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### A Continuing Conundrum: Applying Consistent Gender-Neutral Criteria to Federal Sentencing Departures Based on Family Ties and Responsibilities

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## Notes

### A CONTINUING CONUNDRUM: APPLYING CONSISTENT GENDER-NEUTRAL CRITERIA TO FEDERAL SENTENCING DEPARTURES BASED ON FAMILY TIES AND RESPONSIBILITIES

#### I. INTRODUCTION

Under the federal sentencing regime, district court judges must first consult the United States Sentencing Guidelines (“Guidelines”) in order to determine a defendant’s sentence.<sup>1</sup> However, a defendant may move for a downward departure from that sentencing range based on family ties and responsibilities.<sup>2</sup> In doing so, the defendant asks the judge to decrease his or her sentence in light of the important role that the defendant plays in the family unit.<sup>3</sup>

Take for example three defendants who reside in different jurisdictions and received convictions for the same offense, conspiracy to distribute marijuana.<sup>4</sup> All three defendants are prosecuted under federal law, all are first time offenders with no other criminal history, and all move for downward departures based on their family ties and responsibilities.<sup>5</sup> The first defendant, Linda Smith, resides in New Mexico and is the sole financial provider for her unemployed husband and three children under the age of eight, one of whom suffers from a

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<sup>1</sup> See *infra* Part II.A (providing an overview of how district courts utilize the Guidelines for sentencing determinations).

<sup>2</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (2012) (providing that family ties and responsibilities is not an “ordinarily relevant” basis for departure); see also *infra* Part II.C (discussing downward departures based on family ties and responsibilities in federal sentencing).

<sup>3</sup> See *infra* Part II.C (providing relevant history regarding downward departures based on family ties and responsibilities under the Guidelines).

<sup>4</sup> The following example is fictional and does not refer to actual convictions.

<sup>5</sup> Although courts consider many different factors in assessing sentencing determinations, the following example simplifies the sentencing process in order to highlight the issues related to sentencing departures based on family ties and responsibilities. For this example, assume that each defendant would face the same potential term of imprisonment according to a proper calculation of the sentence under the Guidelines. See *infra* Part II.A (providing an overview of the way in which district courts apply the Guidelines).

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heart defect that requires attentive care.<sup>6</sup> Linda works long hours to ensure that she can provide for her family, including the cost of medical bills, but also works hard to ensure that she plays an active role in her children's lives. The second defendant, John Doe, resides in New York and works two jobs to provide for his wife and two children.<sup>7</sup> John's oldest son, age five, has special needs, and John plays an active role in his son's therapy and counseling. The third defendant, Michelle Johnson, resides in Virginia and is a single mother of two children.<sup>8</sup> Michelle's children, ages ten and thirteen, spend most of their time with their grandparents who reside in the same town.

At sentencing, both Michelle and Linda successfully obtained family ties departures from the applicable guidelines sentence. Although the courts in both John's and Michelle's hearings applied the same standard, the outcome was different. At John's hearing the judge determined that providing primary financial support was not enough to justify a family ties departure. At Michelle's hearing, on the other hand, the judge determined that Michelle's status as the sole caretaker for two children warranted departure.<sup>9</sup> Conversely, at Linda's hearing, the judge determined departure was proper because the loss of Linda's significant

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<sup>6</sup> Linda Smith's residence in New Mexico places her within the jurisdiction of the U.S. District Court for the District of New Mexico. In this jurisdiction, the court determines family ties and responsibilities departures based on whether the facts in a given case take the defendant's situation out of the "ordinary." *United States v. Herrera-Gonzalez*, No. CR 07-1602 JB, 2008 WL 2371564, at \*7 (D.N.M. Feb. 6, 2008), *aff'd*, 304 Fed.App'x 694 (10th Cir. 2008).

<sup>7</sup> John Doe's residence in New York places him within the jurisdiction of the U.S. District Court for the Southern District of New York. In this jurisdiction, the court determines family ties departures based on whether the facts of a given case will result in "exceptional hardship" to the defendant's family upon incarceration. *United States v. White*, 301 F. Supp. 2d 289, 294 (S.D.N.Y. 2004).

<sup>8</sup> Michelle Johnson's residence in Virginia places her within the jurisdiction of the U.S. District Court for the Eastern District of Virginia. Here, the court applies an "exceptional hardship" standard similar to the U.S. District Court for the Southern District of New York. *See United States v. Velez*, 249 F. Supp. 2d 716, 721 (E.D. Va. 2002) (recognizing that the Fourth Circuit utilizes the "exceptional hardship" standard when considering family ties departures (citing *United States v. Bell*, 974 F.2d 537, 539 (4th Cir. 1992)).

<sup>9</sup> The juxtaposition of John's and Michelle's cases highlight the issue of gender stereotyping undertones inherent in a judge's exercise of discretion in departing based on family ties. *See supra* Parts III.B.1-2 (analyzing judicial reliance on gender stereotypes in family ties departures). Because the current family ties departure standard is largely subjective, judges are free to base their determinations on assumptions of male and female roles within the family unit rather than the actual roles played by individual defendants in their own respective families. *See Patricia M. Wald, "What About the Kids?": Parenting Issues in Sentencing*, 8 FED. SENT'G REP. 137, 138 (1995) (recognizing the risk that sentencing judges may rely on gender stereotypes and view women as family caretakers over men when making sentencing determinations).

financial contributions rendered her family circumstances “out of the ordinary.”<sup>10</sup>

Downward departures based on a defendant’s family ties have long been a controversial and murky area in federal sentencing.<sup>11</sup> As evidenced in the above example, district courts lack a controlling standard by which to analyze family ties departures.<sup>12</sup> Despite amendments to the Guidelines that might aid courts in applying consistent and meaningful family ties departures, courts often apply departure standards that fail to consider the devastating impact of a defendant’s incarceration on innocent family members.<sup>13</sup> However, even district courts that successfully focus on this impact often fail to apply the departure standard in a meaningful and objective way.<sup>14</sup> The current

<sup>10</sup> This determination reflects the disparities that exist between similarly situated defendants attempting to move for downward departures based on family ties. Although Linda and John share similar family circumstances, the courts in their jurisdictions apply dissimilar departure standards. Thus, Linda is successful under her jurisdiction’s departure standard while John is not. See *infra* Part III.A (analyzing unwarranted disparities resulting from the application of differing departure standards).

<sup>11</sup> See, e.g., Amy Farrell, *Distinguishing Among the “Unhappys”*: *The Influence of Cultural Gender Norms on Judicial Decisions to Grant Family Ties Departures*, 13 FED. SENT’G REP. 268, 268–73 (2001) (analyzing family ties departures across three different legal standards); Placido G. Gomez, *The Struggle Against Unwarranted Uniformity: The Evolution of Federal Sentencing Departures Based on Extraordinary Family Circumstances the Case of Low-Level Drug Offenders*, 21 T. MARSHALL L. REV. 77, 77–93 (1995) (arguing against unwarranted uniformity in family ties departure determinations); Myrna S. Raeder, *Gender-Related Issues In a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 716–26 (2006) (arguing that family ties departures should focus on non-intuitive gender-related issues that would favor maintenance of the family); Dana L. Shoenberg, *Departures for Family Ties and Responsibilities After Koon*, 9 FED. SENT’G REP. 292, 292–95 (1997) (examining the effects of *Koon v. United States* on family ties departures); Tracy Tyson, *Downward Departures Under the Federal Sentencing Guidelines: Are Parenthood and Pregnancy Appropriate Sentencing Considerations?*, 2 S. CAL. REV. L. & WOMEN’S STUD. 577, 599–606 (1993) (arguing that sentencing judges should consider parental responsibilities and pregnancy in determining family ties departures); Jody L. King, Note, *Avoiding Gender Bias in Downward Departures for Family Responsibilities Under the Federal Sentencing Guidelines*, 1996 ANN. SURV. AM. L. 273, 273–312 (arguing that the exercise of wide discretion to depart based on family ties under the standard in *Koon v. United States* runs the risk of gender bias entering into federal sentencing).

<sup>12</sup> See *infra* Part II.C (providing the differing family ties departure standards in and among federal circuit courts following *Koon v. United States* and various amendments to the Guidelines section regarding family ties).

<sup>13</sup> See *infra* Part II.B (discussing the negative effects of incarceration on a defendant’s family as well as society).

<sup>14</sup> See Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591, 594 (2009) (“If judicial discretion is to be consistent with serving justice in the criminal justice system, a judge must exercise discretion free from bias.”). Ramirez notes that because federal judges bring a variety of personal and legal experiences to the bench, it is imperative that the judiciary recognize that judges’ unconscious or subconscious associations may influence decision making. *Id.* at 594–95.

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discretionary departure system results in unwarranted disparities between similarly situated defendants and judicial reliance on gender stereotypes, contrary to the goals of uniformity and justice in the exercise of such discretion.<sup>15</sup>

This Note begins by providing a brief history and overview of the Guidelines.<sup>16</sup> Part II further looks to the harmful consequences faced by family members upon a defendant's incarceration and explores the development of family ties departures under the Guidelines.<sup>17</sup> Part III of this Note analyzes the flaws and disparities that have resulted from the lack of a uniform and objective family ties departure standard.<sup>18</sup> Finally, Part IV recommends amending the Guidelines to reflect a uniform and objective family ties departure standard that would guide district courts in applying an objective departure analysis.<sup>19</sup>

## II. BACKGROUND

Judicial discretion, which is fundamentally inherent in the U.S. criminal justice system, is of utmost importance when federal district

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Another critic specifically recognizes that the exercise of judicial discretion to depart from the Guidelines could entail judicial application of gender bias. King, *supra* note 11, at 274. King further asserts that application of gender bias in family ties departures would result in disparities between male and female offenders as women take on more family responsibilities compared to men. *Id.* at 290-94. Thus, King argues that courts should apply objective factors in assessing an offender's family ties. *Id.* at 300-02; *see infra* Parts III.B (analyzing the courts' failure to objectively inquire into the effect of a defendant's incarceration on his or her innocent family members).

<sup>15</sup> *See infra* Parts III.A-B (analyzing disparities in family ties departures between similarly situated defendants due to a lack of uniform departure standards and the presence of gender stereotyping in family ties departure decisions); *infra* note 33 (discussing the Guidelines' role in effectuating the goal of uniformity in sentencing); *see also* United States v. Booker, 543 U.S. 220, 246 (2005) (discussing the continuing importance of sentencing uniformity in judicial discretion exercised under the Guidelines). One critic argues that eliminating bias from the exercise of judicial discretion is fundamentally important to achieving "any notion of justice." Ramirez, *supra* note 14, at 595. The Model Code of Judicial Conduct ("Model Code") further exemplifies this idea under canon 2, which requires that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2010). The Model Code also requires judges to "perform all duties of judicial office fairly and impartially" and "without bias or prejudice." *Id.* at R. 2.2, 2.3. In doing so, the Model Code explains that "[a] judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute." *Id.* at R. 2.3 cmt.

<sup>16</sup> *See infra* Part II.A (explaining the history and operation of the Guidelines).

<sup>17</sup> *See infra* Parts II.B-C (discussing the harmful effects of incarceration on the family as well as the history of family ties departures).

<sup>18</sup> *See infra* Part III (analyzing the continuing flaws in the courts' application of family ties departures).

<sup>19</sup> *See infra* Part IV (providing proposed amendments to Guidelines section 5H1.6).

court judges maintain control over a defendant's liberty through the sentencing process.<sup>20</sup> The U.S. Supreme Court's ruling in *United States v. Booker* brought the issue of judicial discretion to the forefront of the criminal justice system by restoring discretion in federal sentencing under the Guidelines.<sup>21</sup> While federal judges maintain discretion over sentencing under the Guidelines, uniformity in sentencing remains a key component in federal criminal jurisprudence.<sup>22</sup> This Note focuses on the exercise of judicial discretion to depart downward from the Guidelines based on a defendant's family ties and concludes that courts have failed to apply a uniform and objective departure standard.<sup>23</sup>

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<sup>20</sup> Ramirez, *supra* note 14, at 594–95. Discretion is a crucial component of the justice system because the legislature typically drafts laws sufficiently general enough to encompass a wide variety of unlawful acts. *Id.* at 594. Further, the executive exercises great discretion in prosecuting individuals. *Id.* Thus, the judiciary must maintain discretion in order to restrain the power of the legislative and executive branches from becoming abusive. *Id.* In a sentencing context, one critic notes that “[t]he nature and degree of discretion accorded to a judge in determining the sentence of a convicted criminal offender bears directly on the coherence and the legitimacy of any criminal justice system.” William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and Its Progeny*, 40 CONN. L. REV. 631, 633 (2008). Berry contends that unlimited judicial sentencing discretion yields unsatisfactory consequences because it results in disparities between offenders with similar culpability. *Id.* However, completely eliminating this discretion would also yield unsatisfactory results because the role of the judge would be usurped, thus leading to unjust outcomes. *Id.*

<sup>21</sup> *United States v. Booker*, 543 U.S. 220, 245 (2005). The Court held that the once mandatory Guidelines are now advisory in nature and that federal sentencing judges should consider the Guidelines while “tailor[ing] the sentence in light of other statutory concerns.” *Id.*; see Berry, *supra* note 20, at 650–61 (discussing the impact of *Booker* and its progeny on the Guidelines); see also *infra* Part II.C.2 (discussing *Booker*'s impact regarding family ties departures under the Guidelines). Berry recognizes two major theories regarding the role the Guidelines played in sentencing after the *Booker* decision. Berry, *supra* note 20, at 651–53. Under the first approach, the Guidelines were considered mandatory for all intents and purposes despite the Court's holding in *Booker*. *Id.* at 651–52. On the other end of the spectrum, the second approach treated *Booker* as reviving the indeterminate sentencing regime that existed prior to the Guidelines. *Id.* at 652–53.

<sup>22</sup> See *Booker*, 543 U.S. at 246 (“The . . . approach, which we now adopt, would (through severance and excision of two provisions) make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.”); see also Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures*, 69 GEO. WASH. L. REV. 57, 57–58 (2000) (discussing the importance of uniformity in federal sentencing). The Guidelines were originally promulgated in response to what Congress viewed as widespread and unwarranted sentencing disparity. *Id.* at 57–58. The statutory scheme under which the Guidelines were promulgated was designed to promote uniformity in federal sentencing. *Id.* at 58.

<sup>23</sup> For a discussion of the issues in courts' application of family ties departures under the Guidelines, see *infra* Part III.

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First, Part II.A provides the history and basic functioning of the Guidelines.<sup>24</sup> Next, Part II.B looks to the detrimental effects of a defendant's sentence on the defendant's dependents and family members.<sup>25</sup> Then, Part II.C explains federal sentencing jurisprudence concerning downward departures from the Guidelines based on a defendant's family ties.<sup>26</sup> Part II.C.1 discusses the way district courts have applied the Supreme Court's departure standard in *Koon v. United States* to family ties departures.<sup>27</sup> Part II.C.2 then describes how amendments to the Guidelines pursuant to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act") and the Court's decision in *Booker* have affected courts' approaches to family ties departures in federal sentencing.<sup>28</sup>

A. *The United States Sentencing Guidelines*

Prior to the Sentencing Reform Act of 1984 ("SRA"), federal judges practiced indeterminate criminal sentencing.<sup>29</sup> Under this method, sentencing judges maintained broad discretion limited only by statutory minimum and maximum sentencing ranges established by Congress.<sup>30</sup>

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<sup>24</sup> See *infra* Part II.A (providing the history and function of the Guidelines). This Note concentrates on the evolution of family ties departures over time; thus, this Note will refer to multiple sets of the Guidelines.

<sup>25</sup> See *infra* Part II.B (discussing the family harms associated with incarceration).

<sup>26</sup> See *infra* Part II.C (discussing family ties departures under the Guidelines).

<sup>27</sup> See *infra* Part II.C.1 (discussing the impact of the *Koon* decision on family ties departures).

<sup>28</sup> See *infra* Part II.C.2 (discussing amendments to the Guidelines pursuant to the PROTECT Act and *Booker* and their impact on family ties departures).

<sup>29</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.); Gilles R. Bissonnette, Comment, "Consulting" the Federal Sentencing Guidelines After *Booker*, 53 UCLA L. REV. 1497, 1502 (2006); see Berry, *supra* note 20, at 636-37 (discussing the four main objectives of sentencing during the era of indeterminate sentencing). The indeterminate sentencing system arose out of policy favoring rehabilitative opportunities for inmates. Bissonnette, *supra*, at 1502; see Berry, *supra* note 20, at 636-37 (listing the four objectives of indeterminate sentencing as retribution, incapacitation, rehabilitation, and deterrence). Rehabilitation ideals reflected the belief that inmates should be given the opportunity to better themselves and become productive members of society. Bissonnette, *supra*, at 1502. In light of this goal, sentencing judges were free to determine "the goals of sentencing, the factors to be considered, and how much weight to accord [certain] factors, as well as the ultimate punishment" on a case-by-case basis. *Id.* Thus, under this regime, Congress allowed the judiciary to consider virtually unlimited information in determining an offender's sentence. Berry, *supra* note 20, at 635.

<sup>30</sup> Bissonnette, *supra* note 29, at 1502. As long as the sentence fell within the range set by Congress, the sentence was afforded "virtually unconditional deference on appeal." *Id.*; see also *Koon v. United States*, 518 U.S. 81, 92 (1996) (explaining how federal judges wielded wide discretion when deciding a criminal defendant's sentence prior to the SRA).

However, because such discretion often resulted in unwarranted sentencing disparity, Congress enacted the SRA in an effort to increase uniformity in federal criminal sentencing.<sup>31</sup> Through the SRA, Congress created the United States Sentencing Commission (“the Commission”) and charged it with creating a comprehensive set of sentencing guidelines aimed at decreasing disparity by providing suggested sentencing ranges for each class of persons convicted.<sup>32</sup> The Commission, in turn, promulgated the Guidelines with the goal of uniformity in sentencing.<sup>33</sup>

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<sup>31</sup> See Bissonnette, *supra* note 29, at 1502–03 (discussing criticisms of the indeterminate sentencing regime); see also U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. 3 (2012) (providing Congress’ three primary objectives in enacting the SRA). The introduction to the Guidelines provides that the SRA’s ultimate objective is to create an “effective, fair sentencing system” through uniformity, honesty, and proportionality in sentencing. *Id.*; see also *Koon*, 518 U.S. at 92 (providing that federal judges’ once wide discretion in criminal sentencing led to the perception that similarly situated offenders received “unjustifiably” differing sentences); *Sentencing Guidelines*, 37 GEO. L.J. ANN. REV. CRIM. PROC., 667, 667 n.2033 (2008) (explaining that the federal sentencing system in place prior to the SRA received criticism, in part, for resulting in widely different punishments for similarly situated offenders). Critics of indeterminate sentencing argued that it created an arbitrary system based on the whims of sentencing judges rather than the law. Bissonnette, *supra* note 29, at 1502; Goldsmith & Porter, *supra* note 22, at 57–58 (arguing that the SRA is “designed to promote uniformity by curtailing judicial discretion”). For example, Berry notes that indeterminate sentencing led to disparities and inconsistencies in sentencing due to unlimited judicial discretion combined with broad statutory sentencing ranges. Berry, *supra* note 20, at 638. One federal judge described judicial discretion under this regime as “almost wholly unchecked and sweeping . . . [which is] terrifying and intolerable for a society that professes devotion to the rule of law.” *Id.* (quoting Judge Marvin Frankel) (internal quotation marks omitted).

<sup>32</sup> *Koon*, 518 U.S. at 92. Congress specifically charged the Commission with the task of “rationaliz[ing] the sentencing rules, to bring to bear the latest scientific studies in effectuating all of the purposes of punishment, and to do the kind of legwork in determining the appropriate sentencing practices that Congress had been unable or unwilling to do.” Bissonnette, *supra* note 29, at 1504–05. Each class of “convicted persons” is determined by comparing offense behavior with offender characteristics. U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. 2 (2012).

