

FAMILY MATTERS: THE ROLE OF “FAMILY TIES AND RESPONSIBILITIES” IN SENTENCING

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INTRODUCTION

Sentencing judges are tasked with balancing objective and subjective factors related to both the facts of cases and the lives of defendants before them. The creation of the Federal Sentencing Guidelines by the United States Sentencing Commission was, at least in part, motivated by a desire for greater uniformity in sentencing and less “inter-judge sentencing disparity” among similarly situated defendants.¹ The Guidelines, which privilege quantifiable, objective factors, sought to cabin judicial discretion and minimize the force of amorphous, subjective factors driving sentencing decisions that collectively created an aura of “lawlessness”² surrounding the entire practice.³

Congress, when it established the U.S. Sentencing Commission that produced the Guidelines, identified five defendant characteristics that it rendered

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1. See generally Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1427–36 (2008). The U.S. Sentencing Commission was established under the Sentencing Reform Act of 1984. *The Beginning of the U.S. Sentencing Guidelines*, UNITED STATES COURTS (Aug. 2009), http://www.uscourts.gov/News/TheThirdBranch/09-08-01/The_Beginning_of_the_U_S_Sentencing_Guidelines.aspx, archived at <http://perma.cc/38TS-392C>.

2. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4-6 (1972).

3. See Stith, *supra* note 1, at 1428 (noting that the “overriding purpose” of the Sentencing Guidelines “was to reduce inter-judge sentencing disparity by reducing judicial discretion”).

“general[ly] inappropriate[]” for judges to consider in sentencing: education; vocational skills; employment record; family ties and responsibilities; and community ties.⁴ Of these five, “family ties and responsibilities”⁵ uniquely, and most directly, implicates a specific third party: the defendant’s family.⁶ The most recent Bureau of Justice Statistics Special Report found that in 2007, sixty-three percent of federal inmates were parents, and approximately 0.4 percent of children under eighteen in the United States had at least one parent in federal prison.⁷ Accordingly, sentencing decisions implicate a broad swath of families, and as this paper will demonstrate, questions about how to treat an individual defendant’s family circumstances permeate sentencing decisions—despite Congress’s instructions.⁸

Congress’s restriction on the consideration of a defendant’s family ties and responsibilities reflects the Commission’s preference for objective, measurable factors related to the offense over subjective factors related to the defendant’s personal life. But courts subjected to the sentencing guidelines were sometimes able to circumvent this rule and extend sentencing discounts to defendants with “extraordinary” family ties and responsibilities.⁹ This carve-out reflected a general “reluctan[ce] to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing.”¹⁰ But the Commission’s po-

4. 28 U.S.C. § 994(e) (2014).

5. For an explanation as to why both family ties *and* responsibilities are articulated in this provision, see Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1171 n.140 (2007) (“Family ties may be thought to be distinct from family responsibilities, in that one could have strong family ties (a devoted son or brother) without necessarily incurring significant family responsibilities.”).

6. The other four factors could, in theory, implicate a third party. Certainly an employer (or potential employer) loses out when an otherwise qualified defendant is sentenced. But the family category is the most grounded in specifics, such that a judge need not hypothesize about would-be beneficiaries and can instead look to identifiable family members. Focusing on cost is another way to isolate a third party—i.e., taxpayers who foot the bill for imprisonment—but that focus is beyond the scope of this paper and it is not one of the factors that Congress lists here.

7. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1–2 (2010), available at <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>, archived at <http://perma.cc/5DX7-W67T>. “Parent” is defined as an inmate who reported having a child under 18. *Id.*

8. DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 13 (2009) [hereinafter PRIVILEGE OR PUNISH].

9. See *infra* notes 15-23 and accompanying text.

10. *United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992) (noting that the sentencing judge “made it clear that the departure was not on behalf of the defendant herself, but on behalf of her family”).

sition on family-based discounts remained “the most restrictive,” especially when compared to that of the states.¹¹

This dynamic of restricted sentencing discretion changed in the aftermath of *United States v. Booker*.¹² In *Booker*, the Supreme Court untied judges’ hands by rendering the Guidelines “effectively advisory,”¹³ thereby facilitating judicial consideration of family circumstances when determining sentence length. This Note assesses the effects of *Booker* and its progeny on federal sentencing as they relate to judicial discretion regarding family circumstances. A thorough analysis of the intersection between sentencing law and family life demonstrates some of the advantages and pitfalls of the pre- and post-*Booker* sentencing regimes in an area of law and of society—i.e., the family—that does not intuitively lend itself to neat or quantifiable metrics. This analysis indicates that while *Booker* freed judges to consider family-related factors more broadly, it simultaneously left them without any guidance on how to integrate such consideration into sentencing decisions. The post-*Booker* regime has preserved the uncertainty that permeated sentencing law when the Guidelines were still mandatory.

Such lack of guidance reflects the underlying tension of what room, if any, there should be for sentencing doctrine to consider harm to a defendant’s family when the fundamental purpose of sentencing is to focus on and punish individual offenders. In an attempt to reconcile this tension, as well as to address the current ad hoc approach to family factors, this Note considers the potential efficacy of a modified process that balances judicial discretion and the interests of defendants’ dependent family members with the foundational goals of sentencing uniformity and the societal interest in punishing offenders.

The remainder of this Note thus proceeds as follows: Part I explores the pre-*Booker* approach to family circumstances, using federal case law to assess the weaknesses generated by inflexible Guidelines that lacked concrete guidance in the familial context and produced widely disparate sentences. Part II draws on post-*Booker* cases to discuss the current prevailing approach to a defendant’s family circumstances and to question whether *Booker* succeeded in addressing the Guidelines’ weaknesses. Part III compares these two lines of case law to determine whether either approach to family circumstances—one that renders consideration of the family an exception versus one that routinely considers family circumstances in the context of multiple subjective factors—advances the fundamental goals of sentencing. Finally, Part IV explores the possibility of supplementing the Guidelines with advisory metrics for judges to consult in adjusting sentences according to particular family circumstances.

11. Markel et al., *supra* note 5, at 1214.

12. 543 U.S. 220 (2005).

13. *Id.* at 245.

I. FAMILY CIRCUMSTANCES PRE-*BOOKER*

Before *Booker*, federal judges did not frequently attach much significance to a defendant's "family ties and responsibilities" when configuring his or her sentence.¹⁴ In large part, this approach was an intended effect of the Sentencing Commission, which "discouraged" attention to a defendant's family ties and responsibilities, deeming the consideration of such "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range."¹⁵ Thus, sentencing courts were only able to consider family ties and responsibilities "if the factor [was] present to an exceptional degree or in some other way [made] the case different from the ordinary case where the factor [was] present."¹⁶ A general consensus subsequently emerged among the circuits that a downward departure from the applicable sentencing guideline range that was "based on family ties and responsibilities should be the exception rather than the rule."¹⁷ This carve-out became widely known as a departure for "extraordinary" family circumstances,¹⁸ giving judges the unenviable task of drawing a line between ordinary and extraordinary family ties and responsibilities.¹⁹

In theory, pre-*Booker* sentencing courts would raise the same couplet of questions when the possibility of extraordinary family circumstances arose: (1) "whether the defendant provided an irreplaceable (or at least critical) role as caregiver to family dependents" and (2) if so, "whether the downward departure contemplated by the judge would suffice to 'cure' the harm that would otherwise be visited upon the family member."²⁰ This trend was formally articulated in 2003—two years before *Booker*—in Section 401 of the Prosecutorial

14. Consider that between 1995 and 2005, only 0.66 percent of defendants received downward departures on the basis of "family ties and responsibilities." See *infra* Appendix I, Tables 1 and 2.

