Note

"Wreaking Extraordinary Destruction": Defendant's Irreplaceability as Presumptively Reasonable Grounds for Downward Departure in Sentencing

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INTRODUCTION

> Senator Kamala Harris: "Your agency will be separating children from their parents and—"
>
> Department of Homeland Security Secretary Kirstjen Nielsen: "No. What we'll be doing is prosecuting parents who have broken the law, just as we do every day in the United States of America."
>
> Harris: "They will be separated?"
>
> Nielsen: "Just as they [are] in the United States every day."[1]

In the summer of 2018, people across the United States were enraged at the Trump Administration's "zero-tolerance" policy for illegally crossing the southern border,[2] which entailed sepa-

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1. *Authorities and Resources Needed to Protect and Secure the United States: Hearing Before the Senate Committee on Homeland Security and Governmental Affairs*, 115th Cong. 19 (2018) (statement of Kirstjen Nielsen).

2. *See* U.S. DEP'T OF JUSTICE, OFFICE OF PUB. AFFAIRS, ATTORNEY GENERAL ANNOUNCES ZERO-TOLERANCE POLICY FOR CRIMINAL ILLEGAL ENTRY (2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/EUK3-T2X8]; *Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy*, HUM. R. WATCH (Aug. 16, 2018), https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy [https://perma.cc/8XFG-MY2M]. The zero-tolerance policy was seemingly intended as a deterrence tactic; one news article noted that a Trump administration official said, "Trump is

rating children from their parents when families crossed together.[3] Child advocates decried the policy, arguing that isolating migrant children from their parents could "cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health,"[4] and fearing the "serious, negative consequences to children's health and development" and the "psychological distress, anxiety, and depression associated with separation from a parent."[5] The news coverage of this controversial practice ultimately culminated in the Trump Administration rescinding the policy through an executive order.[6] Six months after the announcement of the executive order, hundreds of children remained separated from their parents;[7] it soon be-

convinced that family separation has been the most effective policy at deterring large numbers of asylum-seekers." Julia Ainsley & Geoff Bennett, *Trump's Support of Renewed Child Separation Policy Led to Collision with Nielsen*, NBC NEWS (April 8, 2019), https://www.nbcnews.com/politics/white-house/trump-has-months-been-urging-administration-reinstate-child-separation-policy-n992021 [https://perma.cc/NMR9-8WE8].

3. *See* Leslie Shapiro & Manas Sharma, *How Many Migrant Children Are Still Separated from Their Families?*, WASH. POST (Aug. 30, 2018), https://www.washingtonpost.com/graphics/2018/local/tracking-migrant-family-separation/?utm_term=.c1c51c8c3100 [https://perma.cc/WH4S-FYX8]; Sarah Stillman, *America's Other Family-Separation Crisis*, NEW YORKER (Nov. 5, 2018), https://www.newyorker.com/magazine/2018/11/05/americas-other-family-separation-crisis [https://perma.cc/P58J-LLXL].

4. Colleen Kraft, *AAP Statement Opposing Separation of Children and Parents at the Border*, AM. ACAD. PEDIATRICS (May 8, 2018), https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx [https://perma.cc/G2RR-EKNR].

5. Children's Defense Fund et al., *Renewed Appeal from Experts in Child Welfare, Juvenile Justice and Child Development to Halt the Separation of Children from Parents at the Border*, CHILDREN'S DEF. FUND (June 7, 2018), https://www.childrensdefense.org/wp-content/uploads/2018/08/child-welfare-juvenile.pdf [https://perma.cc/3JAU-PXU7].

6. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018), https://www.federalregister.gov/documents/2018/06/25/2018-13696/affording-congress-an-opportunity-to-address-family-separation [https://perma.cc/3JAU-PXU7] ("It is also the policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.").

7. Arelis R. Hernández, *Nearly 250 Migrant Children Still Separated From Parents, ACLU Report Says*, WASH. POST (Oct. 18, 2018), https://www.washingtonpost.com/local/immigration/nearly-250-migrant-children-still-separated-from-parents-aclu-report-says/2018/10/18/d3fc2fd0-d222-11e8-b2d2-f397227b43f0_story.html?utm_term=.a5311fabbd3b [https://perma.cc/98PW-BWXN].

came apparent that thousands more children than originally estimated were separated from their families, and alarmingly, the government "has no way of tracking the children taken from their parents."[8] Over a year after the executive order claimed to end the family separation policy, 700 *more* families had been separated, often due to loopholes in the executive order.[9]

Family separation is not limited to immigrant populations. An estimated 3.6% of all minor children in the United States are currently separated from their parent(s) due to parental incarceration.[10] Mass incarceration has been a growing issue in the United States for decades,[11] but a surge in the incarceration of women over the last half century has led to a dramatic uptick in the number of children deprived of their primary parents as a result of incarceration.[12] In 1970, over 70% of counties in the

8. Sarah Jones, *Trump Administration: Reuniting Some Separated Migrant Families Might Be Too Hard*, NEW YORK MAG. (Feb. 4, 2019), http://nymag.com/intelligencer/2019/02/hhs-reuniting-separated-migrant-families-hard.html [https://perma.cc/6GLT-FGE5].

9. Nina Bala & Arthur Rizer, *Trump's Family Separation Policy Never Really Ended. This Is Why.*, THINK (July 1, 2019), https://www.nbcnews.com/think/opinion/trump-s-family-separation-policy-never-really-ended-why-ncna1025376 [https://perma.cc/964Z-8M97].

10. DOUG HAMILTON ET AL., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (PEW CHARITABLE TRS. 2010), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf [https://perma.cc/W7E2-D5TA] ("2.7 million children have a parent behind bars—1 in every 28 children (3.6[%] has a parent incarcerated, up from 1 in 125 just 25 years ago. Two-thirds of these children's parents were incarcerated for non-violent offenses."). The most recent statistics from the U.S. Department of Justice estimated that 2.3% of all children in the United States had an incarcerated parent in 2007. LAURA E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2010), https://www.bjs.gov/content/pub/pdf/pptmc.pdf [https://perma.cc/UV6D-YJZ4]. This number only reflects the number of children with parents in state or federal prison, not jail. *See id.* at 1.

11. JACOB KANG-BROWN ET AL., VERA INST. OF JUSTICE, THE NEW DYNAMICS OF MASS INCARCERATION 8 (2018), https://www.vera.org/downloads/publications/the-new-dynamics-of-mass-incarceration-report.pdf [https://perma.cc/5XRT-27YB].

12. While the incarceration of men and fathers is an important issue as well, several portions of this Note focus on the incarceration of primary caregiver parents, which more often than not means mothers. This Note speaks about the special incarceration issues of women because, as a generalization, women continue to be impactful in United States children's lives. *See* Gretchen Livingston & Kristen Bialik, *7 Facts About U.S. Moms*, PEW RES. CTR. (May 10, 2018), https://www.pewresearch.org/fact-tank/2018/05/10/facts-about-u-s

United States did not hold women in their jails at all.[13] In contrast, as of November 2018, there were approximately 219,000 women incarcerated in the United States;[14] roughly 1.5 million women are put in jail during a calendar year.[15] Seventy-two percent of the women incarcerated in the United States have minor children,[16] and most of these incarcerated mothers were the primary caregivers of their children just prior to incarceration,[17] leaving nearly 150,000 children currently separated from their mothers.[18]

Just as immigrant children separated from their parents undergo "extremely detrimental" trauma,[19] so too do children isolated from their parents when those parents are incarcerated.[20] Parents suffer from the separation as well; statistics suggest that severing the relationship between a mother and her

-mothers/ [https://perma.cc/2457-V9Y5] (noting that in 2016, working mothers spent an average of fourteen hours a week on childcare, while working fathers spent just eight; and that about one in four U.S. mothers are single parents, versus only 7% of U.S. fathers).

13. ELIZABETH SWAVOLA ET AL., VERA INST. OF JUSTICE, OVERLOOKED 6 (2016), https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf [https://perma.cc/8DW6-DG69].

14. Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Nov. 13, 2018), https://www.prisonpolicy.org/reports/pie2018women.html [https://perma.cc/KVC7-XLMP].

15. HUM. R. WATCH & AM. CIVIL LIBERTIES UNION, YOU MISS SO MUCH WHEN YOU'RE GONE: THE LASTING HARM OF JAILING MOTHERS BEFORE TRIAL IN OKLAHOMA 21 (2018), https://www.aclu.org/report/you-miss-so-much-when-youre-gone [https://perma.cc/QU27-7JG8].

16. Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [https://perma.cc/NN44-Y2CH].

17. GLAZE & MARUSCHAK, *supra* note 10, at 16.

18. *Id.* at 13 app. t.1. While the number of children left behind from the incarceration of fathers is greater (1,559,200 children left behind from 744,200 incarcerated fathers in 2007), the impact on children from maternal incarceration (147,400 children left behind from 65,600 incarcerated mothers in 2007) may be greater because mothers are more likely to be primary caregivers for the children; the most common caregiver of an incarcerated father's child is the other parent (generally, the mother). *Id.* at 13, 16.

19. Hurley Riley, *The Impact of Parent-Child Separation at the Border*, U. MICH. SCH. PUB. HEALTH (Sept. 7, 2018), https://sph.umich.edu/pursuit/2018posts/family-separation-US-border.html [https://perma.cc/T5WS-Z7L4].

20. Stillman, *supra* note 3.

child is linked to higher rates of recidivism and more parole violations.[21] The sudden and unexpected need for a family member or family friend to step into a parenting role can put a strain on family and the community, especially grandparents of children with incarcerated parents.[22] Everyone is obligated to follow the law, and there should be an investigation and accountability when laws are broken. But the harms that accrue on the incarcerated parent's child are harsh, long-lasting, and undeserving;[23] careful consideration should be undertaken before a child needlessly undergoes psychological trauma, economic insecurity, and a risk of severance of their parents' rights.[24] An adult who has been convicted of a crime should be the one subjected to any resulting punishment, not the child of that adult.[25]

For defendants with dependents who rely on them, incarceration creates a multi-dimensional harm when these defendants are unable to continue caring for their families. Some federal courts have noted the value of assigning defendants a lower sentence than ordinarily would be imposed "when a term of imprisonment may 'wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing.'"[26] While

21. STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 4 (2009), https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf [https://perma.cc/YDZ3-G84R].

22. Jillian J. Turanovic et al., *The Collateral Consequences of Incarceration Revisited: A Qualitative Analysis of the Effects on Caregivers of Children of Incarcerated Parents*, 50 CRIMINOLOGY 913, 918 (2012).

23. *See infra* Part I.B.1.

24. *See infra* Parts I.A.3, I.B.1.

25. *See* Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 843–59 (2011) (discussing that the criminal justice system is premised on punishing autonomous, rational adults, not children).

26. United States v. Kon, No. 04 CR, 271-03 (RWS), 2006 WL 3208555, at *4 (S.D.N.Y. Nov. 2, 2006) (quoting United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992)). The court went on to note three Second Circuit cases where a departure was upheld for defendants who provided support for their families. *Id.* Several other courts have used the "wreaking destruction" or "wreaking havoc" language to convey the seriousness of the harm of parental incarceration on dependents. *See, e.g.*, *Johnson*, 964 F.2d at 129 ("The rationale for a downward departure here is not that Johnson's family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing."); United States v. Pearson, 282 F. Supp. 2d 941, 945–46 (E.D. Wis. 2003) ("The court possesses the discretion to avoid wreaking extraordinary destruction on dependents who rely on the defendant for their care."); United States v. Lacarubba, 184 F. Supp. 2d 89, 98–99 (D. Mass. 2002) ("I depart only in recognition of my unwillingness to wreak havoc on the life of the dying [defendant's wife,] Ms. LaCarubba.").

many courts focus on the "extraordinary" nature of the defendant's support for their dependents when considering a lower sentence for a defendant, a few courts have instead used an "irreplaceability" test to determine if a defendant's support for their dependents is so irreplaceable that it necessitates a downward departure in sentencing.[27] This "irreplaceability" test better addresses the needs of dependents; merely analyzing the uniqueness or "extraordinariness" of the situation does not consider the value of the defendant's support for their dependents.

This Note provides an overview of the scope and harms of parental incarceration, the United States federal sentencing regime, and how a defendant's caregiving and financial support factors into (or fails to be factored into) their sentence. Part I provides background information on the increasing number of incarcerated parents in the United States, the rippling effects of parental incarceration, and the United States Federal Sentencing Guidelines and federal sentencing law. Next, Part II.A explores how federal sentencing considers a defendant's family ties and responsibilities, under both the Guidelines and after the Guidelines became non-mandatory. Part II.B explores *United States v. Huerta* and *United States v. Kon*, two cases that utilize an "irreplaceability" test in determining if the defendant's absence will affect his or her dependents to a degree that the court should take these collateral consequences into account at sentencing. Finally, Part III considers solutions to mitigate the harm of parental incarceration. Part III.A reviews previous scholarship suggesting legislative and policy suggestions. Part III.B advocates for the *Huerta* and *Kon* test to be more widely utilized in the federal courts. Part III.C addresses counterarguments. The incarceration of parents is a pervasive issue and its effects are long-ranging; advocates, policy makers, judges, and legislators should use all available tools to lessen the harmful effects of incarceration on defendants' families.

I. PARENTAL INCARCERATION: A CRACK IN THE FAMILY FOUNDATION

Since the beginning of time, the family has been the foundational unit of societal organization.[28] Ancient societies organized

27. *See infra* Part II.B.

28. *See* Douglas J. Brewer & Emily Teeter, *Ancient Egyptian Society and Family Life*, FATHOM ARCHIVE (2004), http://fathom.lib.uchicago.edu/2/21701778/ [https://perma.cc/WCE6-5KYT].

themselves into nuclear families,[29] and the Supreme Court has recognized the fundamental rights to marry[30] and parent.[31] However, the drastic rise of incarceration in the last century (and particularly the rise in women's incarceration) has had turbulent, yet often unexamined, impacts on the family. Section A discusses the scope of parental incarceration, detailing the increase in incarcerated mothers over the last several decades and what happens to their children. Section B discusses the many repercussions of parental incarceration, including harms to children, parents, and community members. Section C provides background on United States federal sentencing law.

A. THE PREVALENCE OF FAMILY SEPARATION DUE TO PARENTAL INCARCERATION

Family separation is a pervasive issue, and has been for decades. But the recent increase in the incarceration of women has led to more children with primary caretakers behind bars.[32] When these children have their primary caretaker arrested or incarcerated, their lives can be turned upside down.[33] The larger the pool of incarcerated parents becomes, the more the ripple effects of their incarceration reverberate throughout their families and communities.

1. Mass Incarceration in the United States

The United States is well-known as the top incarcerating nation worldwide.[34] After several decades of a "historically un-

29. *Id.*

30. Loving v. Virginia, 388 U.S. 1, 12 (1967); *see also* Turner v. Safley, 482 U.S. 78 (1987).

31. Troxel v. Granville, 530 U.S. 57, 66 (2000); *see* discussion *infra* Part I.B.2.

32. *See infra* notes 55–58 and accompanying text.

33. *See infra* Part I.A.3.

34. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., COMM. ON LAW & JUSTICE, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis et al. eds., 2014), http://nap.edu/18613. This dramatic growth of incarceration includes both state and federal prisons. Other organizations offer similar statistics. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/GA2C-KTYK] ("The American criminal justice system holds almost 2.3 million people in 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails as well

precedented and internationally unique" increase in incarceration rates,[35] statistics suggest that there are over 2.1 million incarcerated individuals in the United States.[36] The rapid increase in incarceration rates from 1973 (approximately 200,000 people incarcerated) to 2009 (1.5 million people incarcerated)[37] was perhaps somewhat spurred by increasing crime rates,[38] but the dramatic increase in incarceration was likely caused by policy choices that "significantly increased sentence lengths, required prison time for minor offenses, and intensified punishment for drug crimes."[39] The slew of policy decisions that resulted in decades of greater and greater incarceration rates did not drastically decrease the rate of crime;[40] however, and consequentially, it is estimated that nearly 40% of United States state and federal prisoners (roughly 576,000 people) "are incarcerated with little public safety rational"; that is, incarcerating these people does not make the public any safer.[41]

The rapid increase in prison populations has led to overcrowding, underqualified staff, and limited services and programming options for prisoners.[42] Inmates can have a variety of

as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.").

35. NAT'L RESEARCH COUNCIL, *supra* note 34, at 2.

36. *Highest to Lowest - Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All [https://perma.cc/47QB-79TG] (noting that the United States has the highest number of incarcerated individuals in the world at 2,121,600 people, as of January 13, 2020).

37. NAT'L RESEARCH COUNCIL, *supra* note 34, at 2. This is a 750% increase in the population of incarcerated people.

38. *Id.* at 2–3. The homicide rates in the United States increased dramatically in the 1960s and 1970s, peaking in 1980 (10.2 homicides per 100,000 United States residents). ALEXA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 2 (2011), https://www.bjs.gov/content/pub/pdf/htus8008.pdf [https://perma.cc/3AFC-EPQ6]. After peaking again in 1991 (9.8 homicides per 100,000 United States residents), the homicide rate has decreased or remained steady ever since. *Id.*

39. NAT'L RESEARCH COUNCIL, *supra* note 34, at 4; *see also* JAMES AUSTIN & LAUREN-BROOKE EISEN, BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 3–4 (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf [https://perma.cc/U58Y-HYTJ].

40. NAT'L RESEARCH COUNCIL, *supra* note 34, at 3.

41. AUSTIN & EISEN, *supra* note 39, at 7.

42. *See* CRAIG HANEY, THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT 2–3 (2001), https://aspe.hhs.gov/

psychological reactions to incarceration, which may include hypervigilance, "psychological distancing," social withdrawal, or "post-traumatic stress reactions to the pains of imprisonment."[43] If someone already struggles with mental illness (as many prison inmates do[44]), prison conditions can lead to intense psychological stress.[45] In addition to these psychological harms, when a prisoner is released, collateral consequences form regulatory and legal limitations on a formerly incarcerated person's access to occupational licensing, employment, housing, education, voting, and other benefits, rights, and opportunities.[46] On top of these personal harms, parents must bear the burden of bringing economic strain, instability, and mental health issues upon their families.[47]

2. The Surge of Incarceration of Primary Caregivers

According to recent estimates, 2.7 million children have an incarcerated parent.[48] Studies suggest that almost 7% of United States children have lived with a parent who has been incarcerated at some point in the child's life.[49] As of 2007, parents repre-

basic-report/psychological-impact-incarceration-implications-post-prison-adjustment [https://perma.cc/DTP7-WU4P].

43. *Id.* at 4–12 ("[B]ecause many prisons are clearly dangerous places from which there is no exit or escape, prisoners learn quickly to become hypervigilant and ever-alert for signs of threat or personal risk. . . . The alienation and social distancing from others is a defense not only against exploitation but also against the realization that the lack of interpersonal control in the immediate prison environment makes emotional investments in relationships risky and unpredictable. . . . For some prisoners, incarceration is so stark and psychologically painful that it represents a form of traumatic stress severe enough to produce post-traumatic stress reactions once released.").

44. GLAZE & MARUSCHAK, *supra* note 10, at 7 tbl.12 (noting that 56.5% of all parents in state prison have a mental health problem, with a much higher percentage (72.8%) for mothers in state prison who lived with their minor children prior to incarceration).

45. NAT'L RESEARCH COUNCIL, *supra* note 34, at 6.

46. *About*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, https://niccc.csgjusticecenter.org/about/ [https://perma.cc/VT83-GG5G].

47. *See infra* Part I.B.2.

48. This adds up to about one in every twenty-eight children. Doug Hamilton et al., *supra* note 10, at 4. The latest statistics from the United States Department of Justice state that over 1.7 million minor children in the United States had a parent in prison in 2007. GLAZE & MARUSCHAK, *supra* note 10, at 1.

49. This amounts to over five million kids. DAVID MURPHEY & P. MAE COOPER, PARENTS BEHIND BARS: WHAT HAPPENS TO THEIR CHILDREN? 3

sented more than half of the 1.5 million state and federal prisoners in the United States.[50] Over the preceding sixteen years, the percentage of parents in state and federal prison grew by 79%,[51] with a corresponding increase in children with an incarcerated parent at 80%.[52] The percentage of mothers in state and federal prisons increased by 122%,[53] and the increase in children of incarcerated mothers was over 130%.[54]

The incarceration of women, especially at the state and local level, has grown faster than the rate for men since the 1970s; women are now the fastest-growing population of incarcerated people in the United States.[55] The majority of incarcerated women in the United States have minor children (over 60% of women in prison and almost 80% of women in jails),[56] and 5% of women housed in jails are pregnant.[57] In less than two decades, the number of children with a mother in prison has increased 131%.[58]

The majority of incarcerated women are imprisoned for nonviolent offenses.[59] While some have noted that initial analysis of comparative data may suggest that women are given lighter sentences than men, one study demonstrated that "direct comparison of similar sounding crimes often reveals that the woman is

(2015), https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf [https://perma.cc/3JGW-PSM4].

50. GLAZE & MARUSCHAK, *supra* note 10, at 1 (estimating that 809,800 of the total 1,518,535 prisoners in the United States (approximately 53%) were parents as of 2007).

51. *Id.* at 1. This rate was lower than the overall increase in state and federal prison populations during the same time period (92% increase from 1991 to 2007). *Id.*

52. *Id.*

53. *Id.* at 13 app. tbl.1.

54. *Id.*

55. Sawyer, *supra* note 16.

56. HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 15, at 3.

57. *Id.* at 29.

58. GLAZE & MARUSCHAK, *supra* note 10, at 2.

59. Kajstura, *supra* note 14. Percentages of nonviolent female offenders in local jails, state prisons, and federal prisons are 86%, 63%, and 95%, respectively. *Id.* One report declared, "the vast majority of offenses committed by women are relatively minor and non-violent." ROSS PARKE & K. ALISON CLARKE-STEWART, EFFECTS OF PARENTAL INCARCERATION ON YOUNG CHILDREN 12 (2002), https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF [https://perma.cc/M3T7-6NQL].

less blameworthy than her male counterpart" when the offense, offender's prior record, the relationship between the offender and the crime victim, and how the crime was carried out are taken into consideration.[60] When women commit drug crimes, they commonly are low-level actors, serving as mules or assisting male intimate partners in drug conspiracies.[61] Considering how common it is for incarcerated women to be mothers, and to be the primary caregivers of their minor children, coupled with the proportion of total inmates who are unnecessarily incarcerated, and the amount of female offenders who have committed non-violent offenses, it appears that incarcerated mothers are paying a devastating price for a perceived public safety goal that isn't being effectuated.

These incarcerated mothers are often women of color.[62] For parents incarcerated at the state level, mothers were more likely than fathers to report past physical or sexual abuse (four times more likely), homelessness (twice as likely), and medical and mental health problems (one and a half times more likely).[63] The majority of mothers in state and federal prisons had experienced

60. Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 135 (1999).

61. *Id.* A drug mule is "a drug courier who is paid, coerced or tricked into transporting drugs across an international border but who has no further commercial interest in the drugs." EUROPEAN MONITORING CTR. FOR DRUGS & DRUG ADDICTION, A DEFINITION OF "DRUG MULES" FOR USE IN A EUROPEAN CONTEXT 3 (2012), http://www.emcdda.europa.eu/system/files/publications/692/EMCDDA_ThematicPapers_DrugMules_329088.pdf [https://perma.cc./GWX4-4AFM]. The practice of taking advantage of economically disadvantaged women to use them in drug rings is an international issue:

> Almost without exception these [Latin American] women represent the lowest rung of labor in the drug trade. . . . Others become involved in the trade through their emotional ties to men—whether lovers, brothers, or fathers. . . . [Trafficking] is destroying many families, not just the people who consume but also those of us who are in prison because of someone stronger than us, someone who simply used and abused us.

Corina Giacomello, *How the Drug Trade Criminalizes Women Disproportionately*, N. AM. CONGRESS ON LATIN AM. (June 17, 2014), https://nacla.org/article/how-drug-trade-criminalizes-women-disproportionately [https://perma.cc/5CAV-PPNH].

62. Approximately 50% of state inmates who are mothers are White, about 27% are Black, and 15% are Hispanic. GLAZE & MARUSCHAK, *supra* note 10, at 13 app. tbl.2. For federal inmates who are mothers, approximately 36% are White, 29% are Black, and 31% are Hispanic. *Id.*

63. *Id.* at 7.

physical or sexual abuse, mental health problems, and substance dependence or abuse.[64]

The disparities apply to the children of the incarcerated, too. More children of color have parents in prison than White children;[65] reports suggest that Black children are nearly twice as likely to have an incarcerated parent as White children.[66] In addition, rural children, poor children, and children with parents that have limited education are disproportionately affected by parental incarceration.[67] While nearly half of the children of incarcerated mothers in state prisons are nine years old or younger, it is estimated that over one-third of all children will turn eighteen during the course of their parent's incarceration.[68]

3. What Happens to Children When Their Primary Caregiver Is Incarcerated: The Process

A parent's arrest can significantly impact a child, even if the child did not witness the arrest firsthand.[69] The child "may feel shock, immense fear, anxiety, or anger towards the arresting officers or law enforcement in general. . . . [S]uch events can and often do have a negative impact on a child's immediate and long-term emotional, mental, social, and physical health."[70] In addition, this traumatic experience can lead to a higher likelihood that the child will have problems with law enforcement or commit criminal acts in the future.[71]

Upon a parent's arrest, their child (or children) may be left with the other parent, a relative of the child, or a caregiver designated by the parent.[72] Otherwise, law enforcement is supposed

64. *Id.* at 19 app. tbl.12.

65. *Id.* at 2.

66. MURPHEY & COOPER, *supra* note 49, at 4.

67. *Id.*

68. GLAZE & MARUSCHAK, *supra* note 10, at 3.

69. INT'L ASS'N OF CHIEFS OF POLICE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, SAFEGUARDING CHILDREN OF ARRESTED PARENTS 1 (2014), https://www.bja.gov/publications/iacp-safeguardingchildren.pdf [https://perma.cc/6B5K-BRGD].

70. *Id.*

71. *See id.* at 1–2.

72. Different voices have different views on how much weight to give caregiver designation by the parent. A U.S. Department of Justice report notes that:

> Parents have the right to express their preference in where they would like their child to be housed and the person(s) who should provide care and supervision. If the arrested parent has sole custody of the child, he

to arrange for the child to go into the child welfare system.[73] Unfortunately, researchers have noted that many children are "left to fend for themselves in empty apartments for weeks or even months in the wake of a parent's arrest."[74] Fortunately, this issue has caught the attention of the federal government in recent years, and police-created model policy statements identify the importance of considering the possibility of children's involvement before pursuing an arrest,[75] minimizing trauma to children, and "support[ing] a child's physical safety and well-being following an arrest."[76]

> or she should be given a reasonable opportunity to select a caregiver unless the arrest is for child abuse or neglect, . . .

but officers should confirm that designated caregivers have the ability to be appropriate placements for the children. *Id.* at 15–16. Other reports note that the child's placement may be largely dictated by an officer's judgment call; a California research publication states, "[n]early two-thirds of the responding agencies report that they will accept an arrestee's suggested caretaker, at the discretion of the arresting officer. . . . An officer's response is conditioned by limited resources, and depends on the ability of the officer to make a judgment call in the field." MARCUS NIETO, IN DANGER OF FALLING THROUGH THE CRACKS: CHILDREN OF ARRESTED PARENTS 13 (2002), http://www.library.ca.gov/Content/pdf/crb/reports/02-009.pdf [https://perma.cc/RZ37-94TT]. In the case of an arrested mother, it is much more likely in practice that a police officer or sheriff (46% likelihood), or a child protective services worker (46%) will decide if the parent's designated caretaker is suitable than the arrested mother herself (6% likelihood). *Id.* at 14 chart 4; *id.* at p. 54.

73. *See* INT'L ASS'N OF CHIEFS OF POLICE & U.S. DEP'T OF JUSTICE, *supra* note 69, at 15–16; LEGAL SERVS. FOR PRISONERS WITH CHILDREN, INCARCERATED PARENTS MANUAL: YOUR LEGAL RIGHTS AND RESPONSIBILITIES 2 (Carol Strickman et al. eds., 2010), https://www.prisonerswithchildren.org/wp-content/uploads/2013/01/Incarcerated-Parents-Manual.pdf [https://perma.cc/74TL-KWY7]. "Child welfare" is defined as "a continuum of services designed to ensure that children are safe and that families have the necessary support to care for their children successfully." CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., WHAT IS CHILD WELFARE? A GUIDE FOR EDUCATORS 1 (2018), https://www.childwelfare.gov/pubPDFs/cw_educators.pdf [https://perma.cc/8Z97-KK93]. Child welfare agencies often have mechanisms for reporting and addressing child abuse and neglect, arranging for children in unsafe homes to live with other family members or foster families, and handling reunification and adoption. *Id.*

74. GINNY PUDDEFOOT & LISA K. FOSTER, KEEPING CHILDREN SAFE WHEN THEIR PARENTS ARE ARRESTED: LOCAL APPROACHES THAT WORK 9 (2007), https://www.pdx.edu/ccf/sites/www.pdx.edu.ccf/files/CAprojectKeepingChildrenSafeWhenParentsAreArrested.pdf [https://perma.cc/A8RE-VFRY].

75. INT'L ASS'N OF CHIEFS OF POLICE & U.S. DEP'T OF JUSTICE, *supra* note 69, at 12.

76. *Id.* at 8 ("The overriding policy statement of the Model Policy that guides this discussion paper states that: *It is the policy of this department that*

As noted, upon a caregiver's arrest, if neither a parent, relative, or designated caregiver are willing and fit to take the child, then the child goes to a foster care placement.[77] Foster care is a temporary caregiving situation (with care given by the child's relatives, unrelated foster parents, or in a residential placement) provided by the state for parents who cannot care for their children.[78] Foster care may mean instability in a child's placement, and difficulty in maintaining connections to siblings, extended family, friends, school, and their community.[79]

The latest statistics suggest that there are nearly 443,000 children in foster care in the United States every year,[80] with approximately 7% (over 20,000 children) in the system due to parental incarceration.[81] Approximately 3% of parents incarcerated in state prisons have children in foster care,[82] but the gender of the incarcerated parent changes the statistic; for state-incarcerated mothers, children are five times more likely than children of state-incarcerated fathers to be put in foster care.[83]

While all parental incarceration can carry a risk of disruption in children's lives, there are special repercussions that accompany the recent increase in the incarceration of mothers. Around 80% of mothers in federal and state prisons were the primary caregivers of their children prior to incarceration (as op-

officers will be trained to identify and respond effectively to a child, present or not present, whose parent is arrested in order to help minimize potential trauma and support a child's physical safety and well-being following an arrest.").

