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Gender-Related Issues in a Post-Booker Federal Guidelines World

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* Professor, Southwestern University School of Law. This article updates, revises, and expands several of my previous writings in light of *Booker*.

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I. INTRODUCTION

The Guidelines' concerted effort to produce identical sentences for men and women who commit similar crimes, while never completely successful, imposed draconian costs on families as well as on women who do not resemble the violent male drug dealers who inspired the severe federal drug penalties. For a number of years, I have been an outspoken critic of the Guidelines, particularly as it relates to family ties and other defendant oriented departures.[1] Not only have I argued that gender-related differences can play a legitimate role in sentencing, but that a completely gender-neutral sentencing scheme is bad policy because it has the potential of increasing intergenerational crime by ignoring the gendered realities of caregiving in our current society.

This article discusses why gender related issues are legitimate sentencing factors and reviews the departures that have gendered applications. In addition, I contend that *Booker's*[2] reasonableness analysis provides the flexibility to approve non-Guidelines sentences based on gender-related factors and caution against interpreting the advisory Guidelines as a straitjacket that confines the analysis of

1. *See, e.g.*, Myrna S. Raeder, *A Primer on Gender-Related Issues That Affect Female Offenders*, 20 CRIM. JUST. 4 (2005); Myrna S. Raeder, *Gendered Implications of Sentencing and Correctional Practices*, *in* GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS (Barbara Bloom ed., Carolina Academic Press, 2003); Myrna S. Raeder, *Remember the Family: Seven Myths About Single Parenting Departures*, 13 FED. SENT'G REP. 251 (2001) [hereinafter *Remember the Family*]; Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Women Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133 (1999) [hereinafter *Severing Family Ties*]; Myrna S. Raeder, *The Forgotten Offender: Effects of Federal Sentencing Policy on Women and Their Children*, 8 FED. SENT'G REP. 157 (1995); Myrna S. Raeder, *Gender Issues Raised by the Sentencing Guidelines*, 8 CRIM. JUST. 20 (1993); Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993) [hereinafter *Gender and Sentencing*].

2. 543 U.S. 220 (2005).

the reasonableness of non-Guidelines sentences. I critique the practice of requiring judges to decide the appropriateness of departures before issuing non-Guidelines sentences and also suggest an approach to arguing child centered issues that focuses on the family as a fundamental liberty interest that should be considered in sentencing. While the presence of mandatory minimums will continue to constrain federal sentencing, the safety valve and prosecutorial motions for substantial assistance should help to ameliorate the worst excesses of the federal system. Finally, I discuss the Bureau of Prisons (BOP) regulations concerning community correctional centers, urging their expanded use for women offenders and their children.

II. GENDERED DIFFERENCES IN FEMALE CRIMINALITY

Two of the basic tenets underlying the Guidelines are that sex has no role in sentencing[3] and that downward departures based on individual characteristics of defendants should be limited to extraordinary circumstances.[4] However, despite the dramatic influx of women into the criminal justice system, their numbers still pale in comparison to males, and judges continue to find differences that result in women being over-represented in federal non-incarcerative sentences. For example, in 2003, females under federal correctional supervision were approximately 34% of probationers, 18% of those under supervised release, and 3% of parolees.[5] Yet this is scant comfort when it is estimated that in the face of nearly a decade of dropping crime rates, women are now three times more likely today to go to prison than in 1986.[6]

By year-end 2004, women accounted for 7% of all federal prisoners, up from 5.7% in 1990.[7] The federal system now ranks second behind Texas in the number of women it incarcerates and, along with California, houses over one-third of all female prisoners.[8] That increased incarceration is dictated in large measure by the goal of getting tough on crime, rather than by public safety concerns, can be demonstrated by a comparison with Western Europe, which incarcerates one-tenth of the women incarcerated in the United States, even though it has

3. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2005).

4. *See id.* § 5H1.

5. BUREAU OF JUST. STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 100 tbl.7.2 (2003), *available at* http://www.ojp.usdoj.gov/bjs/abstract/cfjs03.htm [hereinafter BJS COMPENDIUM] (including statistics based on numbers provided from Oct. 1, 2002-Sept. 30, 2003) (on file with the *McGeorge Law Review*).

6. Women's Prison Association, Focus on Women & Justice Series, Trends in Arrests and Sentencing (May 2004), *available at* http://www.wpaonline.org/WEBSITE/home.htm (on file with the *McGeorge Law Review*); *see also* BJS COMPENDIUM, *supra* note 5, at 108 tbl.7.10 (showing women as approximately 7% of federal prisoners in 2003).

7. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2004 at 4-5 tbl.6 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf (on file with the *McGeorge Law Review*).

8. *Id.* at 5.

approximately the same population.[9] While some states have been forced by economic realities to take a closer look at who they incarcerate, the federal prison-building spree continues to accommodate more women, including local D.C. prisoners. Since 1995, the average annual increase of federal prisoners is 7.4%, compared to a state annual increase of 2.6%.[10]

Federal drug laws clearly impact incarceration. While 57.5% of all convicted federal female offenders were sentenced to incarceration, 82% of female drug offenders were incarcerated, compared to 76% of female violent offenders.[11] The higher drug incarceration is likely the result of mandatory minimums and harsh Guidelines sentences, since one would otherwise assume that violent offenders would be punished more severely than drug offenders. Interestingly, the federal violence category reflects a substantially higher rate of female convictions for manslaughter (27%) than murder (11%),[12] possibly resulting from federal jurisdiction over common law crimes in Indian country and other federal enclaves,[13] where previously battered women who have killed their intimates may be claiming self-defense.[14] In other words, even the nature of violence tends to differ between men and women.

Since section 5H1.10 prohibits consideration of sex as a factor in determining sentences, discussion of gender concerning Guidelines sentencing is typically couched in terms not "based" on sex or gender, but instead is identified as "gender related."[15] Yet, despite the 5H1.10 ban, being female is positively correlated with rehabilitation, and studies show lower rates of recidivism for females than males.[16] For example, in 2003, 74% of females were terminated from federal supervised release without violation, compared to nearly 60% of men.[17] Similarly, there is evidence from a recent study of probationers that gender has a statistically significant effect on recidivism, and that women may be

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9. AMNESTY INT'L, NOT PART OF MY SENTENCE: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY III, at 15 (1999), *available at* http://www.amnestyusa.org/countries/usa/document.do?id=D0F5C2222D1AABEA8025690000692FC4 (on file with the *McGeorge Law Review*).

10. *Id.* at 2 tbl.1.

11. BJS COMPENDIUM, *supra* note 5, at 76 tbl.5.4.

12. U.S. SENTENCING COMM'N, 2003 ANNUAL REPORT tbl.5 (2004) (on file with the *McGeorge Law Review*).

13. *See, e.g.*, 18 U.S.C.A. § 13 (West 2000).

14. *Cf.* United States v. Whitetail, 956 F.2d 857, 863 (8th Cir. 1992) (holding that a jury's rejection of a defendant's claim of self-defense based on battered-woman syndrome did not preclude the district court from considering battered-woman syndrome as a mitigating factor at sentencing for second degree murder).

15. *See* Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291, 296 (2002).

16. *See, e.g.*, U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 11 (2004), http://www.ussc.gov/publicat/Recidivism_General.pdf (listing two-year recidivism rate for men as 24.3%, compared to a 13.7% rate for women; and noting a 15% difference in recidivism in Criminal History Categories V and VI) (on file with the *McGeorge Law Review*). *See generally* Candace Kruttschnitt & Rosemary Gartner, *Women's Imprisonment* in 30 CRIME & JUST. 50 (2003) (summarizing general literature).

17. BJS COMPENDIUM, *supra* note 5, at 104 tbl.7.6.

overclassified in terms of risk.[18] Recent state studies duplicate theses findings.[19] The current draft of the Model Penal Code on Sentencing would permit gender as a consideration in sentencing "if there is a reasonable basis in the law for doing so."[20] Similarly, a non-Guidelines sentence was imposed in *United States v. Carmona-Rodriguez*,[21] for an older woman based on markedly lower rates of recidivism for defendants over the age of forty, without referring to the fact that her gender was equally significant, regardless of her age.

In an earlier study, Professor Daly, a criminologist, suggested that direct comparison of similar sounding crimes often reveals that the woman is less blameworthy than her male counterpart.[22] In reaching this conclusion, she evaluated the "gestalt of the harm," which considers such factors as the relationship between victim and offender, the manner in which the crime was committed, as well as the mix of offense and offender biography.[23] Thus, even in a Guidelines equality based mode of sentencing, lighter sentences for females may be justified, although a statistical analysis would not reveal the nuances or textured reasoning that explain away any sentencing differential.

The Guidelines pay little attention to these gendered dynamics that help to explain why women appear to do better than men even in a Guidelines regime.[24] In fact, much of the differential may exist because a large percentage of women are first offenders. Indeed, substantially higher proportions of first offenders are females who have absolutely no prior criminal history.[25] Because this complete absence of criminality is not adequately addressed in the current Guideline matrix, it is arguable that such first time offenders are disadvantaged by the Guidelines, with women comprising a significant proportion of this shortchanged group.[26] This problem exists despite the statutory direction given to the Sentencing Commission to consider the appropriateness of sentences other than imprisonment for first offenders.[27]

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18. *See* David E. Olson et al., *Men Are from Mars, Women Are from Venus, but What Role Does Gender Play in Probation Recidivism?* 5 JUST. RES. & POL'Y 33 (2003).

19. California recidivism statistics show male felon recidivism after one year as nearly 42%, compared to 29% for female felons, at two years 54% compared to 41%, and at three years 59% compared to 45%. CAL. DEPT. CORRECTIONS, RISK MANAGEMENT DIV., RECIDIVISM RATE (Mar. 22, 2006), *available at* http://www.corr.ca.gov/ReportsResearch/OffenderInfoServices/Annual/RECID3/Recid3d2002.pdf (on file with the *McGeorge Law Review*); BRIAN J. OSTROM, ET AL., OFFENDER RISK ASSESSMENT IN VIRGINIA (2002), *available at* http://nicic.org/Misc/URLShell.aspx?SRC=Catalog&REFF=http://nicic.org/Library/018016&ID=018016&TYPE=PDF&URL=http://www.vcsc.state.va.us/risk_off_rpt.pdf (on file with the *McGeorge Law Review*).

20. MODEL PENAL CODE: SENTENCING § 6B.06(4)(b) (Council Draft No. 1, Sept. 27, 2006).

21. 2005 WL 840464, at *4 (S.D.N.Y. Apr. 11, 2005).

22. KATHLEEN DALY, GENDER, CRIME AND PUNISHMENT 165-67 (1994).

23. *Id.* at 90, 99, 165.

24. BJS COMPENDIUM, *supra* note 5, at 77 tbl.5.5.

25. *See* U.S. SENTENCING COMM'N, RECIDIVISM AND THE "FIRST OFFENDER" 11 (May 2004), *available at* http://www.ussc.gov/ publicat/Recidivism_FirstOffender.pdf (on file with the *McGeorge Law Review*).

26. Michael Edmund O'Neill, *Re-Conceptualizing Criminal History for FirstTime Offenders*, 17 FED. SENT'G REP. 191, 192 (2005) (finding nearly forty percent of the individuals with no prior arrests were women); *see Panel I, Disparity in Sentencing—Race and Gender*, 15 FED. SENT'G REP. 160 (2003).

27. *Id.* (citing 28 U.S.C. § 994(j) (1994)).

Studies have been inconsistent as to whether any significant disparity exists when the relevant factors are controlled. The United States Sentencing Commission recently published a report on racial, ethnic, and gender disparities, which found gender disparity favoring women in federal sentencing, but did not conclude whether this was based on improper considerations such as paternalism as opposed to such factors as child care responsibilities.[28]

Notwithstanding sex being a forbidden factor, there is little doubt that men and women differ significantly in their criminal profiles, starting with their pathways to crime, the crimes they commit, their roles in criminal activity, and their family dynamics.[29] Females often enter the criminal justice system due to their attempts to survive victimization. For example, female offenders report very high instances of physical and sexual abuse, totaling more than 40% of federal inmates.[30] Private studies indicate even higher rates of abuse, ranging from 60% to 80%.[31] This picture accords with the route taken by many juvenile girls into the criminal justice system. They start by running away from abusive homes; are brought into the dependency system as status offenders; then violate a court order, typically not to run away or be truant again, and thereby become delinquent.[32]

Moreover, despite the Guidelines' determination to treat all defendants as fungible, women simply do not mirror male criminality. In 2003, a comparison of males to females who were arrested federally reveals that women account for only 14% of all federal arrests, 8% of violent arrests, 15% of drug arrests, but approximately 30% of property arrests.[33] Federally convicted offenders also reflect this disparity, with women comprising approximately 13% of all convictions, nearly 8% of violent offenses, 26% of property offenses, and 13% of

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28. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 128-29 (2004), http://www.ussc.gov/15_year/15year.htm (on file with the *McGeorge Law Review*).

29. *See generally* DANA D. DEHART, PATHWAYS TO PRISON: IMPACT OF VICTIMIZATION IN THE LIVES OF INCARCERATED WOMEN (2004), *available at* http://nicic.org/Misc/URLShell.aspx?SRC=Catalog&REFF=http://nicic.org/Library/020226&ID=020226&TYPE=PDF&URL=http://www.ncjrs.org/pdffiles1/nij/grants/208383.pdf (on file with the *McGeorge Law Review*).

