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NOTES

Considering Caretakers: An Explicit Argument for Downward Departures During Federal Sentencing Mitigation for Caretakers of Children

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The sentencing stage of the federal legal system provides defendants with an opportunity to articulate why the sentencing judge is justified in imposing less severe sentences. Yet, under the Federal Sentencing Guidelines, sentencing judges have been restricted in the characteristics and background information that can be utilized when imposing a downward departure from the recommended Guidelines sentence. More specifically, there is great variability regarding the extent to which family-related circumstances can be utilized as justification for a downward departure due to the Sentencing Commission's ambiguous language. Considering the damaging effects of incarceration on children when a caretaker is physically removed from society, it is crucial that sentenc-

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ing judges are empowered to consider caretakers when determining what punishment fits the crime while also promoting the betterment of society.

Legal scholars have recognized that the Guidelines do not allow a downward departure from recommended sentences to be justified by responsibilities to a third party (e.g., children). Therefore, sentencing judges must be presented with an articulated justification for a downward departure utilizing a defendant-centered lens. For a defendant to successfully argue for a downward departure, a defense attorney's sentencing mitigation must include an explicit and principled rationale. Therefore, in the context of caretaker incarceration, it likely would not be sufficient for a defense attorney to argue that their client deserves a downward departure because incarceration is deleterious for the family, in a general sense.

This Note proposes an explicit and principled argument that can be made for a downward departure based on a defendant's identity as a caretaker. Because the overall goal of the Federal Sentencing Guidelines is to impose sentences that promote retribution, deterrence, incapacitation, and rehabilitation, these four goals of sentencing can serve as useful guideposts for the sentencing mitigation argument. In effect, the argument for a downward departure will explicitly enumerate the impact of incarceration on all caretakers while promoting the objectives behind the Federal Sentencing Guidelines.

INTRODUCTION

The creation of the Federal Sentencing Guidelines (the "Guidelines") in 1987 limited judicial discretion at sentencing, ultimately resulting in extremely harsh sentences that left little room for sentencing mitigation.[1] In 2005, the United States Supreme Court, via

[1] *See* Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 795 (2011).

United States v. Booker, slightly loosened the grasp of the Guidelines by ruling that federal district courts are not "bound to apply the Guidelines"—instead, the Guidelines must be "consult[ed]" and "take[n] into account when sentencing."[2] As a result, judges now have discretion to factor in the "history and characteristics of the defendant" under 18 U.S.C. § 3553(a)(1).[3] However, with an evolving interpretation of the Guidelines and limited guidance, circuits have been split on the extent to which child caretaking responsibilities may be factored into sentencing decisions.[4]

Obviously, incarcerating a child's caretaker creates tremendous implications for both children and caretakers.[5] However, the Sentencing Reform Act does not authorize sentencing a defendant to exclusively avoid third-party harm (e.g., the negative impact of having an incarcerated caretaker on a child).[6] As a result, it is necessary that downward departures at sentencing are argued from a defendant

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[2] United States v. Booker, 543 U.S. 220, 264 (2005).

[3] Abramowicz, *supra* note 1, at 824.

[4] *See id.* at 817–18, 820–23, 829.

[5] *See* Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 81 (2011); Christina Scotti, *Generating Trauma: How the United States Violated the Human Rights of Incarcerated Mothers and Their Children*, 23 CUNY L. REV. 38, 48–49 (2020); Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 390 (2018).

[6] Douglas A. Berman, *Addressing Why: Developing Principled Rationales for Family-Based Departures*, 13 FED. SENT'G. REP. 274, 276 (2001). It is important to note that the Sentencing Commission attempted to grant greater leeway and clarification for family-based departures via Policy Statement § 5H1.6 of the Guidelines. *See id.* at 275. However, § 5H1.6 states family ties and responsibilities are "not ordinarily relevant" and, thus, must be "extraordinary" to justify a downward departure. *Id.* As a result, courts have been left to determine what constitutes "extraordinary" circumstances leading to vastly different interpretations across circuits. *See* CHILDREN OF INCARCERATED CAREGIVERS, RAISING FAMILY CIRCUMSTANCES IN FEDERAL-COURT SENTENCING PROCEEDINGS 2–4 (2022). Because the ambiguity in § 5H1.6 perpetrates disparate treatment of caregivers based on circuit, this Note will instead promote a defendant-centered lens—in adherence with the Guidelines—when arguing for downward departures. Under such a framework, all caretakers—regardless of ordinary or extraordinary circumstances—should receive equal consideration for a downward departure explicitly because of the damaging effects caused by their separation from their children.

perspective instead of a third-party perspective.[7] The former argument exclusively uses the defendant's characteristics and circumstances to argue for a downward departure, whereas the latter uses the effect of incarceration on others as justification.[8] Furthermore, it is not sufficient for a defense attorney to argue in the general sense that incarceration hurts families, and thus, this specific defendant should be sentenced below the Guidelines.[9] Instead, sentencing mitigation should present "explicit and principled rationales for a reliance on family circumstances as a mitigating factor at sentencing."[10]

This Note will articulate an explicit and principled rationale for a reliance on family circumstances as mitigation by employing a caretaker lens, where "caretaker" encompasses any biological or non-biological adults who are responsible for a child. Title 18 U.S.C. § 3553(a)(2)(A)–(D) articulates the goals of federal sentencing: retribution, deterrence, incapacitation, and rehabilitation. This Note will show how a downward departure for defendants who are caretakers for children not only complies with but promotes the federal sentencing goals. Sentencing judges should feel empowered to make downward departures from the Guidelines' recommended sentences because promoting cohesive family units creates long-term benefits for both individuals and society.

Part I of this Note will discuss the Federal Sentencing Guidelines, explaining the creation of the Guidelines as well as the evolution of the Guidelines in light of *Booker*.[11] Part I will also illustrate how the Guidelines have affected sentencing mitigation and sentencing in practice.[12] Part II will pivot from the Guidelines to focus

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[7] *See* Berman, *supra* note 6, at 276.

[8] *See* discussion *infra* Section III.A.

[9] *See* Berman, *supra* note 6, at 277.

[10] *Id.* As articulated in his 2001 article, legal scholar Berman called upon "the Sentencing Commission and federal courts (and perhaps also Congress) . . . to start developing *explicit and principled* rationales for the reliance on family circumstances as a mitigating factor at sentencing." *Id.* at 274. Without any such response approximately twenty-three years later, defense attorneys should feel empowered to catalyze a policy shift through each individual caretaker's sentencing. This Note specifically demonstrates how the explicit and principled argument can be made at sentencing for all caretakers.

[11] *See* discussion *infra* Part I.

[12] *Id.*

on the impact of incarceration on children and caretakers.[13] More specifically, Part II will explore incarceration in the federal legal system and the multi-generational effects of separating a caretaker from children.[14] Part III will provide the intersection of Part I and Part II, explaining the necessity for a caretaker lens when arguing for a downward departure during sentencing mitigation due to the Guidelines' restraints.[15] Then, Part IV will articulate the justification for a downward departure from the Guidelines, utilizing a caretaker lens, through specific reference to the four goals of federal sentencing: retribution, deterrence, incapacitation, and rehabilitation.[16]

I. THE FEDERAL SENTENCING GUIDELINES

Multiple stakeholders are responsible for shaping federal sentencing.[17] Before 1984, federal crimes had "very broad ranges of penalties" resulting in federal judges issuing disparate sentences without needing to provide justification.[18] Sentencing was "opaque, undocumented, and largely discretionary."[19] In response, Congress passed the Sentencing Reform Act of 1984, which created the United States Sentencing Commission (the "Commission").[20] The Commission was tasked with creating guidelines to create more uniformity among federal judges who are responsible for determining the sentence for each individual defendant.[21] In 1987, the Commission created the Guidelines based on the Sentencing Reform Act's requirements, other federal statutes, and an analysis of "10,000 presentence reports" and "over 100,000 federal sentences imposed in the immediate preguidelines era."[22]

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13 *See* discussion *infra* Part II.

14 *Id.*

15 *See* discussion *infra* Part III.

16 *See* discussion *infra* Part IV.

17 *See* U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING iv (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at v.

Since 1987, the Guidelines continue to restructure how attorneys and courts navigate federal sentencing procedures.[23] After a defendant is convicted in the federal criminal system, either after trial or by guilty plea, their punishment is determined at a sentencing hearing.[24] Sentencing judges (usually district judges) can rely on information provided in a presentence report, sentencing memoranda, and/or oral argument when determining the appropriate sentence.[25] A presentence report ("PSR") is prepared by an assigned probation officer who evaluates the defendant's "history and characteristics," such as family background, health, educational attainment, employment history, etc.[26] In addition, the defense attorney can prepare a sentencing memorandum describing any mitigating circumstances such as mental illness or the defendant's minor role in the offense.[27] The PSR, sentencing memorandum, and oral argument are all crucial tools because they allow the defendant to provide contextual information to the sentencing judge and argue why their character or background justifies a lower sentence, in other words, a downward departure.[28]

Plainly, sentencing gives the defendant an opportunity to positively alter the outcome of his or her case.[29] Ultimately, all information provided to the sentencing judge is considered against the recommended minimum and maximum punishment in the Guidelines.[30] While the Guidelines were drafted to eliminate sentencing disparities, the Commission also intended to "provide federal judges with 'sufficient flexibility to permit individualized sentences when

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[23] *See* Abramowicz, *supra* note 1, at 795.

[24] *See* John B. Meixner, Jr., *Modern Sentencing Mitigation*, 116 NW. U. L. REV. 1395, 1407–08 (2022) (discussing the role of presentence reports and sentencing memorandum in shaping a judge's sentencing decision).

[25] *Id.*

[26] *Id.*

[27] *Id.* For an example sentencing memorandum filed on behalf of a defendant, see Memorandum from Randolph P. Murrell, Federal Public Defender, to United States District Court Northern District of Florida Tallahassee Division (Oct. 6, 2006), http://www.fln.fd.org/files/Booker%20Sample%20Memo%20IV.pdf.

[28] *See* Meixner, *supra* note 24, at 1395.

[29] *See id.*

[30] *Sentencing*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/sentencing (last visited Feb. 18, 2023).

warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.'"[31] In short, sentencing judges still possess enormous discretion.

A. *An Introduction to the Guidelines*

The Commission was created by Congress to address (1) extensive judicial discretion; (2) the uncertainty of punishment at the federal level; and (3) the need for specific offenders to receive more serious penalties.[32] However, dramatic disparities between sentencing judges emerged because each sentencing judge was "left to apply his own notions of the purposes of sentencing."[33] A defendant might receive a three-year sentence from one judge but a twenty-year sentence had he been assigned to a different judge.[34] Sentencing outcomes became the luck of the draw. Hence, the necessity for the Guidelines which provided federal judges with parameters, including a minimum and maximum sentence time.[35] These parameters were framed within the overall goal of the Guidelines—to promote the four theories of punishment (i.e., retribution, deterrence, incapacitation, and rehabilitation).[36]

But, not all theories of punishment are treated equally. Due to the Guidelines' focus on "offenders' blameworthiness," the Sentencing Commission was primarily concerned with retributive punishment.[37] Retribution first looks to the harm created by the defendant's conduct, then imposes a punishment based on the resulting harm and the degree of blameworthiness.[38] Retribution is a past-

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[31] Rachel Konforty, *Efforts to Control Judicial Discretion: The Problem of AIDS and Sentencing*, 1998 ANN. SURV. AM. L. 49, 53 (1998).

[32] U.S. SENT'G COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2011), https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf.

[33] *See* Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence From Booker*, 89 N.Y.U. L. REV. 1268, 1269 (2014).

[34] *Id.* at 1269–70.

[35] *See* U.S. SENT'G COMM'N, *supra* note 32, at 2.

[36] *See* 18 U.S.C. § 3553 (1984). The four theories of punishment are reflected in (a)(2)(A)–(D).

[37] James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 180 (2010).

[38] *Id.* at 177.

looking theory, where the severity of the punishment is dictated by the defendant's past acts.[39]

In contrast, deterrence, incapacitation, and rehabilitation are forward-looking theories of punishment, imposing a sentence that is intended to protect society's future safety.[40] There are two different types of deterrence: specific and general.[41] Specific deterrence focuses on the actual defendant, utilizing their own negative experience of punishment to disincentivize their own future wrongdoing.[42] In contrast, general deterrence focuses on discouraging all members of society from committing unlawful conduct by exemplifying someone else's negative experience of punishment.[43] Incapacitation physically removes a defendant from society to prevent them from committing more crime.[44] Rehabilitation is intended to reform the

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[39] *Id.* In other words, retribution imposes "[a]n eye for an eye, a tooth for a tooth" approach to punishment. Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715, 715 (2006).

[40] Gwin, *supra* note 37, at 177.

[41] *Id.* at 176.

[42] Athula Pathinayake, *Contextualizing Specific Deterrence in an Era of Mass Incarceration*, 18 CONN. PUB. INT. L.J. 357, 359 (2019). For specific deterrence to be effective, the individual must experience some sort of "negative stimuli, such as fines, periods of probationary restrictions, or imprisonment." *Id.* at 362. In furtherance of specific deterrence, "policymakers have employed harsher sentences and increased monitoring on the belief that increased punishment and likelihood of detection are considered significant deterrents against future offending." *Id.* at 363. For example, "'three strikes' laws, whereby automatic imprisonment for a lengthy period is imposed for any third offence committed, irrespective of its type or seriousness." *Id.*

[43] *Id.* at 359. It is important to note that general deterrence is difficult to measure. *Id.* at 366. While it is feasible to determine whether an individual was specifically deterred (i.e., whether they have any new convictions post-punishment), measuring the effect of general deterrence requires examining the entire population. *Id.* Furthermore, if a member of the population is deterred from committing a crime, is it truly feasible to attribute their deterrence to another individual's punishment?