<sup>33</sup> See *Koon*, 518 U.S. at 92 (discussing the history behind the Guidelines). The SRA sought to remedy the “unjustifi[ed] and ‘shameful’ consequences” of the indeterminate sentencing system, namely “the great variation among sentences imposed by different judges upon similarly situated offenders.” *Misretta v. United States*, 488 U.S. 361, 366 (1988) (quoting S. Rep. No. 98-225 at 38, 65 (1983)). The Commission introduced the first set of Guidelines three years after President Ronald Reagan signed the SRA into law in 1984. Bissonnette, *supra* note 29, at 1505. The SRA mandates that “[t]he Commission periodically shall review and revise . . . the guidelines” as part of its duties. 28 U.S.C. § 994(o) (2006). The Guidelines also provide that “[b]y monitoring when courts depart from the guidelines and . . . analyzing their stated reasons for doing so . . . the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.” U.S. SENTENCING GUIDELINES MANUAL, ch.1, pt. A, introductory cmt. 4(b) (2012); see also Goldsmith & Porter, *supra* note 22, at 62–66 (providing a brief historical



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The Guidelines set forth forty-three base offense levels as well as six criminal history categories.<sup>34</sup> These offense levels and criminal history categories, when collectively considered, culminate in a sentencing table containing designated sentencing ranges.<sup>35</sup> The SRA originally mandated that district courts adhere to the Guidelines when determining an offender's sentence.<sup>36</sup> Under that application, the judge must first determine which base offense level correlates to the defendant's statutory conviction.<sup>37</sup> Once the judge accounts for adjustments, the judge must next determine the offender's designated criminal history category.<sup>38</sup> Finally, the judge must consult the sentencing table to

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background regarding the purpose, creation, and implementation of the Guidelines in federal sentencing).

<sup>34</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (2012) (setting forth the sentencing table). To determine a defendant's base offense level, the sentencing judge must look to the Guidelines provision that correlates to the defendant's conviction. *Id.* § 1B1.1(a)(1). The sentencing judge then determines the defendant's criminal history category by calculating criminal history points based on factors such as prior sentences, the defendant's age at the time of a prior offense, and whether the defendant commits an offense while currently serving a sentence. *Sentencing Guidelines, supra* note 31, at 685-88.

<sup>35</sup> *Sentencing Guidelines, supra* note 31, at 668. To offer a simple example, suppose John Doe is convicted of voluntary manslaughter under 18 U.S.C. § 1112(a). According to Guidelines section 2A1.3, a voluntary manslaughter conviction carries with it a base offense level of twenty-nine. U.S. SENTENCING GUIDELINES MANUAL § 2A1.3(a) (2012). If this constitutes Doe's first criminal offense, he would have zero criminal history points and fall within the first criminal history category. See *id.* § 4A1.1 (providing the framework for calculating criminal history points); *cf. id.* ch. 5, pt. A (providing the sentencing table). The offense level analyzed with the criminal history category in the sentencing table identifies that the applicable sentencing range is 87 to 108 months imprisonment. *Id.*

<sup>36</sup> 18 U.S.C. § 3553(b)(1) (2000). Under the SRA:

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

*Id.* The mandatory nature of this provision was held unconstitutional by the Supreme Court in *United States v. Booker*. 543 U.S. 220, 259-65 (2005); see also *infra* Part II.C.2 (discussing the Court's ruling in *Booker* and its impact on the Guidelines).

<sup>37</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(1) (2012); *Sentencing Guidelines, supra* note 31, at 668. A judge may also adjust the defendant's base offense level according to "the defendant's role in the offense," "the defendant's role in any obstructive conduct," "the relationship between the counts of which the defendant was convicted," "the defendant's acceptance of responsibility for the offense," and "the level of victim harm." *Id.* at 668.

<sup>38</sup> U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1(a)(6), 4A1.1 (2012); *Sentencing Guidelines, supra* note 31, at 685. Each criminal history category in the sentencing table covers two to three criminal history points. U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (2012). A defendant may receive an increase in his or her criminal history category if he or she has been previously convicted or if he or she "commits another offense while

determine the defendant's applicable sentencing range.<sup>39</sup> Because the Commission intended for each guideline range to carve out a "heartland" of typical cases correlating to the offense and the offender, district courts are only to consider whether a departure from the range is warranted in cases involving unusual or atypical circumstances.<sup>40</sup>

The Commission also offers guidance as to what factual circumstances may warrant a departure from the Guidelines by categorizing potential factors as prohibited, encouraged, and discouraged for sentencing determination.<sup>41</sup> A court may never consider

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serving any criminal justice sentence." *Sentencing Guidelines, supra* note 31, at 685–88. Assignment of criminal history points is based on a defendant's actual judgment rather than time served. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 cmt. n.2 (2012).

<sup>39</sup> *Sentencing Guidelines, supra* note 31, at 668; see U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (2012) (providing the Guidelines sentencing table).

<sup>40</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. 4(b) (2012) (discussing departures from the Guidelines). The Guidelines section that deals with departures states:

- (1) IN GENERAL.—The sentencing court may depart from the applicable guideline range if—
  - (A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or
  - (B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

*Id.* § 5K2.0 policy statement. The Commission allowed for judicial discretion in departures even under the mandatory Guidelines because of the difficulty it faced in creating a set of guidelines that encompassed all conduct relevant to sentencing determinations. *Id.* at ch. 1, pt. A, introductory cmt. 4(b). Further, the Commission does not believe that courts will depart from the Guidelines very often in light of the "heartland" concept. *Id.*; see *Koon v. United States*, 518 U.S. 81, 93–94 (1996) (finding that the Commission did not adequately take unusual cases into consideration when promulgating sentencing guidelines so that atypical factors may provide a basis for departure). Sentencing judges have discretion to depart upwards or downwards under certain circumstances but are required to explain their reasons for exercising such discretion in accordance with the Guidelines. *Sentencing Guidelines, supra* note 31, at 695–96.

<sup>41</sup> *Koon*, 518 U.S. at 93–95. The Commission precludes district courts from departing downward from the Guidelines based on prohibited factors. *Sentencing Guidelines, supra* note 31, at 697; see *infra* note 42 (listing factors prohibited by the Commission for sentencing consideration). Further, the Guidelines discourage downward departures based on the defendant's personal attributes unless the case at hand is "exceptional." *Sentencing Guidelines, supra* note 31, at 697; see *infra* note 44 (listing factors that are discouraged in sentencing consideration). Finally, the Guidelines encourage downward departures based on mitigating factors. *Sentencing Guidelines, supra* note 31, at 697; see *infra* note 43 (listing

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certain factors, such as race or national origin, as a basis for departure.<sup>42</sup> However, a departure may be warranted when an encouraged factor is present to a significantly higher degree than already accounted for in the applicable guideline.<sup>43</sup> Discouraged factors, on the other hand, are not typically relevant in considering whether a departure is warranted, and thus the Commission directs district judges to base departures on discouraged factors only in “exceptional” cases.<sup>44</sup> A defendant’s family ties are not typically considered relevant in sentencing departures and thus are analyzed under this standard.<sup>45</sup>

*B. The Effects of Imprisonment on a Defendant’s Family Members and Dependents*

For defendants convicted and sentenced under the Guidelines, incarceration affects not only their own lives but the lives of their family members and dependents as well.<sup>46</sup> Families often suffer intense

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factors that are encouraged in sentencing consideration). Courts may also depart upwards from the Guidelines in limited circumstances where “aggravating factors [are] associated with the defendant’s conduct such as death, physical injury, extreme psychological injury, abduction or unlawful restraint.” *Sentencing Guidelines*, *supra* note 31, at 701–02.

<sup>42</sup> *Koon*, 518 U.S. at 93. Prohibited factors include “race, sex, national origin, creed, religion, socioeconomic status,” “lack of guidance as a youth,” “drug or alcohol dependence,” and “economic hardship.” *Id.*

<sup>43</sup> *Id.* at 95. Because encouraged factors entail circumstances that the Commission may have taken into account when formulating a guideline, a court may also take these factors into account when it finds that the applicable guideline has not. *Id.* at 94–95. The Guidelines encourage departures based on mitigating factors, including “the victim’s conduct, lesser harm, coercion and duress, voluntary disclosure of an undiscovered offense, or diminished capacity in the commission of a nonviolent offense.” *Sentencing Guidelines*, *supra* note 31, at 697–99.

<sup>44</sup> See *Koon*, 518 U.S. at 95 (providing a brief overview of the Commission’s commentary concerning discouraged factors). The Guidelines discourage departures based on the defendant’s “age; educational or vocational skills; mental and emotional conditions; physical condition (including drug abuse or dependence); gambling addiction; employment record; family ties and responsibilities; and military, civic, charitable, or public service.” *Sentencing Guidelines*, *supra* note 31, at 697 n.2101.

<sup>45</sup> U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (2012); see *infra* Part II.C (discussing family ties departures under the Guidelines).

<sup>46</sup> See, e.g., Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 811–15 (2011); Kimberly L. Alderman, *The Long Arm of the Law: Incarceration and the Ordinary Family*, 55 HOW. L.J. 293, 294–96 (2012); Justin Brooks & Kimberly Bahna, “It’s a Family Affair” – *The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 277–84 (1994); Eleanor Bush, *Considering the Defendant’s Children at Sentencing*, 2 FED. SENT’G REP. 194, 194–98 (1990); Susan E. Ellingstad, Note, *The Sentencing Guidelines: Downward Departures Based on a Defendant’s Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 980–81 (1992). This impact is especially prevalent today as imprisonment rates have more than tripled in the last thirty years, with the prison population reaching its highest pinnacle in 2007 with one in every one hundred adult

emotional, financial, and physical difficulties upon the separation from a loved one due to incarceration.<sup>47</sup> Specifically, incarceration of a family member severely impacts the individual's children because the loss of a parent often damages a child's psychological and financial well-being.<sup>48</sup>

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citizens incarcerated. Alderman, *supra*, at 294; see *Key Facts at a Glance, Imprisonment Rate Data Table*, BUREAU JUST. STATS., <http://bjs.ojp.usdoj.gov/content/glance/tables/incrttab.cfm> (last updated Sept. 31, 2011) (showing that 139 in every 100,000 adult citizens were incarcerated in 1980 compared to 502 in every 100,000 incarcerated in 2009); see also PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 2 tbl.1 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf> (showing that 506 in every 100,000 adult citizens were incarcerated in 2007).

<sup>47</sup> Brooks & Bahna, *supra* note 46, at 280–81. Brooks and Bahna explain that inmates' families suffer harsh economic difficulties in losing the few resources at their disposal because incarceration often affects those families in the lowest socioeconomic position in society. *Id.* at 280. These families are also physically affected when forced to move from their homes and closer to those who are incarcerated. *Id.* In addition to physical family separation, incarceration of loved ones leads to family members feeling isolated while trying to cope with their loss. *Id.* at 281. Another critic poses that the exponential increase in imprisonment over the last thirty years has resulted in incarceration touching the lives of "all ordinary families" rather than only those that are socioeconomically disadvantaged. Alderman, *supra* note 46, at 294. Alderman also explains that incarceration of one family member disrupts the family unit as a whole. *Id.* The private family sphere is intruded upon because family contact and support are regulated by the state while the family member is incarcerated. *Id.* at 294–95. Further, the incarcerated family member's desocialization often leads to high divorce rates and further family disruption. *Id.* at 295; Brooks & Bahna, *supra* note 46, at 283.

<sup>48</sup> Abramowicz, *supra* note 46, at 812. In 2007, the number of minors with a parent in prison increased 79% since 1991 to a total of roughly 1.7 million minors affected. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2008), available at <http://bjs.gov/content/pub/pdf/pptmc.pdf>; SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007, at 2 (2009), available at [http://sentencingproject.org/doc/publications/publications/inc\\_incarcerated\\_parents.pdf](http://sentencingproject.org/doc/publications/publications/inc_incarcerated_parents.pdf). That number represented 2.3% of minors in the United States. GLAZE & MARUSCHAK, *supra*, at 1. Between 1991 and 2007, the number of mothers in prison has grown 122% and the number of fathers in prison by 76%. SCHIRMER ET AL., *supra*, at 2. One critic notes that the effects of parental incarceration are most detrimental when a child is young but that the loss of a parent to incarceration is detrimental to a child at any age because he or she may experience behavior problems, low self-esteem, difficulty in school, and difficulty in maintaining relationships when older. Abramowicz, *supra* note 46, at 812. Thus, dependents with special needs would face additional difficulty in coping with a parent's incarceration. King, *supra* note 11, at 305–06. Further, incarceration of the parent who provides primary financial support will cause extreme financial difficulties for the child. Abramowicz, *supra* note 46, at 812; see GLAZE & MARUSCHAK, *supra*, at 17 app. tbl.9 (showing that 67.2% of federal inmates provided primary financial support to their children and that 54% of state inmates provided primary financial support to their children in 2004). Another critic recognizes that children of incarcerated parents often experience behavior problems similar to children whose parents die or divorce. Brooks & Bahna, *supra* note 46, at 281. This feeling of loss may cause children to experience educational and emotional problems, as well as feelings of anger and embarrassment. *Id.* at 281–82. However, Abramowicz recognizes that a parent's incarceration may benefit a child,

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Children of incarcerated parents are more likely to face incarceration later in life as well.<sup>49</sup> Although the defendant's incarceration is seen as just punishment for the crimes committed, the effect of his or her imprisonment is often viewed as inflicting unwarranted harm on innocent family members.<sup>50</sup>

Under the Guidelines, courts may consider the impact of incarceration on the defendant's family members in determining the

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especially in cases involving a history of abuse or criminal activity. Abramowicz, *supra* note 46, at 812; see SCHIRMER ET AL., *supra*, at 6 ("In some instances, such as a child living in a home where substance abuse was prevalent, the incarceration of a parent may actually result in a more stable environment for the child if a responsible relative is able to take on the child's care.").

<sup>49</sup> Alderman, *supra* note 46, at 295; Brooks & Bahna, *supra* note 46, at 282; see also Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, BERKELEY J. GENDER L. & JUST. 78, 93 (2011) (noting that children of incarcerated parents have a higher chance of being incarcerated as adults); Tiffany J. Jones, Comment, *Neglected by the System: A Call for Equal Treatment for Incarcerated Fathers and Their Children—Will Father Absenteeism Perpetuate the Cycle of Criminality?*, 39 CAL. W. L. REV. 87, 97 (2002) (providing that male youths whose fathers have been incarcerated are at an increased risk of incarceration). Kennedy notes that children of incarcerated parents are more likely than other children at the same socioeconomic level to engage in criminal activity. Kennedy, *supra*, at 93. Further, children of incarcerated parents are also "more likely to engage in drug use, early sexual activity, and truancy" compared to children whose parents are not incarcerated. *Id.* Kennedy further notes that although these consequences may be due in part to the loss of the incarcerated parent, the issues experienced by the children could also be attributed to the child's placement in foster care. *Id.*

<sup>50</sup> See Abramowicz, *supra* note 46, at 838 ("[C]hildren are 'innocents,' and as such do not deserve to be punished for the 'sins' of their parents."); Alderman, *supra* note 46, at 294-96 (discussing the harm to the family caused by an individual's incarceration); Brooks & Bahna, *supra* note 46, at 277-84 (discussing harm to the family when one of its members is incarcerated); Bush, *supra* note 46, at 194-98 (discussing the harm to a defendant's children upon incarceration); Ellingstad, *supra* note 46, at 980-81 (discussing the harm of incarceration to the family). In addition to family harm, critics also focus on the general harm to society stemming from incarceration. Brooks & Bahna, *supra* note 46, at 284-85; Ellingstad, *supra* note 46, at 980-81. According to Brooks & Bahna, society bears the cost of incarceration because children of inmates are more likely to engage in criminal activity. Brooks & Bahna, *supra* note 46, at 284. Further, society must bear the financial cost of supporting the inmate's children or spouse through the public welfare system. *Id.*; see SCHIRMER ET AL., *supra* note 48, at 9 (discussing the risk that inmates will lose their parental rights due to incarceration). Finally, society bears the cost of incarceration due to the high rate of recidivism among parent offenders. Brooks & Bahna, *supra* note 46, at 285. Ellingstad similarly recognizes that society bears the cost of foster care, permanent family dissolution where the court terminates a parent offender's parental rights, and dependence on government aid where the family's primary financial source is incarcerated. Ellingstad, *supra* note 46, at 981. In light of these costs, Ellingstad argues that courts should weigh the cost of incarceration against the benefit of incarceration when determining whether to depart based on family ties. *Id.* at 980-81.

appropriate sentence.<sup>51</sup> Such consideration provides sentencing judges with discretion to consider the defendant's family in light of the additional harm that incarceration may inflict on society, the family, and the defendant himself.<sup>52</sup> However, such a system inherently creates an opportunity for the imposition of a lesser sentence, potential unfairness, and abuse of such system by parents because the likelihood of deterrence has been reduced.<sup>53</sup> Sentencing judges often recognize the tension

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<sup>51</sup> See *infra* Part II.C (discussing downward departures from the Guidelines based on the defendant's family ties and responsibilities); see also *infra* note 57 (providing the text of Guidelines section 5H1.6 addressing departures based on family ties and responsibilities).

<sup>52</sup> See Abramowicz, *supra* note 46, at 835-40 (detailing arguments in favor of family consideration in sentencing due to the additional harms inflicted on the defendant's family and the defendant himself); Bush, *supra* note 46, at 195 (providing the principles driving consideration of the defendant's children at sentencing); Raeder, *supra* note 11, at 698-704 (advocating for judicial focus on the effect of incarceration to the family). Bush argues that the purposes of the criminal justice system, including deterrence, incapacitation, and rehabilitation, support consideration of the defendant's children at sentencing because the judge must weigh the cost of the sentence against its social benefit in achieving those goals. Bush, *supra* note 46, at 194. Bush further claims that the SRA condones consideration of the defendant's family at sentencing. *Id.* at 195. Finally, Bush claims that consideration of the defendant's family would promote consistency in sentencing and would effectuate the least punitive sentence required under 18 U.S.C. § 3553(a). *Id.* at 194-95; see *infra* note 93 (providing the text of the sentencing factors enumerated in 18 U.S.C. § 3553(a)). In Bush's view, a parent's sentence of incarceration is not equal to that of a non-parent because of the impact that sentence will have on the inmate's children. Bush, *supra* note 46, at 194. Further, because parental incarceration would inflict additional punishment compared to nonparent inmates, § 3553(a) requires the court to consider family circumstances so that the punishment is no greater than necessary. *Id.* at 195.

<sup>53</sup> See Abramowicz, *supra* note 46, at 840-42 (presenting arguments against considering the interests of the defendant's children in sentencing); Douglas A. Berman, *Addressing Why: Developing Principled Rationales for Family-Based Departures*, 13 FED. SENT'G REP. 274, 274 (2001) ("[I]t is difficult to provide a principled explanation for exactly why a criminal offender should merit a lesser punishment simply because he or she has a spouse or children or other relatives."). Abramowicz also recognizes arguments that claim there is nothing inherently unfair in failing to consider a defendant's family at sentencing because the defendant could easily have avoided or foreseen those detrimental consequences to his or her family. Abramowicz, *supra* note 46, at 841. In line with this argument, skeptics further argue that taking a defendant's family into consideration during sentencing fails to deter parents from engaging in criminal activity and may actually encourage such activity. *Id.* Finally, critics argue that this standard would undermine the entire legitimacy of criminal law by immunizing parents from penal consequences. *Id.* at 842; see, e.g., *United States v. Norton*, 218 F. Supp. 2d 1014, 1020 (E.D. Wis. 2002) (holding that the female defendant's family circumstances were extraordinary where the defendant was the sole caregiver for two young children and also assisted her nineteen-year-old son with college expenses and health insurance); *United States v. Dyce*, 975 F. Supp. 17, 22 (D.D.C. 1997) (holding that the female defendant's family circumstances were extraordinary where the defendant was the sole caretaker of her three children); see also *United States v. Cage*, 451 F.3d 585, 596 (10th Cir. 2006) (reasoning that to consider the effects of a single mother's incarceration on her children "would effectively immunize single mothers from criminal sanction aside from supervised release"); *United States v. Louis*, 300 F.3d 78, 82 (1st Cir.

