Natalie was eight when she was molested by her older cousin. The cousin was babysitting Natalie and her sister while their parents were out for the evening. When the parents returned, the sister made an offhand comment that set off their alarm bells. They questioned Natalie and she disclosed the abuse. Her parents filed a police report, launching an inquiry that included an investigator coming to Natalie’s school to interview her. Ultimately, the parents decided to spare her the trauma of further investigation and courtroom testimony. The cousin is now married with children. Natalie wrote movingly about these events in an article in the *Atlantic*.

Natalie’s story illustrates how the disclosure of abuse is only the beginning of a long and difficult process. Sometimes families do not contact authorities, choosing to ignore the issue or to deal with it on their own. Other families, like Natalie’s, turn to either child-protective agencies or to the police. This leads to an investigation.

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and, in some cases, a court trial. In this chapter, I look at this official process and the issues it raises for both child victims and accused offenders. Along the way, I discuss plea bargains, sentencing, victim impact statements, risk assessment, and failure-to-protect laws.

To understand legal responses to child sexual abuse (CSA), it is important to consider the purpose of punishment. Many social scientists identify four different rationales. First, punishment is used to incapacitate an offender, ensuring that they are unable to commit a new crime. Incarceration works to achieve this goal, as does capital punishment. In the case of CSA, an offender might be incapacitated by giving them drugs to make them impotent. A second rationale for punishment sees it as a warning to the offender and to others in the community. The hope is that they will see the punishment and decide that the crime is not worth the risk. This is called deterrence. A third rationale is rehabilitation, enabling the offender to return to society as a better-behaving citizen. Finally, many people cite retribution as a reason for punishment. This is represented by the expression “an eye for an eye.”

US attitudes toward punishment have shifted over time. During the 1960s and 1970s, there was fairly widespread support for rehabilitation as a goal of prisons. The other three rationales were present as well, but the public placed relatively more emphasis on rehabilitation. That orientation began to shift toward retribution by the 1980s. Some trace the shift to the publication of Robert Martinson’s article “What Works? Questions and Answers about Prison Reform.” Regardless of its origin, the increased focus on retribution has led to a host of new public policies about CSA. I should note, however, that it is overly simplistic to say that Americans

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are retributive. Research suggests that attitudes are actually more nuanced. While Americans tend to be retributive when asked general questions about what penalty criminals should receive, they are much less so when asked about specific cases.4

One of the factors that drives feelings about punishment involves the assessment of blame. The sociologist Charles Tilly argues that when something good happens, humans look for someone to credit, and when something bad happens, they look to assign blame.5 He identifies a number of factors used to assign blame for bad events. These include how much harm is associated with the event, the assessment of the degree to which a particular person’s (or group’s) actions caused it, and judgement of the degree to which a person was aware that their action would cause a bad outcome and whether or not they intended that outcome. Applying these criteria to CSA, one can generally assume that offenders intended the abuse and were aware that it would cause harm. This leads people to assign a lot of blame to them. Tilly’s work also suggests that more blame would be assigned to an offender with multiple victims and a particularly high level of harm.

Unfortunately, offenders are not the only people to whom blame is assigned in CSA cases. Victims are also blamed. This has been a problem historically, but it still happens today. Which victims are blamed most? Perhaps not surprisingly, it’s usually the people who are seen as the least like us. When victims seem similar to us, more empathy than blame is expressed. As an example of this, men are more likely than women to blame women victims of sexual assault. They see themselves as different from the victim.

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and identify, at least to some degree, with the male offender. Similarly, when white people see a victim who is a person of color, they disassociate themselves, doubting that they can relate to them. The blame placed on victims is important because, among other things, it affects views of appropriate punishments for offenders.

INVESTIGATION THROUGH CHARGES

I turn now look at the beginning of the criminal justice process. What happens when a report of CSA suspicions is filed with the police or the local Child Protective Services (CPS)? In most states, CPS investigates all CSA claims—although the investigation can also be conducted by the police or by both agencies together. Policies vary widely across the country, and there continue to be many unresolved issues with interagency cooperation, communication, and agreement. For example, it is sometimes hard for the police and CPS to work together because the police are most interested in investigating the crime and CPS is most interested in protecting the child.