15. 18 U.S.C.S. App. § 5H1.6 (2014); *Koon v. United States*, 518 U.S. 81, 94-95 (1996).

16. *Koon*, 518 U.S. at 96.

17. *United States v. Sweeting*, 213 F.3d 95, 100 (3d Cir. 2000) (citing similar statements from the Second and Tenth Circuits, as well as from the D.C. Circuit).

18. See, e.g., *United States v. Brand*, 907 F.2d 31, 33 (4th Cir. 1990) (noting that because § 5H1.6 "contains the word 'ordinarily,' the [G]uidelines leave open the possibility of a downward departure based on family responsibilities in *extraordinary* circumstances") (emphasis added).

19. See, e.g., *United States v. Rodriguez-Velarde*, 127 F.3d 966, 969 (10th Cir. 1997) (holding that defendant's familial responsibilities as the widowed father of three children did not merit a departure because "[a] sole, custodial parent is not a rarity in today's society") (citing similar holdings in the First, Third, Fourth, and Eighth Circuits); *United States v. Harrington*, 82 F.3d 83, 90 (5th Cir. 1996) (finding "nothing extraordinary regarding [offender's] family responsibilities that would warrant a reduction in his sentence" because "innumerable defendants" could establish that a prison sentence "disrupts parental relationships") (internal citation omitted).

20. Markel et al., *supra* note 5, at 1172.

Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), otherwise known as the Feeney Amendment, which attempted “to make it more difficult for federal district judges to grant downward departures from the Guidelines and for such departures to be upheld on appeal.”²¹ The Feeney Amendment thus delineated the types of circumstances required to merit a family-based departure.²² Under this legislation, extraordinary circumstances occurred where a within-Guidelines sentence would “cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant’s family,” including where the defendant’s support was “irreplaceable” and loss of that support would “exceed[] the harm ordinarily incident to incarceration for a similarly situated defendant.”²³

In practice, however, the framework to determine downward departures based on extraordinary family circumstances lacked consistent standards—and thus generated inconsistent results.²⁴ Courts still started with the same premise: “if the departure simply reduces rather than eliminates the difficulty, the departure should not be awarded.”²⁵ This standard made judges mostly reluctant to use the “extraordinary” label where the defendant’s family ties or responsibilities might be significant, or the potential hit to the family powerful, but not sufficiently unusual to warrant a departure.²⁶ Alternatively, any departure would need to be meaningful enough to remove—not just soften—the potential blow to the defendant’s family.²⁷ But judges’ interpretations of these benchmarks

21. Alan Vinegrad, *The New Federal Sentencing Guidelines: The Sentencing Commission’s Response to the Feeney Amendment*, 16 FED. SENT’G REP. 98, 98 (2003).

22. See Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(b)(4), 117 Stat. 650-69 (2003).

23. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. n.1(B) (2003).

24. See Douglas A. Berman, *Addressing Why: Developing Principled Rationales for Family-Based Departures*, 13 FED. SENT’G REP. 274, 274 (2001) (describing Congress’ discussion of family circumstances in the Sentencing Reform Act as “not a model of clarity” and “limited and opaque”).

25. Markel et al., *supra* note 5, at 1172 n.147.

26. See, e.g., *United States v. Rodriguez-Velarde*, 127 F.3d 966, 969 (10th Cir. 1997) (holding that defendant’s familial responsibilities as the widowed father of three children did not merit a departure because “[a] sole, custodial parent is not a rarity in today’s society”) (citing similar holdings in the First, Third, Fourth, and Eighth Circuits); *United States v. Harrington*, 82 F.3d 83, 90 (5th Cir. 1996) (finding “nothing extraordinary regarding [offender’s] family responsibilities that would warrant a reduction in his sentence” because “innumerable defendants” could establish that a prison sentence “disrupts parental relationships”) (internal citation omitted); Berman, *supra* note 24, at 275 (“[A]ll the circuit Courts of Appeals have concluded that family circumstances are permissible grounds for a departure if and only if such circumstances are ‘unusual’ or ‘extraordinary.’”).

27. See, e.g., *United States v. Wright*, 218 F.3d 812, 815-16 (7th Cir. 2000) (“Today we conclude that a downward departure for extraordinary family circum-

varied widely, leading to conflicting applications of the same standards and unyielding results.

For example, sentencing courts construed the Guidelines Commentary's emphasis on caregiver irreplaceability differently. In some cases, to assess irreplaceability, judges looked beyond the defendant's immediate family (spouse, adult children) to extended family, friends, or paid caregivers who could help discharge caregiving responsibilities and thus prevent a family-based downward departure.²⁸ Courts even found the availability of monetary funds to constitute adequate reassurance that a child would be accounted for in her mother's absence.²⁹ In other cases, courts rejected proposed departures based on family circumstances when they were sentencing the sole caregiver and a substitute caregiver or money resources was not an option.³⁰ Alternatively, other courts found extraordinary circumstances *despite* the presence of an alternative caregiver,³¹ or determined that a defendant's support for an infirm family member

stances cannot be justified when, even after reduction, the sentence is so long that release will come too late to promote the child's welfare.”).

28. *See, e.g.,* United States v. Pereira, 272 F.3d 76, 82 (1st Cir. 2001) (reversing the district court's decision to grant a downward departure and finding that, although the defendant was the primary caregiver for his parents, the nature of that care (shopping, cleaning, food preparation) was “not so highly specialized as to make him difficult to replace” given the available “network of family, friends, and possible alternative care facilities”); *see also* United States v. McClatchey, 316 F.3d 1122, 1132-33 (10th Cir. 2003) (reversing the district court's decision to grant a family-based departure since there was “no evidence that [defendant], and only [defendant], can provide the help that his son needs” and noting that defendant could afford to pay for additional caregivers if necessary). For a discussion of how sentencing doctrine's insistence on looking beyond the nuclear family—not only recognizing but also assigning responsibilities to extended family members—diverges from the general position taken in family law, see Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 427-32 (2008).

29. *See* United States v. Scoggins, 992 F.2d 164, 166 (8th Cir. 1993) (affirming the district's court refusal to grant a family-based downward departure since “defendant's spendthrift trust allowed sufficient resources to provide professional help for the children during the mother's absence”).