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between addressing the effect of the defendant's incarceration on family ties and ensuring that the defendant does not receive a lesser sentence based on the mere presence of those family ties.<sup>54</sup> Any system that allows significant judicial discretion creates an inherent lack of uniformity and requires a consistent and well-informed departure standard for courts to effectively strike a balance in sentencing decisions.<sup>55</sup>

C. *Downward Departures Based on Family Ties and Responsibilities*

Guidelines section 5H1.6 provides for sentencing departures based on a defendant's family ties and responsibilities.<sup>56</sup> Family ties, however, are considered a discouraged factor in determining whether the circumstances warrant a downward departure.<sup>57</sup> In *Koon v. United States*, the Supreme Court first established the standard by which district courts should analyze whether a discouraged factor would warrant departure in any given case.<sup>58</sup> The standard was widely criticized as being

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2002) (“[S]ingle mother status is not an ‘idiosyncratic’ circumstance, distinguishing her case from the ‘mine-run.’” (quoting *United States v. Chestna*, 962 F.2d 103, 107103, 107 (1st Cir. 1992))); *United States v. Patterson*, 17 F. App'x 496, 497 (8th Cir. 2001) (holding that the defendant's status as a single mother of an infant was not extraordinary enough to remove the case from the “heartland” of the applicable guideline); *United States v. Brand*, 907 F.2d 31, 33 (4th Cir. 1990) (“A sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children.”).

<sup>54</sup> Compare *United States v. Hernandez-Castillo*, No. CR 06-1537 JB, 2007 WL 1302577, at \*6 (D.N.M. Apr. 18, 2007) (“The Court believes that the focus of U.S.S.G. § 5H1.6 is on the loss of caretaking and financial support for the defendant's family that a defendant's incarceration would cause.”), with *United States v. Justice*, No. CR 09 3078 JB, 2012 WL 394455, at \*11 (D.N.M. Jan. 23, 2012) (“Many defendants whom the Court sentences to a term of imprisonment have young children. . . . This pattern is a common one that appears before the Court.”), and *United States v. Tilga*, No. CR 09 0865 JB, 2012 WL 1192526, at \*3 (D.N.M. Apr. 5, 2012) (“[T]he court sees many defendants with children, and . . . must put these circumstances into context. . . . Children often suffer from the choices their parents make . . .”).

<sup>55</sup> See *infra* Part IV (providing recommended amendments to the Guidelines to reflect a uniform standard for family ties and departures that would include objective factors).

<sup>56</sup> U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (2012).

<sup>57</sup> *Id.* The relevant policy statement provides: “[i]n sentencing a defendant . . . family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.” *Id.*

<sup>58</sup> *Koon v. United States*, 518 U.S. 81, 95-96 (1996). The Court stated that in considering discouraged factors, courts could depart on this basis where “the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.” *Id.* at 96. The Court also clarified that where the factor is forbidden courts may not consider that factor in sentencing. *Id.* at 95-96. Further the Court directed judges to consider encouraged factors in sentencing where such factor is not already taken into account by the applicable guideline. *Id.* at 96. Finally, the Court stated that “after considering the structure and theory of both relevant individual guidelines and

unworkable and vague, resulting in differing interpretations among the federal courts when applying it.<sup>59</sup> Although the Guidelines have since undergone amendments, namely the Feeney Amendment pursuant to the PROTECT Act and the now advisory role of the Guidelines under the Supreme Court's decision in *Booker*, district courts have maintained a similar family ties departure standard.<sup>60</sup>

Part II.C.1 first provides the general departure standard handed down by the Supreme Court in *Koon* and looks to the way in which district courts interpreted that standard in the realm of family ties departures.<sup>61</sup> Part II.C.2 then provides an overview of the amendments to the Guidelines pursuant to the PROTECT Act and the Supreme Court's decision in *Booker*.<sup>62</sup> Finally, Part II.C.2 also looks to the way in which these amendments have affected district courts' family ties departure analysis.<sup>63</sup>

#### 1. The Guidelines Departure Standard Under *Koon*

In *Koon*, the Supreme Court suggested a multi-step analysis to guide district courts in determining whether a departure from the applicable sentencing guideline is warranted.<sup>64</sup> According to *Koon*, the sentencing judge should first consider whether unusual factual circumstances exist

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the Guidelines taken as a whole," courts must decide whether an unmentioned factor sufficiently takes the case out of the heartland. *Id.* (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)).

<sup>59</sup> See, e.g., Goldsmith & Porter, *supra* note 22, at 73–74 (attributing the circuit split regarding family ties and responsibility departures to the vague heartland concept provided in *Koon*); Shoenberg, *supra* note 11, at 294 (describing the distinction in *Koon* between "ordinary" and "extraordinary" as a "mission impossible" (internal quotation marks omitted)).

<sup>60</sup> See *United States v. Booker*, 543 U.S. 220, 245 (2005) (holding that the Guidelines, as amended, are now effectively advisory); see also *infra* note 87 and accompanying text (providing the text of the amendments to 2003 Guidelines section 5H1.6 pursuant to the 2003 PROTECT Act).

<sup>61</sup> See *infra* Part II.C.1 (providing the Supreme Court's analysis in *Koon* as well as the district courts' departure standards following that decision).

<sup>62</sup> See *infra* Part II.C.2 (providing an overview of amendments made to the Guidelines pursuant to the PROTECT Act and *Booker*).

<sup>63</sup> See *infra* Part II.C.2 (providing examples of family ties departure standards among the district courts following amendment to the Guidelines).

<sup>64</sup> *Koon v. United States*, 518 U.S. 81, 95–96 (1996). The Supreme Court in *Koon* also explained that the proper standard of review for departure decisions was abuse of discretion. *Id.* at 100. The Court reasoned that "[a] district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." *Id.* at 98. Behind its rationale, the Court noted that "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." *Id.*



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in a given case, so as to take it out of the “heartland” of typical cases.<sup>65</sup> If the circumstances render the case atypical, the sentencing court should then consider whether the Commission forbids, encourages, or discourages departures on the basis of the factors presented.<sup>66</sup> The Court further explained that the sentencing judge should not grant a departure if the circumstances fall within one of the Commission’s prohibited categories.<sup>67</sup> However, a sentencing court may depart on the basis of encouraged factors if those circumstances have not already been adequately taken into account in formulating the applicable guideline.<sup>68</sup> Finally, a sentencing court may depart on the basis of discouraged factors when the factual circumstances separate the case from typical cases involving that factor or when the discouraged factor is present to an “exceptional degree.”<sup>69</sup>

The Commission has never considered a criminal defendant’s family ties as a relevant offender characteristic for the purposes of sentencing.<sup>70</sup>

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<sup>65</sup> *Id.* at 95. The *Koon* Court recommended district courts compare the present case to other similar Guidelines cases when determining whether the circumstances are sufficient to remove it from the “heartland.” *Id.* at 98.

<sup>66</sup> *Id.*; *see supra* notes 42–44 and accompanying text (discussing departures based on prohibited, encouraged, and discouraged factors). Despite the Court’s instructions in *Koon*, district courts developed different standards of analysis for determining departures. *See, e.g.,* *United States v. White*, 301 F. Supp. 2d 289, 295–96 (S.D.N.Y. 2004) (considering first whether the court possesses the power to depart based on the defendant’s family circumstances, then, whether the court should exercise its discretion to depart by balancing the defendant’s family circumstances against statutory concerns, and finally, to what extent the court should depart in light of policy considerations); *United States v. Colp*, 249 F. Supp. 2d 740, 742 (E.D. Va. 2003) (setting forth an expounded version of the *Koon* analysis); *United States v. Pearson*, 282 F. Supp. 2d 941, 943 (E.D. Wis. 2003) (considering first the defendant’s family circumstances, then whether a departure from the applicable guideline would spare unnecessary family hardship, and finally the purposes of sentencing).

<sup>67</sup> *Koon*, 518 U.S. at 95–96; *see supra* note 42 (listing those factors the Commission prohibits for sentencing consideration).

<sup>68</sup> *Koon*, 518 U.S. at 96; *see supra* note 43 (listing factors the Commission encourages for sentencing consideration).

<sup>69</sup> *Koon*, 518 U.S. at 96; *see supra* note 44 (listing factors the Commission discourages for sentencing consideration). The Court informed district courts to apply the same standard to cases in which encouraged factors, those already taken into account by the applicable guideline, removed the case from the norm. *Koon*, 518 U.S. at 96. The Court further advised courts that when an unmentioned factor is present in the facts of a case, the sentencing court should decide whether or not it removes the case from the heartland so that a departure is warranted. *Id.* According to the Court, sentencing courts should consider the purpose behind the Guidelines as well as the Commission’s expectation that unmentioned factors will very rarely warrant departure when making this determination. *Id.*

<sup>70</sup> U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (2012) (“In sentencing a defendant . . . family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.”). In the first Guidelines manual, the Commission similarly provided that “[f]amily ties and responsibilities . . . are not ordinarily relevant in

Thus, under the *Koon* analysis, family ties are a discouraged sentencing factor.<sup>71</sup> In applying the *Koon* standard, the district court must find that family circumstances are extraordinary enough to remove the case from the “heartland” of cases encompassed by the applicable sentencing range, thus permitting a downward departure.<sup>72</sup> However, despite the SRA’s goal of increased sentencing uniformity, drawing the line between ordinary and extraordinary under the *Koon* standard proved difficult.<sup>73</sup>

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determining whether a sentence should be outside the guidelines.” U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (1987). This language was slightly changed in the 1991 manual, although its categorization of family ties departures as discouraged remained the same. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (1991) (“Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.”). In 2005, the Commission adopted language in the family ties and responsibilities policy statement that is currently used in today’s Guidelines manual. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (2005) (“In sentencing a defendant . . . family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.”).

<sup>71</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (2012) (providing that family ties and responsibilities are not “ordinarily relevant” in determining downward departures from the Guidelines); see also *United States v. Carrasco*, 271 F.3d 765, 768 (8th Cir. 2001) (“Family responsibility is generally a disfavored reason for granting a departure.”). Prior to the amendment discussed in the preceding footnote, the standard for departures based on a defendant’s family ties under the Guidelines provided that, “[f]amily ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.” U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (2000); see *supra* note 44 and accompanying text (categorizing a defendant’s family ties and responsibilities as a discouraged factor under the Guidelines). For a discussion of amendments to Guidelines section 5H1.6 made pursuant to the PROTECT Act, see *infra* Part II.C.2.

<sup>72</sup> Compare *United States v. Louis*, 300 F.3d 78, 82 (1st Cir. 2002) (reasoning that only atypical cases falling outside of the “heartland” of cases encompassed in the applicable guideline warrant a downward departure), with *United States v. White*, 301 F. Supp. 2d 289, 294 (S.D.N.Y. 2004) (explaining that a district court has discretion to depart when the defendant’s family circumstances are “extraordinary”). The Court’s “heartland” departure standard in *Koon* has received criticism for its lack of guidance and definitiveness. See Goldsmith & Porter, *supra* note 22, at 79–88 (discussing the issues apparent in departures since *Koon*); Shoenberg, *supra* note 11, at 294–95 (criticizing the problematic expectation that courts differentiate between the ordinary and the extraordinary in determining whether a family ties and responsibilities departure is warranted).

<sup>73</sup> See Goldsmith & Porter, *supra* note 22, at 74–78 (discussing differing court interpretations of “ordinary” family circumstances under *Koon*). Goldsmith & Porter identify three categories of sentencing court standards for family ties departures after *Koon*. *Id.* The first category of family ties departures involve cases in which the defendant is a single parent who typically lacks the availability of other family members or suitable caretakers. *Id.* at 75. The second category includes those defendants in a two-parent household. *Id.* at 75–76. Goldsmith & Porter note that departures within the second category vary widely and unpredictably as they are analyzed under a very fact specific inquiry. *Id.* at 76. Finally, the third category includes those defendants who care for third parties other than their children, such as a spouse, parent, or sibling. *Id.* at 77.

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Several differing standards for “extraordinary” family circumstances arose among and within the federal circuits following the Court’s decision.<sup>74</sup>

The Third Circuit adopted a fairly broad family ties departure standard by requiring that sentencing judges find the defendant’s family circumstances take the case out of the ordinary.<sup>75</sup> The Fourth Circuit, on the other hand, set forth a more narrow family ties departure standard.<sup>76</sup> For instance, the U.S. District Court for the Eastern District of Virginia determined that a family’s significant economic hardship upon a defendant’s imprisonment, standing alone, as well as a family member’s illness, standing alone, are not sufficient to warrant a departure based on “extraordinary” family circumstances.<sup>77</sup> Accordingly, the Fourth Circuit’s narrow departure standard for extraordinary family ties under *Koon* required the combined presence of serious medical and financial family circumstances to render the defendant’s family responsibilities “unique.”<sup>78</sup>

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<sup>74</sup> See *infra* notes 75–84 and accompanying text (discussing the different family ties departures standards among district courts following *Koon*). Another critic identified three basic standards under which departures based on family ties fell after the *Koon* decision. Farrell, *supra* note 11, at 271–72. Under the first standard, Farrell notes that a district court simply considers whether the family circumstance is “extraordinary.” *Id.* at 271. Under the second category, the district court considers whether the impact of the defendant’s incarceration within the applicable guideline on his or her family is exceptional. *Id.* at 271–72. Finally, under the third category, Farrell notes that district courts utilize a more lax standard in considering whether the family circumstance is “substantial.” *Id.* at 272; see *supra* note 31 (providing a brief overview of the SRA’s objectives, including increased sentencing uniformity in response to wide sentencing disparities).

<sup>75</sup> See *United States v. Dominguez*, 296 F.3d 192, 195 (3d Cir. 2002) (“[T]he term ‘extraordinary’ . . . retains its literal meaning: the circumstances of the case must simply place it outside the ordinary.”). The court further explained that departures based on family ties and responsibilities do not require circumstances that are “extra-ordinary by any particular degree of magnitude.” *Id.* The court slightly limited its standard by further providing that family ties departures may not be granted on the basis of “generic concerns regarding breaking up families.” *Id.* at 196–97.

<sup>76</sup> See *United States v. Colp*, 249 F. Supp. 2d 740, 742 (E.D. Va. 2003) (“The Fourth Circuit has narrowly construed downward departures based on family ties.”); *United States v. Velez*, 249 F. Supp. 2d 716, 721 (E.D. Va. 2002) (“The Fourth Circuit has narrowly construed downward departures based on family ties.”).

<sup>77</sup> *Colp*, 249 F. Supp. 2d at 742; *Velez*, 249 F. Supp. 2d at 721.

<sup>78</sup> See *Velez*, 249 F. Supp. 2d at 723 (finding that a combination of “life-threatening illness and economic hardship” constitutes “exceptional” family circumstances). In *Velez*, the defendant requested a family ties departure because of his position as the sole financial provider for his wife and four children. *Id.* at 720. The defendant’s wife became unemployed after she developed clinical depression and post-traumatic stress disorder following the tragic death of their ten-month old child, and she was also diagnosed with cervical cancer, which required extensive treatment. *Id.* The court held that the departure was warranted because the combination of family financial hardship and serious medical issues constituted “unique” family circumstances justifying departure. *Id.* at 722; see also

In the Second Circuit, various grounds arose for determining whether a defendant's family circumstances are sufficiently extraordinary to warrant departure.<sup>79</sup> For example, the U.S. District Court for the Southern District of New York broadly categorized "extraordinary" family circumstances as those that would bring "exceptional hardship" to the family upon the defendant's incarceration under the Guidelines.<sup>80</sup> However, the same court later construed these circumstances more narrowly by permitting departure where minor dependents uniquely rely on the defendant's continuous financial and emotional support.<sup>81</sup>

Differing grounds for family ties departures also arose within the Seventh Circuit.<sup>82</sup> The U.S. District Court for the Eastern District of

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*Colp*, 249 F. Supp. 2d at 743–45 (granting a family ties departure where the defendant was the sole caretaker and provider for her disabled husband who required constant care due to his limited mental and physical capabilities after surviving a severe automobile accident).

<sup>79</sup> See, e.g., *United States v. White*, 301 F. Supp. 2d 289, 294 (S.D.N.Y. 2004) ("Family circumstances are extraordinary when exceptional hardship to a defendant's family would result from a sentence within the Guidelines range."); *United States v. Robles*, 331 F. Supp. 2d 218, 221 (S.D.N.Y. 2004) (providing that family circumstances are sufficiently exceptional *only* when the defendant's family is "uniquely dependant [sic]" on the continuation of the defendant's financial and emotional responsibilities (quoting *United States v. Sprei*, 145 F.3d 528, 535 (2d Cir. 1998))); *United States v. Ayala*, 75 F. Supp. 2d 126, 137 (S.D.N.Y. 1999) (providing that family circumstances warrant departure when the defendant provides a "unique source of financial and/or emotional support for a significant number of dependents" (emphasis added)).

<sup>80</sup> *White*, 301 F. Supp. 2d at 294; see *supra* note 79 and accompanying text (providing the standard for extraordinary family circumstances in *White*); see also *United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992) ("Nor do we find any reason to believe that family circumstances warranting departure must include something beyond extraordinary parental responsibilities."). In explaining its family ties departures standard, the court in *White* explained that some family hardship resulting from a defendant's imprisonment is inherent and therefore is not out of the ordinary. *White*, 301 F. Supp. 2d at 294. In *White*, the defendant was a single mother of five children, ages five to thirteen, and had legal custody of her fourteen-year-old sister. *Id.* at 291. The court granted the defendant's motion to depart based on family ties, finding that the loss of six children to the state foster care system would bring about extraordinary hardship to the family. *Id.* at 295–96.

<sup>81</sup> *Robles*, 331 F. Supp. 2d at 221; see *supra* note 79 and accompanying text (providing the standard for extraordinary family circumstances set forth in *Robles*). In *Robles*, the defendant provided "significant care" for his father, who had undergone two open-heart surgeries, wore a pacemaker, and suffered from seizures. *Robles*, 331 F. Supp. 2d at 220–21. The court held that the defendant's family circumstances did not warrant departure because the defendant's father, rather than minor dependents, would be affected negatively by the defendant's imprisonment. *Id.* at 221.

<sup>82</sup> See *United States v. Owens*, 145 F.3d 923, 926 (7th Cir. 1998) (analyzing whether the defendant's family circumstances were sufficiently atypical to remove the case from the heartland); *United States v. Maas*, 444 F. Supp. 2d 952, 961 (E.D. Wis. 2006) (holding that "the defendant must show that the harm to his children will be greater than in the typical case" to warrant departure (emphasis added)); *United States v. Savulescu*, No. 95 CR 511-2,

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Wisconsin framed its standard for “extraordinary” family circumstances around the effect of a defendant’s incarceration on his or her children.<sup>83</sup> The U.S. District Court for the Northern District of Illinois, on the other hand, more broadly considered the effect of a defendant’s sentence on general family members under its “extraordinary” family circumstances standard.<sup>84</sup> In addition to district courts’ interpretations under *Koon*, the PROTECT Act and the Supreme Court’s decision in *Booker* provided further context for interpretations of family ties departures under the newly advisory Guidelines.<sup>85</sup>

## 2. The PROTECT Act and the Advisory Sentencing Guidelines

Congress, in conjunction with the PROTECT Act of 2003, passed the Feeney Amendment in an effort to curtail departures and prevent sentencing judges from circumventing the Guidelines.<sup>86</sup> As a result,

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2002 WL 745787, at \*1 (N.D. Ill. Apr. 25, 2002) (“In making a finding of extraordinary family circumstances, the court must find that ‘the period of incarceration set by the Guidelines would have an effect on the *family or family members* beyond the disruption to family and parental relationships that would be present in the usual case.’” (emphasis added) (quoting *United States v. Canoy*, 38 F.3d 893, 907 (7th Cir. 1994))).