[44] Gwin, *supra* note 37, at 176. Utilitarian philosopher and legal reformer Jeremy Bentham is responsible for identifying incapacitation as a justification for punishment. Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. *1, *2 (2017). According to Bentham's critique of incapacitation as a justification for punishment, punishment "could be justified only insofar as it prevented more suffering by preventing crime." *Id.* It follows that "incapacitation can only justify punishment insofar as restraining particular

defendant and prepare for reentry through "education, training, and treatment."[45] Congress explicitly requires sentencing judges to consider a defendant's rehabilitation at sentencing and provide the necessary "educational or vocational training . . . in the most effective manner."[46] Importantly, neither deterrence, incapacitation, nor rehabilitation explicitly use third-party harm as a justification for punishing a defendant.[47] As a result, the Guidelines inherently promote a defendant-centered approach to punishment by incorporating the four theories of punishment into the justification for sentencing.[48]

While the four theories of punishment provide a framework for the sentencing judge, a defendant's recommended prison sentence is calculated using the Commission's sentencing table based on the severity of the offense and the defendant's criminal history.[49] First,

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past offenders will prevent crimes that would otherwise occur, without causing greater harm than the crime prevented or any alternative means of preventing crimes." *Id.* at *3.

[45] Gwin, *supra* note 37, at 176–77.

[46] Erica Zunkel, *18 U.S.C. § 3553(a)'s Undervalued Sentencing Command: Providing A Federal Criminal Defendant with Rehabilitation, Training, and Treatment in "The Most Effective Manner*," 9 NOTRE DAME. J. INT'L & COMP. L. 49, 55 (2019). Problematically, the federal prison system is severely overcrowded, thus, making it exceedingly difficult to provide a safe living environment, let alone proper rehabilitation. *See id.* at 58. For example, despite a 2006 Department of Justice study finding 44.8% of all federal inmates required mental health care, only 3% of the inmate population was treated regularly for mental illness in 2017, according to the Bureau of Prison. *Id.* at 61–62.

[47] *See* Berman, *supra* note 6, at 276; Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 584 (2003). For Rappaport, utilitarianism could offer a justification for factoring third-party harms into federal sentencing. *Id.* For example, "[e]ven though the [Sentencing Reform Act's] statement of purposes does not explicitly refer to the financial costs of punishment, it seems inconceivable that Congress intended to bar the Commission from taking such basic considerations into account." *Id.* at 585. Therefore, "[i]f the Commission can take into account the financial costs of prison, then it can also take into account other kinds of social costs, including the collateral harms suffered by innocent third parties" (e.g., a defendant's child). *Id.*

[48] *See* 18 U.S.C. § 3553(a)(2) (1984); Berman, *supra* note 6, at 276.

[49] *See* U.S. SENT'G COMM'N, *supra* note 32, at 2, 3. The sentencing table displays all recommended sentence range in months. *Id.* at 3.

the defendant is assigned a number from one to forty-three depending on the severity of the offense.[50] Additionally, the defendant will be assigned to one of six categories based on their criminal history.[51] Once the defendant is assigned a number for the severity of the offense and for the criminal history, the point where the two numbers intersect on the sentencing table will correspond to the recommended sentence, measured in a range of months.[52] The Commission included a lower and upper boundary to provide sentencing judges with flexibility.[53] Additionally, the Commission has limited the type of factors that may influence a defendant's sentence.[54] While criminal history, dependence on a crime for livelihood, and

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[50] *See id.*; U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf. The severity of the offense appears on the vertical axis of the table. *See id.* Chapter Two of the Guidelines Manual outlines different types of offenses and provides a corresponding "base offense level." *See id.* at § 2A1.1. The "base offense level" can be altered based on "specific offense characteristic." *Id.* For a defendant sentenced for involuntary manslaughter, for example, a sentencing judge can find a "base offense level" of 12 if the conduct was negligent, a "base offense level" of 18 if the conduct was reckless, or a "base offense level" of 22 if the "offense involved the reckless operation of a means of transportation." *Id.* at § 2A1.4. For a drug-related offense, "base offense level" can be dictated by the type of chemical and quantity involved. *E.g., id.* at § 2D1.11. Additionally, the offense level can be adjusted based on the "role the defendant played in committing the offense" (e.g., an organizer or leader of a group of five or more other people will receive a 4-point increase). *See id.* at § 3B1.1. If the defendant accepts responsibility for their actions, they receive a 2-point decrease. *Id.* at § 3E1.1.

[51] *See* U.S. SENT'G COMM'N, *supra* note 32, at 2; U.S. SENT'G GUIDELINES MANUAL § 4A1.1. The criminal history category appears on the horizontal axis of the table. *See id.* at § 5A. To promote the four goals of sentencing listed in 18 U.S.C. § 3553(a)(2) (i.e., retribution; deterrence; incapacitation; rehabilitation), the Guidelines state that a "defendant's record of past criminal conduct is directly relevant . . . ." *Id.* at § 4A1.1. "A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." *Id.* "General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence." *Id.* "To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered." *Id.* "Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." *Id.*

[52] U.S. SENT'G COMM'N, *supra* note 32, at 2.

[53] *See id.*

[54] Konforty, *supra* note 31, at 53.

acceptance of responsibility may warrant an upward or downward departure from the sentencing parameters, social identity-based factors (e.g., race, sex, and socioeconomic status) are forbidden justifications for departures.[55]

After considering the appropriate defendant characteristics, a sentencing judge must ensure the sentence is "sufficient but not greater than necessary" in accordance with 18 U.S.C. § 3553(a).[56] It is important to note that challenging a sentence on the grounds that it is greater than necessary is likely to fail because appellate courts are deferential to the sentencing judge.[57] For one, a sentence within the Guidelines range is considered presumptively reasonable.[58] Additionally, appellate courts may uphold sentences outside of the Guidelines range, so long as the sentencing judge provides proper justification for their departure and the sentence reflects all 18 U.S.C. § 3553(a) factors.[59]

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[55] *Id.* at 53–54.

[56] 18 U.S.C. § 3553 (1984). This is known as the "parsimony provision," requiring a judge to "consider the § 3553(a)(2) factors when determining *both* whether to imprison an offender *and* what length of term to give him." Zunkel, *supra* note 46, at 54.

[57] Gall v. United States, 552 U.S. 38, 51 (2007) ("Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. . . . It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.").

[58] *See id.*

[59] *See id.* But note that it is exceedingly difficult for sentencing judges to determine what constitutes a sentence that is "sufficient but not greater than necessary" and "apply the § 3553 factors." *See* Stephen R. Bough, *Getting to Know a Felon: One Judge's Attempt at Imposing Sentences that are Sufficient, but Not Greater Than Necessary*, 87 UMKC L. REV. 25, 25–26 (2018). For Judge Stephen R. Bough, U.S. District Court Judge for the Western District of Missouri, he sought to "ge[t] inside the mind of a criminal defendant" and better "understand the societal factors partly responsible for sending people to prison, including generational poverty and drug addiction." *Id.* at 26. Additionally, Judge Bough "needed to better understand life inside a prison, the programs offered, . . . the

Even though sentencing judges are permitted to consider defendant characteristics, Congress does not articulate the extent to which family ties can be factored into sentencing determinations.[60] Per 18 U.S.C. § 994(d), "family ties and responsibilities" should be considered "only to the extent that they do have relevance."[61] Although vague, the relevance of family circumstances could also be assumed from a plain reading of 18 U.S.C. § 3553(a)(1), which allows a court to consider the "history and characteristics of the defendant."[62]

In 1987, the Sentencing Commission first issued policy statement § 5H1.6 in an attempt to clarify the consideration of family ties and responsibilities.[63] While family ties alone cannot justify downward departures, the Commission gave sentencing judges discretion to downward depart when the defendant's incarceration would negatively impact caretaking or financial support.[64] In other words, the deleterious effects for children who have an incarcerated caretaker (e.g., psychological; social; educational) is not alone sufficient; the effects of the caretaker's absence *must* be financially tangible, or the defendant must seemingly be a primary caretaker.[65] Section 5H1.6 includes additional carveouts. For one, the policy statement explic-

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mental toll, . . . life after prison, the chances of recidivism, and reintegrating into the working world." *See id.*

[60] Berman, *supra* note 6, at 274.

[61] *Id.*

[62] *Id.*

[63] U.S. SENT'G GUIDELINES MANUAL § 5H1.6 (U.S. SENT'G COMM'N 2013) ("In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted."). Promulgating policy statements is among the Commission's enumerated duties. 28 U.S.C. § 994(a) (1984). The Commission "shall promulgate and distribute to all courts . . . general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code . . . ." *Id.* 18 U.S.C. § 3553 states courts "shall consider . . . any pertinent policy statement," among other enumerated factors, when determining a sentence that is "sufficient but not greater than necessary." 18 U.S.C. § 3553(a) (1984).

[64] U.S. SENT'G GUIDELINES MANUAL § 5H1.6.

[65] *Id. See infra* Section II.A.

itly says that "family ties and responsibilities are not ordinarily relevant" to determining departures.[66] This is important to note because the Commission is clearly signaling to sentencing judges that family-based departures are appropriate in only limited circumstances. Additionally, the language of § 5H1.6 automatically excludes defendants charged with certain offenses from receiving downward departures due to their family ties and responsibilities.[67] Therefore, even for those defendants who are the sole caretakers and financial providers for children, a judge cannot grant a downward departure on family-related grounds.[68]

Assuming a defendant's offense does not preclude them from receiving a downward departure, the judge must still weigh the factors in § 5H1.6(1)(A) such as (1) the seriousness of the offense; (2) the involvement in the offense of any family members; and (3) the danger the offense posed to any family members.[69] Also, the sentencing judge must determine that the defendant satisfies the definition of "caretaker" as outlined in subsection (B).[70] In effect, § 5H1.6

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[66] U.S. SENT'G GUIDELINES MANUAL § 5H1.6. As a result, "courts have concluded that primary or even sole parenting responsibilities are insufficient to permit a departure." Berman, *supra* note 6, at 275.

[67] U.S. SENT'G GUIDELINES MANUAL § 5H1.6. The excluded offenses are those involving a minor victim; sex trafficking; obscenity; sexual abuse; sexual exploitation and other abuse of children; transportation for illegal sexual activity and related crimes. *See id.* While excluding defendants convicted of child- or sex-related offenses from family-based downward departures might seem commonsensical, it is important to consider the effectiveness of such a bar. Of course, wrongful convictions are an inherent possibility. *See generally* Eza Bella Zakirova, *Is It Rational Or Not?: When Innocents Plead Guilty In Child Sex Abuse Cases*, 82 ALB. L. REV. 815, 816–32 (2019). Furthermore, extensive studies suggest sex offenders have a lower rate of recidivism than non-sex offenders. *See generally* 1 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 5–6 (2023). Therefore, is there any utility in subjecting sex offenders to longer sentences knowing the negative consequences of incarceration?

[68] *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.6.

[69] *Id.*

[70] *See id.* In subsection (B), the policy note states departures "based on the loss of caretaking or financial support of the defendant's family" require four elements. *Id.* First, that the defendant's sentence within the Guidelines range will cause a "substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family." *Id.* Second, the "loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant." *Id.* Third, that the loss of caretaking

ties the hands of sentencing judges because it is tremendously difficult to grant a departure satisfying all necessary circumstances of subsections (A) and (B) in the application note.[71]

On November 1, 2023, the United States Sentencing Commission amended the Guidelines.[72] Typically, once a defendant has been sentenced, their "term of imprisonment" cannot be changed by the sentencing judge.[73] However, 18 U.S.C. § 3582(c)(1)(A)(i) provides an exception if "extraordinary and compelling reasons warrant such a reduction."[74] The 2023 amendments included three new grounds for a judge to grant a family-based sentence modification as an "extraordinary and compelling reason[]" under 18 U.S.C. § 3582(c)(1)(A).[75] The three new "extraordinary and compelling reasons" that justify a sentence decrease are now: (1) if a defendant's child is over eighteen years old but they are incapable of self-care due to a "mental or physical disability or a medical condition" and their caregiver has died or is incapacitated; (2) the defendant's parent is incapacitated and the defendant is the "only available caregiver"; and (3) the defendant is the only available caregiver for someone "whose relationship with the defendant is similar in kind to that of an immediate family member."[76]

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or financial support is "irreplaceable to the defendant's family." *Id.* Finally, that the "departure effectively will address the loss of caretaking or financial support." *Id.*

[71] Abramowicz, *supra* note 1, at 823–24. In response to § 5H1.6, Judge Weinstein, United States District Judge of the Eastern District of New York, considered the provision to be "so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep." *Id.* at 824.

[72] *See generally* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 1 (2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf. In 2018, First Step Act amended 18 U.S.C. § 3582(c)(1)(A) allowing sentencing judges to grant sentence reductions by a defendant's own motion because, previously, only the BOP could motion the court. *Id.* Unsurprisingly, this rarely happened—about 24 people per year were granted relief, often because they were about to die or were severely ill. *Id.*

[73] *See* 18 U.S.C. § 3582(c) (1984).

[74] 18 U.S.C. § 3582(c)(1)(A)(i).

[75] U.S. SENT'G COMM'N, *supra* note 72, at 3.

[76] *Id.* at 3–4.

