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## PRISONERS OF FATE: THE CHALLENGES OF CREATING CHANGE FOR CHILDREN OF INCARCERATED PARENTS

AMY B. CYPHERT\*

### ABSTRACT

*Children of incarcerated parents, the invisible victims of mass incarceration, suffer tremendous physical, psychological, educational, and financial burdens—detrimental consequences that can continue even long after a parent has been released. Although these children are blameless, policy makers, judges, and prison officials in charge of visitation policies have largely overlooked them. The United States Sentencing Commission Guidelines Manual explicitly instructs judges to ignore children when fashioning their parents’ sentences, and judges have largely hewed to this policy, even in the wake of the 2005 United States v. Booker decision that made those Guidelines merely advisory, not mandatory. Although some scholars have suggested amending the Guidelines or making other legislative changes that would bring children’s interests forward at the sentencing phase, these suggestions are less likely than ever to bear fruit. In light of the Trump Administration’s “tough on crime” rhetoric, new Attorney General Jefferson Sessions’ “law and order” reputation, and Republican control of the House and Senate, policy change that is viewed as “progressive” is highly unlikely. Therefore, this Article proposes two other avenues for change. First, in a new and unique proposal, this Article suggests federal judges can and should independently order the inclusion of Family Impact Statements into a defendant’s presentence investigation report via a heretofore largely unused “catchall provision” of the Federal Rules of Criminal Procedure.*

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*Second, this Article makes three modest policy recommendations that are aimed at improving the ability of children to visit their incarcerated parents. Visitation has been shown in studies to be a powerful tool of mitigation for many of the harms children experience when their parents are incarcerated, but visitation rates are woefully low. The options for improving circumstances for children of incarcerated parents may well be limited, but there are viable options, and there is no time to waste.*

*“We agree with the sentencing judge that a child will bear a stigma from being born in prison. But it has been recognized since time immemorial that the sins of parents are visited upon their children.”<sup>1</sup>*

## INTRODUCTION

In April of 2016, the Annie E. Casey Foundation released a policy report that detailed in bleak terms the devastating impact that parental incarceration has on the children who are left behind.<sup>2</sup> Too little attention has been paid to these children and the effect their parent’s incarceration has on them. Scholars have termed them “collateral damage”<sup>3</sup> and “invisible victims,”<sup>4</sup> and noted that the high price they pay in terms of their altered trajectories is the “hidden cost[] of our criminal justice policies.”<sup>5</sup> As the Annie E. Casey Foundation report noted, “policy debates about incarceration rarely focus on

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1. United States v. Pozzy, 902 F.2d 133, 139 (1st Cir. 1990).

2. ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES AND COMMUNITIES 1–7 (2016), <http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf>.

3. See, e.g., Roy L. Austin Jr. & Karol Mason, *Empowering Our Young People, and Stemming the Collateral Damage of Incarceration*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Oct. 8, 2014, 7:30 PM), <https://obamawhitehouse.archives.gov/blog/2014/10/08/empowering-our-young-people-and-stemming-collateral-damage-incarceration>; see also Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1015 (2001) (“One of the most serious collateral harms imposed by massive incarceration is the negative impact on children with parents in prison.”).

4. Michal Gilad & Tal Gat, *U.S. v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 37 N.Y.U. REV. L. & SOC. CHANGE 371, 372 (2013) (noting “[t]wo-thirds of incarcerated women have minor children, and as many as seventy to ninety percent of incarcerated mothers are the sole caregivers for their children” and asking, “Where do all these invisible victims of crime go when deprived of their primary or sole caregiver?” (footnote omitted) (first citing BARBARA BLOOM, BARBARA OWEN & STEPHANIE COVINGTON, NAT’L INST. OF CORR., GENDER RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 7 (2003); and then citing Jordana Hart, *Bill Lets Mothers in Prison Keep Tots: Benefits to Parent and Child are Cited*, BOSTON GLOBE, June 26, 1997, at B1)).

5. JEREMY TRAVIS ET AL., URBAN INST. JUSTICE POLICY CTR., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 1 (2005), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310882-Families-Left-Behind.PDF>.

the burden borne by children and families” when a parent is incarcerated.<sup>6</sup> But a burden is indeed borne. These blameless children, who have done nothing wrong, nonetheless will “do the time” with their parents, and will likely experience a myriad of negative impacts. As the quote from the *Pozzy* case illustrates, sentencing judges have largely accepted as a given, reluctantly or not, that these children are to be punished alongside their parents.

But is there another way? Is it simply inevitable that, when a parent has engaged in criminal behavior, their children must necessarily suffer? Are there any low-cost, politically-feasible ways to mitigate this suffering? This Article endeavors to examine the viability of a variety of proposals that might help children of incarcerated parents, and concludes that, although the path forward to assisting them is narrow, it does exist.

Part I lays out in stark detail the extremely difficult situation that children of incarcerated parents experience, outlining the real harms they face—everything from decreases in their physical and psychological health to an increased risk for homelessness and educational failures. These problems follow children into adulthood, setting them up for an increased risk of problems such as drug use, unemployment, and, ultimately, incarceration themselves. In addition, children of incarcerated parents are disproportionately black and living in poverty, mirroring larger trends in the administration of criminal justice in this country. Part I will also explore the reasons that something shown in studies to mitigate so many of those harms—visitation with their parents—is so difficult to achieve in practice, despite the fact that visitation also reduces recidivism rates for incarcerated parents. Although this Article focuses chiefly on federal sentencing practices and rules, and therefore on children of parents incarcerated in federal prisons, the harms that children experience when a parent is incarcerated extend, of course, to state and local jails as well.

These harms, while relatively well documented by researchers, are nonetheless noticeably absent from sentencing decisions and the case law surrounding incarceration. To help explain why this is, the Article shifts in Part II to a discussion of the federal criminal sentencing process, and how, traditionally, children have been left out of the conversation when a parent is facing jail time. Part II gives a brief history of the Sentencing Guidelines, including a discussion of Guidelines Section 5H1.6,<sup>7</sup> which explicitly instructs sentencing judges that the impact of a parent’s incarceration on minor children or other family members is generally *not* to be considered when fashioning a sentence. Part II also discusses the Supreme Court’s 2005 *United States v. Booker*<sup>8</sup> decision, which, along with the vacillating opinions

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6. ANNIE E. CASEY FOUND., *supra* note 2, at 2.

7. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM’N 2016).

8. 543 U.S. 220 (2005).

that have come after it, made the Sentencing Guidelines merely advisory, thus freeing federal judges from blindly following them when sentencing a parent. However, *Booker* and its progeny have largely not lived up to their revolutionary potential with respect to taking family impact into consideration at sentencing. District court judges have taken an uneven approach to downward departures on the basis of family responsibilities when sentencing parents in the wake of the *Booker* decision, and this Article examines that phenomenon and the various reasons for it. Part II concludes by discussing the fact that the Bureau of Prisons, not sentencing judges, decide where federal inmates are incarcerated, and subsequently, this decision has a massive impact on a child's ability to visit their parent in prison.

Part III examines proposed legislative and judicial changes that are relatively feasible in terms of cost and would have a major impact on children of incarcerated parents, but are nonetheless unlikely to come to fruition under the Trump Administration and current Attorney General Sessions. Ultimately, recommendations that would require action on the part of Congress—such as amending the Sentencing Guidelines to clarify that family responsibilities can be considered in fashioning a sentence or amending Federal Rule of Criminal Procedure 32 to mandate the inclusion of Family Impact Statements in presentence investigation reports—are not, at the present, likely to occur. Similarly, it is unlikely action on the part of the Supreme Court—such as directing sentencing judges to ignore the portion of the Sentencing Guidelines that disfavors consideration of family responsibilities in sentence formation—would occur.

But the news is not all bleak: the heart of this Article is Part IV, which makes two sets of recommendations aimed at addressing the issues facing children of incarcerated parents that are likely to succeed, even if on a patchwork basis. First, Part IV explores a novel action that individual federal sentencing judges can take—by using a relatively underutilized provision of the Federal Rules of Criminal Procedure (Rule 32(d)(2)(G))—to require that a presentence investigation report include information about how a parent's incarceration will impact their minor children. This recommendation is unique to this Article; research did not yield evidence of a single instance of a judge using this Rule to require a Family Impact Statement. But a recent opinion out of the Eastern District of New York, where that provision was used to require an assessment of collateral consequences as part of the sentencing report, provides a useful roadmap of how it could be used here.<sup>9</sup> Second, Part IV outlines three recommendations for improving prison visitation policies: (1) making them explicitly welcoming to children; (2) increasing visiting hours; and (3) working with nonprofits to help overcome financial obstacles to visitation for children of incarcerated parents. These three policy changes

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9. *United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016).

are modest, can be implemented with relatively low cost, and are already occurring in certain jurisdictions around the country.

Children of incarcerated parents have never had an easy lot. There is little reason to believe that there will be significant legislation aimed at improving their experiences anytime in the foreseeable future. But there are things that can be done by concerned judges, compassionate prison officials, and even everyday citizens willing to support nonprofit work. Efforts to help protect and foster these invisible victims are timely and essential.

### I. DEFINING THE ISSUE AND THE STAKES

As prison populations have ballooned in recent decades (the United States now has the world's highest incarceration rate),<sup>10</sup> so too have the rates of parental incarceration. "From 1980 to 2000, the number of kids with a father in prison or jail rose by 500 percent."<sup>11</sup> The problem of parental incarceration is a shockingly pervasive issue. In the state of Kentucky, for example, thirteen percent of all children have a parent who was or is incarcerated.<sup>12</sup> A full sixty-three percent of federal prisoners are the parents of minor children, and nearly half lived with their children prior to being sent to prison, suggesting that many of them were actively involved in their children's lives prior to their incarceration.<sup>13</sup> Conservative estimates place the number of children who have had a parent in jail or prison at some point in their lives at around 5.1 million.<sup>14</sup>

As with so many problems that involve incarceration in this country, the issue is one that disproportionately impacts communities of color, with black children 7.5 times more likely and Hispanic children 2.6 times more likely than white children to have a parent in prison.<sup>15</sup> The numbers are stark: for a black child born in 1990, there is a one in four chance their father was incarcerated before the child's fourteenth birthday, a chance that doubles to one in two if the father never completed high school.<sup>16</sup>

Incarceration is also a problem that disproportionately impacts children living in poverty. Children of incarcerated parents are more likely than other

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10. ROY WALMSLEY, KING'S COLL. LONDON INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (8th ed. 2009), [http://www.apcca.org/uploads/8th\\_Edition\\_2009.pdf](http://www.apcca.org/uploads/8th_Edition_2009.pdf). The United States now imprisons 756 per every 100,000 people, more than Russia (629 per 100,000), Rwanda (604 per 100,000) and Cuba (531 per 100,000). *Id.*

11. ANNIE E. CASEY FOUND., *supra* note 2, at 1.

12. *Id.*

13. THE SENTENCING PROJECT, FACT SHEET: PARENTS IN PRISON 1-2 (2012), <http://www.sentencingproject.org/publications/parents-in-prison/>.

14. ANNIE E. CASEY FOUND., *supra* note 2, at 2.

15. THE SENTENCING PROJECT, *supra* note 13, at 1.

16. Angelia Cai, *Insuring Children Against Parental Incarceration Risk*, 26 YALE J.L. & FEMINISM 91, 93 (2014).

children to live in low-income communities with poor-quality housing and underperforming schools.<sup>17</sup> The high rate of incarceration in these neighborhoods promotes a vicious cycle that is hard for communities to climb out of: “The sheer number of absent people depletes available workers and providers, while constraining the entire community’s access to opportunity—including individuals who have never been incarcerated.”<sup>18</sup> Even when parents are released from prison and return to their families and communities, their criminal records can severely reduce their ability to find housing and steady employment, further destabilizing their children.<sup>19</sup> For example, former inmates may be barred from employment opportunities by criminal record disclosure requirements or from housing by blanket bans or policies.<sup>20</sup>

#### A. *The Impact of Parental Incarceration on Children*

While it is perhaps a very obvious conclusion to draw, it is nonetheless an important statement to make: having a parent who is incarcerated can negatively impact *all* aspects of a child’s wellbeing and development, including their emotional, psychological, and educational development and their physical and financial wellbeing. The collateral consequences that parental incarceration can impose on children are broad, vast, and nearly universally negative. Of course, it is important to acknowledge that not all family separation due to incarceration is negative for children. Where an incarcerated parent was abusive, for example, their absence may improve a child’s situation, at least temporarily. “But more typically, the separation due to imprisonment has a negative impact on the family.”<sup>21</sup>

Although too little attention has been paid to examining the tolls of incarceration and parental separation on children of incarcerated parents, the research to date confirms what is intuitive: having a parent in prison is a hugely destabilizing event in a child’s life. Researchers have concluded that

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17. ANNIE E. CASEY FOUND., *supra* note 2, at 4 (citing MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. ON BUDGET AND POLICY PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION (2014), <https://www.cbpp.org/research/changing-priorities-state-criminal-justice-reforms-and-investments-in-education>).

18. *Id.*

19. *Id.* (noting that a lack of training and work experience combined with low levels of educational attainment and a requirement of disclosing a criminal record bar many formerly incarcerated people from gainful employment, and that even in public housing there sometimes exist blanket bans on people with criminal records).

20. See Ofira Schwartz-Soicher et al., *The Effect of Paternal Incarceration on Material Hardship*, 85 SOC. SERV. REV. 447, 449 (2011) (noting “incarceration both substantially and statistically significantly reduces fathers’ financial contributions to their families, destabilizes family relationships, and hinders men’s postincarceration labor-market performance,” and “families of men with an incarceration history may face difficulties in finding housing because landlords may be reluctant to rent to such families if they find out that the fathers have a criminal record”).