<sup>83</sup> *Maas*, 444 F. Supp. 2d at 961; *see supra* note 82 and accompanying text (providing the standard for family ties and responsibilities departures in *Maas*). In *Maas*, the defendant was convicted of “transferring a firearm to a felon” and “transporting in interstate commerce wildlife taken in violation of state law.” *Maas*, 444 F. Supp. 2d at 953–54. At sentencing, the defendant asked for a downward departure on the basis of family ties. *Id.* at 960. The court held that the defendant’s family circumstances were not sufficiently unusual to justify a downward departure. *Id.* at 961. The court reasoned that the defendant’s Guidelines sentence would not negatively impact his children to a significant degree because the defendant’s wife was still available to parent and financially support the children during the defendant’s incarceration. *Id.*; *see United States v. Pearson*, 282 F. Supp. 2d 941, 943 (E.D. Wis. 2003) (“[When] confronted with a motion based on family circumstances . . . the court should consider whether the guideline range is such that a reasonable departure will spare the defendant’s family from unnecessary hardship.”).

<sup>84</sup> *Savulescu*, 2002 WL 745787, at \*1; *see supra* note 82 and accompanying text (providing the standard for family ties and responsibilities departures in *Savulescu*). In *Savulescu*, the defendant moved for a family ties departure as the sole caretaker and source of financial support for his wife, who suffered from severe and chronic bipolar disorder. *Savulescu*, 2002 WL 745787, at \*1, \*3. The court held that the defendant’s circumstances warranted a departure because his wife’s mental illness prevented her from caring for herself medically and financially. *Id.* at \*3. The court further reasoned that the defendant’s wife would lose the benefit of the defendant’s insurance, which covered her medical costs, and that no one else was available to care for his wife upon the defendant’s incarceration. *Id.*

<sup>85</sup> *See infra* Part II.C.2 (explaining the impact of the PROTECT Act and *Booker* on the Guidelines and district courts’ interpretations of family ties departures thereafter).

<sup>86</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.); Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 798 (2005). Most notably, the PROTECT Act changed the

Guidelines section 5H1.6 regarding family ties departures underwent amendment.<sup>87</sup> Pursuant to the PROTECT Act, the Commission included

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standard of review for departure decisions from the *Koon* abuse of discretion standard to a de novo standard. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act § 401(d)(2) (“[T]he court of appeals shall review de novo the district court’s application of the guidelines to the facts.”). The Guidelines also note that “[t]he PROTECT Act . . . directs the Commission, not later than 180 days after the enactment of the Act, to promulgate . . . appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced.” U.S. SENTENCING GUIDELINES MANUAL app. C, vol. II, amend. 651 (2003).

<sup>87</sup> U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (2003) (noting that “Section 401(b)(4) of Public Law 108-21 (the “Protect Act”) directly amended Section 5H1.6 to add the [commentary], effective April 30, 2003”). The amendment added an application note that reads:

1. Circumstances to Consider. –
  - (A) In General. – In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:
    - (i) The seriousness of the offense.
    - (ii) The involvement in the offense, if any, of members of the defendant’s family.
    - (iii) The danger, if any, to members of the defendant’s family as a result of the offense.
  - (B) Departures Based on Loss of Caretaking or Financial Support. – A departure under this policy statement based on loss of caretaking or financial support of the defendant’s family requires, in addition to the court’s consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:
    - (i) The defendant’s service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant’s family.
    - (ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. . . .
    - (iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant’s caretaking or financial support irreplaceable to the defendant’s family.
    - (iv) The departure effectively will address the loss of caretaking or financial support.

*Id.* The Guidelines note that the addition of these criteria imposes a duty on courts to “conduct certain more rigorous analyses.” *Id.* at app. C, vol. II, amend. 651. The Guidelines further note that the addition of factors pertaining to departures based on loss

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an application note for sentencing courts determining family ties departures in order to guide judges.<sup>88</sup> According to the amendment, judges are to consider the seriousness of the offense at hand, the involvement of any of the defendant's family members in the offense, and any danger to the defendant's immediate family members as a result of the offense when determining whether departure is warranted.<sup>89</sup> The application note also restricts family ties departures based specifically on loss of caretaking and financial support to situations involving four circumstances: (1) a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking or essential financial support to the defendant's family; (2) such loss exceeds the harm ordinarily incident to incarceration; (3) the defendant's caretaking or financial support is irreplaceable to his or her family because remedial or ameliorative programs are not reasonably available; and (4) the departure would effectively address the loss.<sup>90</sup> Although the amended commentary provides more guidance to sentencing judges applying section 5H1.6, the commentary does not restrict courts' analysis to these factors in every case.<sup>91</sup>

The Guidelines underwent further change pursuant to the Supreme Court's decision in *Booker*, where the Court directed federal judges to consider the Guidelines as advisory, rather than mandatory, when determining a criminal defendant's sentence.<sup>92</sup> In the wake of *Booker*,

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of caretaking or financial support establishes "heightened criteria" for family ties departures. *Id.*

<sup>88</sup> See *supra* note 87 and accompanying text (providing the amendments to Guidelines section 5H1.6 pursuant to the PROTECT Act).

<sup>89</sup> See U.S. SENTENCING GUIDELINES MANUAL, at ch. 1, pt. A, introductory cmt. 4(b) (2012) ("The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guidelines describes."); *supra* note 87 and accompanying text (providing the amendments to Guidelines section 5H1.6 pursuant to the PROTECT Act).

<sup>90</sup> See *supra* note 87 and accompanying text (providing the amendments to Guidelines section 5H1.6 pursuant to the PROTECT Act). The Guidelines further note that "[t]he Commission believes that these general policy changes, working together, will substantially reduce the incidence of downward departures." U.S. SENTENCING GUIDELINES MANUAL, at app. C, vol. II, amend. 651 (2003).

<sup>91</sup> E.g., *United States v. Davis*, No. 3 06 cr 111 (JCH), 2006 WL 2165717, at \*1 (D. Conn. July 31, 2006). In *Davis*, the court noted that a defendant's family circumstances must be "exceptional" to warrant departure, but in the event that the defendant argues specifically for departure based on "loss of caretaking or financial support" the court should look to the additional factors in Guidelines section 5H1.6 added pursuant to the PROTECT Act. *Id.*; see *supra* note 87 and accompanying text (providing the amendments to Guidelines section 5H1.6).

<sup>92</sup> *United States v. Booker*, 543 U.S. 220, 259-65 (2005). The Court in *Booker* held that the sentencing statute provision mandating district court judges to sentence within the applicable range was unconstitutional. See *id.* at 245 (finding 18 U.S.C. § 3553(b)(1)

district courts faced confusion in attempting to utilize the “effectively advisory” Guidelines in sentencing determinations.<sup>93</sup> However,

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incompatible with the Sixth Amendment’s requirement that juries find facts relevant to sentencing rather than judges). The Court also invalidated the sentencing statute provision that provided the de novo appellate standard of review and replaced it with the “reasonableness” standard. *See id.* at 259, 261 (finding 18 U.S.C. § 3742(e) incompatible with the Sixth Amendment). Justice Breyer, writing for the majority of the court in part, explained that the Guidelines, as amended to sever and excise these provisions, are advisory in nature and instructed district judges to consider the applicable sentencing range while “tailor[ing] the sentence in light of other statutory concerns.” *Id.* at 245. Such concerns include the need for the sentence to “reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.” *Id.* at 245, 260. Although the Guidelines are advisory for federal courts, sentences falling well outside of the applicable range are not afforded a presumption of reasonableness. *United States v. Vigil*, 476 F. Supp. 2d 1231, 1266 (D.N.M. 2007).

<sup>93</sup> *See* Paul J. Hofer, *Beyond the “Heartland”: Sentencing Under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 687–94 (2011) (discussing courts’ reaction to the advisory Guidelines post-*Booker*). The Court’s decision in *Booker* placed emphasis on 18 U.S.C. § 3553 as providing the central framework for federal sentencing under the advisory Guidelines. *Id.* at 688. In pertinent part, 18 U.S.C. § 3553 provides:

- (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE. — The court shall impose a sentence sufficient, but not greater than necessary. . . . The court, in determining the particular sentence to be imposed, shall consider—
- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
  - (2) the need for the sentence imposed—
    - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    - (B) to afford adequate deterrence to criminal conduct;
    - (C) to protect the public from further crimes of the defendant; and
    - (D) to provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
  - (3) the kinds of sentences available;
  - (4) the kinds of sentence and the sentencing range established for—
    - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .
  - (5) any pertinent policy statement—
    - (A) issued by the Sentencing Commission . . .
  - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and



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subsequent Supreme Court decisions helped to clarify the role of the Guidelines in sentencing post-*Booker*.<sup>94</sup> In light of these decisions, the

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- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2006). However, the Commission proposed that the fourth statutory factor, “the kinds of sentence and the sentencing range” established under Guidelines, be the first step in determining sentences post-*Booker*. Hofer, *supra*, at 688. The Commission argued that the Guidelines were already developed to comply with § 3553(a) and thus, the Guidelines deserved “substantial weight” in application. *Id.* at 689. In practice, many district courts took this approach. *Id.* at 688; see Frank O. Bowman, III, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279, 290–94 (2006) (providing that some courts recognized that *Booker* did not abolish the Guidelines nor did it make the Guidelines voluntary); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 719–34 (2005) (predicting *Booker*’s effects on federal sentencing); Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After United States v. Booker*, 41 U. RICH. L. REV. 625, 631–37 (2007) (explaining the trend in circuits post-*Booker* to continue to regard Guidelines sentences as presumptively reasonable); Lee D. Heckman, Note, *The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-Booker World*, 69 OHIO ST. L.J. 149, 171–76 (2008) (recognizing that a majority of circuits continued to calculate Guideline sentencing ranges post-*Booker*); Sarah Millard, Survey, *The Effect of Booker on Federal Sentence Modification Proceedings: How the Tenth Circuit Got it Right in Rhodes*, 87 DENV. U. L. REV. 771, 771 (2010) (arguing for the preservation of the mandatory Guidelines in modification actions).

<sup>94</sup> See generally *Rita v. United States*, 551 U.S. 338 (2007) (expounding on the advisory role of the Guidelines); *Gall v. United States*, 552 U.S. 38 (2007) (expounding on the advisory role of the Guidelines); *Kimbrough v. United States*, 552 U.S. 85 (2007) (expounding on the advisory role of the Guidelines). In *Gall*, the Supreme Court adopted a “guidelines-first” approach and instructed district courts to “begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Gall*, 552 U.S. at 49 (citation omitted); Hofer, *supra* note 93, at 688. Further, in *Rita*, the Court provided that appellate courts could presume sentences within the applicable Guidelines range to be reasonable, but did not hold them to this standard. *Id.* at 691. The Court in *Rita* noted that an assumption of reasonableness is warranted because:

The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time. . . . [I]t is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.

*Rita*, 551 U.S. at 349–50. However, in *Kimbrough*, the Court acknowledged that some sentencing guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role.” *Kimbrough*, 552 U.S. at 109; Hofer, *supra* note 93, at 691. For example, the Commission departed from its empirical research approach in determining sentencing guidelines for drug offenses and instead looked to statutory mandatory minimum sentences established by Congress. *Id.* at 692. In these instances, where the applicable guideline is not the product of empirical research, the Court provided that it is not an abuse of discretion for district courts to conclude that the guideline fails to achieve the sentencing purposes set forth in 18 U.S.C. § 3553(a). *Id.*

Commission amended section 1B.1, which provides “Application Instructions,” to reflect a three-step approach used in determining a defendant’s sentence.<sup>95</sup> Under this approach, district courts should first calculate the applicable Guideline range, then consider policy statements and official commentary to determine whether departure is warranted, and finally should consider the statutory sentencing factors enumerated in 18 U.S.C. § 3553(a) to determine whether a variance from the Guidelines is warranted.<sup>96</sup>

Following these amendments to the Guidelines, district courts have continued to maintain differing family ties departure standards across the circuits by utilizing the “extraordinary” standard set forth in *Koon*.<sup>97</sup>

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<sup>95</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1B.1 (2012) (providing a three-step approach to determining a defendant’s sentence under the Guidelines). The Application Instruction, effective November 1, 2010 provides:

- (a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines . . .
- (b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. . . .
- (c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. . . .

*Id.* The Commission also added background commentary stating that, “[i]f, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a ‘variance.’” *Id.* § 1B.1 cmt. background; Hofer, *supra* note 93, at 697. In an explanatory note, the Commission explained that “[d]eparture’ is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines” and that “[a] ‘variance’—i.e., a sentence outside the guideline range other than as provided for in the Guidelines Manual—is considered by the court only after departures have been considered.” U.S. SENTENCING GUIDELINES MANUAL, at app. C, vol. III, amend. 741 (2012) (quoting, in part, *Izizarry v. United States*, 128 S.Ct. 2198, 2202 (2008)); see, e.g., *United States v. Martinez*, No. CR 09 3078 JB, 2011 WL 6828055, at \*4 (D.N.M. Dec. 19, 2011) (“A district court may also rely on the existence of family ties and responsibilities in varying downward on a defendant’s sentence.”). In adopting this framework, the Commission also acted in accordance with a majority of circuits in regards to the three-step approach. U.S. SENTENCING GUIDELINES MANUAL, at app. C, vol. III, amend. 741 (2012).

<sup>96</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B.1 (2012); see *supra* note 95 and accompanying text (providing the three-step application instructions under the amended Guidelines); see also *supra* note 93 (providing the text of 18 U.S.C. § 3553(a)).

<sup>97</sup> See *supra* note 69 and accompanying text (providing the “extraordinary” standard in *Koon*); see also *United States v. Williams*, Cr. No. 6:07 cr 01207 GRA 1, 2012 WL 4813279, at \*1 (D.S.C. Oct. 10, 2012) (“[A] reduction in a defendant’s sentence based on family ties and responsibilities is discouraged, absent a finding that ‘the defendant’s family ties and responsibilities are extraordinary.’” (quoting *United States v. Wilson*, 114 F.3d 429, 434 (4th Cir. 1997))); *United States v. Gonzalez-Lopez*, No. CR 11 3002 JB, 2012 WL 3150350, at \*11 (D.N.M. July 27, 2012) (“[U]nusual circumstances may be sufficiently extraordinary that they are accepted as a basis for departure . . . .”); *United States v. Tilga*, No. CR 09 0865 JB, 2012 WL 1192526, at \*3 (D.N.M. Apr. 5, 2012) (holding that the defendant’s family

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In the Tenth Circuit, certain district courts have maintained a fairly broad family ties departure standard by requiring that the defendant's family circumstances fall outside of the ordinary spectrum of cases.<sup>98</sup> On the other hand, the Eighth Circuit follows a more narrow approach.<sup>99</sup> In adopting the Eighth Circuit's departure approach, one district court explained that the standard required that the defendant be "unquestionably irreplaceable and critically necessary to effectively provide for a significantly ill and innocent family member."<sup>100</sup> The

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circumstances were within the "heartland" of typical cases); *Unites States v. Sorto*, No. CR 07-0158 JB, 2008 WL 4104121, at \*3 (D.N.M. May 5, 2008) ("When used as the sole basis for departure, family circumstances must be 'extraordinary.'" (quoting *United States v. Jones*, 159 F.3d 492, 499 (10th Cir. 1998))); *United States v. Herrera-Gonzalez*, No. CR 07-1602 JB, 2008 WL 2371564, at \*6 (D.N.M. Feb. 6, 2008) ("[Family] circumstances may be sufficiently extraordinary that they are accepted as a basis for departure . . ."); *United States v. Eriacho*, No. CR 06 2168 JB, 2007 WL 6364848, at \*4 (D.N.M. Oct. 10, 2007) ("In extraordinary circumstances . . . the court has the authority to depart downward [based on family ties]."); *United States v. Crawford*, No. 07-CR-73, 2007 WL 2436764, at \*7 (E.D. Wis. Aug. 22, 2007) ("[W]hile family responsibilities are not ordinarily relevant in determining an appropriate sentence, they are a proper consideration when they are shown to be extraordinary."); *United States v. Hernandez-Castillo*, No. CR 06-1537 JB, 2007 WL 1302577, at \*4 (D.N.M. Apr. 18, 2007) ("[A] district court may depart based on family circumstances 'only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.'" (quoting *Koon v. United States*, 518 U.S. 81, 96 (1996))); *United States v. Davis*, No. 3 06 cr 111 (JCH), 2006 WL 2165717, at \*1 (D. Conn. July 31, 2006) ("[T]he court recognizes that it has discretion to depart on the grounds of exceptional family circumstances."); *United States v. Bailey*, 369 F. Supp. 2d 1090, 1101 (D. Neb. 2005) ("Before departing from the Guidelines, a sentencing court first must determine whether a particular case presents features that 'take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case.'" (quoting *Koon*, 518 U.S. at 95)); *United States v. Marinaro*, No. CR 03 80 B W, 2005 WL 851334, at \*5 (D. Me. Apr. 13, 2005) ("The court should depart on [the] basis [of family ties] 'only if the factor is present to an exceptional degree . . .'" (quoting, in part, *Koon*, 518 U.S. at 96)).

<sup>98</sup> See *Herrera-Gonzalez*, 2008 WL 2371564, at \*7 ("The requirement that the family circumstances be extraordinary does not mean that they must be extra-extraordinary; they must only be outside the ordinary."); *Eriacho*, 2007 WL 6364848, at \*4 ("The requirement that the family circumstances be extraordinary does not mean that they must be extra-extraordinary; they must only be outside the ordinary."); *United States v. Hendry*, No. 05-40151-01-SAC, 2006 WL 3497772, at \*2 (D. Kan. Dec. 5, 2006) ("Family circumstances are only considered in the most extraordinary situations. The defendant's status as a single mother is not such an extraordinary situation. . . . [It] is unfortunately, not very uncommon. . . ." (citations omitted) (quoting, in part, *United States v. Cage*, 451 F.3d 585, 596 (10th Cir. 2006))).

<sup>99</sup> See *Bailey*, 369 F. Supp. 2d at 1101 (adopting the Eighth Circuit's family ties departure standard). The district court explained the Eighth Circuit's family ties departure standard as requiring that "the defendant's care for an innocent family member [be] unquestionably irreplaceable and critically necessary to effectively provide for a significantly ill and innocent family member." *Id.*

<sup>100</sup> *Id.* In adopting the Eighth Circuit's standard, the district court tailored the standard even more narrowly to classify an "innocent family member" as a child. *Id.* at 1102. The

Fourth Circuit has adopted a similar standard, but only requires that the defendant be “irreplaceable” without the additional context of caring for an ill family member.<sup>101</sup>

The Guidelines themselves have also informed the courts’ family ties departure analysis.<sup>102</sup> For example, the Seventh Circuit utilizes the section 5H1.6 commentary in determining whether a defendant’s family ties are sufficiently “extraordinary” to warrant departure.<sup>103</sup> Similarly,

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court provided that “where a child is especially vulnerable and the defendant truly irreplaceable to the child’s recovery, a departure is warranted.” *Id.*

<sup>101</sup> See *Williams*, 2012 WL 4813279, at \*1 (“[A] sentencing court may not depart downward or reduce a sentence on [the basis of family ties] unless it finds that a defendant is ‘irreplaceable’” (quoting *United States v. Wilson*, 114 F.3d 429, 434 (4th Cir. 1997))). The Fourth Circuit continues to rely on the standard expounded in *Koon*, namely that “a defendant’s sentence based on family ties and responsibilities is discouraged, absent a finding that ‘the defendant’s family ties or responsibilities are extraordinary.’” *Id.* (emphasis added) (quoting *Wilson*, 114 F.3d at 434). However, in interpreting the meaning of “extraordinary,” the Fourth Circuit explains that “a sentencing court may not depart downward or reduce a sentence on this basis unless it finds that a defendant is ‘irreplaceable.’” *Id.* (quoting *Elliot v. United States*, 332 F.3d 753, 769 (4th Cir. 2003)).