30. *See* United States v. Leandre, 132 F.3d 796, 807-08 (D.C. Cir. 1998) (affirming denial of defendant's request for a family-based downward departure even though, at best, defendant's brother could care for defendant's two young children and, at worst, the children would be placed in foster care); Murray, *supra* note 28, at 431 (“It is only in rare cases where there is no alternative caregiver and no caregiving network in place that the defendant will be deemed ‘irreplaceable’ and the family circumstances considered sufficiently extraordinary to warrant a departure.”).

31. *See, e.g.,* United States v. Spero, 382 F.3d 803, 805 (8th Cir. 2004) (affirming a departure for defendant, whom the court deemed “critical” to his autistic child's well-being notwithstanding the availability of the child's mother).

met the “extraordinary” bar.³² Adding to the confused line of case law: a finding of extraordinary family circumstances did not necessarily turn on formal, blood-based familial connections.³³ To the contrary, despite the Guidelines’ attempt to prevent such flexibility, courts often exercised considerable discretion in assessing a defendant’s family circumstances and then sentencing him or her accordingly.

Such inconsistent interpretations generated widely disparate sentences for otherwise similarly situated defendants—a result that directly undermined the very catalyst for Congress’s original goal of uniformity in creating the Guidelines. The case of *United States v. Johnson*³⁴ is a prime example of this effect. In *Johnson*, the Second Circuit affirmed a ten-level downward departure for the defendant’s family circumstances: the defendant was the sole caregiver for three young children, including the defendant’s infant granddaughter born to her institutionalized twenty-one-year-old daughter.³⁵ This case is noteworthy because of its different treatment of two defendants, Purvis and Johnson, who were similarly situated—they both concocted and led a check-inflation scheme³⁶—but for Johnson’s family circumstances. The probation department calculated a range of 46 to 57 months for each defendant, but the court ultimately sentenced Purvis to 27 months and two years of supervised release and Johnson to home detention and three years of supervised release, notwithstanding their comparable contributions in spreading the check-inflation scheme to over a dozen other employees.³⁷ As one commenter noted, though this case “dramatizes the disparity” that can occur in the context of departures based on family ties, “the disparity that resulted here [was] at least as likely to arise across cases as within them.”³⁸ Thus, despite their relative rarity,³⁹ departures

32. See *United States v. Haverstat*, 22 F.3d 790, 796-97 (8th Cir. 1994) (affirming a departure for extraordinary family circumstances where defendant’s wife suffered from a psychiatric illness).

33. See *United States v. Sclamo*, 997 F.2d 970, 970-72 (1st Cir. 1993) (affirming a family-based downward departure for a defendant based on his intensive relationship with his live-in girlfriend’s son).

34. 964 F.2d 124 (2d Cir. 1992).

35. *Id.* at 129 (“The number, age, and circumstances of these children all support the finding that [defendant] faced extraordinary parental responsibilities.”).

36. Technically, Purvis, the defendant who received the higher sentence, recruited Johnson to the scheme, but the sentencing court rejected Johnson’s argument about having a “minor” role in the check-inflation scheme and instead construed her role as a leadership one, likely because the two worked together to spread the scheme to over a dozen other employees. See Brief for Petitioner-Appellant at 9, *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992) (Nos. 91-1515(L), 91-1541) (noting that Purvis told Johnson and others about the scheme Purvis had concocted).

37. *Id.* at 2, 7-11.

38. Markel et al., *supra* note 5, at 1147.

based on family circumstances, when found, subverted the Guidelines' foundational purpose of uniformity and predictability.

This pre-*Booker* approach—a paradoxical blend of narrow Guidelines and wide judicial discretion—generated frustration among judges who resented the high standard that the Guidelines demanded for a family-based departure, particularly in close-call fact patterns. Pre-*Booker* courts that were unable to construe the “extraordinary” barometer in a defendant’s favor were stuck with the range the Guidelines produced. For example, in *United States v. Gaskill*, the district judge “reluctantly” denied the defendant’s motion for a family-based downward departure, which the defendant had requested because he was the sole caretaker for his mentally ill wife⁴⁰—even though another court in a different district found that a similar fact pattern warranted a family-based departure.⁴¹ The *Gaskill* district court reasoned that the defendant’s family “situation is so common that [the sentencing judge could not] say that that impact[,] no matter how severe[,] was not within the contemplation of those who prepared and wrote the Guidelines.”⁴² Writing for the Third Circuit on appeal, Judge Weis found that a departure was warranted and remanded the case for resentencing.⁴³ Still, the textual calisthenics that Judge Weis performed in order to rationalize that result indicate just how difficult it was to meet the requirements of this exception:

“In this case, we have not only a policy statement, but an expression of congressional concern in 28 U.S.C. § 994(e) that gives the policy statement added legitimacy. *Nevertheless*, it is important to maintain the distinction between the rigidity of the Guidelines and the more or less hortatory nature of policy statements. *That said, however*, it is significant that the statute only indicates ‘the general inappropriateness’ of considering family ties and responsibilities. . . . Thus we do *not* have a clear prohibition. . . . *However*, the length of imprisonment mandated by the Guidelines and the nature of the offense are also circumstances that should be factored into the equation. . . . The circumstances here are in *sharp contrast* to the cases where departure has been found to be unwarranted.”⁴⁴

In other circumstances, where a family-based departure was deemed impossible, judges strongly decried the Guidelines. In *United States v. Jurado-*

39. Before *Booker* was decided, 0.66 percent of sentences were reduced for family ties and responsibilities; after *Booker* this increased to 1.12 percent. *See infra* text accompanying notes 75-76; *see also infra* Appendix I, Tables 1 and 2.

40. 991 F.2d 82, 84 (3d Cir. 1993); *see also* Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1578-79 (2012) (lamenting the lack of flexibility in a pre-*Booker* case in which Judge Chin empathized with the family struggles plaguing the defendant, a woman who was single-handedly raising six children).

41. *See* *United States v. Haverstat*, 22 F.3d 790, 796-97 (8th Cir. 1994).

42. 991 F.2d at 84.

43. *Id.* at 86.

44. *Id.* at 85 (emphasis added). For a similarly tortured analysis, see *United States v. Johnson*, 964 F.2d 124, 127 (2d Cir. 1992).

Lopez, Judge Gertner begrudgingly rejected the defendant's motion for a departure based on family obligations, writing that the case law in this area "is, in a word, cruel. It does not recognize the pain a mother feels for her newborn. The fact that a child has another caregiver (in this case, the defendant's husband) is all that matters."⁴⁵ Judge Weinstein echoed these sentiments in an academic article, calling the provisions about family-based departures "so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep."⁴⁶

The development of *Booker*, in allowing judges to deviate from the Guidelines, helped to address concerns about the all-or-nothing nature of the "extraordinary" family circumstances standard. However, as the following sections discuss, the current regime remains fraught with issues of non-uniformity and, more broadly, imprecision regarding the goals of family-based leniency and the ways such goals may clash with broader sentencing purposes.

