *DuFresne v. State*, 782 So.2d 888 (Fla. Dist. Ct. App. 2001), *aff’d*, 826 So. 2d 272, 279 (Fla. 2002) (upholding, as intentional conduct that could reasonably be expected to result in mental injury to child, a charge against a teacher who hit and called a student ‘bad’); *John D. v. Dep’t of Soc. Servs.*, 744 N.E.2d 659, 663 (Mass. App. Ct. 2001) (finding “evidence of a risk of harm” solely from inappropriate communications).

¹¹⁴ See Weaver, *supra* note 106 (noting that federal law and state family codes lack definitive definitions of abuse).

¹¹⁵ See *id.* at 265–66.

¹¹⁶ Ford, *supra* note 40, at 643.

¹¹⁷ See Judith G. McMullen, *The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children*, 41 *DRAKE L. REV.* 483, 500 (1992) (discussing difficulties in identifying emotional abuse in children before they grow up and reveal that the abuse occurred).

¹¹⁸ See Lieb et al., *supra* note 45, at 50. BARNETT ET AL., *supra* note 35, at 147 (reporting that 56% of physically abused children were hurt by relatives; 34.1% by acquaintances; and 9.7% by strangers).

close relationships to the children.¹¹⁹ Personal relationships in which the perpetrator physically abused the child are usually between biological parents and their children.¹²⁰ Statistics report that known individuals account for sexual assault in approximately 60% of boys and 80% of girls who are sexually abused.¹²¹ Relationships with teachers, coaches, and acquaintances can also lead to abuse.¹²² Various studies report that child abuse by strangers hovers below 10% of all reported child abuse cases.¹²³

Abuse by familiar assailants is overwhelmingly more prevalent than assault by strangers.¹²⁴ On August 5, 2014, Erroll Foreman, a felon with a three-decade criminal record including a prior conviction for sexually assaulting a minor, was arraigned in Suffolk County for raping and physically assaulting a friend's ten year-old niece.¹²⁵ On November 24, 2015, twenty-one year-old Abigail Hanna was arraigned in Essex County for kidnapping and assaulting a two year-old girl she previously babysat in Hamilton.¹²⁶ While these are just a

¹¹⁹ See Lieb et al., *supra* note 45, at 50 (noting that sexual crimes are more destructive to the victim when perpetrated by relatives or partners).

¹²⁰ BARNETT ET AL., *supra* note 35, at 168.

¹²¹ *Myths About Sex Offenders*, ABC NEWS (Oct. 23, 2014), <http://abcnews.go.com/US/story?id=90200&page=1>.

¹²² See Linda Keene et al., *Legal Dilemma: Rapist's Rights vs. Public's Right to Know*, THE SEATTLE TIMES (July 13, 1993), <http://community.seattletimes.nwsource.com/archive/?date=19930713&slug=1710841> (noting that 43% of sexual assaults in Snohomish County between 1989 and 1992 were perpetrated by teachers, coaches and other acquaintances).

¹²³ See, e.g., Cara Gitlin, *Expert Testimony on Child Sexual Abuse Accommodation Syndrome: How Proper Screening Should Severely Limit its Admission*, 26 QUINNIPIAC L. REV. 497, 511 (2008) (citing BARBARA E. SMITH & SHARON G. ELSTEIN, *Prosecution of Child Sexual and Physical Abuse Cases*, in LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 12, 12 (1998) (finding that strangers were the abusers in only 6% of child abuse cases)).

¹²⁴ Matt Rocheleau, *Statistics About the Victims, Perpetrators of Child Abuse and Neglect*, BOSTON GLOBE (Feb. 9, 2016), https://www.bostonglobe.com/metro/2016/02/09/statistics-about-victims-perpetrators-child-abuse-and-neglect/6KthyEs9TstStVi0CkAigN/story.html?pl=Article_Related_Box_Article ("A new report from the US Department of Health and Human Services shows that Massachusetts had the highest rate of child abuse and neglect in the country during fiscal 2014 About 81 percent of perpetrators were identified as parents. Another 5 percent were an unmarried partner of a parent of the child, and another 4 percent were relatives of the child other than a parent.").

¹²⁵ Zachary T. Sampson, *Felon with Lengthy Record Faces Charges of Raping 10-Year-Old*, BOSTON GLOBE (Aug. 5, 2014), <https://www.bostonglobe.com/metro/2014/08/04/felon-with-long-criminal-record-accused-raping-year-old-girl-dorchester/BEoBC4hZww0fGpcuTf rqXK/story.html>.

¹²⁶ Laura Crimaldi & Evan Allen, *Ex-Babysitter Allegedly Abducted, Beat Hamilton Toddler*, BOSTON GLOBE (Nov. 21, 2015), <https://www.bostonglobe.com/metro/2015/11/21/baby-sitter-arrested-and-charged-abduction-beating-hamilton-toddler/mgPxNimL6dVxrXOjYXQFP/story.html>.

couple of the recent sexual and physical assault cases that have occurred in Massachusetts, they exist within a wider, emerging national issue surrounding the culture of sexual abuse.¹²⁷

D. *Recidivism*

Physical child abusers are likely to abuse their victims again after the first attack.¹²⁸ After receiving intervention or treatment, parental physical abusers have a mixed rate of recidivism of 16-60%.¹²⁹ Parental physical abuse is naturally cyclical due to the shared environment between victim and abuser.¹³⁰ Such parental abuses include kicking, biting, binding, punching, beating, choking, burning, scalding, suffocating, poisoning, and resulting in welts, bruises, scars, fractures, burns, subdural hematomas, and ruptured internal organs.¹³¹ As early as 1968, a study found that 25-50% of battered children cases resulted in a permanent injury or death within a few months.¹³²

Sex offenders have a lower rate of recidivism than physical child abusers.¹³³ Over a three-year period after which sex offenders forty-five years or older were released, the U.S. Department of Justice reported that only 3.3% of sex offenders were arrested again for child sex crimes.¹³⁴ In studies of post-release recidivism among sexual offenders, studies over longer periods of time indicate

¹²⁷ See Caitlin Oprysko, *The Stories Behind the Sexual Assault Survivors in Lady Gaga's Oscars Performance*, ABC NEWS (Feb. 29, 2016, 2:54 PM), <http://abcnews.go.com/Lifestyle/stories-sexual-assault-survivors-lady-gagas-oscars-performance/story?id=37288721> (describing Vice President Joe Biden's emphasis on the importance of fighting sexual abuse while introducing Lady Gaga, who performed at the Academy Award Ceremony surrounded by sexual abuse survivors).

¹²⁸ See Kelley, *supra* note 65, at 411-12 ("[T]he repetitive nature of [battered children's] injuries indicate that an adult who has once injured a child is likely to repeat . . .").

¹²⁹ Emily Campbell, *Birth Control as a Condition of Probation for Those Convicted of Child Abuse: A Psychological Discussion of Whether the Condition Prevents Future Child Abuse or is a Violation of Liberty*, 28 GONZ. L. REV. 67, 89-90 (1992) (noting additionally that in physical abuse cases 20-87% of the families remained the same or worse off after treatment).

¹³⁰ Wright & Wright, *supra* note 71, at 12-13.

¹³¹ *Id.* at 5-6 n.13.