In 2016, CPS agencies received 4.1 million referrals and found

that 2.1 million of them met their criteria for investigation. Of those, 8.5 percent involved sexual abuse. An investigation does not, however, ensure that a criminal prosecution will occur. Sometimes CPS decides that an accusation is unfounded or that the issue is minor and can be dealt with through offender counseling or other noncriminal justice means. Research has found that CPS concludes investigations without law enforcement involvement more often when cases involve younger children, first-time and less-serious offenders, and intrafamilial abuse. The chance of law enforcement involvement is also lowered if a person other than the victim makes the report. Not surprisingly, when the accused has a previous CSA conviction, the case is more likely to lead to further legal action. A study of police sexual abuse investigators found that they are less likely to believe children when there is no physical evidence (like abrasions) or when a child does not show stereotyped emotional responses (like bedwetting). It is not clear what percent of cases end up being sent on for prosecution; one meta-analysis of referrals from both CPS and law enforcement found tremendous variation across place and time. Rates ranged from 40 to 85 percent.

The next stop in the criminal justice process is the prosecutor’s office. Prosecutors file charges in about two-thirds of the CSA cases.

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that are referred to them, a number that has increased substantially from the 1990s. Charges are more likely when at least two of the following conditions are met: the child victim reports the abuse themselves, there is a corroborating witness, the accused has a previous CSA conviction, or the accused confesses. There is a particularly low likelihood of charges when the only evidence is a victim disclosure. It is important to note, however, that prosecutors do not just consider the strength of the evidence when they make decisions about charges. For example, they also consider the


potential impact of a prosecution on the child victim and their family.¹⁵ In the United States, prosecutors may also consider public opinion because, unlike most other Western countries, their position is elected.¹⁶

Once charges are filed, defendants choose whether to plead guilty. A guilty plea causes the case to move directly to the sentencing phase, while a not guilty plea triggers a “preliminary hearing” or, depending on the state, a grand jury hearing. The purpose of this hearing is to determine if there is enough evidence to move forward to trial. State laws vary in terms of a child’s participation in the preliminary hearing. In some states, a police officer can testify in a child’s place, but in others, a child must testify in person or via closed-circuit television. If the judge finds that there is insufficient evidence presented at the hearing, they will dismiss the case. In cases where the evidence is deemed to be sufficient, a trial date is set, and the judge can decide whether to offer bail to the defendant. Having a trial date, however, does not ensure that a trial will actually happen. In some districts, cases can still be dropped if a defendant agrees to plead guilty and participate in a diversion program.¹⁷ Victims or their parents can also stop cooperating in a case if they decide that it would be too emotionally difficult to go through a trial. This decreases the chance a prosecutor will go to trial.¹⁸

A common complaint about the court system is that it takes a very long time to resolve cases. For example, while the stated goal


of the Oregon criminal justice system is to resolve CSA cases in under four months, researchers studied three counties and found that only a minority of cases made that deadline (from 18 percent in one county to 37 and 47 percent in the other two). At the same time, few cases lasted longer than a year (11, 7, and 3 percent, respectively). A lengthy process can be frustrating and upsetting to victims, especially if hearings and trials are frequently rescheduled. In one county in the Oregon study, trials were rescheduled a full 98 percent of the time. The other counties rescheduled 33 and 75 percent of the time.19

**PLEA BARGAINS**

A plea bargain is an offer that a prosecutor makes to a person charged with a crime. If they agree to plead guilty, the prosecutor promises to lower the charge to something less serious. There are advantages and disadvantages to plea bargains. The state relies on them because they decrease the number of trials in an already-overwhelmed legal system. Guilty people often see plea bargains as advantageous because they result in a lighter sentence. Unfortunately, however, plea bargains can have unintended consequences. For example, innocent people sometimes take plea bargains when they lack a strong alibi or fear that a jury will be biased against them. Both innocent and guilty people can feel pressure to take plea bargains if they need to get out of jail to keep their jobs or care for their kids.20

CSA cases raise a number of unique issues in terms of plea bargains. For example, a plea bargain can result in charges that


do not accurately reflect the seriousness of a crime. This is worrisome when an offender pleads a sexual crime down to a nonsexual charge and avoids some of the consequences that are unique to sex crimes (like counseling). I discuss this problem at some length in the next chapter. At the other end of the spectrum, when innocent people plead guilty to a sexual crime in order to take advantage of a plea bargain, they may not fully understand or appreciate the lifelong consequences that are attached to that decision.

