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"Not Ordinarily Relevant": Bringing Family Responsibilities to the Federal Sentencing Table

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"NOT ORDINARILY RELEVANT": BRINGING FAMILY RESPONSIBILITIES TO THE FEDERAL SENTENCING TABLE

Abstract: Incarceration results in negative social, psychological, and economic impacts on an inmate's family and dependents. These impacts last well beyond the period of incarceration and can cause lifelong challenges. Federal statutes require courts to consider mitigating factors while calculating a sentence, including a defendant's characteristics. Family ties and responsibilities are considered an aspect of a defendant's characteristics. Yet the Federal Sentencing Guidelines significantly limit the extent to which courts can use family ties and responsibilities to reduce or alter a defendant's sentence. This Note first argues that the Guidelines should be amended to indicate that courts can consider family ties and responsibilities when determining a sentence. This Note then argues that Rule 32 of the Federal Rules of Criminal Procedure should be amended to require that a family impact assessment be incorporated into each presentence investigation report to provide courts with information about a defendant's family ties and responsibilities.

INTRODUCTION

In 1997, in *United States v. Archuleta*, the U.S. Court of Appeals for the Tenth Circuit held that the district court improperly reduced Joseph Archuleta's sentence by taking into consideration his role as the sole caregiver of his two minor children and his elderly mother.[1] Archuleta indicated there were no alternative caregivers for his family, but the Tenth Circuit found inadequate evidence of this on the record and refused to remand for further evidence.[2] Although the court acknowledged the difficult facts at hand, it felt constrained by the Federal Sentencing Guidelines' ("Guidelines") restrictions against using family responsibilities to impose a lower sentence.[3] Archuleta's family was left

[1] *See* United States v. Archuleta, 128 F.3d 1446, 1447 (10th Cir. 1997). Archuleta was charged with being a felon in possession of a firearm and with making false statements to acquire a firearm. *See id.* Under the Guidelines his sentence would have been a term of imprisonment between thirty-three to forty-one months. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 1997) (providing a table with sentence ranges); *Archuleta*, 128 F.3d at 1447. Instead, the district court granted a downward departure to five months in prison, five months under home confinement, and three years supervised release due to Archuleta's family circumstances. *See Archuleta*, 128 F.3d at 1447.

[2] *See Archuleta*, 128 F.3d at 1450–52 (indicating the absence of facts on the record while stating that a departure for family responsibilities was nonetheless inappropriate).

[3] *See id.* at 1452 (stating that the Guidelines do not allow sentencing departures, even in circumstances that evoke sympathy, unless the circumstances are unusual). Although at the time the Guide-

out of the sentencing process because the court operated under the limitations imposed by the Guidelines.[4] This resulted in the imposition of a sentence without adequate information about Archuleta's family circumstances.[5]

Families of inmates experience significant negative impacts when courts do not include defendants' family responsibilities in their sentencing calculations.[6] These impacts are not just emotional, but extend to financial as well as long-term psychological and social effects.[7] Brought to light in a comprehensive report by the National Research Council in 2014, these unsettling effects have made national headlines.[8] Congress and the President are now taking

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lines were mandatory, the language used in the now-advisory Guidelines remains essentially the same today: "Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 1997); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2014).

[4] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 1997) (stating that family ties are not ordinarily relevant to sentencing decisions); Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U. L. REV. 1119, 1124 (1999) (describing the families of defendants as invisible during sentencing procedures).

[5] *See Archuleta*, 128 F.3d at 1452 (refusing to remand for further evidence on Archuleta's family circumstances because the Guidelines limit departures based on family ties).

[6] *See* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 346 (2004) (stating that the impact on families is the most significant collateral effect of incarceration); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 123, 139–40 (1999) (describing the myriad negative effects of incarceration on an inmate's family members).

[7] *See* COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 6 (Jeremy Travis et al. eds., 2014) [hereinafter COMM. ON CAUSES & CONSEQUENCES], http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes [http://perma.cc/DF62-NDT4] (recognizing the correlation between incarceration and negative social and economic outcomes for inmates' families); Brown, *supra* note 6, at 347 (stating that parental incarceration can lead to poor school performance and depression in children, as well as financial challenges for caregivers).

[8] *See generally* COMM. ON CAUSES & CONSEQUENCES, *supra* note 7 (describing the effects of incarceration on both inmates and their families); Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/ [http://perma.cc/98TT-LCBK] (discussing the results of the National Research Council report); Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), http://nyti.ms/1hPCkIu [http://perma.cc/D3QA-7NT3] (discussing incarceration in the U.S. generally and the 2014 National Research Council report); *When a Parent Goes to Prison, a Child Also Pays a Price*, NPR (June 8, 2014), http://www.npr.org/2014/06/08/320071553/when-a-parent-goes-to-prison-a-child-also-pays-a-price [http://perma.cc/9GWB-LR4E] (discussing the National Research Council report and the effects of parental incarceration on children). Researchers have only recently gained access to national, longitudinal data about these impacts. *See* COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 275 (recognizing the limitation of small sample sizes in past studies, as well as the fact that more recent studies are based on just three data sets of recently available longitudinal data).

steps to initiate reform, adding a new chapter to the long history of federal sentencing reforms.[9]

Over the past ten years, revisions to the Federal Guidelines and several seminal U.S. Supreme Court decisions have resulted in significant changes to federal sentencing.[10] Despite those changes, federal sentencing procedures continue to ignore the interplay between a defendant's family responsibilities and the impact of sentencing on a defendant's family.[11] Probation officers and district courts still lack a comprehensive way to communicate and analyze family impact during sentencing.[12] Today, defendants' families face the same broken system that the Archuleta family faced in 1997.[13] The impact on defendants' families is often described as "collateral damage" in the sentencing process.[14] This description underscores the limited role family impact plays

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[9] *See* Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (proposing several sentencing reforms, including the reduction of sentences for certain drug offenses); COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 44 (describing the series of sentencing reforms that took place from the 1970s to the present); Roy L. Austin, Jr. & Karol Mason, *Empowering Our Young People, and Stemming the Collateral Damage of Incarceration*, WHITE HOUSE BLOG (Oct. 8, 2014, 7:30 PM), http://www.whitehouse.gov/blog/2014/10/08/empowering-our-young-people-and-stemming-collateral-damage-incarceration [http://perma.cc/39C6-H7GW] (discussing an October 8, 2014 White House event announcing programs to support children of incarcerated parents); Lauren-Brooke Eisen, *Are More Criminal Justice Reforms on the Horizon in 2015?*, HUFFINGTON POST (Dec. 29, 2014), http://www.huffingtonpost.com/laurenbrooke-eisen/are-more-criminal-justice_b_6392102.html [http:// perma.cc/9LRC-5BHU] (discussing changes to the criminal justice system in 2014 and proposed changes for 2015).

[10] *See* Gall v. United States, 552 U.S. 38, 49 (2007) (holding that courts may grant a departure from the Guidelines absent extraordinary circumstances); Rita v. United States, 551 U.S. 338, 351 (2007) (reaffirming *United States v. Booker* by holding that the Guidelines provide a first step in federal sentencing and that courts can tailor sentences outside of the Guidelines ranges); United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the Federal Guidelines are not mandatory); Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 1 (2010) (describing a series of changes to federal sentencing initiated in 2005); Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & CIV. RTS. L. REV. 377, 382–84 (2010) (describing how differently a defendant might have been sentenced before and after *United States v. Booker*).

[11] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2014) (stating that "family ties and responsibilities are not ordinarily relevant" to sentencing decisions); Edward Juel, *Renewed Opportunities for Sentencing Advocacy*, 58 FED. LAW. 30, 30 (2011) (observing revisions to the Guidelines in 2010 that allow courts to consider other defendant characteristics like age and mental health). This policy of disregarding family ties has been firm since the Guidelines were first drafted in 1987. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 1987) (stating that family ties are "not ordinarily relevant" to sentencing decisions).

[12] *See* OFFICE OF PROB. & PRETRIAL SERV., ADMIN. OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT, at II-4 (2006) [hereinafter P.S.I. REPORT] (constraining analysis of family circumstances to limited applications, such as a defendant's ability to pay restitution).

[13] *See Archuleta*, 128 F.3d at 1452.

[14] *See* Tanya Krupat, *Invisibility and Children's Rights: The Consequences of Parental Incarceration*, 29 WOMEN'S RTS. L. REP. 39, 43 (2007) (arguing that children of inmates should not be treated as "collateral damage"); Katy Reckdahl, *Mass Incarceration's Collateral Damage: The Children Left Behind*, NATION (Dec. 16, 2014), http://www.thenation.com/article/193121/mass-incarcerations-collateral-

during sentencing.[15] In the same way federal sentencing procedures treat victims as third-party stakeholders, these procedures must also recognize defendants' families as stakeholders.[16]

This Note argues that law and policy require courts to evaluate the impact of sentencing on a defendant's family.[17] In order to accomplish this, two changes must be realized.[18] First, the U.S. Sentencing Commission must revise the Federal Guidelines to require judges to consider family impact as a factor in sentencing decisions.[19] Second, the Judicial Conference should amend Rule 32 of the Federal Rules of Criminal Procedure to require that presentence investigation reports include a family impact assessment.[20]

Part I of this Note provides an overview of federal sentencing procedures regarding a defendant's family responsibilities and includes an introduction to impact assessments.[21] Part II looks at the long-term impact of those decisions on families of inmates, reviews how courts apply federal sentencing procedures regarding family responsibilities, and provides an example of how San Francisco has successfully incorporated family impact assessments into its sentencing procedures.[22] Part III argues that the Guidelines should be amended to require consideration of family ties, and that assessments of the impact of sentences on defendants' families should be provided to sentencing courts in all federal criminal cases.[23]

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damage-children-left-behind [http://perma.cc/MHP6-23FX] (discussing the collateral costs incarceration imposes on families).

[15] *See* Krupat, *supra* note 14, at 41 (describing the impact of incarceration on inmates' families as invisible due to a lack of understanding and acknowledgement about the problem); Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J. L. & SOC. POL'Y 24, 30 (2013) (describing the children of defendants as invisible victims of incarceration).

[16] *See* King & Norgard, *supra* note 5, at 1124 (arguing for the use of family impact evidence to balance victim impact evidence during sentencing of capital crimes); Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 180–81 (1996) (observing the harmful effects of incarceration on inmates' families and arguing that family circumstances must not be disregarded).

[17] *See infra* notes 175–218 and accompanying text.

[18] *See infra* notes 175–218 and accompanying text.

[19] *See infra* notes 187–199 and accompanying text.

[20] *See infra* notes 200–218 and accompanying text.

[21] *See infra* notes 24–93 and accompanying text.

[22] *See infra* notes 94–174 and accompanying text.

[23] *See infra* notes 175–218 and accompanying text.

I. FEDERAL SENTENCING PROCEDURES: THEN AND NOW

For the past twenty-five years, courts have used Federal Sentencing Guidelines ("Guidelines") as part of sentencing procedures in criminal cases.[24] Yet for the past ten years, courts have no longer been required to follow those Guidelines in all cases.[25] This change has allowed courts to craft individualized sentences based on a defendant's characteristics and the nature of the crime.[26] This Part presents an overview of current federal sentencing procedures as they relate to family responsibilities.[27] Section A provides a brief history of the Guidelines.[28] Section B introduces current federal sentencing procedures.[29] Section C discusses impact assessments for both victims and defendants' families and the role these assessments play in sentencing decisions.[30]

A. Federal Sentencing Procedures Under the Mandatory Guidelines

Congress enacted the Sentencing Reform Act of 1984 ("SRA") in response to widespread criticism of federal sentencing practices.[31] Beginning in the early 20th century, all three branches shared sentencing responsibilities: Congress set maximum sentences, judges set the sentence for an individual, and parole boards, under the auspices of the executive branch, determined when an individual had been rehabilitated and could be released from their sentence.[32] Although the Department of Probation provided a brief report with

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[24] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2014) (stating that the Guidelines first went into effect in 1987); Mistretta v. United States, 488 U.S. 361, 391 (1989) (holding that the Guidelines are binding authority during criminal sentencing).

[25] *See* United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the Guidelines are no longer mandatory and are only advisory); United States v. Ameline, 400 F.3d 646, 655 (9th Cir.), *reh'g en banc*, 409 F.3d 1073 (9th Cir. 2005) (remanding a case for reconsideration of a sentence under the newly advisory Guidelines); United States v. Schlifer, 403 F.3d 849, 851 (7th Cir. 2005) (remanding for resentencing because the district court applied the Guidelines as if they were still mandatory).

[26] *See Booker*, 543 U.S. at 245–46 (holding that courts can "tailor" sentences to individuals by taking a defendant's characteristics into consideration); *Ameline*, 400 F.3d at 655–56 (recognizing that under the advisory Guidelines courts must consider a defendant's characteristics in order to create individualized sentences).

[27] *See infra* notes 31–93 and accompanying text.

[28] *See infra* notes 31–49 and accompanying text.

[29] *See infra* notes 50–70 and accompanying text.

[30] *See infra* notes 71–93 and accompanying text.

[31] *See Mistretta*, 488 U.S. at 365 (tracing the history of the SRA's reforms back to concerns regarding indeterminate sentencing and judges' "unfettered discretion"); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 434–35 (1992) (arguing that the SRA was grounded in a rejection of both indeterminate sentencing and the dominant principle that punishment could be a means of rehabilitating offenders).