¹³² Kelley, *supra* note 65, at 411 ("In one study of twelve battered children, eleven had a history of repeated injuries. Three of these children were fatally injured after recovering from prior incident. Another follow-up study of fifty patients revealed that three were killed and four reinjured after their original hospitalization. A third study concluded that in twenty-five to fifty percent of all cases, the child will be permanently injured or killed within the next several months.").

¹³³ Compare PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* 1 (Nov. 2003) (finding 3.3% of released sex offenders were rearrested for molesting children), with Campbell, *supra* note 129, at 89 (stating that physical re-abuse by parents ranges between 16-60%).

¹³⁴ LANGAN ET AL., *supra* note 133, at 1.

higher rates of recidivism.¹³⁵ Over a five-year post-release study, sexual offenders' recidivism was 10–15%.¹³⁶ In the only study examining the rate at which sexual offenders committed new sex crimes within twenty-five-years of their release, data collected after a five-year window only demonstrated a 14% reconviction rate among child molesters.¹³⁷ At the end of the twenty-five year period, the conviction rate at which child molesters committed new sexual crimes increased to 41%.¹³⁸

E. Theories of Punishment

One consistent rationale behind the United States' sentencing evolution is retribution.¹³⁹ While punishment is seen as a "public condemnation," retribution is society's answer to those who disregard the laws and morals that communities value.¹⁴⁰ The Supreme Court of the United States has recognized four theories of punishment as legitimate within our criminal legal system: retribution, deterrence, rehabilitation, and incapacitation.¹⁴¹ Retribution embodies the principle that a criminal's punishment should stem directly from the criminal's culpability.¹⁴² Criminal law carries a moral obligation to issue a justified punishment within reason.¹⁴³ Legal scholar and professor Paul Robinson argues that retribution is, to a certain extent, the perfect equalizer because it aims to balance the scales of society by delivering onto the criminal what is naturally deserved.¹⁴⁴

Deterrence is the principle that punishment only exists as a means to either

¹³⁵ Keith Sothill, *Sex Offender Recidivism*, 39 CRIME & JUST. 145, 157 (2010) (citing Karl R. Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING AND CLINICAL PSYCHOL. 348, 348–62 (1998)).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2:5 (2015) ("Retribution is the most ancient of sentencing rationales and springs from the notion that 'the criminal owes the community a measure of suffering because of that which he inflicted' Bearing many labels and boasting two centuries of academic support, it has been the most broadly supported sentencing rationale since the 1980s.").

¹⁴⁰ See David F. Fisher, *Creative Punishment: A Study of Effective Sentencing Alternatives*, 14 WASHBURN L.J. 57, 58 (1975).

¹⁴¹ See *Graham v. Florida*, 560 U.S. 48, 71 (2010).

¹⁴² *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

¹⁴³ Matthew Haist, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 793–94 (2009); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 477 (1997).

¹⁴⁴ Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 38 (1987).

generally discourage others not to commit the same actions or to specifically discourage the punished individual from reoffending.¹⁴⁵ A classic example of deterrent mandatory minimum prison sentences is California's "Use a gun, go to jail" slogan for its strict firearm statutes.¹⁴⁶ Many argue that mandatory minimum sentencing laws serve a deterrent function against committing a violent crime.¹⁴⁷ United States Attorney Richard B. Roper stated before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security that mandatory minimum sentences have contributed to a reduction of crime rates throughout America.¹⁴⁸ At the "Mandatory Minimums and Unintended Consequences" hearing, Michael Sullivan, former director of the Bureau of Alcohol, Tobacco, and Firearms (BATF), stated that mandatory minimum sentences better protect society by keeping "serious offenders off our streets longer."¹⁴⁹

The United States Sentencing Commission interprets utilitarian principles within mandatory sentencing laws because of their social value.¹⁵⁰ Additionally, proponents argue mandatory minimums fill a utility function for society because they deter would-be crimes, induce guilty pleas, and encourage defendants to cooperate in other investigations.¹⁵¹ Supreme Court Justice Oliver Wendell Holmes Jr. recognized the utilitarian principles embodied in deterrent punishment and wrote that such punishment "seem[s] to be the chief and only universal purpose of punishment."¹⁵² Retributivists believe wrongdoers should suffer to the extent they caused society harm.¹⁵³ Thus, retributive justice requires proportionality between crime and punishment.¹⁵⁴ Part III.A of this Note, will further expand as to why retributive justice for the child abuse crimes

¹⁴⁵ Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, UTAH L. REV. 205, 209 (2003).

¹⁴⁶ Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 11 (2010).

¹⁴⁷ Kirsten E. Brimer, *Justice for Dusty: Implementing Mandatory Minimum Sentences for Animal Abusers*, 113 PENN ST. L. REV. 649, 657–59 (2008).

¹⁴⁸ Richard B. Roper, *Statement Before House Judiciary Committee on Crime, Terrorism, and Homeland Security*, 19 FED. SENT'G REP. 352, 352 (2007).

¹⁴⁹ *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834 and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 76 (2009) [hereinafter Sullivan] (statement of Michael J. Sullivan, Partner, Ashcroft Sullivan LLC).

¹⁵⁰ U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 13–14 (1991).

¹⁵¹ *Id.*

¹⁵² OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 46 (Little, Brown & Co. 1923) (1881).

¹⁵³ See Thomas E. Hill, Jr., *Kant on Wrongdoing, Desert, and Punishment*, 18 LAW & PHIL. 407, 412 (1999).

¹⁵⁴ HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 436 (1979); IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 198 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1887).

discussed would require strict mandatory minimum prison sentences as the only adequate punishment.

1. Punishment Theories in Child Abuse Crimes

Some studies suggest that higher incarceration rates reduce crime, but commentators disagree as to whether deterrence or incapacitation causes this result.¹⁵⁵ Some argue that incarceration reduces crime because it incapacitates criminals (physically preventing them from committing new crimes), not because it deters other criminals.¹⁵⁶ According to David Finkelhor, “[n]o studies have tested whether sentencing practices have an effect on sex crime.”¹⁵⁷ The deterrence argument for mandatory minimum prison sentences is diminished further by “findings suggest[ing] that 76% of active criminals and 89% of the most violent criminals either perceive no risk of apprehension or are incognizant of the likely punishment for their crimes.”¹⁵⁸ To the extent criminals do not believe they will be caught, the length of an eventual prison sentence cannot deter their crimes.¹⁵⁹ Conversely, publicity of an offender’s arrest, and news coverage of law enforcement successfully tracking offenders, are actions believed to deter child sex crimes more effectively than longer sentences.¹⁶⁰

F. Criticism of Mandatory Minimum Sentencing Today

Mandatory minimum sentences are not overwhelmingly well-received in the United States, and many citizens and government officials have called for their abolition.¹⁶¹ Specifically, many validly criticize mandatory minimum sentences for drug and firearm law violations.¹⁶² Opponents of mandatory min-

¹⁵⁵ David Finkelhor, *The Prevention of Childhood Sexual Abuse*, 19 FUTURE CHILD. 169, 176 (2009).

¹⁵⁶ *Id.*; Luna, *supra* note 145.

¹⁵⁷ Finkelhor, *supra* note 155.

¹⁵⁸ John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL’Y 189, 196 (2005) (citing David Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging*, 4 AM. L. & ECON. REV. 295, 302–04 (2002)).

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* at 203.