II. BOOKER AND ITS PROGENY

This section offers a brief summary of post-*Booker* sentencing rulings as a backdrop against which to examine the current approach to family circumstances. Put simply, *Booker* rendered the Guidelines advisory, striking down the part of the Sentencing Reform Act that had made them mandatory. Sentencing courts must now follow a three-step process when calculating a sentence. First, the judge calculates the applicable range under the Guidelines, which "should be the starting point and the initial benchmark."⁴⁷ Second, the judge considers all of the § 3553(a) factors⁴⁸ and determines, based on an individualized assessment of the case, whether those factors support the sentence.⁴⁹ Third, if the judge decides that a deviation is warranted, she must "consider the extent of the deviation and ensure that the justification is sufficiently compelling"⁵⁰

In addition, the post-*Booker* Supreme Court ruled that appellate courts may not presume that an outside-Guidelines sentence is unreasonable, thereby con-

45. *United States v. Jurada-Lopez*, 338 F.Supp.2d 246, 254 n.17 (D. Mass. 2004).

46. Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 169 (1996).

47. *Gall v. United States*, 552 U.S. 38, 49 (2007).

48. In brief, these factors are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the sentences available; (4) the sentencing range established; (5) any pertinent policy statement; (6) the need to avoid unwarranted sentence disparities among similarly situated defendants; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a) (2012).

49. *Gall*, 552 U.S. at 49-50.

50. *Id.* at 50 (noting that "a major departure should be supported by a more significant justification than a minor one").

ferring greater discretion on district court judges who can incorporate case-specific factors more directly.⁵¹ Judges may presume that a within-Guidelines sentence is reasonable.⁵² Taken together with *Kimbrough v. United States*, which allows district courts to issue sentences that reflect policy disagreements with those embedded in the Guidelines,⁵³ these cases strengthened and protected judicial discretion in sentencing.

III. FAMILY CIRCUMSTANCES POST-*BOOKER*

The changes wrought by *Booker* and its progeny provided sentencing courts with flexibility to assess a defendant's family ties and responsibilities. "Delineating the boundaries of what counts as 'extraordinary' family ties and responsibilities [became] much easier in a post-*Booker* sentencing world."⁵⁴ As the Sixth Circuit put it:

Under the mandatory Guideline system, a defendant's only hope of a lesser sentence was a Guideline-based downward departure. . . . Now, because the Guidelines are no longer mandatory and the district court need only consider them along with its analysis of the §3553(a) factors, the decision to deny a Guidelines-based downward departure is a smaller factor in the sentencing calculus. Furthermore, many of the very factors that used to be grounds for a departure under the Guidelines are now considered by the district court—with greater latitude—under §3553(a).⁵⁵

Booker thus offered what many sentencing judges had wanted: relief from the impossible task of parsing multitudinous families and identifying circumstances that might rise to "extraordinary" levels.⁵⁶ The result has been the eschewal of such parsing and a tendency, or at least an opportunity, "to award discounts out of compassion for the defendant's family responsibilities."⁵⁷ Thus, *Booker* effectively eliminated the concept of a downward departure, and the task of elevating a defendant's family ties and responsibilities to an "extraordinary" level became moot.⁵⁸ Ironically, though *Booker* conferred greater discretion on judges to consider family circumstances in sentencing, most judges have not abused that discretion. Though concerns about wild disparities—the same concerns that catalyzed the Guidelines in the first place—have not been fully real-

51. *Id.* at 51 (noting that a court may consider the extent of a deviation "but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance").

52. *Rita v. United States*, 551 U.S. 338, 350-51 (2007).

53. 552 U.S. 85, 101, 111 (2007).

54. Markel et al., *supra* note 5, at 1174.

55. *United States v. McBride*, 434 F.3d 470, 476 (6th Cir. 2006).

56. *See supra* text accompanying notes 40–46.

57. PRIVILEGE OR PUNISH, *supra* note 8, at 48 (2009).

58. *See, e.g., United States v. Prokos*, 441 F. Supp. 2d 887, 891 (N.D. Ill. 2006) (noting that, per the Seventh Circuit, *Booker* "effectively eliminated the concept of a downward departure").

ized, those judges that have exercised wide discretion, particularly in the context of assessing family circumstances, have generated disparate results.

The *Booker*-based approach to family circumstances has enabled judges to draw on a defendant's family circumstances for reasons other than the Congressionally sanctioned purpose of protecting innocent family members from undue harm.⁵⁹ For example, in *United States v. Baker*, the Sixth Circuit upheld a variance that gave the defendant five years' probation rather than a sentence within the Guidelines range of 27 to 33 months.⁶⁰ The court was persuaded by the district court's emphasis on the defendant's "primary concern" for his children.⁶¹ Judge Siler, in explaining the panel's decision to "focus more on the reasons justifying the variance, rather than the extent" of it, suggested that since *Booker*, sentences may incorporate concern for traditional family values.⁶² Likewise, in *United States v. Jones*, the judge granted a downward departure, and issued the lowest possible sentence within that range, with the rationale that the defendant could be with his children as they started high school and thus promote "public safety."⁶³

Family circumstances have also been used to further an additional goal completely unrelated to the family: compensation for the sentencing disparity that results in immigration cases depending on participation in a fast-track program.⁶⁴ In *United States v. Galvez-Barrios*, for example, a Wisconsin district judge emphasized the defendant's family values—including a concern about abandoning his children—and the "financial difficulties" that would burden his family in his absence.⁶⁵ These considerations moved the judge to issue a below-Guidelines sentence, not only because of the relief a lower sentence would provide to his family but also because it would eliminate the disparity that would otherwise have resulted between this defendant and ones in fast-track districts.⁶⁶

59. See Berman, *supra* note 24, at 274 (describing Congress' discussion of family circumstances in the Sentencing Reform Act as "not a model of clarity" and "limited and opaque").

60. 502 F.3d 465, 467 (6th Cir. 2007).

61. *Id.*

62. *Id.* at 469. See also Brenda L. Tofte, *Booker at Seven: Looking Behind Sentencing Decisions: What Is Motivating Judges?*, 65 ARK. L. REV. 529, 568 (2012) (citing decisions where sentences were issued based on defendants' "strong connection with [their] children") (citation omitted).

63. Tofte, *supra* note 62, at 567-68.

64. Illegal reentry cases generally involve at least some discussion about a defendant's family circumstances, which are typically proffered as the reason for the reentry in the first place. See, e.g., *United States v. Trejo-Lara*, No. CR 07-1456 (JOB), 2008 WL 2397672, at *2 (D. N.M. Jan. 30, 2008) ("Many defendants charged with illegal reentry maintain that they return to the United States to help family members in trouble.").

65. 355 F. Supp. 2d 958, 960 (E.D. Wis. 2005).