[32] *See Mistretta*, 488 U.S. at 365 (describing the division of sentencing roles among the three branches).

a recommended sentence, judges were able to apply or ignore that recommendation at their discretion.[33] The SRA eliminated parole boards and emphasized uniformity in sentencing.[34]

One of the cornerstones of the SRA was the establishment of a Sentencing Commission tasked with creating sentencing guidelines.[35] By April 1987, the Commission had drafted its first set of Guidelines, which went into effect six months later.[36] The Guidelines were mandatory and created a rigid structure designed to limit judicial discretion through the application of uniform sentences.[37] Congress designed the Guidelines to ignore mitigating factors, such as a defendant's family responsibilities, because it feared that recognizing such factors might result in exacerbating existing sentencing disparities.[38] Judges could order a "departure" from a Guideline sentence, accompanied by a written statement explaining their reasons for departure, but only in rare in-

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[33] *See* Robert J. Anello & Jodi Misher Peikin, *Evolving Roles in Federal Sentencing: The Post-*Booker/Fanfan *World*, 1 FED. CTS. L. REV. 301, 303 (2006) (reviewing the structure of sentencing pre-1984).

[34] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 1987) (observing that uniformity was one of three goals of the SRA); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 189 (1993) (stating that in order to ensure compliance and effect the desired goal of uniformity, Congress made the Guidelines mandatory and put an end to parole).

[35] *See* Hatch, *supra* note 34, at 188–89 (asserting that the creation of a Sentencing Commission was revolutionary); *see also Mistretta*, 488 U.S. at 384–85 (describing the Sentencing Commission as an unusual government organization due to its responsibilities and independence).

[36] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 1987) (discussing the timeline for the creation and implementation of the Guidelines); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988) (providing details regarding the creation of the Guidelines).

[37] *See* AM. COLL. OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 12 (Sept. 2004), http://www.prisonpolicy.org/scans/SentencingGuidelines_3.pdf [http://perma.cc/FN82-FSEB] (maintaining that application of the Guidelines reduced judicial discretion at sentencing); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 884 (1990) (noting that the Guidelines were mandatory); Brenda L. Tofte, Booker *at Seven: Looking Behind Sentencing Decisions: What Is Motivating Judges?*, 65 ARK. L. REV. 529, 543 (2012) (describing sentencing under the Guidelines as formulaic).

[38] *See* Dana L. Shoenberg, *Departures for Family Ties and Responsibilities After* Koon, 9 FED. SENT'G. REP. 292, 295 (1997) (stating that the Guidelines ignored family ties because of concern that recognizing them would privilege men who were financial providers for traditional, two-parent families). Some have pointed to legislative history to argue that the Sentencing Commission's limitation on family ties as a sentencing factor is contrary to congressional intent. *See* Thomas W. Hillier II, Fed. Pub. Def., W. Dist. of Wash., & Davina Chen, Assistant Fed. Pub. Def., Cent. Dist. of Cal., Joint Statement at the U.S. Sentencing Commission Public Hearing: The Sentencing Reform Act of 1984: 25 Years Later, at 35 (May 27, 2009), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090527-28/ChenHillier_Testimony.pdf [http://perma.cc/742P-AR2J] (reviewing the SRA's legislative history regarding family ties).

stances.[39] As Congress drafted the Guidelines, it took additional steps to reform federal sentencing.[40] Congress established mandatory minimum sentences several years before the Guidelines took effect, further reducing judicial discretion.[41]

After only a few years, it became clear that the Guidelines were not achieving uniformity in sentencing, one of the major goals of the SRA.[42] This was due in part to the Guidelines' complexity, which led courts to inconsistent-

[39] *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 37, at 9–10 (observing that departures were acceptable only in unusual situations). Departures, as with all sentencing decisions under the Guidelines, were subject to appellate review by either party, both the government and the defendant. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 270 (1993) (discussing appellate review of sentences that departed from the Guidelines). The U.S. Sentencing Commission defines a departure as a deviation from a Guideline sentence based on a provision of the Guidelines. *See* U.S. SENTENCING COMM'N, DEPARTURE AND VARIANCE PRIMER 1 (2013), http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Departure_and_Variance.pdf [http://perma.cc/7P88-ZNFE] [hereinafter DEPARTURE PRIMER]. In contrast, a variance is a deviation from a Guideline sentence that is based on a statutory factor that is external to the Guidelines. *See id.* For the purposes of this Note the term "departure" will be used to refer to both departures and variances.

[40] *See* Hatch, *supra* note 34, at 192 (stating that, between 1984 and 1990, Congress passed a series of mandatory minimum sentences for drug-related and violent crimes).

[41] *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 37, at 12 (maintaining that mandatory minimums were a further limit on judicial discretion); William K. Sessions III, *Federal Sentencing Policy: Changes Since the Sentencing Reform Act of 1984 and the Evolving Role of the United States Sentencing Commission*, The Thomas E. Fairchild Lecture (Apr. 15, 2011) *in* 2012 WIS. L. REV. 85, 92–93 (arguing that the enactment of mandatory minimum sentences removed sentencing policy-making from the sphere of the Sentencing Commission). Congress sought to deter drug-related and violent crimes in particular, imposing extensive jail time. *See* Hatch, *supra* note 34, at 192 (discussing Congress' goals in setting mandatory minimum sentences). Some argued that the Guidelines, in tandem with mandatory minimums, resulted in unfair prison sentences. *See id.* at 194 (recognizing that mandatory minimums prevent even the small degree of individualized punishment provided for under the Guidelines); Anthony M. Kennedy, *Speech Delivered by Justice Anthony M. Kennedy at the American Bar Association Annual Meeting*, 16 FED. SENT'G REP. 126, 127 (stating that mandatory minimums were neither wise nor necessary when used with the Guidelines).

[42] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 1987) (noting that uniformity was one of the goals of the SRA); AM. COLL. OF TRIAL LAWYERS, *supra* note 37, at 18–19 (discussing the reasons for the Guidelines' failure to achieve uniform sentences); Hatch, *supra* note 34, at 190 (noting that, within a few years of implementation, many criticized the Guidelines for failing to achieve sentencing uniformity).

ly apply the Guidelines.[43] Many voiced their criticism as the effects of the Guidelines came into focus over the next decade.[44]

The U.S. Supreme Court paid heed to mounting criticism in a decision that rendered the Guidelines far less restrictive of judicial discretion.[45] In 2005, in *United States v. Booker*, the U.S. Supreme Court held that the mandatory Guidelines were unconstitutional and remedied that problem by making them advisory rather than mandatory.[46] The Court determined that the Guidelines should be used to guide rather than control sentencing.[47] The Court further elaborated that judges must be able to "tailor" individualized sentences based on statutory concerns such as the history and characteristics of each defendant.[48] In several successive opinions, the Supreme Court clarified that the Guidelines should be the first step in district court sentencing procedures, even though the Guidelines were no longer a binding end point.[49]

B. Family Ties and Current Federal Sentencing Procedures

Current federal sentencing procedures are based on a slow evolution that took nearly ten years to develop after the U.S. Supreme Court's decision in

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[43] *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 37, at 19 (citing the fact that within two weeks three appellate courts reached three different sentences for the same crime). Critics also blamed a lack of uniformity in sentencing on prosecutors for granting downward departures to defendants who provided the government with "substantial assistance" against co-conspirators. *See id.* at 17. Mandatory minimums also resulted in inconsistent application of Guideline sentences. *See* Hatch, *supra* note 34 at 194 (reflecting on the inconsistent application of mandatory minimums and its effect on the uniformity of the Guidelines). Others note that inconsistencies between sentencing statutes and the Guidelines led to inconsistent results. *See* Stith & Koh, *supra* note 39, at 272.

[44] *See* MICHAEL TONRY, SENTENCING MATTERS 72 (1996) (describing the Guidelines as the most widely criticized federal sentencing reform); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1236 (2004) (remarking on the significant hostility directed at the Guidelines); Miller, *supra* note 31, at 478 (noting that judges, scholars, and attorneys were critical of the Guidelines); Stith & Koh, *supra* note 39, at 281 (observing that many criticized the Guidelines).

[45] *See Booker*, 543 U.S. at 245–46 (reviewing recent decisions and rendering the Guidelines advisory rather than mandatory).

[46] *See id.* (finding 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory, unconstitutional). The first part of the *Booker* opinion, written by Justice Stevens, deemed the Guidelines unconstitutional because they enabled a judge to decide matters of fact at sentencing, thereby violating a defendant's Sixth Amendment right to have facts decided by a jury. *See id.* at 244. In addition to making the Guidelines advisory, *Booker* limited the Guidelines further by returning to a reasonableness standard for appellate review of sentences. *See id.* at 261 (discarding the de novo review standard as implemented by legislation enacted in 2003 and returning to a reasonableness standard).

[47] *See id.* at 245. This was decided in the second part of the majority's opinion, which was written by Justice Breyer. *See id.*

[48] *See id.* (referencing 18 U.S.C. § 3553(a)).

[49] *See* Gall v. United States, 552 U.S. 38, 49 (2007) (describing the Guidelines as the starting point in sentencing); Rita v. United States, 551 U.S. 338, 351 (2007) (stating that the Guidelines are the first consideration in sentencing, but each party can still argue for departures).

Booker.[50] Widespread change in sentencing procedures did not take shape until 2010, when the Sentencing Commission released revised Guidelines.[51] The revised Guidelines reiterated a new three-step sentencing process that the Supreme Court established in its post-*Booker* decisions: (1) begin with the Guidelines; (2) allow both parties to argue for and against following the Guideline sentence or allowing an upward or downward departure from that sentence; (3) then consider any other relevant factors under 18 U.S.C. § 3553(a).[52] Rule 32 of the Federal Rules of Criminal Procedure also reflects this new three-step process, which was incorporated in particular in the presentence investigation and report.[53]

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[50] *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1633 (2012) (describing post-*Booker* changes to federal sentencing procedures as gradual). After its decision in *Booker*, the U.S. Supreme Court issued further opinions elaborating changes to the Guidelines. *See Gall*, 552 U.S. at 47 (rejecting an appellate court's requirement of extraordinary circumstances to justify a district court's departure from the Guidelines); *Rita*, 551 U.S. at 350 (noting that courts can depart or vary from the Guidelines given individual circumstances). *Rita* also held that, in accordance with *Booker*, there is no legal presumption that a Guideline sentence must apply. *See Rita*, 551 U.S. at 351.

[51] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2010) (discussing revisions to the Guidelines due to *Booker*); Juel, *supra* note 11, at 30 (noting that the 2010 revisions to the Guidelines implemented the changes established in *Booker*). Within two weeks of the U.S. Supreme Court's decision in *Booker*, Attorney General James Comey issued a memorandum to federal prosecutors advising them to fight for sentences within the applicable Guidelines range. *See* Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(a)*, 30 CHAMPION 32, 32 (2006) (describing the memo as flouting the Supreme Court's decision in *Booker*); Memorandum from James B. Comey, Dep. Atty. Gen., to all federal prosecutors (Jan. 28, 2005), http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf [http://perma.cc/HZV8-PSPD] [hereinafter Comey Memo]. Comey's memo directed prosecutors to report any sentence that was not within the Guidelines range on a form that was included with the memo. *See* Comey Memo, *supra*, at "*Booker* Sentencing Report Form." Under pressure from the Department of Justice, courts were slow to adapt to a world in which the Guidelines were no longer mandatory. *See* Baron-Evans, *supra*, at 32 (observing that within two years of *Booker* seven Circuit Courts had openly ignored *Booker*'s holding, while district courts were also pursuing Guideline sentences without reference to *Booker*). The Sentencing Commission issued revised Guidelines in 2010. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, § 1B1.1 (U.S. SENTENCING COMM'N 2010) (explaining how *Booker* initiated changes to the Guidelines and detailing the new application instructions).

[52] *See* 18 U.S.C. § 3553(a) (2012); *Gall*, 552 U.S. at 49–50 (describing these steps as a sequential procedure); *Rita*, 551 U.S. at 351 (beginning to formulate these steps); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2010) (outlining these steps); Sessions, *supra* note 41, at 97 (describing the new procedures as a three-step process). Consideration of factors under § 3553(a), such as a defendant's history and characteristics, may or may not lead to a departure. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (U.S. SENTENCING COMM'N 2014). Instead, consideration of § 3553(a) factors may simply lead to a sentence on the lower or higher end of the Guidelines range. *See id.*

[53] *See* FED. R. CRIM. P. 32 advisory committee's note (2007) (noting changes to the rule that reflect the holding in *Booker*).

Section 3553(a) requires courts to consider several factors relevant to setting an appropriate sentence.[54] Among those factors, § 3553(a)(1) includes the broad factor of "the history and characteristics" of a defendant.[55] That category had been virtually neglected by the mandatory Guidelines.[56] Courts and the U.S. Sentencing Commission have interpreted the term "characteristics" to apply to a range of defendant characteristics, including family ties and responsibilities.[57] The 2010 revisions to the Guidelines indicated that the characteristics of age, mental health, emotional and physical conditions, and military service may now be possible grounds for a departure.[58] The 1987, 2010, and 2014 Guidelines, however, contain a policy statement, section 5H1.6, stating that the characteristic of family ties and responsibilities is "not ordinarily relevant" and should not be a factor in sentencing decisions.[59]

The Sentencing Commission interpreted congressional instructions regarding consideration of defendant characteristics in a way that directly con-

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[54] *See* 18 U.S.C. § 3553 (listing factors courts must consider at sentencing).

[55] *See id.* at § 3553(a)(1) (including the "history and characteristics of the defendant" as a factor relevant to determining a sentence).