77. *Id.* at 15–16; LEGAL SERVS. FOR PRISONERS WITH CHILDREN, *supra* note 73, at 2. It should be noted that relatives may also serve as foster parents.

78. Children's Bureau, U.S. Dep't of Health & Hum. Servs., *Foster Care*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/outofhome/foster-care/ [https://perma.cc/4MKZ-WK4Y].

79. CHRISTIAN, *supra* note 21, at 3.

80. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT 1 (2018), https://www.acf.hhs.gov/cb/resource/afcars-report-25 [https://perma.cc/ZH6F-D4QE].

81. *Id.* at 2.

82. GLAZE & MARUSCHAK, *supra* note 10, at 5.

83. *Id.* at 5 (noting that the percentage of state prison-incarcerated fathers who have children cared for in a foster home or agency is 2.2%, whereas the number for mothers is 10.9%).

posed to around 30% of federally- and state-incarcerated fathers).[84] For most fathers who are incarcerated in state prisons, their children are very likely to be cared for by another parent when they become incarcerated (88%), but this is much less likely for incarcerated mothers (37%).[85] Mothers were more likely to be in single-parent households prior to incarceration, leaving no second parent to care for a child when the mother is imprisoned.[86] When a father is incarcerated, the child usually is cared for by their mother; when a mother is incarcerated, the inverse is not nearly as common.

The problem of parental incarceration is expansive, and affects numerous children throughout the United States. These children often suffer through challenging processes, suffer disruptions in their lives and daily routines, and this disruption can impact their development.

B. THE REPERCUSSIONS OF PARENTAL INCARCERATION: THE IMPORTANCE OF FAMILY

Parental incarceration can harm everyone who is impacted by it. The children left behind must scramble to adjust to a life with one less caregiver and financial supporter, in addition to dealing with the stigma of having an incarcerated parent.[87] The incarcerated parent must live with the guilt of those they have left behind, in addition to the typical challenges that come along with incarceration.[88] In addition, community members may suffer from a lost neighbor, friend, or supporter.[89]

1. The Harms to Children

Parental incarceration has a strong correlation with economic strain in children's households, an increased risk of instability in the child's living situation, and a higher likelihood of

84. Around 77% of mothers in state prisons and over 80% of mothers in federal prison were the primary caregivers of their children prior to incarceration; 26% of state-incarcerated fathers and 31% of federally-incarcerated fathers were the primary caregivers of their children prior to incarceration. *Id.* at 16.

85. *Id.* at 5.

86. *Id.* at 4 (noting that of the state prison-incarcerated parents who lived with their minor children prior to arrest or incarceration, 17.2% of fathers reported living in a single-parent home, whereas 41.7% of mothers reported living in a single-parent home).

87. *See infra* Part I.B.1.

88. *See infra* Part I.B.2.

89. *See infra* Part I.B.3.

interaction with the child welfare system.[90] Moving homes, having a non-relative parental figure, divorce, and switching schools can threaten a child's healthy development.[91] Research has linked parental incarceration with health, behavioral, and educational problems; mental and physical health issues can follow these children into their adulthood.[92] Parental incarceration is associated with other Adverse Childhood Experiences (ACEs),[93] which are "exposures that are associated with increased risk for trauma, or toxic stress, particularly when they are cumulative," such as living with someone struggling with substance abuse or mental illness, parental divorce, or witnessing domestic violence.[94] Among children who have had a parent incarcerated, over one-third have been a witness to violence between their parents or guardians.[95] The disruption in the child/parent relationship, long-lasting stress, and replacement care (that may be inadequate) can weigh heavily on children, and disrupt their healthy development.[96] As a result, children may turn to harmful and destructive behaviors, such as withdrawal, physical and verbal aggression, hypervigilance, sexualized actions, fighting, gang involvement, substance abuse, and antisocial characteristics.[97] Further, the stigma of having an incarcerated parent itself is harmful to children.[98] These psychological, physical, financial, and educational hurdles can last even after a child's parent has ended their incarceration.[99]

90. CHRISTIAN, *supra* note 21, at 3.

91. *Id.* at 3.

92. MURPHEY & COOPER, *supra* note 49, at 1–2.

93. *Id.* at 4.

94. *Id.* at 4–5.

95. *Id.* at 4–5. This is in contrast to children without an incarcerated parent, among whom 10% had witnessed violence between their parents or guardians, or witnessed or experienced violence in their neighborhood. *Id.* at 5.

96. COUNCIL ON CRIME & JUSTICE, CHILDREN OF INCARCERATED PARENTS 6 (2006), https://static.prisonpolicy.org/scans/ccj/CCJ%20CIP%20FINAL%20REPORT.pdf [https://perma.cc/9FKR-VG7K].

97. *Id.*

98. *See generally*, MURPHEY & COOPER, *supra* note 49 (explaining such harms).

99. Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 385 (2018) (discussing the "detrimental consequences that can continue even long after a parent has been released").

2. The Harms to Parents

The effects of incarceration on each incarcerated parent and their family can be devastating. While one might think that the overall increase in incarceration has caused an increase in children entering foster care, studies suggest the inverse—the removal of a child *leads to* an increase in criminal activity for their mother.[100] A mother's responsibility for her child can serve as a motivating factor, or a "brake on a parent's destructive behavior . . . Once that brake is removed, destructive behavior accelerates."[101] In contrast, community-based sentencing programs (where a mother is able to avoid incarceration altogether, and can therefore spend time with her children) have demonstrated lower rates of recidivism and better chances of family preservation.[102]

While much attention is paid to the harms on children separated by their parents, less is written about the harms mothers suffer when they are separated from their children. Their experiences can mirror or be impacted by their child's trauma, causing panic, anxiety, and depression.[103] Mothers separated from

100. TIMOTHY ROSS ET AL., HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION, 9–10 (2004), https://www.prisonpolicy.org/scans/vera/245_461.pdf [https://perma.cc/L5W6-2VJU] (concluding that according to a study of New York mothers whose children entered foster care in the fiscal year 1997, "[c]hild removal appears to accelerate criminal activity among the study group's mothers").

101. *Id.* at 14; *see also* DIANA BRAZZELL, USING LOCAL DATA TO EXPLORE THE EXPERIENCES AND NEEDS OF CHILDREN OF INCARCERATED PARENTS 4 (2008), https://www.urban.org/sites/default/files/publication/31861/411698-Using-Local-Data-to-Explore-the-Experiences-and-Needs-of-Children-of-Incarcerated-Parents.PDF [https://perma.cc/L5W6-2VJU] (noting that based on research from Allegheny County, Pittsburgh, "the number of bookings increased steadily in the years before foster care placement, spiked in the year of placement, and continued to rise in the years after placement").

102. COMMONWEALTH OF PA. JOINT STATE GOV'T COMM'N., THE EFFECTS OF PARENTAL INCARCERATION ON CHILDREN: NEEDS AND RESPONSIVE SERVICES, H.R. 203, S. 52, at 24 (2011), https://jsg.legis.state.pa.us/resources/documents/ftp/documents/children%20of%incarcerated%20parents.pdf [https://perma.cc/C5NZ-PNMT] ("According to the survey of 24 community-based programs for mother [sic] and children in 14 states, 'community sentencing programs yielded reduced recidivism and increased family preservation – outcomes that have positive implications for children's adjustment.'"). Visitation alone can decrease recidivism rates for parents. Cyphert, *supra* note 99, at 387.

103. Kimberly Lawson, *The Lasting Impact Family Separation Can Have on Parents*, VICE (July 12, 2018, 2:59 PM), https://broadly.vice.com/en_us/article/j5nqzg/the-lasting-impact-family-separation-can-have-on-parents [https://perma.cc/UVJ8-3GDK].

their children may have suicidal thoughts, risk losing their will to live, discontinue sleeping or eating, or fail to adequately take care of themselves.[104] The pain of incarceration as a parent extends further than the torment of living life behind bars.

Parents placed in jails or prisons are unable to continue caring for their children at home. Consequentially, they run the risk that their children could be removed from their homes (if there is not another, fit parent available to care for them), and eventually their parental rights may be terminated. Removal of a child from their parent/guardian[105] and termination of parental rights[106] are two separate legal processes (although they can certainly be related). Termination of parental rights can happen voluntarily or involuntarily, and is a much longer process.[107] An incarcerated mother can lose her parental rights to her child if her child is in the state's care and the state files a petition for termination of parental rights,[108] if the other parent of the child files for their new spouse to adopt the child, or if a family member cares for the child and requests adoption, proceedings begin.[109] The Adoption and Safe Families Act of 1997 (ASFA)[110] adds further complications; it includes a provision that if a child remains in (non-relative) foster care for fifteen of the last twenty-two months, then the state is required to file a petition for the termination of parental rights and search for a suitable family

104. *Id.*

105. Child removal provisions vary by state. For example, in Minnesota, children may be removed from their parents for various reasons, such as abandonment; physical or sexual abuse (or witness thereof); emotional maltreatment; lacking necessary food, clothing, shelter, education, or other required care; medical neglect; failure to thrive; prostitution; running away; or habitual truancy. MINN. STAT. § 260C.007, subd. 6 (2018).

106. *See Overview of Terminating Parental Rights*, FAMILY LAW SELF-HELP CTR. (2020), https://www.familylawselfhelpcenter.org/self-help/adoption-termination-of-parental-rights/overview-of-termination-of-parental-rights [https://perma.cc/ACN3-25BE] (explaining that termination of parental rights means "the person's rights as a parent are taken away. The person is not the child's legal parent anymore," and listing seven reasons (abandonment, neglect, fitness, risk of injury, token efforts, "Failure of Parental Adjustment," and sexual assault) for termination).

107. *See, e.g.*, § 260C.301.

108. Emily Halter, *Parental Prisoners: The Incarcerated Mother's Constitutional Right to Parent*, 108 J. CRIM. L. & CRIMINOLOGY 539, 551–52 (2018).

109. *Id.* It should be noted that parental rights are not usually terminated immediately upon incarceration. *Id.* at 551.

110. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

for the child's adoption.[111] The average length of an incarcerated parent's stay in state prison is estimated at seven years (and nine years for federal prison), leaving many parents at risk of their state child welfare agency filing termination proceedings.[112] While incarceration alone is not a sufficient reason for severance of parental rights,[113] a parent's inability to care for their children during (and after) incarceration can contribute to termination of parental rights proceedings.[114] Termination of parental rights are ordinarily final; the parent loses their legal relationship with their child.[115]

3. The Harms to the Community

Not every incarceration harms the community from which the incarcerated individual came; community members can benefit when their neighbors who committed crimes are incarcerated.[116] Similarly, when one shares a home with someone who

111. *Id.* at § 103(a)(3). ASFA provides for several exceptions to the 15/22 months rule: termination petitions are not required (1) if a relative is caring for the child, (2) if filing the petition would not be in the child's best interests, or (3) if the state has failed to provide the child's family with adequate reunification services. *Id.*

112. Philip M. Genty, *The Inflexibility of the Adoption and Safe Families Act and Its Unintended Impact upon the Children of Incarcerated Parents and Their Families*, 1 CHILD WELFARE 360° 10, 10 (2008), https://cascw.umn.edu/wp-content/uploads/2013/12/CW360.pdf [https://perma.cc/5L2G-B458]; *see also* GLAZE & MARUSCHAK, *supra* note 10, at 20 (noting that at the time of a 2004 survey, 62.5% of state prison-incarcerated mothers (and 78.9% of federal prison-incarcerated mothers) had served over twelve months already, and 38.2% of state-incarcerated mothers (and 54.4% of federally-incarcerated mothers) had at least twelve months remaining on their current sentence).

113. Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

114. *See* Halter, *supra* note 108, at 551–53 ("Parental rights are generally not terminated at the moment that someone is incarcerated. However, mothers occasionally lose their parental rights during, and as a result of, incarceration . . . . Once a child ends up in the foster system, it is incredibly difficult to get him or her out. . . . [O]nce parental rights are terminated, it is usually final.").

115. *See, e.g.*, *Santosky*, 455 U.S. at 761 ("For the foster parents, the State's failure to prove permanent neglect may prolong the delay and uncertainty until their foster child is freed for adoption. But for the natural parents, a finding of permanent neglect can cut off forever their rights in their child.").

116. Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q.

struggles with substance dependency or is criminally-involved, it can be "enormously stressful and disruptive to healthy family functioning."[117] While some family members may help with caring for children and contributing income, criminally-involved individuals may strain family resources and hinder positive parenting efforts.[118] Still, the high number of incarcerated parents with low-level and nonviolent[119] offenses indicates that many of these incarcerated parents may not be harmful if they stayed in their homes.[120]

Caregivers undergo a major strain when adding another dependent to their lives and homes; suddenly becoming responsible for a child can be "a major, unexpected role transition."[121] While the most common caregiver for incarcerated fathers' children is the other parent, the top caregiver for incarcerated mothers' children is a grandparent (and in particular, a grandmother).[122] Caregivers face a variety of challenges, including the need to change residences with children due to added economic burdens, and difficulty maintaining their jobs.[123] Grandparent caregivers often have their limited physical, emotional, and financial resources strained in their new caregiving role, and may struggle to manage their own needs (such as depression and chronic

33, 38 (2003) (noting that "[i]n a study of two high-incarceration neighborhoods, Rose, Clear, and Ryder (2000) found that while residents benefited from the incarceration of family members and neighbors who were committing crimes, they suffered many losses as well").

117. Turanovic et al., *supra* note 22, at 914, 920 (noting that "if [a] parent was engaging in dangerous or reckless behaviors before imprisonment, then his or her incarceration may allow for the remaining family system to function more positively").

118. *Id.* at 914.

119. PARKE & CLARKE-STEWART, *supra* note 59, at 12; Kajstura, *supra* note 14.

120. It is estimated that over half a million of incarcerated Americans do not pose a risk to public safety. AUSTIN & EISEN, *supra* note 39, at 7.

121. Turanovic et al., *supra* note 22, at 918.

122. GLAZE & MARUSCHAK, *supra* note 10, at 5 (noting that 88.4% of incarcerated fathers in state prison in 2004 had their minor children cared for by the other parent, yet only 37% of incarcerated mothers could say the same. State prison-incarcerated mothers were more likely to have a grandparent (44.9%), usually a grandmother (42.1%), care for their children while incarcerated). Indeed, grandparents have played an important role in childrearing for centuries. Robin McKie, *Wisdom of Grandparents Helped Rise of Prehistoric Man*, GUARDIAN (July 23, 2011, 7:07 PM), https://www.theguardian.com/science/2011/jul/24/prehistoric-man-helped-as-elderly-survived [https://perma.cc/JWZ2-H9X8].

123. Turanovic et al., *supra* note 22, at 917.

health issues).[124] Additional difficulties include guilt over their ability to parent in the place of the missing biological parents, the sensitive topic of petitioning for legal custody of children, and handling particularly difficult children.[125] The consequences of parental incarceration extend beyond merely a parent and child, seeping into extended family and community members' lives.