66. *Id.* at 964. *But cf.* *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1263-65 (D. Utah 2005) (calling *Galvez-Barrios* "wrongly decided" and refusing to

This flexibility to draw on family circumstances to promote other sentencing goals—or any goal—reflects the extreme leeway that judges now have when construing family circumstances. Another decision from Wisconsin provides an apt example. In *United States v. Salazar-Hernandez*, the judge initially denied a defendant’s request for a downward departure but noted the “harshness” of the penalty the defendant faced and the judge’s inability under the then-mandatory Guidelines to “show mercy.”⁶⁷ *Booker* was issued while the defendant’s appeal was pending, ultimately allowing the judge to include the defendant’s motive of “assisting his wife and daughter” in his sentencing calculus.⁶⁸ The Eighth Circuit encountered a similar situation in *United States v. Bueno*, in which the court affirmed the lower court’s decision that the defendant’s wife’s illness justified a substantial downward departure, but at the same time described that decision as “stretch[ing] the allowable downward departure under [the] §5H1.6 [specific offender characteristics] to its very limits.”⁶⁹

This wide discretion to consider family circumstances has, in many ways, resulted in the same problem that plagued pre-*Booker* sentencing; namely, inconsistent sentences despite the presence of similar family-related factors. Though *Booker* blessed judicial discretion during sentencing, it did not advise judges on how to apply such discretion when considering family circumstances, or how to weigh recurring factors. For example, in *United States v. Garcia*, the Tenth Circuit remained unconvinced that defendant’s responsibility of caring for his ill wife and three children should warrant a lower sentence⁷⁰—a decision that is at odds with some⁷¹ and consistent with other⁷² pre-*Booker* cases. Equally striking is *United States v. Martin*, where the First Circuit affirmed a 91-month variance based on “the support that the defendant stood to receive from his family [and] personal qualities indicating his potential for rehabilitation.”⁷³ *Martin*, although an outlier case, reveals the dangerous potential for judges to use their newfound flexibility to conceive of alternative punishment plans that might nominally promote a sentencing goal but, in the aggregate, threaten to undermine the penal system altogether.

One bright side to this snapshot of cases is that a statistical analysis of federal sentences in the pre- and post- *Booker* eras indicates that fears about what judges might collectively do with their discretion have not been fully realized

use defendant’s family status specifically to compensate for the sentence disparity based on defendant’s lack of participation in a fast-track program).

67. 431 F. Supp. 2d 931, 933 (E.D. Wis. 2006).

68. *Id.* at 935.

69. 549 F.3d 1176, 1182 (8th Cir. 2008) (noting skepticism about the medical reports that the defendant submitted, but concluding that it was for the district court, which “obviously credited” the reports, to raise such concerns).

70. 189 F. App’x 819, 822 (10th Cir. 2006).

71. *See supra* notes 31–33 and accompanying text.

72. *See supra* note 30 and accompanying text.

73. 520 F.3d 87, 93 (1st Cir. 2008).

in the family circumstances context. According to data provided by the Sentencing Commission, judges are now somewhat more likely to consider family circumstances when issuing a lenient sentence. But even if family circumstances contribute to the sentence reduction, they are typically not the sole motivator.

Calculations of data from the Sentencing Commission show that before *Booker*, between 1996 and 2005,⁷⁴ downward departures were given in 11.59 percent of federal sentences.⁷⁵ However, only 0.66 percent of defendants received downward departures on the basis of family ties and responsibilities.⁷⁶ From 2005, when *Booker* was decided, through 2012, the proportion of sentences reflecting downward departures or variances has surprisingly not been higher than that of the pre-*Booker* era, at 10.21 percent overall.⁷⁷ However, the proportion of sentences whose downward departure or variance was based, at least in part, on family circumstances increased to 1.12 percent.⁷⁸ These numbers suggest that judges have not completely disregarded the Guidelines, as the great majority of sentences are still within the Guidelines range, but that judges are increasingly inclined to take into account a defendant's family circumstances when issuing a sentence.

The judicial weight now placed on family circumstances should not be overstated. Prior to *Booker*, judges were most likely to cite only one factor in granting a downward departure.⁷⁹ Post-*Booker*, the average number of reasons given for downward departures or variances has risen to 3.57 per sentence.⁸⁰ Thus, although family-based leniency has increased, it still accounts for a tiny proportion of federal sentences overall, especially given the high prevalence of parents in the federal prison population.⁸¹ It would be difficult to argue that widespread abuse of discretion based on considerations of family circumstances is occurring, although as this section has shown, particular cases demonstrate the residual flaws in our system and the need for improvement.

In sum, the doctrine surrounding family circumstances pre-*Booker* was, at best, inconsistent. Yet inconsistencies still abound. In the aftermath of *Booker*,

74. For 2005, this range includes only those cases that preceded *Booker*.

75. See *infra* Appendix I, Table 1.

76. *Id.*

77. See *infra* Appendix I, Table 2. This proportion has been gradually rising, from 5.85 percent in 2006 to 13.65 percent in 2012. *Id.*

78. *Id.*

79. The average number of reasons cited per downward departure pre-*Booker* from 1996 to 2005 was 1.15, meaning that the majority of downward departures were granted on the basis of a single factor. See *infra* Appendix I, Table 1.

80. See *infra* Appendix I, Table 2.

81. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN, DEP'T OF JUSTICE 1, 2 (Mar. 30, 2010), available at <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>, archived at <http://perma.cc/6K5V-6CM3>, archived at <http://perma.cc/6K5V-6CM3>.

judges are now likely to consider multiple factors in granting sentences.⁸² But this discretion may lead to deviation from the Guidelines even where dependent third parties' interests are not clearly at risk.⁸³ Such discretion becomes particularly problematic when it operates to deny a defendant "equality or proportionality" of treatment and, instead, produces "extremely wide deviations."⁸⁴ Thus, although judges are no longer cornered into issuing "cruel" sentences, it is unclear whether their newfound ability to consider family ties and responsibilities actually furthers the goals of sentencing.

IV. BALANCING FAMILY CIRCUMSTANCES AND SENTENCING GOALS

A. *Uniformity*

Judges construe the same or similar family circumstances in divergent ways. This tendency was true both before⁸⁵ and after⁸⁶ *Booker*, though the Commission's data suggests that *Booker* did not significantly exacerbate such disparities.⁸⁷ Moreover, insofar as the Guidelines are meant to achieve uniformity and avoid disparate sentences for similarly situated individuals,⁸⁸ uniformity for the sake of uniformity misses the point. This proposition is particularly salient in the family context, where the potential variation of intricate facts is infinite, and the traditional standard of similarly situated defendants may be too under-inclusive. Furthermore, the inherent subjectivity of family circumstances makes them especially subject to manipulation, and thus in need of seasoned officials—judges—to assess the family in a way that acknowledges and tries to reconcile these competing elements.⁸⁹ Thus, as *Booker* realized, judicial flexibility is crucial precisely because sentencing courts see all kinds of families up close and are best positioned to weigh facts and credibility. Though

82. For example, compare the number of reasons cited before *Booker* was decided, beginning in 1996 through January 11, 2005 (1.15) to the number of reasons cited after *Booker* was decided in 2005 through 2012 (3.57). See *infra* Appendix I, Tables 1 and 2.