[56] *See* Anello & Peikin, *supra* note 33, at 326 (stating that defendant characteristics were not taken into account under the Guidelines); Sessions, *supra* note 41, at 97 (noting that the factors in § 3553(a) enable a judge to consider the defendant as an individual and that considering these factors was discouraged under the Guidelines).

[57] *See* United States v. Menyweather, 447 F.3d 625, 634 (9th Cir. 2006) (recognizing that *Booker* opened the door to allow courts to consider family responsibilities as part of a defendant's characteristics); DEPARTURE PRIMER, *supra* note 39, at 38–40 (including family circumstances in a list of § 3553(a) factors); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, § 5H1.6 (U.S. SENTENCING COMM'N 2014) (including family ties and responsibilities in the chapter on "Specific Offender Characteristics").

[58] *See* U.S. SENTENCING GUIDELINES MANUAL supp. app. C (U.S. SENTENCING COMM'N 2010) (inserting language indicating that these factors may be relevant at sentencing). In May 2010 Attorney General Eric Holder issued a memorandum acknowledging the 2010 Guidelines revisions by noting that the Guidelines were advisory only and encouraging prosecutors to make an assessment of an appropriate sentence based on the unique facts of each case. *See* Memorandum from Eric H. Holder, Jr., Atty. Gen., to all federal prosecutors (May 19, 2010), http://www.nylj.com/nylawyer/adgifs/decisions/060110holdermemo.pdf [http://perma.cc/TT9H-SKUX].

[59] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2014); U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2010); U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 1987). The Guidelines' section 5H1.6, which indicates that family ties are not ordinarily relevant to sentencing decisions, is a policy statement from the Sentencing Commission, rather than an actual guideline. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2014). *Booker* effectively overruled a group of decisions from the early 1990s in which the U.S. Supreme Court gave policy statements great weight. *See Booker*, 543 U.S. at 245–46 (rendering the Guidelines advisory only and allowing courts to "tailor" sentences according to factors outside of the Guidelines); Stinson v. United States, 508 U.S. 36, 42 (1993) (stating that the Guidelines' policy statements are binding authority in federal courts); Williams v. United States, 503 U. S. 193, 201 (1992) (describing policy statements as "an authoritative guide" to the Guidelines); Baron-Evans & Stith, *supra* note 50, at 1653–55 (reviewing the Supreme Court's decisions regarding the binding nature of policy statements).

flicted with congressional instructions to sentencing judges.[60] Section 3553(a) directs sentencing courts to consider a broad range of factors, including a defendant's characteristics, when determining a sentence.[61] In contrast, § 994(e) of title 28 directs the Sentencing Commission to draft guidelines that will not focus on whether a defendant has family ties when recommending a sentence of imprisonment.[62] In addition, 18 U.S.C. § 3661 states that courts have no limit on their ability to consider information regarding a defendant's background and character during sentencing.[63] The U.S. Supreme Court's decision in *Booker* and the Court's directive to consider defendant characteristics under § 3553(a) helped to mitigate this conflict to some extent.[64] In *Booker*, the U.S. Supreme Court acknowledged that consideration of a defendant's characteristics under § 3553(a) is an important step in tailoring sentences to individual defendants.[65]

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[60] *See Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* U.S. v. Booker*: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 11 (2011) (statement of Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n) (noting that §§ 994 and 3553(a) provide conflicting instructions to sentencing courts and the Sentencing Commission); Douglas A. Berman, *Addressing Why: Developing Principled Rationales for Family-Based Departures*, 13 FED. SENT'G REP. 274, 274 (2001) (discussing the lack of clarity in regard to congressional mandates concerning the consideration of offender characteristics at sentencing); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1715 (1992) (stating that chapter 5, part H of the Guidelines, dealing with offender characteristics, conflicts with 18 U.S.C. §§ 3553(a) and 3661).

[61] *See* 18 U.S.C. § 3553(a) ("The court, in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant . . . .").

[62] *See* 28 U.S.C. § 994(e) (2012). Many have pointed to the SRA's legislative history to indicate that Congress enacted § 994(e) to protect defendants from being incarcerated simply because of their lack of employment, education, or family or community ties. *See* Hillier & Chen, *supra* note 38, at 35 (citing S. REP. NO. 98-225, at 175 (1983)). Supporting this view is the Senate Judiciary Committee's further statement that these factors may be useful in deciding on a sentence of probation instead of imprisonment. *See id.* at 35–36. The concern was that the Guidelines might be used to remove disadvantaged defendants from their community and move them into prisons. *See id.* at 36.

[63] *See* 18 U.S.C. § 3661 (2012) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); Freed, *supra* note 60, at 1695 (noting that the Guidelines conflict with statutory requirements); Christina Chiafolo Montgomery, *Social and Schematic Injustice: The Treatment of Offender Personal Characteristics Under the Federal Sentencing Guidelines*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 35 (1993) (discussing conflict between §§ 3661, 3553(a), and 28 U.S.C. § 994(a)); Donald C. Wayne, Comment, *Chaotic Sentencing: Downward Departures Based on Extraordinary Family Circumstances*, 71 WASH. U. L.Q. 443, 453 n.19 (1993) (observing the conflict between 28 U.S.C. § 994(e) and 18 U.S.C. § 3661).

[64] *See Booker*, 543 U.S. at 245–46 (holding that courts can individualize sentences by following statutes like § 3553(a) rather than simply adhering to the Guidelines).

[65] *See* Lynn Adelman, U.S. Dist. Judge, E. Dist. of Wis., Remarks at the U.S. Sentencing Commission Public Hearing: A View from the Judiciary 1 (Feb. 15, 2005) (transcript available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/2005

As a result of the Supreme Court's decision in *Booker*, Rule 32 of the Federal Rules of Criminal Procedure also references defendant characteristics.[66] Federal statute mandates that a probation officer conduct a presentence investigation and prepare a report for the sentencing court.[67] Rules 32(c) and (d) of the Federal Rules of Criminal Procedure describe the method of investigation and required contents of that report.[68] The report gathers information about the defendant, including his or her criminal history, details of the crime, and information about the defendant's history and characteristics as per 18 U.S.C. § 3553(a)(1).[69] Using the Guidelines and facts from the case, the probation officer also includes a recommended sentence in the presentence investigation report.[70]

C. Impact Assessments: Third-Party Rights at Sentencing

As a statutory requirement, federal presentence investigation reports include victim impact assessments.[71] In general, victim impact assessments alert the court to the financial, economic, emotional, and psychological harm experienced by a third party, a victim, as a result of a defendant's crime.[72] Victim impact assessments have become the model for two other third-party assessments: execution and family impact assessments.[73]

0215-16/Adelman_testimony.pdf [http://perma.cc/VAW9-R3N6]) (stating that the *Booker* decision reflects the need to make individualized sentences); Simons, *supra* note 10, at 384 (arguing that *Booker* created a balance between uniformity and individualized sentences).

[66] *See* FED. R. CRIM. P. 32 advisory committee's note (2007) (noting that post-*Booker*, factors under § 3553(a) can be considered and have therefore been added to 32(d)(2)).

[67] *See* 18 U.S.C. § 3552 (2012) (requiring that a presentence investigation and report be provided to the court pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure).

[68] *See* FED. R. CRIM. P. 32(c)–(d) (detailing the presentence investigation and contents of the presentence investigation report). The probation officer preparing the presentence investigation report also follows guidelines set out in a manual produced by the Administrative Office of the United States Courts. *See* P.S.I. REPORT, *supra* note 12, at i-1. This publication was last updated in March 2006 to reflect changes initiated by *Booker*. *See id*.

[69] *See* FED. R. CRIM. P. 32(d)(2)(G) (indicating that the presentence investigation report must include information relevant to § 3553(a)).

[70] *See id.* R. 32(d)(1) (describing the steps involved in calculating a Guideline sentence and assessing any potential mitigating or aggravating factors that might warrant an upward or downward departure).

[71] *See* Victim and Witness Protection Act of 1982, Pub. L. 97-291, § 3, 96 Stat. 1248, 1249 (making a victim impact assessment a required element of presentence investigation reports); FED. R. CRIM. P. 32(d)(2)(B) (indicating that the presentence investigation report must include an assessment of victim impact). For the purposes of this Note the term "impact assessment" refers only to information that would ordinarily be written by a probation officer as part of a presentence investigation report. As it is used here, the term does not encompass statements that may be read by a victim or victims' family during sentencing.

[72] *See* FED. R. CRIM. P. 32(d)(2)(B) (listing the required contents of a victim impact assessment).

[73] *See* Kevin T. Wolff & Monica K. Miller, *Victim and Execution Impact Statements: What Judges Should Know About Case Law and Psychological Research*, 92 JUDICATURE 148, 149 (2009) (linking victim and execution impact statements); *New York Initiative for Children of Incarcerated Parents*

Victim impact assessments were first used in federal criminal sentencing during the early 1980s.[74] In response to growing concerns regarding increased crime rates in the 1970s, President Reagan initiated research into possible victims' rights legislation in April 1982.[75] The resulting report recommended that victims, who had historically been absent as stakeholders in the criminal justice system, be represented in various ways during criminal proceedings.[76] In September 1982, Congress made victim impact evidence at sentencing a statutory right for victims.[77] Accordingly, probation officers prepare a victim impact assessment to determine a crime's medical, psychological, social, and financial impact on a victim.[78]

Critics of victim impact evidence have called for a counterbalance to that powerful evidence in one particular context: execution impact evidence in capital cases.[79] This evidence describes the impact an execution will have on a

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Family Responsibility Statement: Considering the Needs of Children, OSBORNE ASS'N (May 2014), http://www.osborneny.org/images/uploads/printMedia/FRS_Factsheet_Osborne%20Association_2014.pdf [http://perma.cc/R9EY-JUHJ] [hereinafter *New York Initiative for Children of Incarcerated Parents*] (noting that family impact assessments are similar in function to victim impact assessments).

[74] *See* Victim and Witness Protection Act § 103 (adding victim impact assessments to presentence investigation report procedures).

[75] *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, at ii (1982), http://www.ovc.gov/publications/presdntstskforcrprt/welcome.html [http://perma.cc/BVN9-H8YE] (discussing the establishment of the task force). Grassroots organizations like Mothers Against Drunk Driving were also driving forces in the victims' rights movement. *See* Danielle Levine, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335, 341 (2010).

[76] *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 75, at 33 (including a recommendation that presentence investigation reports include victim impact assessments); Levine, *supra* note 75, at 335 (stating that victims are ignored in the criminal justice system). Some argue that victims are already represented in the criminal justice system through public prosecutors that represent the government and the interests of society at large. *See* Abraham Abramovsky, *Victim Impact Statements: Adversely Impacting upon Judicial Fairness*, 8 ST. JOHN'S J. LEGAL COMMENT. 21, 31–32 (1992) (discussing arguments that prosecutors are victims' representatives at trial).

[77] *See* Victim and Witness Protection Act § 103 (amending Rule 32 of the Federal Rules of Criminal Procedure to incorporate victim impact evidence into presentence investigation reports); Wolff & Miller, *supra* note 73, at 150 (recognizing that the Victim and Witness Protection Act of 1982 gave victims new opportunities to participate in sentencing). In 1991, in *Payne v. Tennessee*, the U.S. Supreme Court opened the door to victim impact evidence at sentencing just four years after holding such testimony unconstitutional. *See* 501 U.S. 808, 827 (1991) (holding that the Eighth Amendment is not a per se bar against the use of victim impact evidence at sentencing).

[78] *See* FED. R. CRIM. P. 32(d)(2)(B).

[79] *See* King & Norgard, *supra* note 5, at 1124 (calling for a balance to victim impact sentences in capital cases through the use of execution impact evidence); Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 4–5 (1999–2000) (noting that execution impact evidence is one way to repair the imbalance caused by victim impact evidence). Critics maintain that victim participation at sentencing unfairly elevates the rights of victims above the established rights of defendants. *See* Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 784 (2014) (maintaining that legal scholars are frequent critics of the victims' rights movement); Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME &

defendant's family members, much as victim impact evidence in capital cases gives voice to the grief and loss of a victim's family.[80] Supporters of execution impact evidence argue that this evidence provides important insight into a defendant's character.[81] Now that a defendant's characteristics must be considered during step three of the federal sentencing process, arguments in favor of execution impact evidence have gained footing.[82]

The Supreme Court has not yet ruled on the admissibility of execution impact evidence.[83] In 1978, in *Lockett v. Ohio*, the U.S. Supreme Court appeared to pave the way to admissibility.[84] The Court's decision in *Lockett* required sentencing judges to consider mitigating evidence in capital cases.[85] In

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JUST. 347, 349 (2009) (noting that victims' rights in the criminal justice process may be a threat to the rights of defendants). *But see* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611 (2009) (arguing that victim impact statements do not interfere with defendants' interests). One particular concern is that victim impact evidence will increase sentences unfairly by evoking sympathy for the victim rather than meting out a just punishment based on the offense alone. *See* Robert C. Black, *Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing*, 39 AM. J. JURIS. 225, 232 (1994) (observing that victim participation at sentencing may lead to a more severe sentence); Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 452 (2003) (asserting that the emotional nature of victim impact evidence can improperly influence judges and juries).

[80] *See* King & Norgard, *supra* note 5, at 1124 (describing execution impact evidence); Logan, *supra* note 79, at 5 (defining execution impact evidence). Scholars emphasize that a defendant's family is also victimized by the prospect of losing a loved one to a capital sentence. *See* King & Norgard, *supra* note 5, at 1124.