C. UNITED STATES FEDERAL SENTENCING GUIDELINES AND FEDERAL SENTENCING LAW

Federal sentencing law has several provisions relating to the defendant's caregiving and financial support to their dependents, and for determining whether there would be an adequate replacement for those dependents in the defendant's absence. The Federal Sentencing Guidelines set the bar fairly high, allowing for this to be taken into consideration at the sentencing stage only if the circumstances are "extraordinary" (as in, outside the ordinary consequences of a family member being incarcerated).

Since the advent of the United States Federal Sentencing Guidelines, judges have generally followed the standardized formula it provides for federal criminal sentencing. The Guidelines were closely adhered to for decades, and their pervasive reach continues, even after the Supreme Court declared that federal judges have the discretion to sidestep the Guidelines.

1. The Genesis of the United States Federal Sentencing Guidelines and *United States v. Booker*

The Sentencing Reform Act of 1984 directed the United States Sentencing Commission to create federal sentencing guidelines in order to decrease sentencing disparities and promote proportionality and transparency in sentencing.[126] By 1987, the United States Federal Sentencing Guidelines ("the Guidelines" or "the Sentencing Guidelines") were created, providing federal judges with a uniform guide for determining

124. *Id.* at 918.

125. *Id.*

126. U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS, 1 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf [https://perma.cc/H98W-WRBK].

sentencing outcomes.[127] Judges were bound by the Guidelines,[128] and were forced to work within their framework until the Supreme Court's 2005 case *United States v. Booker*, which shifted the Guidelines from being mandatory on judges to being merely advisory.[129]

In *United States v. Booker*, defendant Freddie J. Booker was found guilty of possession with intent to distribute at least fifty grams of crack cocaine, based on evidence that Booker had 92.5 grams of crack cocaine in his bag.[130] The Sentencing Guidelines directed the judge to sentence Booker to between 210 and 262 months in prison,[131] but at a post-trial sentencing proceeding, the judge concluded that by a preponderance of the evidence Booker was guilty of obstructing justice, and that he had possessed an additional 566 grams of crack cocaine.[132] The obstruction charge and the additional possession mandated a sentence between 360 months and life imprisonment.[133] In the end, "instead of the sentence of 21 years and 10 months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt, Booker received a 30-year sentence" (based on the obstruction and additional possession charges, determined by the judge using a preponderance of the evidence standard, *without* a jury).[134]

The Sixth Amendment, however, gives each defendant protection "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

127. *Id.* at 3.

128. The Operative U.S. Code provision states that:

> Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

18 U.S.C. § 3553 (2000).

129. United States v. Booker, 543 U.S. 220, 227 (2005) (holding that "two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated").

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

which he is charged,"[135] and defendants have "the right to demand that a jury find him guilty of all the elements of the crime with which he is charged."[136] Therefore, the Supreme Court held that when Booker's judge made a determination that affected his sentencing without the jury and with a lower standard of proof, the decision violated the Sixth Amendment.[137] *Booker* therefore morphed the Sentencing Guidelines from requirements placed on judges with limited discretion, to a system that is now "effectively advisory."[138]

In the aftermath of *Booker*, courts use a three-step process with the Guidelines. Courts are instructed to have respectful consideration of the United States Sentencing Guidelines Manual

> (1) in initially calculating the sentencing range;
>
> (2) in considering policy statements or commentary in the Guidelines Manual about departures from the guideline range; and
>
> (3) in considering all of the § 3553(a) factors (which include the guidelines, commentary, and any relevant policy statements in the Guidelines Manual) in deciding what sentence to impose, whether within the applicable range, or whether as a departure or as a variance (or as both).[139]

Despite the discretion the *Booker* decision granted judges in determining sentences, judges have largely continued to follow the Sentencing Guidelines, possibly because a sentence within the Guidelines is often viewed as presumptively "reasonable" on appeal,[140] and judges are concerned about having their decisions overturned,[141] or because they are comfortable and familiar with

135. *Id.* at 230 (quoting *In re* Winship, 397 U.S. 358, 364, (1970)).

136. *Id.* (quoting United States v. Gaudin, 515 U.S. 506, 511 (1995)).

137. *Id.* at 235, 243–44.

138. *Id.* at 245 (Breyer, J., delivering the opinion of the Court in part).

139. U.S. SENTENCING COMM'N, *supra* note 126, at 12.

140. Cyphert, *supra* note 99, at 401 ("[After *Booker*,] [i]n *Rita v. United States*, the Supreme Court [created the presumption] . . . that a sentence within the Guidelines range was a reasonable sentence. . . . [T]he presumption creates a powerful temptation for trial judges (who are understandably not eager to be overturned) to sentence defendants within the Guidelines range."). For an argument that not all Guidelines sentences are automatically "reasonable," see Myrna S. Raeder, *Gender-Related Issues in a Post-*Booker *Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 711 (2006) ("[T]his does not provide an automatic pass for all Guidelines sentences because such an interpretation flies in the face of making the Guidelines discretionary . . . . [T]he [§ 3553(a)] directive to consider . . . the defendant's characteristics . . . seems to render post-*Booker* Guidelines sentences open to reasonableness challenges.").

141. Cyphert, *supra* note 99, at 402–03.

the Guidelines.[142] Therefore, while judges are not required to follow the their ubiquity of its following necessitates a closer look.

2. Federal Sentencing Law and the Sentencing Process

Federal sentencing considers both "utilitarian and retributivist theories of punishment."[143] The Sentencing Guidelines provide that when a judge is considering a defendant's sentence, they should "consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics."[144] Then, "[t]he court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing."[145] In the Criminal Sentencing provision of the United States Code, judges are instructed to consider both the defendant's offense and their personal history and characteristics, and "the need for the sentence imposed" in terms of proportionality, deterrence, and the most effective treatment.[146] While both sources express a desire for retributivism, they also mention taking into account a defendant's personal history and characteristics, including the effect the defendant has on others.[147] The emphasis on calculating both a particular defendant's culpability *and* the effect on public safety underlying

142. Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 155–56 (2014) (suggesting several reasons for judges' adherence to the Sentencing Guidelines, including past experience, cognitive anchoring, and the seemingly "empirical approach" of the Guidelines).

143. Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 75 (2014).

144. U.S. SENTENCING GUIDELINES MANUAL ch. 5, introductory cmt. (U.S. SENTENCING COMM'N 2018).

145. Similarly, the U.S. Code notes that: "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes . . . of this subsection." 18 U.S.C. § 3553(a) (2018). Those purposes note that

> [t]he court, in determining the particular sentence to be imposed, shall consider—. . . (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Id.

146. 18 U.S.C. § 3553 (2018).

147. *See id.*; U.S. SENTENCING COMM'N, *supra* note 144, ch. 5.

these instructions demonstrates overarching objectives of accountability, but also due consideration for the rippling effects the defendant has on their community; retribution is not the singular goal of the United States federal sentencing regime.

Most federal sentencing proceeds in the following manner: a defendant agrees to plead guilty (often in order to gain access to the benefits of a prosecutor's plea deal) and then the defendant presents a "factual basis" to the court (admitting to the basic components of the offense).[148] The court tells the defendant the range of potential punishment, based on the Sentencing Guidelines.[149] To use the Sentencing Guidelines, judges identify the crime committed, consider any relevant history (the criminal record) of the defendant, and locate the box on a grid corresponding to the recommended range of months of imprisonment.[150] Certain situations or characteristics of a defendant may cause the judge to assign a sentence above or below the recommended window. These aggravating or mitigating factors that affect sentencing outcomes are referred to as "departures" or "variances."[151]

Under the Sentencing Guidelines Section 5H1.6, consideration of a defendant's "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted,"[152] which has usually been interpreted to mean that family ties may only cause an adjustment if the familial responsibilities are of an *extraordinary* nature.[153] "Extraordinary" is

148. U. S. SENTENCING COMM'N, *supra* note 126, at 5 ("Over 95% of federal defendants convicted of a felony or Class A misdemeanor offense are adjudicated guilty based on a guilty plea rather than on a verdict at a trial.").

149. *Id.*

150. U.S. SENTENCING COMM'N, *supra* note 144, § 1B1.1.

151. *Id.* ch. 1, pt. A(1)(4)(b). A "departure" is a non-Guidelines sentence (that is, a sentence not within the assigned Guidelines range for the offense) due to a provision in Chapter Four ("Criminal History and Criminal Livelihood") or Chapter Five ("Determining the Sentence") of the Sentencing Guidelines; similarly, a "variance" is a non-Guidelines sentence due to consideration of the 18 U.S.C. § 3553(a) factors. *See* U.S. SENTENCING COMM'N, *supra* note 144, at v; United States v. Valenzuela-Perez, 812 F. Supp. 2d 1274, 1277 (D.N.M. 2011).

152. U.S. SENTENCING COMM'N, *supra* note 144, § 5H1.6.

153. *See* United States v. Dyce, 91 F.3d 1462, 1466 (D.C. Cir. 1996) (declaring that "the 'extraordinary' can be defined only in relation to the 'ordinary'; and at the risk of belaboring the obvious, we add that ordinary family responsibilities can be very great"). See discussion *infra* Part II.A.1 for further detail on Section 5H1.6 Family Ties and Responsibilities departures.

not clearly defined,[154] and the interpretations have not been consistent.[155] Although the Sentencing Guidelines are merely advisory for judges, in practice, some Circuits have continued to stick with the "extraordinary" criteria, while others have been more open-minded to considering family ties as a mitigating factor at sentencing.[156]

After determining the Sentencing Guidelines range, the court decides whether to implement the sentence bargained for in the plea deal, or amend the sentence.[157] The United States Sentencing Commission recommends that the court wait until after it has reviewed the presentence report before accepting the plea deal.[158] The presentence report, ordinarily created after the guilty plea hearing, includes information taken during a presentence interview about "a wide variety of matters concerning the defendant's offense or offenses of conviction and related uncharged criminal conduct, criminal history, personal history (including family history and substance abuse history), financial circumstances, and numerous other issues potentially related to the court's sentencing decision."[159] The presentence report lists the offense and the defendant's information, the punishment range from the Sentencing Guidelines, and "any bases that may

154. *See* United States v. Lacarubba, 184 F. Supp. 2d 89, 93 (D. Mass. 2002) ("How does this human being compare to others the trial court has seen? . . . How atypical does he or she *have* to be . . . ? Where *ought* the line between typical and atypical be? No bright line rule was announced by the Commission; none can be announced by a court."); Tracy Tyson, *Downward Departures Under the Federal Sentencing Guidelines: Are Parenthood and Pregnancy Appropriate Sentencing Considerations?*, 2 S. CAL. REV. L. & WOMEN'S STUD. 577, 595–96 (1993) ("Because the Commission never states the extent to which it considered family ties and responsibilities, 'there is really no way of knowing whether or not the Commission would view the circumstance of this case as "unusual."' . . . The result is a[n] erratic group of sentencing decisions lacking an underlying policy." (quoting United States v. Ryan, 866 F.2d 604, 610 (3d Cir. 1989)).

155. *See, e.g.*, Jason Binimow, Annotation, *Downward Departure from United States Sentencing Guidelines (U.S.S.G. §§ 1A1.1 et seq.) Based On Extraordinary Family Circumstances*, 145 A.L.R. FED. 559 (updated 2020) (cataloguing cases from 1988 to 2018 that were either granted or denied a downward departure based on extraordinary family circumstances); *see also* Tyson, *supra* note 154, at 596–99 (reviewing "an erratic body of decisional law").

156. Cyphert, *supra* note 99, at 404–07; *see infra* note 198 (discussing the Second Circuit's receptiveness to family ties and responsibilities departures).

157. U.S. SENTENCING COMM'N, *supra* note 126, at 5.

158. *Id.* at 5–6.

159. *Id.*

exist for imposing a sentence outside of the applicable range."[160] A sentencing hearing follows, where the court may hear information regarding mitigating factors, before orally announcing a sentence.[161] These mitigating factors, including "extraordinary" family ties and responsibilities, can make a dramatic difference in the outcome of a defendant's case, as sentences entailing dozens of months in prison can be downgraded to result in probation instead.[162]

II. THE LIMITED CONSIDERATION OF FAMILY SUPPORT AND CAREGIVING UNDER FEDERAL SENTENCING LAW

Many courts continue to utilize the "extraordinary" analysis when considering downward departures for family ties and responsibilities, either under the Federal Sentencing Guidelines or federal sentencing law.[163] This analysis does not have clear direction for implementation, is inconsistently applied, and weighs a family's uniqueness more heavily than their need for support. Yet, both before and after *United States v. Booker* (when the Federal Sentencing Guidelines went from mandatory to advisory), some federal courts have instead employed a "replaceability" test to evaluate whether the defendant's absence creates such negative collateral consequences on their families as to deserve a downward departure at sentencing.[164] This takes a step away from reviewing the culpability of the defendant, and a step towards according due weight to the effects on incarceration on the defendant's family.[165] By overlooking the "replaceability" test, judges miss out on an opportunity to save children from unnecessary parental incarceration and the accompanying consequences.

160. *Id.* at 6. The imposition of a "sentence outside of the applicable range" is, as previously mentioned, called a "variance" or a "departure." *Id.*

161. *Id.* at 6–7.

162. *See, e.g.*, United States v. Kon, No. 04 CR, 271-03 (RWS), 2006 WL 3208555 at *1, *3–4, *6 (S.D.N.Y. Nov. 2, 2006) (noting a defendant who pled guilty to two drug-related felonies, which yielded a Guidelines range of thirty to thirty-seven months of imprisonment, but due to a successful downward departure, the defendant was only sentenced for one day of incarceration (which she had already served) and three years of supervised release).

163. *See, e.g.*, *id.* at *4–5.

164. *See e.g.*, United States v. Lacarubba, 184 F. Supp. 2d 89, 98 (D. Mass. 2012).

165. *See id.*

A. HOW PARENTS FIT INTO THE FEDERAL SENTENCING REGIME AFTER *BOOKER*

As mentioned above, the Federal Sentencing Guidelines leave a small pathway[166] for family ties and responsibilities to be considered at sentencing, but only under extraordinary circumstances. The judicial discretion involved in determining what suffices as "extraordinary" can lead to advantageous outcomes for some, but the inconsistency in its application hurts many others. As the Guidelines have been demoted and lessened in their authority, judges have considered utilizing other sentencing provisions to use a defendant's status as a parent as a mitigating factor in sentencing.[167] Still, the judicial landscape is rife with inconsistent practices: some judges depart under Section 5H1.6 of the Guidelines, while others apply variances under 18 U.S.C. § 3553(a).[168] Whatever provision a sentencing judge uses, the "extraordinary" analysis continues to be used.[169]

1. Departures: Sentencing Guidelines Section 5H1.6, Family Ties and Responsibilities

The Commentary to Section 5H1.6 of the Federal Sentencing Guidelines notes that when a judge is determining if a downward departure is appropriate in cases involving loss of caregiving or financial support, they should consider (1) whether the

166. This pathway may appear narrow when courts observe a rigorous definition of "extraordinary" family circumstances, but latest statistics demonstrate that for all federal sentences granted downward departures from the Guidelines range, "Family ties and responsibilities (§ 5H1.6)" was the sixth most popular reason, with 1,697 cases departed for that reason (which constitutes 4.0% of the total 42,387 reasons given for downward departures in fiscal year 2018, and of the total 69,425 federal cases in fiscal year 2018, there were 16,179 in which downward departures were granted). WILLIAM H. PRYOR JR. ET AL., *Reasons Given by Sentencing Courts for Downward Departures from the Guideline Range*, *in* 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 104, 104 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf [https://perma.cc/6G9G-C7S8].