83. See *supra* text accompanying notes 59–69.

84. *United States v. Milo*, 506 F.3d 71, 76 (1st Cir. 2007); see also 18 U.S.C. § 3553(a)(6) (2015) (instructing sentencing courts to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”).

85. See *supra* text accompanying notes 28–38.

86. See *supra* text accompanying notes 70–73.

87. See *supra* text accompanying notes 74–82.

88. See *Booker*, 543 U.S. at 250 (noting Congress's goal to “diminish[] sentencing disparity”).

89. See *Bueno*, 549 F.3d at 1182 (discussing district courts' “institutional advantage” in “finding and judging facts and in mak[ing] credibility determinations”).

appellate courts still maintain room to “rein in outliers and ensure some consistency,” deference to sentencing courts often, and rightly, trumps.⁹⁰

In addition, sentencing law’s overarching goal of uniformity may be at odds with the competing interests of specific third parties, often children. Judge Weinstein articulated this tension by explaining that “the punishment of one is in practical effect punishment of both,” and by adding that this problem is “especially true of the adverse psychological effects of deprivation of a parent’s presence during the initial years of development.”⁹¹ This perspective implicates the just deserts principle of sentencing and would urge judges to balance the need to punish an offense in a consistent manner with the imperative of avoiding unnecessary harm to innocent third parties. In this respect, the holding in *Booker* was an apt solution: it freed judges from confining departures to “extraordinary” family circumstances while allowing them to make more nuanced judgments.⁹²

However, this freedom also has the potential to confer a windfall on the defendant. Leniency toward primary caregivers leaves ample room for manipulation of the system and could create perverse incentives for criminal enterprises to employ caregivers. In addition, and crucially, that a defendant’s family suffers harm as a result of a given sentence may reflect a set of concerns that are simply beyond the scope of sentencing law. Sentencing goals and rules focus principally on the individual, both on the micro level—in terms of the Guidelines and how the sentencing proceeding is carried out—and on the macro level—in terms of the overarching retributive goals that inform sentencing doctrine. Moreover, sentencing decisions generate all sorts of collateral damage and disrupt multitudinous networks, including—but not only—the family. Why treat the familial network any differently? Because the essence of sentencing is the removal of an individual from society, and because, more broadly, most defendants have families affected by their sentence, it is questionable whether it is properly the role of sentencing law to consider specifically, much less grant leniency because of, the impact on a family.

Nonetheless, judges’ impulse to incorporate pertinent family-related factors into the general § 3553(a) analysis shows a widespread refusal to disregard

90. Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 *CARDOZO L. REV.* 775, 779 (2008). See also *Rita v. United States*, 551 U.S. 338, 350–51 (2007).

91. Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 *COLUM. J. GENDER & LAW* 169, 176 (1996). See also *PRIVILEGE OR PUNISH*, *supra* note 8, at 49 (“[T]he fact that offenders do not ‘deserve’ sentencing discounts in an abstract sense does not mean that accommodations should never be made Incarcerating a defendant with significant family responsibilities unquestionably imposes tremendous costs on innocent family members, and those costs are most severe when the defendant is an irreplaceable caregiver to vulnerable family members.”).

92. See generally *PRIVILEGE OR PUNISH*, *supra* note 8, at 50.

family effects completely. In addition, although the Guidelines encourage judges to separate defendants from their families, such a policy is impractical given the lack of private or state resources available to many defendants' families.⁹³ A workable approach is thus necessary to help judges balance these competing offense- and family-specific factors.

B. *Guidance*

Notwithstanding these points about the proper role, if any, of the defendant's family in sentencing, it is deeply unsatisfying that the doctrine has not seriously attempted to give meaningful guidance to judges when it comes to assessing a defendant's family circumstances. This dissatisfaction stems not from any notion that family circumstances must always be considered in the sentencing calculus, but from the reality that defendants often do raise arguments—which judges often consider—about family ties and responsibilities, and so the doctrine's failure to guide judges accordingly is striking. The lack of transparency surrounding family-based decisions, as well as the failure of sentencing law to address the potential for manipulation of this factor, is further troublesome. Whereas in other contexts, such as drugs, the Guidelines have provided judges with metrics, albeit poor ones, to sift through different substances and weights, when it comes to the family, judges are ill equipped to assess the situation beyond their experience in the area. In a way, this absence may reflect the attitude—as articulated in the Guidelines Commentary—that family ties and responsibilities are indeed beyond the scope of sentencing law.

But given the frequency with which justifications for departures based on family circumstances arise, and the dearth of standards with which to assess them, how do we balance all of these competing concerns and interests? As this paper has shown, instructing judges to ignore such circumstances is unrealistic, and mandatory guidelines have proven an unsuccessful mechanism. *Booker* helped matters, enabling judges to calculate a sentence that could at least mitigate potential harms to third-party family members. But the current regime has not provided a clear framework for when and, crucially, how much leniency should be granted when calibrating such remedies. Conversely, the absence of such a framework has generated sentencing disparities, a lack of certainty among all parties involved, and a regime that frustrates broader sentencing goals.

Family law may seem like a natural source of guidance considering its experience in dividing families into various metrics in order to assign legal principles to them. But the two are not truly parallel. Whereas family law is often concerned with balancing a number of interests—safeguarding familial integrity,⁹⁴ preserving parental rights,⁹⁵ and promoting the best interests of the

93. *Id.* at 51.

94. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977).

child⁹⁶—sentencing law focuses first and foremost on the individual defendant. Moreover, if the problem with sentencing law’s treatment of a defendant’s family circumstances is the lack of guidance, family law, given its tortured reliance on the amorphous best interests of the child standard,⁹⁷ is no panacea. Even where family law has attempted to apply rigidity—specifically, in determining child custody awards—courts quickly disregard these rules when other compelling interests are implicated.⁹⁸ Thus, injecting standards that defer to parental rights or children’s interests are unhelpful given that the priorities embedded there are so different from those in sentencing doctrine.

Alternatively, Professor Dan Markel has proposed that leniency be provided in “compelling circumstances . . . when an offender is the sole and irreplaceable caregiver for minors or for aged or ailing persons with whom the defendant has an established relationship of caregiving.”⁹⁹ In an attempt to soften the blow to defendants’ families, Markel recommends “greater use of time-delayed sentence[s]” that would allow the caregiver to remain in that role until, for example, minor children reach the age of majority, aging parents or ill spouses are deceased or improve in health, or alternative care arrangements can be arranged.¹⁰⁰ These recommendations rightly address judges’ concerns about alleviating undue harm to innocent third parties while minimizing the windfall on defendants. However, there are major issues with the manageability and cost of delaying or having to redo sentencing proceedings, not to mention the victim’s and society’s right to the incapacitation of criminals and speedy retribution. Thus, such a solution ultimately subverts fundamental sentencing goals.