¹⁶¹ The Family Against Mandatory Minimums [hereinafter FAMM], <http://famm.org/about/famms-history/> (last visited Nov. 9, 2015) (advocating since 1991 for the abolition of mandatory minimums and reunification of families severed by mandatory minimum incarceration).

¹⁶² Compare FAMM, *Gun Mandatory Minimum Sentences*, <http://famm.org/projects/federal/us-congress/gun-mandatory-minimum-sentences/> (last visited Nov. 9, 2015) (suggesting possible solutions for firearm offenses instead of mandatory minimum sentences), with FAMM, *Quick Facts*, <http://famm.org/the-facts-with-sources/#3> (last visited Nov. 9, 2015) [hereinafter *Quick Facts*] (outlining the resources required to incarcerate the U.S. prison population, and non-violent drug offenders in particular).

imum sentences note that the United States has the highest incarceration rate in the world (2.3 million); federal prisons are nearly 40% over capacity; and maintaining this incarcerated population incurs a great cost to taxpayers.¹⁶³

Another major criticism of the mandatory minimum regime is that the legal system is reinstating the prior indeterminate sentencing system but with different governmental actors now at the helm.¹⁶⁴ Groups like Families Against Mandatory Minimums argue that mandatory minimums transfer sentencing power from judges to prosecutors.¹⁶⁵ Because prosecutors decide which charges to bring and how to negotiate guilty pleas, mandatory minimums have given prosecutors significant power in sentencing.¹⁶⁶ Thus, instead of allowing judges to decide what length of imprisonment should fit a crime, prosecutors can choose to bring a charge carrying a mandatory minimum to pressure the defendant into taking a guilty plea for a sentence shorter than the mandatory minimum.¹⁶⁷

Mandatory minimum sentences in the United States are largely limited to drug and firearm laws, as well as certain financial crimes.¹⁶⁸ Massachusetts' mandatory minimum regime mirrors that of the federal government.¹⁶⁹ Opponents of mandatory minimums argue they fail to deter market-based crimes such as those involving drugs.¹⁷⁰ Opponents find mandatory minimums particularly ineffective at deterring drug crimes because the drug market creates a

¹⁶³ Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 FED. SENT'G REP. 33, 34 (1994) (revealing that a substantial percentage of those sentenced in 1992 had no prior criminal history, and during the crime for which they were sentenced, carried no weapon and played no aggravating role); *Quick Facts*, *supra* note 162.

¹⁶⁴ Luna & Cassell, *supra* note 146, at 13.

¹⁶⁵ FAMM Urges Florida Prosecutor to Use Discretion in Beach Sex Case, FAMM, <http://famm.org/famm-urges-florida-prosecutor-to-use-discretion-in-beach-sex-case/> (last visited Nov. 9, 2015); Luna & Cassell, *supra* note 146, at 13.

¹⁶⁶ Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 550–51 (1978).

¹⁶⁷ *Id.*

¹⁶⁸ Stith & Koh, *supra* note 15, at 259 n.212 (referring to law mandating mandatory minimum such as the Firearm Owners Protection Act, the Omnibus Anti-Drug Abuse Act of 1988, and the Crime Control Act of 1990).

¹⁶⁹ MASS. GEN. LAWS ch. 269, § 10 (2015) (allowing punishment for a range of firearm possessions starting with a mandatory minimum of eighteen months in prison and increasing to ten years); MASS. GEN. LAWS ch. 94C, § 32E(a)(1) (2014) (imposing mandatory minimum of either one year in House of Corrections or 2.5 years in state prison for trafficking fifty pounds or more of marijuana, and substantially higher minimums depending on nature and quantity of the trafficked narcotic).

¹⁷⁰ See Luna, *supra* note 145, at 211–12 (noting deterrence may not be effective if others will take up the criminal activity after the actor is incarcerated).

perpetual demand for drugs, and thus a constant supply of new offenders.¹⁷¹ The incarceration of hundreds of thousands of drug offenders does not affect the supply or demand of drugs because the market continually replenishes with more offenders.¹⁷² Thus, mandatory minimum sentences fail to deter would-be offenders and incapacitation has little effect on the drug market.¹⁷³

The inherent difference between child abuse crimes and drug violation crimes, aside from the obvious violence that is necessarily attributed to former, is the financial benefit that drug trafficking produces.¹⁷⁴ Economists estimate that the illegal drugs market is a “\$300 billion world-wide business” and that the number of users has only grown during the last twenty years.¹⁷⁵ Physical and sexual child abuse cases are different from the drug trafficking violations because they are independent acts rather than parts of a larger enterprise of criminality.¹⁷⁶

G. *Legislative Developments on Child Sexual and Physical Abuse Crimes*

1. Jessica’s Law

In 2005, Governor of Florida Jeb Bush signed into law HB 1877, known as the Jessica Lunsford Act.¹⁷⁷ The law punishes as a life felony (a crime punishable with life imprisonment) lewd or lascivious molestation of a child younger than twelve years old by an offender eighteen years old or older.¹⁷⁸ Some of the specific punishments enumerated within the Act include mandatory minimum sentences of twenty-five years, lifetime sexual offender registration—unless pardoned—and lifetime GPS electronic monitoring.¹⁷⁹ The Criminal Justice Committee in the Florida House of Representatives analyzed HB 1877 and identified as reasons for designating these sexual crimes as a life felony factors such as the victim being under the age of twelve and part of a vulnerable class

¹⁷¹ George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1897 (1999).

¹⁷² Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME & JUST. 17, 57 (1999).

¹⁷³ *Id.*

¹⁷⁴ *See id.* (referring to drug crimes as a “business”).

¹⁷⁵ Tom Wainwright, *How Economists Would Wage the War on Drugs*, WALL ST. J. (Feb. 19, 2016), <http://www.wsj.com/articles/how-economists-would-wage-the-war-on-drugs-1455895053>.

¹⁷⁶ Soledad Larrain & Carolina Bascunan, UNICEF CHILE, *Child Abuse: A Painful Reality Behind Closed Doors*, CHALLENGES, July 2009, at 4, 4, available at http://www.unicef.org/lac/Boletin-Desafios9-CEPAL-UNICEF_eng.pdf.

¹⁷⁷ 2005 Fla. Laws ch. 28.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; see generally Nicholas Corsaro, *Sex, Gadgets, and the Constitution – A Look at the Massachusetts Sex Offender GPS-Tracking Statute*, 48 SUFFOLK U.L. REV. 401 (2015) (exploring and comparing in part the Massachusetts GPS-tracking statute with other states’ statutes).

of citizens due to their “position of familial or custodial authority” under the abuser.¹⁸⁰

Following the success of the Florida legislation, Fox News host Bill O’Reilly called for a nationwide legislative revolution on sexual child abuse crimes on the model of Jessica’s Law.¹⁸¹ Since then, forty five other states have passed legislation similar to Florida’s.¹⁸² Most recently, in 2014, New Jersey passed its own Jessica’s Law, becoming the forty-sixth state to do so.¹⁸³ While not all states have followed the exact sentencing requirements that the original Jessica’s Law set forward, a significant number have imposed the exact same sentencing requirements.¹⁸⁴ Jessica’s Law motivated Texas to pass one of the strictest sentencing laws for child sex abuse crimes in the country.¹⁸⁵ Additionally, there is support in some states to impose even stricter sentencing requirements than those found in Jessica’s Law.¹⁸⁶

Massachusetts followed the movement in 2008 when Governor Deval Patrick signed into law a modified version of the Act.¹⁸⁷ The Act itself, Massachusetts General Laws chapter 265, §23A, implements a ten-year mandatory minimum for rape of a child under sixteen years old if the rape is classified as aggravated due to the age difference between victim and perpetrator.¹⁸⁸ Otherwise, the rape and abuse of a child under sixteen years old is punishable by any term of years up to life imprisonment.¹⁸⁹ Massachusetts is one of a small minority of states that has not passed the twenty-five year mandatory minimum

¹⁸⁰ Fla. H.R. Comm. on Crim. Just., HB 1877 (2005) Staff Analysis 9 (Apr. 15, 2005) [hereinafter Crim. Just. Comm. HB 1877 Staff Analysis] (authored by staff analysts Kramer and Steed).