21. TRAVIS ET AL., *supra* note 5, at 6.

having an incarcerated parent can traumatize a child in the same way that abuse and domestic violence do, and with the same lasting negative impact.<sup>22</sup> Unlike those other forms of loss, the impact of parental separation due to parental incarceration has been relatively underexplored.<sup>23</sup> What we do know, however, is startling.

Children with an incarcerated parent are more likely to face a range of health issues, from asthma and obesity<sup>24</sup> to depression and anxiety.<sup>25</sup> The data is especially striking for very young children (“[m]ore than 15 percent of children with parents in federal prison . . . are 4 or younger”)<sup>26</sup> and for children whose mothers are incarcerated. For these children, we know that the disruption of parental attachment<sup>27</sup> caused by parental incarceration can sharply increase rates of depression and anxiety and severely disrupt a child’s educational performance.<sup>28</sup> Older children do not escape unscathed and still face serious negative impacts when a parent is incarcerated. For example, researchers have concluded that when parents are incarcerated during their children’s adolescence, this separation “interrupts key developmental tasks” during the time “when parent-child relations strongly influence issues of identity.”<sup>29</sup>

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22. ANNIE E. CASEY FOUND., *supra* note 2, at 3.

23. TRAVIS ET AL., *supra* note 5, at 2 (“[T]here has been little research exploring these consequences of parental incarceration. The broader phenomenon of parental separation and loss, particularly in the context of divorce or death, has, by contrast, received substantial research attention.”).

24. The argument is not, of course, that children automatically develop asthma or obesity as a result of having an incarcerated parent. There are, no doubt, issues of correlation as opposed to causation with respect to these negative physical impacts of incarceration. Those ailments tend to occur more in children living in poverty, and as has already been discussed, children living in poverty are disproportionately impacted by parental incarceration to begin with, and further, parental incarceration almost always results in a worsening of a family’s financial situation. *See, e.g.*, Cindy Dell Clark, *Breathing Poorly: Childhood Asthma and Poverty*, in *CHILD POVERTY IN AMERICA TODAY* 33, 37 (Barbara A. Arrighi & David J. Maume eds., 2007) (noting that childhood obesity and asthma are both “pronounced problem[s] for African American inner-city poor children”).

25. Austin & Mason, *supra* note 3.

26. ANNIE E. CASEY FOUND., *supra* note 2, at 2 (first citing LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, *PARENTS IN PRISON AND THEIR MINOR CHILDREN* (2008), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf>; then citing CREASIE FINNEY HAIRSTON, ANNIE E. CASEY FOUND., *FOCUS ON CHILDREN WITH INCARCERATED PARENTS: AN OVERVIEW OF THE RESEARCH LITERATURE* (2007), [http://www.aecf.org/m/resourcedoc/aecf-FocusonChildren-with\\_incarceratedParentsOverviewofLiterature-2007.pdf](http://www.aecf.org/m/resourcedoc/aecf-FocusonChildren-with_incarceratedParentsOverviewofLiterature-2007.pdf)).

27. For more on parental attachment in young children and the impact of incarceration on it, see generally Ross D. Parke & K. Alison Clarke-Stewart, *The Effects of Parental Incarceration on Children: Perspectives, Promises, and Policies*, in *PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES* 189, 202–04 (Jeremy Travis & Michelle Waul eds., 2003).

28. ANNIE E. CASEY FOUND., *supra* note 2, at 3. Children of incarcerated mothers are at an especially high risk of dropping out of school. *Id.*

29. TRAVIS ET AL., *supra* note 5, at 4 (citing RICHARD LERNER, *CONCEPTS AND THEORIES OF HUMAN DEVELOPMENT* (3d ed. 2002)).



Sadly, even if a parent is released from prison, these negative impacts are lasting and haunt children of incarcerated parents through their own adult-hoods. Parental imprisonment has consistently been found “to be a strong risk factor for antisocial behavior, future offending . . . drug abuse, school failure, and unemployment.”<sup>30</sup> Because these children are statistically more likely to grow up and be incarcerated themselves, the problem of parental incarceration is a cyclical one that perpetuates “intergenerational patterns of criminal behavior.”<sup>31</sup>

As if these negative effects were not enough on their own, they are compounded by the social stigma that children of incarcerated parents may experience, a stigma that is not attached to other forms of family loss or financial hardship (such as divorce or the death of a parent).<sup>32</sup> At a recent listening session hosted by the Federal Interagency Reentry Council’s Subgroup on Children of Incarcerated Parents, a young woman “recalled the humiliation she felt when being called out of class after her mother was arrested and the shame of having teachers and classmates look at her differently.”<sup>33</sup> Like other negative impacts on children of incarcerated parents, this stigma often persists even after the parent has been released from prison and reunified with the family.<sup>34</sup>

Of course, when a parent is incarcerated, the family also often experiences a financial burden that intensifies the problems listed above. “When fathers are incarcerated, family income can drop by an average of 22 percent.”<sup>35</sup> Even those prisoners who are paid for a prison job earn as little as

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30. 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, 31 (2013) (first citing Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 135 (2008); and then citing Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1284 (2004)).

31. Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL’Y REV. 283, 289 (2009) (quoting TRAVIS ET AL., *supra* note 5, at 2).

32. Schwartz-Soicher et al., *supra* note 20, at 449 (“The community’s interpretation of the incarceration and any resulting family hardship might stigmatize mothers in ways that other family loss does not. Stigmatization may leave these mothers ostracized at the very time when they need both financial and emotional support.” (citations omitted) (first citing Kathryn Edin et al., *Fatherhood and Incarceration as Potential Turning Points in the Criminal Careers of Unskilled Men*, in IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 46 (Mary Pattillo et al. eds., 2004); and then citing Joyce A. Arditti, *Families and Incarceration: An Ecological Approach*, 86 FAM. IN SOC’Y 251 (2005))).

33. HHS and DOJ Host Listening Session with Youth Who Have an Incarcerated Parent, YOUTH.GOV (2016), <http://youth.gov/feature-article/coip-listening-session-2016>.

34. Schwartz-Soicher et al., *supra* note 20, at 449.

35. ANNIE E. CASEY FOUND., *supra* note 2, at 3 (first Citing Rucker C. Johnson, *Ever Increasing Levels of Parental Incarceration and the Consequences for Children*, in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 77 (Steven Raphael & Michael Stoll eds., 2009); and then citing THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S

\$350.00 per year.<sup>36</sup> Indeed, at least one scholar has called for “incarceration insurance” for children of incarcerated parents: “an upfront subsidy to the child whose parent goes to prison, to be repaid to the state by the incarcerated parent on a deferred basis in lieu of child support.”<sup>37</sup>

The lost parental income is not the only financial factor, as families also have to deal with court-related fines and fees. Maintaining contact between the incarcerated parent and the child, although crucial to help mitigate some of the negative impacts of incarceration (as discussed more fully below), is also costly. It can be expensive and time-consuming for children of incarcerated parents to visit, especially given that “84% of parents in federal prisons are incarcerated more than 100 miles from their last residence.”<sup>38</sup> Even phone calls, seemingly simple but also critical,<sup>39</sup> can be a financial burden: collect phone calls from inmates cost three times as much as collect calls placed from a pay phone outside of prison and five times as much as collect calls placed from residential phones.<sup>40</sup> Given the loss of income and rise in costs associated with parental incarceration, it is no wonder that the rise in incarceration over the past several decades has been linked with a rise in child homelessness, which occurs especially among African American children.<sup>41</sup>

Termination of parental rights is also a very real possibility when parents are incarcerated, and it is little wonder that one out of every five children entering our child welfare system has an incarcerated parent.<sup>42</sup> Each state has its own statute authorizing the involuntary termination of parental rights, and “[e]ach state handles termination for imprisoned parents differently, ranging from states that allow termination based on incarceration for a specified period of time to states that conduct a full-scale critique of the parent-child relationship with incarceration as only one consideration.”<sup>43</sup>

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EFFECTS ON ECONOMIC MOBILITY (2010), [http://www.pewtrusts.org/~media/legacy/uploaded-files/pcs\\_assets/2010/collateralcosts1pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploaded-files/pcs_assets/2010/collateralcosts1pdf.pdf)).

36. TRAVIS ET AL., *supra* note 5, at 5.

37. Cai, *supra* note 16, at 91.

38. THE SENTENCING PROJECT, *supra* note 13, at 2 (citing CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN (2000), <https://www.bjs.gov/content/pub/pdf/iptc.pdf>).

39. For more on the importance of phone calls for inmates, see Artika Tyner et al., *Phone Calls Creating Lifelines for Prisoners and Their Families: A Retrospective Case Study on the Campaign for Prison Phone Justice in Minnesota*, 20 TRINITY L. REV. 83, 84–85, 89–91 (2015) (noting that phone calls are associated with positive outcomes for inmates and are especially important where inmates and/or their friends and family have difficulty communicating via writing).

40. Schwartz-Soicher et al., *supra* note 20, at 449.

41. Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 75 (2014).

42. Austin & Mason, *supra* note 3 (noting “[n]early 20% of all children entering the child welfare system have an incarcerated parent”).

43. Steven Fleischer, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 SETON HALL L. REV. 312, 312 (1998) (footnote omitted) (first citing COLO. REV. STAT.

On the federal level, the Adoption and Safe Families Act of 1997 (“ASFA”)<sup>44</sup> is structured to move children from foster care to adoption placements quickly by requiring states begin the process of terminating parental rights any time a child has been in foster care for fifteen out of the past twenty-two months.<sup>45</sup> These timeframes are especially relevant for incarcerated parents, as “the typical sentence for an incarcerated parent is between 80 and 100 months.”<sup>46</sup> One scholar notes that in practical application, the result of ASFA for children of incarcerated parents is that the law “fails to recognize incarcerated parents as deserving of the same protections as non-incarcerated parents,” and that such an outcome is triggered in part because incarcerated parents are more likely to be poor or members of racial minority groups.<sup>47</sup> The child welfare system disproportionately impacts children of color, and there is evidence that “racism continues to permeate” the child welfare system; some scholars have called that system “eerily reminiscent of the slave codes and Reconstruction, when African-American families had little control over their own composition.”<sup>48</sup> Termination of parental rights is, in many states, a permanent action and, therefore, not remediable even when a parent is released from prison.<sup>49</sup>

### B. Visitation as Mitigating Factor

Despite these bleak outcomes and statistics, there is a ray of hope for children of incarcerated parents and the parents themselves, as we know that visitation is a relatively easy way to mitigate many of the negative outcomes associated with parental incarceration.

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ANN. § 19-3-604 (West 1990 & Supp. 1997); and then citing *In Re L.A.S.*, 134 N.J. 127, 631 A.2d 928 (1993).

44. Pub. L. No. 105-89, § 103, 111 Stat. 2118-20 (codified as amended at 42 U.S.C. § 675(5)).

45. Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM 175, 176 (2012).

46. *Id.* (first citing STEVE CHRISTIAN, NAT’L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS (2009), <https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf>; and then citing Kathleen S. Bean, *Reasonable Efforts. What State Courts Think*, 36 U. TOL. L. REV. 321, 348–51 (2005)).

47. *Id.* at 178–79.

48. Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 609–10, 614 (2011) (citing Ralph Ricard Banks, *Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACK LETTER L.J. 41, 42 (2009)).

49. Mitchell, *supra* note 45, at 178.

### 1. *Benefits of Visitation*

Numerous studies have concluded that frequent and high quality visits between incarcerated parents and their children are beneficial for both.<sup>50</sup> Indeed, one of the two major determinants of child adjustment during the period of parental incarceration is the child's opportunities to maintain contact with the incarcerated parent (the other is the nature and quality of the alternative caregiving arrangements).<sup>51</sup> Although some scholars caution against declaring such visits universally beneficial, noting that much of the research on prison visitation has focused on the benefit to the incarcerated parent and less on benefits to their children,<sup>52</sup> even these scholars accept visitation as neutral at worst for children, noting that "[n]o studies have shown that visitation in prison destroys the benefits [typically associated with] parent/child visitation."<sup>53</sup> The majority of those who have studied the issue have concluded that where the visitation is of a high quality, it is associated with positive outcomes for children, and that "maintaining contact with one's incarcerated parent appears to be one of the most effective ways to improve a child's emotional response to the incarceration and reduce the incidence of problematic behavior."<sup>54</sup>

Visits have also been shown to reduce recidivism rates amongst incarcerated parents and improve long-term success upon reentry.<sup>55</sup> One relatively

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50. See generally Chesa Boudin et al., *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149, 151–52 (2013) (providing a summary of visitation policies in federal prisons and in the fifty states).

51. Ross D. Parke & K. Alison Clarke-Stewart, *Effects of Parental Incarceration on Young Children*, U.S. DEP'T OF HEALTH & HUMAN SERVICES (Dec. 1, 2001), <https://aspe.hhs.gov/basic-report/effects-parental-incarceration-young-children>. This paper was presented at the National Policy Conference, "From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities," in Washington, D.C.

52. See, e.g., Benjamin Guthrie Stewart, Comment, *When Should a Court Order Visitation Between a Child and an Incarcerated Parent?*, 9 U. CHI. L. SCH. ROUNDTABLE 165, 171–75 (2002) (noting that despite the lack of research into the impact of children visiting their parents in prison, most experts conclude such visits are beneficial); see also Rebecca J. Shlafer et al., *Introduction and Literature Review: Is Parent-Child Contact During Parental Incarceration Beneficial?*, in CHILDREN'S CONTACT WITH INCARCERATED PARENTS: IMPLICATIONS FOR POLICY AND INTERVENTION 1, 16 (Julie Poehlmann-Tynan ed., 2015) (describing one researcher as concluding: "[T]he effects of parent-child contact could not be globally described as good or bad. Rather . . . such effects depend on variations in the quality of visitation experiences.").