A better solution may be a set of advisory standards to provide sentencing courts with actual guidance when assessing family circumstances. Although family circumstances necessarily vary in their particulars, they typically hew to the same general contours involving children, elderly parents, and spouses. It would therefore be feasible for a group of legal, developmental, and medical experts to produce a set of family-tailored adjustments in many of the family circumstances frequently encountered by judges. These advisory metrics would be based on the number of relevant third parties, their relationships with the de-

95. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

96. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

97. See generally Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (noting, *inter alia*, that “the determination of what is ‘best’ or ‘least detrimental’ for a particular child is usually indeterminate and speculative”).

98. See, e.g., *Smith v. Smith*, 67 P.3d 351, 354 (Okla. Civ. App. 2002) (the court noted that a father’s child support obligation should increase based on his newly higher income, but then adjusted the obligation based on its determination of what the child actually needed; the court dubbed this position the “three pony rule,” noting that “no child needs three ponies, no matter that the parents might easily afford to provide them.”).

99. PRIVILEGE OR PUNISH, *supra* note 8, at 50.

100. *Id.* at 51.

fendant, and relevant information related to their dependence including age (for children), life expectancy (for ill or aged family members), medical and developmental problems, the type and degree of support previously offered by the defendant, and the presence of other available caregivers. Like the Guidelines, such standards could provide valuable “mental anchors, starting points that influence how judges think about cases and where they wind up,” and thus “increase consistency and transparency.”¹⁰¹

The major stakeholders in sentencing stand to benefit from such a system. Though advisory standards could not guarantee uniformity, they might close gaps between similarly situated defendants, offer judges a shared starting point when confronting complicated or extreme family circumstances, and enhance transparency—and thus confidence—in the entire sentencing process. Defendants and their dependents could use this framework to set expectations about a potential sentence that might be useful in plea negotiations. Prosecutors could use this framework in sentencing arguments, in contrast to the current regime, where, in one attorney’s experience, they do not make explicit reference to the defendant’s personal circumstances, but “only urge that the court impose a sentence within the applicable Guidelines range.”¹⁰²

It would certainly be difficult to create such standards. There would be disagreement on the appropriate devisors, the relevant factors to consider, and the weight to give each factor. Other problems include the cost of creating and implementing such a system, as well as the pitfalls of introducing yet another variable to the sentencing equation. Such standards also risk favoring nuclear families, reinforcing socioeconomic biases, and giving defendants a free pass so long as they find a way to fit any familial mold. Most important, a greater reliance on granular metrics hazards diverting even more attention from the individual defendant with whom sentencing law is primarily concerned.

A one-size-fits-all solution is impossible. However, a one-size-fits-many framework that maintains judicial flexibility would be preferable to the ad hoc approach to family-based sentence adjustments that has dominated sentencing law. Though objective factors are properly the main focus of sentencing, the subjective factor of the family is impossible to ignore. We must provide judges with effective tools to assess this factor consistently in service of sentencing uniformity and the overarching goals of punishment.

101. Bibas & Klein, *supra* note 90, at 779–80.

102. Chin, *supra* note 40, at 1570.

APPENDIX I

Table 1 Part 1 of 2. Pre-Booker Sentencing Statistics

Fiscal Year	Total Number of Cases	Total Number of Downward Departures	Percentage of Cases Where Downward Departures were Granted ¹⁰³	Total Number of Downward Departures Due to Considerations of Family Ties and Responsibilities	Percentage of Cases Where Family Ties and Responsibilities Led to Downward Departures ¹⁰⁴	Total Number of Reasons for Downward Departures	Number of Reasons per Downward Departure ¹⁰⁵
1996 ¹⁰⁶	42,436	4,201	9.90%	290	0.68%	4,672	1.11
1997 ¹⁰⁷	48,848	5,574	11.41%	322	0.66%	6,301	1.13
1998 ¹⁰⁸	50,754	6,509	12.82%	363	0.72%	7,542	1.16
1999 ¹⁰⁹	55,557	8,304	14.95%	492	0.89%	9,683	1.17
2000 ¹¹⁰	59,846	9,286	15.52%	439	0.73%	10,288	1.11

103. The data included in this column was calculated by dividing the “Total Number of Downward Departures” by the “Total Number of Cases.”

104. The data included in this column was calculated by dividing the “Total Number of Downward Departures Due to Considerations of Family Ties and Responsibilities” by the “Total Number of Cases.”

105. The data included in this column was calculated by dividing the “Number of Reasons for Downward Departures” by the “Total Number of Downward Departures.”

106. All of the sentencing statistics from 1996 included in this Table are from *Reasons Given By Sentencing Courts for Upward and Downward Departures (October 1, 1995, through September 30, 1996)*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1996), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1996/TAB-2425.pdf>, archived at <http://perma.cc/3CPM-JQBA>.

107. All of the sentencing statistics from 1997 included in this Table are from *Reasons Given By Sentencing Courts for Upward and Downward Departures, Fiscal Year 1997*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1997), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1997/TABLE2425.pdf>, archived at <http://perma.cc/D2QS-LP9L>.

108. All of the sentencing statistics from 1998 included in this Table are from *Reasons Given By Sentencing Courts for Upward and Downward Departures, Fiscal Year 1998*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1998), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1998/table2425.pdf>, archived at <http://perma.cc/U8PH-EK4J>.

109. All of the sentencing statistics from 1999 included in this Table are from *Reasons Given By Sentencing Courts for Upward and Downward Departures, Fiscal Year 1999*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1999), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1999/table2425.pdf>, archived at <http://perma.cc/55JM-5WJS>.

110. All of the sentencing statistics from 2000 included in this Table are from *Reasons Given By Sentencing Courts for Upward and Downward Departures, Fiscal Year 2000*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2000), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2000/table-2425.pdf>, archived at <http://perma.cc/4AXM-5F6W>.

Table 1 Part 2 of 2. Pre-Booker Sentencing Statistics

Fiscal Year	Total Number of Cases	Total Number of Downward Departures	Percentage of Cases Where Downward Departures were Granted	Total Number of Downward Departures Due to Considerations of Family Ties and Responsibilities	Percentage of Cases Where Family Ties and Responsibilities Led to Downward Departures	Total Number of Reasons for Downward Departures	Number of Reasons per Downward Departure
2001 ¹¹¹	59,897	10,026	16.74%	418	0.70%	11,044	1.10
2002 ¹¹²	64,366	9,865	15.33%	409	0.64%	10,995	1.11
2003 ¹¹³	70,258	4,896	6.97%	430	0.61%	5,950	1.22
2004 ¹¹⁴	70,068	3,270	4.67%	326	0.47%	4,516	1.38
2005 ¹¹⁵	18,788	752	4.00%	74	0.39%	1,098	1.46
Totals	540,818	62,683	11.59%	3,563	0.66%	72,052	1.15

111. All of the sentencing statistics from 2001 included in this Table are from *Reasons Given By Sentencing Courts for Upward and Downward Departures, Fiscal Year 2001*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2001), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2001/tab2425.pdf>, archived at <http://perma.cc/B7TD-Y4TW>.