¹⁸¹ Bill O’Reilly, *What is Jessica’s Law*, BILLOREILLY.COM, <https://www.billoreilly.com/jessicaslaw> (last visited Nov. 9, 2015).

¹⁸² Munoz, *supra* note 7.

¹⁸³ *Id.*

¹⁸⁴ *State Statutes Related to Jessica’s Law*, NAT’L CONF. ST. LEG., http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf [hereinafter NCSL] (listing the following states that have also incorporated twenty-five-year mandatory minimum sentencing: Arkansas, California, Connecticut, Florida, Georgia, Kansas, Louisiana, Maryland, Michigan, Missouri, Montana, Nevada, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin).

¹⁸⁵ See John Bradley, *New Sex Offender Crimes and Punishments*, 70 TEX. B.J. 768 (2007).

¹⁸⁶ Todd, *supra* note 44, at 550 (advocating for legislative change in Pennsylvania to increase maximum sentences for rape of a child from 20 years to at least 40 years to life).

¹⁸⁷ *Jessica’s Law and Statutory Rape*, MASS. L. UPDATE (Aug. 13, 2008), <http://masslawlib.blogspot.com/2008/08/jessicas-law-and-statutory-rape.html>; H.R. 4811, 185th Gen. Court, Reg. Sess. (Mass. 2007) [hereinafter H.R. 4811].

¹⁸⁸ MASS. GEN. LAWS ch. 265, § 23A (2008).

¹⁸⁹ *Id.*

sentencing laws.¹⁹⁰

2. Massachusetts Legislation

Child abuse does not have a consistently used definition.¹⁹¹ Massachusetts General Laws chapter 265, section 13(J) provides a suitable definition of physical child abuse.¹⁹² Section 13(j) is the statute for “Assault and Battery upon a Child”, and defines ‘Bodily injury’ as:

[S]ubstantial impairment of the physical condition including any burn, fracture of any bone, subdural hematoma, injury to any internal organ, any injury which occurs as the result of repeated harm to any bodily function or organ including human skin or any physical condition which substantially imperils a child’s health or welfare.¹⁹³

Because sexual abuse is even harder to define, chapter 265, section 13(B) simply refers to it as “an indecent assault and battery.”¹⁹⁴ Section 13(B) is titled “Indecent Assault and Battery on Child under the age of 14” and plaintiffs have challenged the term “indecent” as unconstitutionally vague.¹⁹⁵ The Appeals Court of Massachusetts reaffirmed earlier case law defining “indecent” as: “[A] touching is indecent when, judged by the ‘normative standard’ of societal mores, it is ‘violative of social and behavioral expectations,’ in a manner ‘which [is] fundamentally offensive to contemporary moral values . . . [and] which the common sense of society would regard as immodest, immoral and improper.’”¹⁹⁶

Massachusetts precedent suggests that the umbrella of “indecent assault and battery” encompasses many types of conduct.¹⁹⁷ Massachusetts General Laws

¹⁹⁰ NCSL, *supra* note 184.

¹⁹¹ BARNETT ET AL., *supra* note 35, at 142 (defining physical child abuse according to the Child Abuse Prevention and Treatment Act [hereinafter CAPTA] as: “Any recent or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which presents an imminent risk of serious harm;” alternatively defining child abuse according to the Centers for Disease Control and Prevention’s definition: “The Intentional use of physical force by a parent or caregiver against a child that results in, or has the potential to result in, physical injury.”).

¹⁹² MASS. GEN. LAWS ch. 265, § 13J (2015).

¹⁹³ *Id.*

¹⁹⁴ *See id.* at §13B.

¹⁹⁵ *See Commonwealth v. Miozza*, 67 Mass. App. Ct. 567, 570 (2006).

¹⁹⁶ *Id.* at 571 (quoting *Commonwealth v. Rosa*, 62 Mass. App. Ct. 622, 625 (2004)).

¹⁹⁷ *See Rosa*, 62 Mass. App. Ct. at 627 (referring to conduct where defendant continually inserted his thumb into the mouth of a child less than fourteen years old, followed the action with suggestive remarks, and attempted to make the victim play a game of pseudo-fellatio); *see also Miozza*, 67 Mass App. Ct. at 569 (describing defendant’s conduct toward two victims, one younger than ten years old and the other younger than eight, in which he placed each child upon him while he kissed them openly on their mouths and fondled their private

chapter 265, § 23 is the statute for “Rape and Abuse of Child,” but notably this law does not require the mandatory minimum, which this Note referenced earlier is required in § 23A.¹⁹⁸ In Massachusetts, those who are convicted of rape against children only receive a mandatory minimum sentence of at least ten years if the act was aggravated by considerable age disparities between the victim and perpetrator.¹⁹⁹ The mandatory minimum is imposed if the age disparity for a victim, younger than twelve-years old, is greater than five years, or if the victim was between twelve and sixteen-years old then the disparity must be greater than ten years.²⁰⁰ On July 29, 2008 Massachusetts Attorney General Martha Coakley congratulated Governor Patrick for signing into law An Act Further Protecting Children (HB4811), stating its aim was to “hold accountable predators who take advantage of innocent and vulnerable children” as well as ensuring prison sentences are delivered to serious child offenders.²⁰¹

3. Variation Among the States

As one of the several states that legislated tougher penalties for child sex abusers, Texas also created mandatory minimum prison sentences for physical child abuse crimes.²⁰² Section 22.04 of Texas’s Penal Code targets those who cause serious bodily injury, bodily injury, or serious mental deficiency, impairment, or injury to either a child, elderly, or disabled individual.²⁰³ Texas’s Penal Code treats these victims as a vulnerable class of citizens and, in accordance to whichever degree of felony committed, requires mandatory minimum prison sentences, starting with five years for a first-degree felony violating § 22.04.²⁰⁴ The bill analysis of HB1286 (the latest amendment to § 22.04) conducted by House Research Organization indicates that the purpose of the bill was to make the category of disabled persons more inclusive in order to distinguish between nondisabled children and disabled children.²⁰⁵ The bill sought better protection for children as a vulnerable class of citizens and included a

areas); *see also* *Commonwealth v. King*, 445 Mass. 217, 219 (2005) (where the four-year-old victim’s biological father made the victim perform oral sex on him); *Commonwealth v. Lawton*, 82 Mass. App. Ct. 528, 533 (2012) (reaffirming prior case ruling that unnatural sexual intercourse is “anal intercourse . . . and other intrusions of a part of a person’s body or other object into the . . . anal opening of another person’s body”).