53. Stewart, *supra* note 52, at 175.

54. NANCY G. LA VIGNE ET AL., URBAN INST. JUSTICE POLICY CTR., *BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS* 10 (2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411616-Broken-Bonds-Understanding-and-Addressing-the-Needs-of-Children-with-Incarcerated-Parents.PDF>.

55. *Id.* at 10–11; see also William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. RES. IN CRIME & DELINQ. 287, 304 (2008); TRAVIS ET AL., *supra* note 5, at 6 ("Studies comparing the outcomes of prisoners who maintained family connections during prison through letters and personal visits with those who did not suggest that maintaining family ties reduces recidivism rates.").

recent and large-scale study reviewed the impact of visitation on rates of recidivism among 16,420 offenders released from Minnesota prisons between 2003 and 2007.<sup>56</sup> The researchers found that *any* visit at all reduced the risk of recidivism by thirteen percent for felony reconvictions and by twenty-five percent for technical violation revocations.<sup>57</sup> Further, more frequent visits and visits that were timed near the date of the inmate's release were associated with even greater reductions in recidivism.<sup>58</sup> That study also noted that recent research in Florida and Canada has produced similar results, finding that visitation is associated with reduced recidivism.<sup>59</sup> Because recidivism is costly to society in multiple ways (in Minnesota, for example, release violators cost the state an average of \$9,000 for every return to prison),<sup>60</sup> this research suggests that visitation would be a good area of investment for prisons, a point that is relevant to this Article's recommendations aimed at improving prison visitation policies.

## 2. Barriers to Visitation

Despite these wide-ranging and fairly well-established benefits, fewer than half of all incarcerated parents are *ever* visited by their minor children, and even amongst those who do receive visits, many describe them as "infrequent."<sup>61</sup> While every family and situation is different, the three main barriers to visitation identified by researchers are: (1) financial costs, a hurdle exacerbated, as discussed above, by the fact that these children are more likely to live in poverty; (2) fear of psychological harm/stigma to children during visitation; and (3) visitation policies that generally do not consider children's unique needs and are sometimes actively hostile to them.

The cost of visitation, from bus fares or gas costs to meals and missed work for adults, can certainly chill visits from children to their incarcerated parents. As noted above, children of incarcerated parents often come from

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56. Grant Duwe & Valerie Clark, *Blessed Be the Social Tie That Binds: The Effects of Prison Visitation on Offender Recidivism*, 24 CRIM. JUST. POL'Y REV. 271, 271 (2013).

57. *Id.* at 289.

58. *Id.* Interestingly, the researchers found "not all types of visitation ha[d] a beneficial effect on recidivism"; visits from ex-spouses, for example, were associated with an increase in recidivism. *Id.* at 290. The researchers theorized that those visits may have had more of an impact on recidivism than other visits in part because, for married inmates, "visits with either spouses or children may be difficult because they create more stress and are often reminders of how their incarceration is preventing them from raising their children or helping provide for their families." *Id.* Visits from fathers, siblings, clergy, and in-laws were the most important for reducing recidivism. *Id.*

59. *Id.* at 276–77.

60. *Id.* at 291.

61. Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472, 476 (2006) (citing Cynthia Seymour, *Children with Parents in Prison: Child Welfare Policy, Program, and Practice Issues*, 77 CHILD WELFARE 460 (1998)); THE SENTENCING PROJECT, *supra* note 13, at 2.

low-income communities, and a vast majority of parents in federal prisons are incarcerated more than 100 miles from their last residence.<sup>62</sup> Thus, such a visit can take a day or longer. The ability to bear these costs is of course exacerbated by the financial strain that parental imprisonment places on families. Even technological advances such as video visitation may not fully address the financial barriers to visitation, given that this technology is often prohibitively expensive. Some jurisdictions charge \$20.00 for a twenty minute “visit,” for example.<sup>63</sup> As one scholar notes, “the fees for online video visitation run the risk of becoming exploitative” because the unregulated fees are not tied to the costs of the service but rather are a way for prisons to make money off of the desire of families to stay in touch with their incarcerated loved ones.<sup>64</sup>

Further, incarcerated parents may be reluctant to have their children see them in prison, and/or the children’s caregivers may worry about the psychological harm of such a visit.<sup>65</sup> This fear has even been enshrined in Supreme Court precedent: “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.”<sup>66</sup> Yet, the Federal Interagency Reentry Council recently touted its efforts to improve access to video communication for incarcerated parents because “this technology may give a way for children to interact with their incarcerated parents without experiencing the stigma and difficulties of visiting a parent in a correctional facility.”<sup>67</sup> As for parents, one group of researchers noted that visits with their children may be a stark reminder that the incarcerated parent is not able to be fully present for their child in a traditional way, or to provide for that child.<sup>68</sup> Accordingly, an incarcerated parent may choose to self-restrict visitation with his or her child in an attempt to shield both of them from pain.

Finally, as will be discussed more fully below, prison visitation policies also complicate the ability of incarcerated parents to maintain relationships with their children. Inconvenient visitation hours, lack of parking, visitation rooms that are not private or child friendly, and rules about who is eligible to

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62. THE SENTENCING PROJECT, *supra* note 13, at 2.

63. Patrice A. Fulcher, *The Double Edged Sword of Prison Video Visitation: Claiming to Keep Families Together While Furthering the Aims of the Prison Industrial Complex*, 9 FLA. A&M U. L. REV. 83, 97 (2013). Professor Fulcher also notes that there is reason to be skeptical of video visitation in general, arguing that “caution should be exercised where cost saving measures may lead to human exploitation.” *Id.* at 87–88.

64. *Id.* at 108.

65. Miller, *supra* note 61, at 476.

66. *Overton v. Bazzetta*, 539 U.S. 126, 129 (2003).

67. THE FED. INTERAGENCY REENTRY COUNCIL, A RECORD OF PROGRESS AND A ROADMAP FOR THE FUTURE 60 (2016), <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf>.

68. Duwe & Clark, *supra* note 56, at 290.

visit and when visitation can occur, can all deter family members, especially children, from visiting.<sup>69</sup> Ultimately, while visitation is one of the most important protective measures for a child of incarcerated parents, it is highly underutilized.

## II. *UNITED STATES V. BOOKER*: AN INADEQUATE REVOLUTION

Several scholars have argued that one way to combat the very real problems wrought by parental incarceration is through reform of sentencing practices and policies.<sup>70</sup> Many have seized upon the Supreme Court's 2005 *United States v. Booker* decision and the resulting revolution in sentencing to argue that such sentencing reform is timely.<sup>71</sup> Sentencing reform, and the associated goal of rethinking the criminal justice system that arrests, prosecutes, and incarcerates so many people to begin with is certainly essential. However, as this Part demonstrates, sentencing reform is an unlikely vehicle for improving the experiences of children of incarcerated parents, both because *Booker* has had a relatively small impact on district court judges' sentencing practices with respect to their consideration of defendants' family ties and also because of mixed messages from appellate courts. This Part will address the advent of the federal sentencing guidelines, the policy decision to codify within them a disregard for parental status, and what *Booker* and subsequent cases have meant in practical terms for the consideration at sentencing of defendants' family responsibilities.

### A. *The Advent of the Sentencing Guidelines*

In the mid-1980s, sentencing within the federal court system was wildly inconsistent, and similarly situated defendants charged with comparable crimes could and did receive vastly different sentences.<sup>72</sup> The disparities

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69. Parke & Clarke-Stewart, *supra* note 51.

70. See, e.g., Emily W. Andersen, "Not Ordinarily Relevant": *Bringing Family Responsibilities to the Federal Sentencing Table*, 56 B.C. L. REV. 1501, 1501 (2015) (arguing "the Guidelines should be amended to indicate that courts can consider family ties and responsibilities when determining a sentence," and that "Rule 32 of the Federal Rules of Criminal Procedure should be amended to require that a family impact assessment be incorporated into each presentence investigation report to provide courts with information about a defendant's family ties and responsibilities").

71. See, e.g., Sarah Abramowicz, *A Family Law Perspective on Parental Incarceration*, 50 FAM. CT. REV. 228, 228 (2012) (arguing "[s]entencing law is in flux, making this an opportune time to reconsider whether and to what extent we should take children's interests into account when sentencing their parents").

72. See *Mistretta v. United States*, 488 U.S. 361, 364-65 (1989).

Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. This broad discretion was further enhanced by the power later granted the judge to suspend the sentence and by the resulting growth of an elaborate probation system. Also, with the advent

were further aggravated by the fact that parole boards could unilaterally release a prisoner early for good behavior.<sup>73</sup> Spurred on by public outcry over this inconsistent sentencing, Congress passed the Sentencing Reform Act of 1984 provisions of the Comprehensive Crime Control Act of 1984,<sup>74</sup> which provided for the creation of a United States Sentencing Commission (“the Sentencing Commission”) and the promulgation of guidelines for federal judges (“the Guidelines”) to follow when sentencing defendants.<sup>75</sup>

The first set of Sentencing Guidelines, which became effective on November 1, 1987, essentially abolished parole and established a series of sentencing ranges that took into account (1) the seriousness of the criminal conduct (referred to as “offense behavior”) and (2) the defendant’s criminal record (part of the category of “offender characteristics”).<sup>76</sup> The Guidelines were mandatory and federal judges could only “depart” from them (sentencing a defendant to a longer or shorter sentence than that contemplated by the Guidelines range) if he or she determined that “an aggravating or mitigating circumstance exist[ed] that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”<sup>77</sup>

Crucially, Section 5H1.6 of the Guidelines provided that “[f]amily ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the guidelines.”<sup>78</sup> In adopting Section 5H1.6, the

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of parole, Congress moved toward a ‘three-way sharing’ of sentencing responsibility by granting corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge. Thus, under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch’s parole official eventually determined the actual duration of imprisonment.

*Id.*; see also U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENTENCING COMM’N 2016) (“Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”).

73. See *Mistretta*, 488 U.S. at 364–65 (describing Executive Branch power to release prisoners early).

74. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 (2012)).

75. 18 U.S.C. § 3553 (2012).

76. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM’N 1987).

The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of ‘bank robbery/committed with a gun/\$2500 taken.’ An offender characteristic category might be ‘offender with one prior conviction who was not sentenced to imprisonment.’

*Id.*

77. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1990 (codified as amended at 18 U.S.C. § 3553(b)(1) (2012)); see also *Mistretta*, 488 U.S. at 367–68 (discussing the Sentencing Reform Act of 1984).

78. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM’N 1987).



Sentencing Commission was responding to a congressional mandate specifying that it is generally inappropriate for judges to consider family ties and responsibilities in fashioning an appropriate sentence.<sup>79</sup> According to the legislative history, this Section was adopted in an attempt to address concern that those with strong community and family ties would otherwise be given sentences that were too lenient.<sup>80</sup> As a former member of the Sentencing Commission wrote, in an attempt to reduce the sentencing disparities between “white, middle class defendants with strong ties to visibly intact families” and “unemployed, unmarried minority defendants,” Congress decided the *fair* solution was to largely ignore family responsibilities in calculating the Guidelines’ ranges.<sup>81</sup>

Accordingly, once the Guidelines were in place, federal district court judges were instructed to depart downward on the basis of a “discouraged factor . . . only if the factor [was] present to an exceptional degree or in some other way ma[de] the case different from the ordinary case.”<sup>82</sup> Appellate courts generally held that family ties were only “exceptional” when the defendant was an “*irreplaceable*” caretaker of children or other elderly or ill family members.<sup>83</sup>

#### B. *United States v. Booker and Its Impact (or Lack Thereof)*

The Guidelines, and their de-emphasis of parental responsibilities in fashioning sentences of incarceration, were binding on federal judges from their introduction in 1987 until 2005, when the Supreme Court in a landmark decision declared that the Sixth Amendment requires that the Guidelines be merely advisory.<sup>84</sup> In *United States v. Booker*, the Court held that because the Guidelines were mandatory and binding, and because departures were not available “[i]n most cases, as a matter of law,” juries were precluded from

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79. 28 U.S.C. § 994(e) (2012).

80. Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 201 (1994).

81. *Id.*

82. *Koon v. United States*, 518 U.S. 81, 96 (1996).

83. *United States v. Leon*, 341 F.3d 928, 929, 931 (9th Cir. 2003) (affirming the downward departure for a husband whose wife was ill with cancer and potentially suicidal, where the husband was the sole source of financial support for the wife and all other family members were deceased or otherwise unavailable); *see also* *United States v. Pereira*, 272 F.3d 76, 81–83 (1st Cir. 2001) (reversing the downward departure for a son who provided approximately twenty hours of care per week to his elderly parents, noting the presence of alternative sources of care such as other siblings and nursing homes); *United States v. Faria*, 161 F.3d 761, 762–63 (2d Cir. 1998) (vacating the downward departure for a father whose three minor children lived with his ex-wife and had alternative sources of financial support).