30. CAROLINE WOLF HARLOW, BUREAU OF JUST. STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1-2 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf (on file with the *McGeorge Law Review*). The percentage of state prisoners is even higher (nearly sixty percent). *Id.*

31. *See, e.g.*, CHI. COALITION FOR THE HOMELESS, UNLOCKING OPTIONS FOR WOMEN: A SURVEY OF WOMEN IN COOK COUNTY JAIL 1 (2002), *available at* http://www.chicagohomeless.org/factsfigures/jailstudy.pdf (finding that women inmates in the Cook County Jail had been victims of child abuse, sexual assault, and domestic violence at rates two and three times the national average; majority were homeless at the time of their arrest, and many also had histories of substance abuse and mental illness, often associated with their past abuse having gone untreated) (on file with the *McGeorge Law Review*).

32. *See* Joseph R. Biden, Jr., *What About the Girls? The Role of the Federal Government in Addressing the Rise in Female Juvenile Offenders*, 14 STAN. L. & POL'Y REV. 29, 35-36 (2003) (noting that sixty percent of all runaways are girls and decrying the mixed message that we give adult women to flee abuse, while criminalizing girls for the same behavior). *See generally* Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165 (2004).

33. BJS COMPENDIUM, *supra* note 5, at 19 tbl.1.3.

drug offenses.[34] Generally, racial and ethnic differences, which some attribute to the war on drugs, result in a disproportionate percentage of minority women and their children being impacted by incarceration.[35] For example, the number of Hispanic female inmates increased 71% from 1990 to 1996.[36] In 2003, African-American females were more than twice as likely as Hispanic females, and nearly five times more likely than white females, to be incarcerated.[37] In addition, about 58% of all sentenced female inmates were minorities in 2003.[38] This pattern is replicated in the federal system, where more than 60% of incarcerated women in 2003 were imprisoned for drug offenses.[39]

There is a virtual consensus that incarcerated women are an incredibly needy population. Besides profound physical and sexual abuse, many have entrenched histories of drug and alcohol dependence and serious physical and mental health disorders.[40] Women also have higher rates of HIV infection than male inmates, as well as co-occurring substance abuse.[41] The fact that this population of women engages in substance abuse should come as no surprise. Commentators and service providers posit that a correlation exists between victimization and specific high-risk behaviors such as serious polydrug abuse.[42] Thus, it is likely that some segment of female offenders resort to substance abuse to self medicate depression resulting from their violent encounters and/or mental illness[43] or as a

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34. *Id.* at 65 tbl.4.5.

35. *See generally* Josephine Gittler, *The American Drug War, Maternal Substance Abuse And Child Protection: A Commentary*, 7 J. GENDER RACE & JUST. 237 (2003); MARC MAUER, ET AL., GENDER AND JUSTICE: WOMEN, DRUGS, AND SENTENCING POLICY, EXECUTIVE SUMMARY (1999), *available at* http://www.sentencingproject.org/pdfs9042smy.pdf (on file with the *McGeorge Law Review*).

36. BUREAU OF JUST. STATISTICS, PRISONERS IN 1997, tbl.12 (1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p97.pdf (on file with the *McGeorge Law Review*).

37. BUREAU OF JUST. STATISTICS, PRISONERS IN 2003, 10 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf (on file with the *McGeorge Law Review*).

38. *Id.* at 9.

39. *See* BJS COMPENDIUM, *supra* note 5, at 108 tbl.8 (showing women as 8% of 85,789 drug offenders, compared to a total prison population of nearly 11,000); U.S. SENTENCING COMM'N, 2003 ANNUAL REPORT tbl.7.

40. *See, e.g.*, PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf (noting that approximately eighty percent of mentally ill females reported physical or sexual abuse) (on file with the *McGeorge Law Review*); JENNIFER C. KARBERG & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES, 2002, at 1 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sdatji02.pdf (noting that more than fifty percent of female jail inmates were dependent on alcohol or drugs) (on file with the *McGeorge Law Review*).

41. U.S. GEN. ACCT. OFF., REPORT TO THE HONORABLE ELEANOR HOLMES NORTON HOUSE OF REPRESENTATIVES, WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS 4, 7, 24-25, 73 (1999), *available at* http://www.gao.gov/archive/2000/gg00022.pdf [hereinafter GAO REPORT] (on file with the *McGeorge Law Review*).

42. *See, e.g.*, U.S. OFF. OF JUST. PROGRAMS, CONFERENCE PROCEEDINGS, NATIONAL SYMPOSIUM ON WOMEN OFFENDERS 22-29, 33-40 (1999), *available at* http://permanent.access.gpo.gov/lps9890/lps9890/www.ojp.usdoj.gov/cpo/womenoffenders/women.pdf (on file with the *McGeorge Law Review*).

43. *See* DITTON, *supra* note 40.

way to avoid dealing with deeper traumas that have scarred them. Similarly, the link between substance abuse and criminality is well accepted.

Given the relatively few community-based residential substance abuse or mental health programs for indigent women with children, it is arguable that we have turned prisons into the social services agency of last resort. Thus, correctional officials are often stymied about how to deal with women offenders because their problems do not implicate the traditional discipline, security, and escape concerns associated with men's prisons. In other words, physical and mental health care, treatment for substance abuse and trauma, and relationships inside as well as outside prison, not security, are the major operational issues in most women's institutions. Prior to *Booker,* the Guidelines attempted to mask all gender related differences. Now that all factors relating to a just sentence can be discussed, the genie is out of the bottle, and the reasonableness review provides a vehicle for reintroducing gender-related realities into the policy debate.

III. THE GENDERED IMPACT OF SENTENCING ON CHILDREN OF INCARCERATED MOTHERS

High among the gender related impacts caused by Guidelines sentencing is the tragic effect of long prison sentences on the children of incarcerated mothers. Elsewhere, I have argued at length, with little success, why family ties departures should be granted more frequently.[44] Nearly seventy percent of women under correctional sanction have two minor children[45] and about half of women in federal prisons with young children had lived with those children prior to entering prison.[46] In 1999, more than 1.3 million minor children had a mother under correctional sanction in the United States; more than a quarter million of these children had mothers who are serving time in prison or jail.[47] A recent California study estimated 152,000 children with incarcerated mothers in 2001.[48] It is likely that the number of children impacted by their mother's federal incarceration is similar, given comparable incarceration statistics.

Many incarcerated women are single mothers, who are marginally employed. Nearly thirty percent of female inmates reported receiving welfare assistance at the time just before the arrest that resulted in their sentence.[49] Yet we sentence these women based on male models of criminality and violence, giving them long sentences for nonviolent drug and property offenses that ignore the

44. *See supra* note 1.

45. LAWRENCE A. GREENFELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, WOMEN OFFENDERS 7 (1999), http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf (on file with the *McGeorge Law Review*).

46. *Id.* at 8.

47. *Id.*

48. *See* CHARLENE WEAR SIMMONS, CALIFORNIA RESEARCH BUREAU, CALIFORNIA LAW AND THE CHILDREN OF PRISONERS 1, 6 (2003), *available at* http://www.library.ca.gov/crb/03/03/03-003.pdf (on file with the *McGeorge Law Review*).

49. GREENFELD, *supra* note 45, at 8.

disruption that children face when their sole or primary parent is incarcerated. This blindness to gender-related realities occurs even though there is no dispute that, unlike the children of male offenders who overwhelmingly reside with their mothers, children of single mothers are typically shifted to other relatives, friends, or foster care, with less than 30% residing with their father.[50] Siblings are often separated and may be sent to live in unstable environments.

Pre-*Booker,* the federal system was particularly harsh in discounting family ties as a reason to lower sentences, ignoring the fact that many of these nonviolent female offenders are single parents by labeling it as not "extraordinary." We are one of the few countries that routinely separate incarcerated mothers from their infants. Most keep young children with their mothers and provide alternatives to prison, intuitively recognizing that parental bonding is a necessary step in the development of a healthy child. Reactions of children to separation can include guilt, "denial, anger, anxiety, inability to concentrate, depression, sadness, grief, shame, . . . fear," developmental regression,[51] and even post traumatic stress disorder.[52] It is common knowledge that children of incarcerated parents have greater risk of offending. The introduction to the bipartisan Second Chance Act states, "[t]he long-term generational effects of a social structure in which imprisonment is the norm and law-abiding role models are absent are difficult to measure but undoubtedly exist."[53] For example, a study in Sacramento County, California, found that of all children arrested between the ages of nine and twelve, 45% had an incarcerated parent.[54] Another study revealed a 60% rate of teenage pregnancy of female children of incarcerated mothers and a 40% delinquency rate for teenage sons.[55]

IV. THE GENDERED IMPACT OF SENTENCING ON LOSS OF PARENTAL RIGHTS

Unnecessary prison terms also destroy the ability to maintain family ties that are essential to ensuring family reunification and avoiding termination of parental rights under the Adoption and Safe Families Act (ASFA).[56] ASFA's timelines can

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50. *See* CHRISTOPHER J. MUMOLA, BUREAU OF JUST. STATISTICS, INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf (noting ninety percent of children of incarcerated males reside with their mothers) (on file with the *McGeorge Law Review*).

51. *See* Simmons, *supra* note 48, at 6; Julie Poehlmann, *Representations of Attachment Relationships in Children of Incarcerated Mothers*, 76 CHILD DEV. 679, 682 (2005). *See generally* CHILDREN OF INCARCERATED PARENTS (Katherine Gabel & Denise Johnston, eds., 1995).

52. Jackie Crawford, *Alternative Sentencing Necessary for Female Inmates With Children*, CORRECTIONS TODAY, June, 2003, *available at* http://www.aca.org/publications/ctarchivespdf/june03/commentary_june.pdf (on file with the *McGeorge Law Review*).

53. S. Res. 2789, 108th Cong. (2004).

54. SIMMONS, *supra* note 48, at 7.

55. Crawford, *supra* note 52.

56. Adoption and Safe Families Act (ASFA) of 1997, Pub. L. No. 105-89 (codified as amended in scattered sections of 43 U.S.C.). *See generally* PATRICIA E. ALLARD & LYNN D. LU, BRENNAN CENTER FOR JUSTICE, REBUILDING FAMILIES, RECLAIMING LIVES: STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE AND

result in even an eighteen-month prison sentence being a death penalty for parental rights, sentencing mothers to a lifetime without their children. Termination proceedings are mandated if a child spends fifteen out of twenty-two months in foster care, unless the child is in the care of a relative,[57] the family has not been provided with reunification services, or a compelling reason exists as to why it is not in the best interest of the child to terminate the parental relationship.[58] In the five years after ASFA was adopted, reported cases concerning termination of parental rights increased approximately 250%.[59] Laws concerning termination of parental rights vary and pose significant problems for incarcerated women.[60] While incarceration *per se* is not a reason justifying termination in most states,[61] several include a provision for lengthy[62] or repeated incarceration.[63] Moreover, cases involving termination of incarcerated parents often cite reasons that are a consequence of imprisonment:[64] child in foster care most of her life, parental failure to contact or support child for a period of over six months, parent incapable of performing parental duties, parent's progress stagnated, abandonment, or parent failed to rehabilitate.[65] Female inmates are impacted disproportionately to men, since as previously mentioned, due to the

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THEIR INCARCERATED PARENTS (2006), *available at* http://www.brennancenter.org/programs/cj/Family%20Rights%20Report.pdf (on file with the *McGeorge Law Review*); TIMOTHY ROSS ET AL., VERA INST. OF JUST., HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION, (2004), *available at* http://www.vera.org/publication_pdf/245_461.pdf (on file with the *McGeorge Law Review*); Philip M. Genty, *Incarcerated Parents and the Adoption and Safe Families Act (ASFA): A Challenge for Correctional Services Providers*, ICCA J. Community Corrections 42 (Nov. 2001).

57. 42 U.S.C.A. § 675(5)(E) (West 2003). Some states have adopted even shorter deadlines. *See, e.g.*, OHIO REV. CODE ANN. § 2151.414(E)(12) (LexisNexis 2002); CAL. WELF. & INST. CODE § 361.5(a)(2) (West 2005).

58. *See generally* Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176 (2004); Katherine A. Hort, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879 (2001).

59. Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1678 (2003).

60. *See* Philip M. Genty, *Permanency Planning in the Context of Parental Incarceration: Legal Issues and Recommendations*, 77 CHILD WELFARE 543, 545 (1998). *See generally* Lanette P. Dalley, *Imprisoned Mothers and Their Children: Their Often Conflicting Legal Rights*, 22 HAMLINE J. PUB. L. & POL'Y 1 (2000); Heidi Rosenberg, Comment, *California's Incarcerated Mothers: Legal Roadblocks to Reunification*, 30 GOLDEN GATE U. L. REV. 285 (2000); Pamela Lewis, Comment, *Behind the Glass Wall: Barriers that Incarcerated Parents Face Regarding the Care, Custody and Control of their Children*, 19 J. AM. ACAD. MATRIMONIAL LAW. 97 (2004).