Even though the 2023 amendments are applicable to sentence modifications—not downward departures at initial sentencings—it is encouraging to see congressional focus on caregiver-based reductions that do not require blood relation. But despite using this more inclusive language, the modifications still problematically require the caregiver status to rise to the level of "extraordinary and compelling."[77] Preserving the ambiguous distinction between extraordinary and ordinary caretaking responsibilities enables judicial discretion while obfuscating the damaging consequences of incarceration felt by *all* caretakers.

B. *The Evolution of the Guidelines*

Sentencing under the Guidelines has not always been as discretionary as modern-day sentencing practices. *United States v. Booker* sparked the evolution of federal sentencing into what it is today.[78] At the initial passage of the Guidelines, 18 U.S.C. § 3553(b)(1) made the Guidelines mandatory; judges were *required* to sentence inside of the set parameters.[79] However, *Booker* dramatically altered sentencing by rendering the Guidelines only "effectively advisory."[80] Now, sentencing judges possess broad power to determine what constitutes a "sufficient" sentence.[81] First, judges are required to calculate the congressionally recommended month range, utilizing severity of offense and criminal history.[82] But then, the judge considers whether the parameters promote the federal goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation.[83]

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[77] 18 U.S.C. § 3582(c)(1)(A)(i). *See* Berman, *supra* note 6, at 275.

[78] Abramowicz, *supra* note 1, at 824. The Court's reasoning in *Booker* has been criticized by some. According to Congressman Tom Feeney, the "Supreme Court's decision [in *Booker*] to place this extraordinary power to sentence a person solely in the hands of a single federal judge—who is accountable to no one—flies in the face of the clear will of Congress." Yang, *supra* note 33, at 1272.

[79] Yang, *supra* note 33, at 1272.

[80] United States v. Booker, 543 U.S. 220, 245 (2005). The Court found "mandatory" sentences under the Guidelines to be contrary to the Sixth Amendment right to trial by jury. *See id.* at 233.

[81] 18 U.S.C. § 3553(a) (1984).

[82] *See* Yang, *supra* note 33, at 1286–87; *see also supra* text accompanying notes 50–51.

[83] *Id.* 18 U.S.C. § 3553(a)(2)(A)–(D) instructs the sentencing judge to consider the theories of punishment in conjunction with the "nature and circum-

Although the enumerated parameters can serve as guideposts, sentencing judges are free to sentence below or above the Guidelines if doing so achieves the federal goals of sentencing.[84]

After *Booker*, sentencing judges still lacked clear guidance on the extent to which downward departures—especially for family ties—were warranted.[85] Additional clarification came in *Gall v. United States*, where the Court held that "extraordinary circumstances" are not necessary for a Guidelines departure.[86] Under *Gall*, if a sentencing judge departs from the Guidelines (upward or downward), an appellate court "may not apply a presumption of unreasonableness."[87] To preserve the sentencing judge's discretion, the appellate court can "consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors . . . justify the extent of the variance."[88] In an opinion issued on the same day as *Gall*, *Kimbrough v. United States* established that district courts are justified in granting downward departures due to a policy-based disagreement when the Guidelines do not reflect up-to-date "empirical data and national experience."[89]

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stances of the offense and the history and characteristics of the defendant." Congress articulated the four goals of sentencing by requiring the sentence to (1) "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;" (2) "to afford adequate deterrence to criminal conduct;" (3) "to protect the public from further crimes of the defendant;" and (4) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553.

[84] *See* Abramowicz, *supra* note 1, at 824–25.

[85] *Id.* at 825–26. *See infra* Section II.A.

[86] *See* Gall v. United States, 552 U.S. 38, 47 (2007).

[87] *Id.* at 51.

[88] *Id.*

[89] Kimbrough v. United States, 552 U.S. 85, 109–11 (2007) (finding the district court's 4.5 year downward variance was reasonable and not an abuse of discretion when the district court "accorded weight to the Sentencing Commission's consistent and empathetic position that the crack/powder disparity is at odds with § 3553(a)"). There is disagreement on the extent to which courts can depart from the Guidelines for a policy-based justification. *See* Abramowicz, *supra* note 1, at 827–28. In *Kimbrough*, the contested policy was a 100:1 sentencing disparity for crack versus powder cocaine. The Supreme Court upheld the district court's findings that the ratio was inappropriate and that the Guidelines reflected outdated empirical data and did not promote the federal sentencing goals. *Id.* However,

Booker, *Gall*, and *Kimbrough* create a confusing sentencing terrain where a sentencing judge should use the Guidelines to calculate the Sentencing Commission's recommended sentence range but is then free to depart.[90] And even though the Guidelines were initially created to promote sentencing uniformity, a discretionary departure is likely to survive the high abuse-of-discretion standard.[91] With Guidelines that have been gradually chipped away, how does modern-day federal sentencing operate in practice?

C. *The Guidelines in Practice*

Within five years of *Booker*, defendants in the federal legal system felt the effects of increased judicial discretion.[92] For example, according to the U.S. Sentencing Commission, the black-white sentencing disparity increased from 5.5% to 23.3% in 2010.[93] By 2013, the disparity remained astonishingly high at 19.5%.[94] Furthermore, judges appointed after *Booker* impose sentences that are 2.5 months longer than sentences imposed by pre-*Booker* appointed judges.[95] On average, female judges impose sentences that are 1.4 months shorter than male judges.[96] Black judges are less likely to make an upward departure from the Guidelines than White judges.[97]

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prior to *Kimbrough*, Congress had already hinted at its disapproval of the sentencing disparity between crack and powder cocaine. *Id.* Therefore, the question of judicial discretion for departures remains open in policy areas that lack congressional support. *Id.* More specifically, to what extent can sentencing judges make a downward departure for family ties in light of § 5H1.6 stating that family justifications are not typically relevant?

90 *See* Yang, *supra* note 33, at 1288.

91 *See id.*

92 Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity, Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 4–5 (2013).

93 *Id.*

94 *Id.*

95 Yang, *supra* note 33, at 1317–18. Data was collected utilizing a random sample of judges from 156 courthouses in seventy-four district courts from 2000 to 2009. *Id.* at 1300.

96 *Id.* at 1318.

97 *Id.*

Additionally, the Guidelines have altered how defense attorneys utilize sentencing mitigation to argue for departures at sentencing.[98] Prior to the Guidelines, a defense attorney could argue for a reduced sentence by leveraging mitigating evidence and arguing for leniency.[99] Now, successful sentencing mitigation is more likely achieved when specific language of the Guidelines is invoked to demonstrate *how* the evidence and circumstances warrant a downward departure.[100] Under the Guidelines, defense attorneys may also be inclined to place less weight on a defendant's good acts during their sentencing mitigation.[101] Although counterintuitive, the Commission has characterized prior good acts as "not ordinarily relevant" to sentencing, and a downward departure for good acts is typically warranted only when military service or charitable acts are "exceptional."[102]

The flipside of the immense judicial discretion post-*Booker* is a sentencing judge's flexibility to impose a non-custodial sentence instead of prison.[103] However, despite the availability of non-custodial

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[98] Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 456 (2002). "[D]efense counsel plays the most critical role in developing and presenting arguments for downward departures from the Federal Sentencing Guidelines. Most obviously, a departure will likely not even be considered unless and until defense counsel brings a formal motion supported by a formal brief, which details the facts and legal precedent claimed to allow and warrant a departure." *Id.* at 455–56.

[99] *Id.* at 456–57.

[100] *Id.* at 457.

[101] *See* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1121 (2008).

[102] *Id.* at 1121–22. A sentencing judge's determination of what constitutes an "exceptional" good act is only one additional example of the enormous discretion inherent in federal sentencing. While some courts try to compare and measure "good acts" among defendants who committed similar crimes, other courts compare among defendants who all completed multiple good acts. *Id.* In contrast, other courts believe that the good acts should be weighed against the harm the defendant caused with their offense. *Id.*

[103] *See* Melissa Hamilton, *Prison-By-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*, 51 HOUS. L. REV. 1271, 1274–75 (2014). Only three to four decades ago, probation, community-service, and fines were imposed about as frequently as prison sentences. *Id.* Thus, it is evident that a defendant is less likely to receive a non-custodial sentence in the modern-day sentencing scheme.

sentences, probation- and fine-only sentences are rare.[104] In fact, the Commission states that custodial imprisonment should be the presumptive sentence, and the Guidelines provide limited guidance to assist judges in deciding between a custodial and non-custodial sentence.[105]

II. THE INCARCERATION OF CARETAKERS

With the United States having one of the highest incarceration rates in the world, the impact of incarceration undeniably reverberates through multiple generations of American families.[106] In the 2016 Survey of Prison Inmates by the Department of Justice, 626,800 males and 57,700 females in federal prisons were parents with minor children.[107] A more recent estimate has approximated

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[104] *See* U.S. SENT'G COMM'N, QUARTERLY DATA REPORT 10 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_3rd_FY23.pdf. From October 1, 2022, through June 20, 2023, 47,931 people received a federal sentence. *See id.* A total of 3,426 (7.1%) received probation and 196 (0.4%) received only a fine. *See id.* 44,309 (92.4%) received imprisonment. *See id.*

[105] Hamilton, *supra* note 103, at 1287. The Guidelines' design is inherently biased towards custodial sentences even though judges have sufficient discretion to impose a non-custodial sentence. When the Sentencing Commission designed the Guidelines, the recommended sentence ranges were based upon the average custodial time served by first time offenders. *Id.* at 1289. As a result, the Guidelines exclude approximately 50% of all cases where judges imposed non-custodial sentences instead (commonly imposed for non-violent offenses). *Id.* It is of note that women are less likely to be incarcerated for a violent offense than men. Scotti, *supra* note 5, at 48. According to the Federal Bureau of Prisons ("BOP"), most incarcerated females are held in minimum or low security facilities. *Id.* Furthermore, the BOP finds that women are most often incarcerated for a non-violent, drug offense and incarcerated as accessories versus instigators. *Id.*

[106] *See* Angela Cai, *Insuring Children Against Parental Incarceration Risk*, 26 YALE J.L. & FEMINISM 91, 99 (2014).

[107] U.S. DEP'T OF JUST., SURVEY OF PRISON INMATES, 2016: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2016), https://bjs.ojp.gov/content/pub/pdf/pptmcspi16st.pdf. It is of note that mothers and fathers of color are incarcerated disproportionately, thus, depriving more children of color of their paternal figures. *See id.* at 4. In federal prison, 67% of Hispanic females; 54% of Black females; and 49% of White females had minor children. *Id.* at 2. Similarly, 64% of Black males; 64% of Hispanic males; and 34% of White males had minor children. *Id.*

1.7 million to 2.7 million children have experienced parental incarceration at least once in their childhood.[108] With a national recidivism rate greater than 50%, children are also likely to repeatedly lose their caretakers to prison.[109] Because people of color are more frequently incarcerated, children of color are disproportionately likely to have an incarcerated caretaker.[110] Furthermore, incarceration is more likely to affect families with lower educational attainment levels and lower socioeconomic status.[111]

To substantiate the argument for downward departures or non-custodial sentences, it is notable that many incarcerated parents are serving custodial sentences for non-violent offenses.[112] In a U.S. Department of Justice Special Report examining federal inmates in 2004, drug offenders and public-order offenders were more likely to report having children than violent offenders.[113]

Importantly, data does not accurately capture incarcerated people who are primary caretakers of non-biological children—the effects of incarceration are also presumably felt among non-biological family units. Therefore, this Note will employ inclusive language to ensure that biological and non-biological caretakers are equally discussed in the context of federal incarceration.

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[108] Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. JUST. J. 11, 11–12 (2017), https://www.ojp.gov/pdffiles1/nij/250342.pdf.

[109] Kennedy, *supra* note 5, at 85.

[110] *Id.* at 87. One statistic shows that while 7% of African American children and 2.6% of LatinX children have an incarcerated caretaker, only 0.8% of White children have an incarcerated caretaker. *Id.* In data from 2007, 40% of all incarcerated parents were African American fathers. Martin, *supra* note 108, at 12.

[111] *See* Kennedy, *supra* note 5, at 87. Most incarcerated parents have not completed high school, and those who have a high school degree likely have a General Educational Development degree. *Id.* Furthermore, one statistic finds that 53% of biological fathers who are incarcerated in a state prison had a pre-arrest monthly income of $1,000. *Id.* Fifty-one percent of incarcerated mothers had a pre-arrest monthly income of $600 or less. *Id.*

[112] *See* 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).

[113] U.S. DEP'T. OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 4 (2008), https://bjs.ojp.gov/content/pub/pdf/pptmc.pdf.

A. *The Effect of Incarceration on Children*

The incarceration of a caretaker affects children emotionally, psychologically, educationally, and economically.[114] In fact, research shows that the long-term effects of incarceration on children are similar to that of abuse and domestic violence.[115] The separation inherent in the incarceration of a caretaker increases the likelihood of depression and anxiety, and it perpetrates adverse health effects such as asthma and obesity.[116] Problematically, the effects of incarceration are felt even after the caretaker is released; children who had a formerly-incarcerated caretaker are at greater risk for "antisocial behavior, future offending . . . drug abuse, school failure, and unemployment."[117] And because children of an incarcerated caretaker are at greater risk of incarceration, the effects of incarceration are repeatedly felt among multiple generations of the same family.[118]

Additionally, the incarceration of a caretaker often removes one source of financial support from a family unit. Among state and federal carceral systems, 54% of incarcerated parents reported serving as the primary financial provider regardless of whether they lived in the same household as their children.[119] In addition to the potential loss of income, incarceration can create additional financial burdens if the incarcerated person also provided childcare.[120] Approximately

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[114] Cyphert, *supra* note 5, at 390.

[115] *Id.* at 390–91.