84. *United States v. Booker*, 543 U.S. 220, 245 (2005).

fulfilling their constitutional duty of determining the facts that led to sentencing, denying defendants their Sixth Amendment right to a trial by jury.<sup>85</sup> The Court did not get rid of the Guidelines entirely, but merely made them advisory rather than binding on judges.<sup>86</sup> The Court also invalidated Section 3742(e) of the Guidelines, which had required appellate courts to apply a *de novo* standard of review to district court departures from the Guidelines, and made clear that appellate courts should review them only for “reasonableness.”<sup>87</sup>

Following *Booker*, the Supreme Court issued a series of decisions that seemed to swing back and forth between reinforcing judicial discretion and reinforcing adherence to the Guidelines. If *Booker* opened the door to district court judges exercising more discretion in sentencing decisions, the Court’s next decision disincentivized them from doing so. In *Rita v. United States*,<sup>88</sup> the Supreme Court gave permission to appellate courts to presume that a sentence within the Guidelines range was a reasonable sentence.<sup>89</sup> As Justice Souter noted in his dissent, the presumption creates a powerful temptation for trial judges (who are understandably not eager to be overturned) to sentence defendants within the Guidelines range.<sup>90</sup>

The Court did not stay on the side of Guidelines adherence for long, though; later that same year, the Court bolstered the ability of district court judges to exercise discretion. In *Gall v. United States*,<sup>91</sup> the Court clarified that the rather deferential “abuse-of-discretion” standard was the proper one for appellate review of the “reasonableness” of district court sentencing decisions.<sup>92</sup> In so doing, the Court rejected a rule adopted by several courts of appeals that required district courts to give “‘proportional’ justifications for departures from the Guidelines range.”<sup>93</sup> Once again, district courts were given the message that the Guidelines were truly advisory.

The Court seemingly reinforced judicial discretion with its *Kimbrough v. United States*<sup>94</sup> decision, holding that a sentencing court could outright reject the Guidelines’ policies in fashioning a sentence.<sup>95</sup> In that case, the district court had departed downward, in part out of disagreement with the then-

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85. *Id.* at 233–37.

86. *Id.* at 258–60.

87. *Id.* at 260–63.

88. 551 U.S. 338 (2007).

89. *Id.* at 341.

90. *Id.* at 391–92 (Souter, J., dissenting).

91. 552 U.S. 38 (2007).

92. *Id.* at 41.

93. *Id.* at 46.

94. 552 U.S. 85 (2007).

95. *Id.* at 91.

existing Sentencing Guidelines' 100-to-1 ratio for crack cocaine versus powder cocaine sentences.<sup>96</sup> The sentencing disparity was deeply unpopular; even as the Court was hearing *Kimbrough*, the Sentencing Commission itself had already reversed course on the sentencing disparity between crack and powder cocaine, and Congress ultimately addressed the disparity through legislative means.<sup>97</sup> Because *Kimbrough* limits the times when a judge can reject the Guidelines' policies and suggests closer appellate review may be appropriate when courts do so, at least one commentator has suggested that *Kimbrough*, "[d]espite [its] pro-discretion holding[], . . . contain[s] language that encourages fealty to the Guidelines."<sup>98</sup>

The Court did ultimately extend to district court judges the ability to depart from the Guidelines for policy disagreements outside of crack cocaine guidelines. In *Pepper v. United States*,<sup>99</sup> the Court affirmed a district court's downward departure based on post-sentencing rehabilitation, despite the existence of a federal statute<sup>100</sup> and a Commission policy statement<sup>101</sup> disfavoring consideration of such evidence at sentencing.<sup>102</sup> However, like *Kimbrough*, the *Pepper* decision is mixed on the question of judicial discretion and Guidelines allegiance: the Court was careful to limit its holding to those cases where judicial deviation from the Guidelines on the basis of policy disagreements is "appropriate," without fully defining that term.<sup>103</sup>

Whatever the intended impact of *Booker* and subsequent cases on the balance between sentencing judges' discretion and Guidelines fealty, many federal judges in the years since have hewed rather tightly to the Guidelines,

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96. *Id.* at 91–93 (explaining that under Guidelines Section 2D1.1, "a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine").

97. Carissa Byrne Hessick, *A Critical View of the Sentencing Commission's Recent Recommendations to "Strengthen the Guidelines System"*, 51 HOUS. L. REV. 1335, 1340 (2014).

98. *Id.* at 1339–40.

99. 562 U.S. 476 (2011).

100. 18 U.S.C. § 3742(g)(2) (2012) precluded a district court from "impos[ing] a sentence outside the applicable guidelines range except upon a ground that was specifically and affirmatively" relied upon in the prior sentencing and upheld as a valid ground on appeal, and therefore prohibited a district court from departing on the basis of anything post-sentence. Section 3742(g)(2) was held unconstitutional by the *Pepper* decision. 562 U.S. at 496.

101. Section 5K2.19 provided that "[p]ost-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense." U.S. SENTENCING GUIDELINES MANUAL § 5K2.19 (U.S. SENTENCING COMM'N 2011) (withdrawn 2012).

102. *Pepper*, 562 U.S. at 481.

103. *Id.* at 501 ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views. That is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted." (citation omitted) (citing *Kimbrough v. United States*, 552 U.S. 85, 109–10 (2007))).

with compliance<sup>104</sup> stabilizing at above eighty percent.<sup>105</sup> Various theories for this phenomenon have been suggested, including fear of non-Guidelines sentences being overturned<sup>106</sup> (as predicted by Justice Souter in his dissent in *Rita*),<sup>107</sup> sentencing judges' comfort and familiarity with the Guidelines,<sup>108</sup> and judicial desire to avoid disparate sentences<sup>109</sup> (which, sadly, appears to be well founded, as the Sentencing Commission itself has reported a widening gap in racial disparities between white and black defendants post-*Booker*).<sup>110</sup> Despite repeated rulings from the Supreme Court encouraging judicial discretion in sentencing,<sup>111</sup> as one scholar has noted, “[t]he gravitational pull of the Guidelines appears to be so strong that the change from mandatory to advisory Guidelines has had little to no impact on the average

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104. Compliance is defined as defendants who are sentenced within the applicable advisory Guidelines range or pursuant to a request from the government for a sentence below the otherwise applicable advisory Guidelines range.

105. *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 1 (2011) (statement of Judge Patti B. Saris, Chair, U.S. Sentencing Comm’n), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20111012\\_Saris\\_Testimony.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20111012_Saris_Testimony.pdf). *But see* Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 4–5, 33 (2010) (concluding that five years of data from the District of Massachusetts suggest that judges there did respond to increased discretion in sentencing post-*Booker*, though acknowledging that the results are “necessarily tentative” and limited to one single district court).

106. Nancy Gertner, *Judicial Discretion in Federal Sentencing—Real or Imagined?*, 28 FED. SENT’G REP. 165, 165 (2016) (“[I]n jurisdictions with crowded dockets, or where that is the perception, in jurisdictions that suffered from rigorous Guideline enforcement before *Booker*, the Guidelines are the easy default. . . . [Judges who follow the Guidelines] will appear efficient and . . . will surely avoid criticism.”).

107. *Rita v. United States*, 551 U.S. 338, 391–92 (2007) (Souter, J., dissenting).

108. Mark Osler & Judge Mark W. Bennett, *A “Holocaust in Slow Motion?” America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117, 155 (2014).

109. Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1269 (2014).

[The Guidelines] give[] guidance in the one area in which judges are most likely to feel in need of it. How, after all, does one go about quantifying punishment for crime? Judges faced with the task are acutely aware of the inevitable subjectivity of the exercise and are customarily grateful for standards provided by officially anointed experts, even if they may not always agree with the experts in particular cases.

*Id.* (citing *Federal Sentencing After Booker: Hearing Before the U.S. Senate Comm’n* (2012) (statement of Judge Paul J. Barbadoro, Judicial Conferer of the U.S. Comm. on Criminal Law), <https://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing>

110. U.S. SENTENCING COMM’N, [PART E: DEMOGRAPHIC DIFFERENCES IN SENTENCING] REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING I (2012), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part\\_E.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_E.pdf).

111. Admittedly, federal district court judges could be forgiven for seeing seemingly pro-discretion decisions such as *Gall* as somewhat murky. *See, e.g.*, Hessick, *supra* note 97, at 1337–40.

length of federal sentences.”<sup>112</sup> For many federal defendants and for others involved in the federal criminal system, *Booker* has had a very small impact indeed.<sup>113</sup>

### C. Post-Booker Section 5H1.6 Decisions

Given the mixed signals sent by the Supreme Court regarding Guidelines allegiance versus judicial discretion, it is perhaps no surprise that courts post-*Booker* have not responded uniformly to their enhanced leeway to consider family ties in sentencing decisions. Rather, “[i]nterpretive disparity regarding when and how to apply family ties departures persists.”<sup>114</sup> Some courts have looked to United States Code Section 3553(a)(1),<sup>115</sup> which instructs sentencing judges to consider “the history and characteristics of the defendant” in determining the appropriate sentence, and have concluded that this language permits consideration of a defendant’s family ties and responsibilities, Section 5H1.6 notwithstanding. For example, the Ninth Circuit has held that “[i]n the ‘broader appraisal,’ available to district courts after *Booker*, courts can justify consideration of family responsibilities, an aspect of the defendant’s ‘history and characteristics,’ for reasons extending beyond the Guidelines.”<sup>116</sup> Indeed, Justice Stevens appeared to bless this approach in his concurrence in the *Rita* decision, noting that while matters such as family ties are not ordinarily considered under the Guidelines, it is nonetheless a “matter[] that § 3553(a) authorizes the sentencing judge to consider.”<sup>117</sup> The First Circuit has noted that *Booker* and *Kimbrough* opened the door for a judge to “vary from the [Guidelines], disagreeing with details or even major premises” when determining whether family responsibilities are the proper

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112. Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 521 (2014).

113. Bowman, *supra* note 109, at 1229–30 (“[F]rom the points of view of federal defendants in the mass and of the system that processes them from arrest to prison gate, perhaps the most surprising fact about *Booker* is just how small an effect it has actually had.”)

114. Andersen, *supra* note 70, at 1524.

115. 18 U.S.C. § 3553(a)(1) (2012).

116. *United States v. Menyweather*, 447 F.3d 625, 628, 634 (9th Cir. 2006), *overruled on other grounds by* *Kimrough v. United States*, 552 U.S. 85 (2007) (footnote omitted) (citation omitted) (first citing *United States v. Gorsuch*, 404 F.3d 543, 548 (1st Cir. 2005); and then citing 18 U.S.C. § 3553(a)(1) (2012)) (affirming downward departure for defendant mother who was a single parent, whose fiancé had been murdered while she was pregnant with their child, and was the sole source of financial support for a minor child).

117. *Rita v. United States*, 551 U.S. 338, 364–65 (2007) (Stevens, J., concurring); *see also* *United States v. Serrata*, 425 F.3d 886, 918–19 (10th Cir. 2005) (characterizing family ties as relevant under the post-*Booker* § 3553(a)(1) analysis); *United States v. Ranum*, 353 F. Supp. 2d 984, 986 (E.D. Wis. 2005) (same).

basis for a downward departure.<sup>118</sup> The Second Circuit has held that Section 5H1.6 is “no more binding on sentencing judges than the calculated Guidelines ranges themselves.”<sup>119</sup>

Other courts, however, have continued to place substantial weight in Section 5H1.6. In *United States v. Christman*,<sup>120</sup> the Sixth Circuit overturned a below-Guidelines sentence for a defendant that had been based, in part, on his family ties, specifically caring for his elderly mother.<sup>121</sup> The court noted that under Section 5H1.6, a defendant’s family ties were not ordinarily relevant and should only be considered by district courts “in exceptional cases.”<sup>122</sup> The court, acknowledging the existence of *Booker* but nonetheless citing to pre-*Booker* commentary on Section 5H1.6, concluded that the defendant’s care of his mother was simply not irreplaceable.<sup>123</sup> The court reasoned that alternative arrangements could generally be made for the care of children, including foster care, and thus parenthood itself was not a reason to depart downward. “To say otherwise would be to invite gross sentencing disparities based solely on whether one has a young child . . . .”<sup>124</sup>

Other courts have similarly clung to the notion that only “irreplaceable” caregivers should be granted downward departures, even in a post-*Booker* world. In *United States v. Lackard*,<sup>125</sup> the Fourth Circuit affirmed a district court’s refusal to grant a defendant downward departure to allow him to care for his son with disabilities because he was not “irreplaceable” as a caregiver.<sup>126</sup> Although the Fourth Circuit acknowledged that this “irreplaceable caregiver” standard was the one in use *prior* to the *Booker* decision, it nonetheless reasoned that “the Guidelines are still to be considered in determining an appropriate sentence,” and ultimately affirmed the district court decision.<sup>127</sup>

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118. *United States v. Prosperi*, 686 F.3d 32, 48–49 (1st Cir. 2012) (affirming the downward departure for a defendant who cared for his wife, who was battling cancer, and a defendant who provided care for daughter with disabilities).

119. *United States v. Thavaraja*, 740 F.3d 253, 255, 262–63 (2d Cir. 2014) (quoting *United States v. Jones*, 460 F.3d 191, 194 (2d Cir. 2006)) (affirming the below-Guidelines sentence for a defendant based in part on the impact his deportation would have on his family).

120. 607 F.3d 1110 (6th Cir. 2010).

121. *Id.* at 1112.

122. *Id.* at 1119 (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (U.S. SENTENCING COMM’N 1995)).

123. *Id.* at 1120.

124. *Id.*

125. 549 F. App’x 193 (4th Cir. 2013).

126. *Id.* at 195–96 (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (U.S. SENTENCING COMM’N 2012)).

127. *Id.* at 196 (holding that the defendant had “failed to rebut the presumption of reasonableness afforded his within-Guidelines sentence”).