112. All of the sentencing statistics from 2002 included in this Table are from *Reasons Given By Sentencing Courts for Upward and Downward Departures, Fiscal Year 2002 (Prior to Enactment of the PROTECT Act)*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2002), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2002/tab2425.pdf>, archived at <http://perma.cc/L56H-KGEP>.

113. All of the sentencing statistics from 2003 included in this Table are from *Reasons Given By Sentencing Courts for Other Departures Below the Guideline Range, Fiscal Year 2003*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2003), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2003/table25A.pdf>, archived at <http://perma.cc/MCY8-3LEE>. The U.S. Sentencing Commission in 2003 divided the statistics into government initiated (such as pursuant to plea agreements) and non-government initiated (including family ties); only the non-government initiated downward departures were analyzed here. *See id.*

114. Data reported for 2004 was separated based on whether sentencing occurred before or after the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004). The data in this table includes the sum of both pre- and post-*Blakely* data. All of the 2004 sentencing statistics from before *Blakely* included in this Table are from *Reasons for Departures Below the Guideline Range, Fiscal Year 2004 Pre-Blakely*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2004), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2004/table25pre.pdf>, archived at <http://perma.cc/W25B-MGKY>, and all of the sentencing statistics from after *Blakely* included in this Table are from *Reasons for Departures Below the Guideline Range, Fiscal Year 2004 Post-Blakely*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2004), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2004/table25post.pdf>, archived at <http://perma.cc/FGT8-GDUG>.

115. The Sentencing Statistics data included herein in Table 1 is from October 1, 2004 through January 11, 2005, before *Booker* was decided in 2005, and it is found at *Reasons for Departures Below the Guideline Range, Fiscal Year 2005 Pre-Booker*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2005), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2005/table25_pre.pdf, archived at <http://perma.cc/9PGE-5LFE>.

Table 2 Part 1 of 2. Post-Booker Sentencing Statistics

Fiscal Year	Total Number of Cases	Total Number of Downward Departures	Percentage of Cases Where Downward Departures were Granted ¹¹⁶	Total Number of Downward Departures Due to Considerations of Family Ties and Responsibilities	Percentage of Cases Where Family Ties and Responsibilities Led to Downward Departures ¹¹⁷	Total Number of Reasons for Downward Departures	Number of Reasons per Downward Departure ¹¹⁸
2005 ¹¹⁹	53,674	3,199	5.96%	214	0.40%	8,718	2.73
2006 ¹²⁰	72,585	4,243	5.85%	284	0.39%	12,214	2.88
2007 ¹²¹	72,865	4,957	6.80%	468	0.64%	16,707	3.37
2008 ¹²²	76,478	6,678	8.73%	666	0.87%	23,022	3.45
2009 ¹²³	81,372	9,358	11.50%	1,063	1.31%	33,040	3.53

116. The data included in this column was calculated by dividing the “Total Number of Downward Departures” by the “Total Number of Cases.”

117. The data included in this column was calculated by dividing the “Total Number of Downward Departures Due to Considerations of Family Ties and Responsibilities” by the “Total Number of Cases.”

118. The data included in this column was calculated by dividing the “Number of Reasons for Downward Departures” by the “Total Number of Downward Departures.”

119. The Sentencing Statistics data included herein in Table 2 is from January 12, 2005 through September 30, 2005, after *Booker* was decided in 2005, and it can be found at *Reasons for Departures Below the Guideline Range, Fiscal Year 2005 Post-Booker*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2005), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2005/table25b_post.pdf, archived at <http://perma.cc/9NL5-WJ77>.

120. All of the sentencing statistics from 2006 included in this Table are from *Reasons for Departures Below the Guideline Range, Fiscal Year 2006*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2006), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2006/table25b.pdf>, archived at <http://perma.cc/LH8B-HH3C>.

121. All of the sentencing statistics from 2007 included in this Table are from *Reasons Given By Sentencing Courts for Sentences Below the Guideline Range with Booker/18 U.S.C. § 3553, Fiscal Year 2007*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2007), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2007/Table25b.pdf>, archived at <http://perma.cc/74CH-RKLZ>.

122. All of the sentencing statistics from 2008 included in this Table are from *Reasons Given By Sentencing Courts for Sentences Below the Guideline Range with Booker/18 U.S.C. § 3553, Fiscal Year 2008*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2008), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2008/Table25b.pdf>, archived at <http://perma.cc/XBQ5-CHE5>.

123. All of the sentencing statistics from 2009 included in this Table are from *Reasons Given By Sentencing Courts for Sentences Below The Guideline Range with Booker/18 U.S.C. § 3553, Fiscal Year 2009*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2009), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2009/Table25b.pdf>, archived at <http://perma.cc/3GEX-9E3Y>.

Table 2 Part 2 of 2. Post-Booker Sentencing Statistics

Fiscal Year	Total Number of Cases	Total Number of Downward Departures	Percentage of Cases Where Downward Departures were Granted	Total Number of Downward Departures Due to Considerations of Family Ties and Responsibilities	Percentage of Cases Where Family Ties and Responsibilities Led to Downward Departures	Total Number of Reasons for Downward Departures	Number of Reasons per Downward Departure
2010 ¹²⁴	83,946	11,116	13.24%	1,312	1.56%	40,076	3.61
2011 ¹²⁵	86,201	11,371	13.19%	1,470	1.71%	44,351	3.90
2012 ¹²⁶	84,173	11,487	13.65%	1,393	1.65%	44,574	3.88
Totals	611,294	62,409	10.21%	6,870	1.12%	222,702	3.57

124. All of the sentencing statistics from 2010 included in this Table are from *Reasons Given By Sentencing Courts for Sentences Below the Guideline Range with Booker/18 U.S.C. § 3553, Fiscal Year 2010*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2010), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table25b.pdf>, archived at <http://perma.cc/8TK4-ZHBP>.

125. All of the sentencing statistics from 2011 included in this Table are from *Reasons Given By Sentencing Courts for Sentences Below the Guideline Range with Booker/18 U.S.C. § 3553, Fiscal Year 2011*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2011), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table25b.pdf>, archived at <http://perma.cc/XWR5-DMAD>.

126. All of the sentencing statistics from 2012 included in this Table are from *Reasons Given By Sentencing Courts for Sentences Below the Guideline Range with Booker/18 U.S.C. § 3553, Fiscal Year 2012*, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2012), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table25b.pdf>, archived at <http://perma.cc/3MHF-4533>.