¹⁹⁸ MASS. GEN. LAWS ch. 265, § 23 (punishing whoever has sexual intercourse or unnatural sexual intercourse with a child under the age of sixteen).

¹⁹⁹ MASS. GEN. LAWS. ch. 265, § 23A.

²⁰⁰ *Id.*

²⁰¹ Press Release, Attorney General Martha Coakley, Attorney General Martha Coakley Applauds Governor Patrick for Signing Child Protection Law (July 24, 2008) (on file with author) [hereinafter Coakley Press Release].

²⁰² TEX. PENAL CODE ANN. § 22.04 (West 2015).

²⁰³ *Id.*

²⁰⁴ *See id.* § 12.32 (first degree), § 12.33 (second degree), § 12.34 (third degree).

²⁰⁵ HOUSE RESEARCH ORG., BILL ANALYSIS OF TEX. H.B. 1286, 84th Leg., Reg. Sess.

punishment that was proportional to the crime committed.²⁰⁶

Arizona also imposes mandatory minimum prison sentences on individuals convicted of physical child abuse.²⁰⁷ However, the Arizona law differs from the Texas law in a number of ways, including the definitions of the classes protected by the laws.²⁰⁸ Arizona statute § 13-3623 criminalizes any circumstances that result in the death, serious physical injury, or injury to the person or health of a child or vulnerable adult.²⁰⁹ Physical injury is defined as “the impairment of physical condition and includes any skin bruising, pressure sores, bleeding, failure to thrive, malnutrition, dehydration, burns, fracture of any bone, subdural hematoma, soft tissues swelling, injury to any internal organ or any physical condition that imperils health or welfare.”²¹⁰ While the statute distinguishes and designates amongst varying mens rea and classifications of felonies, prior versions of the corresponding sentencing statute only stipulated mandatory minimums and maximums.²¹¹ Representative Eddie Farnsworth proposed the latest amendment to §13-702 in House Bill 2207.²¹² The proposed amendment would allow the court to consider mitigating and aggravating circumstances in sentencing.²¹³ Arizona’s current statute for sentencing physical child abusers still implements a mandatory minimum scheme but provides a sliding scale to allow some discretion.²¹⁴

As stated earlier in this Note, New Jersey is the most recent state to pass a statute similar to the Florida statute criminalizing child sex abuse by naming it the Jessica Lunsford Act.²¹⁵ New Jersey currently imposes a mandatory minimum sentence of twenty-five years for sexually assaulting a child under the age of thirteen.²¹⁶ In New Jersey House Representative Munoz’s statement regarding the passing of Assembly Bill 892, Munoz explicitly states that the amendment was modeled on Florida’s own Jessica Lunsford Act.²¹⁷ New Jersey’s own version of the Act, however, allows for a “negotiated reduction of the mandatory term” under certain conditions to fifteen years without eligibility of

(Apr. 8, 2015), http://www.hro.house.state.tx.us/pdf/ba84r/hb1286.pdf#na_vpanes=0 [hereinafter H.B. 1286].

²⁰⁶ *Id.*

²⁰⁷ ARIZ. REV. STAT. ANN. § 13-3623 (2009).

²⁰⁸ *Id.*

²⁰⁹ *See id.* § 13-3623 F(3).

²¹⁰ *See id.*

²¹¹ *See id.* at § 13-702.

²¹² *See* H.B. 2207, 48th Leg., 2nd Reg. Sess. (Ariz. 2008).

²¹³ *Id.*

²¹⁴ ARIZ. REV. STAT. ANN. § 13-702 (2006).

²¹⁵ A892, Assemb. Judiciary Comm., 216th Leg., 2014 Sess. (N.J. 2014) (statement of Rep. Nancy F. Munoz, primary sponsor), http://www.njleg.state.nj.us/2014/Bills/A1000/892_11.pdf [hereinafter Munoz statement].

²¹⁶ N.J. STAT. ANN. § 2C:14-2 (West 2014).

²¹⁷ Munoz statement, *supra* note 215.

parole.²¹⁸

4. Variation Among Countries

Undertaking a comparative study of child abuse around the world would be difficult because of differing definitions of child abuse, types of abuse studied, and varying qualities of studies conducted.²¹⁹ Despite such difficulties in collecting data, the World Health Organization has reported that international studies taken as a whole show that twenty-five percent of all adults were physically abused as children and find that “1 in 5 women and 1 in 13 men report having been sexually abused as a child.”²²⁰ An international study, spanning six developed and industrialized countries, researching factors that relate to recidivism amongst sexual offenders, recorded a 12.7% rate from the 9,603 child molesters in the study.²²¹

Sexual child abuse crimes are particularly difficult to predict because offenders exist within “every social stratum.”²²² Countries around the world have also begun to increase the period of sentences for offenders convicted of sexual abuse crimes—against children and adults alike—just as in the United States.²²³ China, Egypt, Jordan, Nigeria, and Saudi Arabia are the only countries that allow the death penalty for rape crimes.²²⁴ A form of alternative punishment to incarceration that has been deemed a success in European countries, is voluntary and/or mandatory castration.²²⁵ Countries such as Poland, Moldova, South Korea, and Russia have legislated mandatory chemical castration for individuals convicted of child abuse.²²⁶ Other European nations such as Germany and the Czech Republic, have legislated a voluntary option for physical castration through surgery in an effort to treat concerns of recidivism of sex offenders.²²⁷ Israel, New Zealand, Portugal, Argentina, and England have in place voluntary chemical castration for sex offenders in lieu of prison

²¹⁸ *Id.*

²¹⁹ *Child Maltreatment*, WORLD HEALTH ORG, <http://www.who.int/mediacentre/factsheets/fs150/en/> (last updated Sept. 2016).

²²⁰ *Id.*

²²¹ R. Karl Hanson & Monique Brussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 351 (1998).

²²² Mark D. Kiehl & Jack Burke, *Post-Incarceration Supervision of Pedophile Offenders: An International Comparative Study*, 51 CRIM. L. BULL. 1, 1 (2015).

²²³ *Id.* at 11.

²²⁴ James Vicini, *Court to Consider Death Penalty for Child Rape*, REUTERS (Apr. 13, 2008), <http://www.reuters.com/article/us-usa-execution-rape-idUSN1128546220080413>.

²²⁵ *Id.* at 11–12.

²²⁶ *Id.* at 12 (citing *Russia Introduces Chemical Castration for Pedophiles*, RT (Oct. 4, 2011), <https://www.rt.com/news/pedophilia-russia-chemical-castration-059/> (stating sex crimes for kids under fourteen years old get mandatory chemical castration and repeat offenders receive life sentences)).

²²⁷ Kiehl & Burke, *supra* note 222, at 12.

sentences, which is seen as more of an effort to help treat offenders rather than to punish them.²²⁸ While the majority of states in the United States have moved toward longer prison sentences for sexual abuse crimes, eight states have legislated the use of chemical castration.²²⁹

The use of castration in the United States is not a popular method of punishment.²³⁰ Chemical castration sparked debate over prisoners' Eighth Amendment protection against cruel and unusual punishment, as well as raises questions of protection of prisoners' human rights.²³¹ The Eighth Amendment issues surrounding castration focus predominately on whether the practice can be deemed a punishment or a treatment, and whether castration can be mandated for prisoners or simply made optional.²³² Critics of government-imposed castration laws argue that the laws violate an individual's right to choose whether or not to procreate.²³³ They also raise concerns about whether prisoners can actually freely give consent to the procedure or merely acquiesce when the alternative is draconian prison sentences.²³⁴

III. ARGUMENT

Massachusetts should follow the lead of other states and implement mandatory minimum sentencing to ensure that child abuse will not be tolerated.²³⁵ While actions such as GPS monitoring for child sexual abusers are important, mandatory prison sentences are also valuable because children are some of society's most vulnerable citizens.²³⁶ Mandatory minimums are essential to protecting those most vulnerable from harm.²³⁷ Both sexual abuse and physical abuse create detrimental, lasting effects on victims; therefore, one

²²⁸ *Id.* at 13 (explaining that it is becoming more commonplace to undergo castration in England).