61. *See* Loene Trubkin, Go to Jail, Lose Your Kid: Mothers Incarcerated Too Long are Stripped of Parental Rights (2005) (surveying case law) (unpublished student paper on file with author).

62. *See, e.g.*, COLO. REV. STAT. ANN. § 19-3-604(1)(b)(iii) (LexisNexis 2004); MO. ANN. STAT. § 211.447(6)(1) (West 2004).

63. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 50/1(D)(s) (West 2004); Ohio Rev. Code Ann § 2151.414(E)(13) (LexisNexis 2002).

64. *See, e.g.*, Denise Johnston & Michael Carlin, *When Incarcerated Parents Lose Contact with Their Children*, 6 CCIP J (2004), http://e-ccip.org/journal.html (on file with the *McGeorge Law Review*).

65. *See* Trubkin, *supra* note 61.

prevalence of single incarcerated mothers, their children have a greater probability of being in foster care than do male inmates.

Lassiter v. Department of Social Services[66] rejected any requirement that a state must provide a parent with an attorney in termination proceedings, although many states provide an attorney for the court appearance. However, often such appointment occurs well after the need arises for the mother to connect with her child and the foster care system. The difficulty for incarcerated parents to contact foster parents, social workers, child protection agencies, and others responsible for parental rights determinations can be daunting without an attorney. Attempts to require the state to provide such legal advice in a correctional setting, if not otherwise legislatively mandated, have not proved successful. *Glover v. Johnson*[67] held that the fundamental right of access to courts did not require the state to provide legal assistance for inmates in connection with custody matters. Thus, unless a local bar association or law school provides pro bono services to women to undertake representation or simply to provide a contact with the woman's attorney or foster care mother, incarcerated women have a difficult time of meeting reunification plans. Similarly, if a parent is incarcerated in another state, there appears to be near unanimous agreement that her presence is not required at the termination proceeding so long as she is represented by counsel.[68]

In several states, statutes require that child welfare agencies provide reunification services to incarcerated parents,[69] but some claim that this requirement is often ignored. In order to escape from ASFA, many advocates on behalf of incarcerated mothers work to avoid foster care placements by the use of guardianships, which also requires legal assistance. Some programs also attempt to provide services in cases where the children are at risk of foster placements.[70] Keeping a child out of governmental supervision may also have the benefit of eliminating any later attempts to recoup payment from incarcerated mothers for such services, an issue that arises with some regularity.[71]

Usually, state and federal foster care systems offer cash payments to non-relatives to care for children placed in foster care. In reality, however, many of these children are not placed in the homes of strangers but with their relatives

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66. 452 U.S. 18 (1981).

67. 75 F.3d 264 (6th Cir. 1996), *cert. denied*, 519 U.S. 816 (1996).

68. *See in re* Adoption/Guardianship No. 6Z980001, 748 A.2d 1020, 1023 (Md. App. 2000).

69. *See* CAL WELF. & INST. CODE § 361.5(e)(1) (West 1998); *see also* N.Y. SOC. SERV. LAW 384-b(2)(b), (7)(f) (McKinney 2003 & Supp. 2006). *See generally* Cristine H. Kim, Case Note, *Putting Reason Back Into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287 (1999).

70. Women's Prison Association has a number of programs aimed at women offenders and their children, described at www.wpaonline.org. For more descriptions, see also services of Chicago Legal Advocacy for Incarcerated Mothers, identified at www.c-l-a-i-m.org and those of Legal Services for Prisoners with Children, listed at www.prisonerswithchildren.org.

71. *See generally* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, JUDGES' J., Winter 2004 at 5 ; Drew A. Swank, *Enforcing the Unenforceable: Child Support Obligations of the Incarcerated*, 7 U.C. DAVIS J. JUV. L. & POL'Y 61 (2003).

who are willing to provide temporary care as "kinship care" providers.[72] Yet even if relatives want to provide a home for the children they may not be able to afford this luxury, since similar payments are often not available to kinship caregivers.[73] For example, *Lipscomb v. Simmons*[74] upheld an Oregon statute that provided aid to foster parents who were not related to their foster children, but denied state aid to foster parents who were related to their foster children. Changes in welfare laws, mandated by the passage in 1996 of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[75] make it even more difficult for relatives to obtain the financial support necessary to care for these children. Temporary Assistance for Needy Families (TANF) not only removes any entitlement to benefits but also imposes time limits on eligibility for benefits. Similarly, relatives may not necessarily be able to adopt children to keep them within the extended family.[76]

Despite a mother's incarceration, even a damaged parent-child relationship is likely to be better than no relationship.[77] Ironically, the substance abuse problem that is a significant reason for a mother being incarcerated often cannot be easily treated in the community prior to arrest. For example, in one survey, less than ten percent of child welfare agencies were able to find substance abuse treatment programs for most of their clients within thirty days.[78] We assume these children will have a better place to live, while the numbers tell us there are not enough foster care parents or homes for adoptions, particularly for children who are not infants.[79] Parental bonds are blithely severed without checking to see if anything

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72. *See generally* REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE, JUNE 2000, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ADMINISTRATION FOR CHILDREN AND FAMILIES ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES CHILDREN'S BUREAU, http://aspe.hhs.gov/hsp/kinr2c00/index.htm (on file with the *McGeorge Law Review*).

73. *See* Susan Phillips and Barbara Bloom, *In Whose Best Interest? The Impact of Changing Public Policy on Relatives Caring for Children with Incarcerated Parents*, 77 CHILD WELFARE 531, 536-38 (Sept/Oct 1998).

74. 962 F.2d 1374, 1376 (9th Cir. 1992) (en banc).

75. Personal Responsibility and Work Opportunity Reconciliation Act (PRWRA) of 1996, Pub. L. No. 104-193, 115, 110 Stat. 2105.

76. *See* Mullins v. Oregon, 57 F.3d 789, 791 (9th Cir. 1995) (holding a biological connection, standing alone, did not give grandparent a constitutionally protected liberty interest in adoption of a grandchild).

77. Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty-State Analysis*, 30 J. FAM. L. 757, 804 (1991-92).

78. U.S. DEP'T HEALTH & HUM. SERVS., BLENDING PERSPECTIVES AND BUILDING COMMON GROUND: A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION 80 (1999), *available at* http://aspe.hhs.gov/HSP/subabuse99/subabuse.htm (on file with the *McGeorge Law Review*).

79. *See* U.S. Dep't of Health & Human Serv., Admin. For Children and Families, Adoption and Foster Care Analysis and Reporting System, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.htm (on file with the *McGeorge Law Review*). The preliminary fiscal year 2003 estimates as of April 2005 shows nearly 120,000 children waiting an average of forty-four months for adoption from the public foster care system. *Id.* Further, 50,000 were adopted in 2003 and 68,000 children in foster care had their parental rights terminated for all living parents. *Id.* Of the children adopted, the mean waiting time after termination was sixteen months. *Id. See generally* U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN,

is substituted in their place. Indeed, states that aggressively promote adoptions from foster care are rewarded with large bonuses from the federal government.[80] Yet, for older children who have bonded with their parent, the trauma of separation is compounded by the fact that termination may result in severing their ties with their mothers, siblings, grandparents, and relatives without substituting any new relationships in their place. Foster care is not a panacea. Many of these children will face multiple placements.

Obviously, some foster care arrangements are better for children than remaining in dysfunctional families, but it would be naive to think that being shuttled among strangers is always preferable to remaining with family. For example, a Bureau of Justice Statistics survey found eighty-seven percent of female prisoners who spent their childhood in foster care or institutions reported being physically or sexually abused.[81] Since substance abuse and marginalized school and job performance are often associated with low self-esteem that may result from physical and sexual abuse, some placements put children at more risk than staying with a parent who is obtaining supervised treatment.[82] Anecdotally, since the increase in ASFA termination, some children who have aged out of foster care are attempting to find the mothers and families who no longer have legal ties to them. The Children of Incarcerated Parents Bill of Rights includes the "right to a lifelong relationship with my parent" and urges that jurisdictions focus on rehabilitation for nonviolent offenders whose children are at risk of becoming the responsibility of the state.[83]

After incarcerated mothers serve their sentences, the myriad collateral consequences of incarceration threaten reintegration of their families.[84] Even if a

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REPORT NO. GAO-02-585 (June 2002), *available at* http://www.gao.gov/new.items/d02585.pdf (on file with the *McGeorge Law Review*).

80. *See* 42 U.S.C.A. § 673b(d)(1) (West 2003); Nev Moore, *Adoption Bonuses: The Money Behind the Madness*, MASS. NEWS, http://www.massnews.com/past_issues/2000/5_May/mayds4.htm (on file with the *McGeorge Law Review*); U.S. DEP'T OF HEALTH & HUM. SERV., DEPARTMENT OF CHILDREN & FAMILIES, DCF LEADS THE NATION IN ADOPTION EFFORTS, RECEIVES $3.5M FROM FEDERAL GOVERNMENT FOR INCREASING ADOPTIONS OF FOSTER CHILDREN (2005), http://www.dcf.state.fl.us/news/3.5madoptions.shtml (on file with the *McGeorge Law Review*).

81. CAROLINE WOLF HARLOW, BUREAU OF JUST. STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 2 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf (on file with the *McGeorge Law Review*).

82. A related issue in state court is the increase of charges against women for child endangerment arising solely from their abuse in a domestic violence setting. Even if the mother is not criminally charged, in some jurisdictions neglect proceedings have become routine. *See, e.g.*, Nicholson v. Williams, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002) (enjoining such proceedings). New York State Court of Appeals clarified that neglect is not established solely when a child has witnessed the mother's domestic abuse in *Nicholson v. Scoppetta*, 820 N.E.2d 840, 849 (N.Y. 2004).

83. S.F. PARTNERSHIP FOR INCARCERATED PARENTS, CHILDREN OF INCARCERATED PARENTS: A BILL OF RIGHTS (Oct. 2003), *available at* http://www.centerforce.org/families/bill_of_rights.pdf (on file with the *McGeorge Law Review*).

84. *See generally* NATASHA A. FROST, ET AL., INSTITUTE ON WOMEN & CRIMINAL JUSTICE, HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977-2004 (2006), *available at* http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf (on file with the *McGeorge Law Review*); LENORA LAPIDUS, ET AL.,

single mother avoids termination of parental rights, in a majority of states she may be denied federal cash assistance and food stamps due to her drug-related felony conviction[85] as well as denied public housing[86] or assistance to pay for private housing and educational benefits.[87] Conditions of her release, such as work and drug treatment, typically take no account of her child care responsibilities, resulting in ever increasing numbers of women being incarcerated for technical violations, not new crimes. Some judges may even require the female to notify her employer of her criminal history.[88] Deportation[89] or inability to return to the United States[90] may also occur in some cases, depending upon the crime, regardless of whether her child is a citizen.

Rational sentencing policy would include a cost benefit analysis weighing the reasons favoring imprisonment of nonviolent mothers against the risk that such maternal incarceration is more likely to devastate the lives of innocent children and produce a new generation of criminals than to serve valid public safety concerns. Pre-Guidelines and mandatory minimums, many of these women were prime candidates for probation and would have resided with their children in the community. Today, they populate federal prisons, with their children shuttled to relatives, friends, and foster care, while they await the all too frequent termination of their parental rights. The few community correctional facilities designed to avoid this fate by letting mothers reside with their young children while providing them gender-specific substance abuse treatment and parenting classes, cannot begin to accommodate the women offender population.

CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES (2004), *available at* http://nicic.org/Misc/URLShell.aspx?SRC=Catalog&REFF=http://nicic.org/Library/020392&ID=020392&TYPE=PDF&URL=http://www.fairlaws4families.org/final-caught-in-the-net-report.pdf (on file with the *McGeorge Law Review*); U.S. GOV'T ACCOUNTABILITY OFF., DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS (GAO-05-238 Sept. 2005), *available at* http://www.gao.gov/new.items/d05238.pdf (on file with the *McGeorge Law Review*); URBAN INSTITUTE, PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., 2003); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2004); Ann L. Jacobs, *Give 'Em a Fighting Chance: Women Offenders Reenter Society*, 16 CRIM. JUST. 44 (2001).

85. *See generally* PATRICIA ALLARD, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES (2002), *available at* http://www.sentencingproject.org/pdfs/9088.pdf (on file with the *McGeorge Law Review*).

86. *See generally* Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545 (2005).

87. *See generally* Kylie Beth Crawford, Comment, *Collateral Sanctions in Higher Education: A Constitutional Challenge to the Drug-Free Student Loan Provision of the Higher Education Act of 1998*, 36 U. TOL. L. REV. 755 (2005).

88. *See, e.g.*, United States v. Souser, 405 F.3d 1162, 1168 (10th Cir. 2005) (rejecting notification requirement where it was not shown to be reasonably necessary to protect the public).

89. *See, e.g.*, United States v. Hernandez, 325 F.3d 811, 816 (7th Cir. 2005) (reversing downward departure granted to avoid deportation and separation from defendant's children who were citizens).

90. *See, e.g.*, United States v. Manasrah, 347 F. Supp. 2d 634, 636 (E.D. Wis. 2004) (granting, in part, a pre-*Booker* family ties departure where an abusive husband threatened to leave country with children, and defendant might not be permitted to return due to her felony conviction).