[116] *Id.* Antisocial behavior among children is especially common. Martin, *supra* note 108, at 12–13. In a meta-analysis of forty different studies examining the effect of incarceration on children, antisocial behavior (i.e., "criminal acts and persistent dishonesty") was more prevalent than mental health and drug-related issues. *Id.*

[117] Cyphert, *supra* note 5, at 392. An increased risk of school failure for children of incarcerated parents can be explained by the higher rate of suspension and expulsions. Martin, *supra* note 108, at 13.

[118] Cyphert, *supra* note 5, at 390.

[119] Cai, *supra* note 106, at 104. In a 2004 study by the U.S. Department of Justice, 51.9% and 54.1% of female and male incarcerated parents, respectively, provided the primary financial support for their minor children and lived with their minor children in the month before their arrest or prior to their incarceration. U.S. DEP'T. OF JUST., *supra* note 113, at 6.

[120] Cai, *supra* note 106, at 104.

25% of incarcerated mothers and fathers who do not provide financial support still provided childcare.[121] By removing a primary caretaker from a family unit, the nonincarcerated caretakers are burdened with stress while deprived of companionship and emotional support.[122] Simultaneously, children lose their parental figures and are forced to cope with the stigma that comes with having an incarcerated caretaker.[123] In sum, the financial resources required to support and maintain a relationship with an incarcerated caretaker (e.g., expensive phone calls, travel costs, or care packages) redirect resources away from children.[124]

If the incarcerated individual was the primary caretaker, their children will likely be forced to relocate.[125] The child's removal to a non-custodial parent or relative may force the child to move away from their friends or school, negatively impacting their development, psychological wellbeing, and education.[126] Younger children, infants, and toddlers particularly feel the negative implications of their primary caretaker's incarceration because the separation occurs during crucial developmental years.[127] In situations where a family or friend is not able to step in as a caretaker, the child will

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121 *Id.*

122 *Id.* at 107.

123 *See* Cyphert, *supra* note 5, at 392. Children are often treated differently by teachers and their peers after disclosing that their caretaker is incarcerated. *See id.* Unsurprisingly, this disparate treatment brings shame and humiliation. *See id.*

124 *See* Cai, *supra* note 106, at 108–09. In a study conducted at San Quentin prison, half of the women visiting their incarcerated partners reported sending several hundred dollars every week. *Id.* For a family unit of a low socioeconomic status surviving on a single income, this is a significant drain on their resources. *Id.* Furthermore, phone calls from an incarcerated caretaker can cost three times as much as a phone call made from a standard payphone and five times as much as a phone call made from a standard residential phone. *Id.*

125 Abramowicz, *supra* note 1, at 813. A 2004 U.S. Department of Justice study examining state prisons found 64.2% of females and 46.5% of males were living with their minor children in the month before their arrest or just prior to their incarceration. U.S. DEP'T. OF JUST., *supra* note 113, at 4. After their female caregiver's incarceration, 37% of children live with their other parent, 44.9% live with a grandparent, and 22.8% live with other relatives. *Id.* at 5. Among minor children with an incarcerated male caregiver, 88.4% live with their other parent, 12.5% live with a grandparent, and 4.7% live with other relatives. *Id.*

126 Abramowicz, *supra* note 1, at 813.

127 *Id.* at 812.

likely be placed in foster care and face a heightened risk of abuse or neglect.[128]

For children of an incarcerated caretaker, it is imperative to maintain a relationship with the incarcerated family member in order to lessen the negative effects of incarceration.[129] If a child can participate in a high quality visit with their incarcerated caretaker, the maintenance of regular contact is "one of the most effective ways to improve a child's emotional response to the incarceration and reduce the incidence of problematic behavior."[130] But not all children are able to regularly participate in visitation because of the financial costs, the concern that the child will be psychologically harmed by seeing their parental figure in a prison context, or prison visitation policies that do not allow minor children to visit.[131]

B. *The Effect of Incarceration on Caretakers*

Even though children are undeniably harmed by incarceration, effective sentencing mitigation must show the effect of incarceration on caretakers because the Guidelines limit the judge's consideration of third-party harms.[132]

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[128] *Id.* According to the U.S. Department of Justice, 10.9% of minor children of incarcerated females reside in a foster home or agency due to their caregiver's incarceration. U.S. DEP'T. OF JUST., *supra* note 113, at 5.

[129] *See* Cyphert, *supra* note 5, at 392–94.

[130] *Id.* at 395.

[131] *Id.* The Supreme Court has stated that "children [who visit inmates in prison] are at risk of seeing or hearing harmful conduct during visits and must be supervised with special care in prison visitation facilities." *Id.* at 397. As a result, video visitation has increased in popularity for child visitors because it is "a way for children to interact with their incarcerated parents without experiencing the stigma and difficulties of visiting a parent in a correctional facility." *Id.* In a study funded by the National Institute of Justice, researchers also found that a positive parent-child relationship predating the parent's incarceration is necessary for the child to benefit from the visit. Martin, *supra* note 108, at 14. If there was no parent-child relationship before the parent's incarceration, visitation alone was not sufficient to "promote a positive relationship." *Id.* This data only supports the value in promoting non-custodial sentences, when possible, to further the interests of children and caregivers.

[132] Berman, *supra* note 6, at 276.

For one, a primary caretaker's incarceration places them at a heightened risk for the termination of their parental rights.[133] In 1997, Congress enacted the Adoption and Safe Families Act ("ASFA"), which was intended to provide better permanency for children impacted by the criminal legal system.[134] In reality, ASFA has made it easier for parents' rights to be terminated.[135] When a primary caretaker is incarcerated, a child is automatically at a heightened risk to enter the family regulation system (i.e., state services and financial support) which places the caretaker's parental and custody rights at risk.[136] ASFA requires the state to develop a case plan for all placed children and to make "reasonable efforts" for reunification.[137] Problematically, even incarcerated caretakers

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[133] *See* Anna Iskikian, *The Sentencing Judge's Role in Safeguarding the Parental Rights of Incarcerated Individuals*, 53 COLUM. J.L. & SOC. PROBS. 133, 157 (2019).

> The termination of parental rights is a procedure whereby the legal tie between a biological parent and child is severed. It then follows that a biological parent whose parental rights are terminated is "legally unable to participate in the child's life." For incarcerated parents, termination proceedings are typically initiated by the state, or by the child's other natural parent, or by another caregiver with whom the child resides during the parent's imprisonment. Generally, termination proceedings entail a full hearing in which clear and convincing evidence is required to show "parental unfitness, severe neglect, or abandonment."

Id.

[134] Carla Laroche, *The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration*, 12 COLUM. J. RACE & L. 517, 529 (2022).

[135] *See id.*

[136] *See id.* at 528–29.

[137] *Id.* at 529. "The term 'reasonable efforts' is broad and generally means providing 'accessible, available, and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children.'" *Id.* Several states, such as New York and Washington, have recognized that ASFA disproportionately leads to the termination of parental rights for incarcerated people. Iskikian, *supra* note 133, at 156. In response, ASFA's "mandatory termination provision for incarcerated parents" has been adjusted to include an exception giving parents the opportunity to be "judged individually by the roles they play in their children's lives, rather than the lengths of their sentences." *Id.*

are required to comply with all court-imposed requirements to regain primary custody from the state.[138] And regardless of a caretaker's compliance, the state has the ultimate authority to determine if parental rights will be terminated.[139] Since 2006, more than 32,000 incarcerated caretakers have permanently lost their parental rights despite never physically or sexually abusing their children.[140] Out of those caretakers, approximately 5,000 caretakers lost their rights strictly because of their incarceration.[141]

Caretakers who are stripped of their parental rights face a "double punishment:" the necessity to cope with losing their child and the challenges of reentry if they are released from prison.[142] For many newly released individuals, familial support is crucial to successfully reintegrate into society and avoid recidivism.[143] Caretakers cite their continued relationship with their children as a motivating factor for maintaining their sobriety and securing new employment—two enormous barriers for a successful reentry into society.[144]

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[138] Iskikian, *supra* note 133, at 158.

[139] *Id.* at 157–58. The decision to terminate parental rights presents "tensions between the parents' rights to raise their children and the state's interest in protecting children and promoting the child's best interests." Kennedy, *supra* note 5, at 95. Therefore, it is necessary to "think critically about the standards of termination of parental rights and sentencing, and to modify the construction and administration of prisons to support incarcerated parents." *Id.*

[140] Iskikian, *supra* note 133, at 134.

[141] *Id.*

[142] *Id.* at 145–46. *See* REENTRY COORDINATION COUNCIL, COORDINATION TO REDUCE BARRIERS TO REENTRY: LESSONS LEARNED FROM COVID-19 AND BEYOND 7–12 (2022). Upon release, formerly incarcerated individuals are forced to navigate "many barriers, including in employment and economic mobility, housing, public benefits, access to education, civic participation, and access to treatment and health care." *Id.* at 7. Food insecurity is common—one study found 91% of newly released individuals experienced food insecurity. *Id.* at 8. And with approximately 65% of the prison population combating substance use disorder, reentry places these individuals at increased risk of "relapse and recidivism." *Id.* at 10. One study estimates that newly released individuals are "over forty times more likely to die from an opioid overdose than the general population." *Id.*

[143] Iskikian, *supra* note 133, at 151–52. A study of males incarcerated in Ohio said "family support" was the reason they were able to avoid future imprisonment and "increased their chances of finding employment." *Id.*

[144] *Id.* at 152.

Incarceration can also create negative implications for a caretaker's perception of their ability to care and connect with their child during their confinement.[145] "Prison ideology and norms" may make it challenging for caretakers to simultaneously navigate their treatment as a prisoner with their identity as a caretaker.[146] When living in an inherently dehumanizing and demeaning environment, caretakers—especially paternal figures—may find it difficult to accept their identity as a caretaker.[147] If incarcerated male caretakers are also "not encouraged or expected" by lawmakers or prison officials to "fulfill any [non-economic] parental obligations," then it is inevitable for incarcerated men to assume "economic fatherhood" is the norm.[148] When in reality, most incarcerated male caretakers previously lived with or had regular contact with their children.[149] If these incarcerated caretakers assume their primary purpose is to provide financial support for their children, they might "devalue their role as parents" and diminish the importance of their socioemotional connection with their children.[150]

Incarcerated women face a unique physical challenge due to the limited number of federal correctional facilities, inevitably placing women at significant distances from their families.[151] On average, a federal female correctional facility is 160 miles farther from family than a male federal correctional facility, with most female facilities located in rural areas.[152] With a significant number of incarcerated women serving as the primary caretaker prior to their incarceration, the separation from their children inevitably induces anxiety, depression, and post-traumatic stress disorder.[153]

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145 Kennedy, *supra* note 5, at 94. One incarcerated mother states, "[I]t's so hard to write my kids. There's nothing to write but bad things." *Id.*

146 *Id.*

147 *See id.*

148 Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L.Q. 191, 200 (2006).

149 *Id.*

150 *Id.* at 200–01.

151 *See* Scotti, *supra* note 5, at 50.

152 *Id.*

153 *Id.*

C. *Incarceration in the Federal System*

Incarcerated caretakers and their children face unique obstacles if they are involved in the federal legal system. As soon as a federal judge sentences a defendant to a federal prison sentence, the defendant is in the custody of the Federal Bureau of Prisons ("BOP").[154] The BOP is responsible for placing the defendant in one of approximately 130 facilities throughout the United States.[155] Because BOP facilities are not equally spaced throughout the country, certain incarcerated caretakers are forced to serve their sentence hundreds of miles from their family.[156] While sentencing judges can recommend a geographical location for placement, Congress has given the BOP the power to make the ultimate assignment and is "free to reject the recommendation of the sentencing judge."[157]

The BOP does recognize that "visits [by family] are an important factor in maintaining the morale of the individual offender and motivating [them] toward positive goals."[158] However, prison administrators ultimately have the authority to revoke visitation privileges, and courts are likely to defer to prison protocols.[159] A 2019 report

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[154] Cyphert, *supra* note 5, at 407.

[155] *Id.* at 407–08.

[156] *See id.* at 408. A 2009 study found that 84% of parents in federal facilities were located more than 100 miles from home, and only 5% of incarcerated parents were within fifty miles. *Id.* Furthermore, the limited number of female facilities makes it even more likely for female caretakers to be far away from their children. *Id.*

[157] *Id.* Interestingly, in *Froehlich v. Wisconsin Department of Corrections*, Judge Posner discussed that "it may be a moral duty" to move a female state prisoner closer to her children despite there being no constitutional requirement on prison officials to place the inmate in closer proximity to family. Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1181 (2007).