²²⁹ CAL. PENAL CODE § 645 (West 2012); FLA. STAT. § 794.0235 (2012); GA. CODE ANN. § 16-6-4 (West 1997); LA. REV. STAT. ANN. § 14:43.6 (2012); MONT. CODE ANN. § 45-5-512 (West 1998); OR. REV. STAT. ANN. § 144.625 (West 1998); TEX. GOV'T. CODE ANN. § 501.061 (West 2011); WIS. STAT. ANN. § 304.06(1q) (West 2012).

²³⁰ Matthew V. Daley, *A Flawed Solution to the Sex Offender Situation in the United States: The Legality of Chemical Castration for Sex Offenders*, 5 IND. HEALTH L. REV. 87, 94-98 (2008); Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 39-53 (1990).

²³¹ Daley, *supra* note 230; Fitzgerald, *supra* note 230.

²³² Daley, *supra* note 230, at 97-101.

²³³ Fitzgerald, *supra* note 230, at 41-44; Owen Bowcott, *Human Rights Groups Call for End to Surgical Castration of Sex Offenders*, THE GUARDIAN (Feb. 22, 2012), <https://www.theguardian.com/law/2012/feb/22/surgical-castration-sex-offenders-cpt-report>.

²³⁴ Bowcott, *supra* note 233.

²³⁵ IDAHO CODE ANN. § 19-2520(G) (West 2013); *see supra* Part I (Introduction).

²³⁶ Corsaro, *supra* note 179, at 401-06; *see supra* Part II.G.4 (Variation Among the States).

²³⁷ *See supra* Part II.G.4 (Variation Among the States).

form of abuse should not be held as deserving of a different quality of punishment than the other.²³⁸ This Note prescribes factors for the Massachusetts's legislature to consider in creating twenty-five year mandatory minimum sentencing laws against perpetrators of physical and sexual child abuse, and argues that such a law will reflect a retributive theory of punishment within Massachusetts.

A. *Retributive Justice Requires Mandatory Minimum Sentencing*

Retributive justice places more onus on society to punish criminals, not because it is simply deserved, but because it has become a moral obligation.²³⁹ Take, for example, Idaho's mandatory minimum sentencing law against child sexual abusers: reflected within the first paragraph of the statute is an understanding that society must demand justice for the wrong committed.²⁴⁰ In demanding justice for wrongs committed, such as child abuse, retributive rationales dictate that the punishment should not exceed the crime, for if it did, "all maltreatment . . . would make the humanity suffering in his person loathsome or abominable."²⁴¹

The retributive theory of justice supports implementation of these high mandatory minimum sentences because while it remains arguable whether such legislation provides deterrent results, the moral depravity from such acts committed is not debatable.²⁴² The great majority of children who have endured physical or sexual abuse do not fully heal from the trauma or injuries inflicted until they reach adulthood.²⁴³ Retribution requires the punishment match the harm caused, and because the harm endured by a victim extends well into their adult life, a mandatory minimum sentence of twenty-five years best equates the punishment to the harm.²⁴⁴ The true parameters of the harm caused by physical and/or sexual crimes perpetrated against children are difficult to assess. Since the extent of the harm committed cannot be predicted but is known to effect large portions of a victim's life, it is the position of this Note that twenty-five year sentences will accurately reflect a punishment comparable to the crimes committed.

²³⁸ See generally BARNETT ET AL., *supra* note 35.

²³⁹ Haist, *supra* note 143, at 793–94.

²⁴⁰ IDAHO CODE ANN. § 19-2520G ("The legislature hereby finds and declares that the sexual exploitation of children constitutes a wrongful invasion of a child and results in social, developmental and emotional injury to the child. It is the policy of the legislature to protect children from the physical and psychological damage caused by their being used in sexual conduct. In order to protect children from becoming victims of this type of conduct by perpetrators, it is necessary to provide the mandatory minimum sentencing format contained in subsection (2) of this section.").

²⁴¹ KANT, *supra* note 154, at 198.

²⁴² See *supra* Part II.B (Child Abuse).

²⁴³ See *supra* Part II.B (Child Abuse).

²⁴⁴ See *supra* Part II.E (Theories of Punishment) and Part II.B (Child Abuse).

Perpetrators of child abuse crimes deserve mandatory minimum prison sentences because such sentences rectify the abhorrent harm these crimes cause to society, while also vindicating the harm of individual victims.²⁴⁵ These punishments unambiguously send a message to criminals that prescribed tough sentences are a forewarned conclusion to their actions.²⁴⁶ Because child abuse is a violent crime, minimum sentences requiring incarceration for child abusers may also incorporate deterrent functions.²⁴⁷ While mandatory minimum prison sentences have not conclusively been proven to have a deterrent effect, it is still argued that they contribute to a reduction of crime in the United States.²⁴⁸ Mandatory minimum sentencing is a powerful asset in combating physical and sexual child abusers that have personal relationships with the victims. If formulaic terms such as California's slogan of "Use a gun, go to jail" can be developed for child abusers in Massachusetts, it could effectively serve as a general deterrent against the potential Abigail Hannas of the state.²⁴⁹ For the more heinous child abusers, such as Erroll Foreman, setting lengthy mandatory prison sentences can aid in protecting potential future victims.²⁵⁰

B. *Child Abuse Crimes Demand Equal Punishment*

This Note accepts Massachusetts' current legislative definition for each type of abuse.²⁵¹ Massachusetts should implement mandatory minimum prison sentences for physical and sexual child abusers because it has been a consistent crisis that has targeted one of this nation's most vulnerable classes.²⁵² Whereas sexual child abuse is readily seen as a public issue, physical child abuse is not perceived with the same severity.²⁵³ Due to the large number of children who are physically abused each year, along with the strong likelihood of recidivism and probability that the abusers have personal relationships with the victims, this Note advocates implementing mandatory minimum prison sentences for physical abuse crimes committed against children.²⁵⁴ While physical and sexu-

²⁴⁵ See Hill, *supra* note 153, at 443.

²⁴⁶ Luna, *supra* note 145.

²⁴⁷ See Brimer, *supra* note 147 ("Mandatory minimum sentencing schemes that provide clear notice of the severe consequences of certain criminal actions are fair and add to the deterrent objective of the law.").

²⁴⁸ Roper, *supra* note 148; Sullivan, *supra* note 149.

²⁴⁹ See *supra* Part II.E (Theories of Punishment) and Part II.C (Personal Relationships vs. Stranger Relationships).

²⁵⁰ See *supra* Part II.E (Theories of Punishment) and Part II.C (Personal Relationships vs. Stranger Relationships).