For example, California has recently developed a phased housing plan to shift 4500 female offenders to community-based facilities,[91] but it is unclear how long it will take to implement this program. Moreover, eligibility often applies only to women who in the past would have served their sentences on probation in the community. Post-*Booker* one can only hope that added judicial discretion and the reasonableness review of sentences will reverse the unbearably heartless and destructive approach to families inherent in the Guidelines sentencing matrix, which rejects any consideration of the gendered realities of most women offenders.

V. *BOOKER'S* IMPACT ON HOW JUDGES DETERMINE SENTENCES

A. *Variations About the Weight Given to the Guidelines in Sentencing*

The *Booker* revolution has two components. First, Justice Stevens's majority opinion applied *Blakely v. Washington*[92] to the Guidelines, subjecting them to jury trial requirements of the Sixth Amendment. Second, Justice Breyer's majority remedial opinion held the Guidelines are no longer mandatory, but are now "effectively advisory."[93] Justice Breyer emphasized that the sentencing court is required to consider the Guidelines ranges, but can "tailor the sentence in light of other statutory concerns as well,"[94] citing 18 U.S.C. § 3553(a). In addition, the Breyer opinion excised the de novo standard for review of downward departures, which was imposed by the Protect Act and the Feeney Amendment, effective in October 2003.[95] In its place, *Booker* substituted "unreasonableness" as the proper standard for reviewing all sentencing decisions.[96]

Booker generated significant disagreements about the role that the advisory Guidelines should play in fashioning a sentence. Justice Breyer's mandate that judges "must consult those Guidelines and take them into account when sentencing"[97] was interpreted in several ways. Judge Cassell indicated "in all future sentencings, the court will give heavy weight to the Guidelines in determining an appropriate sentence. In the exercise of its discretion, the court will only depart from those Guidelines in unusual cases for clearly identified and

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91. *See, e.g.*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION GENDER RESPONSIVE PROGRAM ACCOMPLISHMENTS FOR FEMALE OFFENDERS, *available at* http://www.corr.ca.gov/Communications/ocs/GRP_Accomplishments.pdf (on file with the *McGeorge Law Review*); *see also* TASK FORCE ON CALIFORNIA PRISON CROWDING 3 (NCCD, 2006) (indicating nearly 5900 incarcerated women were eligible for community placement), *available at* http://www.nccd-crc.org/nccd/pubs/2006_ca_taskforce.pdf (on file with the *McGeorge Law Review*).

92. 542 U.S. 296 (2004).

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

94. *Id.* at 245-46.

95. Pub. L. 108-21, § 401(d)(1), 117 Stat. 670 (2003), codified at 18 U.S.C.A. § 3742(e) (West Supp. 2005).

96. *Booker*, 543 U.S. at 261.

97. *Id.* at 264.

persuasive reasons."[98] In contrast, Judge Adelman took exception to this approach as being inconsistent with *Booker*[99] and viewed the restrictions on considering a defendant's characteristics found in section 5H1 as incompatible with the requirement of 18 U.S.C. § 3553(a) to consider the "history and characteristics of the defendant." In Judge Adelman's view, "courts not imposing sentences within the advisory guideline range should provide an explanation for their decision," but were not bound to follow the old "'departures' methodology" and "need not justify a sentence outside of them."[100]

In *United States v. Phelps,*[101] Judge Collier suggested a middle approach in which departures become relevant only if they implicate one of the enumerated purposes or objectives of sentencing.[102] In other words,

> the Court will not consider itself bound by the provisions of U.S.S.G. § 5H in exercising the discretion afforded by *Booker.* Nevertheless, the Court declines to treat §§ 3553(a)(1) and 3661 as giving defendants carte blanche to argue for a sentence based upon a full range of offender characteristics as such.[103]

In another case, he utilizes a three step methodology: 1) apply the relevant Guidelines; 2) look to the sentencing purposes of § 3553(a)(2); and 3) "determine a reasonable sentence in accordance with § 3553(a), including but not limited to considering the relevant Guidelines range."[104] While this approach appears to require justification as to why a Guidelines sentence is greater than necessary to comply with the stated objectives of sentencing, it does not preclude a non-Guidelines sentence. For example, after *Phelps,* Judge Collier imposed a non-Guidelines sentence for a sixty-nine-year-old wheelchair bound woman who had serious health problems, because the 5H1.4 departure for physical condition was inapplicable since it required a showing that the Bureau of Prisons (BOP) would be unable to accommodate the defendant's need.[105] Judge Adelman has also refined his sentencing practice to reflect a three-step approach, explicitly recognizing that after the sentencing range is identified, step two requires a determination from the Commission's policy statements of whether departures "clearly apply," before reaching the appropriate sentence in light of the § 3553(a) factors.[106]

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98. United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005).
99. United States v. Ranum, 353 F. Supp. 2d 984, 986-87 (E.D. Wis. 2005)
100. *Id.* at 987.
101. 366 F. Supp. 2d 580, 593 (E.D. Tenn. 2005).
102. *Id.* at 593.
103. *Id.* at 592-93.
104. United States v. Seiber, 2005 WL 1801614, at *3 (E.D. Tenn. July 29, 2005).
105. *Id.* at *3, *5.
106. United States v. Johnson, 2005 WL 1788784, at *1 (E.D. Wis. 2005).

A number of circuits have now weighed in on a variety of *Booker* issues. However, as noted in a recent opinion, achieving agreement has "unfortunately, been like trying to herd bullfrogs into a wheelbarrow."[107] Post-*Booker*, courts are not even consistent in their use of terminology, with the Seventh Circuit asserting that framing the review issue around departures is obsolete.[108] Indeed, Justice Stevens's dissent from the remedial opinion pointed out that "Congress' demand in the PROTECT Act that departures from the Guidelines be closely regulated and monitored is eviscerated—for there can be no 'departure' from a mere suggestion."[109] Generally, when a Guidelines sentence is rejected, most judges now speak of imposing a non-Guidelines sentence or a *Booker* departure.[110]

Even with appellate guidance, a substantial amount of variation exists in how much weight district court judges are giving the Guidelines. This occurs despite the fact that appellate courts are still giving great weight to the Guidelines, because they are also giving deference to sentencing judges who impose non-Guidelines sentences, with the following caveats: 1) the trial judge must explain the sentencing decision in light of the statutory factors and 2) if the sentence varies dramatically from the Guidelines range, the judge must demonstrate substantial reasons for the difference.

Typically, the circuits are affirmatively requiring the trial courts to determine the correct Guidelines range,[111] as well as the authority to depart[112] before imposing any sentence. For example, the Seventh Circuit has made clear that *Booker* did not return complete pre-Guidelines sentencing discretion to judges, and it is error to treat the Guidelines as entirely defunct.[113] Similarly, in *United States v. Hughes*,[114] Judge Wilkins interpreted *Booker* as mandating that "a district court shall first calculate (after making the appropriate findings of fact) the range prescribed by the Guidelines. Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence."[115]

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107. United States v. McBride, 434 F.3d 470, 474 (6th Cir. 2006).

108. United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2005).

109. United States v. Booker, 543 U.S. 220, 301 (2005).

110. *See* United States v. Crosby, 397 F.3d 103, 111 n.9 (2d Cir. 2005) (suggesting non-Guidelines sentence be used instead of departure); *see also McBride*, 434 F.3d at 476.

111. *See, e.g.*, *McBride*, 434 F.3d at 476; United States v. Baretz, 411 F.3d 867, 878 (7th Cir. 2005); United States v. Haack, 403 F.3d 997, 1002-03 (8th Cir. 2004), *cert. denied*, 126 S.Ct. 276, 163 L.Ed.2d 246 (2005); United States v. Crosby, 397 F.3d 103, 111-12 (2d Cir. 2005).

112. *See, e.g.*, *McBride*, 434 F.3d at 476; *Haack*, 403 F.3d at 1002; *Crosby*, 397 F.3d at 113. *See also* United States v. Jackson, 408 F.3d 301, 305 (6th Cir. 2005); United States v. Crawford, 407 F.3d 1174, 1183 (11th Cir. 2005).

113. United States v. Rennicke, 132 F. App'x 652, 655 (7th Cir. 2005).

114. 396 F.3d 374, 378-79 (4th Cir. 2005).

115. *Id.*

Post-*Booker,* discretionary denials of departures are still unreviewable,[116] but either party can challenge the reasonableness of the sentence, which includes the district court's refusal to sentence below the applicable Guidelines range.[117] Therefore, the defendant can now challenge the excessiveness of a Guidelines sentence as being unreasonable given the totality of the § 3553(a) factors.[118] As a result, the significance of obtaining a departure becomes less critical, although as a practical matter, it is still essential for a defendant to obtain a sentence lower than the applicable Guidelines range. In other words, the procedural posture of the case has a significant impact on the appellate court's reasonableness analysis. Using a deferential standard of review, it is much easier to find reasonableness of a lower sentence imposed by the trial court, than to find that a sentence within the Guidelines range is unreasonable. For example, in *United States v. Gipson,* [119] the Seventh Circuit held that the District Court did not act unreasonably by refusing to depart downward from the Guidelines range based on the differential in punishment for crack cocaine versus powder cocaine.[120]

Regardless of whether a judge is willing to disregard the Guidelines based on a more holistic view of the defendant's life history, family obligations, and the absence of any perceived need for incarceration or a lengthy sentence, or believes that the Sentencing Commission has adequately reflected all of the sentencing factors that are contained in the Sentencing Reform Act, the same departure analysis is required. First, the defendant must be shoehorned into the current departure scheme, and second, all other factors that could decrease the sentence must be presented in order to support the appropriateness of a non-Guidelines sentence and to preserve the issue of "reasonableness" for appeal. However, while probation officers submit presentence reports based on the Guidelines factors, some may be open to counsel's suggestion to recommend that the court use its discretion to impose a lower sentence than provided by the Guidelines.[121] In fact, one of many unresolved post-*Booker* issues is the role of the probation officer in recommending a sentence. The federal Guidelines changed the orientation of probation officers from social workers to number crunchers. Now their role in sentencing also bears rethinking.

If the district court is open to considering the Guidelines as a jumping off point to argue for an appropriate sentence, while apparently the applicability of a

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116. *See, e.g., McBride,* 434 F.3d at 476; United States v. Winingear, 422 F.3d 1241, 1246-47 (11th Cir. 2005).

117. *McBride,* 434 F.3d at 476.

118. *Id.* at 475-76.

119. 425 F.3d 335, 337 (7th Cir. 2005); *see also* United States v. Chauncey, 420 F.3d 864 (8th Cir. 2005) (holding the 100-month sentence for possession with intent to distribute marijuana was not unreasonable and passed muster under *Booker).*

120. *Gipson,* 425 F.3d at 337.

121. *Cf.* United States v. Manasrah, 347 F. Supp. 2d 634, 638 (E.D. Wis. 2004) (granting a pre-*Booker* departure for family ties where court noted that probation officer stated that "but for the guidelines, her office would recommend probation").

Guidelines departure must be determined, the court need not dwell on the correctness of a questionable departure. In other words, the Second Circuit has added the welcome qualification that if a close question exists as to the precise meaning or application of a policy statement authorizing a departure, "a judge who has considered policy statements concerning departures need not definitively resolve such questions if the judge has fairly decided to impose a non-Guidelines sentence."[122] The Eighth Circuit has also adopted this view, recognizing that "there may be situations where sentencing factors may be so complex, or other § 3553(a) factors may so predominate, that the determination of a precise sentencing range may not be necessary or practical."[123] However, judges must still identify potential applicable ranges, the reason why a specific range is not being selected, and other § 3553(a) factors that predominate.[124] Since most of the departures relating to females found in section 5H of the Guidelines are discouraged and require exceptional circumstances, making their appropriateness questionable, this provides a more flexible approach for reaching the ultimate sentence.

In all other departure cases, despite the Guidelines being discretionary, the lawyers, judges, and probation officers are still going through the complicated ritual of determining the Guidelines sentence before the court can use its discretion to disregard the particular case as not being reasonable. Ultimately, requiring courts to calculate non-routine departures appears to inhibit the granting of a non-Guidelines sentence because it continues to atomize the sentencing decision, rather than permitting counsel to focus on the overall narrative of the defendant that supports a lower sentence. Arguing several departures in a piecemeal fashion has the disadvantage of some potentially being applicable and others not, which means that a lower sentence can be justified under the Guidelines, just not as low as what counsel believes is reasonable. In other words, some judges will still be more likely to give lower sentences only if they can fit within the existing departure case law. Thus, if judges believe the Guidelines are too harsh, yet are uncomfortable rejecting them, they may decide that a non-Guidelines sentence is unwarranted because the Guidelines departure result is close enough for government work. While some departures might permit the same result as a non-Guidelines sentence, the point framework inherent in departures works against the more holistic reasonableness approach to deciding non-Guidelines sentences.

The better solution is to require only traditional departures to be evaluated, rather than discussing the applicability of discouraged departures requiring exceptional circumstances. In this way, the offender's Guidelines sentence would take into account all of the factors found to be applicable by the Sentencing

122. United States v. Crosby, 397 F.3d 103, 112 (2d Cir. 2005).

123. *Haack*, 403 F.3d at 1003.