[158] Markel et al., *supra* note 157, at 1178. Recently, the Federal Bureau of Prisons has instituted programming to facilitate family contact while a caretaker is serving a custodial sentence. *See id.* at 1181. Mothers and Infants Together ("MINT") allows "[e]ligible women who have been sentenced to incarceration [to] reside in a community correction setting with their infants up to 18 months after delivery." *Id.*

[159] *See* Dona Playton, *The High Cost of Incarceration: A Call for Gender-Responsive Criminal Justice Reforms for Women and Their Children*, 21 CONN. PUB. INT. L.J. 45, 79 (2021). In 2003, a group of incarcerated women in the Michigan Department of Corrections challenged a prison policy restricting their visitation rights because it constituted "cruel and unusual punishment." *Id.* The policy

funded by the National Institute of Corrections and the Bureau of Justice Assistance, "Model Practices for Parents in Prisons and Jails," has called for greater transparency in visitation policies and procedures because caretakers and children often spend significant money on transportation and accommodations only for the prison to deny entry.[160] Additionally, a less traumatic and more child-friendly visitation experience could be achieved if children are not subjected to "metal detectors, drug-sniffing dogs, and invasive searches."[161] Instead, family visitation rooms could ensure the child's comfort while also easing the child's anxiety about their incarcerated caretaker's wellbeing.[162] But ultimately, advocating for child-friendly visitation experiences is effectively pointless when caretakers are placed hundreds of miles away from their children, making visitation near-impossible.[163]

III. THE NEED FOR A CARETAKER LENS

Extensive research proves that incarceration negatively impacts caretakers and children economically, psychologically, socially, and emotionally.[164] And while sentencing judges may recognize the negative effects of incarceration on defendants and families, the Sentencing Reform Act "does not clearly authorize judges to decrease sentences based on third-party family harms."[165] 18 U.S.C. § 3553(a) instructs sentencing judges to focus on the crime and the

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banned visitation by nieces and nephews and prevented children from visiting if their caretakers lost parental rights. *Id.* Psychiatrist Dr. Terry Kupers testified that there is a "strong and consistent positive relationship that exists between parole success and maintaining strong family ties while in prison." *Id.* at 80. "Only [fifty] percent of the 'no contact' inmates completed their first year on parole without being arrested, while [seventy] percent of those with three visitors were 'arrest free' during this period." *Id.* The Supreme Court upheld the policy, finding the regulations "protected legitimate penological interests and therefore could withstand constitutional challenge." *Id.* at 81.

160 Playton, *supra* note 159, at 85.

161 *Id.* at 87.

162 *Id.* at 88.

163 *See* Cyphert, *supra* note 5, at 396.

164 *See* discussion *supra* Part II.

165 Berman, *supra* note 6, at 276.

defendant by considering "the nature and circumstances of the offense and the history and characteristics of the defendant."[166] Similarly, the goals of sentencing—which a federal sentence must promote—do not expressly mention third parties.[167] 18 U.S.C. § 3553 only permits consideration of third parties under (a)(6) and (a)(7).[168] Therefore, without any provision in the Sentencing Reform Act that expressly authorizes sentencing judges to factor in third-party harms, a federal sentence should seemingly reflect only the defendant's characteristics and offense.[169]

A. *The Need for a Defendant-Centered Approach*

Legal scholarship has explored the implications of invoking a defendant-centered lens in different stages of criminal legal procedure. In death penalty litigation, the high frequency of wrongful convictions has led legal scholars to contemplate whether a higher standard of proof should be utilized.[170] Invoking a defendant-centered theory of reasonable doubt, as opposed to a society-centered theory, might focus on the inherent value in the defendant's interests (e.g., life, liberty, etc.) to justify the necessity for the highest possible burden of proof.[171] In the larger context of determining what acts should be criminalized, scholars have evaluated the usage of a defendant-centered lens versus a familial lens.[172] For example, why is the failure to pay child support criminalized while the failure to pay debt is not?[173] Under a familial lens, the failure to pay child support

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166 18 U.S.C. § 3553(a) (1984).

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

168 *See* Berman, *supra* note 6, at 276. Where, (a)(6) requires sentencing judges to consider similarly situated defendants and (a)(7) requires the consideration of victims. *Id.*

169 *Id.* at 278.

170 *See* Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 45 (2005).

171 *Id.* at 70–71. On the contrary, the society-centered theory would argue the standard of proof should be determined based on what would "create legitimacy for the legal system." *Id.* In other words, a standard of proof that would "ensure that society as a whole accepts guilty verdicts, regardless of whether jurors require such certainty in actuality." *Id.* at 66.

172 *See* Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1330 (2008).

173 *Id.* at 1351.

is presumably criminalized because children are harmed.[174] Therefore, one justification for using a familial lens in this context is to promote a "certain vision of family life within society."[175] This perfectly illustrates how the law is leveraged to demonstrate certain societal ideals or beliefs.

Federal sentencing is a unique context for employing a defendant-centered lens because of the confusing doctrinal landscape for utilizing family circumstances.[176] In 2000, pre-*Booker*, 450 downward departures were granted for family circumstances.[177] However, in light of the restrictions imposed by § 5H1.6, caretaker downward departures were limited to "unusual" or "extraordinary" circumstances.[178] Now, courts fluctuate in their determination of what constitutes "extraordinary," with many courts unconvinced that primary and sole parenting responsibilities are sufficient for a departure.[179] In modern-day sentencing, the extraordinary versus ordinary distinction is often where arguments for caretaker downward departures reach a dead end. Problematically, sentencing courts have not extensively explored why a defendant's family circumstances *should* be used to justify a downward departure and how such a departure actually promotes the four goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation.[180]

1. AN EXERCISE OF JUDICIAL DISCRETION: *UNITED STATES V. JOHNSON*

In light of federal judicial discretion, courts have demonstrated that downward departures for family responsibilities are possible. In *United States v. Johnson*, the Second Circuit upheld the downward

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174 *Id.*

175 *Id.* A similar rationale can be found in the justification for punishing adultery, bigamy, incest, and the failure to satisfy parental responsibility laws. *Id.* It is interesting to reflect on how our societal construction of punishment is reflective of our shared family values while simultaneously enforcing certain familial norms.

176 Berman, *supra* note 6, at 274.

177 *Id.*

178 *See* discussion *supra* Part I.

179 Berman, *supra* note 6, at 275.

180 *Id.*

departure granted to accommodate Cynthia Johnson's family responsibilities.[181] In 1989, Johnson was convicted of conspiracy, bribery, and theft of public money.[182] At sentencing, Johnson had a base offense level of ten for the bribery counts with a five-level increase because the cost of the bribes exceeded $40,000.[183] Then, Johnson received four additional levels for acting as an organizer and two additional levels for obstruction of justice.[184] In sum, Johnson's offense level was increased from ten to twenty-three.[185] However, the sentencing judge then acknowledged Johnson's family circumstances:

> The defendant is a single mother. . . . Her [institutionalized] daughter, age 21 is . . . the mother of a six-year-old child who currently resides with the defendant. Also residing with the defendant in Florida is her son, Lamont, and two children aged six and five, as well as her youngest child, who is five months old. The father of the child is unemployed and resides in Queens, New York. . . . There are no signs of use [of] drugs or alcohol, and she apparently has no mental or emotional health problems.[186]

Based on Johnson's family circumstances, the sentencing judge determined Johnson was the primary caretaker of four young children warranting a downward departure of thirteen levels with a sentence of six months of non-custodial home detention, followed by three years of supervised release, and $27,973 in restitution.[187]

On appeal, the court rejected the government's argument that family circumstances "can never justify a downward departure."[188] The government grounded its justification in § 5H1.6, stating that "family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable

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181 *Id.*
182 United States v. Johnson, 964 F.2d 124, 125 (2d Cir. 1992).
183 *Id.* at 126.
184 *Id.*
185 *Id.*
186 *Id.*
187 *Id.*
188 *Johnson*, 964 F.2d at 126.

guideline range."[189] In light of the advisory nature of the policy guidelines and Congress explicitly granting sentencing departures under the Sentencing Reform Act, the court found the standard for a departure to be whether there is "an aggravating or mitigating circumstance not adequately taken into consideration by the Sentencing Commission."[190]

In the context of family circumstances, the "Sentencing Commission understood that many defendants shoulder responsibilities to their families, their employers, and their communities."[191] And while ordinary family responsibilities do not warrant departure, extraordinary circumstances are supported by the policy statement because had Congress intended an "absolute rule that family circumstances may never be taken into account in any way, it would have said so."[192] Thus, the court affirmed the downward departure stating, "The rationale for a downward departure here is not that Johnson's family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing."[193]

The Second Circuit's language in upholding Johnson's downward departure encapsulates the necessity to factor familial circumstances—specifically, caretaker responsibilities—into federal sentencing. More importantly, the court demonstrates that downward departures for familial circumstances are not explicitly contrary to the Guidelines and surrounding policy. It is important to note that

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[189] *Id.* Because § 5H1.6 is a policy statement, the court extensively discussed the weight that should be placed on policy statements versus the Guidelines.

> On the one hand, [policy statements] warrant greater attention than does ordinary legislative history, because Congress specifically directed sentencing courts to consider the policy statements. . . . Moreover, the policy statements are approved by the Sentencing Commission as a whole, and Congress had the policy statements before it when it approved the Guidelines and amendments thereto. On the other hand, as many courts have noted, the policy statements cannot be viewed as equivalent to the Guidelines themselves.

Id. at 127 (citations omitted). Policy statements are *merely advisory*. *Id.* (emphasis added).

[190] *Id.* at 128.

[191] *Id.*

[192] *Johnson*, 964 F.2d at 129.

[193] *Id.*

the *Johnson* court utilizes a third-party harm justification for a family-based departure; the downward departure was only granted to avoid removing the children's primary caretaker.[194] So, while Johnson's downward departure was affirmed by the Second Circuit, the utilization of a third-party harm justification is merely a discretionary decision because the Sentencing Reform Act does not "clearly authorize judges to decrease sentences based on third-party harms."[195] To successfully argue for more caretaker downward departures like in Ms. Johnson's case, defense attorneys can and should use defendant-centered language during sentencing mitigation.[196] Invoking defendant-centered language will show sentencing judges how granting a downward departure simply because a defendant is a caretaker is in harmony with and in furtherance of the sentencing goals.

2. DEFENSE ATTORNEYS: LEVERAGING DISCRETION DURING MITIGATION

In the post-*Booker* sentencing landscape where the Guidelines are merely advisory, defense attorneys can utilize sentencing mitigation as a tool to argue for downward departures.[197] During sentencing mitigation, a defense attorney should present any "empathy-evoking evidence" that can "humanize" the defendant.[198] In other words, mitigation evidence should help paint a fuller picture of who the defendant is beyond the alleged offense and show how this individual ended up in this current situation.

Deciding how and what to present during mitigation is discretionary, but defense attorneys do have a duty to "ensure all reasonably available mitigating and favorable information, which is likely

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194 *Id.*

195 Berman, *supra* note 6, at 276. *Johnson* is a noteworthy decision because the Second Circuit could have reasoned that Johnson's caretaker responsibilities are not a mitigating circumstance warranting a downward departure, and thus, the district court abused its discretion. *See id.* Instead, the court recognized the gap that exists in the Guidelines and the lack of an "absolute" rule forbidding any consideration of family circumstances. *See Johnson*, 964 F.2d at 129.

196 *See* Berman, *supra* note 6, at 276.

197 *See supra* Section I.B.

198 Todd Haugh, *Can the CEO Learn from the Condemned? The Application of Capital Mitigation Strategies to White Collar Cases*, 62 AM. U. L. REV 1, 10 (2012).

to benefit the client, is presented to the court."[199] Mitigation evidence can include mental health history, social history, employment history, and familial support.[200] Additionally, defense attorneys can present recommendations for community resources or treatment to demonstrate that a non-custodial sentence might be more appropriate.[201] Under guidelines presented by the National Legal Aid and Defender Association, the defense attorney is ultimately required to develop a plan and argue for the "least restrictive sentencing outcome."[202] The failure to present sufficient mitigating evidence could potentially rise to the level of a *Strickland* violation if an objective attorney under the circumstances would have presented particular mitigating evidence.[203]

To exemplify the utilization of a defendant-centered lens, consider the two following arguments, based on the same set of facts, that could be made during sentencing mitigation. Assume a single father committed a non-violent and victimless crime.[204] At sentencing mitigation, the defense attorney could focus on the negative implications for the child's wellbeing to justify their father serving a shorter or non-custodial sentence.[205] Such an argument employs a third-party lens because the defense attorney is arguing a downward

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[199] Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 62 (2013). Mitigation evidence is provided to sentencing judges in a sentencing memorandum. *See* Meixner, *supra* note 24, at 1408. Sentencing judges review the memorandum prior to the sentencing hearing where defense attorneys can provide oral argument to advocate for downward departures. *See id.* There are no "formal rules" on preparing a sentencing memorandum. *Id.*

[200] Gohara, *supra* note 199, at 69.

[201] *Id.* at 63–64.

[202] *Id.* at 62.

[203] *See* Strickland v. Washington, 466 U.S. 668, 669 (1984). The Sixth Amendment guarantees the right to effective assistance of counsel. *Id.* at 680. This imposes a "duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options." *Id.* Investigation includes finding and presenting mitigating evidence that a reasonable attorney under the circumstances would present during the federal sentencing phase. *See* Gray v. Branker, 529 F.3d 220, 228 (4th Cir. 2008) (finding defense counsel was ineffective under *Strickland* in their "failure to investigate and develop, for sentencing purposes, evidence of Gray's impaired mental condition").

[204] *See* Berman, *supra* note 6, at 277.

[205] *See* discussion *supra* Part II.

departure should be granted to avoid the child's resulting harm. If the sentencing judge adheres to the instructions presented by the Sentencing Commission, a downward departure is unlikely because primary caretaking responsibilities typically do not rise to the "extraordinary" circumstances which warrant departure.[206]

Now, compare with arguing through a defendant-centered lens. The defense attorney should first present to the sentencing judge that the defendant's crime has placed them at risk for losing their parental rights.[207] Because the defendant is a single parent, the defense attorney should then argue that the prospect of losing custody will serve as significant deterrence for committing any future crimes.[208] The emotional and psychological repercussions of losing parental rights could effectively serve as double punishment and the overall impact of the sentence becomes "uniquely severe" compared to the same sentence served by non-caretakers.[209] Additionally, retribution calls for a punishment that is commensurate to the harm caused by the crime.[210] Here, when the defendant committed a non-violent and victimless offense, the defense attorney has a strong argument that imposing a sentence without a downward departure would be "greater than necessary" because the same punishment would be disproportionately harsh for caretakers as opposed to non-caretakers.[211] In essence, the presentation of the latter argument at a sentencing hearing is specifically tailored to the sentencing goals outlined in 18 U.S.C. § 3553(a), thus, presenting an argument that is more palatable for a downward departure.