²⁵¹ See *supra* Part II.G.2 (Massachusetts Legislation).

²⁵² See VICTIMS OF CRIME, *supra* note 51 ("Over the course of their lifetime, 28% of U.S. youth ages 14 to 17 had been sexually victimized.").

²⁵³ See Todd, *supra* note 44.

²⁵⁴ See *supra* Part II.B (Child Abuse) and Part II.C (Personal Relationships vs. Stranger Relationships).

al abuse are technically different crimes, they both invoke similar concerns for child safety and produce the same general harms, which is why Massachusetts should equate both crimes under a uniform mandatory punishment regime.²⁵⁵ The castration alternative form of punishment, as practiced in other countries, is not a conceivable option in Massachusetts due to the suffering inflicted on offenders, which exceeds the proportionality principle of retributive justice, and the human rights concerns surrounding the practice.²⁵⁶

It is highly probable that child abuse victims will be abused again, given that physical child abuse is more prevalent among children who have personal relationships with their abusers, and that such relationships foster an environment of continual interactions.²⁵⁷ While mandatory minimums can serve a combination of functions, including retribution and deterrence, they also serve as a last resort to protect children by physically incapacitating offenders.²⁵⁸ Not only would creating mandatory minimum sentencing schemes for physical and sexual child abuse crimes serve as society's moral stand against offensive conduct, but it would also help to prevent the unfortunate cycle of abused children growing up to become abusers themselves.²⁵⁹

C. *What the Massachusetts Mandatory Minimum Scheme Should Not Include*

1. Child Corporal Punishment

While statewide legislation has shifted tremendously in the last ten years (following Florida's Jessica Lunsford Act) to punish child sexual abusers with twenty-five year mandatory minimum prison sentences, there is a pervasive mentality favoring child corporal punishment that has persisted throughout the United States.²⁶⁰ Amidst the backdrop of a culture supportive of child corporal punishment, this Note's goal for Massachusetts to create mandatory minimums for physical child abusers would seem incompatible.²⁶¹ Thus, the immediately apparent question would be how the court or legislature should distinguish be-

²⁵⁵ See *supra* Part II.B (Child Abuse) and Part II.C (Personal Relationships vs. Stranger Relationships).

²⁵⁶ See *supra* Part II.E (Theories of Punishment) and Part II.G.4 (Variation Among Countries).

²⁵⁷ Kelley, *supra* note 65, at 411–12; Wright & Wright, *supra* note 71, at 10–15.

²⁵⁸ Luna, *supra* note 145.

²⁵⁹ See VICTIMS OF CRIME, *supra* note 51 (stating that 40–80% of juvenile sex offenders have themselves been victims of sexual abuse).

²⁶⁰ See *supra* Part II.G (Legislative Development on Child Physical and Sexual Abuse Crimes); Pollard, *supra* note 77, at 581, 627–35 (discussing multiple studies that reveal over 90% of Americans spank their toddlers).

²⁶¹ See Pollard, *supra* note 77, at 579–83 (demonstrating that child corporal punishment is popular in the United States even today).

tween serious physical abuse and simply raising children.²⁶²

Using Texas as an example of states that have maintained traditional child corporal punishment practices, as well as two of the more popular reasons for why the practice still exists, it can be seen that even though no state in America has completely outlawed child corporal punishment it is by no means as strong a belief as once held.²⁶³ Due to this recent trend of decreasing tolerance for child punishment, this Note's proposal to better protect children by seeking mandatory prison minimums for physical child abuse has a base of public support, thereby better withstanding criticism from corporal punishment proponents.

2. Emotional Abuse

While emotional abuse is a serious form of abuse, this Note's support for mandatory minimum prison sentences would not be compatible with what is defined as emotional abuse because of its unique range of meanings in contrast to physical and sexual abuse.²⁶⁴ Emotional abuse is hard to define because it encompasses "[a]ny imaginative form of cruelty . . . that is not a beating or sexual contact."²⁶⁵ Professionals heavily criticize the protections against emotional abuse in part because of the fact that it is hard to define and is underreported when potentially witnessed.²⁶⁶ Critics of emotional abuse statutes disfavor such laws because the nature of the crime can make it difficult to prove harms committed or identifiable triggers for the abuse, and some children simply cope with it and move on into adulthood, making it hard for prosecutions to have a meaningful impact in the victim's life.²⁶⁷

Regardless of the past three decades worth of research into emotional abuse, legal action is not taken absent some additional form of abuse, such as sexual or physical abuse.²⁶⁸ Despite identifying issues that can exist with emotional

²⁶² See Coleman et al., *supra* note 76 ("All states' laws permit the use of 'reasonable' corporal punishment; simultaneously they all prohibit nonaccidentally inflicted serious injury Thus, being able to distinguish between reasonable corporal punishment and maltreatment—whether this is formally denominated abuse or neglect—is critical for the relevant actors").

²⁶³ See Collette, *supra* note 90 ("As widespread as this practice remains, it is on a steep decline."); Pollard, *supra* note 77, at 627–30 (noting the "I-was-spanked-and-I'm-okay" logic and biblical references advocating child corporal punishment).

²⁶⁴ See Shull, *supra* note 102 (explaining that emotional abuse is much harder to define because it encompasses all other abuse that does not fall under physical or sexual abuse).

²⁶⁵ *Id.* at 1667.

²⁶⁶ See Weaver, *supra* note 106, at 251–52 ("Since social workers have very little guidance from the law regarding how it will consider evidence of psychological or emotional abuse, they often do not identify or screen this type of abuse unless it occurs with other types of maltreatment or there is proof of a persistent pattern of severe emotional abuse.").

²⁶⁷ McMullen, *supra* note 117.

²⁶⁸ Loue, *supra* note 97, at 336.

abuse legislation in states such as Alabama and California, Massachusetts is one of the states capable of prosecuting and adjudicating this severe problem.²⁶⁹ However, mandatory minimum sentences should not apply to emotional abusers because emotional abuse legislation may seek to punish neglectful conduct the same as intentional conduct by virtue of defining them together.²⁷⁰ Most importantly, the issue of emotional abuse will not be resolved with mandatory minimums but rather by better identifying the abuse in the first place, both socially and legally.²⁷¹

D. *Factors the Massachusetts Legislature Should Incorporate*

Massachusetts House Bill 4811 sought to protect children from abuse by implementing varying punishments for physical and sexual abuse crimes, but only mandated minimum sentencing for the most aggravated assaults.²⁷² Massachusetts has arguably not achieved the goals government officials like former Attorney General Coakley had intended, given that as recently as the 2014 fiscal year, Massachusetts had the highest rate of child abuse.²⁷³ Massachusetts can better legislate in order to truly hold child predators accountable and ensure they receive prison sentences, as advocates for prior legislation intended.²⁷⁴ Massachusetts can take legislative steps, similar to those adopted in Florida, Texas, Arizona, and New Jersey, in order to guard against future physical and sexual child abuse.²⁷⁵ Massachusetts should classify children as part of a vulnerable class like in Texas and Arizona, as well as develop a sliding scale of mandatory minimum ranges in order to give prosecutors more discretion when convicting abusers, as modeled by Arizona's legislature.²⁷⁶

By classifying children as a vulnerable class of citizens, § 22.04 of the Texas

²⁶⁹ See Pollard, *supra* note 77, at 650 (demonstrating that courts in Massachusetts have found emotional abuse based on words alone); see also *John D. v. Dep't of Soc. Servs.*, 744 N.E.2d 659, 663 (Mass. App. Ct. 2001); ALA. CODE § 26-14-1 (2016); Loue, *supra* note 97, at 327 ("California's criminal code imposes punishment on any person 'who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering.'").