167. *See, e.g.*, United States v. Valenzuela-Perez, 812 F. Supp. 2d 1274, 1277 (D.N.M. 2011) (considering both the Sentencing Guidelines and 18 U.S.C.A. § 3553(a) in analyzing the defendant's children's struggles).

168. *See id.* ("'Variance' and 'departure' are of course terms of art, and though the outcome—a non-guidelines sentence—might be the same, different analyses are required. A departure involves application of Chapter 4 or 5 of the sentencing guidelines [such as § 5H1.6], while a variance involves consideration of the sentencing factors in 18 U.S.C. § 3553(a)." (citations omitted)).

169. *See infra* notes 170–77 and accompanying text.

sentence "will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family,"[170] (2) whether "[t]he loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant,"[171] (3) if there is "no effective remedial or ameliorative programs" available, "making the defendant's caretaking or financial support irreplaceable[172] to the defendant's family,"[173] and (4) if "[t]he departure effectively will address the loss of caretaking or financial support."[174] Notably, these criteria point to the effect that the defendant's presence or absence has on their family members,[175] not on their culpability for the crime they have been charged with.[176]

170. U.S. SENTENCING COMM'N, *supra* note 144, § 5H1.6.

171. *Id.*

172. One judge noted the challenge in determining the exact meaning of the powerful words in these criteria, focusing on "irreplaceable":

> But this enterprise is not about word games. I see a continuum of cases representing the adverse impact a defendant's incarceration can have on innocent dependants [sic], from the 'ordinary burdens' to 'significantly' more burdens than usual. The issue is at what point on that continuum burdens are imposed on innocent dependents that are simply not justified by our legitimate need to punish the wrongdoer, that are cruel and unnecessary.

United States v. Lacarubba, 184 F. Supp. 2d 89, 98 (D. Mass. 2002).

173. U.S. SENTENCING COMM'N, *supra* note 144, § 5H1.6.

174. *Id.*; *see also* United States v. Martinez, No. CR 09-3078 JB, 2011 WL 6828055, at *5 (D.N.M. Dec. 19, 2011) (considering "substantial, direct, and specific loss of essential caretaking, or essential financial support" as a factor as the court addressed the appropriateness of "a departure for the loss of caretaking or financial support to the defendant's family").

175. *See* United States v. Trinidad-Toledo, No. CR 06-1646 JB, 2007 WL 506190, at *5 (D.N.M. Jan. 16, 2007), *aff'd*, 260 F. App'x 74 (10th Cir. 2008) ("An examination of the cases denying the departure reveals that a primary consideration is the extent the individual is needed in the home.").

176. Some courts have noted that incarceration, despite its collateral consequences on family members, is simply the cost a defendant must pay for committing a crime. *See, e.g.*, United States v. Reed, 859 F.3d 468, 473 (7th Cir. 2017) ("Every sentencing judge knows that a prison sentence will impose hardships on an offender's family. Every judge has heard heartrending accounts of those hardships. The most common response is to . . . [note that] the hardship was caused by the offender's decision to commit the crimes for which he is being sentenced."); United States v. Schroeder, 536 F.3d 746, 756 (7th Cir. 2008) ("That's an unfortunate thing that's happened to your family [regarding a sick child with no alternative caregiver], but the fact that [the defendant is absent] . . . is something based on conduct [the defendant] chose to commit. And I

Many have requested downward departures under Section 5H1.6 (Family Ties and Responsibilities), and despite a freedom to deviate from the Guidelines, judges oftentimes hold fast to the "extraordinary" bar that has been set.[177] Even with this adherence, the interpretation of "extraordinary" varies widely across courtrooms. Courts note that an "extraordinary" case is a situation "outside the heartland of similarly situated defendants."[178] Courts often find the incarceration of single parents and primary caregivers the norm, noting that "[a] sole, custodial parent is not a rarity in today's society . . . . [I]n many cases . . . the children will have to live . . . in foster homes. . . . [The defendant]'s situation, though unfortunate, is simply not out of the ordinary."[179]

One court recently noted that it would be willing to depart in "a situation where the young child has serious health problems and requires constant care,"[180] or "if there was no mother or other family members present to care for the child."[181] Yet, a defendant with three minor children suffering from various physical and mental health problems,[182] a single mother of two

expressly reject that as a consideration that should somehow mitigate his sentence."). Other courts have mentioned a concern for proffering special treatment to defendants who are parents. *See, e.g.*, United States v. Stefonek, 179 F.3d 1030, 1038 (7th Cir. 1999) ("Imprisoning the mother of a child for even a short period of time is bound to be a wrenching experience for the child, but the guidelines do not contemplate a discount for parents of children.").

177. *See supra* note 176 and accompanying text.

178. *Trinidad-Toledo*, 2007 WL 506190, at *5; *cf.* United States v. Dominguez, 296 F.3d 192, 195 (3d Cir. 2002) ("Whether a particular case is appropriate for downward departure is a question of its lying 'outside the heartland,' that is, outside the ordinary. . . . There is no requirement that the circumstances be *extra*-ordinary by any particular degree of magnitude . . . . [The circumstances need not be] extra-extraordinary (*i.e.*, 'truly extraordinary' or 'so extraordinary').").

179. United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990); *see* United States v. Sweeting, 213 F.3d 95, 103 (3d Cir. 2000) ("[T]he unfortunate reality [is] that single parents often commit crimes requiring incarceration.").

180. United States v. Justice, No. CR 09-3078 JB, 2012 WL 394455, at *11 (D.N.M. Jan. 23, 2012).

181. *Id.*; *see also* United States v. Rivera, 994 F.2d 942, 948 (1st Cir. 1993) ("It may not be unusual, for example, to find that a convicted drug offender is a single mother with family responsibilities, but, at some point, the nature and magnitude of family responsibilities (many children? with handicaps? no money? no place for children to go?) may transform the 'ordinary' case of such circumstances into a case that is not at all ordinary.").

182. United States v. Valenzuela-Perez, 812 F. Supp. 2d 1274, 1276–77 (D.N.M. 2011).

whose children would go into foster care,[183] and a defendant who was a single mother of five (including a child with a neurological disorder)[184] were denied downward departures. These inconsistent outcomes result in some defendants benefiting from the criteria, while many others are left in the dust.[185]

2. Variances: Defendant's History and Characteristics Under 18 U.S.C. § 3553(a)

One court explained the shift from utilizing Section 5H1.6 of the Guidelines to 18 U.S.C. § 3553(a) sentencing factors for family tie evaluations by noting that "[a]lthough '[t]he concept of departures has been rendered obsolete in post-*Booker* sentencing . . . the district court may apply those departure guidelines by way of analogy in analyzing the section 3553(a) factors.'"[186] Thus, courts have treated § 3553(a) somewhat similarly to the pre-*Booker* Section 5H1.6 analyses.[187] Federal courts are instructed to "apply the factors set forth in 18 U.S.C. § 3553(a) in

183. *Brand*, 907 F.2d at 33–34.

184. *Sweeting*, 213 F.3d at 97, 101–02 (denying a downward departure for a single mother of five minor children, the oldest of which suffered from Tourette's Syndrome).

185. The *Huerta* court listed a number of cases that were or were not granted downward departures. United States v. Huerta, 371 F.3d 88, 94 (2d Cir. 2004). The *Huerta* court noted that they granted downward departures in the following cases: "where defendant was sole provider for his wife (who had a 'limited earning capacity' because of her difficulty speaking English) and their two children (ages 8 and 9)"; "where the defendant was the sole caretaker for her three children and the young child of her institutionalized daughter"; and "where the defendant and his wife were responsible for caring for their two daughters (ages 4 and 11), the defendant's disabled father (who depended on the defendant to help him in and out of his wheelchair) and the defendant's grandmother." *Id.* The court then noted situations where a downward departure was not granted, including a case where there were nearby family members that could assist the defendant's wife with childcare; a case where five of the defendant's six children were over eighteen, and there was evidence that family members were available to care for the minor child; and a case where the defendant's child did not live with him and his ex-wife earned a $40,000 salary). *Id.* at 95.

186. United States v. Schroeder, 536 F.3d 746, 756 (7th Cir. 2008) (second and third alterations in original) (quoting United States v. Miranda, 505 F.3d 785, 792 (7th Cir. 2007)).

187. It should be noted that § 3553(a) explicitly references the Guidelines as a factor for judges to consider. *See* 18 U.S.C. § 3553(a) (2018) ("The court, in determining the particular sentence to be imposed, shall consider—. . . (4) the kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ."); *see also* Dan Markel et al., *Criminal Justice and*

determining whether to apply a sentence within the advisory guidelines range,"[188] including "the history and characteristics of the defendant."[189] Yet, one federal Circuit Court of Appeals acknowledged that while the § 3553(a) factors effectively replaced Section 5H1.6 commentary, the court still focused on the same aspects (namely, pointing out that "the relevant inquiry is the effect of the defendant's absence on his family members").[190] Despite the different verbiage in § 3553(a) focusing on the *defendant*'s history and characteristics, courts continue to consider the effect of the defendant's presence or absence on *family members* when making family responsibility-related decisions.

B. *UNITED STATES V. HUERTA* AND *UNITED STATES V. KON*: DEFENDANT'S IRREPLACEABILITY

In *United States v. Huerta*,[191] defendant-appellee Albert Huerta pleaded guilty to two counts of conspiring to submit and submitting false statements relating to health care matters.[192] Huerta had two minor children, an unemployed wife, and provided financial, moral, and physical caretaking support to his disabled and uninsured father.[193] In considering a Section 5H1.6 Family Ties and Responsibilities claim,[194] the Second Circuit was dismayed that the district court failed to expressly address the replaceability of Huerta's roles as a physical, emotional, and financial caretaker for his child and family.[195] The court highlighted how crucial replaceability was to its determination regarding if a downward departure in the defendant's sentence was appropriate: "this factor—the absence or presence of adults who can step in during the defendant's incarceration to assist

the Challenge of Family Ties, 2007 U. ILL. L. REV. 1147, 1174 ("[C]ourts are awarding more downward departures than previously. In the post-*Booker* world . . . '[c]onsideration of family responsibilities' may now be viewed as part of a defendant's 'history and characteristics,' and judges can assess those traits as reasons to mitigate the length of sentences." (third alteration in original) (footnotes omitted) (quoting 18 U.S.C. § 3553(a)(1))).

188. *Schroeder*, 536 F.3d at 755 (quoting *Miranda*, 505 F.3d at 791).

189. 18 U.S.C. § 3553(a)(1).

190. *Schroeder*, 536 F.3d at 756.

191. 371 F.3d 88 (2d Cir. 2004) (per curiam).

192. *Id.* at 90.

193. *Id.* at 94.

194. *Huerta* was decided in 2004, before *United States v. Booker* was decided in 2005; therefore, the court's analysis was rooted in the Sentencing Guidelines, and the court performed its analysis under Section 5H1.6. *See id.*

195. *See id.* at 94–95.

with caring and providing for the defendant's dependents—is a central part of the extraordinary family circumstances inquiry."[196] Because the court could not tell if Huerta's wife could sustain the family business in Huerta's absence, or if other adult family members could assist financially or with childcare, the court remanded the case to the district court to determine these facts.[197] What would happen to his dependents in his absence was a major concern for the court.

After *Booker*, another federal court expressed a keen interest in the replaceability of a defendant's caretaking and financial support. In *United States v. Kon*,[198] defendant Yit Tin Kon pleaded guilty to two felonies related to the possession of and intention to distribute MDMA.[199] Kon had a two-year-old child with her husband (who also happened to be her co-defendant in the case) from whom she had separated shortly after they were both arrested.[200] After the separation, their daughter resided with Kon.[201] Her husband provided no financial support to them,

196. *Id.* at 95.

197. *Id.*

198. United States v. Kon, No. 1:04-CR-00271, 2006 WL 3208555 (S.D.N.Y. Nov. 2, 2006). *Kon*, similarly to *Huerta*, was decided within the Second Circuit. Other scholars have noted that the Second Circuit has historically been one of the most receptive to family ties and responsibilities departures. *See, e.g.*, Alan Ellis & Samuel A. Shummon, *Let Judges Be Judges! Post-*Koon *Downward Departures, Part 7: Family Ties and Responsibilities*, CRIM. JUST., Summer 1999, at 48, 50 ("Among the circuits, the Second Circuit has been the most receptive to downward departures for family ties and responsibilities; in comparison with other circuit courts, it does not second-guess the factual findings of the lower courts concerning the extraordinary nature of the defendant's family circumstances."); Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 942–43 (1993) ("The Second Circuit has been favorably inclined towards family based departures. . . . Numerous district court cases within the Second Circuit have granted departures for single mothers both before and since [*United States v.*] *Johnson*, and the Second Circuit has virtually invited family ties departures for males and females." (footnote omitted)); Karen R. Smith, United States v. Johnson*: The Second Circuit Overcomes the Sentencing Guidelines' Myopic View of "Not Ordinarily Relevant" Family Responsibilities of the Criminal Offender*, 59 BROOK. L. REV. 573, 607 (1993) ("Among the circuits, the Second Circuit seems the most receptive to the development, even encouragement, of downward departure jurisprudence in [the family ties] area.").

199. *Kon*, 2006 WL 3208555, at *1.

200. *Id.* at *2.

201. *Id.*

had "little to no contact with Kon or their daughter," and threatened Kon that her child would be taken away from her.[202] Kon, an immigrant from Malaysia with a junior high education and a job washing hair at salons, did not have any immediate family in the United States to assist with childcare.[203]

The *Kon* court acknowledged that in the wake of *Booker*, it was obliged to impose a sentence based on consideration of § 3553(a) factors, and one such factor was the Guidelines.[204] First, the court performed a Guidelines calculation: based on Kon's offenses, her acceptance of responsibility, and her criminal history, the Guidelines yielded a range for imprisonment at thirty to thirty-seven months; a range of supervised release for at least three years; and an ineligibility for probation.[205] Then, the court turned to the remaining factors of § 3553(a), including "the history and characteristics of the defendant,"[206] which led the court to consider "Kon's extraordinary family circumstances" as the sole caretaker for her toddler, without family members available for assistance.[207] The court recognized its precedents for imposing downward departures when incarceration would "wreak extraordinary destruction" on the dependents that a defendant would have to leave behind in the case of imprisonment.[208] The *Kon* court looked to the *Huerta* court for the "standard for weighing the severity of the impact of a defendant's incarceration upon a family's circumstances," reiterating the importance of considering a defendant's irreplaceability in caregiving and providing for their dependents.[209] The *Kon* court noted:

> While the *Huerta* court emphasized that all families suffer when a family member is incarcerated for any length of time, that expected degree of suffering is exacerbated exponentially when no other adult in the family can provide alternative means of assistance or support for the defendant's dependents. . . . [W]hen no such reasonable alternative is available, and the defendant is the sole care-taker of his or her dependents, a sentencing court can exercise its discretion under a finding of extraordinary family circumstances.[210]

202. *Id.*
203. *Id.*
204. *Id.* at *1.
205. *Id.* at *3–4.
206. *Id.* at *4 (quoting 18 U.S.C. § 3553(a)(1) (2018)).
207. *Id.*
208. *Id.* (quoting United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992)).
209. *Id.* at *5.
210. *Id.*

The court then found extraordinary circumstances sufficient for either a downward departure under Section 5H1.6 or a non-Guidelines sentence pursuant to the defendant's history and characteristics under § 3553(a)(1).[211] After consideration of the other § 3553(a) factors (including "the need for the sentence to reflect the seriousness of the offense"[212] and "provid[ing] adequate general and specific deterrence,"[213]) Kon was given a non-Guidelines sentence of one day of incarceration (which she had already served by that point) and three years of supervised release.[214]

The *Kon* court solidified that even after *Booker*, the Second Circuit's test for extraordinary family circumstances (under either Section 51H.6 or § 3553(a)) was a defendant's replaceability as a caregiver and provider for their dependents. *Kon* wasn't the only court to highlight the importance of a defendant's irreplaceability, but the fact that *Kon* occurred after *Booker* sends a message to other federal courts that the irreplaceability test is still a valid standard to use.[215] The old "extraordinary" test needlessly focused on the unusualness of a family's circumstances, as

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at *6.