124. *Id.*

Commission, but would be free to treat all other departures, typically found in sections 5H1 or 5K, without regard to the departure jurisprudence that is hostile to extraordinary departures. In other words, there should be no requirement that discouraged departures must be separately determined. Requiring calculation of all departures simply duplicates the Guidelines result and discourages the granting of non-Guidelines sentences based on the additional factors that *Booker* has legitimized.

It is unclear whether conceding that a departure is not applicable has any negative impact on the appeal. Certainly, the overall use of this technique may be a negative influence in developing defense friendly departure jurisprudence. Again, this poses problems as to those judges who will not often deviate from the narrow departure case law, even though they have the discretion to do so. The post-*Booker* sentencing statistics clearly suggest that relatively few judges are mavericks. Judge Adelman is one of those who recognizes that many proffered departures are unwarranted under the departure case law, yet is willing to fashion non-Guidelines sentences that reflect "the nature of the offense, the history of the defendant, and the needs of the public and any victims"[125] based on the compelling personal histories of the defendants he sentences.[126]

Other judges have not rushed to join him, and the bad departure case law can be expected to continue to play a dominant role in sentencing. For example, in *United States v. Palma,*[127] a female drug and money courier for her uncle, who apparently received no financial gain from her activities, combined requests for departure based on her cultural history, duress, and coercion exacerbated by her vulnerability and the influence of her uncle, her aberrant behavior, her frailty, and her children.[128] The judge admitted that she was genuinely remorseful, had no criminal history, and did "not appear to do much more than work to support her two children and take care of them . . . . She does not frequent bars, and does not do drugs or drink alcohol."[129] The judge also recognized how lamentable her predicament was. Yet, he responded that he doubted the Tenth Circuit would uphold such departures and that the Guidelines indicate that, "even in the most difficult and justifiably sympathy-evoking area, courts should depart downward only in rare cases."[130] Then in a cursory footnote, the judge rejected her request for a non-Guidelines sentence.[131] The only reason for that result, other than a pro

125. *See, e.g.*, United States v. Johnson, No. 05-CR-80, 2005 WL 1788784, at *3 (E.D. Wis. July 25, 2005).

126. *See, e.g., id.* at *2-3 (denying departures for mental abuse, family ties, and totality of circumstances, in favor of a non-Guidelines sentence based on horrific child abuse, mental health, and substance abuse issues, and involvement with abusive men, where her failure to surrender was caused by her depression about wanting to be with her children during the holidays).

127. 376 F. Supp. 2d 1203 (D. N.M. 2005).

128. *Id.* at 1206.

129. *Id.* at 1208.

130. *Id.* at 1213.

131. *Id.* at 1222 n.5.

forma mention of § 3553, appears to be his previous statement that she had benefited because her plea was to a charge that carried a statutory maximum that was fifty percent lower than the Guidelines sentence.[132] However, the statutory sentence should have been the start, not the finish of the non-Guidelines analysis.

This type of sentencing belies the promise that *Booker* would generally result in the exercise of more judicial discretion as to sympathetic defendants, though it may yet prove a true test of whether the appellate court will agree that the maximum applicable sentence she received is reasonable, given the trial court's complete disregard of that issue.[133] To paraphrase Mark Twain's oft-repeated quote, "the reports of the Sentencing Guidelines' death have been greatly exaggerated."

B. Reviewing Sentences for Reasonableness

The application of *Booker's* undefined "reasonableness" standard permits every defendant and prosecutor to appeal a sentence not required by a plea agreement on the grounds that it is unreasonable. Some circuits have agreed with the Seventh Circuit's view that a sentence within a properly calculated Guideline range is entitled to a rebuttable presumption of reasonableness, with the farther the sentence departs from the Guidelines, the more compelling the § 3553(a) must be.[134] However, this does not provide an automatic pass for all Guidelines sentences because such an interpretation flies in the face of making the Guidelines discretionary and permitting judges to rely on § 3553(a). The introduction to that section specifically states that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" set forth in paragraph (2) of the Act. Those purposes include just punishment, deterrence, public safety, and rehabilitation, while the mandatory Guidelines emphasized just desserts and long sentences. Thus, the directive to consider all of the stated purposes as well as the defendant's characteristics, which is specifically mentioned in section 3553(a)(1), seems to render post-*Booker* Guidelines sentences open to reasonableness challenges. Indeed, the Eighth Circuit has specifically rejected the argument that the court lacks jurisdiction to review a Guidelines sentence for reasonableness.[135]

Moreover, Justice Breyer referenced 18 U.S.C. § 3661, which says that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the

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132. *Id.* at 1219-21.

133. *See* United States v. Cunningham, 429 F.3d 673, 679-80 (7th Cir. 2005) (remanding for resentencing where judge did not address the defendant's main argument for a lower sentence).

134. United States v. Castro-Juarez, 425 F.3d 430, 433 (7th Cir. 2005). The Supreme Court recently granted certiorari to determine how Guidelines sentences affect the reasonableness review. *See* Claiborne v. United States, 2006 WL 2187967 (U.S. Nov. 3, 2006); Rita v. United States, 2006 WL 2307774 (U.S. Nov. 3, 2006).

135. *See* United States v. Mickelson, 433 F.3d 1050, 1055 (8th Cir. 2006).

United States may receive and consider for the purpose of imposing an appropriate sentence." To the extent the Guidelines do not permit such information to be used for departures, it would appear contrary to a discretionary approach to reasonableness. Post-*Booker,* mechanical Guidelines sentences can be challenged by arguing that the trial court did not exercise its required discretion in fashioning the sentence. In other words, it is questionable whether a judge exercises judicial discretion by simply relying on a mandatory scheme that the Supreme Court has held is not constitutional in its current form. Indeed, Judge Posner remanded a case for resentencing where the defendant contended that a Guidelines sentence was unreasonable. In light of the defendant's long history of psychiatric illness and marijuana use, the trial judge's "rote statement" that he considered all relevant factors did not indicate that he considered the defendant's argument in a reasoned exercise of discretion.[136]

Arguably, lengthy Guidelines sentences for female nonviolent offenders with little or no prior criminal history, significant family obligations, and/or backgrounds that encouraged submission to their male intimates, should not survive a reasonableness review in the absence of a mandatory minimum or case specific factors justifying the term. However, the circuits appear timid in their new-found discretion. The Seventh Circuit has clearly signaled that it will be rare when a Guidelines sentence is unreasonable.[137] Post-*Booker*, displeasure with the Guidelines is not by itself an adequate reason for lowering a sentence,[138] and even the few judges who have significantly lowered Guidelines sentences in crack cocaine cases have still imposed lengthy terms of incarceration.[139]

Sometimes the reasonableness review produces unusual results, such as in *United States v. Lazenby*,[140] where the Eighth Circuit reversed a downward variance of eighty-three percent below the bottom of a Guidelines sentence as unreasonable, despite the defendant's significant rehabilitative efforts to reunite with her children because the sentence did not adequately reflect the seriousness of the drug offense.[141] Yet at the same time, it also reversed a much lengthier sentence of another female co-conspirator as unreasonable because it did not take into account the disparity between the two women's sentences for similar conduct and the second female's role in obtaining guilty pleas from others.[142] Indeed, *Lazenby* stands virtually alone as reversing a departure for ostensibly

136. United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005).

137. United States v. Williams, 425 F.3d 478, 479, 481 (7th Cir. 2005) (rejecting claim that 115-month sentence was unreasonable for being a felon in possession of a weapon).

138. *See, e.g.*, United States v. Pho, 433 F.3d 53, 54 (1st Cir. 2006) (rejecting sentence outside the advisory Guidelines based solely on the rejection of the disparate treatment between crack and powder cocaine).

139. *See, e.g.*, United States v. Williams, 435 F.3d 1350, 1351 (11th Cir. 2006) (affirming sentence of ninety months, instead of the Guidelines sentence of 188 to 235 months for selling $350 of crack cocaine).

140. 439 F.3d 928 (8th Cir. 2006).

141. *Id.* at 932-33.

142. *Id.* at 933-34.

being too low, but the extreme disparity appears to have occurred because different judges sentenced the two women, and the appellate court clearly found that the more culpable defendant was given the lower sentence.[143]

Judicial discretion is also limited by 18 U.S.C. § 3553(c), which requires a district court that imposes a sentence outside the Guidelines range to state the specific reason for the imposition of a different sentence in its written order. This permits appellate courts to monitor sentences they deem inappropriate by remanding for further clarification before undertaking their reasonableness review. This requirement applies whether or not the sentence results from a Guidelines departure or non-Guidelines sentence,[144] though the Ninth Circuit has permitted citation of factually similar cases and comparison of departure levels of cases to satisfy this requirement.[145] While reasonableness provides a way to loosen the unyielding grip of Guidelines sentences, its promise has not yet been realized.

C. Gendered Implications in the Reasonableness Review

The reasonableness challenges that will most likely implicate sentencing of female offenders are: 1) claims by the defense that a sentence is unduly long, either because it is mandated by the Guidelines, or a result of an upward departure; and 2) claims by the prosecution that a sentence is unduly short, usually as a result of allegedly unwarranted downward departures or a non-Guidelines sentence. The Ninth Circuit's analysis in *United States v. Menyweather*,[146] which typifies the second challenge, favors judicial discretion to fashion more flexible sentences and should be argued as a model for other circuits. It comes as no surprise that the case involves a female defendant who kept getting a break from the sentencing judge. Pre-*Booker*, the trial judge gave her an eight-level downward departure for mental and emotional condition, diminished capacity, and extraordinary family circumstances, and had twice re-imposed the same sentence after remands based in part on his insufficient explanation of the departures, which the government argued were inappropriate.[147]

When the Ninth Circuit finally heard *Menyweather* a third time, *Booker* governed the analysis. The court held that it was not an abuse of discretion to downwardly depart from the Guidelines, and if any error existed, it was harmless in view of the sentencing factors listed in 18 U.S.C. § 3553(a).[148] While the majority stated that if it were applying a de novo standard to the family ties

143. *See id.* at 931-32.

144. *See, e.g.*, United States v. Menyweather, 447 F.3d 625, 635 (9th Cir. 2006).

145. *See id.* at 635-36.

146. 447 F.3d 625.

147. *Id.* at 627.

148. *Id.* at 628.

departure it would have reversed, *Menyweather* held the sentence was reasonable because the abuse of discretion standard applied to the district court's determination of its departure authority, and the clearly erroneous standard applied to factual findings.[149] In the alternative, *Menyweather* held that any error was harmless as a non-Guidelines *Booker* sentence, because previously discouraged factors such as family ties could now be considered.[150] In addition, since two departures had been granted, when the court reviewed the reasonableness of the extent of the departures, it combined them. Thus, since both family ties and diminished capacity departures generally ranged between one and four levels, a combined departure of eight levels was not unreasonable.[151] Of course, while this analysis favors the defense when the judge is lenient, it favors the prosecution when the judge is harsh.

Ironically, the defendant in *Menyweather* was not the most sympathetic or representative female offender. She was an administrative employee at the United States Attorneys Office, who embezzled more than $400,000 over several years, part of which resulted in a loss to a travel agency that had to be made up by the innocent travel agent.[152] Menyweather's expert characterized her as suffering from severe post-traumatic stress due to her abandonment by her parents as a child and the violent murder of her fiancé, which occurred when she was five months pregnant with their child,[153] and described her thefts as compulsive coping behaviors.[154] In contrast, the government argued that she "lived as a successful professional and parent with no psychological treatment for eight years after the death of her fiancé and before her embezzlement scheme began."[155] The family ties departure was based on her being the sole parent and primary source of financial support for her eleven-year-old daughter.[156] The judge departed two levels lower than requested by the defense sentencing her to five years of probation, conditioned on serving forty days on consecutive weekends in "a jail-type institution," restitution, and 3000 hours of community service, instead of a Guidelines sentence of twenty-one to twenty-seven months.[157]

Other circuits may not be as flexible. Even *Menyweather* noted that, post-*Booker*, the legal interpretation of the Sentencing Guidelines is reviewed de novo.[158] Thus, a narrow circuit interpretation of a departure, such as single parenthood not being extraordinary for family ties purposes, would seem to

149. *Id.* at 630, 633.

150. *Id.* at 634.

151. *Id.* at 635-36.

152. *Id.* at 637 (Kleinfeld, J., dissenting).

153. *Id.* at 628.

154. *Id.*

155. *Id.* at 632 n.5.

156. *Id.* at 628.

157. *Id.*

158. *Id.* at 630. *See* United States v. Mashek, 406 F.3d 1012, 1016 (8th Cir. 2005) (mentioning four other circuits that applied the de novo standard to the legal interpretation of Guidelines sentences post-*Booker*).

imply that without other facts supporting the departure, its application would be incorrect under an abuse of discretion standard. Of course, post-*Booker* the court can alternatively impose a lower sentence as a matter of its non-Guidelines discretion. In fact, in *United States v. Serrata,*[159] where improper family ties departures were given to male defendants, the appellate court remanded for imposition of a non-Guidelines sentence.