The vast majority of criminal charges in the United States end in a plea bargain. In fact, across the federal and state court systems, 97 percent of cases do not go to trial, largely because defendants plead guilty.\(^2^1\) While this percentage is lower in CSA cases, it is still significant. In a study in Outagamie County, Wisconsin, for example, half the CSA charges between 2009 and 2014 were reduced, mostly through plea bargains.\(^2^2\) In three counties in Oregon between 2007 and 2008, the percentages of plea bargains in felony CSA cases were 63, 77, and 79.\(^2^3\)

**THE CRIMINAL JUSTICE EXPERIENCE FOR CHILDREN**

Over one hundred thousand children testify in various kinds of legal trials in the United States each year. In order to be allowed to testify, a child victim must be mature enough to accurately recall events and to understand the seriousness of an oath. They must also be able to understand that telling the truth is required.\(^2^4\)


\(^2^3\) Walsh et al., “Length of Time to Resolve Criminal Charges of Child Sexual Abuse.”

court determines that a child meets these criteria, they can decide whether or not to testify. This decision can be highly stressful, particularly when adults have a stake in the decision. For example, a prosecutor might pressure a child to testify to increase the chance of a conviction. Pressure can also come from a child’s relatives in intrafamilial cases—either because the relatives really want a conviction or because they do not.

### Alternatives to Child Testimony

When children are unwilling or unable to testify in CSA cases, it can be very difficult for a prosecutor to secure a conviction. This has led to a search for alternatives. For example, an adult could testify about what a child victim told them, or a prosecutor could show a videotape of an investigative interview conducted with the child. While these solutions may sound promising, many are also illegal. This is because the Confrontation Clause of the US Constitution gives defendants the right to cross-examine all witnesses in person.

This issue of out-of-court statements being admissible as evidence was litigated in 2004 in the Supreme Court case *Crawford v. Washington*. The court found that defendants must be given an opportunity to confront accusers. An exception was made, however, for out-of-court statements that were “not testimonial,” meaning that they were not gathered as part of an attempt to build a case against a defendant. For example, if a child spontaneously tells her teacher that her stepfather abused her, the teacher can recount that in court. If, however, a child tells a police officer that they have been abused in response to a direct question, that is not admissible. Video recordings taken as part of an investigation are also prohibited. The *Crawford* decision means that today, many victims of CSA are forced to testify in court since most evidence is gathered as part of investigations.25

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Interviews with abuse victims reveal that they often experience the legal process as frustrating, intrusive, and terrifying. Courthouses are scary places, with rules that are difficult for children to understand. While some courts allow children to testify over closed-circuit television, others force them to appear in the courtroom with the person who abused them. Research suggests that long-term psychological distress and distrust of the legal system sometimes result when children testify in CSA cases. This is particularly true when they have to testify multiple times or when the perpetrator is acquitted. At the same time, children who do not testify can also experience psychological distress, especially when their abusers are acquitted or end up with minimal sentences.

Courthouse Dogs

Dogs can be very comforting to children who have to testify in legal hearings and trials. Courthouses are increasingly allowing these support animals to accompany child victims. There is an organization that provides therapy dogs to courthouses. Check them out at https://courthousedogs.org/.


CONVICTION OR ACQUITTAL?

Many factors go into whether a defendant in a CSA trial is convicted or acquitted. Clearly, the strength of the evidence matters, but what about the characteristics of offenders or victims? It turns out that the research findings on this question are not entirely clear, although most studies find no link between convictions and victim characteristics such as age.30 At the same time, a recent study of child stranger rape in the United Kingdom found that when a weapon was used or when the assault occurred outside, it dramatically increased the chances of conviction. This is probably because weapons and the outside setting conform to images of what a “real” rape looks like.31 When

31. Lundrigan, Dhami, and Agudelo, “Factors Predicting Conviction in Child Stranger Rape.”
medical evidence (like DNA or abrasions) is submitted as evidence, it also increases the chances of conviction in CSA cases. A study with mock jurors found that gay men who abused children were more likely to be convicted than either women or heterosexual men.