B. *The Need for an Explicit and Principled Rationale for Downward Departure*

The Sentencing Commission has created a landscape that is undeniably confusing. Sentencing courts are given conflicting information from 18 U.S.C. § 3553 and § 5H1.6, leaving little guidance on how to navigate family circumstances at sentencing.[212] To

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206 *See* Berman, *supra* note 6, at 275.
207 *See* discussion *supra* Part II.
208 *See* Berman, *supra* note 6, at 277.
209 *See id.*; *see also* discussion *supra* Part II.
210 Gwin, *supra* note 37, at 177.
211 *See* Zunkel, *supra* note 46, at 54.
212 *See* discussion *supra* Part I.

achieve reform and ensure that defendants are sufficiently sentenced, courts must "recognize the inappropriateness of their preoccupation with an illusory distinction between ordinary and extraordinary family circumstances."[213] Instead, courts should explore how downward departures for family circumstances can be granted in harmony with the goals of the Federal Sentencing Guidelines.[214]

Without a provision of the Sentencing Reform Act explicitly allowing familial circumstances—regardless of "ordinary" or "extraordinary" classification—to justify departures, the justification should focus on the defendant and offense.[215] Additionally, the Sentencing Reform Act's interest in "purposeful and proportionate sentences" requires sentencing courts to explicitly articulate how a downward departure, justified by familial circumstances, adheres to § 3553(a) without perpetuating sentencing disparities among similarly-situated defendants.[216] Therefore, the strongest justification is rooted in the four goals of sentencing outlined in § 3553(a)(2)(A)–(D), which Congress evidently places great significance on by nature of their inclusion. If an argument for a downward departure invokes a caretaker lens to illustrate how a downward departure for a caretaker promotes retribution, deterrence, incapacitation, and rehabilitation, then the argument would explicitly adhere to the Guidelines.

IV. A JUSTIFICATION FOR DOWNWARD DEPARTURE FROM THE GUIDELINES UTILIZING A CARETAKER LENS

There is extensive scholarship contemplating the most foolproof argument that can be made for considering caretakers during federal sentencing.[217] When contemplating between a child- or defendant-centered lens, the latter is more palatable to the Sentencing Reform Act, which "does not clearly authorize judges to decrease sentences

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213 Berman, *supra* note 6, at 278.

214 *See id.*

215 *See id.*

216 *See id.*

217 *See, e.g.*, Abramowicz, *supra* note 1, at 839–40, 874; Scotti, *supra* note 5, at 91–98; Berman, *supra* note 6, at 276.

based on third-party family harms."[218] Within the defendant-centered lens camp, some scholars have discussed utilizing the four theories of punishment as guideposts when arguing for a downward departure.[219] This Section will flush out how the argument can be made in a sentencing mitigation context, demonstrating why it is the most suitable strategy for defense attorneys arguing for caretaker downward departures.

In a complicated federal sentencing terrain, there are three certainties that support using the four goals of sentencing as the strongest justification for caretaker-based downward departures. First, the Sentencing Commission's introduction of policy statement § 5H1.6 and the 2023 amendments support the notion that Congress has not created an absolute bar against considering family circumstances.[220] Second, under *Kimbrough*, a sentencing court can have a policy-based disagreement with the Guidelines, which currently limit downward departures to only "extraordinary" family circumstances.[221] And last, 18 U.S.C. § 3553(a) is clear: Sentencing judges are already instructed to consider retribution, deterrence, incapacitation, and rehabilitation when determining a sentence.[222]

When formulating an argument to present during sentencing mitigation that utilizes the four theories of punishment as justification for downward departures, it is important to recognize that some goals are incompatible with others.[223] If a sentencing judge is committed to sentencing in furtherance of all four goals of sentencing,

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[218] *See* Berman, *supra* note 6, at 276.

[219] *See, e.g.*, *id.* at 277; Abramowicz, *supra* note 1, at 839–40; Rappaport, *supra* note 47, at 566, 569.

[220] United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992). *See supra* text accompanying note 6.

[221] Kimbrough v. United States, 552 U.S. 85, 111 (2007). *See supra* text accompanying note 6.

[222] *See* 18 U.S.C. § 3553(a) (1984).

[223] *See* Dennis M. Ryan, *Criminal Fines: A Sentencing Alternative to Short-Term Incarceration*, 68 IOWA L. REV. 1285, 1288–90 (1983). Because the United States utilizes custodial (i.e., incarceration) and non-custodial punishment (e.g., fines), it is insightful to consider how the different types of punishment achieve different or similar goals. *Id.* at 1290. Ryan thoughtfully points out that if custodial and non-custodial punishments "achieve the same goals, then fines might be effectively substituted for incarceration in criminal sentencing." *Id.* at 1290. Incarceration and fines both promote retribution by "taking something away from

then it is crucial for this unavoidable incompatibility to be understood because it could produce favorable results for caretakers. For instance, it is near-impossible to promote rehabilitation in an environment that is inherently punitive (which promotes retribution) and isolated from the outside (which promotes incapacitation).[224] The harshness of prison environments are inherently more conducive to promoting retribution, incapacitation, and deterrence than rehabilitation.[225] The Sentencing Commission has also seemingly placed greater emphasis on certain theories of punishment despite its acknowledgment of all four theories in 18 U.S.C. § 3553(a).[226] In the Senate Report to the Sentencing Reform Act:

> The [Senate] committee rejected rehabilitation as the primary justification of punishment. They argued that deterrence was not a sufficient justification of punishment although it was indeed relevant in "justifying the existence of the criminal sanction." Ultimately, they endorsed the notion of just deserts and concluded that "those who violate others' rights deserve punishment." . . . The just-deserts model, according to the committee, is at odds with rehabilitation.[227]

While the Sentencing Reform Act may have moved away from rehabilitation to place greater emphasis on retribution and deter-

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the offender"—liberty and property, respectively. *Id.* at 1291. Both can have deterrent effect, although the deterrent effect of incarceration is debatable. *Id.* Research does not indicate that either punishment promotes rehabilitation. *Id.* at 1292. The most tangible difference is incapacitation, where only incarceration physically isolates a person from society. Ryan*, supra* at 1291. Therefore, when a sentencing judge is determining a custodial or non-custodial sentence, it seems crucial to first determine whether incapacitation is the primary goal. *Id.*

[224] *Id.* at 1290.

[225] *Id.*

[226] *See* Jalila Jefferson-Bullock, *How Much Punishment is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL'Y 345, 351 (2016).

[227] *Id.* at 373. The just-deserts model is equivalent to retribution, where the punishment imposed should equal the harm caused by the defendant. Gwin, *supra* note 37, at 180.

rence, the discretionary nature of sentencing allows judges to be persuaded by different justifications.[228] However, an argument for downward departing because of caretaker status can also promote all four theories of punishment.[229] If judges "shall impose a sentence sufficient, but not greater than necessary," then statutory compliance would require a sentencing judge to issue a downward departure—if doing so promotes the theories of punishment—instead of a harsher sentence that would be overly retributive and utterly non-rehabilitative.[230]

A sentencing memorandum and/or oral argument during sentencing hearings are the opportunities for defense attorneys to present their mitigating evidence.[231] Thus, either would serve as the appropriate vehicle for a defense attorney arguing that a caretaker downward departure promotes the four theories of punishment. Because successful sentencing mitigation invokes case-specific facts to demonstrate the appropriateness of a downward departure, this Note will do the same.[232] I will utilize the facts from *United States v. Johnson* to explicitly argue, through a caretaker lens, that granting a downward departure in light of Ms. Johnson's caretaking responsibilities furthers the goals of the Federal Sentencing Guidelines because of the deleterious effect of incarceration on caretakers.[233] And while Ms. Johnson's downward departure was granted because the court considered her family circumstances to rise to the level of the "extraordinary" threshold, I will avoid the "extraordinary" vs. "ordinary" distinction to instead argue that someone's identity as a

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228 Jefferson-Bullock, *supra* note 226, at 389.

229 *See supra* text accompanying note 223.

230 18 U.S.C. § 3553(a) (1984).

231 *See supra* Section III.A.2.

232 *See* Memorandum from Randolph P. Murrell, Federal Public Defender, to United States District Court Northern District of Florida Tallahassee Division, *supra* note 27.

233 *See supra* Section III.A.1. As discussed above, the *Johnson* Court affirmed the downward departure to not "wreak extraordinary destruction on dependents" because it found no "absolute" rule barring any consideration of family circumstances. *See id.*; United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992). Instead, I will demonstrate how the same set of facts can be argued from a caretaker lens to ensure any mitigating circumstances warranting a downward departure are exclusively based on the defendant and their offense.

caretaker is alone sufficient for a downward departure.[234] Eliminating the "extraordinary" vs. "ordinary" classification from the federal sentencing lexicon will eliminate tremendous ambiguity because of the inherent difficulty in determining what constitutes "extraordinary" circumstances. Furthermore, if caretaker status alone equally qualifies all caretakers for a downward departure, sentencing proceedings may become less discriminatory because a sentencing judge's inherent biases will not be able to deem who is more fit to caretake.

A. *Framing the Argument*

Before a defense attorney presents any defendant-specific facts during sentencing mitigation, the sentencing judge should be informed of the evolving consideration of caretakers in federal sentencing.[235] Sentencing judges should understand that considering caretakers is not novel or explicitly contrary to the Guidelines.[236] In fact, *Booker*, *Gall*, and *Kimbrough* provide the framework for rethinking caretaker sentencing by empowering sentencing judges to depart from the Guidelines for policy-based disagreements regardless of whether "extraordinary circumstances" are present.[237] This is a pivotal moment for "family ties jurisprudence."[238]

United States v. Johnson is the quintessential caretaker downward departure case.[239] *Johnson* not only demonstrates the power of judicial discretion but, most importantly, articulates a rationale that is grounded in empathy—a humanistic approach to sentencing that is necessary but not common.[240] *Johnson* led to a breadth of caretaker case law where sentencing judges opted to grant downward

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234 *See* Johnson, 964 F.2d at 129–30; *see also supra* Section III.A.

235 *See supra* Section I.A.

236 *See id.*

237 *See supra* Section I.B.

238 *See* Abramowicz, *supra* note 1, at 829.

239 *See supra* Section III.A.1.

240 *See* United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992) ("The rationale for a downward departure here is not that Johnson's family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing.").

departures instead of destroying family units.[241] And while sentencing mitigation should present caretaker downward departures to provide judges with any binding or persuasive precedent, a defense attorney will likely face the "extraordinary circumstances" roadblock[242]—in other words, a judge's reluctance to grant a caretaker downward departure unless they subjectively determine the circumstances rise to the "extraordinary" threshold.[243] Sentencing mitigation is the opportunity for defense attorneys to address a judge's concerns or reluctance.[244] Successful sentencing mitigation should weave together the overwhelming social science demonstrating the damaging effects of incarceration and should present Guidelines-friendly sentencing alternatives that also support the best interest of the caretaker.[245] So long as a sentencing judge fairly weighs caretaker status and articulates how the "§ 3553(a) factors, on a whole, justify the extent of the variance," the judge should feel empowered to harness their discretion to promote the consideration of *all* caretakers.[246]

B. *A Downward Departure in Furtherance of Retribution*

Granting a downward departure in a case like Ms. Johnson's promotes retribution because when a caretaker of children commits

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[241] *See id. See, e.g.*, United States v. Munoz-Nava, 524 F.3d 1137, 1142–43 (10th Cir. 2008) (upholding downward departure when defendant "was the primary caretaker and sole supporter of his eight-year-old son"); United States v. Chamness, No. 5:11-CR-00054R, 2012 U.S. Dist. LEXIS 106496, at *5, *18–19 (W.D. Ky. July 30, 2012) (affirming pregnant defendant's downward sentence to two years probation, counseling, parenting classes).

[242] *See supra* text accompanying note 6.

[243] *See Johnson*, 964 F.2d at 129.

[244] *See supra* Section III.A.2.

[245] *See* discussion *supra* Parts II, III.

[246] Gall v. United States, 552 U.S. 38, 51 (2007). *See Chamness*, 2012 U.S. Dist. LEXIS 106496, at *16–19 ("[C]ourts imposing punishment are not precluded from weighing as a factor a defendant's family ties and responsibilities. . . . Indeed, the family circumstances of a criminal defendant often play an important role when judges craft sentences from the Guideline's factors. . . . [T]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court. The Magistrate Judge did not unfairly weigh [defendant's] pregnancy and for that reason the sentence is not substantively unreasonable.") (internal citations and quotations omitted)).

a victimless, non-violent offense, the collateral harm from serving the Guidelines sentence likely exceeds the harm of the offense. Therefore, a Guidelines custodial sentence would be "greater than necessary" and not adhere to the requirements in 18 U.S.C. § 3553(a).