215. Several other courts have also focused on irreplaceability in making sentencing decisions. *See, e.g.*, United States v. Daidone, 124 F. App'x 677, 679 (2d Cir. 2005) (citing six additional cases that consider defendant's irreplaceability for their dependents); United States v. Roselli, 366 F.3d 58, 68 (1st Cir. 2004) ("[W]e have upheld departures in limited circumstances where a defendant was so irreplaceable that incarceration would cause exceptional hardship to his family."); United States v. Pereira, 272 F.3d 76, 82 (1st Cir. 2001) ("[C]ourts have affirmed departures where the evidence established that the care rendered by the defendant was irreplaceable."); United States v. Haversat, 22 F.3d 790, 797 (8th Cir. 1994) (granting a downward departure where husband was an "irreplaceable" part of his wife's treatment plan for her "severe" and "potentially life threatening" psychiatric problems); United States v. Sclamo, 997 F.2d 970, 972, 974 (1st Cir. 1993) (affirming a downward departure where the minor child with whom defendant lived, who suffered from psychological disorders, "would risk regression and harm if defendant were incarcerated" and defendant's "continued presence was 'necessary for [the child's] increasing progress'"); United States v. Davis, No. 3:06-CR-00111, 2006 WL 2165717, at *2 (D. Conn. July 31, 2006); United States v. Roberts, No. 01-CR-410, 2005 WL 1153757, at *7 (S.D.N.Y. May 16, 2005) ("[Defendant] has satisfied the Second Circuit's *Huerta* test."); United States v. Lacarubba, 184 F. Supp. 2d 89, 91 (D. Mass. 2002) ("Before a court . . . can depart downward for 'extraordinary family obligations' the trial court must measure the defendant against all other defendants, no matter

opposed to the family's needs, and was not consistently or clearly implemented. In contrast, the "irreplaceability" test provides an opportunity to take the defendant's support for their dependents into account and gives greater weight to a defendant's role as a caregiver. This allows for consideration of what the effects of incarceration will be for a defendant's dependents and a chance to mitigate the harm to the family. A more widespread use of the "irreplaceability" test could increase the number of parents who are able to stay in their homes with their families, instead of being needlessly incarcerated.

III. A JUDICIAL TOOL FOR FEDERAL DOWNWARD DEPARTURES: PRESUMING REASONABLENESS IN ABSENCE OF REPLACEMENT CARETAKER OR PROVIDER CASES

Parents who provide care and financial support to their dependents face an uphill battle in proving their circumstances to be sufficiently "extraordinary" to cause a judge to deviate from normal sentencing patterns. As with other areas involving judicial discretion, the differing methods of analysis lead to a lack of clarity for parties and inconsistent outcomes across jurisdictions. Fortunately, several remedies have been proposed to address this issue. This Part will review prior scholarship on ideas to bring greater justice into this realm, as well as propose a novel solution based on federal precedent. Section C will also address counterarguments related to the disparate treatment of similarly situated defendants.

A. SUGGESTED SOLUTIONS TO THE PARENTAL INCARCERATION PROBLEM: A REVIEW

As the era of mass incarceration continues, and the proportion of incarcerated mothers increases, conversation around the issue of incarcerated parents and the effects on their children has grown.[216] It is not merely the fact that many parents are being incarcerated that is concerning, but rather that there are pathways judges may take to avoid incarcerating parents or to incarcerate them for shorter lengths of time (in appropriate situations) that are not utilized, and the result is parents needlessly incarcerated (and children needlessly separated from their

the crime of his or her conviction, and determine whether he or she is 'irreplaceable.'").

216. *See supra* Part I.A.2.

parents). Other scholars have researched and detailed several proposed solutions to address this issue, and they deserve mention here.[217] These solutions offer practical and innovative remedies to address excessive parental incarceration, but some of them may prove difficult to implement.

1. Amending the Federal Sentencing Guidelines (Section 5H1.6)

Emily W. Andersen advocates for an amendment to Section 5H1.6 of the Guidelines, which would lead to greater consideration of alternatives to incarceration.[218] One (seemingly) simple solution to address the inconsistent interpretation of "extraordinary" circumstances among jurisdictions,[219] while highlighting the importance of family responsibilities, is to amend the Guidelines to allow for a lower bar than "extraordinary."[220] Although the Guidelines are no longer binding on federal judges, because

217. Note that these solutions, and indeed this Note, focus on federal sentencing and federal solutions to this issue. While most incarceration happens at the state and local level, *see* Sawyer & Wagner, *supra* note 34 (noting that approximately 83% of people incarcerated in the United States are in local jails or state prisons), federal systems can have far-reaching impact by influencing state policymakers. For a discussion of how states have adopted similar schemes, see Markel et al., *supra* note 187, at 1175–78.

218. *See* Emily W. Andersen, Note, *"Not Ordinarily Relevant": Bringing Family Responsibilities to the Federal Sentencing Table*, 56 B.C. L. REV. 1501, 1530–33 (2015). In addition to amending Section 5H1.6, Anderson asserts "revisions to section 5H1.6 should indicate that, in some circumstances, alternative sentences can and should be considered. . . . Such alternatives may provide a more efficient way of achieving the same result—punishment of an offender—without causing negative impacts on an offender's family." *Id.* at 1532–33 (footnote omitted). Andersen also advocates for family impact statements to be added to presentence investigation reports. *See id.* at 1533–35.

219. *See id.* at 1521 ("This interpretive disparity [concerning 'extraordinary' circumstances] has persisted even after the U.S. Supreme Court rendered the Guidelines advisory in 2005, in *United States.* [sic] *v. Booker*."). "Revising the Guidelines would resolve discrepancies in courts' interpretations of extraordinary or unusual family ties." *Id.* at 1531.

220. The Guidelines, which currently read, "In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted," U.S. SENTENCING COMM'N, *supra* note 144, § 5H1.6, could be edited to strike "not ordinarily relevant" and replace it with "may be relevant."; *see also* Andersen, *supra* note 218, at 1531–32.

many federal judges continue to follow the Guidelines,[221] and they continue to be considered under § 3553(a) analysis, amending the Guidelines to more explicitly provide for a judge's consideration of a defendant's role in the lives of their dependents will likely lead to more judges taking the analysis more seriously.

While this suggestion is appealing, Amy B. Cyphert notes several concerns with its implementation.[222] First, amending the Guidelines may bring about debates regarding unfair treatment for similarly situated defendants;[223] the "extraordinary" bar served as a gatekeeper, making downward departures for family ties an exception, not the rule. Lowering the standard could create a scheme where parents are systematically favored. Second, critics may assert that too many parents or caregivers may be eligible for the departure, incentivizing those who have committed (or plan to commit) crimes to become pregnant as a get-out-of-jail-free card.[224] Finally, Cyphert highlights the unlikelihood of successful legislative and administrative action given the current political climate.[225]

221. *See* Cyphert, *supra* note 99, at 402 (noting that since *Booker*, judges sentencing defendants within the Guidelines (or below the range after a request from the government) has "stabiliz[ed] at above eighty percent").

222. *Id.*

223. *Id.* at 410–11 ("The question of whether parents should receive a lessened or alternative sentence because of their status as parents is . . . a controversial one. Some commentators have argued that to do so would be to violate principles of equal protection, and even incentivize . . . 'irreplaceable caregivers' . . . to engage in criminal behavior." (footnote omitted)).

224. *Id.* at 406 ("In its opinion, the court noted federal courts' reluctance to grant downward departures where female defendants became pregnant subsequent to their arrests or convictions, in part because to do so is to 'send[] an obvious message to all female defendants that pregnancy is 'a way out.'" (alteration in original) (quoting United States v. McMahill, No. 06-216, 2013 WL 2186981, at *3 (W.D. Pa. May 21, 2013))).

225. *See id.* at 413 ("[P]rogress on these issues is increasingly unlikely under the Trump Administration . . . ."). Cyphert further explains that "the Sentencing Commission seeking amendment of a legislative provision from Congress, Congress following through, the Commission recommending the appropriate amendment to the Guidelines as a result, and Congress approving the amendment—is extraordinarily unlikely in the foreseeable future." *Id.* at 416.

2. Family Impact Assessments in Presentence Investigation Reports

Andersen (and others[226]) also argues for incorporating family impact assessments into the sentencing process through presentence investigation reports by amending Rule 32 of the Federal Rules of Criminal Procedure.[227] A family impact statement is a set of questions incorporated into presentence investigation reports to solicit information regarding the defendant's children and family members, as well as his or her roles in and responsibilities to the family.[228] Family impact statements help decisionmakers by providing more information about the defendant's family, as well as the roles and contributions the defendant provides, and what the potential effect would be if the defendant were incarcerated.[229] Andersen hypothesizes that having this information would help judges to understand a defendant's life holistically (while still retaining the discretion to determine if the circumstance called for a downward departure).[230] Several jurisdictions have already successfully adopted the practice of using family impact statements, and probation officers could incorporate the family impact statement inquiry into their role as investigators for the court.[231]

226. *See, e.g.*, COUNCIL ON CRIME & JUSTICE, *supra* note 96, at 45 ("Recommendations and Action Steps . . . Family Impact Assessment in Judicial Hearings: Establish a protocol for assessing family impact at sentencing and what can be done to alleviate undue stress on the children."); Christian, *supra* note 21, at 8 ("States could require, in appropriate cases, that pre-sentence investigation reports include a family impact statement, including recommendations for the 'least detrimental alternative' sentence and for services to and supports for children during a parent's imprisonment.").

227. *See* Andersen, *supra* note 218, at 1533–35.

228. *See* LINDSEY CRAMER ET AL., URBAN INST., TOOLKIT FOR DEVELOPING FAMILY IMPACT STATEMENTS: CHILDREN OF INCARCERATED PARENTS PROJECT 3 (2015), https://www.urban.org/sites/default/files/publication/53651/2000253-Toolkit-for-Developing-Family-Impact-Statements.pdf [https://perma.cc/CX4X-KA6Q].

229. *Id.*

230. Andersen, *supra* note 218, at 1515–16 ("Although some of the information provided in a family impact assessment is already included in a presentence investigation report, the family impact assessment brings together this scattered information, sometimes supplementing it with additional details, in order to foreground the burden a sentence will place on the defendant's family."); *id.* at 1533–34.

231. *Id.* at 1534–35.

Cyphert again expresses concern with this solution, noting that,

> amendment to the Federal Rules of Criminal Procedure is a complicated and time consuming process that involves Congress, the Supreme Court, advisory committees, and public notice and comment. . . . [R]eliance on rule change as a method of addressing the challenges faced by incarcerated parents and their children may be misplaced.[232]

Instead, Cyphert suggests the more moderate fix that individual judges could use their power to require family impact statements in their own courtrooms.[233] Cyphert's solution empowers judges to gather the information they need for just decision making without the burden of amending laws.

3. Policy Improvements

Numerous sources investigating the effects of incarcerating parents cite various policy solutions to mitigate the harm on children and families. Innovative programs allowing mothers to remain with their infants in prison nurseries or community-based residential parenting programs have shown great promise,[234] and expanding the eligibility pool of such programs would serve even more families.[235] Nine states have had prison nurseries, and such nurseries have existed in the United States for over 100 years.[236] These unique opportunities provide strong incentives for parent participants to remain in good standing by following the prison rules.[237] It is possible that prison nurseries

232. Cyphert, *supra* note 99, at 411–12 (footnote omitted).

233. *Id.* at 418. Cyphert specifically advocates for judges to use Federal Rule of Criminal Procedure 32(d)(2)(G), which "requires that the presentence investigation report include 'any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a),'" to mandate a section about collateral consequences in the presentence report, which would include consequences for dependents. *Id.* at 420 (quoting FED. R. CRIM. P. 32(d)(2)(G)).

234. *See* Halter, *supra* note 108, at 549–51, 557–64 (explaining that a parent's constitutional right to parent should be honored by allowing the parent to live with their infant, noting how this regime would be compatible with the criminal justice system, and listing policy justifications).

235. *See* KAREN SHAIN ET AL., CALIFORNIA'S MOTHER-INFANT PRISON PROGRAMS: AN INVESTIGATION 21 (2010), https://www.prisonerswithchildren.org/wp-content/uploads/2013/01/CA-Mother-Infant-Prison-Programs_report.pdf [https://perma.cc/FNM4-XNKA] (recommending such an expansion).

236. SARAH DIAMOND, PRISON NURSERY PROGRAMS: LITERATURE REVIEW AND FACT SHEET FOR CT 1 (2012), https://docs.wixstatic.com/ugd/f2f533_fc7cfce398854a27a5b2c65feb8a8efc.pdf [https://perma.cc/5AUK-3WB4].

237. *Id.* at 3.

may be comparable in price to the cost of foster care, and with separate areas for mothers and young children protecting them from violence, a mother who would like to raise her child while incarcerated could be afforded the invaluable opportunity to spend vital attachment time with her infant.[238]

When cohabitation is not feasible, visitation can be an important point of contact for children and their parents, mitigating some of the harms of separation.[239] Incarceration facilities can improve their visitation policies by explicitly encouraging and enabling children to participate in the visitation program, avoiding onerous clothing requirements for visitors, allowing for toys and age-appropriate activities in the visitation spaces, permitting appropriate physical contact, timing visiting hours to make sense with work and school schedules, expanding visiting hours, and partnering with local nonprofit organizations.[240] States can also inquire where a child will be living during the period of incarceration and work to place incarcerated parents in facilities closer to their children to ease the traveling burden for children and their caregivers.[241]

Funding for greater governmental support to children of incarcerated parents and resources for family caregivers, such as reunification services and financial assistance, would also assist families.[242] Intermittent sentencing can allow parents to serve their sentences in smaller chunks of time instead of all at once, such as weekdays from 9:00 AM to 5:00 PM.[243] Finally, greater

238. Jennifer Warner, Note, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN'S L.J. 65, 89–90 (2015).

239. Cyphert, *supra* note 99, at 394–95 ("Numerous studies have concluded that frequent and high quality visits between incarcerated parents and their children are beneficial for both . . . . Visits have also been shown to reduce recidivism rates amongst incarcerated parents and improve long-term success upon reentry.").