At several points in this book, I have talked about common misperceptions of CSA. These are of particular concern in a court context because they can lead to mistaken assumptions about guilt and innocence. For example, if members of a jury believe that all abused children act out sexually, they may be disinclined to believe a child who does not. In a study of jurors and jury-eligible college students, researchers found that knowledge about CSA is extremely variable and frequently incorrect. A recent study with undergraduate students also uncovered significant misperceptions about CSA. For example, a full 71 percent agreed that medical evidence exists in most CSA cases. This belief is actually wildly inaccurate, with less than 1 percent of cases involving this kind of evidence. The college students also held


significant misperceptions of behavioral signs of abuse as well as likelihood of disclosure.

Given that a significant percentage of the population believes myths about CSA, it would make sense to educate juries. This has proven to be difficult, however, because there are limits on what experts are allowed to say in court. In most cases, they must confine their testimony to explaining child behavior in general terms. For example, an expert would be allowed to tell a jury that many child victims delay the disclosure of abuse. The expert could not, however, suggest that a particular defendant is guilty because the child victim delayed disclosure. Additionally, in most jurisdictions, experts are barred from providing juries with statistics because of concerns about bias. To understand this, imagine being on a jury in a CSA case and an expert says that less than 5 percent of abuse claims are false. This might make it hard to consider the possibility that a particular claim might be untrue.37

Expert testimony that relies on “syndromes” is also problematic in court. In the 1980s, a psychologist named Roland Summit proposed the existence of child sexual abuse accommodation syndrome (CSAAS). Summit did not systematically collect data, but rather based the syndrome on his clinical experiences with abused children. He found that abused children often react in five ways: with secrecy, helplessness, entrapment/accommodation, delayed and unconvincing disclosure, and recantation.38 Summit’s work appeared at a time when syndromes, like battered-women syndrome, were popular in legal cases. Even though Summit clearly stated that CSAAS was not to be used to substantiate claims of

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CSA, it began to appear in court cases as evidence to bolster child credibility. Some courts, however, disallowed prosecutors from arguing CSAAS because it is difficult to falsify. If a child is unconvincing, for example, the prosecutor can simply say it’s a result of CSAAS. Additionally, research has only found empirical support for some of the reactions Summit identified. This is one of the reasons that CSAAS is not listed in the American Psychological Association’s *Diagnostic and Statistical Manual*—the book that is essentially the bible for establishing scientific credibility in psychology. Nonetheless, the use of CSAAS by lawyers for the prosecution continues in some courts even today.

It is clear that CSA trials are difficult to navigate—for both the defense and the prosecution. What is the rate of convictions versus acquittals? Pulling together data from twenty-four studies on child abuse conducted in the United States (five of these studies included physical as well as sexual abuse), researchers found that 66 percent of cases that went to trial resulted in convictions. It is important to note, however, that 82 percent of the people who had originally been charged with abuse ended up pleading guilty and not going to trial at all. This means that 94 percent of all the cases in which charges were filed resulted in conviction.

**THE ROLE OF RISK ASSESSMENT IN SENTENCING**

Risk assessment has played a role in criminal justice decision-making for many years. Sometimes risk assessment is used to determine what type of treatment offenders should receive. Other
times, judges use risk assessment as part of sentencing itself.\textsuperscript{42} Here, I’ll focus on its role in sentencing.

Prior to the 1960s, clinical psychologists commonly interviewed offenders and deemed them either “dangerous” or “not dangerous.” Today, courts tend to rely on actuarial tools developed to estimate the probability that a person will reoffend. These tools are basically checklists with factors, like drug addiction or a previous conviction, associated with recidivism. Sometimes the checklists also include factors that are associated with desistence from crime. These are called \textit{promotive} factors because rather than increasing risk, they lower it. For example, it is known that people with supportive family systems are less likely to engage in crime than are people who do not have such support.\textsuperscript{43} The checklists are scored by adding points for risk factors and subtracting them for promotive factors. The higher the score, the greater a person’s chance of recidivism is estimated to be.\textsuperscript{44}

Some of the factors on risk assessment inventories are \textit{fixed}, meaning that they do not change over time. Gender is an example of a fixed factor because the majority of people do not change their gender. Men automatically receive more risk points because they are more likely than women to engage in crime. Another fixed factor is crime type. Particular crimes are associated with elevated reoffense risk and receive more points. Risk factors that have the potential to change over time are called \textit{variable}. For example, people are categorized as being lower risk if they have skills that make them employable. This means it is possible to get training


and reduce one’s risk score. Some variable factors, however, simply change at their own pace. Age is one of these—the older you are, the less likely you are to commit a crime, but no amount of effort on your part will make you age faster.