To avoid a remand, counsel should request the trial court to indicate that it would grant the identical non-Guidelines sentence if the departure is rejected on legal grounds by the appellate court. Otherwise, like *Serrata,* if a material error is made in the Guidelines calculation, some circuits will remand for resentencing, without reaching the issue of the reasonableness of the sentence in light of the statutory factors.[160] Moreover, this suggests that in all questionable departure cases, it is incumbent on the defense to demonstrate all factors supporting a non-Guidelines sentence. For instance, in *United States v. Clark,*[161] Judge Luttig rejected a comparison to lower state sentences as grounds to impose a non-Guidelines sentence in the absence of unusual circumstance.[162] While Judge King concurred in the judgment, he remarked that the factors before the judge would have justified a non-Guidelines sentence. The trial judge had described Clark as having no prior criminal history or propensity towards crime and "that she probably would not have been involved in criminal activity but for her boyfriend."[163] In addition, she had not engaged in criminal activity since her arrest, had secured employment, suggesting little need to deter future criminal activity, and the judge had made obtaining a GED a condition of her probation.[164] Indeed, she sounds like the prototype of the females who are now referred to as the "Girlfriend Problem,"[165] discussed later in this article.

Predictably, circuits that have narrowly applied departures, appear to be taking an equally constrained view of reasonableness, though it is unclear whether they will be equally vigilant as to upward and downward departures.[166] Generally, in this brave new world of discretionary federal sentencing, it is not a given that federal judges who have long chafed over the lack of flexibility imposed by the Guidelines will significantly lower sentences based on individualized factors and their displeasure with the severity of many Guidelines ranges. Judicial complaints about being unable to fashion a just sentence are

159. 425 F.3d 886, 913-15 (10th Cir. 2005).

160. *See* United States v. Cantrell, 433 F.3d 1269, 1280 (9th Cir. 2006).

161. 434 F.3d 684 (4th Cir. 2006).

162. *Id.* at 687.

163. *Id.* at 689.

164. *Id.*

165. *See infra* text accompanying notes 230-63.

166. United States v. Castro-Juarez, 425 F.3d 430, 437 (7th Cir. 2005) (remanding because explanation of upward departure was not substantially compelling).

directed towards mandatory minimums as well as to the Guidelines matrix.[167] Thus, despite Justice Scalia's belief that *Booker* presages "excessive sentencing disparities" that will "wreak havoc" on the judicial system,[168] my initial prognostications as to *Booker* hold true. A relatively low proportion of sentences have been dramatically affected as a result of *Booker*, but judges appear more willing to give nonviolent first offenders, who include many females, a break.[169] Similarly, more female defendants benefit when judges do not require "extraordinary" circumstances for non-Guidelines sentences based on a defendant's characteristics, but many judges are not exercising their *Booker* discretion. A relative handful of district court judges are responsible for most of the post-*Booker* gender related departure cases. In a post-*Booker* world, sensitizing judges about gender related issues is key to obtaining just sentences for more women offenders.[170] Obviously, there will be circumstances, particularly involving violent or habitual offenders,[171] where the absence of a mandatory sentencing scheme may disadvantage defendants when compared to the current matrix, but for most women offenders, discretion is likely to be an advantage.

The remainder of this article will address how counsel can argue specific issues that raise gendered implications at sentencing in light of *Booker's* more flexible approach to factors that can be considered in rendering a fair sentence that is not greater than necessary to satisfy the goals of sentencing.

VI. FACTORING CHILDREN INTO THE SENTENCING MIX

Even in a Guidelines regime, judges have had relative freedom to determine where in the range to sentence an individual defendant.[172] Some judges assume that women offenders are bad mothers or focus on accountability, without recognizing the underlying difficulties that may have led to a woman's substance abuse or other nonviolent criminal activity. After *Booker*, counsel must educate judges about non-intuitive gender related issues favoring maintenance of the

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167. *See, e.g.*, United States v. Hungerford, 2006 WL 2923703 (9th Cir. 2006) (Reinhardt, J. concurring in judgment, condemning 159-year mandatory sentence for a fifty-two-year-old mentally disturbed woman with no prior criminal record).

168. *Booker*, 543 U.S. 220, 312-13 (2005).

169. *See* U.S. SENTENCING COMM'N, CASES SENTENCED SUBSEQUENT TO *U.S. V. BOOKER* 1, 15 (2005), *available at* http://www.ussc.gov/Blakely/PostBooker_111005.pdf (on file with the *McGeorge Law Review*).

170. *See* NAT'L INST. OF CORRECTIONS, SENTENCING WOMEN OFFENDERS: A TRAINING CURRICULUM FOR JUDGES (2000), http://nicic.org/Library/016419 (last visited July 15, 2006) (on file with the *McGeorge Law Review*). The 2000 version is available on the website and the statistics were updated in 2003. *Id.*

171. *See, e.g.*, United States v. Egenberger, 424 F.3d 803, 806 (8th Cir. 2005) (affirming higher non-Guidelines sentence imposed due to repeated fraudulent use of social security numbers and need to impress seriousness of the matter on the defendant); United States v. Fogg, 409 F.3d 1022, 1026-27 (8th Cir. 2005) (affirming maximum sentence of twenty-four months for two misdemeanor larceny convictions based on defendant's numerous convictions). *Cf.* United States v. Gasaway, No. 1:98 CR 72(1), 2005 WL 2284210, at *5-6 (E.D. Tex. Aug. 24, 2005) (declining to resentence, where female defendant had very long record of drug use and crimes relating to drug addiction, despite her employment success).

172. United States v. White, 301 F. Supp. 2d 289, 294 (S.D.N.Y. 2004).

family unit. Not only can counsel be more assertive in judicial argument, but also in identifying these issues in plea negations with prosecutors, and with probation officers, who in some cases may be willing not to oppose a reduced non-Guidelines sentence. Indeed, in some cases, it may be possible to obtain a stipulation to a non-Guidelines sentence.[173]

Similarly, even without regard to *Booker*, when both parents face relatively short sentences, judges can stagger the timing of the incarceration to accommodate child-care obligations or permit a defendant to surrender after nursing her infant to the child's first birthday.[174] Of course, judges may believe that when a female has already received a break, a request for probation based on childcare considerations justifies a lecture about her chutzpa.[175] However, it should be remembered that sometimes when a wife is charged as a co-conspirator with her husband, she might view the relationship as providing stability for her children, rather than as a sign that she was not concerned that her children were in close proximity to significant amounts of illegal substances. Indeed, her plea of guilty to misprision of a felony in this circumstance may be a more accurate reflection of her true role in the crime than any initial conspiracy charges brought against her, which could have totaled forty years.

A. Section 5H1.6: Family Ties Departure

1. The Procedural Context

The most significant departure from a gendered perspective is section 5H1.6 addressing family ties, because women are typically the sole or primary caretakers of their children.[176] As previously discussed, post-*Booker* in most circuits, counsel must first determine if a family ties departure is appropriate before arguing that a non-Guidelines sentence is warranted due to family circumstances. In other words, if a departure can be granted, there is no need to reject the Guidelines to impose an equitable sentence. Similar to the other discouraged departures found in section 5H1 involving characteristics of the defendant, a family ties departure requires a showing of exceptional circumstances. However, after *Booker*, the de novo standard is only applicable to reviewing the legal interpretation of the departure, not its application to the

173. *See, e.g.*, United States v. Kee, 2005 WL 1162449, at *1 (S.D.N.Y. May 13, 2005).

174. *See* Gao v. United States, 375 F. Supp. 2d 456, 461 (E.D. Va. 2005).

175. United States v. Garcia, No. SA-04-CR-404(2)-FB, 2005 WL 1683628, at *1 (W.D. Tex. July 8, 2005) (denying a request for probation and noting the court would entertain a joint motion to set aside the plea agreement and go to trial on the forty-year maximum cocaine counts, where defendant had been permitted to plea guilty to misprision of a felony; probation request was based on fact that defendant would be in prison at the same time as her husband).

176. Men are also eligible for this departure, and given their much larger numbers in sentencing, some family ties cases involve male parents. Similarly, family ties are not limited to children, but that is their most gendered application.

particular case, which is governed by abuse of discretion. As a result, family ties departure are more likely to be affirmed, although the definition of what is exceptional is so narrow in some circuits as to render the departure inoperable in most cases. Thus, its invocation is a necessary ritualistic first step, undertaken so that the trial court can find the departure is unavailable, before proceeding to the next step of determining the appropriateness of a non-Guidelines sentence based on the same or additional factors. Ironically, this approach suggests the oddity of counsel arguing either that a family ties departure is not available in order to obtain a non-Guidelines sentence, or conversely, arguing it is available, but requesting an alternative non-Guidelines sentence in case the appellate court disagrees. In other words, an alternative finding as to a non-Guidelines sentence is necessary to ward off a remand if the Court of Appeals rejects the departure because it does not accord as much deference to the trial court's decision as given in *Menyweather*.[177]

2. *The Family Ties Case Law*

In 2003, section 5H1.6 was amended to make this departure even more difficult to obtain. Although the Guidelines do not consider family ties as a relevant departure factor, and several circuits have considered single mothers as not extraordinary, additional requirements now apply: the caretaking loss is now required to be "essential," exceeding the harm that ordinarily occurs, the parent must be "irreplaceable," and the departure must effectively address the loss of caretaking. As a result, courts may view this departure as applicable only if the sentence results in no incarceration or one that is sufficiently short so that the departure is not viewed as benefiting the mother more than the child.[178] Several recent cases claim that the new requirements do not change the previous case law,[179] which may indicate why only 430 family ties departures were granted in fiscal year 2003,[180] and why the government was successful in six of its seven appellate challenges to such departures in 2003.[181] While this judicial view is likely to be an accurate assessment in some circuits, other circuits had previously been more flexible than the current interpretation mandates.

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177. 447 F.3d 625, 631-33 (9th Cir. 2006); *see supra* text accompanying notes 146-58.

178. *See, e.g.*, United States v. Jebara, 313 F. Supp. 2d 912, 920 (E.D. Wis. 2004) (imposing a split sentence of five months imprisonment followed by home confinement, on the theory that the family could adequately care for the children during that time, but not long term); United States v. Johnson, No. 05-CR-80, 2005 WL 1788784, at *2 (E.D. Wis. July 25, 2005) (denying section 5H1.6 departure, where other family members were available and defendant owed time on her revocation sentence, granting non-Guidelines departure).

179. *Cf.* Elliott v. United States, 332 F.3d 753, 769 (4th Cir. 2003) (reversing departure where care was not irreplaceable).

180. U.S. SENTENCING COMM'N, 2003 ANNUAL REPORT tbl.25a (2003).

181. *Id.* at tbl.58.

Despite the added limitations, section 5H1.6 departures were being granted pre-*Booker*, particularly where the children have significant medical or emotional issues.[182] Similarly, a family ties departure was granted where the defendant's six children would probably be placed in foster care, although due to the seriousness of the crime in which the defendant was a lookout to a bank robbery, the court still imposed an incarcerative sentence that might result in the children spending some time in foster care.[183] In *United States v. Eisinger*,[184] the court denied a family ties departure despite finding compelling circumstances and discussing the family ties literature, instead granting the departure on other grounds.[185] It is arguable that this route was taken to avoid an appeal of the section 5H1.6 issue.

Since the new section 5H1.6 criteria do not specifically identify single parenting as an inappropriate factor, the circuits that have been favorable to family ties departures still have the ability to affirm them. For example, the Sixth Circuit recently affirmed a ten-level downward departure for a woman caring for three children and one grandchild, where the children's father was incarcerated.[186] As previously discussed, *Menyweather* affirmed an eight-level departure, with a flexible view concerning the feasibility of alternative care.[187] Given the strong support for family ties departures long demonstrated by the Second Circuit, a similar approach would not be surprising.[188] Indeed, in one recent case a woman who served eight months was granted a downward departure including no further incarceration because no other family member could care for her four children who had developed depression, separation anxiety, and post traumatic stress disorder during her incarceration.[189] Yet, even in the Second Circuit, mere status as a single mother of a four-year-old child was held not to justify a family ties departure.[190] Similarly, in another single mother case, although incarceration was described as "a veritable train wreck for the children . . . that does deeply trouble

182. *See, e.g.*, United States v. Spero, 382 F.3d 803, 805 (8th Cir. 2004) (affirming downward departure for male who had critical role regarding autistic son, who was one of four children, even though defendant was married); United States v. Roselli, 366 F.3d 58, 69-70 (1st Cir. 2004) (granting a departure to a male where two of his children had cystic fibrosis and he was irreplaceable in their care); United States v. Davis, 2004 WL 1965698 (N.D. Ill. 2004) (granting a departure to a single mother of five children who developed severe emotional and behavioral problems since learning of their mother's arrest and likely incarceration).

183. *See* United States v. White, 301 F. Supp. 2d 289, 296-97 (S.D.N.Y. 2004).

184. 321 F. Supp. 2d 997 (E.D. Wis. 2004).

185. *Id.* at 1005.

186. *See* United States v. Marine, 94 F. App'x 307, 309 (6th Cir. 2004).

187. *See* 447 F.3d at 633; *see supra* text accompanying notes 146-58.