1. RETRIBUTION: THE THEORY

Retribution has been invoked as a justification for legal punishment for centuries, but its form has evolved with time.[247] In the Hammurabi Code of 1760 BC, retribution was "cruder" by operating as an "eye for an eye, a tooth for a tooth."[248] Under the influence of Kant and Hegel, retribution has assumed a more morally conscious role.[249] According to Kant, punishment is justified only when the defendant's actions are "morally wrong" and the punishment must be "equivalent to the offense committed."[250]

To determine a punishment that "fits" the crime, a court must look at the resulting harm. Therefore, retribution seemingly provides a loophole to the Guidelines' limitation on considering third-party harms.[251] In modern day sentencing, courts disagree on the type of harms that should be used to determine the severity of punishment.[252] Historically, courts focused on direct harms and the broader societal impacts of the offense.[253] But, courts today have expanded to also consider less direct injuries which can include emotional, psychological, and social injuries.[254] For example, when sentencing for a crime with a victim, courts may consider the victim's long-term therapeutic treatment and psychological impact months after the incident.[255]

But because retribution traditionally focuses on the direct harm perpetrated by the defendant, sentencing courts have found it difficult to impose a sentence that also considers the resulting collateral

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247 *See* Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1053 (2012).
248 *Id.* at 1054.
249 *Id.* at 1054–55.
250 *Id.* at 1055.
251 *See* Berman, *supra* note 6, at 276.
252 *See* Ryan, *supra* note 247, at 1072–73.
253 *Id.*
254 *See id.* at 1073.
255 *See id.*

harm.[256] Therefore, when sentencing courts impose a downward departure due to family circumstances, judges have opted to ignore retributivist rationale and instead prioritize alternative theories.[257] For example, in *United States v. Johnson*, the Second Circuit explained, "The rationale for a downward departure . . . is not that Johnson's family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing."[258]

2. RETRIBUTION: THE ARGUMENT

Utilizing a caretaker lens, a successful retribution-focused argument for downward departure should focus on the harm perpetrated by the offense and then ensure that the defendant's punishment is commensurate.[259] Ms. Johnson participated in a scheme that stole money from inflated paychecks.[260] Ms. Johnson's actions did not directly cause any physical harm to any individuals. Nonetheless, Ms. Johnson's base offense level was a twenty-three and, dependent on her Criminal History Category, she faced a minimum Guidelines range of forty-six to fifty-seven months.[261]

In contrast, Ms. Johnson would personally endure tremendous harm as a direct result of her custodial incarceration under the Guidelines range. By nature of Ms. Johnson's custodial incarceration, she would immediately be placed at risk for losing her parental rights.[262] Specifically, because Ms. Johnson is the primary caretaker of her biological and non-biological children, she would have to comport with ASFA requirements to regain her primary custody

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256 *See* Rappaport, *supra* note 47, at 587. Collateral harm specifically refers to the harm to third parties, as a result of the defendant's alleged actions. *Id.* This can include harm to victims and, of course, family members. *Id.* However, the difficulty in factoring in collateral harms derives from determining what exactly constitutes collateral harm. *Id.* "[E]ven if separation from children is arguably the most significant loss that a parent may experience . . . earning potential, professional license, reputation . . . may be just as important to many other defendants." *Id.*

257 *See* Rappaport, *supra* note 47, at 586.

258 *Id.*

259 *See id.* at 587.

260 *See* United States v. Johnson, 964 F.2d 124, 126 (2d Cir. 1992).

261 *Id. See supra* text accompanying notes 50–51.

262 *See supra* Section II.B.

from the state.[263] In light of research indicating the disproportionate termination of parental rights for incarcerated people and the bureaucratic barriers for regaining those rights, Ms. Johnson's custodial incarceration would make her loss of rights a likely reality.[264]

If Ms. Johnson received a Guidelines custodial sentence, she would be forced to navigate the barriers to reentry (e.g., regaining employment, housing, economic mobility) on top of the trauma of being stripped of her parental rights.[265] Because incarcerated individuals often cite "family support" as a necessity for regaining stability and not recidivating, Ms. Johnson's separation from her children would intensify her resulting harm—perpetrating the "double punishment" effect commonly felt by incarcerated caretakers.[266] Furthermore, the physical and emotional barriers imposed by the isolating prison environment would hinder her ability to meaningfully communicate or visit with her children.[267] Specifically, limited BOP facilities for incarcerated females increase the likelihood that Ms. Johnson would not be easily accessible for her minor children.[268] Even if Ms. Johnson was located within driving distance of her children, it is unclear whether she had another adult that could bring the children for visitation. In short, the physical separation from Ms. Johnson's children—who she was solely responsible for—would likely induce anxiety, depression, and post-traumatic stress disorder, as supported by research.[269] The record does not indicate that Ms. Johnson had mental health-related problems prior to her potential custodial incarceration. Therefore, the high probability of experiencing harmful mental health effects—likely for the long-term—as a direct result of custodial incarceration constitutes a tangible harm from Ms. Johnson's punishment.

If a sentencing court were to follow traditional notions of retribution, then the direct harm perpetrated by the defendant should be the focus of the retribution analysis.[270] Here, in a victimless and non-

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263 *See id.*
264 *See supra* text accompanying note 133.
265 *See supra* text accompanying note 142.
266 Iskikian, *supra* note 133, at 134. *See supra* text accompanying note 142.
267 *See supra* Section II.B.
268 *See supra* Section II.C.
269 *See* Scotti, *supra* note 5, at 50.
270 *See supra* Section IV.A.1.

violent offense, the harm must be determined from any monetary loss in government funds that was likely recovered by the time of Ms. Johnson's sentencing.[271] Under traditional notions of retribution, Ms. Johnson's harm guaranteed from her custodial Guidelines sentence clearly outweighs any harm perpetrated by her punishable acts.[272] Even under a less direct approach to retribution which might consider emotional or social injuries, the likelihood of Ms. Johnson being stripped of her parental rights and potential psychological side effects still outweigh the harm of the offense itself.[273]

Thus, to promote retribution requiring an "eye for an eye," Ms. Johnson was appropriately granted a downward departure. In Ms. Johnson's case, a non-custodial sentence was deemed appropriate for the non-violent and victimless nature of her offense. Non-custodial sentences are compatible with retribution because they still take something "away" from an individual: Sentencing Ms. Johnson to six months of home detention, three years of supervised release, and restitution of $27,973 still serves to deprive her of liberty and property.[274]

Of course, a non-custodial sentence might not always be suitable. Instead, the argument for a downward departure might exclusively be for a shorter custodial sentence that could still serve to benefit the caretaker by limiting the time physically separated from their children and minimizing psychological harm. Regardless, the well-established body of research illustrating the emotional and psychological harm incarcerated caretakers face allows the same argument to be made for any defendant who is a caretaker. In short, the failure to grant a downward departure subjects the incarcerated care-

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271 *See* United States v. Johnson, 964 F.2d 124, 126 (2d Cir. 1992).

272 *See supra* Section IV.A.1.

273 *See supra* Section IV.A.1.

274 *See supra* text accompanying note 223. Under supervised release, an individual is required to follow mandatory conditions and any discretionary conditions imposed by the sentencing judge. U.S. SENT'G COMM'N, SUPERVISED RELEASE PRIMER 5–7 (2021), https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_Supervised_Release.pdf. Mandatory conditions include not committing another federal, state, or local offense; not possessing or using controlled substances; and often being drug tested. *Id.* at 6. An example of a discretionary condition is requiring the individual to successfully complete a treatment program. *Id.* at 8.

taker to punishment that is more severe than similarly situated defendants.[275] Therefore, the failure to grant such a departure does not promote retribution and violates the 18 U.S.C. § 3553(a) requirement that the punishment is "sufficient but not greater than necessary."[276]

It is important to acknowledge that legal scholars have been critical of a retributive argument grounded in the "double punishment" theory.[277] One identified shortfall is the reluctance among sentencing courts and the Sentencing Commission to use "collateral harms" (e.g., loss of earning potential) as justification for downward departures.[278] However, the argument in this Note assumes caretaker responsibilities—by nature of explicit inclusion in § 5H1.6 and the 2023 Guidelines amendments—are inherently unique from generalized collateral harms.[279] In light of this, successful sentencing mitigation should encourage sentencing judges to distinguish caretaker status when making sentencing determinations. As the 2023 Guidelines state, "extraordinary and compelling" family-based sentence modifications are warranted under 18 U.S.C. § 3582(c)(1)(A).[280] If a defendant's caretaker status rises to the level of an "extraordinary" circumstance, then a sentencing judge should comfortably place weight on the collateral harm as doing so adheres to the Guidelines.[281] If the defendant's caretaker responsibilities do not rise to the "extraordinary" threshold as defined by the Guidelines or sentencing case law, then successful sentencing mitigation should invoke *Kimbrough* and *Gall* to argue a downward departure is still

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275 For example, consider two co-defendants with equal involvement in a federal offense. Both co-defendants have been convicted of the same charge and face the same sentencing range as recommended by the Federal Sentencing Guidelines. Co-defendant A is the primary caretaker for three minor children, while co-defendant B does not have or care for any children. At first blush, sentencing co-defendants A and B to the same sentence for the same crime would be fair due to their equal involvement. But the negative impact that co-defendant A's incarceration will have on them due to the physical separation from their children and the stress of making additional caretaker arrangements creates the sentencing disparity. *See also* Berman, *supra* note 6, at 276.

276 18 U.S.C. § 3553(a)(2)(A) (1984). *See* discussion *supra* Part I.

277 *See* Rappaport, *supra* note 47, at 587.

278 *Id.*

279 *See supra* Section I.A.

280 U.S. SENT'G COMM'N, *supra* note 72, at 3.

281 *See id.*; *see also supra* Section I.A.

warranted.[282] Because *Gall* stands for the proposition that "extraordinary circumstances" are not necessary for a Guidelines departure while *Kimbrough* empowers a sentencing court to make a policy-based departure, sentencing judges are poised to abolish the extraordinary/ordinary caretaker distinction and consider collateral harm when doing so promotes the federal goals of sentencing.[283]

C. *A Downward Departure in Furtherance of Deterrence*

Sentencing Ms. Johnson to a non-custodial sentence below the Guidelines promotes deterrence because continuing her primary childcare responsibilities on the outside allows her to avoid the barriers to reentry, decreasing the likelihood of recidivism.[284] Because it is questionable that custodial sentences even have a deterrent effect, six months of home detention, followed by three years of supervised release and restitution, is "sufficient, but not greater than necessary."[285]

1. DETERRENCE: THE THEORY

Unlike retribution, which focuses on ameliorating the harm that resulted from the defendant's past offense, deterrence looks to prevent future harm.[286] While two types of deterrence exist, general and specific, invoking a defendant-centered lens requires specific deterrence.[287] Specific deterrence focuses on the actual defendant and how their punishment can prevent them from committing more unlawful conduct in the future.[288]

Specific deterrence originates from the idea that crime is committed by "conscious, rational considerations" of a crime where the criminal conducts a "cost-benefit analysis of the outcomes of a crime before offending, only acting if they identified a net positive

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[282] *See supra* Section I.B.

[283] *See* Gall v. United States, 552 U.S. 38, 47 (2007); Kimbrough v. United States, 552 U.S. 85, 111 (2007).

[284] *See supra* text accompanying note 142.

[285] 18 U.S.C. § 3553(a) (1984).

[286] *See supra* Section I.A.

[287] *See supra* Section I.A.

[288] *See supra* Section I.A. In contrast, general deterrence would utilize the defendant as a case study to demonstrate the repercussions for a particular action. The rationale behind general deterrence is that the observation of another person's punishment will serve as the deterrence.

outcome."[289] Therefore, the notion is that an offender will consciously abstain from future criminal activity because of the "negative experience of punishment" resulting from the fines, periods of probationary restrictions, or the experience of incarceration.[290] The United States has disproportionately utilized custodial sentences as a method of punishment, in comparison to the rest of the world, based on the belief that incarceration achieves specific deterrence.[291] However, statistics do not support that an increase in the rate of incarceration translates to a decrease in the crime rate itself.[292] Additionally, evidence does not support that people who commit a crime actually partake in a cost-benefit analysis; many crimes are committed due to irrational or emotionally-driven choices.[293]

Incarceration increases the likelihood of recidivism because longer sentences reduce social connections and increase the likelihood of poverty, drugs, or poor mental illness due to the inability to reacclimate to society.[294] In a 1993 study examining recidivism among 1,231 people convicted of driving under the influence, data showed that sentences greater than six months began to diminish in deterrent effect.[295] Therefore, it is crucial for a sentencing judge to consider the value in sentencing a defendant to additional months when it is likely the additional period of incarceration will not serve any benefit.[296] Furthermore, sentencing judges should know that the deterrent effect of a sentence depends on the nature of the crime. An offense that was emotionally driven, instead of calculated, is less likely to be deterred by a prison sentence because the defendant did not conduct a cost-benefit analysis prior to the commission of the offense.[297] In other words, punishing a crime of self-defense or a crime committed while under the influence will likely have little to no deterrent effect if the defendant finds themselves in a similar life-threatening situation or if they did not receive proper substance abuse treatment.

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289 Pathinayake, *supra* note 42, at 360.
290 *Id.* at 362.
291 *Id.* at 369.
292 *See id.* at 371.
293 *Id.*
294 *Id.* at 371–72.
295 Pathinayake, *supra* note 42, at 375.
296 *Id.*
297 *Id.* at 371.

2. DETERRENCE: THE ARGUMENT

The argument for a family-based departure through a caretaker lens is centralized around the negative correlation between length of incarceration and deterrent effect.[298] Therefore, because research indicates successful reentry decreases recidivism—and familial connections are crucial for successful reentry—downward departing for a defendant like Ms. Johnson promotes deterrence.