There are many different risk-assessment tools available today. Some have been created by private companies and others by academics or nonprofits. There is wide variation in the factors that are included, but a study found that most contain measurements of criminal history, criminal lifestyle (like being friends with other people who are engaged in criminal activities), mental health, and drug/alcohol use. Many assessments also use personality traits that are associated with crime, such as being manipulative or lacking self-control.\(^{45}\) It is important to note that none of these commonly used measures is promotive—they all represent negative risk factors.

The goal of risk assessment is fairly obvious: to predict whether people will engage in criminal behavior in the future. Unfortunately, it is very difficult to determine which (if any) of the available tools actually meet this goal. Researchers are an intrepid bunch, however, and have tried various tactics. One method involves administering the tool to incarcerated people, calculating a risk score for them, and then monitoring them postrelease. An effective risk-assessment tool would assign higher risk scores to the people who end up being rearrested. Another methodology is to apply the tool to cases from the past using prison records. Scores for former inmates are calculated and compared with official records of rearrests. This methodology is challenging because prison records are not very detailed. For example, as described above, family support helps people desist from crime, but few criminal justice systems keep records about the strength of people’s family ties.

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Using a combination of different methodologies, researchers have found that actuarial tools are much better at predicting the recidivism of sexual offenders than are the unstructured psychological interviews used in the past. Interestingly, it also appears that actuarial tools are more effective when used alone than when combined with the judgement of psychologists. In terms of determining which tool is best, one meta-analysis found that commonly used risk-assessment techniques have somewhat different levels of success in predicting recidivism but that the differences are extremely small. In general, the tools accurately predict sexual recidivism in about 70 percent of cases. Unfortunately, however, the tests provide quite different results on individual cases. While 55 percent of the offenders were identified as being at high risk on at least one of the tests, only 3 percent of the sample were identified as high risk by all of the assessments.

Are Brain Scans the Future of Risk Assessment?

Imagine if a simple brain scan could predict which CSA offenders were at high risk of reoffending. While it sounds more like science fiction than reality, scientists at the University of New Mexico are experimenting with just this technique. They believe that brain scans, in combination with standard assessment tools, will provide better accuracy. These

brain scans, however, are controversial because they raise many ethical issues. You can read about them here: https://www.themarshallproject.org/2018/08/14/a-dangerous-brain.

Risk assessment has received a lot of criticism, particularly when it is used in the sentencing phase of a trial. It’s easy to see why. Imagine that a fifty-year-old employed married mother with no prior criminal history beats up and paralyzes a stranger in a bar. If risk assessment is allowed to influence sentencing, it is likely that the woman will receive a relatively short sentence because her age, gender, employment, marriage, and lack of prior criminal behavior/drug addiction mark her as low risk. Now imagine an unemployed young man who has a past drug offense commits exactly the same act. He will receive a longer sentence because he will be deemed at greater risk of reoffense. Many people think that is not fair—the older woman and the young man committed exactly the same act but are punished differently because of unchangeable characteristics and factors from their pasts. This criticism really boils down to a debate about the purpose of punishment. People who think that the point of punishment is retribution tend to be critical of using risk assessment in sentencing, but those who think that the purpose of punishment is rehabilitation might see it as being smart policy. Regardless, the fact that risk assessment is only correct about 70 percent of the time concerns people across punishment ideologies. Imagine that the young man in the bar happened to be in the group of people who are mistakenly identified as high risk by the assessment—would it be fair to sentence him to extra time?

Another criticism of risk assessment is that it reinforces biases already present in the criminal justice system. For example, racial minorities are more likely to be arrested, convicted, and receive a long sentence than are equivalent white people.50 When past con-

50. Tammy Rinehart Kochel, David B. Wilson, and Stephen D. Mastrofski,
victions (or past sentence length) are used in risk assessment, it is essentially reinforcing prior racial discrimination. A similar argument can be made about assessment tools that include unemployment as a risk factor. While it is true that employed people are less likely to recidivate, we also know that discrimination, lack of transportation, and lack of skills keep many poor people from being able to get or keep a job. When unemployment is used as a risk factor, it effectively penalizes people for being poor.51 Unfortunately, it is difficult to evaluate risk-assessment tools for bias because some of the most popular tools were created by private companies. These companies are unwilling to reveal their proprietary risk formulas.