[81] *See* King & Norgard, *supra* note 5, at 1125 (noting the relevance of this evidence as a reflection of the defendant's character); Logan, *supra* note 79, at 38 (asserting that execution impact evidence demonstrates a defendant's character and is therefore relevant); Jalem Peguero, *On Mitigation: The Role of "Execution Impact" Evidence*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 65, 73 (2014) (arguing that this type of evidence is relevant to elucidating the defendant's character).

[82] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2010) (describing the third step as an evaluation of factors under 18 U.S.C. § 3553(a), which includes defendant characteristics); Logan, *supra* note 79, at 13–14 (discussing the important role of character evidence in capital trials, in particular evidence regarding the potential impact of execution on family members).

[83] *See* King & Norgard, *supra* note 5, at 1146 (arguing that allowing execution impact evidence would align with U.S. Supreme Court precedent requiring courts to consider all mitigating evidence); Logan, *supra* note 79, at 32–33 (stating that state courts have different approaches to the admissibility of execution impact evidence due to ambiguity regarding the U.S. Supreme Court's view on this type of evidence).

[84] *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality opinion) (stating that the Eighth and Fourteenth Amendments require courts to consider mitigating factors in capital cases).

[85] *See id.* (stating that mitigating factors must be considered during capital sentencing). The Court emphasized the need for individualization in cases in which capital punishment is a possible sentence. *Id.* at 605. Despite the holding in *Lockett*, most state courts do not allow execution impact evidence. *See* Logan, *supra* note 79, at 32–33 (providing an overview of the posture of execution impact evidence in state courts); Darcy F. Katzin, Note, *The Relevance of "Execution Impact" Testimony as Evidence of Capital Defendants' Character*, 67 FORDHAM L. REV. 1193, 1206 (1998) (noting that the highest courts in five states have ruled execution impact evidence inadmissible). The Supreme Court of California and the Oregon Supreme Court allow execution impact evidence in capital cases. *See* Logan, *supra* note 79, at 33. A recent decision from the U.S. District Court for the District of Hawaii

Lockett, the Court recognized that crafting individualized sentences required consideration of a variety of factors, particularly those related to the "life and characteristics" of the defendant.[86] The holding in *Lockett* was limited to capital cases, but it is similar to the U.S. Supreme Court's directive in *Booker* that a defendant's characteristics must be considered at sentencing in accordance with 18 U.S.C. § 3553(a).[87]

A small number of jurisdictions have applied or have considered applying the rationale from *Lockett* regarding execution impact evidence to all criminal cases by using family impact evidence, or assessments, in non-capital cases.[88] A family impact assessment is typically presented to judges as part of a presentence investigation report conducted by a probation officer.[89] A family impact assessment might indicate that a defendant is the sole caregiver for a child, or describe the relationship between the defendant and his or her children and spouse.[90]

When a presentence investigation report includes a family impact assessment, this information serves the interests of the defendant's family by informing the court about the potential impact of a proposed sentence.[91] Using this information, the court can craft a sentence that holds the defendant accountable for his or her crime, but also reflects the defendant's status as a parent or integral family member and possibly utilizes alternatives to incarceration or probation in appropriate cases.[92] Although some of the information provided in a

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allowed execution impact evidence and provided clearly defined parameters for that evidence. *See* United States v. Williams, 18 F. Supp. 3d 1065, 1071–72 (D. Haw. May 7, 2014) (holding that defendant's family could provide evidence of their relationship with defendant and the impact his death would have on them).

[86] *See Lockett*, 438 U.S. at 602–03 (recognizing the need to consider details about the defendant in order to perform the long-established practice of creating individualized sentences).

[87] *See Booker*, 543 U.S. at 245–46 (permitting the sentencing court to consider "other statutory concerns" under § 3553); *Lockett*, 438 U.S. at 604–05 (indicating that because individual characteristics are considered in non-capital cases they are all the more important in capital cases due to the irrevocability of the sentence).

[88] *See* S.F. SENTENCING COMM'N, 2013 ANNUAL REPORT, at 9 (discussing San Francisco's use of family impact assessments); Margaret Dizerega, *San Francisco's Family-Focused Probation: A Conversation with Chief Adult Probation Officer Wendy Still*, 24 FED. SENT'G REP. 54, 54 (2011) (describing San Francisco's use of family impact assessments at sentencing); *New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (listing jurisdictions that evaluate family circumstances at sentencing).

[89] *See* Dizerega, *supra* note 88, at 54 (stating that family impact assessments can be included in a presentence investigation report).

[90] *See id.* (noting that family impact evidence typically includes family details such as number of dependents and whether defendant is a primary caregiver); *New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (referencing the possible items that can be included in a family impact assessment).

[91] *See New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (discussing the relevance and uses of family impact assessments).

[92] *See* S.F. SENTENCING COMM'N, *supra* note 88, at 9 (stating that family impact assessments are not used to minimize a defendant's culpability); *New York Initiative for Children of Incarcerated*

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.[93]

II. FAMILY IMPACT: WHAT IT IS AND HOW FEDERAL COURTS AND THE CITY AND COUNTY OF SAN FRANCISCO ADDRESS IT

Despite revisions to the Federal Sentencing Guidelines ("Guidelines") that allow judges to consider additional factors at sentencing, judges have been hesitant to issue below-Guidelines sentences.[94] In 2014 federal district judges used their discretion to apply below-Guidelines sentences, or downward departures, at the request of defendants in 21.4% of cases.[95] The number of down-

Parents, *supra* note 73 (noting that family impact assessments are meant to protect children, not prevent parents from being punished). Children's rights advocates in particular are seeking to incorporate family impact evidence at sentencing. *See New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (advocating for the use of family impact evidence); *Introduction*, S.F. CHILDREN OF INCARCERATED PARENTS, http://www.sfcipp.org/intro.html [http://perma.cc/JM3U-APVL] (discussing the challenges facing children of incarcerated parents and the need to take them into consideration at sentencing). In 2005, the non-profit organization San Francisco Children of Incarcerated Parents ("SFCIP") worked with children whose parents were imprisoned in order to draft a Children of Incarcerated Parents Bill of Rights. *See Who We Are*, S.F. CHILDREN OF INCARCERATED PARENTS, http://www.sfcipp.org/whoweare.html [http://perma.cc/KF8X-NBVA] (describing the development of the Children of Incarcerated Parents Bill of Rights). This Bill of Rights has been influential to the work of other non-profit organizations as well as to city and state legislatures. *See Right 3. I Have the Right to Be Considered When Decisions Are Made About My Parent*, S.F. CHILDREN OF INCARCERATED PARENTS, http://www.sfcipp.org/right3.html [http://perma.cc/7QS4-UATR]; *see also New York Initiative for Children of Incarcerated Parents*, OSBORNE ASS'N, http://www.osborneny.org/programs.cfm?programID=23 [http://perma.cc/KQ3P-CWZE] (indicating that the New York Initiative for Children of Incarcerated Parents was inspired by the SFCIP Bill of Rights).

[93] *See* P.S.I. REPORT, *supra* note 12, at II-1, II-3, II-4 (stating that probation officers can use these questions to determine how defendants' family histories may have influenced their actions and to determine their ability to pay restitution).

[94] *See* Baron-Evans & Stith, *supra* note 50, at 1677 (observing that rates of departure have been low even after *United States v. Booker* made the Guidelines advisory); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1496–97 (2008) (suggesting that after applying the Guidelines for twenty years judges may be hesitant to depart from what had become routine sentencing practice).

[95] *See* U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl.N [hereinafter USSC 2014 SOURCEBOOK]. Sentences of imprisonment remain high with 87% of all sentences for terms of imprisonment only. *See id.* at fig.D. A total of 46% of all sentences in 2014 were within the Guidelines range. *See id.* at tbl.N. Departures are often requested by the prosecution for providing information about other suspects. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2014) (stating that courts may depart when the government makes a motion for a downward departure based on the defendant's "substantial assistance in the investigation or prosecution of another person"). Government-sponsored departures accounted for 30.3% of all departures in 2014. *See* USSC 2014 SOURCEBOOK, *supra*, at tbl.N.

ward departures granted varies widely based on the district and the crime.[96] Family ties were cited as a reason for a downward departure in only 2.5% of all federal cases sentenced in 2014.[97]

This Part discusses how sentencing decisions impact families and explores how courts address that impact during sentencing.[98] Section A reviews the long-term impact of incarceration on defendants' families.[99] Section B surveys federal case law applying family ties departures.[100] Section C discusses the use of family impact assessments during criminal sentencing in San Francisco, as well as proposed legislation to incorporate family impact assessments into Connecticut's sentencing procedures.[101]

A. What Is Family Impact? Documenting the Impact of Incarceration on Families of Inmates

The Guidelines' emphasis on the use of incarceration as a punishment has resulted in significant negative impacts on inmates' families.[102] In 2004, 63%

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[96] *See* U.S. SENTENCING COMM'N, 2013 ANNUAL REPORT, at A-40 [hereinafter USSC 2013 ANNUAL REPORT]. For example, the highest rate of below-Guidelines sentences in 2014 was 39.7% in the Second Circuit; the lowest was 14.4% in the Tenth Circuit. *See* USSC 2014 SOURCEBOOK, *supra* note 95, at tbls.N-2 & N-10 (listing departure statistics for the Second and Tenth Circuits).

[97] *See* USSC 2014 SOURCEBOOK, *supra* note 95, at tbls.25, 25A & 25B (listing the reasons given for court-granted downward departures in 2014). Note that the author calculated this figure, 2.5%, by reference to Tables 25, 25A, and 25B, which separate departures based on the authority the court cited for each departure decision (for example, *Booker* or 18 U.S.C. § 3553(a)). *See id.* (providing raw numbers for court-granted downward departures based on circumstances like family ties); USSC 2013 ANNUAL REPORT, *supra* note 96, at A-40 (describing how departure statistics are classified according to the authority courts cite for those departures). Few districts make sentencing decisions public, making analysis of how and why courts decide whether to apply a departure a challenge. *See* Scott, *supra* note 10, at 1 (identifying Massachusetts as the only federal district to make the documentation accompanying sentencing decisions public); Tofte, *supra* note 37, at 535 (same). Of the inmates in federal prison, approximately 63% are parents, although 36% are primary caregivers to their children. *See* LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 14 app. tbl.3 (2010). For the purposes of this Note, departures based on family ties or responsibilities will be referred to as "family ties departures."

[98] *See infra* notes 94–174 and accompanying text.

[99] *See infra* notes 102–121 and accompanying text.

[100] *See infra* notes 122–153 and accompanying text.

[101] *See infra* notes 154–174 and accompanying text.

[102] *See* COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 262 (observing that incarceration results in weaker family relationships and decreased well-being of children); Baron-Evans & Stith, *supra* note 50, at 1662 (noting that the Guidelines focused on incarceration as the primary mode of punishment). Since the adoption of the Guidelines in 1987, the federal prison population has increased by 550%. *See* E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 2 tbl.1 (listing the number of inmates in federal prison at yearend 2013: 215,866); PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-86, at 13 (1988) (listing the number of inmates in federal prison at yearend 1986: 33,135). The federal incarceration rate has grown faster than all of the state incarceration rates. *See* COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 55. Most agree that crime rates have not increased, but rather the rate and length of sentences has increased. *See id.* at 3 (pointing to policy

of federal inmates were parents of minor children, and 52.2% lived with their children prior to incarceration.[103] For those inmates that lived with their children, 36.1% of male inmates and 82.8% of female inmates were the primary caregivers.[104] Of those inmates who were not primary caregivers, 54.9% shared caregiving responsibilities with someone else.[105] In addition, 67.2% of inmates reported being the primary source of financial support to their children prior to incarceration.[106] The widespread effect of sentencing expands even further when a defendant is a primary caregiver for dependents such as elderly parents or infirm siblings.[107]

For the children of incarcerated parents, the impact of parental incarceration has been described as a traumatic experience similar to parental divorce or death.[108] This trauma can delay a child's mental and emotional development, leading to mental health consequences like depression as well as behavioral problems.[109] The effects are not limited to the child's home life, but extend to decreased performance in school.[110] Parental incarceration also has strong

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choices rather than crime rates as the cause for rising rates of incarceration); Hagan & Dinovitzer, *supra* note 6, at 129–30 (stating that incarceration and crime rates have not been correlated and that crime rates have been declining since the mid-1990s).

[103] *See* GLAZE & MARUSCHAK, *supra* note 97, at 16 app. tbls.7 & 8.

[104] *See id.*

[105] *See id.*

[106] *See id.* at 17 app. tbl.9.

[107] *See* DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 50–51 (2009) (arguing that a defendant's family responsibilities should be extended beyond children to include anyone for whom the defendant serves as a primary caregiver, including elderly parents). This collateral damage also has a ripple effect through communities. *See* Hagan & Dinovitzer, *supra* note 6, at 134 (stating that imprisonment of working males causes instability in their home communities); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 468 (2013) (recognizing that lack of education, unemployment, and unstable family life are often markers of communities with a large number of incarcerated citizens).

[108] *See* Lerer, *supra* note 15, at 31 (linking parental incarceration to other forms of traumatic loss). In situations where an incarcerated parent was abusive, removal from parental custody is not associated with negative impacts. *See* SARA WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY 95 (2014) (noting the correlation between positive parental relationships and negative impacts of parental incarceration on children); Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 812 (2011) (acknowledging that separation from an abusive parent may benefit a child).

[109] *See* WAKEFIELD & WILDEMAN, *supra* note 108, at 154 (discussing behavioral problems associated with parental incarceration); Lerer, *supra* note 15, at 31 (listing harms such as depression, developmental delays, and antisocial behavior); Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 135 (2008) (listing harms such as drug abuse, mental health problems, and antisocial behavior).