<sup>102</sup> See *Crawford*, 2007 WL 2436764, at \*7–8 (applying Guidelines section 5H1.6 commentary to determine whether the defendant’s family circumstances warranted departure); *Davis*, 2006 WL 2165717, at \*1–2 (applying Guidelines section 5H1.6 commentary to determine whether the defendant’s family circumstances warranted departure). In *Davis*, the court considered whether:

- (i) The defendant’s service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant’s family.
- (ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. . . .
- (iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant’s caretaking or financial support irreplaceable to the defendant’s family.
- (iv) The departure effectively will address the loss of caretaking or financial support.

*Id.*; see *supra* note 87 (providing amendments to the Guidelines section 5H1.6 commentary).

<sup>103</sup> *Crawford*, 2007 WL 2436764, at \*7–8; see *supra* note 87 (providing the amendments to the Guidelines section 5H1.6 commentary). The court explained the Seventh Circuit departure standard as this: “[W]hile family responsibilities are not ordinarily relevant in determining an appropriate sentence, they are a proper consideration when they are shown to be extraordinary.” *Crawford*, 2007 WL 2436764 at \*7 (emphasis added); see, e.g., *United States v. Capri*, No. 03 CR 300-1, 2005 WL 1916720, at \*7 (N.D. Ill. July 5, 2005) (“A defendant’s responsibilities to a child or an infirm family member properly may serve as a basis for departure under the Guidelines, if the harm to the family member exceeds that which a normal family member would experience from incarceration of a caregiver, and care from other sources is not reasonable [sic] available to alleviate the harm.”). The court went on to apply the standard to the defendant’s situation according to the factors enumerated in Guidelines section 5H1.6. *Crawford*, 2007 WL 2436764, at \*8; see *United*

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the Second Circuit utilizes section 5H1.6 for family ties departures as well but has narrowed the language in a way that requires defendants to show “particularly severe hardship” to the family upon their incarceration.<sup>104</sup>

While family ties departure standards vary across the federal circuits, a similar pattern exists between district courts within the same circuit.<sup>105</sup> Namely, district courts in the Tenth Circuit have varied widely in applying the “extraordinary” standard to family ties departures, even within a single district court over time.<sup>106</sup> For example, in decisions handed down in 2007 and 2008, the District Court for the District of New Mexico broadly construed “extraordinary” family ties and responsibilities to include those that are “outside the ordinary.”<sup>107</sup> However, in two other decisions handed down in those same years, that same district court more narrowly defined its family ties departure standard to encompass situations where the defendant’s incarceration has a substantially negative impact on his or her family members.<sup>108</sup> The

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States v. Rose, 722 F. Supp. 2d 1286, 1290 (M.D. Ala. 2010) (applying the factors in Guidelines section 5H1.6 to the defendant’s motion for downward departure based on family ties and responsibilities).

<sup>104</sup> *Davis*, 2006 WL 2165717, at \*1–2 (quoting *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005)). In *Davis*, the court first recognized that Guidelines section 5H1.6 provided the proper inquiry for the defendant’s claim. *Id.*; see also *supra* note 102 (providing the language utilized by the court in *Davis*). However, in examining that language, the court adopted the Second Circuit’s prevalent family ties departure standard, which provides that “[a] departure . . . is not available ‘where other relatives could meet the family’s needs . . . or the defendant’s absence did not cause a particularly severe hardship.’” *Davis*, 2006 WL 2165717, at \*2 (emphasis added) (quoting *Selioutsky*, 409 F.3d at 119).

<sup>105</sup> See *infra* notes 106–09 (providing family ties departures standards within the Tenth Circuit).

<sup>106</sup> See, e.g., *United States v. Sorto*, No. CR 07-0158 JB, 2008 WL 4104121, at \*1 (D.N.M. May 5, 2008); *United States v. Herrera-Gonzalez*, No. CR 07-1602 JB, 2008 WL 2371564, at \*1 (D.N.M. Feb. 6, 2008); *United States v. Eriacho*, No. CR 06 2168 JB, 2007 WL 6364848, at \*1 (D.N.M. Oct. 10, 2007); *United States v. Hernandez-Castillo*, No. CR 06-1537 JB, 2007 WL 1302577, at \*1 (D.N.M. Apr. 18, 2007); *United States v. Novack*, No. 05-10058-01-WEB, 2006 WL 1314295, at \*1 (D. Kan. May 11, 2006).

<sup>107</sup> *Herrera-Gonzalez*, 2008 WL 2371564, at \*7 (“The requirement that the family circumstances be extraordinary does not mean that they must be extra-extraordinary; they must only be outside the ordinary.”); *Eriacho*, 2007 WL 6364848, at \*4 (“The requirement that family circumstances be extraordinary does not mean that they must be extra-extraordinary; they must only be outside the ordinary.”).

<sup>108</sup> *Sorto*, 2008 WL 4104121, at \*3 (“To warrant departure on this basis, a defendant must demonstrate that the period of incarceration set by the Guidelines would have an effect on the family or family members beyond the disruption to family and parental relationships that would be present in the usual case.” (quoting *United States v. Palma*, 376 F. Supp. 2d 1203, 1214 (D.N.M. 2005))); see *Hernandez-Castillo*, 2007 WL 1302577, at \*6 (“The Court believes that the focus of U.S.S.G. [section] 5H1.6 is on the loss of caretaking and financial support for the defendant’s family that a defendant’s incarceration would cause.”).

U.S. District Court for the District of Kansas, on the other hand, requires that the defendant's care be "irreplaceable" to warrant a family ties departure.<sup>109</sup>

While it appears that courts recognize differences in prevailing departure standards, these inconsistencies remain nonetheless.<sup>110</sup> Because district courts have continuously wielded wide discretion in family ties departures, this area of federal sentencing lacks uniformity and objective analysis.<sup>111</sup>

### III. ANALYSIS

The vague "extraordinary" departure standard set forth in *Koon* sparked confusion among district courts in determining whether a defendant's circumstances warranted departure based on the defendant's family ties.<sup>112</sup> Despite amendments to the now "advisory" Guidelines, district courts continue to embrace the vague "extraordinary" standard in *Koon* when determining whether to depart on the basis of family ties.<sup>113</sup> Although the amended Guidelines section 5H1.6 commentary could inform the problematic *Koon* standard by

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<sup>109</sup> *Novack*, 2006 WL 1314295, at \*1 ("A downward departure for extraordinary family circumstances may be appropriate where the care provided by the defendant is 'irreplaceable or otherwise extraordinary.'" (quoting *United States v. Roselli*, 366 F.3d 58, 69 (1st Cir. 2004))). The district court, however, did not expound upon its meaning of "irreplaceable" in the opinion. *Id.* at \*1-2.

<sup>110</sup> *See United States v. Hughes*, No. 04 445 (CKK), 2006 WL 2092634, at \*7 (D.D.C. July 27, 2006) (noting that "it appears that this Circuit has a narrower view of 'extraordinary' circumstances that might warrant a family ties and responsibilities downward departure pursuant to the Sentencing Guidelines, as compared to the Second Circuit"). The court in *Hughes* compared its D.C. Circuit standard, which recognizes that "the imposition of prison sentences normally disrupts . . . parental relationships" and thus does not warrant departure, to that of the more lax Second Circuit approach. *Id.* The court noted that the Second Circuit allows for departures where the family's stability depends on the defendant's continued presence. *Id.* at \*6.

<sup>111</sup> *See infra* Part III (analyzing the reoccurring issues apparent in family ties departure determinations).

<sup>112</sup> *See supra* Part II.C.I for a discussion on the differing standards employed by district courts in determining family ties departures pursuant to the Supreme Court's decision in *Koon*.

<sup>113</sup> Hofer, *supra* note 93, at 694-95. Hofer notes that one of the biggest challenges to embracing the advisory role of the Guidelines in federal sentencing is district judges' reluctance to stray from the Guidelines. *Id.* at 695. Hofer notes that "[s]ome . . . sentencing judges continue to describe sentencing in terms nearly indistinguishable from pre-*Booker* practice—calculation of the guidelines followed by a search for anything 'unusual' or 'atypical' about an offense or defendant that might take the case out of the 'heartland' and justify a sentence outside the guidelines range." *Id.* at 694-95; *see supra* note 97 and accompanying text (providing examples of district courts' continued reliance on the *Koon* standard).

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appropriately focusing on the adverse effects of a sentence on the defendant's family members, district courts have been slow to fully embrace this approach.<sup>114</sup>

Rather, because district courts focus on whether "extraordinary" family circumstances are present, they have continued to apply their own varying standards and thus have failed to adopt a uniform standard under which to consider these decisions.<sup>115</sup> Thus, the same issues apparent in departure decisions during the *Koon* era have continued, despite helpful Guidelines amendments.<sup>116</sup> Namely, this inconsistent and unbridled standard results in unwarranted disparities between similarly situated defendants in family ties departure decisions.<sup>117</sup> Further, under these varying standards district courts have either completely failed to emphasize the harm families experience upon a defendant's incarceration in family ties departures or, in the alternative, have failed to do so in an objective manner, and thus have allowed

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<sup>114</sup> See *supra* note 87 (providing the text of the amended Guidelines section 5H1.6 commentary pursuant to the PROTECT Act). The commentary language addressing "[d]epartures [b]ased on [l]oss of [c]aretaking or [f]inancial [s]upport" provides a good starting point for addressing the detrimental effect of incarceration on a defendant's innocent dependents and family members. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 policy statement (2003); see *supra* Part II.B (discussing the harm caused by incarceration to a defendant's family and society in general). However, as the commentary language stands, courts may utilize these factors if they deem necessary but are not directed to in every case. See, e.g., *United States v. Davis*, No. 3 06 cr 111 (JCH), 2006 WL 2165717, at \*1 (D. Conn. July 31, 2006). In *Davis*, the court noted that "[i]n order to depart [based on family ties], the court must find the family circumstances to be 'exceptional' . . . [but] when the defendant argues for a departure based on 'loss of caretaking or financial support,' . . . the court is required to consider the presence of the [the factors outlined in Guidelines section 5H1.6]." *Id.* (emphasis added). While some courts have shifted their focus to the effect of incarceration on a defendant's family, others have not. Compare *United States v. Hernandez-Castillo*, No. CR 06-1537 JB, 2007 WL 1302577, at \*6 (D.N.M. Apr. 18, 2007) ("The Court believes the focus of U.S.S.G. § 5H1.6 is on the loss of caretaking and financial support for the defendant's family that a defendant's incarceration would cause."), and *United States v. Capri*, No. 03 CR 300-1, 2005 WL 1916720, at \*7 (N.D. Ill. July 5, 2005) ("A defendant's responsibilities to a child or infirm family member properly may serve as a basis for a departure under the Guidelines, if the *harm to the family member* exceeds that which a normal family member would experience from incarceration of a caregiver . . . ." (emphasis added)), with *United States v. Eriacho*, No. CR 06 2168 JB, 2007 WL 6364848, at \*4 (D.N.M. Oct. 10, 2007) ("The requirement that the family circumstances be extraordinary does not mean that they must be extra-extraordinary; they must only be outside the ordinary.").

<sup>115</sup> See *supra* Part II.C (discussing the differing family ties departure standards utilized by district courts).

<sup>116</sup> Compare *infra* Parts III.A.1, B.1 (examining disparities and reliance on gender-stereotyping in family ties departure under *Koon* and the Guidelines), with *infra* Parts III.A.2, B.2 (examining disparities and judicial reliance on gender-stereotyping in family ties departures under the amended Guidelines).

<sup>117</sup> See *infra* Part III.A (discussing continued disparities in family ties departure jurisprudence).

unfounded notions of gender bias and stereotyping to influence federal sentencing.<sup>118</sup>

To begin, Part III.A.1 of this Note first analyzes unwarranted disparities in family ties departures that existed under the discretionary *Koon* regime.<sup>119</sup> Part III.A.2 then examines how courts have failed to adopt a uniform departure standard and thus have continued to engage in disparate departure determinations contrary to the goals of sentencing uniformity.<sup>120</sup> Next, Part III.B.1 examines departures determinations under *Koon* that properly focused on the detrimental family impact of incarceration yet provided too much discretion, thus resulting in judicial reliance on gender stereotypes rather than objective analysis.<sup>121</sup> Finally, Part III.B.2 examines application of family ties departure standards post-amendment to show that courts have continued to exercise wide discretion in this area and thus have failed to engage in meaningful objective analysis.<sup>122</sup>

A. *Unwarranted Disparities in Family Ties and Responsibilities Departures for Similarly Situated Defendants Due to the Lack of a Uniform Departure Standard*

Although Guidelines section 5H1.6, which addresses departures based on family ties and responsibilities, has undergone substantial amendments pursuant to the PROTECT Act, federal district courts continue to apply the vague “extraordinary” model explained in *Koon* when faced with family ties departures.<sup>123</sup> However, federal district courts have inconsistently interpreted the term “extraordinary” and thus have developed individualized standards regarding those circumstances

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<sup>118</sup> See *supra* Part II.B (discussing the detrimental effects of a defendant’s incarceration on his or her family members); see also *infra* Part III.B (examining district court standards that fail to objectively focus on the harm to a defendant’s family upon his or her incarceration).

<sup>119</sup> See *infra* Part III.A.1 (analyzing disparities in departures between similarly situated defendants under *Koon*).

<sup>120</sup> See *infra* Part III.A.2 (analyzing disparities in departures between similarly situated defendants under the amended Guidelines).

<sup>121</sup> See *infra* Part III.B.1 (analyzing the lack of objective analysis in family ties departures under *Koon*).

<sup>122</sup> See *infra* Part III.B.2 (analyzing the lack of objective analysis in family ties departures under the amended Guidelines).

<sup>123</sup> See *supra* note 97 and accompanying text (providing examples of district courts’ continued reliance on the *Koon* “extraordinary” standard after amendments to the Guidelines); see also, e.g., *United States v. Williams*, Cr. No. 6:07 cr 01207 GRA 1, 2012 WL 4813279, at \*1 (D.S.C. Oct. 10, 2012) (“[A] reduction in a defendant’s sentence based on family ties and responsibilities is discouraged, absent a finding that ‘the defendant’s family ties or responsibilities are extraordinary.’” (quoting *United States v. Wilson*, 114 F.3d 429, 434 (4th Cir. 1997))).



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that might warrant a departure based on family ties.<sup>124</sup> Naturally, application of these differing standards has produced unwarranted disparities in family ties departures among similarly situated defendants.<sup>125</sup> Such disparities stand in direct contrast with Congress' goal of uniformity in federal sentencing.<sup>126</sup> Because the Commission promulgated the Guidelines in order to address this precise issue, continued application of these highly discretionary standards will undermine the purpose of the Guidelines.<sup>127</sup>

1. Disparate Family Ties Departure for Similarly Situated Defendant Under the *Koon* "Extraordinary" Standard

Because sentencing judges were afforded too much discretion to depart from the Guidelines under the *Koon* standard, application of that standard to family ties departures resulted in the failure of courts to attain the goals of uniformity.<sup>128</sup> Not surprisingly, application of the

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<sup>124</sup> See *supra* Part II.C (providing an overview of the differing family ties departure standards utilized by district courts under *Koon* and following amendments to the Guidelines).

<sup>125</sup> See *infra* Part III.A (analyzing the continued disparities in departures between similarly situated defendants under Guidelines section 5H1.6).

<sup>126</sup> See 18 U.S.C. § 3553(a)(6) (2006) ("The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities . . ."); see also *supra* note 31 (discussing Congress' goal to achieve uniformity in federal sentencing).

<sup>127</sup> See U.S. SENTENCING GUIDELINES MANUAL, at ch. 1, pt. A, introductory cmt. 3 (2012) (recognizing that Congress sought uniformity in sentencing in promulgating the Guidelines). Initially, Congress promulgated the SRA in order to create an effective federal sentencing scheme with uniformity, honesty, and proportionality at its center. *Id.*; see Goldsmith & Porter, *supra* note 22, at 57-58 ("The [SRA] . . . [was] [e]nacted in response to widespread unwarranted sentencing disparity . . . [and was] designed to promote uniformity by curtailing judicial discretion."). However, even under the advisory Guidelines, the Supreme Court recognized the important role the Guidelines played in reaching Congress's goal of national uniformity in sentencing. *United States v. Booker*, 543 U.S. 220, 246 (2005). To ensure this goal would be met, the Court required that federal sentences be "reasonable" and permitted appellate courts to impose a presumption of reasonableness on sentences within the applicable guideline range. *Id.* at 260-61; see *Gall v. United States*, 552 U.S. 38, 51 (2007) (reiterating this principle).

<sup>128</sup> See *supra* note 31 (providing the purpose of the Guidelines in response to indeterminate sentencing). In *Booker*, Justice Stevens argued in a dissenting opinion, joined by Justices Souter and Scalia (in part), that a federal sentencing regime with too much discretion would run contrary to Congressional intent. *Booker*, 543 U.S. at 296 (Stevens, J., dissenting). Justice Stevens argued that a set of advisory Guidelines would allow for too much discretion in federal sentencing in direct contrast with the sentiments of those Congressmen involved with the SRA. *Id.* For example, in discussing sentencing issues prior to implementation of the Guidelines, one senator remarked that "[t]he present problem with disparity in sentencing . . . stems precisely from the failure of [f]ederal judges—individually and collectively—to sentence similarly situated defendants in a

differing standards for family ties departures that existed among federal courts under *Koon* resulted in disparities between court determinations of “extraordinary” family circumstances warranting departure, even where the circumstances were similar.<sup>129</sup>

Given the purpose and goals inherent in the Guidelines, defendants who face similar family circumstances should experience similar success or failure when seeking sentencing departures based on family ties.<sup>130</sup> However, defendants with similar family circumstances sentenced in different circuits under the *Koon* regime faced a contrary reality due to the application of varying departure standards.<sup>131</sup> For example, the likelihood that a defendant acting as the sole caretaker for elderly parents would receive a family ties departure would wholly depend on the standard applied in that jurisdiction.<sup>132</sup> If sentenced under the

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consistent, reasonable manner.” *Id.* at 297 (quoting Sen. Laxalt) (citing 130 Cong. Rec. 976 (1984)).

<sup>129</sup> *But see generally* Goldsmith & Porter, *supra* note 22 (arguing that disparities in family ties departures stem from inconsistent standards of review among the appellate courts as well as lack of guidance from the Commission). Goldsmith and Porter primarily argue that the Supreme Court’s decision in *Koon* set a confusing example for federal appellate courts when reviewing sentencing decisions so that disparity existed in departure determinations. *Id.* at 88–89. To illustrate this contention, Goldsmith and Porter briefly review broad topics such as “single-parenting,” a “defendant’s responsibilities in [a] two-parent home,” and a “defendant’s care of [a] spouse, parent, or sibling” in discussing disparities between federal circuits granting family ties departures since *Koon*. *Id.* at 75–78. Goldsmith and Porter similarly discuss disparities between the federal circuits when granting departures based on a defendant’s aberrant behavior as more evidence of the Court’s problematic stance in *Koon*. *Id.* at 78–79.

<sup>130</sup> *See id.* at 74–76, 83 (using disparities between family ties departures under *Koon* to argue that departure analysis should undergo change in order to reduce sentencing disparity).

<sup>131</sup> *See infra* notes 132–37 and accompanying text (analyzing disparities in family ties departures between sentencing decisions arising in the Seventh and Second Circuits).