Courts trying to sort out the contours of *Booker* and its progeny have not even been able to reach a consensus in their treatment of pregnant defendants at sentencing.<sup>128</sup> In 2012, a district court in Kentucky affirmed a magistrate judge's decision to depart downward and sentence a defendant to two years of probation, in part because the defendant was two months pregnant.<sup>129</sup> Although the district court judge noted that "[t]he explicit references to [the defendant's] pregnancy" by the magistrate judge at sentencing gave him pause, and that he "would have opted for a different, stiffer penalty,"<sup>130</sup> he nonetheless affirmed the probation sentence, noting that a court imposing punishment could properly consider a defendant's family ties and responsibilities.<sup>131</sup> By contrast, the very next year, a district court in Pennsylvania denied a motion to vacate a sentence that did not grant a departure for the defendant's pregnancy.<sup>132</sup> In its opinion, the court noted federal courts' reluctance to grant downward departures where female defendants became pregnant subsequent to their arrests or convictions, in part because to do so is to "send[] an obvious message to all female defendants that pregnancy is 'a way out.'"<sup>133</sup> The Court cited to Section 5H1.6, noting that "[p]regnancy of a female defendant is neither unusual nor extraordinary and is something that the Bureau of Prisons 'has had experience in handling.'"<sup>134</sup>

Ultimately, although family ties are now the third most common reason for a departure from the Guidelines, family-based departures are still granted in fewer than ten percent of all cases,<sup>135</sup> and courts approach this unevenly with most judges continuing to faithfully follow the Guidelines.<sup>136</sup> Thus, Section 5H1.6 and its disregard for family ties remain important considerations for many federal judges when fashioning an appropriate sentence. Further, the Sentencing Commission has provided *no* additional guidance to judges, nor have they revised Section 5H1.6 since the *Booker* decision.<sup>137</sup>

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128. See Andersen, *supra* note 70, at 1524–26.

129. United States v. Chamness, No. 5:11-CR-00054-R, 2012 WL 3109494, at \*6–7 (W.D. Ky. July 31, 2012).

130. *Id.* at \*7.

131. *Id.* at \*6.

132. United States v. McMahill, No. 06-216, 2013 WL 2186981, at \*1 (W.D. Pa. May 21, 2013).

133. *Id.* at \*3 (quoting United States v. Pozzy, 902 F.2d 133, 139 (1st Cir. 1990)).

134. *Id.* at \*4 (quoting *Pozzy*, 902 F.2d at 138–39).

135. U.S. SENTENCING COMM'N, TABLE 25: REASONS GIVEN BY SENTENCING COURTS FOR DOWNWARD DEPARTURE FROM THE GUIDELINE RANGE—FISCAL YEAR 2015 (2015), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-source-books/2015/Table25.pdf> (noting that family ties and responsibilities account for approximately nine percent of all departures).

136. See *supra* text accompanying notes 112–113.

137. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. historical note (U.S. SENTENCING COMM'N 2016) (indicating that § 5H1.6 was last revised in 2004).

Accordingly, the author of this Article joins others<sup>138</sup> in calling for (1) a formal amendment of the Sentencing Guidelines to make clear to sentencing judges that they can and should consider family ties and responsibilities when determining a sentence, and (2) a corresponding change to Federal Rule of Criminal Procedure 32 to make clear that the presentence investigation report provided to the sentencing judge should address a defendant's family responsibilities, if any. Both recommendations are explained more fully in Part III.

In the absence of such amendments, despite the holdings of *Booker* and its progeny, "federal sentencing procedures continue to ignore the interplay between a defendant's family responsibilities and the impact of sentencing on a defendant's family."<sup>139</sup> Therefore, the likelihood that problems of parental incarceration can be addressed through individual sentencing decisions is unlikely, and the promise of *Booker* is left unrealized in this area. In any event, a federal sentencing judge can only control the length of a sentence, but not other aspects of incarceration such as location and certain conditions of visitation—both of which can exacerbate problems of parental incarceration.<sup>140</sup> As the next Section will detail, if meaningful change regarding a child's ability to visit his or her imprisoned parent is to happen, it is much more likely to come through policies guiding prisons than through sentencing decisions of judges.

#### D. *The Bureau of Prison's Role in Incarceration Placement*

While much scholarship has been devoted to the *Booker* decision and its progeny, the length of parental incarceration is just one factor that impacts children of incarcerated parents. Children are also potentially harmed when parents are incarcerated too far away for visitation.<sup>141</sup> Once a federal judge has determined the length of a defendant's sentence of incarceration, his or her involvement in the fashioning of the sentence is largely completed and the Bureau of Prisons ("BOP") takes over.

Pursuant to title 18, Section 3621 of the United States Code, it is the BOP that designates where an inmate serves their sentence.<sup>142</sup> The BOP's

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138. Andersen, *supra* note 70, at 1530–32 ("Like the 2010 revisions to the Guidelines that allowed courts to consider characteristics such as age and mental health, revisions to section 5H1.6 can simply indicate that family ties 'may be relevant in determining whether a departure is warranted.'" (quoting U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, 5H1.3 (U.S. SENTENCING COMM'N 2014))).

139. *Id.* at 1503.

140. *See infra* text accompanying notes 142–143.

141. *See supra* Part B.1 (explaining the benefits of visitation).

142. 18 U.S.C. § 3621(b) (2012) provides:

The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the



statutory authority provides it with near absolute discretion to place inmates in correctional facilities, even if well outside the judicial district where they were sentenced (and therefore potentially far away from any dependent children), provided that the facility meets “minimum standards of health and habitability established by the Bureau.”<sup>143</sup> Although Section 3621 directs the BOP to consider “any statement by the court that imposed the sentence . . . recommending a type of penal or correctional facility as appropriate,”<sup>144</sup> the BOP is not *required* to follow a judge’s recommendation regarding placement, even if that judge makes the recommendation to facilitate the maintenance of an inmate’s ties to their children.<sup>145</sup> As one court put it when denying an inmate’s request to be transferred to a newly-opened correctional facility closer to his family, Congress has “expressly given” the BOP, rather than district court judges, the power to assign where an inmate is imprisoned.<sup>146</sup> While the BOP is to consider a judge’s recommendation, “the BOP is free to reject the recommendation of the sentencing judge.”<sup>147</sup>

The BOP operates 122 prisons throughout the United States, and contracts with private corporations to operate 11 additional correctional facilities.<sup>148</sup> Because the prison network is so massive, and because many of the prisons are clustered in certain geographic regions and absent in others,<sup>149</sup> the result is that many incarcerated parents are imprisoned hundreds of miles from their children. According to a 2009 study, eighty-four percent of parents in federal facilities were incarcerated more than 100 miles from their place of residence at arrest; only about five percent of parents in the federal system were within fifty miles of their place of residence at arrest.<sup>150</sup> This

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Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable . . . .

*Id.*

143. *Id.*

144. § 3621(b)(4)(B).

145. *See, e.g.*, *United States v. Jessop*, No. 1:04–CR–159 (GLS), 2006 WL 1877143, at \*1 (N.D.N.Y. July 6, 2006) (noting that under Section 3621(b)(4) “BOP has the exclusive right to designate the place of confinement, but it has the discretion to consider judicial recommendations concerning such matters as proximity to family or program participation,” and “the court has no jurisdiction to supersede the BOP’s authority”).

146. *United States v. Leland*, No. 1:03–cr–00033–JAW–01, 2012 WL 1207160, at \*1 (D. Me. Apr. 11, 2012) (quoting § 3621(b)).

147. *Id.* (citing *United States v. Boutot*, 480 F. Supp. 2d 413, 419–20 (D. Me. 2007)).

148. *Our Locations*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/> (last visited Jan. 12, 2018).

149. For example, there is no federal prison located in the large geographic swath made up of the contiguous states of Idaho, Montana, Wyoming and North Dakota. *See Our Locations*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/map.jsp> (last visited Jan. 12, 2018).

150. SARAH SCHIRMER ET AL., *THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007*, at 8 (2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Incarcerated-Parents-and-Their-Children-Trends-1991-2007.pdf>.

problem is especially exacerbated for incarcerated mothers, as “[w]omen convicted of federal crimes are particularly likely to be incarcerated far away from their children, because of the relatively small number of federal prisons for women.”<sup>151</sup> Even if a district court judge were sympathetic to a mother’s desire to serve her term near her children, it is the BOP who decides where inmates are placed, and there are very few federal options for incarcerated women.

### III. SHOUTING IN THE WIND: RECOMMENDATIONS UNLIKELY TO COME TO FRUITION

#### A. *Previous Scholarship Addressing Children of Incarcerated Parents*

Scholars have already offered several helpful frameworks for improving the way that the criminal justice system treats the children of incarcerated parents, and this Article appreciates and has benefited from these excellent starting places. However, in light of changed political circumstances as well as the lessons of time, this Article also candidly acknowledges why these previous recommendations are unlikely to be successful.

For example, Chesa Boudin has argued that children of incarcerated parents have a constitutional right, grounded in their “First Amendment freedom of association and their due process liberty interests,” to maintain a relationship with their incarcerated parent.<sup>152</sup> Mr. Boudin, himself the son of incarcerated parents,<sup>153</sup> who, as an infant, was the subject of a seminal case about his mother’s right to visitation with him,<sup>154</sup> inverts traditional paradigms to make this argument. The First Amendment argument he makes reframes the discussion to focus on the *child’s* right to freedom of association with their parent, rather than focusing on the incarcerated parent’s rights.<sup>155</sup> This inversion of the traditional framework allows advocates (in theory) to sidestep the daunting Supreme Court precedents that provide essentially no right to visitation for inmates—precedents which culminate in a ruling that “freedom of association is among the rights least compatible with incarceration.”<sup>156</sup> Mr. Boudin’s due-process-liberty-interest argument posits that the Supreme

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151. Abramowicz, *supra* note 71, at 231 (citing Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 745–46 (2006)).

152. Chesa Boudin, *Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 79 (2011).

153. Jodi Wilgoren, *From a Radical Background, A Rhodes Scholar Emerges*, N.Y. TIMES (Dec. 9, 2002), <http://www.nytimes.com/2002/12/09/us/from-a-radical-background-a-rhodes-scholar-emerges.html>.

154. *Boudin v. Thomas*, 533 F. Supp. 786, 793 (S.D.N.Y. 1982), *appeal dismissed*, 697 F.2d 288 (2d Cir. 1982).

155. Boudin, *supra* note 152, at 105–07.

156. *Id.* at 105 (quoting *Overton v. Bazetta*, 539 U.S. 126, 131 (2003)).

Court has recognized a constitutional due process liberty interest in family integrity.<sup>157</sup> “That right, at least as it pertains to children, should not stop at the prison gate.”<sup>158</sup> His arguments are intriguing, but ultimately unlikely to be persuasive; he himself acknowledges that “[s]ome of the constitutional arguments put forward here have been rejected or ignored by the Supreme Court.”<sup>159</sup>

Several scholars have argued that courts and policy makers should adopt a family law perspective when sentencing parents or when determining prison visitation policies. Sarah Abramowicz, for example, has argued that family law, with its focus on the best interests of children, offers both a rationale for considering children’s interests at sentencing and also a method for incorporating those interests.<sup>160</sup> Professor Abramowicz frames her argument around seizing upon the momentum of *Booker* and, given that sentencing law is in a time of flux, asserts that now is the time to “bring children’s experience out from the shadows of family law.”<sup>161</sup> She argues that “in every case where a parent stands to be incarcerated, the court should articulate how incarceration of the parent is likely to affect his or her child, and balance the potential harm to the child against competing concerns.”<sup>162</sup> Her arguments are compelling and add an important dimension to the debate, and she herself acknowledges that she is beginning a conversation rather than providing all of the answers.<sup>163</sup> Further, she also acknowledges that many of the “least controversial” solutions are ones that are beyond the scope of the judiciary and need to be implemented by policy makers.<sup>164</sup> Unfortunately, for the reasons discussed above in Part II (including a desire to avoid being overturned, judicial familiarity with the Guidelines, and a desire to avoid disparate sentences), the judiciary does not appear to have “seized” the post-*Booker* opportunity to revolutionize sentencing with an eye toward the best interests of children of incarcerated parents.

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157. *Id.* at 109–12.

158. *Id.* at 111.

159. *Id.* at 105.

160. Abramowicz, *supra* note 71, at 229. Professor Abramowicz makes similar arguments regarding the use of family law as a framework for addressing parental incarceration in an earlier article as well. See Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 797 (2011).

161. Abramowicz, *supra* note 71, at 229.

162. *Id.* at 235–36.

163. *Id.* at 236 (“The difficult question that follows is how courts should balance children’s interests against competing concerns when sentencing parents convicted of crimes. This Article hopes only to begin that conversation, and to encourage the family law community to engage in it; it does not purport to definitively resolve the issue.”).

164. *Id.* (“One of the least controversial approaches—albeit one that would need to be taken up by legislators and prison administrators, as judges have limited control in the matter—would be to address prison policies that harm the children of incarcerated parents.”).