[110] *See* Murray & Farrington, *supra* note 109, at 135 (citing school failure as one of the risks of parental incarceration on children); 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, 604 (1993) (indicating that poor school performance is one of several negative outcomes of parental incarceration).

links to economic hardship for the families of inmates.[111] Finally, incarceration can lead to a loss of parental rights when there are no alternative caregivers and a child is placed in foster care.[112] Although foster care is a state-run program, federal law requires that children in foster care for more than fifteen months be put up for adoption.[113]

For incarcerated parents, maintaining relationships with minor children is complicated by both distance and cost.[114] A 1997 report noted that 84% of federal inmates had been assigned to prisons that were over 100 miles from their residences, and that 43.3% of federal inmates were in prisons that were 500 miles or more from their residences.[115] Traveling to a federal prison to visit an inmate is therefore expensive and time-consuming, all the more so given that few federal prisons are accessible by public transportation.[116] In 2004, 44.7%

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[111] *See* COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 279 (maintaining that families often become homeless and rely on public assistance when a father is incarcerated); Lerer, *supra* note 15, at 32–33 (stating that because incarcerated parents cannot make financial contributions to their families, children may face outcomes such as homelessness and lack of access to food and health care).

[112] *See* Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1678–79 (2003) (discussing the potential for inmates to lose parental rights during incarceration); Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM 175, 176 (2012) (stating that inmates without family networks are at risk of losing parental rights). The loss of parental rights due to incarceration disproportionately affects women, as 11% of female inmates have minor children in foster care whereas only 2% of male inmates report the same. *See* Jody L. King, *Avoiding Gender Bias in Downward Departures for Family Responsibilities Under the Federal Sentencing Guidelines*, 1996 ANN. SURV. AM. L. 273, 284 (1996) (recognizing the disproportionate impact of loss of custody on female inmates); Lerer, *supra* note 15, at 29 (providing statistics on inmates' loss of parental rights).

[113] *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a), 111 Stat. 2115, 2118 (codified as amended at 42 U.S.C. § 675(5) (2012)); Genty, *supra* note 112, at 1676 (discussing the Adoption and Safe Families Act of 1997 ("ASFA"), which requires states to begin termination of parental rights proceedings when a child has been in foster care for fifteen out of twenty-two months); Mitchell, *supra* note 112, at 176 (indicating that ASFA can have a significant impact on inmates with minor children). There has been an increase in the termination of parental rights for incarcerated parents since Congress implemented ASFA. *See* Mitchell, *supra* note 112, at 188. In addition, ASFA provides states financial incentives of $4000 to $8000 per child adopted. *See id.* at 187.

[114] *See* CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, INCARCERATED PARENTS AND THEIR CHILDREN 5 (2000) (indicating the distance between prisons and inmate residences); COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 264 (noting the high cost of visiting and remaining in contact with inmates).

[115] *See* MUMOLA, *supra* note 114, at 5.

[116] *See* Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271, 284 (2007) (discussing the cost of maintaining contact with inmates); Giovanna Shay, *Visiting Room: A Response to* Prison Visitation Policies: A Fifty-State Survey, 32 YALE L. & POL'Y REV. 191, 195 (2013) (noting that few prisons are accessible by public transportation); Tyson, *supra* note 110, at 605 (1993) (stating that prisons are generally inaccessible via public transportation). Federal Correction Institution ("FCI") Danbury is the only federal prison for female inmates on the East Coast. *See* Shay, *supra*, at 195. The Bureau of Prisons planned to close the female portion of FCI Danbury in 2013 but reversed course amid widespread criticism. *See id.*; Piper Kerman, *For Women, a Second Sentence*, N.Y. TIMES (Aug. 13, 2013), http://www.nytimes.com/2013/08/14/opinion/for-women-a-second-

of federal inmates reported that they never received personal visits from their minor children.[117] Even maintaining contact with family by telephone is prohibitive, as inmates must pay for their calls and call length is limited to fifteen minutes.[118]

Although these effects are evident across racial and ethnic categories, the burden is disproportionately placed on black and Hispanic families.[119] Black children are 7.5 times more likely to have a parent in prison than white children, and Hispanic children are 2.7 times more likely to have a parent in prison than white children.[120] This disparity is due in part to mandatory minimum sentences and Guideline policies that emphasized certain factors, such as criminal history, which had a disproportionate effect on minority groups.[121]

B. Case Review: Family Ties Departures in Federal Courts

Courts have struggled to apply sentencing departures based on family ties and circumstances due to difficulty interpreting the Guidelines' policy statement, section 5H1.6, regarding family ties departures.[122] The Guidelines indi-

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sentence.html?_r=0 [http://perma.cc/SW3S-D9YL] (discussing the planned move of FCI Danbury's female inmate population and the already difficult reality of visiting parents in distant prisons).

[117] *See* GLAZE & MARUSCHAK, *supra* note 97, at 18 app. tbl.10 (providing statistics for the frequency of inmate contact with minor children).

[118] *See Stay in Touch*, FED. BUREAU OF PRISONS, http://www.bop.gov/inmates/communications.jsp [http://perma.cc/TKM3-YRJP] (explaining telephone privileges for inmates); FED. BUREAU OF PRISONS, PROGRAM STATEMENT: INMATE TELEPHONE REGULATIONS 9 (2008), http://www.bop.gov/policy/progstat/5264_008.pdf [http://perma.cc/GF4U-85AT] (noting that the maximum duration of phone calls is fifteen minutes). In addition, inmates are limited to 300 minutes of phone time each month, with an extra 100 minutes in November and December, which amounts to twenty fifteen-minute phone calls in a typical month. *See id.* In 2004, 42.2% of federal inmates reported speaking to their children by telephone once a month or less. *See* GLAZE & MARUSCHAK, *supra* note 97, at 18 app. tbl.10. Note that the author calculated this figure, 42.2%, with reference to Table 10.

[119] *See* DOUGLAS C. MCDONALD & KENNETH E. CARLSON, BUREAU OF JUSTICE STATISTICS, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 178 (1993) (suggesting that the Guidelines emphasized certain factors that led to longer sentences of incarceration for blacks and Hispanics in comparison with whites); COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 260 (recognizing the correlation between racial and ethnic disparities of prison populations and rates of parental incarceration); WAKEFIELD & WILDEMAN, *supra* note 108, at 32 (stating that parental incarceration is unequally distributed among black and white children).

[120] *See* COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 260 (providing statistics regarding racial and ethnic disparities in prison populations).

[121] PAUL J. HOFER ET AL., U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 117, 131 (2004) (discussing the various causes of racial disparity under the Guidelines). Prosecutorial discretion has also resulted in racial disparity due to decisions regarding which crimes to prosecute. *See id.* at 81; MARC MAUER, RACE TO INCARCERATE 137–39 (1999) (describing the racial bias evinced by prosecutorial discretion).

[122] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2014) (family ties policy statement); Berman, *supra* note 60, at 278 (stating that the extraordinary circumstance provision is difficult to interpret); Montgomery, *supra* note 63, at 37 (observing that by not defining extraordinary circumstances the Guidelines leave room for interpretation); Ilene H. Nagel &

cate that family ties are "not ordinarily relevant" to departure decisions.[123] This leaves judges to determine what circumstances are extraordinary enough to pass the high bar of "not ordinarily relevant."[124] This interpretive disparity has persisted even after the U.S. Supreme Court rendered the Guidelines advisory in 2005, in *United States. v. Booker*.[125] Further, although in 2007, in *Gall v. United States*, the U.S. Supreme Court held that extraordinary circumstances was not the proper standard for departures, lower courts continue to apply this standard when considering family ties departures from the Guidelines.[126]

Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 202 (1994) (arguing that judicial distinctions between ordinary and extraordinary family ties have been insufficient); Susan E. Ellingstad, Note, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 975 (1992) (noting that by leaving room for interpretation the Guidelines allow for unintended sentencing disparity).

[123] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2014). Further, the Guidelines indicate that although departures may be appropriate in an "unusual case," the Guidelines are intended to cover a "heartland" of typical cases in which departures are not necessary. *See id.* at ch. 1, pt. A. Several Circuit Court opinions remanded cases when district judges interpreted this to mean that family ties departures were prohibited regardless of the circumstances. *See* United States v. Rivera, 994 F.2d 942, 953 (1st Cir. 1993) (granting new sentencing proceedings because of the district court's erroneous belief that it lacked legal authority to grant a family ties departure); United States v. Gaskill, 991 F.2d 82, 83 (3d Cir. 1993) (noting that the district court could have exercised its discretion to depart for family ties); United States v. Headley, 923 F.2d 1079, 1082 (3d Cir. 1991) (stating that the district court thought it did not have the legal authority to depart based on family ties).

[124] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (U.S. SENTENCING COMM'N 2014) (stating generally that specific offender characteristics may be relevant in unusual cases); 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, 610 (1993) (observing that the Sentencing Commission's concept of ordinary family circumstances is "shrouded in mystery").

[125] *See* United States v. Booker, 543 U.S. 220, 245–46 (2005); Baron-Evans & Stith, *supra* note 50, at 1681–82 (noting that evidence indicates judges have exercised their discretion in a limited way post-*Booker*). Some courts have held that the Guidelines' limitation on considering family ties was never binding, or at the very least is no longer binding post-*Booker*. *See* Gall v. United States, 552 U.S. 38, 47 (2007) (holding that extraordinary circumstances are not required to grant a departure); United States v. Prosperi, 686 F.3d 32, 49 (1st Cir. 2012) (holding that, post-*Booker*, policy statements are relevant but not decisive in determining whether to craft a sentence based on the circumstances presented); United States v. Johnson, 964 F.2d 124, 127 (2d Cir. 1992) (holding that policy statements were not binding well before *Booker* made the Guidelines advisory); *see also* Baron-Evans & Stith, *supra* note 50, at 1732 (arguing that the Supreme Court's decisions have indicated that policy statements are not binding on courts); Marc Miller & Daniel J. Freed, *Offender Characteristics and Victim Vulnerability: The Differences Between Policy Statements and Guidelines*, 3 FED. SENT'G REP. 3, 3 (1990) (arguing that courts should give less deference to policy statements than to Guidelines).

[126] *See* United States v. Culbertson, 406 F. App'x 56, 58 (7th Cir. 2010) (hewing to the Guidelines' limitation against considering family ties in all but extraordinary situations); United States v. Phimphangsy, 403 F. App'x 127, 130–31 (8th Cir. 2010) (affirming the district court's decision to impose a Guideline sentence without departing because defendant's circumstances were not extraordinary and the Guidelines adequately considered those circumstances).

The Sentencing Commission revised the family ties and responsibilities policy statement, section 5H1.6, in 2003, adding an application note regarding departures based on the loss of caretaking or financial support.[127] Although a step in the right direction, the four requirements outlined in this application demonstrate that the Commission continues to view family ties departures as exceptional.[128] The Sentencing Commission has provided no additional guidance to courts seeking interpretive assistance in applying family ties departures since the addition of the application note in 2003.[129]

Subsection 1 reviews case law on family ties departures from the pre-*Booker* era, from 1987 to 2004.[130] Subsection 2 reviews case law on family ties departures since 2005.[131]

1. Family Ties Departures: 1987–2004

During the seventeen-year period in which the Guidelines were mandatory, courts applied family ties departures with mixed results both within and across districts.[132] Most courts refused to grant a family ties departure in the absence of extraordinary circumstances.[133] In 1997, in *United States v. Archuleta*, the U.S. Court of Appeals for the Tenth Circuit vacated a district court departure based solely on family ties.[134] The Tenth Circuit held that even though the defendant was the sole caregiver to his two minor children and his

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[127] *See* U.S. SENTENCING GUIDELINES MANUAL app. C, vol. II (U.S. SENTENCING COMM'N 2003) (explaining the addition of the new application note); THOMAS W. HUTCHISON ET AL., FED. SENT. L. & PRAC. § 5H1.6 (2015) (discussing the new application note).

[128] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. n.1 (U.S. SENTENCING COMM'N 2014) (stating that, in addition to three other requirements, a defendant must show that the loss of caretaking support would cause more than the ordinary degree of harm that results from incarceration). It follows from this language, as well as language used regarding grounds for departures generally, that a defendant's family ties and responsibilities are still held to an extraordinary standard. *See id.* (noting that departures should be granted in exceptional cases only).

[129] *See id.* (indicating that section 5H1.6 was last revised in 2004). The 2004 revision was a rewording of a provision in section 5H1.6 that for certain crimes family ties are not relevant in determining a sentence. *See* U.S. SENTENCING GUIDELINES MANUAL supp. app. C (U.S. SENTENCING COMM'N 2008).

[130] *See infra* notes 132–142 and accompanying text.

[131] *See infra* notes 143–153 and accompanying text.

[132] *See* United States v. Thomas, 930 F.2d 526, 529 (7th Cir. 1991) (referencing splits between and within circuits in regards to whether extraordinary circumstances are required for a family ties departure); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 116 (1998) (discussing sentencing variation within districts); Berman, *supra* note 60, at 276–77 (recognizing the inconsistency in sentences based on differing interpretations of extraordinary circumstances); Ellingstad, *supra* note 122, at 969 (noting that at the time of writing at least three Circuits had internal variations in interpreting family ties and responsibilities under section 5H1.6).