²⁷⁰ See Loue, *supra* note 97, at 314 (explaining that there are various definitions of emotional and psychological abuse).

²⁷¹ See *id.* at 322–23 (explaining that there is little case law on emotional abuse and identifying such abuse is difficult due to the interactions of parenting style and children's behavior).

²⁷² H.B. 4811, *supra* note 187.

²⁷³ See Coakley Press Release, *supra* note 201 ("Enactment of this law is yet another positive step toward keeping children safe."); Rocheleau, *supra* note 124.

²⁷⁴ Coakley Press Release, *supra* note 201.

²⁷⁵ See *supra* Part II.G (Legislative Developments on Child Sexual and Physical Abuse Crimes).

²⁷⁶ ARIZ. REV. STAT. ANN. § 13-702 (2006); TEX. PENAL CODE ANN. § 22.04 (West 2015).

Penal Code punishes physical injuries inflicted on a child with a range of mandatory minimum prison sentences.²⁷⁷ The Texas legislature believed that such criminal penalties accurately reflect the heinous nature of crimes perpetrated upon the weaker populations of the state.²⁷⁸ Massachusetts and Texas use nearly identical conduct to define physical injuries to a child, but where Massachusetts currently has no mandatory minimum and a maximum of five years, Texas mandates five years as the minimum for the same crime.²⁷⁹ Since physical child abuse has a high rate of recidivism and creates tremendous damage to children as sexual abuse, Massachusetts should legislate mandatory minimum prison sentences to severely penalize and better protect against forms of child abuse.²⁸⁰

For nearly a decade Arizona has incorporated minimum and maximum prison sentences for physical child abuse.²⁸¹ The latest amendment to its physical child abuse statutes created more categories of set prison sentences.²⁸² Prosecutors now have greater discretion by opting either for the higher maximum or settling at a mitigated minimum, but this does not change the fact that minimums exist.²⁸³ Massachusetts could legislate a similar sliding scale of mandated minimum prison sentences in order to combat the criticism that prosecutors wield too much power.²⁸⁴

Florida legislators enacted the Jessica Lunsford Act in part as a reaction to the tragedy that had taken place. According to the House of Representatives Staff Analysis of HB8711, the victim being under the age of twelve and the possibility that child abusers have familial or custodial authority over victims were both factors taken into consideration when drafting the act.²⁸⁵ By stating that the purpose of New Jersey's latest legislation was modeled on Florida's own act, New Jersey House Representative Munoz relies on the same concerns that lead to the first Jessica Lunsford Act.²⁸⁶ Florida and New Jersey are two of the twenty-six states that have legislated twenty-five year mandatory minimum sentences for sex crimes committed against children.²⁸⁷ The problem of recidivism in sexual and physical child abuse, the serious lasting effects of such

²⁷⁷ TEX. PENAL CODE ANN. § 22.04 (West 2015).

²⁷⁸ H.B. 1286, *supra* note 205.

²⁷⁹ MASS. GEN. LAWS ch. 265, § 13J (2015); TEX. PENAL CODE ANN. §§ 22.04, 12.32 (West 2015).

²⁸⁰ *See supra* Part II.B (Child Abuse).

²⁸¹ ARIZ. REV. STAT. ANN. § 13-702 (2006).

²⁸² H.B. 2207 48th Leg., 2nd Reg. Sess. (Ariz. 2008).

²⁸³ ARIZ. REV. STAT. ANN. § 13-702 (2006).

²⁸⁴ *See supra* Part II.F (Criticisms of Mandatory Minimums Today).

²⁸⁵ Crim. Just. Comm. HB 1877 Staff Analysis, *supra* note 180; *see supra* Part II.B (Child Abuse) (discussing the serious concern for abuse occurring within close relationships between children and abusers).

²⁸⁶ *See supra* Part II.G.3 (Variation Among the States).

²⁸⁷ NCSL, *supra* note 184.

abuses (regardless of secondary aggravating conditions), and the deterrent and retributive value of mandatory minimum sentences support the argument that Massachusetts should legislate for such sentences as well.²⁸⁸

IV. CONCLUSION

In comparison to a majority of states in America, Massachusetts does not penalize physical and sexual child abusers as stringently because it does not impose mandatory minimums.²⁸⁹ In fact, Massachusetts only applies a mandatory minimum prison sentence in the most aggravated circumstances for sexual child abuse, while leaving wide discretion to both the judges and prosecutors in setting prison terms for physical and lesser sexual crimes.²⁹⁰ Since children are a vulnerable class of the citizenry, due to both the high probability for abuse by someone they are familiar with and their lack of defenses against attacks by strangers, Massachusetts should legislate strict mandatory minimum prison sentences for child abusers.²⁹¹ Mandatory minimum prison sentences serve multifaceted, penological, and societal functions like retribution, deterrence, and incapacitation.²⁹² Child abuse is not a financial market such as the drug or firearm industry, in which new offenders go on to fill the void left by convicted offenders.²⁹³ Recidivism is a strong concern with both physical and sexual child abusers, and assuring the incapacitation of known offenders for a mandatory minimum set term would aid in reducing rates of recidivism. Precedents have been set by multiple state legislatures, and Massachusetts should follow the majority of jurisdictions that have implemented mandatory minimums for sexual child abuse, but also be on the forefront of American legislation by equally punishing physical child abusers under a mandatory minimum prison sentence.

Certain concerns over the boundary and extent will surely arise with the legislation this Note advocates. One such concern is how the court system would address instances of child corporal punishment, and how distinct of a line should be drawn between child abuse and stern parenting.²⁹⁴ Another issue

²⁸⁸ See generally *supra* Part II; Goode, *supra* note 52 (demonstrating that the decline in child sexual abuse can be attributed in part to the deterrent effects of increased prosecution efforts).

²⁸⁹ See *supra* Part II.G (Legislative Development on Child Physical and Sexual Abuse Crimes).

²⁹⁰ H.R. 4811, *supra* note 187.

²⁹¹ Wright & Wright, *supra* note 71.

²⁹² See *supra* Part II.E (Theories of Punishment).

²⁹³ See Fletcher, *supra* note 171, at 1907 (explaining that deterrence can be used as a possible justification for treating felons as a class).

²⁹⁴ See Coleman et al., *supra* note 76 ("Nonaccidental physical injuries children suffer at the hands of their parents occur along a continuum that ranges from mild to severe. At the outer edges of the continuum, one might find, on the one hand, a slight swat to the buttocks, and on the other, a brutal beating.").

would be whether the legislation should extend to other types of child abuse, such as emotional abuse.²⁹⁵ While these concerns are legitimate within a dialogue balancing legal responsibilities with child welfare, child corporal punishment and emotional abuse do not fit the mandatory minimum scheme envisioned within this Note because of the arguments presented. Therefore, Massachusetts' legislation for twenty-five year mandatory minimum prison sentences should be created and limited to child physical and sexual abuse crimes.

²⁹⁵ See Ford, *supra* note 40 (explaining that emotional abuse is difficult to identify, prevent, and prove in court).