Other scholars have made specific recommendations for rule or policy changes that need to occur at the federal level. For example, Emily Andersen argues that the Guidelines themselves should be revised to indicate that, in some circumstances, “alternative sentences can and should be considered” for defendants with family responsibilities.<sup>165</sup> The question of whether parents should receive a lessened or alternative sentence because of their status as parents is, of course, a controversial one. Some commentators have argued that to do so would be to violate principles of equal protection,<sup>166</sup> and even incentivize certain groups of people (namely “irreplaceable caregivers”) to engage in criminal behavior.<sup>167</sup> These are not merely the hypothetical thoughts of academics; some courts have even gone so far as to suggest that taking parental status into account in fashioning a custodial sentence might incentivize some defendants to actually become parents in order to seek more lenient sentencing. The First Circuit has reasoned that “allow[ing] a departure downward for pregnancy could set a precedent that would have dangerous consequences in the future, sending an obvious message to all female defendants that pregnancy is ‘a way out.’”<sup>168</sup> While this Article agrees that certain changes should be made to the Guidelines, as is outlined in more detail below, it is important to consider the resistance such a proposal has already received from both scholars and judges, as well as the current political climate.<sup>169</sup>

Andersen also argues that there should be a requirement that the presentence investigation reports currently required pursuant to Federal Rule of Criminal Procedure 32 include a “family impact assessment,” which would “include information about a defendant’s family and the impact a potential sentence might have on the family.”<sup>170</sup> While this is a laudable goal, it again

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165. Andersen, *supra* note 70, at 1532.

166. Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1195 (2007) (“Family ties benefits not only impede the accurate and just administration of criminal penalties, but they can also threaten basic commitments to equality under law.”).

167. *Id.* at 1199 (“[S]ome family ties benefits can have the unwanted effect of incentivizing more criminal activity—and more successful criminal activity to boot. To the extent the law effectively signals messages to the public by highlighting that family membership confers special benefits, some family ties benefits would encourage family members to keep their criminal enterprises in the family.”). For a response, see generally Boudin, *supra* note 152, at 112–14, arguing that “the idea that some discount in sentencing or access to a child-friendly visiting room would incentivize crime should be absurd on its face.”

168. *United States v. Pozzy*, 902 F.2d 133, 139 (1st Cir. 1990) (quoting Presentence Investigation Report, *id.* (No. 89-1879)).

169. See, e.g., Laura Litvan & Billy House, *GOP Frets over Slow Pace of Congress Early in Trump Term*, BLOOMBERG POLITICS (Feb. 16, 2017, 4:15 PM), <https://www.bloomberg.com/news/articles/2017-02-16/republicans-fret-over-slow-pace-of-congress-early-in-trump-term> (noting that “Congress is off to a slow start” and that “[t]he Senate is tied up with delays in confirming President Donald Trump’s cabinet, the House is spending most of its time undoing regulations from the end of the previous president’s term”).

170. Andersen, *supra* note 70, at 1533–34.

must be noted that amendment to the Federal Rules of Criminal Procedure is a complicated and time consuming process that involves Congress, the Supreme Court, advisory committees, and public notice and comment.<sup>171</sup> Accordingly, reliance on rule change as a method of addressing the challenges faced by incarcerated parents and their children may be misplaced. Therefore, this Article instead brings a new suggestion to the table, and encourages federal sentencing judges to make use of a somewhat obscure provision of the Federal Rules of Civil Procedure to accomplish the same goal.

*B. Previous Recommendations Unlikely to Gain Political Traction*

Several of the articles discussed above were written under the Obama Administration, and there was much excitement when President Obama took office that there would be significant criminal justice reform.<sup>172</sup> “More than any administration in recent history, the Obama White House . . . focused on a law enforcement mission that might seem antithetical to hard-nosed prosecutors: getting criminal offenders out of jail early and trying to give them the skills to stay out.”<sup>173</sup> The Obama Administration did include the children of incarcerated parents in the policy reforms it began on the problem of mass incarceration. In 2013, the White House hosted a “Champions of Change” event to honor those who work to address the unique obstacles faced by children of incarcerated parents.<sup>174</sup> In 2014, the Department of Justice and the

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171. CHARLES ALAN WRIGHT ET AL., 4 FEDERAL PRACTICE AND PROCEDURE § 1001 n.16 (2015). This process itself is a rather involved one:

The current rulemaking process under the Rules Enabling Act places primary responsibility for rule development in judicial committees, though all amendments ultimately are subject to approval by Congress before taking effect. First, the Advisory Committee on Civil Rules (composed of judges, professors, and lawyers) proposes and approves an amendment to the rules. Next, the proposed revision may be preliminarily reviewed by the Standing Committee on Practice and Procedure. Third, the amendment is circulated for consideration and comment by the public, and then is returned to the Advisory Committee, which may make further changes. This final draft must again be approved by both the Advisory Committee and the Standing Committee on Practice and Procedure, and is next passed to the United States Judicial Conference. After being accepted by the Judicial Conference, a proposed amendment is submitted to the Supreme Court. Finally, after promulgation by the Supreme Court, the new rule becomes effective the following December 1 unless Congress takes action to alter or reject it.

*Id.*

172. Of course, policies aimed specifically at children of incarcerated parents are not the only way for an administration to address the problems faced by children of incarcerated parents: wide scale criminal justice reform, including addressing racial disparities in prosecutions and the school to prison pipeline, would no doubt make a real difference for these children. Such broader initiatives are ultimately outside the scope of this Article, however.

173. Eric Lichtblau, *Obama Legacy of Freeing Prisoners May Come Under Trump Siege*, N.Y. TIMES (Jan. 15, 2017), <https://www.nytimes.com/2017/01/15/us/politics/obama-prisoners.html>.

174. Cecilia Muñoz, *Supporting Children of Incarcerated Parents*, WHITE HOUSE: BLOG (JUNE 19, 2013, 9:46 AM), <https://obamawhitehouse.archives.gov/blog/2013/06/19/supporting-children-incarcerated-parents>.

Department of Health and Human Services joined others at the White House in announcing programming aimed at helping children of incarcerated parents to succeed.<sup>175</sup> On June 24, 2016, President Obama announced a series of measures to help support reentry for those leaving prison, including “the development of model family strengthening policies that can be adopted by and implemented in prisons and jails” such as “visiting policies and procedures; visiting room and waiting room environments; parenting and other programming offered in correctional facilities; [and] family reunification and reentry planning.”<sup>176</sup>

As of the time of this Article’s drafting, the year-old Trump Administration has not yet spoken on any of these issues. It should. But most political observers agree that significant progress on these issues is increasingly unlikely under the Trump Administration, as President Trump came to power on a “law and order” platform and, at his confirmation hearings, Attorney General Sessions vowed that “cracking down on drugs, violence, gun crimes and illegal immigrants would be among his top priorities.”<sup>177</sup> There is good reason to believe he will follow through on those priorities, as they mirror the goals that he espoused during his many years as a federal prosecutor and senator.<sup>178</sup> These priorities, combined with Republican control of Congress, contribute to the conclusion below that most legislative change in favor of children of incarcerated parents is unlikely at this time.

### *1. Revision of the Sentencing Guidelines*

As noted above, other scholars have called for a revision of the Sentencing Guidelines,<sup>179</sup> and the Sentencing Commission does indeed possess the statutory authority to propose Guidelines amendments to Congress.<sup>180</sup> There

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175. Austin & Mason, *supra* note 3.

176. The White House Office of the Press Sec’y, *FACT SHEET: President Obama Announces New Actions to Reduce Recidivism and Promote Reintegration of Formerly Incarcerated Individuals*, OBAMA WHITE HOUSE ARCHIVES (June 24, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/24/fact-sheet-president-obama-announces-new-actions-reduce-recidivism-and>.

177. Lichtblau, *supra* note 173.

178. *Id.*

179. *See, e.g.*, Andersen, *supra* note 70, at 1532.

180. 28 U.S.C. § 994(p) (2012). This subsection provides in relevant part that the Sentencing Commission:

may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, . . . except to the extent that . . . amendment is otherwise modified or disapproved by Act of Congress.

*Id.*

are several forms this revision could take. First, there could be a simple excision of Section 5H1.6 and its language providing that family responsibilities should not ordinarily be relevant in the sentencing process. Second, there could be an explicit alteration of the language, perhaps one that allowed for a more nuanced approach and provided specific language regarding dependent minor children. Unfortunately, for the reasons that will be discussed below, these changes are unlikely in the foreseeable future.

Despite their being unlikely, there is historical precedent for such amendments. In 2010, the Sentencing Commission amended Guidelines Section 5H1.11.<sup>181</sup> That provision, which mirrored Section 5H1.6 in important ways, had discouraged consideration of “[m]ilitary, civic, charitable, or public service,” during the sentencing phase, using the same language as Section 5H1.6 that they were “not ordinarily relevant.”<sup>182</sup> The amended language drafted by the Commission provides that prior “[m]ilitary service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”<sup>183</sup> In making this change, the Commission remarked that “applying this departure standard to consideration of military service is appropriate because such service has been recognized as a traditional mitigating factor at sentencing.”<sup>184</sup> The Commission then cited to a Supreme Court opinion in support of this statement.<sup>185</sup> As noted above, multiple federal appellate courts have recognized the appropriateness of family responsibilities, including to minor children, as a proper mitigating factor at sentencing.<sup>186</sup> Therefore, there is both judicial and historical precedent for an amendment favoring recognition of family responsibility on the part of the Sentencing Commission.

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181. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 historical note (U.S. SENTENCING COMM’N 2010).

182. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (U.S. SENTENCING COMM’N 2009).

183. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (U.S. SENTENCING COMM’N 2010); *see also* Hessick, *supra* note 97 at 1363 (suggesting the consideration of military service is limited to prior service).

184. U.S. SENTENCING GUIDELINES MANUAL III app. C, amend. 739 (U.S. SENTENCING COMM’N 2011), [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/APPENDIX\\_C\\_Vol\\_III.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/APPENDIX_C_Vol_III.pdf) (citing *Porter v. McCollum*, 558 U.S. 30, 43 (2009)).

185. *Id.* (“Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . . .” (citing *Porter*, 558 U.S. at 43)).

186. *See, e.g.,* *United States v. Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006) *overruled on other grounds by* *Kimrough v. United States*, 552 U.S. 85 (2007) (holding that a single parent caring for a child, when balanced against other factors, is a proper mitigating factor); *United States v. Prospero*, 686 F.3d 32, 48 (1st Cir. 2012) (holding that caring for a spouse battling cancer is a proper mitigating factor).

However, there are several reasons to believe that such an amendment is unlikely to occur. First, the majority of amendments made by the Sentencing Commission since the inception of the Sentencing Guidelines have been to *increase* sentence length rather than *decrease* sentence length by allowing for more mitigating circumstances.<sup>187</sup> The Commission has proposed hundreds of amendments, and “all but a handful” have proposed increases.<sup>188</sup> One reason for this may be that the eight member Sentencing Commission has historically been disproportionately staffed with prosecutors.<sup>189</sup> There is, for example, a legislative mandate that the Attorney General or his designee sit as ex officio members,<sup>190</sup> but no such mandate requires that defense counsel be represented.<sup>191</sup> The Sentencing Commission’s membership bias has caused its recommendations to be called into question: “Because the DOJ has such influence on the Commission, one is left to wonder whether the Commission’s recommendations about sentencing are entirely neutral.”<sup>192</sup>

Second, these amendments may be unlikely because the Sentencing Commission may not believe it has the power to amend Section 5H1.6 due to 28 U.S.C. § 994(e), which is the underlying legislation providing that “family ties and responsibilities” are “general[ly] inappropriate”<sup>193</sup> to consider when fashioning a sentence. Of course, the Sentencing Commission could ask Congress to amend that provision.<sup>194</sup> It is certainly within the Commission’s power to make such legislative requests of Congress, and there is

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187. See Hessick, *supra* note 97, at 1374 (stating “the guideline amendment process has generally operated as a one-way ratchet to increase sentences”).

188. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 766–67 (2005).

189. See *id.* at 762–64 (explaining how the Commission member selection process “heavily tilt[s] toward law enforcement” and noting “[o]f the twenty-three people who ha[d] served as commissioners [by 2005], thirteen were former prosecutors—and that does not include the ex officio members appointed by the Attorney General. Moreover, for much of the Commission’s existence, there have been enough former prosecutors on the Commission to form a majority, or close to it, at any one time.” (footnotes omitted)).

190. 28 U.S.C. § 991(a) (2012) (providing that “[t]he Attorney General, or the Attorney General’s designee, shall be an ex officio, nonvoting member of the Commission”).

191. Hessick, *supra* note 97, at 1375.

192. *Id.* at 1376.

193. See 28 U.S.C. § 994(e) (2012) (“The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”). Because the provision does not address military service, this would not have been an issue when the Commission amended § 5H1.11 in 2010, as discussed above.

194. See Hessick, *supra* note 97, at 1374 (“This is a highly controversial guideline policy. Not only do a majority of federal judges disagree with the exclusion of family ties as a sentencing consideration, but there are significant negative external consequences associated with incarcerating parents. In particular, there appear to be a host of negative effects on children related to the separation caused by a parent’s incarceration.” (footnotes omitted) (first citing Julian Abele Cook, Jr., *Gender and Sentencing: Family Responsibility and Dependent Relationship Factors*, 8 FED. SENT’G REP. 145, 145 (1995); then citing Joseph W. Luby, *Reining in the “Junior Varsity Congress”*: A



again historical precedent for it. For example, as a recent Second Circuit opinion noted, since the *Booker* decision, the Sentencing Commission has made repeated requests to Congress to require both district court and appellate judges to give more weight to the Guidelines.<sup>195</sup>

Accordingly, the Commission can and does make legislative recommendations to Congress, and amending 28 U.S.C. § 994(e) would be an appropriate one. But this path—the Sentencing Commission seeking amendment of a legislative provision from Congress, Congress following through, the Commission recommending the appropriate amendment to the Guidelines as a result, and Congress approving the amendment—is extraordinarily unlikely in the foreseeable future.