240. *Id.* at 422–26.

241. Christian, *supra* note 21, at 8.

242. HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 15, at 11 ("Recommendations . . . To the Congress of the United States . . . Pass legislation to provide targeted support to children with incarcerated parents, reunification services for incarcerated parents, and financial assistance and other resources to family caregivers.").

243. Eleanor Bush, *Considering the Defendant's Children at Sentencing*, 2 FED. SENT'G REP. 194, 198 (1990). For example, when twenty-year-old Monalisa Perez accidentally shot and killed her boyfriend (and the father of her two children) Pedro Ruiz III during a YouTube stunt gone wrong, the judge "allowed Perez to serve her sentence in 10-day increments in South Dakota, where she

use of alternatives to incarceration in general would afford parents the opportunity to continue living in their communities, providing a sense of normalcy for their children.[244]

4. Cementing the Constitutional Right To Parent for the Incarcerated

Amongst the emotional anguish, logistical challenges, and serious risk of termination of parental rights that comes along with parental incarceration, displacement of a child, and the potential for foster care, there is one missing component: a protection of the parent's constitutional right to parent. Unfortunately, the United States justice system does not value the fundamental right to parent for prisoners. The Supreme Court has recognized a fundamental right, protected by the Fourteenth Amendment,[245] to raise, parent, and control one's child.[246] Parents have a right to make decisions related to healthcare, child labor, discipline (including corporal punishment), where the child lives,[247]

now lives." Tu-Uyen Tran, *Minnesota Woman Sentenced for Fatally Shooting Boyfriend in Failed YouTube Stunt*, TWIN CITIES PIONEER PRESS, https://www.twincities.com/2018/03/14/minnesota-woman-sentenced-for-fatally-shooting-boyfriend-in-failed-youtube-stunt/ [https://perma.cc/D4X9-HJ9C] (last updated Mar. 15, 2018); *see also* State v. Perez, 54-CR-17-185 (D. Minn. June 28, 2017).

244. Julie Smyth, *Dual Punishment: Incarcerated Mothers and Their Children*, III COLUM. SOCIAL WORK REV. 33, 41 (2012).

245. *See generally*, Roger M. Baron, *A Parent's Constitutional Right to Possession of His Children*, 7 PROB. L.J. 251 (1987).

246. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 68–69 (2000) ("[S]o long as a parent adequately cares for [their] children (i.e., is fit), there will . . . be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the . . . children."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (finding another education statute (requiring children to attend public schools instead of religious ones) unconstitutional, noting that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"); Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923) (finding an education statute (forbidding schools from teaching children foreign languages) an unconstitutional infringement with a parent's right "to control the education of their own," and that due process protections include the right to "establish a home and bring up children").

247. *Prince*, 321 U.S. at 166.

who they can speak with, and so on.[248] Ordinarily, the government defers to parental prerogatives in nearly all aspects of a child's life,[249] unless two parents are in a dispute, or a parent is unfit or unable to continue caring for their child.[250] As with other fundamental protections the Court has identified, the right to parent is well documented and protected in the United States.[251]

In general, the incarcerated have all of the "rights which have not been taken away from them expressly or by necessary implication of law."[252] They "retain the essence of human dignity inherent in all persons,"[253] yet they do not retain rights that are

248. *See* JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 141–48 (2014). These rights apply to parents that still have legal rights over their child or children.

249. There are some government regulations that take precedence over parental prerogatives, such as state compulsory education laws. *See generally* RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 1:6 COMPULSORY EDUCATION AND SCHOOL REGULATION (2004); limitations on child labor, 29 CFR § 570.2 (2019), 29 CFR §§ 570.31–34 (2019); and prohibitions against abuse and neglect. *See Definitions of Child Abuse and Neglect in Federal Law*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/can/defining/federal/ [https://perma.cc/XU29-5N32].

250. *Troxel*, 530 U.S. at 68–69 (noting that the State will not "inject itself into the private realm of the family" when a parent or parents are "fit"). Parental prerogatives are not deferred to in custody disputes (as each parent's prerogatives may be in stark contrast with the other's); instead, the "best interest of the child" standard is generally used. Donald K. Sherman, *Child Custody and Visitation*, 6 GEO. J. GENDER & L. 691, 701 (2005) ("If parents are unable to reach a child custody agreement . . . courts may intervene in custody and visitation disputes. The standard for deciding these cases is the 'best interest of the child standard'; it is the same in all fifty states.").

251. For a robust discussion of the Fourteenth Amendment right to parent, *see* Halter, *supra* note 108, at 553–57.

252. RUSSELL J. DAVIS, 73 OHIO JURIS., PENAL AND CORRECTIONAL INSTITUTIONS, § 145 CONSTITUTIONAL AND CIVIL RIGHTS OF INMATES, GENERALLY (Lexis 2018). Prisoners in the United States retain many important constitutional protections (but usually with many caveats and limitations), such as the "right of meaningful access to courts"; First Amendment rights of speech, religion, and association; very limited (but still preserved) privacy rights; Eighth Amendment protection against "cruel and unusual" punishment; procedural due process protections; and rights to equal protection. *Substantive Rights Retained by Prisoners*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 1025, 1025–28, 1031, 1038–41, 1054, 1064 (2012).

253. DAVIS, *supra* note 252.

"inconsistent with status as a prisoner or with legitimate penological objectives."[254] But amongst the prisoner's right to other family connections, such as the right to get married,[255] the United States does not recognize a parent's right to visit with their child,[256] much less communicate with them. Incarceration, therefore, is not just a period of limited liberty, but a dangerous zone of unprotected rights and risk of damaging or severing a parent-child relationship.

Enforcing the fundamental right to parent could be a possible avenue for securing more protections and options for incarcerated parents. Emily Halter argues that "incarcerated women have a fundamental right under the Fourteenth Amendment to parent their children. Consequently, state and federal prisons in the United States should be required to provide options to facilitate that right."[257] Halter explains that Supreme Court precedent dictates that a mother's constitutional right to parent her children can only be revoked if she is found to be unfit.[258] Incarceration alone does not imply an inability to parent well (or a history of poor parenting), especially given the prevalence of incarceration due to low-level drug offenses and nonviolent crimes.[259] Halter advocates for allowing incarcerated women to remain with their children during incarceration through prison nurseries and "community-based residential parenting programs."[260] Even if courts are unwilling or unable to vindicate this right, she adds, legislatures should take the lead in making important and impactful policy changes to implement better options for incarcerated mothers and their children.[261] Again, unfortunately, this proposal requires courts or legislatures to take big leaps and advocate fiercely for a politically weak population.

254. *Id.*; *see also* Turner v. Safley, 482 U.S. 78, 95 (1987) (noting that an inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system") (citing *Pell v. Procunier,* 417 U.S. 817, 822 (1974)).

255. *Safley*, 482 U.S. at 96 (finding that prisoners maintain the constitutional right to marry).

256. George L. Blum, Annotation, *Right of Jailed or Imprisoned Parent to Visit from Minor Child*, 6 A.L.R.6th 483 (2005); *see also* Cyphert, *supra* note 99, at 409 (noting "the daunting Supreme Court precedents that provide essentially no right to visitation for inmates").

257. Halter, *supra* note 108, at 553.

258. *Id.* at 554 (referencing Troxel v. Granville, 530 U.S. 57 (2000)).

259. *Id.* at 554–55.

260. *Id.* at 544.

261. *Id.* at 545, 561–64.

These ideas have yet to be enacted on a national scale. While there is recent a senate bill[262] (and a mirrored house bill[263]) that makes some policy changes (codifying special rights for visitations, parenting classes, and free phone and video calls[264]), neither bill has made much progress towards being enacted.[265] With a closely divided Senate[266] and a president that prides himself on enforcing "law and order,"[267] it is uncertain if any of these changes will be enacted anytime soon. However, recent bipartisan support for the passage of a criminal justice reform bill[268] may indicate that the time is now for criminal laws to adapt with the changing times.

Each of these proposed solutions holds promise, and all are worthy of pursuit. Yet many of these suggestions require considerable change, effort, and political cooperation. Parental incarceration and the ensuing family separation affects millions of parents and children, so the need for reform is urgent.

262. Next Step Act of 2019, S. 697, 116th Cong. (2019).

263. Next Step Act of 2019, H.R. 1893, 116th Cong. (2019).

264. S. 697 § 602; H.R. 1893 § 602 (2019).

265. As of January 13, 2020, S. 697 had zero cosponsors and H.R. 1893 had two. *See* Bill Cosponsor S.697, CONG.GOV., https://www.congress.gov/bill/116th-congress/senate-bill/697cosponsers/ [https://perma.ccZ2G8-R4UA]; Bill Cosponsor H.R. 1893, CONG.GOV., https://www.congress.gov/bill116th-congress/house-bill/1893/cosponsors/ [https://perma.cc/7ZTJ-HP2Z].

266. *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/SU8K-UBTQ] (noting fifty-three Republicans and forty-five Democrats in the 2019–21 Senate).

267. Terence McArdle, *The 'Law and Order' Campaign that Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018), https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/?utm_term=.3f08cbc1d271 [https://perma.cc/28LS-J3KF] ("Donald Trump invoked the phrase 'silent majority' during his presidential run and, lately, has seized on another Nixon favorite: 'law and order.'").

268. *See* First Step Act of 2018, S. Res. 756, 115th Cong. (2018) (enacted), https://www.congress.gov/bill/115th-congress/senate-bill/756 [https://perma.cc/5BLG-ERV3]; German Lopez, *Congress Just Passed the Most Significant Criminal Justice Reform Bill in Decades*, VOX (Dec. 20, 2018, 1:55 PM), https://www.vox.com/policy-and-politics/2018/12/20/18148482/first-step-act-criminal-justice-reform-house-congress [https://perma.cc/WA34-L8UM] (detailing the passage of the First Step Act).

B. JUDICIAL ACTION: DEFENDANT'S STATUS AS PRIMARY CARETAKER OF DEPENDENT(S) AS PRESUMPTIVELY REASONABLE GROUNDS FOR DOWNWARD DEPARTURE

Huerta and *Kon* provide a dormant remedy that has yet to gain attention by the legal academic and policy communities (although some other courts[269] have followed the "irreplaceability" test articulated in *Huerta* and *Kon*). These federal cases stand for the notion that in an analysis of a defendant's caregiving and financial support to their dependents (under either a Section 5H1.6 Family Ties and Responsibilities or a section 3553(a) defendant history and characteristics analysis), the primary issue is how the defendant's dependents will fare in the absence of the defendant's caretaking and financial support services. *Kon* asserts that "[w]hen no other adult in the family can provide alternative means of assistance or support for the defendant's dependents," it is reasonable for the court to find "extraordinary" family circumstances and grant a downward departure.[270]

This test, which boils down to labeling an irreplaceable[271] caregiver defendant as an "extraordinary" family circumstance, requires no new laws, but merely following federal district and circuit court precedent. In fact, the test could be viewed as merely an extension of preexisting factors in Section 5H1.6,[272] a

269. *See supra* note 215.

270. United States v. Kon, No. 1:04-CR-00271, 2006 WL 3208555, at *5 (S.D.N.Y 2006).

271. For another scholar noting the prevalence of "irreplaceability" analysis, see Markel et al., *supra* note 187, at 1172–73 ("To the extent that there is pattern underlying the pre-Booker federal cases involving downward departures for family ties, it is discernible by asking whether the defendant provided an irreplaceable (or at least critical) role as caregiver to family dependents.").

272. Section 5H1.6 provides:

> (B) Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires . . . the presence of the following circumstances: (i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family. (ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant . . . . (iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

component of the Guidelines which must be considered under § 3553(a).[273] This test has the potential to gain traction[274] through individual judges invoking *Huerta* and/or *Kon* as justifications for their decisions.[275] The solidification of the test through greater usage across district and circuit courts (or, perhaps, the Supreme Court) would carry the advantage that it will signal to other judges that utilizing the test will be presumed "reasonable,"[276] potentially lessening any fears lower court judges may have of being overturned.[277] "Irreplaceability" need not be a strict or singular path towards a downward departure

> (iv) The departure effectively will address the loss of caretaking or financial support.

U.S. SENTENCING COMM'N, *supra* note 144, at 463

273. 18 U.S.C. §§ 3553(a)(4)–(5) (2018).

274. As of January 2020, just five federal cases (all in New York) have cited *Kon*. *See, e.g.*, United States v. Marsh, 820 F. Supp. 2d 320, 351 (E.D.N.Y. 2011) (citing *Kon* as a case "imposing a non-guidelines sentence in light of family circumstances where defendant was the mother of a two year-old daughter and the father was no longer involved in raising the child"), *as amended* (Nov. 3, 2011). *Huerta* has been cited (as of January 2020) by thirty-one other cases (including *Kon*), but only five cases reference *Huerta* for its "irreplaceability" test. United States v. Daidone, 124 F. App'x 677, 679 (2d Cir. 2005); United States v. Daidone, 112 F. App'x 104, 105 (2d Cir. 2004), *order amended and superseded*, 124 F. App'x 677 (2d Cir. 2005); United States v. Bueno, No. 09 CR 625(HB), 2010 WL 2228570, at *3 (S.D.N.Y. June 3, 2010); United States v. Davis, Crim. No. 3-06-CR-111 (JCH), 2006 WL 2165717, at *2 (D. Conn. July 31, 2006); United States v. Roberts, No. 01 CR, 410(RWS), 2005 WL 1153757, at *7 (S.D.N.Y. May 16, 2005). An additional case cites *Huerta* more broadly, but still under a family ties departure analysis. United States v. Cabrera, CR No. 07-077-ML, 2009 WL 1530703, at *3 (D.R.I. May 28, 2009).

275. While a more formalized solidification of the irreplaceability test is possible, for reasons cited in Part III.A above, they are not likely to happen anytime soon. An amendment to the Guidelines would be unlikely as it is a challenging process that does not invoke much hope without strong indicators of Congress and the United States Sentencing Commissions' intent to make such reforms. Nor does it appear that the Supreme Court of the United States will soon take this issue under its purview. Therefore, this Note will focus instead on individual judges taking up the irreplaceability test. For notes about the challenges of amending the Guidelines, see Cyphert, *supra* note 99, at 413–16.

276. *United States v. Booker* invalidated the prior appellate review standards by excising § 3742(e), shifting the appellate review standard from de novo review to "review for 'unreasonable[ness].'" 543 U.S. 220, 224 (2005).