<sup>132</sup> *See, e.g.,* United States v. Robles, 331 F. Supp. 2d 218, 220 (S.D.N.Y. 2004) (noting that the defendant moved for family ties departure based on his role as sole caregiver to his elderly father); United States v. Pearson, 282 F. Supp. 2d 941, 942–43 (E.D. Wis. 2003) (noting that the defendant moved for family ties departure based on her role as primary caretaker to her elderly parents). In *Pearson*, the defendant resided with her parents, cooked for them, completed their shopping, drove them to their respective medical appointments, administered their medication, and managed the household from day to day. *Id.* at 943. The defendant’s father was sixty-three years old and suffered from diabetes and kidney failure, which rendered him “essentially bed-ridden” as he awaited a kidney transplant. *Id.* The defendant’s mother was fifty-nine years old and suffered from diabetes, problems with her kidney, Crohn’s disease, and lymphedema in her leg. *Id.* The defendant’s mother also had a history of strokes and required the use of a wheelchair because of a heal infection caused by diabetes complications. *Id.* In *Robles*, the defendant, much like the defendant in *Pearson*, undertook significant responsibilities for his ailing parent, including the completion of his father’s cooking, cleaning, and shopping. *Robles*,

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Eastern District of Wisconsin's broad "unnecessary hardship" standard, the defendant would likely prevail due to the jurisdiction's more holistic approach to family ties departures.<sup>133</sup> However, the defendant's motion would likely fail if presented to a judge applying the Southern District of New York's narrow "uniquely dependent" departure standard.<sup>134</sup> Under the "unnecessary hardship" standard the court would look to all circumstances surrounding the claim in order to gauge whether or not departure was warranted.<sup>135</sup> However, under the "uniquely dependent" standard, the defendant would face a higher threshold in moving for departure based on the same family circumstances, thus making success more difficult.<sup>136</sup> This kind of unwarranted disparity between similarly

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331 F. Supp. 2d at 220. The defendant's father had undergone two open-heart surgeries, wore a pacemaker, and also suffered from seizures. *Id.*

<sup>133</sup> See *Pearson*, 282 F. Supp. 2d at 943, 946 (granting the defendant's motion for family ties departures under its "unnecessary hardship" standard); see also *supra* note 83 (providing the departure standard utilized in *Pearson*). In applying its "unnecessary hardship" standard, the court looked to the specific circumstances of the defendant's family situation. *Pearson*, 282 F. Supp. 2d at 943. The court also considered sentencing factors such as "the need for just punishment, protection of the public, deterrence, and rehabilitation of the defendant." *Id.*; see *supra* note 93 (providing the sentencing factors enumerated in 18 U.S.C. § 3553(a)).

<sup>134</sup> See *Robles*, 331 F. Supp. 2d at 221 (denying the defendant's motion for departure based on family ties under its "uniquely dependent" standard); see also *supra* note 79 (providing the departure standard in *Robles*). In explaining its family ties departure standard, the court explained that hardship to the defendant's family was not sufficient. *Robles*, 331 F. Supp. 2d at 221.

<sup>135</sup> See, e.g., *Pearson*, 282 F. Supp. 2d at 942-46. In *Pearson*, one of the defendant's siblings lived nearby, another sibling was unable to drive, and the third sibling lived only a few hours away. *Id.* at 943. In granting departure, the court reasoned that despite their proximity, the defendant's siblings would not be able to take on the defendant's family responsibilities given their limited availability to provide care. *Id.* at 945. The court recognized that the defendant's sister could provide in-home care but would not be available to provide transportation to medical appointments or perform any required housework. *Id.* The court further found it impossible for the defendant's brother to care for the parents due to the amount of travel required by his full-time job. *Id.* The court also struck down the possibility of a private caregiver during the defendant's incarceration based on its expense to the public. *Id.* at 943. After considering all of these circumstances, the court concluded that the defendant's family circumstances were unique because she actively served as the sole family member available to care for her parents. *Id.* at 943, 946. Thus, the defendant's absence upon imprisonment would cause an "unnecessary hardship" to her family. *Id.* at 946.

<sup>136</sup> See *Robles*, 331 F. Supp. 2d at 221 (setting forth the "uniquely dependent" standard for family ties departures). In *Robles*, the court held that the defendant's family circumstances were not sufficiently extraordinary to warrant departure because the mere presence of other family members stripped the defendant's caretaking role of its uniqueness. *Id.* The court maintained this position despite statements from the defendant's cousin and brother confirming the significance of the defendant's caretaking in his father's life. *Id.* at 220-21. Unlike the court in *Pearson*, the court did not consider the potential difficulties or limitations that could affect the ability of the defendant's family members to provide the

situated defendants would result under the *Koon* regime because courts failed to adopt uniform standards that would place a uniform focus on certain family circumstances.<sup>137</sup>

While unwarranted disparities in family ties departures existed across the federal circuits under the *Koon* regime, this problematic trend prevailed within federal circuits as well. Under this scenario, a defendant's success in attaining a family ties departure would wholly depend on the standard applied by sentencing judges within the same circuit.<sup>138</sup> For example, a defendant's success in moving for a family ties departure based on her substantial financial contributions would likely be inconsistent throughout the Seventh Circuit under *Koon*.<sup>139</sup> If the defendant faced sentencing under the "atypical" family circumstances standard, she would be more likely to receive departure due to the

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same care in the defendant's absence. *See id.* at 221 ("Presumably, Robles's cousin and the other members of his family also can assist in making care giving arrangements for Robles's father during any period that Robles is incarcerated. While it is not the Court's intent to trivialize the logistical and financial effort that may be required in making these arrangements, such efforts do not provide a basis for a downward departure . . .").

<sup>137</sup> Compare *Pearson*, 282 F. Supp. 2d at 943, 946 (holding the defendants family circumstances warranted downward departure under the "unnecessary hardship" standard), with *Robles*, 331 F. Supp. 2d at 221 (holding the defendant's family circumstances did not warrant downward departure under the "uniquely dependent" standard). *But see* *Koon v. United States*, 518 U.S. 81, 92 (1996) (discussing the enactment of the SRA in response to disparate sentencing between similarly situated offenders).

<sup>138</sup> *See infra* notes 139–42 and accompanying text (analyzing disparities in family ties departures between decisions arising within the Seventh Circuit).

<sup>139</sup> *See, e.g.*, *United States v. Owens*, 145 F.3d 923, 926 (7th Cir. 1998) (providing that the defendant moved for family ties departure in the district court based on significant financial contributions to his family); *United States v. Maas*, 444 F. Supp. 2d 952, 961 (E.D. Wis. 2006) (providing that the defendant moved for family ties departure based on significant financial contributions to support his family). In *Owens*, both the defendant and his common-law wife worked to support their three small children. *Owens*, 145 F.3d at 926. The defendant claimed that his partner would not be able to financially support their children in his absence and that the family would have to move to public-assisted housing and receive welfare benefits if forced to rely solely on his wife's income during his incarceration. *Id.* While both the defendant and his common-law wife had received public assistance six years prior, neither had ever lived in public housing and both were able to maintain jobs in the years leading up to the defendant's trial. *Id.* In support of his motion, at sentencing the defendant also argued that he visited daily with his brother, who suffered from Downs Syndrome. *Id.* Similarly, in *Maas*, the defendant claimed that his partner would face serious financial hardship upon his incarceration. *Maas*, 444 F. Supp. 2d at 961. While the defendant was married, he argued his wife would not be able to financially support their two children on her own and as a result the family home would be foreclosed on. *Id.* The defendant also argued that no other family members were able to provide support for his wife and children during his incarceration as his mother struggled to raise her own children and his wife was estranged from her family. *Id.*

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latitude afforded the judge under this broad standard.<sup>140</sup> However, if the court sentenced the defendant under a more exacting standard, such as the standard arising in the Seventh Circuit requiring that the defendant show great harm would result to her children upon incarceration, she would be much less likely to receive departure due to the circumscribed nature of this departure standard.<sup>141</sup> Thus, a defendant in this situation would face unwarranted disparity in her sentencing throughout the circuit in which she resides, not because her family circumstances changed, but simply because courts have failed to adopt uniform family ties departure standards.<sup>142</sup>

Under the highly discretionary *Koon* standard, court determinations created unwarranted disparities between similarly situated defendants because these courts analyzed cases under their own interpretations of “extraordinary” family circumstances.<sup>143</sup> These problematic results run directly contrary to the goals of the Guidelines.<sup>144</sup> Although amendments to Guidelines section 5H1.6, pursuant to the PROTECT Act, provided courts with an opportunity to apply a more uniform departure standard, courts failed to embrace this language and continued to apply

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<sup>140</sup> See *Owens*, 145 F.3d at 926, 929 (providing the district judge’s departure determination and affirming the decision of the lower court on appeal); see also *supra* note 82 (providing the departure standard utilized in *Owens*). In *Owens*, the court held that the defendant’s family circumstances warranted departure because the financial harm that the defendant’s family would suffer upon his incarceration rendered the circumstances “atypical” compared to other families whose family member faced sentencing under the Guidelines. *Owens*, 145 F.3d at 929.

<sup>141</sup> See *Maas*, 444 F. Supp. 2d at 961 (holding the defendant was not entitled to a downward departure on the basis of extraordinary family circumstances); see also *supra* note 82 (providing the departure standard in *Maas*). In applying this narrow standard the court in *Maas* mused that “some degree of financial hardship . . . from the absence of a parent through incarceration is not in itself sufficient as a basis for departure.” *Maas*, 444 F. Supp. 2d at 961 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. n.1(B)(ii) (2006)). Here, similar to the defendant’s family in *Owens*, the defendant’s family risked the loss of their home and significant financial support upon the defendant’s imprisonment. *Id.* In denying departure the court reasoned that the defendant’s family circumstances were not extraordinary because the defendant’s wife was employed and was still able to maintain an income during the defendant’s incarceration. *Id.* But see *Owens*, 145 F.3d at 926 (providing that the defendant’s common-law wife was employed and maintained steady employment for the previous six years).

<sup>142</sup> Compare *Owens*, 145 F.3d at 929 (affirming the defendant’s family ties departure under the district court’s “atypical” family circumstances standard), with *Maas*, 444 F. Supp. 2d at 961 (denying the defendant’s family ties departure based on the court’s standard requiring that the defendant show significant harm to his children).

<sup>143</sup> See *supra* notes 128–42 and accompanying text (examining the disparities in family ties departures under *Koon* due to application of differing departure standards).

<sup>144</sup> See *supra* note 31 (discussing the goal of uniformity at the heart of the Guidelines).

differing standards, thus continuing the trend in unwarranted disparities.<sup>145</sup>

## 2. Continued Disparities in Family Ties Departures Following Amendment to Guidelines Section 5H1.6 Pursuant to the PROTECT Act

Despite the amendments to Guidelines section 5H1.6, which presented federal courts with an opportunity to streamline analysis under family ties departures, courts continued to rely on the vague “extraordinary” standard in *Koon* and thus created the same inconsistent and disparate issues present in today’s federal sentencing arena.<sup>146</sup> Thus, disparities in family ties departures continue between similarly situated defendants, contrary to the goals underlying the Guidelines.<sup>147</sup>

<sup>145</sup> See *infra* Part III.A.2 (examining the continued disparities in family ties departures due to the lack of a uniform departure standard among courts following amendments to Guidelines section 5H1.6).

<sup>146</sup> See *supra* note 97 and accompanying text (providing examples of district courts’ continued reliance on the *Koon* departure standard). Particularly, the application note concerning loss of essential caretaking or financial support could provide courts with a single standard that focuses on the detrimental impact of a defendant’s incarceration on innocent third parties. See *supra* Part II.B (discussing the detrimental impact of incarceration on defendants’ family members); see also note 87 (providing the amendments to Guidelines section 5H1.6 pursuant to the PROTECT Act). But see *supra* note 53 and accompanying text (providing policy arguments against consideration of family circumstances in federal sentencing).

<sup>147</sup> See *supra* note 31 (discussing the goal of uniformity at the heart of the Guidelines). While courts differ in their applications of family ties departures, courts may also consider these factors in alternatively determining whether or not to grant a variance from the Guidelines range based on 18 U.S.C. § 3553 sentencing factors. See, e.g., *United States v. Justice*, No. CR 09-3078 JB, 2012 WL 394455, at \*11-12 (D.N.M. Jan. 23, 2012) (denying the defendant’s motion for departure based on family ties but granting the defendant’s motion to vary downward based on § 3553(a) sentencing factors); *United States v. Martinez*, No. CR 09-3078 JB, 2011 WL 6828055, at \*4 (D.N.M. Dec. 19, 2011) (“A district court may also rely on the existence of family ties and responsibilities in varying downward on a defendant’s sentence.”). However, variances from the Guidelines do not carry the same presumption of reasonableness that a Guidelines’ sentence, which includes departures, does on appeal. See *United States v. Hernandez-Castillo*, No. CR 06-1537 JB, 2007 WL 1302577, at \*3 (D.N.M. Apr. 18, 2007) (“[I]f ‘the district court properly considered the relevant Guidelines range and sentenced the defendant within that range, the sentence is presumptively reasonable.’ . . . On the other hand, criminal sentences that vary materially from the properly calculated guideline sentencing range are not accorded a presumption of reasonableness.” (quoting *United States v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006))). Thus, consistent departures based on family ties and responsibilities still play an important role in ensuring similarly situated defendants receive similar sentences. See *United States v. Sorto*, No. CR 07-0158 JB, 2008 WL 4104121, at \*2 (D.N.M. May 5, 2008) (“[T]he court must still carefully consider possible departures under the Guidelines before it can meaningfully decide a variance request.”).

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Similar to under the *Koon* regime, defendants with similar family circumstances sentenced today face inconsistent results due to the application of varying departure standards.<sup>148</sup> As seen under the *Koon* era, the likelihood that a defendant would succeed in moving for a family ties departure based on her substantial financial contributions wholly depends on the standard applied in that jurisdiction.<sup>149</sup> If the court in that jurisdiction follows the commentary to Guidelines section 5H1.6, focusing on the loss of financial support or essential caretaking, it is more likely the defendant's motion will succeed as the court would carefully consider the nature of the defendant's family responsibilities.<sup>150</sup> However, if the court in that jurisdiction follows a more stringent departure standard, such as the Second Circuit's "particularly severe hardship" standard, the defendant would be much less likely to receive departure due to the court's much more narrow application.<sup>151</sup> Thus,

<sup>148</sup> See *infra* notes 149–52 and accompanying text (analyzing disparities in family ties departures between sentencing decisions arising in the Eleventh and Second Circuits).

<sup>149</sup> See, e.g., *United States v. Rose*, 722 F. Supp. 2d 1286, 1290 (M.D. Ala. 2010) (providing that the defendant moved for downward departure based on family ties based on the loss of financial support that incarceration would bring to his partner and her nephew); *United States v. Davis*, No. 3 06 cr 111 (JCH), 2006 WL 2165717, at \*2 (D. Conn. July 31, 2006) (providing that the defendant moved for downward departure based on the loss of financial support incarceration would bring to her husband and children). In *Rose*, the defendant was in a committed twenty-year relationship with his girlfriend, helped care for the girlfriend's autistic nephew, and provided the family's primary source of income. *Rose*, 722 F. Supp. 2d at 1290. In *Davis*, the defendant provided the primary means of financial support for her two children and unemployed husband. *Davis*, 2006 WL 2165717, at \*2.

<sup>150</sup> See *Rose*, 722 F. Supp. 2d at 1290 (granting the defendant's motion for family ties departure after considering family circumstances under Guidelines section 5H1.6); see also *supra* note 87 (providing the text of the amended Guidelines section 5H1.6 pursuant to the PROTECT Act); *supra* note 103 (providing the court's section 5H1.6 departure standard). In granting the defendant's motion for family ties departure, the court in *Rose* reasoned that "[a] guideline sentence would have 'caused a substantial, direct, and specific loss of essential caretaking' to Rose's family" and therefore, the court granted the defendant a three-level departure. *Rose*, 722 F. Supp. 2d at 1290 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. n.1(B)(i) (2010)). The court further reasoned that although the defendant's long-time girlfriend was able to work she was "in dire need of [the defendant's] support," because she was "suffering without [the defendant] in the home," and was "working night shifts, and . . . [was] forced to spend her resources in order to find care for her nephew." *Id.* In *Rose*, the court carefully considered the nature of defendant's family responsibilities to his girlfriend and her nephew. *Id.* The nephew suffered from autism and required "24-hour supervision." *Id.* Along with his girlfriend, the defendant had acted as the nephew's caretaker, as well as the family's primary source of income. *Id.*

<sup>151</sup> See *Davis*, 2006 WL 2165717, at \*3 (denying the defendant's motion for departure based on family ties under the Second Circuit's "particularly severe hardship" standard); see also *supra* text accompanying note 104 (providing the Second Circuit departure standard). In considering the defendant's claim, the court in *Davis* placed substantial focus on whether or not other adults could care for a defendant's dependents upon his or her incarceration. *Davis*, 2006 WL 2165717, at \*2. Though the court recognized that the family's

this kind of unwarranted disparity between similarly situated defendants continues post-*Koon* because courts have failed to seize the opportunity for a uniform family ties departure standard and instead foolishly held on to their own.<sup>152</sup>

Defendants moving for family ties departure based on critical emotional support provided to a vulnerable child would face similar unwarranted disparities depending on the sentencing jurisdiction.<sup>153</sup> Here, application of the Eighth Circuit's narrow "irreplaceable" caretaker standard would likely result in downward departure, whereas application of the Fourth Circuit's broad "irreplaceable" standard would likely produce the opposite result.<sup>154</sup> Despite the similarity in family

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income would suffer, it reasoned that this was not the "type of loss that substantially exceeds the loss typically suffered by the family of defendants." *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 5H1.6, Application Note 1(R)(ii) (2006)). The court determined that the defendant's husband could adequately replace the defendant as the primary financial supporter by reasoning that the husband was "able to care for their daughters and is able to work," and though "unemployed now, he has been employed in the recent past." *Id.* The court rested its conclusion on the mere presumption that the defendant's husband could gain employment rather than delving into the husband's actual ability to step in and support the family. *Id.* This kind of consideration is in stark contrast with the court in *Rose*, which delved into the actualities of the defendant's family responsibilities. Compare *Rose*, 722 F. Supp. 2d at 1290 ("[The defendant's girlfriend] is working night shifts, and she is forced to spend her resources . . . because Rose is not available to help."), with *Davis*, 2006 WL 2165717, at \*2 ("[The defendant's] husband is able to care for their daughters and is able to work. . . . While unemployed now, he has been employed in the recent past.").

<sup>152</sup> Compare *Rose*, 722 F. Supp. 2d at 1290 (granting the defendant's family ties departure under the standard enumerated in Guidelines section 5H1.6), with *Davis*, 2006 WL 2165717, at \*1-2 (denying the defendant's motion for departure based on family ties under the Second Circuit's "particularly severe hardship" standard). In amending Guidelines section 5H1.6 pursuant to the PROTECT Act, the Commission presented courts with a uniform standard applicable to family ties departures. See *supra* note 87 (providing amendments to Guidelines section 5H1.6 pursuant to the PROTECT Act).

<sup>153</sup> See, e.g., *United States v. Williams*, Cr. No. 6:07 cr 01207 GRA 1, 2012 WL 4813279, at \*1 (D.S.C. Oct. 10, 2012) (providing that the defendant moved for downward departure based on family ties in light of his role in the life of his terminally ill daughter); *United States v. Bailey*, 369 F. Supp. 2d 1090, 1097-1100 (D. Neb. 2005) (providing that the defendant moved for downward departure based on family ties in light of the emotional support he provided for his young daughter suffering from emotional trauma). In *Williams*, the defendant claimed he played a vital role in the life of his seven-year-old daughter who suffered from brain cancer. *Williams*, 2012 WL 4813279, at \*1. In *Bailey*, the defendant claimed that his emotional support was critically necessary to his young daughter who had suffered from emotional trauma. *Bailey*, 369 F. Supp. 2d at 1097-1100. The emotional trauma suffered by the defendant's daughter stemmed from the sexual abuse she suffered at the hands of her mother's boyfriend. *Id.* at 1097.