## 2. Applying *Pepper v. United States to Section 5H1.6*

In light of the Sentencing Commission and/or Congress being unwilling or unable to amend Section 5H1.6 of the Guidelines or the relevant underlying legislation which disfavors consideration of family responsibilities at sentencing, it is worth exploring the likelihood that another branch—the judicial one—might take on this issue. Individual judges arguably already have the power to do more to take children into consideration at sentencing. But the odds that the Supreme Court itself will mandate or even bless such an approach is unlikely.

In theory, the Supreme Court could unilaterally direct sentencing judges to ignore Section 5H1.6 when fashioning their sentences. This outcome is

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*Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199, 1219–20 (1999); then citing Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 936–37, 939–40, 943 (1993); then citing Patricia M. Wald, “What About the Kids?”: *Parenting Issues in Sentencing*, 8 FED. SENT’G REP. 137, 137 (1995); then citing Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 201 (1994); and then citing U.S. SENTENCING COMM’N, RESULT OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, tbl. 13 (2010)).

195. *United States v. Pruitt*, 813 F.3d 90, 94 n.8 (2d Cir. 2016). In the *Pruitt* decision, the Second Circuit affirmed the underlying top of the Guidelines range sentence of the appellant, but wrote to urge the Sentencing Commission and the Judicial Conference to amend the Statement of Reasons form included within the statutorily-required form for the entry of criminal judgments. *Id.* at 91. Writing for the Court, Judge Gleeson, a District Court judge sitting by designation, noted:

a check-a-box section of the form, which was checked by the district court in this case, invites sentencing judges to impose a sentence within the applicable Guidelines range simply because the judge finds no reason to depart. Because that both undermines the statutory obligation to state the reasons for every sentence and unlawfully presumes the reasonableness of the advisory Guidelines range, the form should be amended.

*Id.* The case is thus also an example of the two-way relationship between the Sentencing Commission and federal judges, as the latter at times make recommendations to the former within written opinions.

perhaps the most unlikely, especially given the more conservative make-up of today's Court with the addition of new Justice Neil Gorsuch, who in his first few months on the bench has "asserted his exceptionally conservative views early and often across a dizzying range of hot-button issues."<sup>196</sup> Despite the unlikelihood of it occurring, it is worthwhile to briefly outline how an advocate might attempt to rely on the *Pepper* decision in an attempt to at least argue to the Supreme Court that it direct lower courts to disregard Section 5H1.6.

As discussed above, in its *Pepper* decision, the Court affirmed a district court's downward departure based on post-sentencing rehabilitation, despite the existence of a federal statute and a Commission policy statement disfavoring consideration of such evidence at sentencing.<sup>197</sup> As it did in the *Pepper* decision, the Court could hold that sentencing judges are free to disregard Section 5H1.6 of the Guidelines, since the Court's "post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views. That is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."<sup>198</sup>

Just as the Court in *Pepper* carefully dissected the proffered rationales behind the Sentencing Commission's policy statement by attacking the commentary provided for the relevant section,<sup>199</sup> so too could the Court do this for Section 5H1.6. The commentary on that section provides in part that "the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration."<sup>200</sup> The Court could instead focus on the facts that defendant's families frequently face more than "some degree of financial hardship" and that children suffer more than "to

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196. Ariane de Vogue, *Justice Neil Gorsuch Delivering as Trump's Promised Conservative*, CNN (June 27, 2017), <http://www.cnn.com/2017/06/26/politics/justice-neil-gorsuch-president-trump-gets-his-man/index.html> (quoting interview with Joshua Matz, former clerk to Justice Anthony Kennedy).

197. *See supra* notes 99–102 and accompanying text.

198. *Pepper v. United States*, 562 U.S. 476, 501 (2011) (citation omitted) (citing *Kimbrough v. United States*, 552 U.S. 85, 109–10 (2007)).

199. *Id.* at 501–04. The Commission had provided commentary stating "that departures based on postsentencing rehabilitation would '(1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) [governing good time credit] and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced *de novo*.'" *Id.* at 501 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K2.19 cmt. (U.S. SENTENCING COMM'N 2010)). The Court rejected both of those rationales. *Id.* at 501–04.

200. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. (U.S. SENTENCING COMM'N 2016).

some extent” when a parent is incarcerated. The Court could thus conclude, as it did in *Pepper*, that “a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission’s views”<sup>201</sup> as laid out in Section 5H1.6, since the Commission’s views there “rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.”<sup>202</sup> Again, though, it seems unlikely that the Supreme Court would reach such a holding, especially with the addition of Justice Gorsuch.

### 3. Requirement of a Family Impact Statement

Scholars have called for an amendment of Federal Rule of Criminal Procedure 32 to include a “family impact assessment,” which would “include information about a defendant’s family and the impact a potential sentence might have on the family.”<sup>203</sup> Such an amendment is procedurally cumbersome<sup>204</sup> and politically unlikely.<sup>205</sup> Although there is precedent for Congress to demand the inclusion of impact statements in presentence investigation reports,<sup>206</sup> and while this Article will briefly explore what such an amendment would look like in practice, once again this particular strategy is unlikely to come to fruition, at least through a formal amendment of the Rules. Even though it is unlikely that there will be a wholesale shift here, there is still a way for individual judges to mandate the inclusion of such statements in their own courtrooms.

In 2009, the San Francisco Adult Probation Department began to incorporate Family Impact Statements into the presentence investigation reports they prepared before each defendant’s sentencing.<sup>207</sup> The goal of the Family

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201. *Pepper*, 562 U.S. at 501.

202. *Id.*

203. Andersen, *supra* note 70, at 1533–34; *see also* Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 114 (2014) (“[S]ection 3552 of title 18 of the United States Code, governing presentence investigation reports, should be amended at paragraph (B) to require that a part of the presentence report would include a new ‘Family Impact Statement.’”).

204. *See supra* note 171.

205. *See supra* note 169.

206. For example, in 1982, Congress passed the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1512–15, 3579–80 (2012)), which mandated inclusion of victim impact statements in noncapital sentencing reports for federal crimes. Specifically, that law requires presentence investigation reports to include “(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and (D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.” Victim and Witness Protection Act § 3.

207. Wendy S. Still, *San Francisco Realignment: Raising the Bar for Criminal Justice in California*, 25 FED. SENT’G REP. 246, 247–48 (2013).

Impact Statements is to insure that sentencing judges have access to information about how a sentence of incarceration might impact the defendant's children and how best to protect family ties.<sup>208</sup> These statements were modeled after "environmental impact statements,"<sup>209</sup> which are prepared by federal agencies before they undertake any action that could significantly affect the environment.<sup>210</sup> The Family Impact Statements "focus on the sentenced person's family details, such as the number of children, the children's living situation, the person's relationship to the caregiver, status as a primary caregiver, and the county where the children reside."<sup>211</sup>

The use of Family Impact Statements is still relatively low, and only a handful of states are currently implementing them.<sup>212</sup> But states that have adopted the practice, even on a trial basis, have reported encouraging results. In New York State, for example, the criminal justice advocacy group, The Osborne Association, worked with state probation professionals to urge probation officers to incorporate Family Impact Statements into their pre-sentencing investigation reports.<sup>213</sup> The Osborne Association worked alongside probation officers in a collaborative manner, rather than attempting to create change through legislative channels.<sup>214</sup> The initiative encountered some resistance, including resistance from those who "were concerned that [Family Impact Statements] would prioritize the defendant's family circumstances over the victim's family circumstances, thereby eclipsing the statutorily required Victim Impact Statement."<sup>215</sup> By working collaboratively with probation officers, the Osborne Association was able to overcome this initial

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208. *Id.*

209. Margaret diZerega, *San Francisco's Family-Focused Probation: A Conversation with Chief Adult Probation Officer Wendy Still*, 24 FED. SENT'G. REP. 54, 54 (2011).

210. Peter Olasky, *Crime Impact Statements*, 37 COLUM. J.L. & SOC. PROBS. 329, 349–50 (2004). Environmental impact statements are required at the federal level by the National Environmental Policy Act of 1969, which "requires that before a federal agency undertakes an 'action' that could significantly affect the environment, the agency must prepare and publicize a detailed statement outlining the environmental impact of the proposed action as well as alternatives." *Id.* (citing 40 C.F.R. §§ 1502.12–.16 (2003)).

211. diZerega, *supra* note 209, at 54 (citing CAROL LIU, FACT SHEET: SENATOR LIU, FAMILY IMPACT STATEMENT (2010)).

212. See THE OSBORNE ASS'N, FAMILY IMPACT STATEMENTS: CONSIDERING THE NEEDS OF CHILDREN 2 (2012) (noting that as of 2012, only courts in San Francisco, Arkansas, and Tennessee used Family Impact Statements).

213. Allison Hollihan, *Garnering Support for Policy Change: Family Impact Statement*, JUSTICE STRATEGIES (Feb. 26, 2015), <http://www.justicestrategies.org/coip/blog/2015/02/garnering-support-policy-change-family-impact-statement>.

214. *Id.* ("While state legislation or regulatory reform would be required to add a stand-alone [Family Impact Statement] section to pre-sentencing investigation reports, it is not needed to include such information into the existing report format.")

215. *Id.* Indeed, the group ultimately chose to rename the statements to "Family Responsibility Statements." *Id.*

resistance, and Family Impact Statements are now highlighted as a “best practice” in Office of Probation and Correctional Alternatives training for all new probation officers in New York.<sup>216</sup>

In order to make Family Impact Statements mandatory for inclusion in federal presentence investigation reports, an amendment to Rule 32 of the Federal Rules of Criminal Procedure (which requires the reports) would be required. Specifically, there would need to be an amendment to Rule 32(d), which currently requires that the presentence investigation report include “the defendant’s history and characteristics,” “information that assesses any financial, social, psychological, and medical impact on any victim,” and “when appropriate, the nature and extent of nonprison programs and resources available to the defendant.”<sup>217</sup> The amendment could track the language already provided about impact on victims and, thus, could require that the presentence investigation report contain “information that assesses any financial, social, psychological, and medical impact on the defendant’s family, especially any minor children.”

#### IV. RECOMMENDATIONS THAT ARE MORE LIKELY TO SUCCEED

The preceding Part is rather depressing, as it concludes time and time again that certain avenues for addressing the issues experienced by children of incarcerated parents are likely foreclosed, and will remain foreclosed for some time in the future. But not all is lost. First, there is an alternative way that individual district court judges could mandate the use of Family Impact Statements in their courtrooms, even absent a formal amendment of Rule 32, and this Article makes the unique case for it here. Second, there are certain modest but impactful policy shifts that individual states or even prisons could adopt that would support meaningful visitation between incarcerated parents and their children, and this visitation is a powerful protection against many of the harms associated with parental incarceration.

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By emphasizing the defendant’s parenting *responsibilities*, rather than the impact on their children, we garnered buy-in from those who expressed concern about eclipsing the victim impact statement or who were not overly-empathetic about potential impacts on children (e.g., ‘the parent should have thought of the children before committing the crime’). Furthermore, by simply changing the name to Family Responsibility Statement, people were less likely to conflate Victim Impact Statements and Family Impact Statements.

*Id.*

216. *Id.*

217. FED. R. CRIM. P. 32(d)(2)(A)–(C).

A. *Using Federal Rule of Criminal Procedure Rule 32(d)(2)(G) to Require the Inclusion of Family Impact Statements in Presentence Investigation Reports*

Currently, Rule 32(d)(2)(G) requires that the presentence investigation report include “any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).”<sup>218</sup> This language was included as part of the 2007 Rule 32 amendments that were undertaken in the wake of the *Booker* decision.<sup>219</sup> According to the commentary included with that amendment, the language in subsection (d)(2)(G) “contemplates that a request can be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case.”<sup>220</sup>

Research did not yield a single example of a judge using this subsection to require anything resembling a family impact statement. Rather, the few citations to this subsection of the Rule have pertained to matters other than family ties, such as to support the inclusion of an unproven allegation that the defendant sexually abused a child,<sup>221</sup> or to justify a refusal of a district court judge to recuse herself from a case at sentencing.<sup>222</sup> But in one remarkable, recent opinion out of the Eastern District of New York, Senior District Court Judge Frederic Block relied on Rule 32(d)(2)(G) to require the probation department to include a summary of all federal collateral consequences faced by the defendant, and noted that “[t]he Probation Department should include a collateral-consequences section in all future pre-sentence reports.”<sup>223</sup> Because this groundbreaking opinion could provide a roadmap for judges to similarly mandate the inclusion of Family Impact Statements, it is worth exploring more fully here.

In *United States v. Nesbeth*,<sup>224</sup> the defendant had been found guilty, after a jury trial, of importation of cocaine with intent to distribute, resulting in an

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218. FED. R. CRIM. P. 32(d)(2)(G). The Section 3553(a) factors include the kinds of sentences available, any pertinent policy statements, and the history and characteristics of the defendant. 18 U.S.C. § 3553(a) (2012).

219. FED. R. CRIM. P. 32, 2007 amend. cmt.

220. *Id.* Note that as of the time of those amendments, the language was found in subsection (d)(2)(F), not (d)(2)(G). *Id.* In the 2011 amendments, the language was renumbered subdivision (d)(2)(G) for “stylistic purposes.” FED. R. CRIM. P. 32, 2011 amend. cmt.

221. *United States v. Bartlett*, 416 F. App’x 508, 510–11 (6th Cir. 2011).

222. *United States v. Mitchell*, No. 13–cr–00538, 2014 WL 3735266, at \*1 (D.N.J. July 29, 2014) (denying defendant’s motion for recusal in response to sentencing judge’s request to probe for more information on defendant’s finances). In *Mitchell*, the sentencing judge noted that Rule 32(d)(2)(G) recognizes the judge’s right and obligation to “seek[] additional information pursuant to its duty to consider all relevant information and to ensure the accuracy of the PSR [presentence investigation report] prior to fashioning a sentence.” *Id.* at \*5.