VICTIM IMPACT STATEMENTS AT SENTENCING

The victim’s rights movement mentioned in chapter 1 has been remarkably successful in passing legislation. For example, its work led to the 2004 federal Crime Victims’ Rights Act that guaranteed eight different rights to victims, including notification about hearings and protection from the accused. The act also gave victims a greater role in sentencing outcomes. This led many states to allow victims to either submit a written statement or speak in front of the judge during sentencing or parole hearings. This is called a victim impact statement.

The admissibility of victim impact statements has been repeatedly contested in the courts. In the 1987 Supreme Court case Booth


v. *Maryland*, the justices ruled that family members of a homicide victim could not speak during sentencing because it would focus attention on the victim rather than on the crime itself. They also worried that it would encourage the judge to make decisions based on emotion instead of facts.\(^\text{52}\) In other words, victim impact statements introduce the possibility that sentences are set based on how articulately and emotionally grief is expressed by victims rather than on the culpability of the defendant.\(^\text{53}\) In 1991, however, the Supreme Court reversed its prior decision, ruling in *Payne v. Tennessee* that families could speak during the sentencing phase of capital trials.

Victim impact statements are designed to compensate for some of the unique ways the US criminal justice system excludes victims. Unlike in many other countries, US victims cannot directly bring a case against the person who harmed them—they have to go through the prosecutor. Criminal cases are between the accused and the state, and the victim’s role is solely as a witness.\(^\text{54}\) This leads to a situation where victims have very little control in the process and are not given an opportunity to speak freely. Victim impact statements are a way to rectify this situation. Anecdotal evidence suggests that giving a statement can be cathartic and meaningful for victims.\(^\text{55}\) This is not always the case, however. There are

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victims who choose not to write an impact statement because they cannot stand to relive the crime.\textsuperscript{56} Others find that reading the impact statement in court is distressing when the defendant smirks or appears not to care.\textsuperscript{57}

\textbf{One Survivor’s Victim Impact Statement Experience}

One CSA survivor wrote about her experience with creating and delivering a victim impact statement. It’s a compelling and emotional piece:


There have been a number of unintended consequences of victim impact statements. First, when victims express severe emotional harm, the crimes against them are seen as more serious and the criminal as deserving of harsher punishment.\textsuperscript{58} Similarly, when juries in capital trials hear victim impact statements, they are more likely to feel sympathy toward the family and negative feelings toward the offender. Consequently, they are more likely to vote for the death penalty.\textsuperscript{59} This scenario is exactly what the Supreme Court warned about in their ruling on the \textit{Booth} case.

A second problem with victim impact statements involves race. One study asked actual jurors about the decisions they had made.

\begin{thebibliography}{9}
\end{thebibliography}
in real-life murder cases. Specifically, they asked them about the factors that most influenced them to vote for or against the death penalty. The victim “having a loving family” and the grief and suffering of the family ranked lower in decisions made about Black defendants than white.60

Perhaps one of the biggest concerns about victim impact statements is that, in some cases, they are used as tools for prosecutors to impose maximum punishments. When a victim (or their family member) does not support severe sanctions, a prosecutor could discourage them from submitting a statement. There is only anecdotal evidence for this possibility. In one example, the husband and daughter of a murder victim in Nebraska were denied the right to speak at a commutation hearing because the prosecutor labeled them as “agents of the defendant” when they made known their opposition to the death penalty.61 There are also examples of antideath penalty victims being denied services from victim advocacy agencies or not being told about hearings involving their case.62

SENTENCING

While the goal of this section of the book is to discuss average sentences for CSA offenses, I should warn that disappointment lies ahead. It is extremely difficult to summarize criminal sentences because most cases resolve in plea bargains—meaning that the sentences correspond to the reduced charge, not to the original

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charge. It is also complicated by the fact that there are a lot of different CSA charges, ranging from minor to extremely serious. Averaging the sentences for such disparate violations does not make a lot of sense. Finally, the United States has multiple court systems. Most CSA cases are prosecuted through state courts, but the federal government can also take jurisdiction. These court systems have different sentencing structures. The situation on Native American lands is even more complex. While the federal government has jurisdiction there, tribes have concurrent jurisdiction and can also prosecute the case. This is important because federal prosecutors do not always agree to take on CSA cases that occur on reservations. By federal law, however, tribal justice systems only have the power to impose up to three years in prison and $15,000 in fines—regardless of the seriousness of the offense.63 This lowers calculations of the “average” CSA sentence in the United States.