188. *See, e.g.*, United States v. Johnson, 956 F.2d 124, 125 (2d Cir. 1992); United States v. Concepcion, 795 F. Supp. 1262, 1282 (E.D.N.Y. 1992) ("Removing the mother in such a matriarchal setting destroys the children's main source of stability and guidance and enhances the possibility of their engaging in destructive behavior," and later themselves becoming offenders.). For an extensive discussion of the earlier case law, see *Remember the Family, supra* note 1; *Gender and Sentencing, supra* note 1.

189. United States v. Hernandez, No. 03 CR. 1257(RWS), 2005 WL 1330764, at *5 (S.D.N.Y. June 2, 2005).

190. United States v. Mateo-Ruiz, 112 F. App'x 790, 792 (2d Cir. 2004)

the Court,"[191] nothing in the record took the case out of the heartland to justify a departure.

More distressing, *United States v. Burk*[192] denied a family ties departure to a mother of a child who had an unusually severe case of autism, even though she had a "central role in his care and treatment."[193] While the court recognized that the defendant presented evidence that could have justified a downward departure, it concluded the defendant failed to establish her case was exceptional.[194] The court sentenced her to eight months for bank fraud based on punishing her for her crime, "her prior pattern of fraudulent activity, [and her] failure to cooperate fully with the presentence investigation."[195] No discussion was given as to why a community correctional facility, split sentence, or home confinement could not have equally met the goals of sentencing. Moreover, the court refused to stay imposition of the sentence, even though the defendant claimed that she needed additional time to provide for a transition for her child to an alternative caretaker and if no stay were granted she would likely serve her sentence before the appeal was resolved.[196] To me, after *Booker* this result is shocking, but without a presumption that children are a valid consideration in sentencing, we will continue to see sentences that are more harmful to children than to the offender. Eight months in the life of a vulnerable four-year-old is quite different than that same time served by his mother.

Even the Second Circuit has signaled that care must still be taken to identify the factors that make the case extraordinary. In *United States v. Daidone*,[197] the government argued that family circumstances were not sufficiently extraordinary because of the availability of the father to help care for and support their four children, two of whom have mental or emotional disorders. The appellate court remanded the case for resentencing in light of *Booker*, suggesting that it would be useful in determining the reasonableness of any sentence for the trial court to more completely discuss its factual findings concerning the extent of the children's emotional dependency on the mother, as well as whether other family members could meet the children's needs, and the availability of other family to provide financial support.[198]

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191. United States v. Ochoa-Suarez, No. 03 CR. 747 JFK, 2005 WL 66889, at *2 (S.D.N.Y. Jan. 11, 2005) (finding sentencing range of 151 to 188 months for forty-year-old single mother with infant who was first offender charged with drug conspiracy), *modified by* United States v. Ochoa-Suarez, No. 03 CR. 747(JFK), 2005 WL 287400, at *2 (S.D.N.Y. Feb. 7, 2005) (applying a ten year mandatory minimum post-*Booker*).

192. 372 F. Supp. 2d 104 (D. Me. 2005).

193. *Id.* at 105.

194. *Id.* at 107.

195. *Id.*

196. *Id.*

197. 124 F. App'x 677 (2d Cir. 2005).

198. *Id.* at 680; *see also* United States v. Thomas, 181 F. App'x 188 (3d Cir. 2006) (affirming denial of family ties departure of woman with seven children, whose father was also sentenced to imprisonment, and whose children had no other family members to care for them).

A few recent cases granting departures appear to be mixing section 5H1.6 terminology with non-Guidelines sentencing factors. For example, in *United States v. Rodriguez,* where a representative of Child Protective Service testified that additional incarceration would recommend termination of the mother's parental rights, the judge departed to the statutory minimum, even though that would still result in the loss of her children.[199] Similarly, in *United States v. Capri,*[200] where the court departed for a mother whose children had special medical and psychiatric conditions, noting that ordinarily is not never, it found the departure reasonable under § 3553(a)(2), without designating it as an alternative non-Guidelines sentence.[201] Indeed, the court rejected the prosecutor's incredibly insensitive suggestion that availability of foster care was an adequate alternative for caregivers. While these departures benefit the female defendants, they are not true section 5H1.6 cases.

In 1996, Judge Weinstein generally referred to the current family ties policy as "so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep."[202] Unfortunately, nearly ten years later little had changed, when in 2004, Judge Gertner similarly characterized the case law prohibiting her from granting a departure based on the defendant's family ties as "cruel."[203] It is disheartening that this departure, which has provided some relief to single mothers and their children, has been rendered even less available without any real focus on weighty policy issues concerning the children. The view that the family ties departure is a gender break for females has overshadowed the reality that avoiding the needless disruption of the lives of children is an appropriate sentencing factor for nonviolent offenders. Moreover, the current departure approach ignores the fact that many women offenders suffer trauma because of the separation from their children, with its attendant guilt and recognition that their children may believe they have been abandoned and the possibility that parental rights will be terminated. These concerns obviously have negative effects on their rehabilitation. Studies indicate that family ties are a strong indicator for successful reentry.[204]

Assuming that *Booker* eliminates the problems caused by the bad family ties case law is unrealistic. Many judges are not imposing lower non-Guidelines sentences, and appellate courts will be loath to hold it is unreasonable to refuse to

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199. United States v. Rodriguez, No. 8:03CR36, 2005 WL 1319259 *2, 5 (D. Neb. June 3, 2005).

200. No. 03 CR 300-1, 2005 WL 1916720 (N.D. Ill. July 5, 2005).

201. *Id.* at *7-8.

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

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

204. *See* JEREMY TRAVIS, ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 39 (2001), *available at* http://www.urban.org/pdfs/from_prison_to_home.pdf (on file with the *McGeorge Law Review*) (discussing studies). *See generally* Jeremy Travis, *Families and Children,* FED. PROBATION, June 2005, at 31 (2005); Marsha M. Yasuda, Comment, *Taking a Step Back: The United States Supreme Court's Ruling in* Overton v. Bazzetta, 37 LOY. L.A. L. REV. 1831 (2004).

consider single parenthood and family responsibilities in sentencing, particularly when sentences within the Guidelines range are presumptively reasonable and discretionary refusals not to depart downward are unreviewable.[205] Similarly, the reasonableness analysis for departures simply duplicates the trend of the pre-*Booker* case law. In other words, whatever the circuit previously awarded is the base-line for reasonableness. Thus, in stingy circuits, the extent of current departures will likely be measured against earlier departures of fewer levels, while in more generous circuits, the comparison will favor larger departures. Indeed, it may require combining several departures, as in *Menyweather,*[206] to justify an eight-level discount. Similarly, the Tenth Circuit recently noted when reversing a sentence of six days in prison and three years of supervised release in a drug conspiracy where the Guidelines indicated a minimum of forty-six months imprisonment:

> Nor does her status as a single mother, because the father of her child is in jail, justify such an extreme variance. We are not insensitive to the problems of incarcerating a single mother; doing so creates enormous costs for an innocent child and for society at large. However, we cannot find reasonable a sentencing decision that would effectively immunize single mothers from criminal sanction aside from supervised release. Her situation is, unfortunately, not very uncommon. The district court noted this itself when it denied a downward departure on the basis of her family times and responsibilities because it did not fall outside the heartland of cases. Although these facts may justify some discrepancy from the advisory guidelines range, they simply are not dramatic enough to warrant such an extreme downward variance. As such the district court's sentencing decision was unreasonable.[207]

A recent article, while sympathetic to the plight of nonviolent women and their children, suggests that family ties should not generally be considered at sentencing because a more reasoned policy concerning drugs or nonviolent offenders would obviate the need to rely on this disfavored factor.[208] However, the practical difficulty with such an approach is that sentencing has been increasingly punitive for the last thirty years, and women offenders do not have the luxury of waiting for a more rational sentencing policy while their children grow up without them. The family ties departure still needs a Guidelines fix to

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205. *See, e.g.*, United States v. Tobacco, 428 F.3d 1148, 1151-52 (8th Cir. 2005) (finding the sentence of a male defendant not unreasonable because it is within the Guidelines and also noting that the discretionary decision not to depart downward for family ties is unreviewable).

206. *See supra* text accompanying notes 146-58.

207. United States v. Cage, 451 F.3d 585, 596 (10th Cir. 2006).

208. *See* Dan Markel, et al., *Criminal Justice and the Challenge of Family Ties*, U. ILL. L. REV. 74-77 (forthcoming 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933427#Paper Download (on file with the *McGeorge Law Review*).

make such departures the norm for nonviolent parents who are the sole or primary caretakers of their children.[209] This also is in line with results from a survey that found approximately sixty percent of federal judges who responded wanted more emphasis at sentencing placed on family ties of offenders.[210] The sentencing presumption should be exactly the opposite of the present section 5H1.6 departure approach. Instead of a discouraged departure requiring extraordinary circumstances that downplays the importance of sole and primary parenting, a departure for nonviolent parents should ordinarily be granted unless good cause exists to deny it. Courts should factor in barriers to visiting, including the parent's distance from home when determining the extent of a departure in order to give voices to the children who are currently excluded from the Guidelines matrix.[211] The Sentencing Commission should reanalyze its parenting policy, instead of continuing to view the Guidelines as untouched by the seismic shift of power *Booker* portends.

B. Fashioning a Non-Guidelines Approach Favoring Family Ties

It is a sorry commentary on America's family values when the privation that female offenders face to maintain their family ties is considered ordinary. Professor Berman has suggested that the introductory language in a recent House Resolution stating that "the rights of parents ought to be strengthened whenever possible as they are the cornerstone of American society" should be viewed by post-*Booker* courts as an invitation to exercise their discretion to give greater consideration to parental responsibilities in departure decisions.[212] While the resolution arose in the context of parental complaints about sex education in elementary school education, dicta in several Supreme Court cases support this sentiment more broadly. For example, Justice O'Connor's plurality in *Troxel v. Granville*,[213] rejecting the right of grandparents to obtain visitation objected to by the child's mother, observed, "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."[214] Similarly, *Stanley v. Illinois*,[215] a case requiring that an unwed father be given a fitness hearing before his children could be taken

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209. *See Remember the Family*, *supra* note 1 (suggesting revision to section 5H1.6).

210. LINDA DRAZGA MAXFIELD, U.S. SENTENCING COMM'N, FINAL REPORT: SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES (2003), *available at* http://www.ussc.gov/judsurv/jsfull.pdf (Exhibits II-19 and III-19 showed respectively fifty-nine percent of district judges and sixty-three percent of circuit judges wanted more emphasis on family ties) (on file with the *McGeorge Law Review*).

211. *See infra* text accompanying notes 212-29 (arguing for parenting to be considered in sentencing).

212. *See* H.R. 547, 109th Congress, 1st Sess. (2005) (finding that Ninth Circuit deplorably infringed on parental rights in *Fields v. Palmdale School District*), *discussed at* http://sentencing.typepad.com/sentencing_law_and_policy/2005/11/a_new_argument_.html (on file with the *McGeorge Law Review*).

213. 530 U.S. 57 (2000).

214. *Id.* at 65.

215. 405 U.S. 645, 651 (1972).

from him in a dependency proceeding, asserted:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and "(r)ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953).

Stanley also recognized that the "integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment . . . ."[216] *Santosky v. Kramer*[217] imposed a clear and convincing evidence standard before a state can terminate parental rights, opining that "[s]ome losses cannot be measured."[218] In *Santosky*, a finding of permanent neglect "effectively foreclosed the possibility that Jed would ever know his natural parents."[219]

The response to this line of cases is likely to be that prisoners lose many of their rights as a consequence of incarceration.[220] However, that begs the question of whether such consequences are appropriate to be considered in the sentencing context. For example, in *United States v. Meyers*[221] the Second Circuit recently vacated a condition of supervised release that prevented an unwed male child pornography defendant from visiting with his natural son in foster care without pre-approval of the Probation Office. While the decision did not categorically hold this condition unconstitutional because it lacked a detailed *record* of why the condition had been imposed, *Meyers* recognized that given the fundamental liberty interest implicated by the sentencing condition, it must be reasonably necessary and the deprivation narrowly tailored to serve a compelling governmental interest.[222] If it is potentially unconstitutional to interfere with visitation under supervised release, it hardly seems a stretch that family ties should be considered relevant to the reasonableness of the original sentence.[223]

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216. *Id.*

217. 455 U.S. 745 (1982).

218. *Id.* at 760-61 n.11.

219. *Id.*

220. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 133-36 (2003) (affirming limitation on contact visits); Gerber v. Hickman, 291 F.3d 617, 621 (9th Cir. 2002) (stating that most attributes of marriage, including bearing and raising children, do not survive imprisonment), *cert. denied,* 537 U.S. 1039 (2002).

221. 426 F.3d 117 (2d Cir. 2005).

222. *Id.* at 125-26.