223. *United States v. Nesbeth*, 188 F. Supp. 3d 179, 197 (E.D.N.Y. 2016).

224. 188 F. Supp. 3d 179.

advisory guidelines range of thirty-three to forty-one months of incarceration.<sup>225</sup> Judge Block departed and issued a non-incarceratory sentence of one year of probation, “in part because of a number of statutory and regulatory collateral consequences [the defendant would] face as a convicted felon.”<sup>226</sup> Recognizing the significance of such a decision, Judge Block wrote a lengthy opinion that is part scholarly article and part sentencing memorandum. He began by tracing the history of collateral consequences in this country, including post-conviction statutory and regulatory collateral consequences.<sup>227</sup> He then turned to the governing case law and arrived at his sentence, factoring in the collateral consequences the defendant would face and balancing of all Section 3553(a) factors.<sup>228</sup> Finally, he included a section on the responsibilities of counsel and the Probation Department with respect to collateral consequences.<sup>229</sup>

The opinion is sweeping in its reach and rather astonishing in its scope, and it garnered a fair amount of media attention.<sup>230</sup> Although the defendant in *Nesbeth* did not have children, and so Judge Block did not have occasion to speak on the impact of parental incarceration as a form of “collateral consequence,” he did note in dicta that incarceration can cause parents to lose custody of their children, amongst other harms, and that, “[i]n this way, the statutory and regulatory scheme contributes heavily to many ex-convicts becoming recidivists and restarting the criminal cycle.”<sup>231</sup> Judge Block ended his opinion by declaring, in part because of Rule 32(d)(2)(G), that “it is the obligation of both the defense lawyer and the prosecutor, as well as the Probation Department in the preparation of its [presentence investigation report], to assess and apprise the court, prior to sentencing, of the likely collateral consequences facing a convicted defendant.”<sup>232</sup>

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225. *Id.* at 180.

226. *Id.*

227. *Id.* at 180–86.

228. *Id.* at 186–96.

229. *Id.* at 196–98.

230. *See, e.g.*, Benjamin Weiser, *U.S. Judge’s Striking Move in Felony Drug Case: Probation, Not Prison*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/nyregion/in-a-striking-move-brooklyn-judge-orders-probation-over-prison-in-felony-drug-case.html> (noting that the *Nesbeth* opinion has been called “groundbreaking”); Lincoln Caplan, *Why a Brooklyn Judge Refused to Send a Drug Courier to Prison*, NEW YORKER (June 1, 2016), <http://www.newyorker.com/news/news-desk/why-a-brooklyn-judge-refused-to-send-a-drug-courier-to-prison> (describing the opinion as “cutting-edge”). Not all of the press was favorable. *See, e.g.*, Lia Eustachewich, *Woman Gets off Easy for Smuggling \$45k Worth of Cocaine*, N.Y. POST (May 25, 2016), <http://nypost.com/2016/05/25/woman-gets-off-easy-for-smuggling-45k-of-cocaine/> (describing the opinion and sentence as “a big break” for the defendant).

231. *Nesbeth*, 188 F. Supp. 3d at 185 (footnotes omitted) (citing MICHELLE ALEXANDER, *THE NEW JIM CROW* 97, 142–58 (2010)).

232. *Id.* at 197.

The Government did not appeal the *Nesbeth* decision, and thus, neither the Second Circuit nor the Supreme Court have weighed in on the ideas (and ideals) Judge Block outlined there. However, despite the opinion being only eighteen months old, it has already been cited to dozens of times by other judges, defense attorneys, and scholars.<sup>233</sup> Mandating a Family Impact Statement that required the probation department to include information about how an incarceratory sentence would impact a defendant's children is just as squarely within a judge's power under Rule 32(d)(2)(G) as a statement on collateral consequences. Federal district court judges who are concerned about this issue and do not want to wait for action from Congress, the Supreme Court, or the Sentencing Commission, have a tool already at their disposal for mandating the inclusion of Family Impact Statements.

### B. Improving Prison Visitation Policies

As discussed above, frequent and high-quality visitation has been shown to benefit both children and incarcerated parents, as well as society at large through lowered recidivism rates. Visitation policies, however, frequently deter families from visiting. Restrictive visitation policies that deter children from visiting “flow from cultural and institutional beliefs that incarcerated individuals, including parents, do not deserve privileges such as family visitation.”<sup>234</sup> Indeed, some states have visitation policies that single out children. For example, New Hampshire prohibits all toys in the visiting room and warns that “visits will be terminated if children are allowed to misbehave or become out of control.”<sup>235</sup>

Prison visitation policies can be dizzying in their scope and uneven in their application. At a recent listening session hosted by the Federal Inter-agency Reentry Council's Subgroup on Children of Incarcerated Parents, a young woman recounted her story of being turned away at the door of her father's prison after having traveled for a long distance because she had violated the prison's dress code.<sup>236</sup> Her violation? She was wearing blue, which was associated as a gang color.<sup>237</sup> Visitor dress codes can be mind-bogglingly specific; in the state of Tennessee, for example, visitors must wear undergarments but must not wear “inappropriate” undergarments such as

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233. See, e.g., *United States v. Jaime*, 235 F. Supp. 3d 262, 265 (D.C. Cir. 2017) (relying on *Nesbeth* to sentence a defendant to pre-judgment probation); see also *supra* note 230 (collecting news reports on *Nesbeth*).

234. Parke & Clarke-Stewart, *supra* note 51.

235. N.H. DEP'T OF CORR. POLICY & PROCEDURE DIRECTIVE 7.09.IV.I.3 (2017), <https://www.nh.gov/nhdcc/policies/documents/7-09.pdf>.

236. YOUTH.GOV, *supra* note 33.

237. *Id.*



“thongs and water brassieres.”<sup>238</sup> They are also prohibited from wearing “spandex or spandex-type fabrics,”<sup>239</sup> “worn or tattered clothing,”<sup>240</sup> and “clothing with logos that contain pictures.”<sup>241</sup> As any parent of a toddler can attest, children’s clothing frequently contains logos with pictures.

Amending prison visitation policies so that they are more family friendly and more encouraging of visits from children is relatively low hanging fruit for improving the experiences of children of incarcerated parents. The specific series of recommendations that follow are modest, cost little to implement, and have already been proven successful in certain states and districts.

### *1. Policies Should Explicitly Promote Visits by Children*

Prison visitation policies should explicitly promote visits by minor children in a welcoming fashion. Washington State’s Department of Corrections is a leader in this area. Its prison visitation policy clearly provides that “[t]he Department will provide visiting opportunities and programs and a secure and welcoming visit space for offenders and their families to provide as normal a family experience as possible.”<sup>242</sup> Rather than viewing children as an afterthought, or being openly hostile to their presence by banning toys or diaper bags, the Washington policy provides that “[d]esignated visit areas should include a section that has a child-friendly environment with toys and games suitable for interaction by family members of all ages,”<sup>243</sup> and that “[s]pace may be provided for the proper storage of visitors’ coats, handbags, and other personal items not allowed into the visiting area.”<sup>244</sup> The policy recognizes that young, minor children should be treated differently than other visitors, and provides that “[i]n addition to brief, appropriate contact at the beginning of each visit, an offender may have physical contact with his/her child(ren) 8 years of age and under.”<sup>245</sup> Physical contact with an incarcerated parent is especially important for very young children, and “the lack of contact visitation in most local jails creates serious problems for newborns and infants who do, in fact, crave their parent’s touch.”<sup>246</sup>

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238. TENN. DEP’T OF CORR., ADMIN. POLICIES & PROCEDURES 507.01.VI.M.1.b (2017), <https://www.tn.gov/content/dam/correction/documents/507-01.pdf>.

239. *Id.* at VI.M.2.a.

240. *Id.* at VI.M.2.f.

241. *Id.* at VI.M.2.g.

242. WASH. DEP’T OF CORR. POLICY 450.300.I.A (2016), <http://www.doc.wa.gov/information/policies/showFile.aspx?name=450300>.

243. *Id.* at 450.300.I.A.1.a.

244. *Id.* at 450.300.I.A.1.e.

245. *Id.* at 450.300.VII.D.

246. See generally Megan McMillen, Note, *I Need to Feel Your Touch: Allowing Newborns and Infants Contact Visitation with Jailed Parents*, 2012 U. ILL. L. REV. 1811, 1852 (2012).

The overall tone of the Washington policy as it relates to children is one of welcome, and this is reflected in the directive the policy provides to employees who oversee these visits, which reiterates “the importance of visiting to maintain ties with family and friends, and in some cases reunification of offenders with their families and significant others.”<sup>247</sup> Prisons can and should have policies that promote safety while also promoting the maintenance of family ties and visitation for children.

### 2. *Visitation Hours Should Be Extended*

Prisons should review their visitation hours to be sure they are as convenient and open as possible. Too often, visitation hours are scheduled only, or predominantly, during working hours, and this further deters children (who under policy must be accompanied by adults) from being able to visit their incarcerated parents. States and cities that have addressed this issue have been able to make meaningful changes. For example, the San Francisco Children of Incarcerated Parents Partnership<sup>248</sup> “worked with the[ir local] sheriff’s department to improve the visiting policies” in prisons there, and focused specifically on increasing visiting hours.<sup>249</sup> As a result of that partnership, “opportunities for parent-child visits increased to 32.5 hours per week in 2011 from 11.5 hours per week in 2007.”<sup>250</sup>

### 3. *Partnerships with Nonprofits Should Be Explored*

Prisons should work with local nonprofits to support opportunities for children to have free transportation to prisons on selected visitation days. Because parents are frequently incarcerated far from their minor children, the costs (both in terms of dollars and time) of attempting to visit are often quite high.<sup>251</sup> Several nonprofits have stepped up to try to help families who wish

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247. WASH. DEP’T OF CORR. POLICY 450.300.I.A.2 (2017).

248. The San Francisco Children of Incarcerated Parents Partnership (“SFCIPP”) “is a coalition of social service providers, representatives of government bodies, advocates and others who work with or are concerned about children of incarcerated parents and their families.” *Frequently Asked Questions*, SFCIPP, <http://www.sfcipp.org/faqs> (last visited Dec. 15, 2017).

249. Richard A. Webster & Jonathan Bullington, *How to Break the ‘Generational Curse’ That Keeps Communities in Fear, Poverty*, TIMES PICAYUNE (Jan. 12, 2017), [http://www.nola.com/crime/index.ssf/2017/01/new\\_orleans\\_parental\\_incarcera\\_1.html](http://www.nola.com/crime/index.ssf/2017/01/new_orleans_parental_incarcera_1.html).

250. *Id.*

251. An excellent example of this is provided in Boudin et al., *supra* note 50, at 179. Boudin writes:

For a mother and child living in New York City whose husband and father is incarcerated at Attica Correctional Facility in upstate New York, it would take six hours to drive to the prison. Without a car, the journey by bus may be difficult to schedule. In addition to transportation costs, once at Attica, the mother and child would need to pay for food and accommodations. Depending on Attica’s rules and whether there is an unforeseen

to visit but cannot afford the trip. For example, each year, the Center for Restorative Justice Works hosts its “Get on the Bus” event, which provides free transportation for children to visit their parents who are incarcerated in California.<sup>252</sup> The program attempts to make the child’s visit more comfortable and meaningful, providing the children with travel bags and meals, and also with post-event counseling on the ride home (along with a teddy bear and a letter from their incarcerated parent).<sup>253</sup>

These programs not only alleviate the financial burden of visiting, they also normalize the experience in a way that reduces stigma, as all of the other children on the bus are going to visit an incarcerated parent as well. The event also helps make the visits more family friendly. For example, during a Get on the Bus trip to San Quentin for Father’s Day last year, the itinerary for the visit included face painting and temporary tattoos.<sup>254</sup> The Center for Restorative Justice Works operates the program in conjunction with the California Department of Corrections and Rehabilitation.<sup>255</sup> All prison systems should be open to such partnerships, and indeed should actively seek them out.

## V. CONCLUSION

*“Men are not prisoners of fate, but only prisoners of their own minds.”*<sup>256</sup>

Children of incarcerated parents have done nothing wrong. They have broken no laws, they have violated no rules. Still, they are punished. They serve their parents’ sentences alongside them, innocent and often hidden victims. It is beyond time for judges and policy makers to consider these children when fashioning a sentence or setting policy such as prison visitation rules. Although the current Republican-controlled Congress and the Trump Administration may not prioritize changes to the Sentencing Guidelines or

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lockdown (eliminating all visits) or other interruption, the mother and child are not guaranteed to see their husband and father. In sum, for the mere possibility of a short visit with their husband and father, the mother and child would likely have to spend several hundred dollars and commit at least two days.

*Id.*

252. *Who We Are*, CTR. FOR RESTORATIVE JUSTICE WORKS, <http://www.crjw.us/programs/get-on-the-bus/who-we-are/> (last visited Jan. 12, 2018).

253. *Id.*

254. *Families Visit San Quentin Inmates for Father’s Day*, MARIN INDEP. J. (June 17, 2016), <http://www.marinij.com/article/NO/20160617/NEWS/160619807>.

255. *Id.*

256. Franklin D. Roosevelt, *Address at the White House Conference on Children in a Democracy*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=15747> (last visited Jan. 12, 2018).

the Federal Rules of Criminal Procedure that would benefit children of incarcerated parents, there are still changes that individual judges or prison policy officials can undertake now. These children deserve our attention and the modest changes outlined here should be considered only the beginning of what we can do.