[133] *See* United States v. Archuleta, 128 F.3d 1446, 1452 (10th Cir. 1997); United States v. Cacho, 951 F.2d 308, 311 (11th Cir. 1992); United States v. Goff, 907 F.2d 1441, 1446 (4th Cir. 1990).

[134] *See Archuleta*, 128 F.3d at 1451–52.

elderly mother, his circumstances were not extraordinary within the meaning of section 5H1.6.[135] Similarly, in 1990, in *United States v. Goff*, the U.S. Court of Appeals for the Fourth Circuit overturned the defendant's sentence because the district judge granted a family ties departure in order to protect the defendant's children, who were aged seven, six, and two.[136] The court held that there was nothing unusual about the defendant's circumstances and that a departure was therefore inappropriate.[137] Finally, in 1992, in *United States v. Cacho*, the U.S. Court of Appeals for the Eleventh Circuit held that the district court had not erred in its refusal to grant the defendant, a mother of four minor children, a downward departure.[138] The Eleventh Circuit held that district courts were not at liberty to depart downward for family ties unless extraordinary circumstances were present.[139]

In contrast, in an often-cited 1992 case, *United States v. Johnson*, the U.S. Court of Appeals for the Second Circuit affirmed a sentence that granted a significant family ties departure.[140] The defendant was the only caregiver to four

[135] *See id.* (holding that the circumstances did not pass the threshold of those unusual cases that merit a downward departure for extraordinary family circumstances).

[136] *See Goff*, 907 F.2d at 1446 (4th Cir. 1990). The defendant played a minor role in a drug ring run by her boyfriend. *See id.* at 1443. The district court departed from a possible thirty-three- to forty-one-month Guideline range sentence and instead sentenced the defendant to twenty-four months in prison. *See id.* at 1444. The district court was also moved to impose a lower sentence because the defendant's children would be forced to move out of state to live with their elderly grandmother during the defendant's incarceration. *See id.* at 1446. The Fourth Circuit, following precedent from its own and other Circuits, as well as the then-mandatory Guidelines, determined that reducing the defendant's sentence to protect her minor children was unwarranted. *See id.* (citing case law and section 5H1.6 to hold that a departure based on the defendant's family circumstances was inappropriate).

[137] *See id.* (citing United States v. Daly, 883 F.2d 313, 319 (4th Cir. 1989)) (stating that the defendant's circumstances are similar to any other defendant with children and that disruption in parent-child relationships is a normal consequence of imprisonment).

[138] *See Cacho*, 951 F.2d at 311 (affirming the lower court's decision not to apply a downward departure due to family ties). As a matter of first impression, the Eleventh Circuit looked to precedent in the Fourth, Sixth, and Eighth Circuits regarding family ties departures. *See id.* The defendant also requested a downward departure due to her minor role in the offense, but the district court denied this request and the Eleventh Circuit affirmed. *See id.* at 309. The defendant was charged with transporting cocaine from Haiti to the United States as a drug mule. *See id.* She was sentenced to six-and-a-half years in prison. *See id.* The sentencing judge noted that the Guidelines had reduced his ability to consider a downward departure for family ties, stating, "[P]rior to the time that the Sentencing Guidelines came into effect, this Court had the discretion to consider some of the equitable considerations that you have just alluded to. That has been taken away from the Court, rightly or wrongly." *See id.* at 310 (quoting the district court record).

[139] *See id.* at 311.

[140] *See Johnson*, 964 F.2d at 125. The Second Circuit departed from a recommended prison sentence to home detention. *See id.* at 126; Lerer, *supra* note 15, at 53–54 (discussing the *United States v. Johnson* case and the Second Circuit's downward departure based on family ties); Wayne, *supra* note 63, at 450 (noting that at the time of writing the Second Circuit was the only Circuit to issue a downward departure where the only reason given for the departure was the defendant's family ties).

minor children, one of whom was an infant.[141] In comparing the district court's sentence with the requirements of the Guidelines, the Second Circuit held that the defendant's family circumstances were, in fact, extraordinary and should be accorded weight through a departure.[142]

2. Family Ties Departures: 2005 to Present

Interpretive disparity regarding when and how to apply family ties departures persists.[143] One clear example comes from the opposing ways that two federal district courts treated two pregnant defendants.[144] In 2013, in *United States v. McMahill*, the U.S District Court for the Western District of Pennsylvania refused to reverse a sentence based on the defendant's family ties.[145] The court held that the defendant's pregnancy was not an unusual circumstance so that a family ties departure was unwarranted.[146] In contrast, in 2012, in *United States v. Chamness*, the U.S. District Court for the Western District of Kentucky affirmed a downward departure because the defendant was two months pregnant.[147] Although the district court noted that the Guidelines discourage

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[141] *See Johnson*, 964 F.2d at 125 (affirming the district court's sentence based on the defendant's family circumstances).

[142] *See id.* at 129 (holding that the number and age of the defendant's children made her circumstances extraordinary). The Second Circuit added, "[W]e are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing." *Id.* In addition, the Second Circuit held that courts are not required to give policy statements as much deference as the Guidelines and noted that the language regarding family ties in section 5H1.6 is a policy statement. *See id.* at 127–28. The U.S. Supreme Court curtailed this practice in 2003, in *Stinson v. United States*, by holding that the Guidelines' policy statements are binding authority. *See* 508 U.S. 36, 42 (1993).

[143] *See* Abramowicz, *supra* note 108, at 818 (stating that federal circuits differ when interpreting extraordinary family circumstances).

[144] *See* United States v. McMahill, No. 12-787, 2013 WL 2186981, at *1 (W.D. Pa. May 21, 2013) (denying motion to vacate a sentence that did not grant a departure for defendant's pregnancy); United States v. Chamness, No. 5:11-CR-00054-R, 2012 WL 3109494, at *7 (W.D. Ky. July 31, 2012) (affirming a sentence that granted a departure for defendant's pregnancy).

[145] *See McMahill*, 2013 WL 2186981, at *6. The defendant was charged with mail fraud. *See id.* at *1. She filed a motion to vacate or correct her twenty-month sentence, arguing that her attorney had failed to inform the sentencing court of her pregnancy. *See id.* The government argued that the defendant had told her attorney not to disclose her pregnancy and that the defendant herself could have brought her pregnancy to the attention of the sentencing judge if she wanted the judge to take her pregnancy into consideration. *See id.* at *6.

[146] *See id.* at *4. Further, because the defendant became pregnant after her conviction, the court was reluctant to grant a departure because it might set an example for other female defendants that pregnancy is a viable method of gaining a reduced sentence. *See id.*

[147] *See Chamness*, 2012 WL 3109494, at *7. The court granted a departure from the Guideline range of zero to six months of imprisonment to two years of probation. *See id.* The defendant was charged with animal cruelty under federal law because the acts of cruelty took place at Fort Campbell, Kentucky. *See id.* Given the nature of the charges, the sentencing judge expressed concern for the defendant's well-being and ordered mental health counseling and parenting classes. *See id.* at *2.

consideration of family ties, the court held that judges are not prohibited from considering family ties.[148]

Interpretive disparity is also evident in two post-*Booker* cases involving defendants who were caregivers to minor children. In 2011, in *United States v. Vega*, the U.S. District Court for the District of Massachusetts granted a family ties departure, indicating concern for the defendant's high degree of responsibility for the children in her care.[149] Yet in 2012, in *United States v. Williams*, the U.S. Circuit Court of Appeals for the Sixth Circuit affirmed the district court's refusal to grant a family ties departure for a similarly situated defendant who was the mother of five children.[150] Instead of arguing for a family ties departure under section 5H1.6 of the Guidelines, however, the defendant had argued that 18 U.S.C. § 3553(a)(1) required the court to consider her family circumstances as one of her characteristics.[151] The Sixth Circuit rejected this argument, noting that although § 3553(a)(1) allows such considerations, the

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[148] *See id.* at *6. The district court indicated that a more serious penalty might have been appropriate, but it nonetheless held that the departure due to defendant's pregnancy was not unreasonable. *See id.* at *7. The court's decision reflects the appellate standard of review established by the U.S. Supreme Court in 2007 in *Gall v. United States*. *See id.* at *2 (citing *Gall*, 552 U.S. at 51).

[149] *See* Statement of Reasons at 3, United States v. Vega, No. 1:09-cr-10315-NG (D. Mass. July 25, 2011) (noting the defendant's family responsibilities and reducing the sentence by applying a family ties departure). The Guidelines range called for a sixty-three- to seventy-eight-month sentence of incarceration. *See id.*; U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2011) (providing the Guidelines table with sentencing ranges). Instead, the court reduced the sentence to time served and three years of supervised release. *See* Statement of Reasons, *supra*, at 3–4. The defendant was charged with conspiracy to possess and intent to sell cocaine. *See* Judgment in a Criminal Case at 1, United States v. Vega, No. 1:09-cr-10315-NG (D. Mass July 25, 2011). This was a first-time offense for the defendant. *See* Statement of Reasons, *supra*, at 3. The sentencing judge in *United States v. Vega* was the Honorable Nancy Gertner, an outspoken critic of the mandatory Guidelines. *See id.* at 1; Nancy Gertner, *What Yogi Berra Teaches About Post*-Booker *Sentencing*, 115 YALE L.J. POCKET PART 137, 140 (2006), http://www.yalelawjournal.org/forum/what-yogi-berra-teaches-about-post-booker-sentencing [http://perma.cc/P2T2-ANDR] (criticizing the mandatory Guidelines regime as overly restrictive). Judge Gertner has gone on record regarding her disfavor of the extraordinary family circumstances standard of section 5H1.6. *See* Gertner, *supra*, at 141; *see also* Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 98 (2011) (describing Judge Gertner as atypical due to her willingness to apply family ties departures).

[150] *See* United States v. Williams, 505 F. App'x 426, 427 (6th Cir. 2012). Like the defendant in *Vega*, the defendant in *United States v. Williams* was a first-time offender and was charged with conspiracy to possess with intent to distribute methamphetamine. *See id.*; Electronic Brief of the Defendant/Appellant Debra Williams, *Williams*, 505 F. App'x 426 (No. 10-5028), 2012 WL 900850, at *9 (discussing the defendant's lack of a criminal record); Statement of Reasons, *supra* note 149, at 3 (describing the defendant's circumstances in *Vega* and giving reasons for downward departure); Judgment in a Criminal Case, *supra* note 149, at 1 (listing the charges against the defendant in *Vega*). The defendant in *Williams* faced a sentence within the Guidelines range of 188–235 months. *See Williams*, 505 F. App'x at 427 (listing the Guidelines range). The district court sentenced the defendant to the low end of the range, amounting to fifteen-and-a-half years. *See id.* The defendant appealed the sentence, arguing that the district court failed to consider her family circumstances. *See id.* at 428–29.

[151] *See id.* at 429; 18 U.S.C. § 3553(a)(1) (2012).

Guidelines limit these considerations to unusual circumstances.[152] The Sixth Circuit affirmed the district court's determination that a family ties departure was unwarranted "because everybody has got family circumstances."[153]

C. Family Impact Assessments in Practice: San Francisco Set the Bar, States May Follow

Because families of inmates experience a wide range of negative effects due to sentencing procedures that are blind to family impact, some jurisdictions have begun to consider ways to mitigate those effects.[154] For example, the City and County of San Francisco's Adult Probation Department ("APD") incorporated family impact assessments into the sentencing phase of criminal prosecutions to help mitigate the impact of incarceration on family members.[155] San Francisco adopted family impact assessments in 2009 and continues to rely on the assessments to evaluate how sentencing will impact a defendant's family.[156] The APD prepares a family impact assessment as part of the presentence investigation report that is shared with the court during sentencing.[157] Family impact is one of many factors that APD staff evaluate in

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[152] *See Williams*, 505 F. App'x at 429.

[153] *See id.* (quoting the district court record). The Sixth Circuit held that the district court had adequately considered the defendant's request before rejecting it. *See id.*

[154] *See* Telephone Interview with Wendy Still, Chief Adult Prob. Officer, and Lee Anne Hudson, Div. Dir. of Investigations/Records and Reception, S.F. Adult Prob. Dep't (Feb. 17 & 19, 2015) [hereinafter SFAPD Interview] (discussing the benefits of using family impact assessments to reduce negative impacts to families of defendants when appropriate); H.B. 6660, 2013 Gen. Assemb., Reg. Sess. (Ct. 2013) (a bill to add family impact assessments to presentence investigation reports).

[155] *See* Dizerega, *supra* note 88, at 55 (discussing the Adult Probation Department ("APD")'s use of family impact assessments).

[156] *See id.* (noting that family impact assessments were added to the presentence investigation report in 2009); SFAPD Interview, *supra* note 154 (indicating that family impact assessments are still part of the APD's presentence investigation reports). Chief Still notes the influence of the San Francisco Children of Incarcerated Parents ("SFCIP") Children of Incarcerated Parents Bill of Rights, as well as her own experience in seeing firsthand the impact of parental incarceration on children. *See* SFAPD Interview, *supra* note 154; *supra* note 92 and accompanying text (discussing the SFCIP's Children of Incarcerated Parents Bill of Rights). Chief Still observes that science has recently caught up with and supported that experience by documenting those impacts in research studies. *See* SFAPD Interview, *supra* note 154.