Incarcerating a caretaker, like Ms. Johnson, creates a physical isolation from their children that threatens their relationship upon release.[299] This is especially true in the federal carceral system where most parents are more than 100 miles from their children.[300] Due to the difficulty of reentry, it is crucial that released caretakers have maximum familial support and are not dealing with newly-developed emotional or psychological side effects from being stripped of caretaking responsibilities.[301]

In Ms. Johnson's case, it is indisputable that her acts required planning and deliberation (as opposed to an emotionally-driven offense).[302] If the offense was emotionally driven and uncalculated, a defense attorney should highlight the negative correlation between length of incarceration and deterrent effect.[303] Under such circumstances, the defense attorney should argue for a non-custodial sentence because the benefit of maintaining close family ties likely outweighs the cost of separating the caretaker.[304] But, even for a calculated act, research supports a negative correlation between length of incarceration and deterrent effect.[305]

Sentencing Ms. Johnson within the Guidelines range, a minimum of forty-six months assuming base offense level is one, is greater than necessary to achieve deterrence. Longer prison sentences are "unlikely to deter future crime" and, in fact, might have the "opposite effect"—longer sentences "may desensitize many to

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298 *See id.*
299 *See supra* Section II.A.
300 *See supra* Section II.A.
301 *See supra* Section II.A.
302 *See* United States v. Johnson, 964 F.2d 124, 126 (2d Cir. 1992).
303 Pathinayake, *supra* note 42, at 371.
304 *See supra* text accompanying note 105.
305 Pathinayake, *supra* note 42, at 375.

the threat of future imprisonment."[306] Similarly, it is difficult to argue that a Guidelines sentence has any deterrent effect because people who commit crimes are often not even familiar with the associated punishment.[307] Therefore, it is impossible to argue with certainty that sentencing a defendant like Ms. Johnson to a custodial sentence within the Guidelines range will effectively prevent another individual for committing a similar act of bribery and theft.

Without any significant data supporting the difference in deterrent effect between custodial and non-custodial sentences, a non-custodial sentence in Ms. Johnson's case was more compatible with deterrence. Ultimately, decreasing the amount of time a caretaker is separated or preventing separation altogether promotes deterrence by maintaining close community bonds to ease the reentry process. If the goal of punishment is to prevent an individual from committing future misconduct, it is essential to determine why the individual committed the offense in the first place. If an individual committed a crime out of economic necessity to support their children, then subjecting that individual to heightened stigma, employment barriers, and trauma will only exacerbate their socioeconomic challenges.[308]

D. *A Downward Departure in Furtherance of Incapacitation*

Downward departures in furtherance of incapacitation are arguably the most defendant-dependent because the ultimate goal is to protect society from that specific individual. For non-violent offenders, like Ms. Johnson, a downward departure granting a non-custodial sentence for a mother with caretaking responsibilities promotes incapacitation because she poses little to no societal threat. For a caretaker who committed a "violent" offense, it is still necessary to consider the costs and effectiveness of custodial incarceration to determine if a Guidelines sentence is truly necessary.

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[306] U.S. DEP'T OF JUST., FIVE THINGS ABOUT DETERRENCE 1 (2016), https://www.ojp.gov/pdffiles1/nij/247350.pdf.

[307] *Id.*

[308] *See supra* text accompanying note 142.

1. INCAPACITATION: THE THEORY

The purpose of incapacitation is to remove the defendant from society in order to physically prevent them from committing additional crimes.[309] However, incarcerating for the goal of incapacitation does present a catch-22. Incapacitation is grounded in the notion that offenders are "inherently dangerous and likely to reoffend regardless of where they are put."[310] Simultaneously, incapacitation also assumes custodial incarceration will prevent reoffending.[311] Yet, in reality, we know that access to resources (e.g., secure housing, employment, etc.) and familial support actually prevent reoffending. In other words, it is beneficial to not isolate a human behind bars from the necessary resources that would allow them to flourish.[312] Sadly, federal sentencing trends show a gradual increase in sentence length seemingly indicating that incapacitation is the priority.[313]

Legal scholar Priscilla Ocen has aptly called the movement towards widespread caretaker incarceration, or incapacitation, as the "incapacitation of motherhood."[314] Ocen describes that the incapacitation of motherhood is accomplished through a variety of methods:

> First, motherhood is incapacitated largely through the removal of women from the ability to procreate or parent via incarceration and the conditions of confinement they confront while serving their custodial sentences. For example, pregnant prisoners are exposed to humiliating, degrading, or negligent treatment, including the use of shackles during labor and delivery. These humiliating practices punish women for procreating and discourage further childbearing.

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309 Gwin, *supra* note 37, at 176.

310 Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 3 (2017).

311 *Id.*

312 *See supra* text accompanying notes 142–43.

313 Binder & Notterman, *supra* note 310, at 14. From 1988 to 2012, the average length of sentencing more than doubled regardless of crime. *Id.* Between 1992 and 2008, the number of people serving a life sentencing without the possibility of parole increased from 12,453 to 41,000. *Id.*

314 Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2195 (2018).

> Second, the procreative capacities of women who are of reproductive age are circumscribed by practices and policies like lengthy sentences, coerced sterilizations, and accelerated timelines for the termination of parental rights. Taken together, the individual and collective acts of incapacitation in prison result in women's temporary or permanent inability to procreate or parent their children.[315]

In light of the racial disparities in federal sentencing practices, the "incapacitation of motherhood" will disproportionately deprive women of color of their ability to procreate or parent.[316] Of course, the same disproportionate impact is felt by men of color and the children of color who are deprived of their caretakers.[317]

Ultimately, the goal of federal sentencing under the Guidelines is to provide a sentence that is "sufficient but not greater than necessary."[318] Knowing the trauma perpetrated by incarcerating a mother, or any caretaker, and knowing incapacitation is intended to prevent reoffending, under what circumstances would a custodial sentence actually achieve its intended effects? A custodial sentence is likely not necessary if the crime is non-violent, victimless, and the defendant does not pose any threat to society.[319]

2. INCAPACITATION: THE ARGUMENT

In a case like Ms. Johnson's, the argument for a downward departure to promote incapacitation is simple. Because Ms. Johnson committed a non-violent and victimless offense, serving a custodial sentence does not make society any safer than if Ms. Johnson served a non-custodial sentence.[320] Similarly, it cannot be argued that incarcerating Ms. Johnson decreases the likelihood of her recidivating, based on the breadth of evidence indicating the opposite.[321] Instead,

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315 *Id.*
316 *See supra* text accompanying note 110.
317 *See id.*
318 18 U.S.C. § 3553(a) (1984).
319 *See supra* text accompanying note 44.
320 *See supra* Section IV.C.1.
321 *See supra* text accompanying notes 142–43.

incarcerating a defendant like Ms. Johnson perpetrates the "incapacitation of motherhood" effect, depriving her of the ability to parent her children and the ability to choose to have a child.[322] And regardless of whether a defendant is the primary caretaker, *all* caretakers face the same risks from custodial incarceration: losing parental rights; mental health disorders; and a difficult reentry.[323] If a defendant does not pose a threat to society, a non-custodial sentence is compatible with incapacitation because a defendant is still subjected to restraints on their freedom and must comply with supervisory conditions.[324] In contrast, a custodial sentence is "greater than necessary" and, in effect, contrary to the Guidelines.[325]

E. *A Downward Departure in Furtherance of Rehabilitation*

Granting a downward departure for a caretaker promotes rehabilitation because the carceral environment is not equipped to properly rehabilitate. To the greatest extent feasible, caretakers should remain involved in their children's lives to avoid the negative effects of physical separation and ensure they have sufficient familial support to be truly rehabilitated.

1. REHABILITATION: THE THEORY

Rehabilitation is intended to reform the defendant and prepare them for reentry through education, training, and treatment.[326] With proper rehabilitation, the "criminal" behavior should ideally stop.[327] In order to promote rehabilitation, prisons can offer programming for substance abuse and mental health support as well as educational or vocational training.[328] Research has repeatedly shown that effective prison programming can "significantly reduce" recidivism.[329]

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322 *See* Ocen, *supra* note 314, at 2195; *see also* discussion *supra* Part II.

323 *See supra* Section II.B.

324 *See supra* text accompanying note 223.

325 18 U.S.C. § 3553(a) (1984).

326 Gwin, *supra* note 37, at 176–77.

327 *See* Marissa A. Booth, *The Road to Recovery: The Third Circuit Recognizes the Importance of Rehabilitative Needs During Sentencing in* United States v. Schonewolf, 64 VILL. L. REV. 569, 570 (2019).

328 *See id.* at 574–75.

329 Amanda Dick, Note, *The Immature State of Our Union: Lack of Legal Entitlement to Prison Programming in the United States as Compared to European Countries*, 35 ARIZ. J. INT'L & COMP. L. 287, 294 (2018).

And while prison programming providing parenting support could benefit caretakers separated from their children, a limited budget makes it extremely unlikely that federal facilities offer high-quality resources.[330]

In reality, the availability of prison programming to foster rehabilitation depends on the facility.[331] The federal government requires prison programming to be available, but it is scarce.[332] For example, as of 2018, the Rehabilitation and Values Enhancement Program, which offers cognitive-behavioral therapy, is only offered at two of 122 federal prisons.[333] The Challenge Program, also offering cognitive-behavioral therapy, is only offered at thirteen facilities.[334] Federal facilities are required to offer Adult Continuing Education courses, but these include only foundational skills, not any secondary education courses.[335] Vocational programs are available at about half of the federal facilities, making access truly "the luck of the draw."[336] Therefore, how likely is it for an incarcerated individual to be rehabilitated while serving a custodial sentence?

2. REHABILITATION: THE ARGUMENT

Serving a non-custodial sentence would be the most appropriate and beneficial for a defendant like Ms. Johnson to be properly rehabilitated.[337] Ms. Johnson's rehabilitation would be contingent on her placement facility and the available programming. At the outset, the BOP has the discretion to place defendants at any facility—regardless of the sentencing judge's recommendation.[338] The limited number of female facilities, coupled with limited programming in federal facilities, makes her accessibility even more unlikely.

Successful sentencing mitigation should emphasize the BOP's discretionary power to make placements and the limited viable op-

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330 *See supra* text accompanying note 46.
331 Dick, *supra* note 329, at 296.
332 *Id.*
333 *Id.*
334 *Id.*
335 *Id.*
336 *Id.* at 297.
337 *See supra* text accompanying note 105.
338 Cyphert, *supra* note 5, at 408.

tions because a non-custodial sentence likely guarantees better access to resources. For example, even if a sentencing judge determines a custodial sentence is more suitable because the defendant can access drug treatment, the BOP might place the defendant at a facility that does not offer the judge's recommended programming. Or, the programming may be full. In contrast, the sentencing judge can issue a non-custodial sentence and attach discretionary conditions such as the successful completion of a treatment program.[339] The latter option guarantees the defendant can adhere to the judge's recommended sentence, allows the defendant to continue their caretaking responsibilities, and promotes rehabilitation.

Additionally, incarcerating a defendant like Ms. Johnson subjects her to the negative psychological side effects from physical separation and isolation. If the sentencing court's goal is to prevent Ms. Johnson from recidivating, the most supportive environment will be at home—serving a non-custodial sentence. Serving a non-custodial sentence avoids the deleterious effects of separating a caretaker from their children, avoids subjecting Ms. Johnson to the barriers to reentry, and still promotes the goals of sentencing.

If a non-custodial sentence is inappropriate in light of a defendant's offense, defense attorneys should still argue for a shorter sentence conditioned on completing non-residential programming.[340] Programming could be targeted at parental responsibilities and strengthening the caretaker-child bond post-incarceration in order to minimize the likely impact of incarceration.[341] Simultaneously, non-residential programming furthers sentencing goals by targeting the collateral results of caretaker incarceration such as heightened prevalence of anxiety and depression or substance usage to cope with reentry stresses.[342]

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339 *See supra* text accompanying note 274.

340 Booth, *supra* note 327, at 575. Ideally, non-residential treatment programming post-release would enable the defendant to still live with their children and complete their caretaker duties.

341 *See* discussion *supra* Part II. Non-custodial programming could also include substance abuse treatment, mental health treatment, etc.

342 *See supra* Section II.B.

CONCLUSION

The creation of the Federal Sentencing Guidelines was intended to limit judicial discretion at sentencing and ameliorate the vast disparities among different sentencing judges. However, *Booker* reshaped the Guidelines, instructing sentencing judges to use the parameters as advisory while utilizing the "history and characteristics of the defendant" to impose a sentence "sufficient but not greater than necessary."[343]

Sentencing hearings are a crucial opportunity for a defendant to argue to the court why they are deserving of a downward departure.[344] It is well established that incarceration negatively impacts children when their caretakers are required to serve a custodial sentence.[345] Additionally, incarceration affects the caretaker, during and post-incarceration, because of the threat to their parental rights and to the parent-child relationship.[346] However, the Sentencing Guidelines have restricted successful sentencing mitigation to mostly requiring defendant-focused arguments, making it difficult for defendants to receive a downward departure due to family-related responsibilities.[347]

In the modern-day sentencing terrain, it is crucial that an argument for a downward departure for caretakers is made in accordance with the Sentencing Guidelines. Therefore, the argument for a caretaker downward departure should utilize a defendant-centered lens to demonstrate how the departure promotes the four goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation.[348] Most importantly, the argument for a downward departure using a caretaker lens should be made for *all* caretakers—not just those arbitrarily deemed "extraordinary." If defense attorneys can successfully demonstrate how a caretaker's downward departure promotes the four goals of sentencing, then a judge's failure to grant the departure is contrary to the Federal Sentencing Guidelines.

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343 *See* discussion *supra* Part I.
344 *See* discussion *supra* Section I.C.
345 *See* discussion *supra* Section II.A.
346 *See* discussion *supra* Section II.B.
347 *See* discussion *supra* Part III.
348 *See* discussion *supra* Part IV.