277. "[M]any federal judges in the years since [*Booker*] have hewed rather tightly to the Guidelines, with compliance stabilizing at above eighty percent. Various theories for this phenomenon have been suggested, including fear of non-Guidelines sentences being overturned (as predicted by Justice Souter in his dissent in *Rita*) . . ." Cyphert, *supra* note 99, at 402–03 (referring to Justice Souter's dissent in *Rita v. United States*, 551 U.S. 338 (2007)).

for family ties and responsibilities, but departures resulting from irreplaceable defendants should be presumed reasonable.[278]

There is much room for further articulating what criteria should be applied for determining what "irreplaceable" means. For example, courts could consider the defendant's special skills, characteristics, or relationships as important components of their caregiving. Courts might also see if there is a willing and appropriate substitute available to provide care for dependents if the defendant is incarcerated. The cost of the defendant's incarceration could be compared to the cost of hiring a replacement caregiver or compared to the lost income a family would experience if a defendant were incarcerated. Statements from dependents, and those who would have to provide additional support in the defendant's absence, could be taken into consideration. Additional attention may be afforded to dependents that are ill, disabled, or otherwise require specialized or difficult care. Defendants could be given an opportunity to explain to the court why their presence in their homes and communities would bring greater public safety than their incarceration. A judge will be able to make the most just ruling given a full articulation of every negative consequence of incarceration (such as lost caregiving and financial support, the literal costs of housing someone in a jail or prison, as well as strain on alternative caregivers and communities) as well as every positive effect of allowing a defendant to avoid incarceration (such as family and community preservation). Judges may consider all of these factors and more in considering whether a defendant is irreplaceable, and in appropriate cases, relieving a defendant and their family of a needlessly burdensome incarceration. As more judges utilize the irreplaceability test and articulate the factors important to their

278. The 2002 Federal District of Massachusetts case *United States v. Lacarubba* criticized the *United States v. Pereira* court for too stringently holding to the "irreplaceability" standard, especially as compared to the Second Circuit, which had found sufficient reason for family tie departures without a strict finding of irreplaceability. United States v. Lacarubba, 184 F. Supp. 2d 89, 94–96 (D. Mass. 2002). *Lacarubba* noted that finding a replacement caregiver is not always a sufficient replacement: "Caretaking, in short, goes beyond physical acts, and includes emotional and psychological attachments. It is not just a question of any two arms, any old paycheck. A husband of thirty years stands in a different position relative to a wife than any caregiver." *Id.* at 98. Similarly, this Note does not advocate for such a strict adherence to the "irreplaceability" test as to exclude those whose care could potentially be replaced by a hired caregiver but would result in a hardship for the dependent who requires care.

analysis, the test will become clearer for future courts and parties to use.

The concretization of the irreplaceable defendant test would impact the disparate outcomes for parent-defendants across courts, particularly in regard to single parents and sole care providers. While the Second Circuit certainly maintains a pattern of acknowledging the plight of single parents or parents caring for their entire households,[279] still many other judges have denied departures for these caretakers and providers.[280] Considering the prevalence of parental incarceration, the growth of maternal incarceration, and the accompanying harms to children, parents, and the communities, it is sensible and prudent to encourage (through formal or informal means) judges to utilize existing federal precedent to take a defendant's dependents into consideration at sentencing.

C. COUNTERARGUMENT: DISPARATE TREATMENT OF SIMILARLY SITUATED DEFENDANTS

Critics may assert that consideration of the support a defendant provides for their dependents creates a scheme in which similarly situated defendants (as in, defendants who committed the same or similar crimes) would have different sentences,[281] or

279. *United States v. Kon* references three Second Circuit cases where departures were upheld for such reasons: (1) "where defendant provided substantial support for two children and defendant's wife spoke limited English," United States v. Galante, 111 F.3d 1029, 1035 (2d Cir.1997), (2) "where defendant was sole supporter of four young children," United States v. Johnson, 964 F.2d 124, 129–30 (2d Cir. 1992), and (3) "where defendant supported wife, two young children, and his disabled father, who relied on defendant to get out of his wheelchair" United States v. Alba, 933 F.2d 1117, 1122 (2d Cir.1991)). United States v. Kon, No. 1:04-CR-00271, 2006 WL 3208555, at *5 (S.D.N.Y. Nov 2, 2006).

280. *See, e.g.*, United States v. Trinidad-Toledo, No. CR 06-1646 JB, 2007 WL 506190, at *1 (D.N.M. Jan. 16, 2007), *aff'd*, 260 F. App'x 74 (10th Cir. 2008) (declining to grant a downward departure, despite the fact that the defendant was "the sole source of income and support for his disabled wife . . . and his eight-year old daughter"); United States v. Leandre, 132 F.3d 796, 807–08 (D.C. Cir. 1998) (denying a downward departure where defendant was "a single father of two young children who might be placed in foster care if [Defendant]'s brother refuse[d] to take them into his home"); United States v. Brand, 907 F.2d 31, 33–34 (4th Cir. 1990) (denying downward departure for a single mother of two children who would go into foster care if she were incarcerated).

281. *See, e.g.*, Cyphert, *supra* note 99, at 410 ("The question of whether parents should receive a lessened or alternative sentence because of their status as parents is, of course, a controversial one. Some commentators have argued that

may perversely incentivize certain defendants to commit crimes.[282] Some may say that prison nurseries, even if they could be cost-effective and safe for children, detract from the purpose of punishing the defendant.[283] These criticisms evoke questions of basic fairness, the intention of punishment in the United States legal system, the consequences of having children or remaining childless, and who bears the burden of punishment.

If United States federal sentencing law was only concerned with proportionally punishing the defendant's crime, then this disparity would be an improper result. Defendants with children or dependent family members could get an unfair advantage over other defendants who committed the same or similar offense. In fact, one of the aims of the Sentencing Guidelines is to lessen disparities among similarly situated defendants.[284] The

to do so would be to violate principles of equal protection . . . ."); Markel et al., *supra* note 187, at 1215 ("A person who commits a crime can reasonably foresee that if prosecuted and punished, his punishment will affect not only himself but also his family. Just about everyone acknowledges that extending a discount to an offender for a reason unrelated to his crime constitutes an undeserved windfall.").

282. Cyphert, *supra* note 99, at 410–11 (noting commentators' concerns that alternative or lessened sentences for parents could "incentivize certain groups of people (namely 'irreplaceable caregivers') to engage in criminal behavior," and citing a federal court's concern for "sending an obvious message to all female defendants that pregnancy is 'a way out'") (quoting United States v. Pozzy, 902 F.2d 133, 139 (1st Cir. 1990)); Markel et al., *supra* note 187, at 1215 ("[G]iving benefits to defendants with family ties in the currency of sentencing discounts will also, on the margin, incentivize this class of defendants to seek out greater criminal opportunities, or they will be recruited or pressed into action by others.").

283. Warner, *supra* note 238, at 90 ("Empowering mothers to make a choice about their newborn and possibly raise their newborn during a prison sentence is in opposition to what the United States criminal justice system is trying to achieve.").

284. 18 U.S.C. § 3553(a)(6) (2018) ("The court, in determining the particular sentence to be imposed, shall consider— . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."); *see also* OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, PRIMER: DEPARTURES AND VARIANCES, 47–48 (2016), https://www.ussc.gov/sites/default/files/pdf/training/primers/2016_Primer_Departure_Variance.pdf [https://perma.cc/K6ZV-S4CT] (noting that a "district court [is] not 'forbidden to consider the guidelines and the need to avoid unwarranted sentence disparities when exercising its discretion; to the contrary, 'the governing statute directs the sentencing court to consider these matters as two factors among several in the sentencing process'" (quoting United States v. Ruelas-Mendez, 556 F.3d 655, 658 (8th Cir. 2009))). However, an Eighth Circuit court

advantage for those defendants with children necessarily results in a disadvantage for those who are childless, arbitrarily rewarding those who have exercised their right to have a child and punishing those who have not exercised this right.

However, the unlawful act alone is not the only consideration at sentencing. Both the 18 U.S.C. § 3553(a) "Factors To Be Considered in Imposing a Sentence"[285] and the Sentencing Guidelines[286] take factors besides the defendant's crime into account, such as "the history and characteristics of the defendant,"[287] consideration of specific offender characteristics,[288] the defendant's acceptance of responsibility,[289] and if a proposed sentence "will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's

recently found that the effort to avoid unwarranted disparities referred to *national* disparities, not differences between the sentences of co-conspirators. Roger W. Haines, Jr. et al., *Federal Sentencing Guide: § 716 Departures: Disparity Between Co-Defendants*, FED. SENTENCING GUIDE, https://sentencingcases.com/700-departures-generally-§5k/715-specific-grounds-for-departure-§5k2/716-disparity-between-co-defendants [https://perma.cc/5EYV-J3NN]; *see* United States v. Hemsher, 893 F.3d 525, 535 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 470 (2018) ("[Defendant] argues the great disparity between his sentence and those of the cooperating co-defendants is evidence that his sentence is unreasonable. . . . However, [defendant]'s argument founders [sic] on the mistaken premise that the statutory direction to avoid unwarranted sentencing disparities among defendants refers to differences among co-conspirators. It does not."); United States v. Pierre, 870 F.3d 845, 850 (8th Cir. 2017) ("The statutory direction to avoid unwarranted disparities among defendants, 18 U.S.C. § 3553 (a)(6), refers to national disparities, not differences among co-conspirators.").

285. 18 U.S.C. § 3553(a) (2018).

286. U.S. SENTENCING COMM'N, *supra* note 144, at 376, 458–65.

287. 18 U.S.C. § 3553(a)(1).

288. GUIDELINES MANUAL, *supra* note 144, at 458–65 (listing the following as potentially relevant offender characteristics in sentencing: age, education and vocational skills, mental and emotional conditions, physical condition ("Including Drug or Alcohol Dependence or Abuse; Gambling Addiction"), employment record, family ties and responsibilities, role in the offense, criminal history, "Dependence upon Criminal Activity for a Livelihood," and "Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works;" but prohibiting consideration of "Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status" as relevant factors). *But see id.* at 470–71 (noting that certain factors may only be taken under consideration under specific provisions, such as taking "defendant's acceptance of responsibility" into consideration under § 3E1.1, and taking "defendant's aggravating or mitigating role in the offense" into consideration under § 3B1.1 and § 3B1.2).

289. *Id.* at 376.

family."[290] Federal judges are instructed to review "the need for the sentence imposed" in terms of proportionality, deterrence, and the most effective treatment.[291] Therefore, the sentencing structure was never intended to be a direct comparison of the culpability of two defendants based exclusively on the crime(s) each committed. Rather, judges have the discretion to take into consideration relevant factors, including those that affect the defendant's family members and dependents. People have complicated pasts and extenuating circumstances, and "[e]ach of us is more than the worst thing we've ever done."[292]

Departures were built into the Sentencing Guidelines to account for the difficulty in accurately and fairly applying a standardized system to each individual case.[293] The purposes of punishment in the federal sentencing system extend beyond merely retribution for the offense committed.[294] When one defendant has dependents that rely upon them for care and support, another defendant who committed the same or similar offense (but lacks dependents) is not similarly situated.[295] Taking these dependents into consideration at sentencing does not lessen the culpability of the defendant, but rather takes into account another factor worth consideration at sentencing: excessive hardship on vulnerable dependents.[296]

290. *Id.* at 462–63 (USSG § 5H1.6 cmt. 1(B)(i)).

291. 18 U.S.C. § 3553.

292. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17–18 (2014).

293. U.S. SENTENCING COMM'N, *supra* note 144, at 7 ("[I]t is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. . . . [T]he Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.").

294. *See* 18 U.S.C. § 3553(a)(2)(A)–(D).

295. For an example of a court acknowledging the disparity argument but finding the departure warranted nonetheless based on the implicit conclusion that similarly situated defendants may be different due to their caregiving responsibilities, see *United States v. Lacarubba*, 184 F. Supp. 2d 89, 98–99 (D. Mass. 2002) ("If this departure means other offenders without dying spouses get longer sentences, so be it; it is warranted by the Guidelines, by the facts, by our common humanity.").

296. *See, e.g.*, United States v. Johnson, 964 F.2d 124, 129–30 (2d Cir. 1992) ("The rationale for a downward departure here is not that Johnson's family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing. . . . '[The hardship of] those children being without a mother for an extended period of time . . . was extraordinary grounds for a departure.'");

Carrying the burden of raising the next generation and repopulating the future workforce by having children is a pursuit that the state routinely supports. While taxes are uniformly applied to adults with and without children, parents are offered tax credits for having children,[297] and government money funds public schools and playgrounds.[298] This is one example of the state acknowledging the difficult but important work of parenting, and taking children's needs into consideration when requiring resources from or allocating resources to adults. Just as a defendant is greater than their crime, an adult is more than an island without connections. Sentencing law in the United States was never intended to evaluate someone in a vacuum when people lead complicated, intersectional lives that deeply affect others.

Defendants are not the only ones suffering from the effects of incarceration and family separation. Cyphert argues that incarcerating parents and refusing to allow them to communicate with and parent their children often leads to inevitable and unjust punishment for those children, who are blameless.[299] Professor Sarah Abramowicz posits that if children are to be held accountable as autonomous adults later in life, then the criminal justice system must take them into consideration when sentencing parents, because incarcerating a parent can be so detrimental to a child's development and wellbeing that they do not form to become fully rational and legal adults.[300] One scholar

Lacarubba, 184 F. Supp.at 98–99 ("These family responsibilities do not remotely lessen the defendant's culpability for the crimes he has committed. I depart only in recognition of my unwillingness to wreak havoc on the life of the dying Ms. LaCarubba [defendant's wife] . . . .").

297. Richard Auxier et al., *The Tax Policy Center's Briefing Book: Key Elements of the U.S. Tax System, What is the Child Tax Credit?*, TAX POL'Y CTR., URBAN INST. & BROOKINGS INST., https://www.taxpolicycenter.org/briefing-book/what-child-tax-credit [https://perma.cc/H7U7-9HEZ].

298. *Policy Basics: Where Do Our State Tax Dollars Go?*, CTR. ON BUDGET & POL'Y PRIORITIES (July 25, 2018), https://www.cbpp.org/research/state-budget-and-tax/policy-basics-where-do-our-state-tax-dollars-go [https://perma.cc/6R2L-F55M].

299. Cyphert, *supra* note 99, at 387 ("These blameless children, who have done nothing wrong, nonetheless will 'do the time' with their parents, and will likely experience a myriad of negative impacts. . . . [S]entencing judges have largely accepted as a given, reluctantly or not, that these children are to be punished alongside their parents.").

300. Abramowicz, *supra* note 25, at 798 ("If criminal law is to treat adults as if they are autonomous, then it needs to take responsibility for any actions that will render a child less so, such as the decision to incarcerate the parent of a

went so far as to assert a constitutional right for children to maintain a relationship with their incarcerated parents.[301] As much as possible, fit and interested parents should not be deprived of the opportunity to parent their children; anything less serves undue hardship onto their children.

CONCLUSION

In the age of mass incarceration, and with the recent rapid expansion of the number of incarcerated mothers, it has never been more important to inspect the impact of parental incarceration on children. The repercussions of maternal incarceration, which represents many caregivers in the United States, are pervasive and long-reaching. While United States federal sentencing law has long recognized extraordinary family circumstances as worthy of consideration at sentencing, inconsistent implementation and insufficient clarification have resulted in disparate outcomes.

United States v. Huerta and *United States v. Kon* provide judges with an additional tool within their arsenal of just sentencing practices: the presumption that it is reasonable for federal judges to grant downward departures for defendants who are sole or primary caregivers of their dependents, and whom are effectively irreplaceable. By spreading the use of and amplifying the precedent that creates the irreplaceability test, courts can take family impact into account, and lessen the impactful harms that parental incarceration has on all involved.

minor child."); *see also* Warner, *supra* note 238, at 90 ("What the criminal justice system and society forget is that these women are not merely 'prisoners'—they are mothers, and the future of their children is at stake.").

301. Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 80 (2011) ("[This Article] puts forward the First Amendment freedom of association and the due process liberty interest as the legal bases for children's right to a relationship with their convicted parents.").