All across the United States, judges have the power to determine criminal sentences except in death penalty cases when juries have this responsibility. Judges, of course, are not allowed to set any sentence that they want. One of the factors that limits their discretion is mandatory minimum sentencing. As its name implies, mandatory minimums specify the lowest-level sentence that can be imposed. These minimums vary based on the severity of the offense and the offender’s prior convictions. Sentencing guidelines are similar to mandatory minimums but are less deterministic. They provide judges with a range of suggested sanctions but allow them to choose a sentence that is shorter or longer than the recommendation.

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Between the 1980s and 2010, rates of incarceration skyrocketed in the United States. This was not a result of more crime (in fact, the crime rate dropped to historic lows over the period) but instead was largely driven by increases in sentencing. One example is the increase in the number of life sentences. In 1984, only thirty-four thousand people in the United States were sentenced to life. Today, that figure is over one hundred and sixty thousand—about one out of every nine incarcerated people. Looking just at sexual abuse, between 1994 and 2006, the federal court system increased the median length of sentences from thirty-six to sixty-three months. The 2003 federal passage of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act also boosted federal sentences because it allowed for life imprisonment for second-time offenses.

### Some Examples of State Laws

Montana had a mandatory minimum sentence of twenty-five years for most sex crimes against children (rape, incest, and other types of assault). This was reduced to ten years in 2017 as part of a

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package of sentencing reforms. In 2019, however, the state legislature voted to go back to twenty-five years, with an exception for juvenile offenders that enables them to serve less time.67

Massachusetts has several laws governing different kinds of sexual abuse. In cases where an adult has sexual intercourse by force with a child under the age of sixteen, however, the offender can be subject to life imprisonment.68

California has legislation stating that sexual intercourse with a child under ten automatically triggers a sentence of at least twenty-five years. For other kinds of sexual acts (like oral copulation), the mandatory minimum is fifteen years.69

The imposition of increasingly long sentences for CSA has not been without controversy. There are concerns, for example, that high mandatory minimums encourage plea bargains, even among innocent people. Other people worry that the minimums increase the number of trials because people refuse to plead guilty to charges that bear very high penalties. As described above, this is problematic because the court system is already overwhelmed. More trials also mean more children needing to provide testimony. A final concern is that lengthy sentences might result in fewer reports of intrafamilial abuse. Family members may be unwilling to subject offenders to sentences that could involve incarceration for twenty-five years or more.70

70. Robert Levy, “The Dynamics of Child Sexual Abuse Prosecution: Two
It is clear that there are a number of risks associated with the imposition of long sentences. Perhaps these risks don’t really matter, however, if long sentences effectively deter abuse. Deterrence could happen in one of two ways. First, convicted offenders could leave prison and choose not to reoffend because they are afraid of being caught and sentenced again. In this case, their experience of prison makes them less willing to engage in crime in the future. The other way deterrence might happen is that people in the general population decide not to abuse children because they fear heavy sanctions if caught.

Most of the research on the relationship between sentence length and deterrence does not focus on CSA, but rather looks at

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crime more generally. In a comprehensive review of this literature, two economists found that there are a number of conditions that must be met for a long sentence to deter crime.71 First, the person considering crime needs to believe that there is a relatively high likelihood that they will be caught. In other words, if the person thinks they won’t be caught, sentence length does not really matter. Unfortunately, many offenders underestimate the chance they will be arrested, especially if they have gotten away with crime in the past. A second condition necessary for long sentences to deter crime is that potential offenders need to be aware of the sentence. Many sentencing policies are not publicized or are only reported in select media outlets. As a result, most people don’t know or can’t remember what particular sentences are.