[157] *See* Dizerega, *supra* note 88, at 55; Wendy S. Still, *San Francisco Realignment: Raising the Bar for Criminal Justice in California*, 25 FED. SENT'G REP. 246, 247 (2013). Chief Still states that a research project is currently underway to determine how family impact assessments influence the sentences APD staff recommend in their presentence investigation reports. *See* SFAPD Interview, *supra* note 154. That research has already resulted in a plan to incorporate a written statement with each recommendation that will indicate how APD staff evaluated each relevant factor in the presentence investigation report, including family impact, before arriving at a recommended sentence. *See id.*

order to set a recommended sentence.[158] These assessments are used for defendants in all criminal prosecutions, regardless of the charges against them.[159]

San Francisco's use of family impact assessments facilitates the creation of a holistic picture of each defendant as an individual whose sentence will impact a wide network of other individuals.[160] In order to prepare a family impact assessment, the APD gathers information relevant to the defendant's family circumstances.[161] Information collected includes the number of the defendant's minor children, whether the defendant provides financial support to his or her children, whether the defendant is the primary caregiver, and whether the defendant lives with his or her children.[162]

For the APD, family impact assessments are not just a matter of checking boxes on a form.[163] The APD also initiated a shift in department culture to focus on the needs of the defendant, reflecting a family-focused mission.[164] The APD designed this approach to both benefit defendants through reduced rates of recidivism and benefit the defendants' families through the consideration of alternative sentencing and probation options.[165] The APD's use of family impact assessments and the shift to family-focused policies and procedures has produced dramatic results.[166] The APD's caseload has dropped by forty-three

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[158] *See* SFAPD Interview, *supra* note 154. Victim impact statements are also included in the presentence investigation report per California law. *See id.* In determining a recommended sentence, APD staff look at the totality of the circumstances as represented in the presentence investigation report. *See id.*

[159] *See id.* Division Director Hudson notes that APD procedures prevent submitting a presentence investigation report to the court without a family impact assessment. *See id.*

[160] *See id.*

[161] *See id.* The APD reviewed research on the impact of incarceration on families, motivating factors for rehabilitation, resiliency factors, as well as the experience of APD staff to build a template for their family impact assessments. *See id.*

[162] *See New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (listing questions relevant in preparing San Francisco's family impact assessment).

[163] *See* SFAPD Interview, *supra* note 154.

[164] *See id.* Chief Still indicates that the APD has "woven the thread of family-focused probation and supervision" throughout its department by revising its policies and practices to reflect that focus. *See id.*; *see also* Still, *supra* note 157, at 248 (discussing the department's shift toward family-focused procedures).

[165] *See* Dizerega, *supra* note 88, at 54 (observing that contact with family can reduce rates of recidivism); *New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (discussing the possibility that a family impact assessment might result in alternatives to incarceration).

[166] *See* Wendy Still, *Improving Outcomes in the Era of Criminal Justice Realignment*, CITY & COUNTY S.F. ADULT PROB. DEP'T (March 1, 2015), http://sfgov.org/adultprobation/sites/sfgov.org.adultprobation/files/CJ%20Trends%20Fact%20Sheet.2.2015.pdf [http://perma.cc/GVZ4-8NFW] (providing statistics and an overview of changes in the San Francisco criminal justice system that took place between 2009 and early 2015); SFAPD Interview, *supra* note 154 (discussing the March 2015 report that documents the APD's success since introducing these changes in 2009).

percent between 2009 and February 2015.[167] Further, San Francisco saw a forty percent decrease in its jail population during this time.[168]

Although San Francisco is currently the only U.S. jurisdiction to use family impact assessments, the State of Connecticut has considered adopting them.[169] In 2014 Connecticut had pending legislation to incorporate family impact assessments into the sentencing stage of criminal prosecutions.[170] When passed by the House in May 2013, the bill remained limited to custodial parents of minors, but also enumerated the scope of impact such statements could address.[171] For example, assessments might address the child's financial needs, the relationship between parent and child, alternatives to a prison sentence, and whether family or community support would be available to the child.[172] Despite passing in the House in 2013 and the Senate in 2014, the bill did not make it to a vote in both houses in a single session and was stalled.[173] The bill was reintroduced in the House in January 2015 and was referred to the Joint Committee on the Judiciary for further review.[174]

III. MOVING FAMILIES AND FEDERAL SENTENCING FORWARD: WHAT *BOOKER* BEGAN IS NOT YET COMPLETE

Criminal defendants have a legal right to have their family responsibilities considered during federal sentencing.[175] This right was granted by Congress

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[167] *See* SFAPD Interview, *supra* note 154.

[168] *See id.* This is all the more extraordinary given that, during this time, California was implementing a "realignment" to redistribute state prisoners to county jails. *See id.*; *see also* OFFICE OF RESEARCH, CAL. DEP'T OF CORR. & REHAB., REALIGNMENT REPORT 1 (2013) (discussing the effects of California's Public Safety Realignment Act of 2011, including the transfer of some offenders from state prisons to county jails).

[169] *See* H.B. 6660 (proposing to include family impact assessments at sentencing); Dizerega, *supra* note 88, at 54 (noting that San Francisco is the only jurisdiction to use family impact assessments in the U.S.). In 2013 the San Francisco APD received the President's Award from the American Probation and Parole Association for innovative practices. *See* SFAPD Interview, *supra* note 154.

[170] *See* S.B. 361, 2014 Gen. Assemb., Reg. Sess. (Ct. 2014). The Office of Chief Public Defender first proposed this legislation for the 2013 legislative session. *See* CONN. DIV. OF PUB. DEF. SERV., THE ANNUAL REPORT OF THE CHIEF PUBLIC DEFENDER 57 (2012). The proposal began as a general request that courts consider family impact assessments during sentencing of custodial parents facing incarceration. *See id.* (describing the proposed bill).

[171] *See* H.B. 6660.

[172] *See id.*

[173] *See* S.B. 361; H.B. 6660; E-mail from Anne Rajotte, Law Librarian, Conn. State Library, to author (Jan. 20, 2015, 09:59 EST) (on file with author) (describing the status and legislative history of both bills, as well as Connecticut legislative procedures regarding bills).

[174] *See* H.B. 6479, 2015 Gen. Assemb., Reg. Sess. (Ct. 2015). The proposed bill would "require that a family impact statement be considered by the court prior to sentencing in any case in which a custodial parent will be incarcerated." *Id.*

[175] *See* 18 U.S.C. § 3553 (2012) (stating that courts must consider a defendant's characteristics when setting a sentence); *id.* § 3661 (indicating that courts may consider any evidence regarding a defendant's characteristics in order to determine an appropriate sentence); United States v. Booker,

and affirmed by the U.S. Supreme Court.[176] Despite this, family ties departures under section 5H1.6 of the Federal Sentencing Guidelines ("Guidelines") were cited in just 2.5% of all cases sentenced in 2014.[177] Although a family ties departure may not be appropriate in all cases, at a minimum courts should understand and consider the family circumstances of each defendant.[178] Depending on the facts of an individual defendant's case and family life, this could result in a lower term of imprisonment or an alternative punishment such as probation or supervised release.[179]

The past thirty years have clearly demonstrated that ignoring the impact of sentencing on defendants' families creates collateral damage that affects millions of Americans.[180] Efforts to prevent sentencing disparity through mandatory Guidelines failed.[181] Recognizing this, in 2005, in *United States v.*

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543 U.S. 220, 245–46 (2005) (indicating that judges should use 18 U.S.C. § 3553(a) to set individualized sentences).

[176] *See* 18 U.S.C. §§ 3553, 3661; *Booker*, 543 U.S. at 245–46.

[177] *See* USSC 2014 SOURCEBOOK, *supra* note 95, at tbls.N, 25, 25A & 25B (providing 2014 statistics regarding downward departures that were requested by defendants and granted by courts). In light of the U.S. Supreme Court's decision in *United States v. Booker*, legal scholars and practitioners predicted that courts would use their renewed discretion to grant significantly more downward departures. *See* MARKEL ET AL., *supra* note 107, at 48 (arguing that courts would increase the use of downward departures for family ties post-*Booker*); Tofte, *supra* note 37, at 533–34 (observing that despite initial predictions of post-*Booker* increases in downward departures, as of 2012 the evidence indicates those predictions have not been borne out). Court-initiated downward departures (as opposed to government-requested downward departures) have increased from 5.2% in 2004 to 21.4% in 2014. *See* USSC 2014 SOURCEBOOK, *supra* note 95, at tbl.N; U.S. SENTENCING COMM'N, 2004 SOURCEBOOK tbl.26A [hereinafter USSC 2004 SOURCEBOOK]. Family ties accounted for departures in 0.45% of all cases sentenced in 2004 (pre-*Booker*) and over time increased to 2.5% in 2014. *See* USSC 2014 SOURCEBOOK, *supra* note 95, tbls.N, 25, 25A & 25B; USSC 2004 SOURCEBOOK, *supra*, at tbls.25 & 26A. Note that the author calculated these figures, 0.45% and 2.5%, by reference to these tables.

[178] *See* Dizerega, *supra* note 88, at 55 (stating that family impact assessments give judges a holistic view of defendants so that all factors relevant to their crime and characteristics are considered during sentencing).

[179] *See* Baron-Evans & Stith, *supra* note 50, at 1662 (discussing the Sentencing Commission's singular focus on imprisonment despite congressional directives to consider probation and other alternatives to imprisonment).

[180] *See* Krupat, *supra* note 14, at 43 (arguing that children should not be dismissed as the collateral damage of incarceration); Traum, *supra* note 107, at 468 (noting that the collateral impacts of incarceration affect others beyond the defendant).

[181] *See* U.S. GEN. ACCOUNTING OFFICE, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED 110 (1992) (finding that the Guidelines were unable to remove disparities caused by differences in gender, race, age, or location of sentencing); Baron-Evans & Stith, *supra* note 50, at 1682–83 (arguing that disparity increased under the mandatory Guidelines). Even if the Guidelines are revised to provide courts with more guidance regarding when and how to apply family ties departures, some might argue that family ties departures will continue to thwart the goal of uniformity in sentencing. *See* 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, 933 (1993) (recognizing that family responsibilities used to calculate departures may cause sentencing disparity); Shoenberg, *supra* note 38, at 295 (noting that those who are focused on avoiding disparity disagree with applying family ties departures). Most, however, have criticized the very goal

Booker, the U.S. Supreme Court returned to sentencing procedures that focus on defendants as individuals rather than plot points on a sentencing grid.[182] Although *Booker* was an important first step towards individualized sentences that account for a defendant's family circumstances, additional reform is necessary.[183]

This Part argues that two changes to federal sentencing procedures will help courts evaluate and consider family circumstances during sentencing.[184] Section A recommends changing section 5H1.6 of the Guidelines to enable judges to consider family ties and grant departures based on a totality of the circumstances approach.[185] Section B recommends amending Rule 32 of the Federal Rules of Criminal Procedure to incorporate family impact assessments in presentence investigation reports in order to help judges determine when family ties departures may be appropriate.[186]

A. Setting a Reachable Standard for Family Ties: Recommended Amendments to Section 5H1.6 of the Guidelines

In order to create a consistent method of assessing how a potential sentence might impact a defendant's family, the Sentencing Commission should issue revisions to section 5H1.6, the Guidelines' policy statement on family

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of uniformity in sentencing as an unattainable ideal that may limit rather than achieve justice. *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 37, at 35 (stating that the Guidelines placed the goal of uniformity above individualized sentencing); Adelman, *supra* note 65, at 2 (asserting that the goal of eliminating disparity is not workable); Ellingstad, *supra* note 122, at 957 (maintaining that sentencing uniformity is an unreachable goal due to the individual characteristics and nature of each crime and defendant). In fact, supporters of family impact evidence argue that by *not* considering this evidence courts are creating disparity among offenders by inflicting a "double punishment" on defendants with family responsibilities. *See* Nagel & Johnson, *supra* note 143, at 204 (describing punishments to single mothers as a double punishment due to the potential to lose their parental rights); Smith, *supra* note 124, at 637 (asking if punishments are really the same when defendants with family responsibilities face different consequences than defendants without).

[182] *See Booker*, 543 U.S. at 245–46 (holding that the Guidelines are only advisory and that courts should consider a defendant's characteristics under 18 U.S.C. § 3553(a)).

[183] *See* Baron-Evans & Stith, *supra* note 50, at 1632–35 (discussing the slow response to *Booker* and the challenges ahead); Juel, *supra* note 11, at 30 (noting that changes to federal sentencing procedures since *Booker* should ensure that defendants receive individualized sentences); Shelley R. Sadin, *Sentencing Individuals Under the Guidelines: The Vital Role of Background and Character Information*, 11 FED. SENT'G REP. 316, 317 (1999) (calling for defense attorneys to remind courts to focus on defendants as individuals and avoid trying to impose identical sentences); William K. Sessions III, *The Relevance of Offender Characteristics in a Guideline System*, 51 HOUS. L. REV. 1211, 1226 (2014) (recommending that the Sentencing Commission continue to amend its policies on the relevance of a defendant's characteristics at sentencing).

[184] *See infra* notes 175–218 and accompanying text.

[185] *See infra* notes 187–199 and accompanying text.