<sup>154</sup> Compare *Williams*, 2012 WL 4813279, at \*2 (denying the defendant's motion to depart based on family ties under the Fourth Circuit's "irreplaceable" departure standard), with *Bailey*, 369 F. Supp. 2d at 1103 (granting the defendant's motion to depart based on family ties under the Eighth Circuit's narrower "irreplaceable" departure standard). See *supra* note



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circumstances, defendants would experience disparate departures because application of the Eighth Circuit standard entails a more holistic focus on the defendant's role regarding the vulnerable child.<sup>155</sup> On the other hand, application of the Fourth Circuit standard focuses less on the defendant's actual family role and thus leads to dissimilar departure determinations.<sup>156</sup> If both jurisdictions were to similarly consider the effect of incarceration on innocent dependents, these departure determinations may prove more uniform and cohesive to the Congressional intent underlying the Guidelines.<sup>157</sup>

As previously analyzed, some courts have failed to focus on the impact of a defendant's incarceration on innocent family members when applying these differing family ties departure standards.<sup>158</sup> While other

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99 (providing the Eighth Circuit departure standard utilized in *Bailey*); *supra* note 101 (providing the Fourth Circuit departure standard utilized in *Williams*).

<sup>155</sup> See *Bailey*, 369 F. Supp. 2d at 1098-99 (considering the defendant's role in his daughter's well-being). In considering the defendant's motion to depart, the presiding judge recounted his gut reaction to the motion and then explained how analyzing the actual facts of the case changed his mind:

Indeed, when I first skimmed the motion to depart under U.S.S.G. § 5K2.0 in this case, my reaction was quick and visceral: "Are you kidding me?" The Assistant Federal Public Defender asked me to impose a non-prison sentence on Bailey, a fellow who possessed child pornography, in order to save the defendant's little girl. No way, I thought, hell will freeze over before that happens. I next explain how hell froze over.

*Id.* at 1091. In determining that departure was warranted the court looked to the effect the defendant's incarceration would have on his daughter. *Id.* at 1198-99. The court reasoned that the defendant's daughter suffered from a serious condition where the presence of the defendant's emotional support was critical to the child's recovery and could not be duplicated. *Id.* at 1103. The court relied on evidence from a forensic psychologist's report indicating that the daughter suffered from symptoms indicating post-traumatic stress disorder and had continuously expressed trust in her father, the defendant. *Id.* at 1098-99. The court also analyzed a variety of possible alternative caregivers in the event that the defendant was incarcerated but ultimately determined that none were appropriate or as effective as the defendant. *Id.* at 1099-1100. For example, the court reasoned that the defendant's mother and father were unavailable because of age and health issues. *Id.*

<sup>156</sup> See *Williams*, 2012 WL 4813279, at \*1-2 (demonstrating a lack of consideration by the court regarding the defendant's role in his daughter's life). In denying a family ties departure, the court in *Williams* failed to focus on the health consequences faced by the defendant's daughter upon his incarceration. *Id.* Rather, the court simply reasoned that the defendant's circumstances were not "extraordinary" in light of the fact that the defendant had not maintained custody of his daughter in the past. *Id.* at \*2. The court noted that custody of the defendant's daughter had moved from her mother to a third party. *Id.*

<sup>157</sup> See *supra* note 31 (providing the goals and purposes underlying the SRA and the Guidelines).

<sup>158</sup> See *supra* notes 128-57 and accompanying text (examining the disparities between district courts' approaches to family ties departures).

courts have been more successful in this regard, these standards provide sentencing judges with too much discretion and lead to a lack of objective analysis in family ties departure determinations.<sup>159</sup>

*B. Judicial Reliance on Gender Stereotyping in the Exercise of Discretion to Depart Based on Family Ties and Responsibilities*

The lack of uniformity regarding family ties departures among federal courts has produced different court interpretations of the term “extraordinary,” which often leads to unwarranted disparities in departure determinations.<sup>160</sup> One prevalent issue in these differing standards is that some district courts fail to take into account the detriment caused to the family following the defendant’s incarceration.<sup>161</sup> However, harm to the family should be at the center of family ties departure analysis because such consequences can wreak punishment beyond that typically encompassed by imprisonment.<sup>162</sup> Some courts have properly focused on the detrimental impact of a defendant’s incarceration under the Guidelines in determining whether a family ties departure is warranted.<sup>163</sup> While this trend better addresses

<sup>159</sup> See *infra* Part III.B (analyzing the continuing lack of objective analysis and reliance on gender stereotyping present in family ties departure determinations).

<sup>160</sup> See *supra* Part III.A (analyzing the continuing problematic disparities in family ties departures stemming from different district court departure standards).

<sup>161</sup> See, e.g., *United States v. Dominguez*, 296 F.3d 192, 195 (3d Cir. 2002) (“[T]he term ‘extraordinary’ . . . retains its literal meaning: the circumstances of the case must simply place it outside the ordinary.”); *United States v. Herrera-Gonzalez*, No. CR 07-1602 JB, 2008 WL 2371564, at \*7 (D.N.M. Feb. 6, 2008) (“The requirement that the family circumstances be extraordinary does not mean that they must be extra-extraordinary; they must only be outside the ordinary.”); see also *supra* Part II.B (discussing the harmful effects of incarceration on inmates’ families).

<sup>162</sup> See 18 U.S.C. § 3553(a) (2006) (“The court shall impose a sentence sufficient, but not greater than necessary . . .”); see also *Bush*, *supra* note 46, at 195 (discussing the importance of considering the defendant’s dependents at sentencing in order to affect the purposes of § 3553(a)); *Ellingstad*, *supra* note 46, at 980–81 (discussing the social costs of incarceration). The Second Circuit recognized this principle in *United States v. Johnson*, 964 F.2d 124, 129–30 (2d Cir. 1992). There the defendant was solely responsible for caring for four children under the age of six, one of which belonged to her institutionalized daughter. *Id.* at 126. The defendant was convicted of stealing money from the government by inflating her paychecks in her position as a payroll clerk at the Bronx V.A. Hospital. *Id.* In affirming the district court’s decision to depart based on family ties, the Second Circuit held that the departure had properly been based on reducing the substantial harm faced by the defendant’s children upon her incarceration. *Id.* at 129–30. *But see supra* note 53 and accompanying text (discussing policy arguments against consideration of family circumstances in federal sentencing).

<sup>163</sup> See, e.g., *United States v. Sorto*, No. CR 07-0158 JB, 2008 WL 4104121, at \*3 (D.N.M. May 5, 2008) (“To warrant departure on this basis, a defendant must demonstrate that the period of incarceration set by the Guidelines would have an effect on the family or family members beyond the disruption to family and parental relationships that would be present

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the issue of innocent family members in federal sentencing, courts often fail to consider this impact in a meaningful way. Rather than using objective factors to measure a defendant's caretaking abilities or financial support to his or her family, courts often rely on notions of stereotypical gender roles when determining whether the defendant's absence will harm the family.<sup>164</sup> This trend appeared under the vague "extraordinary" standard in *Koon* and has continued under subsequent amendments to the Guidelines.<sup>165</sup> Although recent amendments offer an opportunity for courts to more adequately focus on this important aspect of family ties departures, courts have not fully or meaningfully embraced them.<sup>166</sup> Thus, the same risk that courts will improperly rely on gender stereotypes in family ties departures continues at present.<sup>167</sup>

### 1. Judicial Reliance on Gender Stereotyping Under the *Koon* "Extraordinary" Standard

Court determinations of "extraordinary" family circumstances under the differing departure standards following the Supreme Court's decision in *Koon* often evinced notions of gender stereotyping.<sup>168</sup> Courts often focused on presumptive notions that female defendants act as

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in the usual case." (quoting *United States v. Palma*, 376 F. Supp. 2d 1203, 1214 (D.N.M. 2005)); *United States v. White*, 301 F. Supp. 2d 289, 294 (S.D.N.Y. 2004) ("Family circumstances are extraordinary when exceptional hardship to a defendant's family would result from a sentence within the Guidelines range . . .").

<sup>164</sup> See *infra* Part III (analyzing the continuing lack of objective family ties departure standards and courts' reliance on gender stereotypes in departure decisions under the Guidelines).

<sup>165</sup> See *infra* Part III.B (analyzing the continuing lack of objective family ties departure standards and courts' reliance on gender stereotypes in departure decisions under the Guidelines). While the Guidelines section 5H1.6 commentary does not yet include objective factors to guide a court's analysis, this standard provides a good starting point for meaningful family ties departures. See *supra* note 87 (providing the amendments to Guidelines section 5H1.6 pursuant to the PROTECT Act).

<sup>166</sup> See *supra* Part II.C (providing an overview of district court family ties departure standards under the Guidelines); see also *supra* note 87 (providing the amendments to Guidelines section 5H1.6 pursuant to the PROTECT Act).

<sup>167</sup> See *infra* Part III.B (analyzing the continuing lack of objective analysis in court determinations of family ties departures under the Guidelines).

<sup>168</sup> See *King*, *supra* note 11, at 289-300, for a discussion of the presence of gender bias under the Guidelines, including the deep-rooted societal view of women as caretakers. Another critic also recognizes the presence of gender stereotypes in sentencing determinations. *Bush*, *supra* note 46, at 196. *Bush* notes that judges themselves recognize that they regard maternal caretaking, as opposed to paternal caretaking, more highly in making sentencing determinations. *Id.* *Bush* further notes that "[s]uch special regard for maternal care may reflect stereotypes more than it does reality" as family members may equally suffer harm at the loss of paternal care. *Id.*

family caretakers, especially in regards to minor dependents.<sup>169</sup> Some courts completely failed to objectively consider defendants' roles in the family by regarding single parents as an ordinary family circumstance given the frequency with which it occurs today.<sup>170</sup> However, other courts focused on the effects of a single mother's incarceration on minor dependents to find that mere status as a single mother is sufficiently "extraordinary" to warrant departure, despite a lack of objective inquiry aimed at gauging the reality of the defendant as caretaker.<sup>171</sup> This lack of objective inquiry indicates that sentencing judges rely on their own assumptions concerning gender roles in the family.<sup>172</sup> However, if courts are to meaningfully engage in family ties departures that truly address harm to the family they must objectively analyze the defendant's actual role within the family unit.<sup>173</sup>

Indeed, family ties departures based on the defendant's status as a single mother have been granted even in spite of policies against decreased sentencing in such circumstances.<sup>174</sup> To illustrate, consider a

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<sup>169</sup> See generally Farrell, *supra* note 11 (discussing the influence of cultural assumptions pertaining to gender roles, including the view of women as self-sacrificing caretakers, in departure decisions based on family ties and responsibilities).

<sup>170</sup> See *United States v. Louis*, 300 F.3d 78, 82 (1st Cir. 2002) ("[S]ingle mother status is not an 'idiosyncratic' circumstance, distinguishing her case from the 'mine-run.'" (quoting *United States v. Chestna*, 962 F.2d 103, 107 (1st Cir. 1992))); *United States v. Brand*, 907 F.2d 31, 33 (4th Cir. 1990) ("A sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children."). Under this approach, courts completely fail to objectively analyze the realities of the defendant's family circumstances. See, e.g., *United States v. Patterson*, 17 F. App'x 496, 497 (8th Cir. 2001) (holding that the defendant's status as a single mother of an infant was not extraordinary enough to remove the case from the "heartland" of the applicable guideline).

<sup>171</sup> See, e.g., *United States v. White*, 301 F. Supp. 2d 289, 295 (S.D.N.Y. 2004) (holding that the female defendant's family circumstances were extraordinary where the defendant was the sole caregiver for her six young children); *United States v. Norton*, 218 F. Supp. 2d 1014, 1017, 1020 (E.D. Wis. 2002) (holding that the female defendant's family circumstances were extraordinary where the defendant was the sole caregiver for two young children and also assisted her nineteen-year-old son with college expenses and health insurance); *United States v. Dyce*, 975 F. Supp. 17, 22 (D.D.C. 1997) (holding that the female defendant's family circumstances were extraordinary where the defendant was the sole caretaker of her three children). But see Farrell, *supra* note 11, at 271 (arguing that women defendants are less likely to receive family ties departures based on their role as a mother because caretaking duties are culturally regarded as typical female family responsibilities and thus not "extraordinary").

<sup>172</sup> See Wald, *supra* note 9, at 138 (recognizing the inclination of sentencing judges to reinforce gender stereotypes by implicitly regarding women as caretakers over men).

<sup>173</sup> See *infra* Part IV (suggesting amendments to Guidelines section 5H1.6 that would provide a uniform departure standard with objective criteria for court application).

<sup>174</sup> See *supra* note 53 (presenting policy arguments against departing on the basis of family ties). Compare *Brand*, 907 F.2d at 33 ("A sole, custodial parent is not a rarity in today's society . . ."), with U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, introductory

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defendant who pled guilty to bank robbery and moved for a family ties departure based on the fact that she was a single mother to six children.<sup>175</sup> In considering whether to depart, the court struggled with the seriousness of the defendant's crime balanced against the need for general and specific deterrence, the improper implications of departing from the applicable sentence merely on the basis of motherhood, as well as the defendant's lack of concern for her dependents' well-being until faced with sentencing.<sup>176</sup> Even against these policy considerations, the court incorrectly granted departure based on the hopes that the defendant could care for her children and remain together as a "family unit."<sup>177</sup> Successful departure in the face of these conflicting policies indicates that the sentencing judge based the decision on the mere idea of the defendant as a natural caregiver, despite finding that the defendant actually failed to act in the best interests of her children.<sup>178</sup> The court's failure to objectively measure the defendant's caretaking role indicates that departure was based on a gender stereotype rather than on meaningful analysis.<sup>179</sup>

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cmt. 1.4(b) (2012) ("[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often.").

<sup>175</sup> *White*, 301 F. Supp. 2d at 292-93. The defendant and her female cousin acted as lookouts while sitting in a car outside of the bank where the violent robbery occurred. *Id.* at 290. The defendant was the biological mother of five children and also retained custody of her younger sister. *Id.* at 293.

<sup>176</sup> *Id.* at 296. The court recognized that it had "to be concerned that a downward departure would send the wrong message that a defendant can commit a crime as serious as bank robbery and yet be permitted to hide behind her children." *Id.* The court went on to recognize the impropriety of overlooking serious criminal conduct of single parents, especially "when those parents apparently do not become concerned with the well-being of their children until they are facing imprisonment." *Id.* The court found that the defendant and her cousin were not concerned with their children's well-being when engaging in the violent robbery, especially given the presence of the defendant's infant cousin in the car during the robbery. *Id.*

<sup>177</sup> *Id.* at 296-97; see *supra* note 53 and accompanying text (providing policy arguments against consideration of family circumstances in federal sentencing).

<sup>178</sup> *White*, 301 F. Supp. 2d at 296. In granting the departure, the court significantly reduced the defendant's sentence from a range of fifty-seven to seventy-one months to a range of twenty-four to thirty months. *Id.* at 290, 297.

<sup>179</sup> See *id.* at 295-96 (determining departure without the use of objective factors). In determining whether to depart, the court failed to look at objective information that would aid in analyzing the defendant's role as caretaker. *Id.* at 295-96. But see *United States v. Crawford*, No. 07-CR-73, 2007 WL 2436764, at \*7-8 (E.D. Wis. Aug. 22, 2007) (considering letters from health care and social service providers as well as a family therapist when determining whether to depart based on family ties). In *White*, the court only considered the age of the children and the presence of alternative caregivers. *White*, 301 F. Supp. at 295. Even in considering alternative caregivers, though, the court simply cast away with one alternative based on its view that it was "unrealistic." *Id.*

Male defendants, on the other hand, are not typically viewed as fulfilling the same natural caregiving role as female defendants in the context of family ties departures.<sup>180</sup> Rather, male defendants are often depicted as the breadwinners or primary financial supporters of their families and as such, must show circumstances above and beyond significant monetary contribution to receive a reduced sentence based on family ties.<sup>181</sup> By relying on these assumptions, courts failed to engage in meaningful departure analysis that focused on the resulting harm to the family from the male defendant's absence.<sup>182</sup> Unfortunately, this unjust trend has continued over time.<sup>183</sup>

## 2. Continued Judicial Reliance on Gender Stereotyping

Despite amendments to Guidelines section 5H1.6 that might inform departure analysis, courts have continued to focus on the ambiguous

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<sup>180</sup> See *United States v. Louis*, 300 F.3d 78, 83 (1st Cir. 2002) (reasoning that the male defendant's family circumstances would not warrant a departure "even if [the defendant] could demonstrate that he was the *only parent* available to meet *all* of [his son's] needs." (first emphasis added)). Compare *United States v. Dominguez*, 296 F.3d 192, 194, 199 (3d Cir. 2002) (holding the female defendant's extraordinary family circumstances warranted departure where the defendant resided with and cared for her elderly parents), and *United States v. Pearson*, 282 F. Supp. 2d 941, 945-46 (E.D. Wis. 2003) (holding the female defendant's extraordinary family circumstances warranted departure where the defendant resided with and cared for her infirm parents), with *United States v. Robles*, 331 F. Supp. 2d 218, 221 (S.D.N.Y. 2004) (holding the male defendant's family circumstances were not sufficiently extraordinary to warrant departure where the defendant was responsible for giving significant care to his elderly father).

<sup>181</sup> Compare *United States v. Carrasco*, 271 F.3d 765, 768 (8th Cir. 2001) (holding that the male defendant's family circumstances did not warrant a family ties departure where the defendant was the primary source of financial support for his disabled wife and three children), and *United States v. Maas*, 444 F. Supp. 2d 952, 961 (E.D. Wis. 2006) (holding the male defendant was not entitled to family ties departure where his wife and children would only suffer economically during his incarceration), with *United States v. Savulescu*, No. 95 CR 511-2, 2002 WL 745787, at \*1, \*3 (N.D. Ill. Apr. 25, 2002) (holding the male defendant's unique family circumstances warranted departure where the defendant solely provided financial support for his wife and where the defendant's wife suffered from a debilitating mental illness), and *United States v. Ayala*, 75 F. Supp. 2d 126, 138 (S.D.N.Y. 1999) (holding the male defendant's family circumstances warranted departure where the defendant provided primary financial support for his wife and two children and where the defendant's daughter suffered from Downs Syndrome and relied on the defendant for her unique medical care).

<sup>182</sup> See *supra* Part II.B (discussing the detrimental and costly effects of a defendant's incarceration on his or her family members as well as society in general).

<sup>183</sup> See *infra* Part III.B.2 (analyzing the continuing trend in judicial bias and lack of objectivity following amendments to the Guidelines); see also *Ramirez*, *supra* note 14, at 594 ("If judicial discretion is to be consistent with serving justice in the criminal justice system, a judge must exercise discretion free from bias.").

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departure standard set forth in *Koon*.<sup>184</sup> Because the highly discretionary *Koon* standard lives on, notions of gender stereotyping continue to make their way into court decisions regarding family ties departures.<sup>185</sup>

Similar to the era of family ties departures under *Koon*, some courts continue to place too much emphasis on the normalcy of single-motherhood in family ties departures.<sup>186</sup> By only considering the frequency with which this circumstance occurs, these courts fail to consider the harmful impact that the single parent's incarceration may have on innocent family members.<sup>187</sup> Further, while some courts have properly focused on whether the defendant's sentence would negatively impact innocent family members, those courts continue to apply departure standards without meaningful attention to the defendant's actual role in the family.<sup>188</sup> Instead, when granting departures based on family ties, courts often rely on the stereotype that female defendants are natural caretakers, rather than considering objective factors that might substantiate that notion.<sup>189</sup>

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<sup>184</sup> See *supra* note 97 (providing examples of district court departure standards that continue to utilize the "extraordinary" inquiry prevalent in *Koon*).

<sup>185</sup> See *supra* Part III.B.1 (examining issues with gender stereotyping in the exercise of judicial discretion to depart based on family ties in the years after *Koon*).