Ultimately, the economists’ review found that, while there may be some deterrent effect of long sentences, it is very small, likely because the two conditions described above are rarely met. A study that looked specifically at the link between sentence length and recidivism in CSA cases came to essentially the same conclusion: sentence length does not affect the likelihood of a person committing a new crime.72 Of course, deterrence is not the only goal of punishment. When offenders are in prison, they are also incapacitated and therefore unable to commit new crimes (except crimes against other incarcerated people or staff members). As discussed in chapter 3, however, as people age, they become far less likely to commit any type of crime. This means that the incapacitation effect of crime may be significant when people are young but that it likely fades over time.


FAILURE TO PROTECT

So far, this chapter has focused on the criminal justice experiences of victims and offenders. In some cases, however, it is not just the offender who is held responsible for abuse. Failure-to-protect laws are a type of mandatory reporting law (see chapter 6 for a more complete discussion of mandatory reporting laws). Failure-to-protect laws focus narrowly on caretakers’ responsibility to report clear and dangerous situations of abuse to authorities. Specifically, these laws have been used to prosecute parents (usually mothers) who do not take action to prevent the abuse of their child by their spouse or romantic partner. Penalties associated with a failure to protect can involve prison time as well as a permanent child abuse record, making the offender ineligible for many jobs and for volunteering in schools.

There have been a number of successful prosecutions of people under failure-to-protect laws, and some of the resulting penalties have been quite harsh. 73 For example, a young woman named Tondalao Hall was sentenced to thirty years in prison in Oklahoma for failing to protect her children from abuse by her boyfriend. The boyfriend was sentenced to two years. 74 In 2019, after serving fifteen years, the governor finally commuted her sentence and she was released.

From a historical perspective, what happened to Hall is not terribly remarkable. The family has traditionally been seen as a “private” space mostly occupied by women and children. While men obviously live in homes too, most of their lives are conducted in the workplace—the “public” sphere. Women are seen as innate

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caregivers, legitimizing and naturalizing their responsibility for raising children. All of these beliefs lead to mothers being blamed when bad things befall children. For example, starting at least in the early 1900s—and continuing today—mothers have been blamed when their children are victims of incest.75 Similarly, a recent study looked at families in which a son had been sexually abused. The researchers found that many family members, as well as social service agencies, blamed the mothers. Sadly, many of the mothers blamed themselves as well.76

Not surprisingly, poor women receive the most scrutiny as mothers. They are essentially caught in a trap—they are expected to rise to cultural standards of motherhood, but their poverty means that they don’t have the resources to do so. For example, poor women are often unable to pay for quality childcare. Rather than seeing this as a societal problem, we blame the mother for not supervising her children. When it comes to abuse, poor women are in a bind as well. They, like all mothers, are expected to protect their children. If they discover their children are being abused and report it, however, they risk being blamed for lax supervision. This can result in the children’s removal from the home.77

For all of these reasons, some domestic abuse prevention groups have argued that failure-to-protect laws are problematic. They also point out that many abusers target the mother as well as the child, causing the mother to legitimately fear violence if she makes a report. While most of these laws specify an exception to mandatory reporting in these cases, it is very hard to prove that fear of

harm outweighed the risk to the child from abuse. An additional criticism of failure-to-protect laws is that domestic violence shelters are often full, and there are few other resources available for women who leave abusive situations. Mothers’ failure to report can be a rational response to individual and societal oppression and a lack of other options.

CONCLUSION

This chapter examined the criminal justice process from the time a CSA accusation is made through criminal sentencing. Some accusations do not result in criminal charges because CPS, the police, or the prosecutor analyze the evidence and decide that it is too weak to convict the accused person. Alternately, some families decide not to go forward with prosecution. This was the case with Natalie, whom we met at the start of the chapter. When criminal charges are filed, the vast majority end in plea bargains. Plea bargains have the advantage of shortening the justice process and freeing child victims from stressful courtroom testimony but may result in misrepresentative charges on offenders’ records. The sentences offenders receive from judges are shaped by mandatory minimums and sentencing guidelines, as well as by risk assessments and victim impact statements. While prison sentences are effective at incapacitating offenders, their length does not appear to have a deterrent effect.

When most people think about criminal sanctions, they just think as far as the sentence that is imposed. The assumption is that people serve their terms, are released back into society, and move on. But the legal impact of a CSA conviction can last well past release—following many people for the rest of their lives. The

next chapter discusses those post-prison prevention measures, their efficacy, and their unintended consequences.

FURTHER READING