[186] *See infra* notes 200–218 and accompanying text.

ties and responsibilities.[187] The Guidelines are the starting point in the three-step federal sentencing process, making revisions to the Guidelines a logical first step in providing a solid footing for judicial discretion regarding family ties.[188]

Booker re-opened the door to the use of judicial discretion in applying the advisory Guidelines, yet the current "not ordinarily relevant" language of section 5H1.6 gives judges little guidance in determining which circumstances make family ties and responsibilities a relevant consideration at sentencing.[189] Revising the Guidelines would resolve discrepancies in courts' interpretations of extraordinary or unusual family ties.[190] Because courts already consider many factors during sentencing, family ties could simply be one additional factor, though not a determinative one, in that totality consideration.[191] Like the 2010 revisions to the Guidelines that allowed courts to consider characteristics such as age and mental health, revisions to section 5H1.6 can simply in-

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[187] *See* Berman, *supra* note 60, at 278 (suggesting that the Sentencing Commission revise the Guidelines to provide a foundation for the consideration of family ties departures); Weinstein, *supra* note 16, at 169, 169 n.1 (describing section 5H1.6 and 28 U.S.C. § 994(e) as "so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep."). Federal sentencing should instead align with the approach used in 1992, in *United States v. Johnson*, when the U.S. Court of Appeals for the Second Circuit affirmed a family ties departure to the sole caregiver of four minor children. *See* 964 F.2d 124, 129, 131 (2d Cir. 1992). The Second Circuit assessed the facts of the case to determine that a downward departure was appropriate in order to mitigate harm to the defendant's family. *See id.* at 129.

[188] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2010) (reviewing the three-step sentencing procedure); Sessions, *supra* note 41, at 97 (describing the post-*Booker* sentencing procedure as a three-step process). In a 2002 survey conducted when the Guidelines were still mandatory, district and circuit court judges indicated a desire to be able to consider many of the mitigating factors the Guidelines had banned. *See* LINDA DRAZGA MAXFIELD, U.S. SENTENCING COMM'N, OFFICE OF POLICY ANALYSIS, FINAL REPORT: SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES, at B-8, D-8 (2003), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/200303-judge-survey/execsum.pdf [http://perma.cc/9MVJ-M9PH] (providing survey results indicating that district court and circuit judges wanted to see more emphasis on factors such as age, mental and emotional conditions, and family ties). Further, nearly 60% of both district and circuit court judges responded that the Guidelines should more strongly emphasize family ties. *See id.*

[189] *See* Berman, *supra* note 60, at 278 (arguing that explicit guidance as to when family ties warrant a sentence reduction is needed); Wayne, *supra* note 63, at 453 (asserting that the Sentencing Commission should revise section 5H1.6 in order to give judges better guidance as to which family circumstances are relevant).

[190] *See* United States v. Culbertson, 406 F. App'x 56, 58 (7th Cir. 2010) (following the Guidelines' proscription against granting family ties departures unless the circumstances are extraordinary); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (U.S. SENTENCING COMM'N 2014) (stating that specific offender characteristics may be relevant only in unusual cases and that the Guidelines should be applied in all but unusual cases). *But see* Gall v. United States, 552 U.S. 38, 47 (2007) (rejecting an appellate review standard that would require the presence of extraordinary circumstances in order for a reviewing court to affirm a district court's departure from the Guidelines).

[191] *See* 18 U.S.C. §§ 3553(a), 3661 (requiring sentencing courts to consider a defendant's characteristics and requiring sentencing courts to consider any relevant evidence).

dicate that family ties "may be relevant in determining whether a departure is warranted."[192]

Revisions to section 5H1.6 should reflect the need to consider the impact of each sentence on a defendant's family, in particular the impact on dependents, whether children, spouses, parents, or others within the defendant's care.[193] Prior to their incarceration, over 60% of inmates were parents of minors; of those inmates, nearly 55% shared caregiving responsibilities for minor children and over 65% provided primary financial support to minor children.[194] When a parent is incarcerated, children experience significant trauma with consequences that range from behavioral and psychological conditions to poor school performance.[195] Because so many families of inmates face these negative impacts both during and after the incarceration of a loved one, section 5H1.6 should allow and encourage courts to consider these impacts during sentencing.[196]

Given that the Guidelines are still focused on determining sentences of imprisonment, revisions to section 5H1.6 should indicate that, in some circumstances, alternative sentences can and should be considered.[197] These alternatives

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[192] *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, 5H1.3 (U.S. SENTENCING COMM'N 2014).

[193] *See* Shoenberg, *supra* note 38, at 295 (arguing that district courts need guidance in setting sentences that will not cause additional harm to a defendant's dependents). Using "dependents" rather than minor children keeps the language broad enough to encompass defendants who may be primary caregivers for mentally ill siblings or elderly parents. *See* MARKEL ET AL., *supra* note 133, at 50–51 (arguing that extending family ties departures to a defendant's dependents ensures fairness to defendants who have family responsibilities but do not have children). For example, some have suggested making downward departures for single parents and primary caregivers an explicit provision of section 5H1.6. *See* Raeder, *supra* note 181, at 962 (stating that if section 5H1.6 is revised it must take into account downward departures for single parents as well as primary caregivers). As it stands, the application note regarding downward departures for primary caregivers and financial providers is too stringent. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. n.1 (U.S. SENTENCING COMM'N 2014) (listing four requirements for these types of departures). Of course, given that remaining in the care of a defendant may in some cases cause harm to a dependent, the court should likewise have discretion to deny downward departures or seek alternate punishments. *See* Nagel & Johnson, *supra* note 143, at 208.

[194] *See* GLAZE & MARUSCHAK, *supra* note 97, at 16 app. tbls.7 & 8, 17 app. tbl.9.

[195] *See* Lerer, *supra* note 15, at 31 (describing parental incarceration as a form of childhood trauma and describing the resulting mental health effects on children); Murray & Farrington, *supra* note 109, at 135 (stating that poor school performance is one way that parental incarceration affects children).

[196] *See* COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 6 (stating that incarceration causes negative effects for former inmates and their families, such as reduced earnings for the family as a whole and behavioral problems among their children); Berman, *supra* note 60, at 278 (arguing that the U.S. Sentencing Commission should revise the Guidelines in order to allow courts to consider harms to third parties at sentencing).

[197] *See* COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 9 (recommending alternatives to imprisonment); Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1414–15 (2002) (recommending the use of alternatives to prison to avoid third-party harms); Weinstein, *supra* note 16, at 179–80 (describing the alternatives to imprisonment he has employed as Sen-

include probation, home confinement, or work-release and weekend-only incarceration.[198] 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.[199] In short, alternatives to incarceration can help keep a family together and still accomplish the goals of punishment.[200]

B. Bringing Family Circumstances to Light: Adding Family Impact Assessments to Presentence Investigation Reports

Once the Sentencing Commission amends section 5H1.6 to allow courts to consider family circumstances as a regular practice, further changes are needed in order to provide courts with the information they need to consider family ties departures.[201] Incorporating a family impact assessment into the sentencing process would assist courts with this effort.[202] There is already infrastructure in place to accommodate a family impact assessment: the presentence investigation report.[203]

As an element of the presentence investigation report, a family impact assessment would become part of the sentencing record and would enable judges to better assess the totality of the circumstances surrounding the offense and offender before imposing a sentence.[204] Judges would still be free to determine if they felt a departure was warranted.[205] By including a family impact assess-

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ior U.S. District Judge for the Eastern District of New York, including restitution, house arrest, community service, probation, and home confinement).

[198] *See* Brown, *supra* note 196, at 1415 (describing alternatives to incarceration).

[199] *See* COMM. ON CAUSES & CONSEQUENCES, *supra* note 7, at 9, 22 (suggesting that alternatives to incarceration may be more effective and efficient than incarceration). Alternative punishments may be particularly suited to nonviolent offenders and offenders suffering from mental illness or substance abuse. *See id.* at 199.

[200] *See* Weinstein, *supra* note 16, at 180 (arguing that alternatives to incarceration will help keep families intact).

[201] *See supra* notes 187–199 and accompanying text; *infra* notes 202–218 and accompanying text.

[202] *See New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (maintaining that family impact assessments help courts make informed decisions about the family impact of sentencing).

[203] *See id.* (noting that family impact assessments can be incorporated into presentence investigation reports); SFAPD Interview, *supra* note 154 (stating that family impact assessments are part of every presentence investigation report prepared by the Adult Probation Department).

[204] *See New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (observing that family impact assessments and the presentence investigation report can help judges choose an appropriate sentence); SFAPD Interview, *supra* note 154 (indicating that judges use the family impact assessment alongside the presentence investigation report to evaluate the totality of the circumstances).

[205] *See* 18 U.S.C. § 3553(a) (listing the many factors a court must consider at sentencing); FED. R. CRIM. P. 32(h) (noting that courts can depart from a sentence that is recommended in the presentence investigation report).

ment in a presentence investigation report, judges would have access to pertinent information to help them arrive at a just and fair sentence.[206]

San Francisco's family impact assessments should serve as a model for these revisions to Rule 32.[207] The City and County of San Francisco has successfully incorporated family impact assessments into their presentence investigation reports.[208] These assessments include information about a defendant's family and the impact a potential sentence might have on the family.[209] Like the probation officers in San Francisco's Adult Probation Department, federal probation officers are also in a unique position to gather this information.[210]

When family impact assessments are incorporated into Rule 32 and the presentence investigation report, the instructions federal probation officers use to draft their reports must also be revised.[211] These revisions would indicate the types of questions that probation officers should ask defendants and their families, and should also reflect the new section 5H1.6 Guideline policy statement regarding the standard for granting family ties departures.[212]

Probation officers could use some of the information they already collect to build these family impact assessments.[213] Federal probation officers complete a presentence investigation report worksheet in order to build their report, and this worksheet includes basic information about a defendant's family members.[214] In addition, probation officers are instructed to make a home visit during which they are expected to ask the defendant's family questions related to their relationship with the defendant and the impact incarceration might

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[206] *See* Dizerega, *supra* note 88, at 55 (recognizing that family impact assessments can help sentencing courts by presenting a more holistic picture of a defendant).

[207] *See id.*

[208] *See id.* (describing the San Francisco Adult Probation Department's use of family impact assessments in presentence investigation reports).

[209] *See* Still, *supra* note 157, at 247–48 (describing family impact assessments).

[210] *See* P.S.I. REPORT, *supra* note 12, at I-1 (describing probation officers are "independent investigators" uniquely positioned to gather details about the defendant).

[211] *See id.* at II-3 (describing the information about a defendant's family as providing potential support for a departure). The instructions echo the Guidelines' unworkable standard regarding offender characteristics such as family ties: "In *extraordinary* cases, these factors may even be considered when determining whether a departure from the advisory guidelines or a sentencing variance is warranted." *See id.* (emphasis added); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6, ch. 5, pt. A (U.S. SENTENCING COMM'N 2014).

[212] *See New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (providing a list of potential questions to build a family impact assessment template); *see also supra* notes 187–199 and accompanying text (arguing for a revised standard for determining when a family ties departure is warranted under section 5H1.6).

[213] *See* P.S.I. REPORT, *supra* note 12, at I-1 to I-2 (noting that the presentence investigation report is comprehensive and that all information relevant to the defendant's history should be considered for inclusion in the report).

[214] *See* U.S. DIST. COURT FED. PROB. SYS., WORKSHEET FOR PRESENTENCE REPORT 4–6 (2007) (including space for names and ages of a defendant's children, spouse, parents, and siblings).

have on the family's financial situation.[215] Although questions asked during the presentence investigation are often designed to solicit information about whether the defendant might be able to pay restitution or find support from family during probation, these questions also would be useful in developing an impact assessment.[216]

As an "independent investigator" for the court, the probation officer is in a unique position to gather and present facts that might assist a court in determining when a downward departure due to family ties is appropriate.[217] With this in mind, defense attorneys have a duty to ensure that the probation officer has captured any facts that may be relevant to tailoring the sentence to the defendant's family circumstances.[218] These additional facts will assist the probation officer in recommending a downward departure or alternative sentence, and can help the judge in determining what type and length of sentence is warranted based on the facts of the case and the family ties and responsibilities of the defendant.[219]

CONCLUSION

In order to help combat the widespread negative impacts of incarceration on the families of inmates, federal sentencing procedures must take the needs of a defendant's dependents into consideration. This can be accomplished by amending section 5H1.6 of the Federal Sentencing Guidelines to provide a less restrictive standard for allowing family ties departures, and by amending Rule 32 of the Federal Rules of Criminal Procedure to include family impact assessments in presentence investigation reports. Defendants have a legal right to receive a sentence that is individualized and that takes their characteristics into account. Although a family ties departure may not be appropriate in every case, at a minimum, defendants and their families should be assured that federal courts will consider family circumstances during sentencing. The long-term

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[215] *See* P.S.I. REPORT, *supra* note 12, at II-16 (listing questions to ask during a home visit).

[216] *See id.* at II-4 (referencing the utility of questions about family and financial support); *New York Initiative for Children of Incarcerated Parents*, *supra* note 73 (describing the types of questions that are relevant to conducting a family impact assessment).

[217] *See* P.S.I. REPORT, *supra* note 12, at I-1 (describing the probation officer as an "independent investigator" and noting that they will receive information from all parties involved in sentencing); Smith, *supra* note 124, at 617 (stating that the probation officer has an important task in "ferreting out" facts to provide to the court). *But see* STITH & CABRANES, *supra* note 125, at 86–87 (arguing that probation officers often report facts presented by the defendant and prosecutor without independently investigating those facts).

[218] *See* Smith, *supra* note 124, at 577 (stating that probation officers are hampered by the lack of clarity surrounding a working definition of extraordinary circumstances under section 5H1.6); Tofte, *supra* note 37, at 578 (noting that attorneys can now offer facts at sentencing to help their clients argue for downward departures).

[219] *See* FED. R. CRIM. P. 32(d)(1)(E) (requiring inclusion of any facts that may be relevant to a departure from the calculated Guideline sentence).

effects of incarceration are devastating to inmates, their families, and their communities. Federal sentencing procedures must empower courts to view the people who stand before them not just as defendants, but as fathers, mothers, partners, and caregivers.

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