<sup>186</sup> See, e.g., *United States v. Hendry*, No. 05-40151-01-SAC, 2006 WL 3497772, at \*2 (D. Kan. Dec. 5, 2006) ("Family circumstances are only considered in the most extraordinary situations. The defendant's status as a single mother is not such an extraordinary situation. . . . [It] is, unfortunately, not very uncommon . . . ." (citations omitted) (quoting *United States v. Cage*, 451 F.3d 585, 596 (10th Cir. 2006))).

<sup>187</sup> See *supra* Part II.B (discussing the detrimental and costly effects of a defendant's incarceration on his or her family members as well as society in general).

<sup>188</sup> See, e.g., *United States v. Capri*, No. 03 CR 300-1, 2005 WL 1916720, at \*7 (N.D. Ill. July 5, 2005) ("A defendant's responsibilities to a child or an infirm family member properly may serve as a basis for a departure under the Guidelines, if the *harm to the family member* exceeds that which a normal family member would experience from incarceration of a caregiver, and care from other sources is not reasonable [sic] available to alleviate the harm." (emphasis added)).

<sup>189</sup> *Id.* at \*6 (granting the female defendant's departure request without objectively analyzing her role within the family). In considering whether to grant the defendant's motion to depart based on family ties and responsibilities, the court in *Capri* noted that "[the defendant] has done a relatively good job caring for her children and managing her family" and "those who are currently taking care of her children *may not* be able to do as good a job as she has done." *Id.* (emphasis added). The court came to this determination without an objective inquiry into the role and responsibility played by the defendant in the lives of her children. *Id.* at \*5-8; see also *United States v. Martinez*, No. CR 09-3078, 2011 WL 6828055, at \*4-6 (D.N.M. Dec. 19, 2011) (granting a family ties departure without objective analysis into the defendant's role in her family). The court in *Martinez* approached the defendant's motion for a downward departure based on family ties in a similar fashion. *Id.* There, without objectively inquiring into the role played by the defendant regarding her children, the court concluded that "she will be able to take care of her family members" and that "[Martinez's] progress in abstaining from

The trend in granting downward departures for single mothers continues in spite of policy considerations to the contrary.<sup>190</sup> To illustrate, take for example a defendant who pled guilty to mail fraud and sought departure based on the fact that she was a single mother of four children.<sup>191</sup> In determining whether to depart, the court struggled with the propriety of departure in light of the defendant's lengthy criminal history, which indicated disregard of her role as a single mother.<sup>192</sup> Despite its trepidation, the court incorrectly granted the downward departure based on its conclusory finding that the defendant had "done a relatively good job caring for her children and managing her family under very difficult circumstances."<sup>193</sup> In doing so, the court failed to objectively analyze the defendant's caretaking role and thus likely based its decision on stereotypical gender assumptions.<sup>194</sup>

Just as family ties departures continue to evince stereotypical female gender assumptions, the trend continues for males seeking departure as well.<sup>195</sup> Unlike their supposed "caretaker" female counterparts, courts

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methamphetamine use encourages the Court that she will be able to fulfill these duties." *Id.* at \*5.

<sup>190</sup> See *Martinez*, 2011 WL 6828055, at \*6 ("The Court is very cautious to not disproportionately sentence men to prison—who also plead that their family needs them—and then let mothers serve no time in prison. Punishment based solely on the defendant's sex or their family role would be unfair and not just."); see also *supra* note 53 and accompanying text (providing policy arguments against considering family circumstances in federal sentencing).

<sup>191</sup> *Capri*, 2005 WL 1916720, at \*1. The mail fraud charge arose from the defendant's participation in an elaborate scheme to defraud a life insurance company. *Id.* The defendant assisted her co-defendant in securing a loan for \$11,750,000 by providing information she knew or strongly suspected to be fraudulent. *Id.* The defendant also set up a sham company to aid in securing the loan with the intent that the company would receive loan proceeds. *Id.*

<sup>192</sup> *Id.* at \*6 ("[I]t is difficult to avoid the observation that Capri's repeated decisions to commit serious crimes that she surely knew could subject her to incarceration are hardly a testament to good parenting.") Prior to the mail fraud charge, the defendant pled guilty to separate felony forgery offenses in both 1994 and 1998. *Id.* at \*3. The defendant further pled guilty to "corruptly endeavoring to obstruct the due administration of the internal revenue laws" in 1999 after filing nineteen fraudulent tax returns for the year 1992. *Id.* Finally, while awaiting sentencing for the mail fraud offense, the defendant was arrested for a separate fraud charge as well. *Id.*

<sup>193</sup> *Id.* at \*6. The court came to this conclusion despite evidence that the defendant's "house was filthy and in extreme disorder, lacked functioning lights, had what appeared to be several days of discarded food strewn throughout the kitchen, and had dirty clothing scattered over the floors." *Id.* at \*4.

<sup>194</sup> See *id.* at \*5–6 (determining departure was warranted without analyzing objective factors to justify the decision).

<sup>195</sup> See, e.g., *United States v. Justice*, 2012 WL 394455, at \*2, \*11–12 (D.N.M. Jan. 23, 2012) (denying departure based on family ties where the defendant provided primary financial support to his wife and young child).



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continue to depict male defendants as breadwinners or the primary financial supporters of their families who must show circumstances above and beyond significant monetary contribution to receive a departure.<sup>196</sup> Reliance on stereotypical assumptions, such as females as “caretakers” and males as “breadwinners,” means that courts continue to engage in hollow family ties departures without regard to the actual role of defendants within their families or the harm that incarceration may cause.<sup>197</sup> However, courts can adequately address these harms, through family ties departures, by objectively analyzing the defendant’s family situation.<sup>198</sup>

Up to present, district courts have exercised wide discretion in developing their own standards for departures based on family ties.<sup>199</sup> However, such discretion has created unwarranted disparities in departure determinations and has permitted judges to freely rely on their own stereotypical assumptions in making those determinations.<sup>200</sup> Considering the issues that have plagued family ties departures since the days of *Koon*, this Note proposes a uniform departure standard that would curb unwarranted sentencing disparity and trigger meaningful judicial analysis of family circumstances.<sup>201</sup>

## IV. CONTRIBUTION

In addressing the issues inherent in the current standard for family ties and responsibilities departures, the most efficient way to affect

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<sup>196</sup> *Id.* at \*11. In *Justice*, the court mused that “prisons are filled with men who are fathers. . . . Circumstances that might justify a departure would include a situation where the young child has serious health problems and requires constant care.” *Id.* The court also recognized departure may be warranted for a male defendant where “there was no mother or other family members present to care for the child, and a lengthier term of incarceration would result in the father losing custody of the child to the state permanently.” *Id.*; see *United States v. Rose*, 722 F. Supp. 2d 1286, 1290 (M.D. Ala. 2010) (granting departure based on family ties where the male defendant helped care for his girlfriend’s nephew and provided substantial financial support). *But see* *Bush*, *supra* note 46, at 197 (recognizing that loss of financial support can have a devastating impact on and serious consequences for the family, especially regarding children).

<sup>197</sup> See *supra* Part II.B (discussing the detrimental and costly effects of a defendant’s incarceration on his or her family members as well as society in general).

<sup>198</sup> See *Bush*, *supra* note 46, at 197 (directing courts to rely on concrete evidence in assessing the defendant’s family role).

<sup>199</sup> See *supra* Part II.C (discussing the differing district court standards for family ties departures under *Koon* and following amendments to the Guidelines).

<sup>200</sup> See *supra* Parts III.A–B (analyzing continuing issues in disparate departures and judicial reliance on stereotypes without objective inquiry in family ties departures under *Koon* and the amended Guidelines).

<sup>201</sup> See *infra* Part IV (proposing amendments to Guidelines section 5H1.6 regarding family ties departures).

change in court application is by amending the Guidelines. Although district court judges retain authority to vary from the Guidelines under the post-*Booker* advisory regime, the Guidelines still carry weight in sentencing analysis.<sup>202</sup> Judges must first calculate the applicable Guideline range and then determine whether a departure is warranted before considering a variance.<sup>203</sup> Further, even where courts determine departure is not warranted, such courts may also consider family circumstances in alternatively determining whether a variance is warranted.<sup>204</sup> Thus, an amendment to the Guidelines will inform judicial determinations of departures, as well as variations.

#### A. Guidelines Amendment

Guidelines section 5H1.6 should first be amended to direct courts to focus on the impact that a sentence has on the defendant's family. Second, the policy statement should be amended to include a non-exhaustive list of objective factors that would aid the court in assessing the defendant's actual role in his or her family.

#### § 5H1.6 Family Ties and Responsibilities (Policy Statement)

In sentencing a defendant . . . family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

##### Commentary

##### Application Note:

##### 1. Circumstances to Consider. –

(A) In General. – In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

- (i) The seriousness of the offense.
- (ii) The involvement in the offense, if any, of members of the defendant's family.
- (iii) The danger, if any, to members of the defendant's family as a result of the offense.

<sup>202</sup> *Rita v. United States*, 551 U.S. 338, 349–50 (2007). In *Rita*, the Court emphasized that the Guidelines should still carry substantial weight because they reflect data collected over “tens of thousands of sentences” and thus provide a rough approximation of sentences that would achieve the factors set forth in 18 U.S.C. § 3553(a). *Id.* at 349–50.

<sup>203</sup> See *supra* notes 94–95 and accompanying text (providing the “guidelines-first” approach to sentencing determination adopted after *Booker*).

<sup>204</sup> See *supra* note 147 and accompanying text (discussing courts' consideration of family ties in determining whether to vary from the Guidelines according to the § 3553(a) sentencing factors).

- (B) Departures Based on Loss of Caretaking or Financial Support. – A departure under this policy statement *shall be* based on ~~the~~ loss of caretaking or financial support of the defendant’s family ~~requires~~. ~~i~~n addition to the court’s consideration of the non-exhaustive list of circumstances in subdivision (A), *departure requires* the presence of the following circumstances:
- (i) The defendant’s service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant’s family.
  - (ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. . . .
  - (iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant’s caretaking or financial support irreplaceable to the defendant’s family.
  - (iv) The departure effectively will address the loss of caretaking or financial support.
- (C) Essential Caretaking or Essential Financial Support. – *In considering whether the defendant’s service of a sentence within the applicable guidelines range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant’s family described in subdivision (B)(i), the court should consider the following non-exhaustive list of factors:*
- (i) *The defendant’s caretaking role in his or her family unit, supported by evidence from ties in the community as well as experts specializing in family dynamics.*
  - (ii) *The consequences to the defendant’s family resulting from the loss of the defendant’s income upon incarceration, supported by evidence of such consequences.*
  - (iii) *The age of the defendant’s dependents.*
  - (iv) *Whether the defendant’s dependents have special needs or medical conditions.*
  - (v) *The availability of alternative caretakers in the defendant’s family or community upon the defendant’s incarceration.*
  - (vi) *In cases involving minor dependents, whether the defendant’s incarceration presents the risk of loss of custody.*<sup>205</sup>

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<sup>205</sup> The proposed amendments are italicized and are the contributions of the author. The text that has not been italicized represents the language as it appears in the original policy statement and has been maintained to provide context.

## B. Commentary

Guidelines section 5H1.6 should first be amended to mandate that departure “shall be based on loss of caretaking or financial support of the defendant’s family” and “requires the presence of the following circumstances.” By amending the language to mandate loss of essential caretaking or financial support, the application note will set forth a uniform standard for district courts determining whether to depart based on family ties and responsibilities. This standard properly focuses on the negative impacts of the defendant’s incarceration on innocent family members, as well as society, and thus will aid courts in alleviating those harms through family ties departures.<sup>206</sup> Mandating this standard will help ensure that courts no longer apply inconsistent standards across jurisdictions, resulting in unwarranted departure disparities.<sup>207</sup>

Because mere application of the “loss of essential caretaking or financial support” standard would provide sentencing judges with too much discretion, section 5H1.6 should also be amended to include objective factors to aid courts in determining whether the defendant’s incarceration will cause a substantial, direct, and specific loss.<sup>208</sup> In applying these objective factors, courts will be better able to assess the actual roles played by defendants within their respective family units and thus the impact that incarceration would have on the defendant’s family.<sup>209</sup> In order to assess the defendant’s role as caretaker, the court should require objective evidence that supports the defendant’s claim.<sup>210</sup> The court should also require similar objective evidence to assess the detrimental impact that would ensue from the loss of the defendant’s

<sup>206</sup> See *supra* Part II.B (discussing the detrimental and costly effects of a defendant’s incarceration on his or her family members as well as society in general).

<sup>207</sup> See *supra* Part II.C (explaining the differing family ties departure standards utilized by courts under *Koon* and subsequent amendments to the Guidelines); see also *supra* Part III.A (analyzing continuing unwarranted disparities in family ties departures resulting from the application of inconsistent departure standards).

<sup>208</sup> See *supra* Part III.B (analyzing continuing issues in courts’ departure analysis even where courts considered the effect of incarceration on the defendant’s family).

<sup>209</sup> See *King*, *supra* note 11, at 302 (“A departure decision should not be made on the basis of gender but rather on the basis of specific attributes or circumstances of the defendant.”).

<sup>210</sup> See, e.g., *United States v. Crawford*, No. 07-CR-73, 2007 WL 2436764, at \*8 (E.D. Wis. Aug. 22, 2007) (considering objective evidence in assessing the defendant’s role as the family caretaker). In *Crawford*, the court considered letters from a community pediatrician, therapist, as well as an Early Childhood Special Education Teacher. *Id.* The letters described the defendant as “the best person to care for her children,” as well as an integral component in creating a stable, loving environment for her children. *Id.* One critic similarly directs courts to rely on concrete evidence to assess the defendant’s parenting skills. *Bush*, *supra* note 46, at 197. Such evidence is important in sentencing because judges typically are not in a position to evaluate family environments, unlike social workers or family court judges. *Id.*

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financial support.<sup>211</sup> This would lessen the opportunity for judicial reliance on stereotypical assumptions of females as “caretakers” and males as mere “breadwinners.”<sup>212</sup> Further, courts should consider the dependents’ age and special needs, as well as the existence of alternative caretakers, and the likelihood that parental rights will be terminated, in order to gauge the gravity of harm caused by incarceration.<sup>213</sup> This non-exhaustive list of objective factors will aid judges in focusing more on the defendant’s actual family situation rather than reverting to their own unfounded, stereotypical views.

Critics will argue that the proposed amendment will fail to produce uniformity in family ties departures and will also argue that the proposed amendment creates poor public policy by creating a sentencing loophole for offenders merely because they have a family. The proposed amendment addresses the former argument because application of a consistent standard, albeit one that includes a list of non-exhaustive factors, will nonetheless dramatically decrease disparity and better achieve the goals of sentencing uniformity.<sup>214</sup> The proposed amendment also addresses the latter argument because courts will engage in an objective analysis and act consistent with public policy by disfavoring lesser sentences for defendants based on the mere existence of family members.<sup>215</sup> Application of these objective factors will ensure that departure is granted only where incarceration would surely cause unwarranted harm. Further, because sentencing judges are required to balance the factors enumerated in 18 U.S.C. § 3553(a) against departures under the Guidelines, this provides further assurance that courts will impose lesser sentences only when warranted.<sup>216</sup> In sum, analysis under the proposed standard will result in more uniform and meaningful family ties departures.

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<sup>211</sup> See *supra* note 47 and accompanying text (recognizing the detrimental effects that loss of a defendant’s financial support would entail for his or her family).

<sup>212</sup> See *supra* Part III.B (analyzing judicial application of unfounded gender stereotypes in family ties departures without objective inquiry into the facts of a case).

<sup>213</sup> See *supra* notes 47–49 (discussing how the harm and social cost of incarceration is influenced by the innocent family member’s age and special needs, the lack of alternative caretakers other than the state, and the possibility that defendants may lose their parental rights); see also *Crawford*, 2007 WL 2436764, at \*8 (considering the age and special needs of the defendant’s children, the availability of alternative caretakers, and the risk that the defendant would lose her parental rights upon incarceration).

<sup>214</sup> See *supra* note 31 and accompanying text (providing the purpose and goals behind promulgation of the SRA).

<sup>215</sup> See *supra* note 53 and accompanying text (discussing policy arguments against considering the defendant’s family at sentencing).

<sup>216</sup> See *supra* note 93 (providing the sentencing factors enumerated in 18 U.S.C. § 3553(a)); see also *supra* note 95 and accompanying text (discussing the amendments to Guidelines section 1B.1 Application Instructions following *Booker*).

## V. CONCLUSION

Following the Supreme Court's departure standard articulated in *Koon*, federal courts adopted varied departure standards regarding family ties and responsibilities. In doing so, courts failed to effectuate the purposes underlying the Guidelines and effectively combat the unwarranted harm experienced by a defendant's family members upon incarceration. In applying these varying departure standards, courts created disparities in departures between similarly situated defendants, contrary to sentencing goals of uniformity. Further, while many standards ignored the detrimental effects of incarceration on the family, those that appeared to focus on such harm were applied without meaningful, objective analysis and allowed for dated stereotypes to influence departure decisions. While amendments to Guidelines section 5H1.6 presented courts with an opportunity to get it right, history repeated itself.

In order to solve this continuing conundrum in family ties departures, section 5H1.6 must undergo further amendment so that it mandates a uniform and objective departure standard. Under this standard, Linda Smith, John Doe, and Michelle Johnson would experience a greater degree of fairness in sentencing under the Guidelines.<sup>217</sup> In comparing Linda's and John's similar family circumstances under the proposed amendment, application of that standard would produce a uniform result—most likely a successful departure for both—because the courts would delve into the actual family circumstances faced by both defendants.<sup>218</sup> In comparing John's and Michelle's family situations, application of the proposed standard would again bring about different results. Here the courts would set aside any assumptions associating Michelle as a "caretaker" and John as a mere "breadwinner" and then would objectively analyze the defendants' family roles under the proposed factors.<sup>219</sup> Thus, John would likely receive departure although Michelle would not.<sup>220</sup>

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<sup>217</sup> See *supra* Part I (presenting a hypothetical based on three defendants' motions for departure based on family ties).

<sup>218</sup> Based on the simplified hypothetical, both Linda and John play an active role in their families. They both supply the primary means of financial support while maintaining an active caretaking role as well. Each defendant also has young children, at least one of which has special needs. The presence of these factors likely show that the family's loss upon the defendant's incarceration would be substantial. See *supra* Part II.B (discussing factors related to family harm caused by incarceration). Thus, upon a showing of factual evidence, the court would likely depart in both instances.

<sup>219</sup> Michelle's previous success in obtaining a departure indicates the court based its decision on gender stereotypes. There the court ignored the fact that Michelle's children spent most of their time with grandparents and were older in age. In granting departure

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Although *Booker* ushered in a renewed sense of judicial discretion in federal sentencing, uniformity remains a vital and important sentencing goal. Therefore, family ties departures must be applied in a consistent manner in order to avoid unwarranted disparity. Given the high cost of incarceration to innocent family members and society in general, the departure standard should focus on the harmful effects of incarceration to the family. However, if these goals are to ever be realized, courts must apply family ties departures in a meaningful and objective way. The proposed amendments to Guidelines section 5H1.6 would provide the means to realize those goals.

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the court likely assumed that Michelle played a vital caretaking role in the lives of her children. See *supra* Part III.B (analyzing courts' reliance on the notion of women as natural caretakers in family ties departures). John's previous failure likewise indicates that the court based its decision on the idea of the male "breadwinner" defendant. Under the assumption, John was not viewed as a caretaker despite evidence to the contrary. Rather, as a "breadwinner" John was unable to meet the higher departure threshold. See *supra* Part III.B (analyzing courts' reliance on the notion of men as natural "breadwinners," rather than caretakers, in family ties departures).

<sup>220</sup> Application of the proposed objective factors would show that John plays an active role in his family, especially to his young children, one of which has special needs, and he provides key financial support. Michelle, on the other hand, plays less of an active role in her family that includes two teenage children. Based on these simplified factors, it is likely that John's family would suffer greatly upon his absence while Michelle's family would likely not. See *supra* Part II.B (discussing factors related to family harm caused by incarceration).

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