223. *United States v. Smith*, 436 F.3d 307 (1st Cir. 2006), is distinguishable. *Smith* held that a condition of supervised release requiring the defendant to stay away from his natural minor daughter without permission of the Probate Court was not an abuse of discretion. In *Smith* the defendant and the mother of his child were not married, had a difficult relationship and the question of visitation was pending before the Probate Court. A state

Some may claim that female offenders are bad mothers who did not care about their children when they committed their crimes.[224] I have argued elsewhere that it is unfair to make such a categorical denunciation without evaluating the individual relationship between a moth r and her child.[225] Indeed, in what is now widely referred to as the "Girlfriend Problem," women who live with drug traffickers find it virtually impossible to avoid criminal activity, resulting in a choice between leaving their intimates who are often the father of their children or staying to face potential conspiracy charges.[226] The most relevant voices on this issue belong to the children of incarcerated parents who are now joining together to create their own agenda. Their Bill of Rights includes "the right to be considered when decisions are made about my parents."[227] In other words, when the voices of innocent victims are heard in sentence allocution, the children of offenders should routinely be included. If our sentencing practices were more oriented toward restorative justice and communitarian values, we would recognize that incarceration is not necessarily the way in which defendants can correct the harm they have caused to the community at large, including their children. Instead, we are stuck in an incarcerative rut and are sorely in need of more innovative sentencing if offenders are to become productive members of society, which is often dependent on reassembling their families.

In a post-*Booker* regime, one would expect more compassion for children and their mothers. Many of these women can succeed, and keep their families intact, if given a chance. Even pre-*Booker*, the case law occasionally reflected such victories. For example, in *United States v. Rodriguez*,[228] a single mother who benefited from a departure was released early from probation. The Assistant United States Attorney confirmed that she had been fully cooperative from the time of her arrest and that "her involvement in the underlying criminal conduct had been the result of untoward, beguiling, and strong influences by the co-defendant on whose behalf Ms. Rodriguez had acted."[229] Criminal activity based

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court restraining order and trespass notice had also been issued concerning the defendant's behavior in attempting to visit his daughter. Therefore, the question of public safety was viewed as justifying a sufficient nexus for the condition. *Id.* at 311-12.

224. *See, e.g.*, United States v. Garcia, No. SA-04-CR-404(2)-FB, 2005 WL 1683628, at *1 (W.D. Tex. July 8, 2005) (noting that the defendant did not appear concerned about her children being in proximity to drugs in denying a request for probation based on fact that defendant would be in prison at the same time as her husband).

225. *Remember the Family, supra* note 1; *see infra* the "Girlfriend Problem" at text accompanying notes 230-63.

226. *See* Douglas A Berman, Legislative Briefing on "The Girlfriend Problem," http://sentencing.typepad.com/sentencing_law_and_policy/2005/06/legislative_bri.html (last visited July 15th, 2006) (on file with the *McGeorge Law Review*); *Severing Family Ties, supra* note 1; *see also* United States v. Greer, 375 F. Supp. 2d 790, 795 (E.D. Wis. 2005).

227. CHILDREN OF INCARCERATED PARENTS: A BILL OF RIGHTS, RIGHT 3 (2003), *available at* http://www.centerforce.org/families/bill_of_rights.pdf (on file with the *McGeorge Law Review*).

228. United States v. Rodriguez, No. CRIM.A. 01-639-2, 2005 WL 994606, at *1-2 (E.D. Pa. Apr. 28, 2005).

229. *Id.* at *1.

on bad choices in relationships should not lead to lengthy prison sentences for nonviolent women in a post-*Booker* world. Even without any change to section 5H1.6, the sentencing presumption should be that a reasonable sentence includes consideration of the offender's role as a sole or primary parent based on the importance of family considerations to our society. It is unreasonable to encourage the disintegration of family ties solely on a "just desserts" rationale. The money that is being spent to incarcerate mothers and provide foster care to their children can be better used to keep families together while being supervised and provided with necessary services in the community.

VII. THE "GIRLFRIEND PROBLEM"

When I first began writing about this issue more than ten years ago,[230] the "Girlfriend Problem" had no name. At the time, it struck me when reading the facts of published drug conspiracy cases that one of the most troubling gender issues concerning female offenders could not easily be pigeonholed into a specific type of legal challenge. The subject simply surfaced as background information that indicated women were often being charged as a result of their relationships with men.[231] Little has changed in the past decade. *United States v. Hued*,[232] decided in 2004 is typical: "Hued's legal troubles arise from her on-and-off six year romantic relationship with her co-defendant, . . . a drug dealer" who stored some of his belongings in her apartment.[233] Similarly, in *United States v. Greer*,[234] Judge Adelman noted that the defendant "did not sell cocaine but was the girlfriend, sister, and cousin of men who did. On several occasions, she helped them in relatively small ways. Thus, although the offense was serious, her involvement was "minimal."[235] Greer was characterized as making "poor choices in men,"[236] another common feature that often has it roots before the advent of the current criminal charges. Generally, these females either are married to, living with, or intimately involved with males who are described as being central to the conspiracies in question. In some cases, such as in *Greer*, male relatives may be

230. *Gender and Sentencing, supra* note 1, at 977-99.

231. *See, e.g.*, United States v. Goff, 907 F.2d 1441, 1443 (4th Cir. 1990) (noting that defendant made several trips with her boyfriend who was reputed to be a major drug dealer); United States v. Wylie, 919 F.2d 969, 972 (5th Cir. 1990) (despite male co-conspirator's agreement to plead guilty only if his female co-conspirator's name was omitted from each count, such omission did not amount to her de facto dismissal from the indictment). *See generally* Shimica Gaskins, Note, *"Women of Circumstance" – The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533 (2004); Haneefah A. Jackson, Note, *When Love Is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 HOW. L.J. 517 (2003).

232. 338 F. Supp. 2d 453 (S.D.N.Y. 2004).

233. *Id.* at 454-55.

234. 375 F. Supp. 2d 790 (E.D. Wis. 2005).

235. *Id.* at 793.

236. *Id.*

the link,[237] as well as intimates. In contrast to their paramours, the female defendants often have relatively minor roles in the conspiracies that include facilitating drug deals by answering the phone, opening the door, or acting as couriers for their male intimates.

While the mate of a white collar criminal may be shielded from his crime in the suites, the living companion of a drug dealer who sells his wares on the streets or at home is not equally sheltered. Mere presence is easily converted to membership in a conspiracy by the number of ways in which women have been socialized to further their relationships with men. Thus, indigent women become active participants in crime by permitting drugs in the home, answering the door or the phone, and by giving or bringing contraband to buyers.

Given the nature of such women's relationships, unless a female leaves her mate who is dealing drugs, it may be relatively difficult for her to disassociate herself from the conspiracy. In other words, she is likely to be aware of his criminal endeavors and her familial actions often promote his criminal activities. Undoubtedly, such females do receive the benefit of drug money and have enough involvement with illicit activity to be charged and often convicted of crime. However, many of them have children with their male co-conspirators and may genuinely love them, while others are conditioned by culture or coercion to stay. The mates of drug dealers, unlike the mates of men accused of white collar crime who also receive the benefits of tainted money, usually live at the scene of criminal activity. Therefore, some women who are poor may be sucked into criminal drug activity whereas women who associate with more affluent men who commit white collar felonies do not face putting their relationships aside in order to remain crime free. For example, in *United States v. Rodriguez*[238] the uneducated addicted mother of five lived in a home populated by drug dealers, including her husband, knew the drugs were being sold in her home and benefited from the money to support her family. Even with a departure, she faced a statutory minimum of five years and the parental termination of at least some of her children.[239] The court noted that "had [the defendant] been charged in state court with a similar offense, she would most likely not be faced with the specter of losing custody of her children by reason of a lengthy incarceration."[240]

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237. *See, e.g.*, United States v. Cantrell, 433 F.3d 1269, 1274 (9th Cir. 2006) (involving a father of grown daughters); United Sates v. Palma, 376 F. Supp. 2d 1203, 1206 (D. N.M. 2005) (involving an uncle who was a father figure); United States v. Mata, 145 F. App'x 276, 278 (10th Cir. 2005); United States v. Hernandez, 2005 WL 1330764, at *2 (S.D.N.Y. June 2, 2005) (involving a brother, and two co-defendants who fathered her children); United States v. Musick, 2005 WL 1278429, at *2 (E.D. Tenn. Feb. 2, 2005) ("[The] Court does not believe in the absence of [her son] that the defendant would have ever been involved in any criminal activity.").

238. No. 8:03CR36, 2005 WL 1319259 (D. Neb. June 3, 2005).

239. *Id.* at *4.

240. *Id.* at *5.

The interaction between class and gender can also be observed in an early Guidelines case, *United States v. Pozzy*,[241] where the wife appeared to have little to do with her husband's drug business beyond enjoying its financial benefits. The trial judge found that the wife had no alternative but to stay or leave when her husband deals drugs and then she becomes an abettor. He granted a departure citing section 5K2.12, which permits coercion to justify a lesser sentence. The First Circuit reversed the departure on the grounds that coercion does not exist merely because of the marital relationship,[242] while recognizing that a departure might still be available on the grounds the wife was a minor participant.[243]

The interrelationship of gender to crime and sentencing is fairly complex in such situations and raises a number of policy questions. When charging conspiracies, how do prosecutors determine which women to arrest? Are some women really arrested to provide leverage for plea bargaining with the more culpable male, either to provide information and testimony in exchange for immunity or to be dismissed in exchange for the male's plea?[244] What determines who is charged with conspiracy rather than misprision of felony, or who is allowed to plead to possession, or escape charges entirely in exchange for cooperation? Since decisions concerning the nature of the charge and plea bargaining rest with the prosecutor unless some constitutionally improper motivation is shown, gender questions concerning their culpability are often not raised on appeal by women who are convicted because evidence supporting the verdict always exists. For example, one female defendant who moved to Minneapolis to marry her male co-defendant claimed she had no criminal intent to join the conspiracy, but found herself counting money and writing messages for him.[245] Large quantities of drugs and money were found in their residence and she admitted to maintaining ledgers.[246] Needless to say, the jury convicted her. Similarly, another woman who pled guilty to a drug conspiracy agreed to accompany her boyfriend of five years on a drug buy and carry the purchase money.[247] While she claimed it was the first time she had actively participated in his drug dealing, she admitted that for two years she suspected his illegal earnings were drug related.[248]

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241. 902 F.2d 133 (1st Cir. 1990), *cert. denied*, 498 U.S. 943 (1990).

242. *Id.* at 139.

243. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2005).

244. *See, e.g.*, United States v. Seligsohn, 981 F.2d 1418, 1426 (3d Cir. 1992) (white collar crime family business case, in which the wife claimed she was coerced into pleading guilty by the government's threat not allow her husband to enter a plea if she did not agree to the bargain; the court noted that the government could appropriately bargain for a package deal as part of the plea, provided that the defendant's decision to forego a trial is otherwise voluntary, but did not assess the implied coercion of a package deal in a husband-wife context).

245. United States v. Comeaux, 955 F.2d 586, 590 (8th Cir. 1992).

246. *Id.*

247. United States v. Handy, 752 F. Supp. 561, 561 (E.D.N.Y. 1990).

248. *Id.*

It is obvious that many of these women are not totally innocent, although some claim mere presence as a defense at trial.[249] However, unless the government permits them to plead to lesser offenses they become subject to long mandatory minimums and Guidelines sentences that are disproportionate to their culpability as a member of the conspiracy. While the safety valve was enacted to rectify some of these problems, it is not a panacea, because it applies only to certain charges and categories of offenders and also has a tell-all requirement.[250] Anecdotally, women do not appear to be comfortable "betraying" their intimates by revealing the details of their crimes, even though this may mean they give up the opportunity to avoid prosecution[251] or to obtain the significant benefit that the safety valve offers to depart below any applicable mandatory minimum. Similarly, continuing relationships with male co-conspirators can result in the government refusing to move for a substantial assistance departure.[252]

Determining the extent of a female's criminal culpability also comes directly into play in assigning minimal or minor role status for purposes of downward departures in drug conspiracies[253] pursuant to section 3B1.2 of the Guidelines.[254] It is hardly accidental that the Bureau of Justice Statistics once defined persons having a "peripheral" role in the offense to include a "girlfriend, spouse, or courier with little knowledge of the drug activity."[255] In some cases, police investigative methods can result in much longer sentences than would otherwise be available. For example, in *United States v. Floyd*,[256] in order to identify a

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249. *See, e.g.*, Zafiro v. United States, 506 U.S. 534, 536 (1993) (rejecting the proposition that severance is required as a matter of law when co-defendants present mutually exclusive defenses; Zafiro presented unsuccessful defense that she was merely the girlfriend of one of the defendants and had no idea that the suitcase he stored in her apartment contained drugs); *see also* United States v. Andrews, 137 F. App'x 993, 994 (9th Cir. 2005) (finding notes containing information about victims, spending spree notes and testimony about purchases were sufficient for a conviction as a participant in co-defendant's credit card offenses and also that the exclusion of expert evidence about battered woman syndrome was not an abuse of discretion).

250. *See generally* Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471 (2000). *See also infra* text accompanying notes 286-301.

251. *See, e.g.*, United States v. Hued, 338 F. Supp. 2d 453, 455 (S.D.N.Y. 2004) (finding a woman violated the agreement not to prosecute by omitting details of her boyfriend's crimes and contacting him).

252. *See, e.g.*, United States v. Noe, 411 F.3d 878, 890-91 (8th Cir. 2005) (noting that the government refused to depart based on intercepted phone calls); United States v. Fleuristal, 133 F. App'x 781, 783 (2d Cir. 2005) (noting that the government refused to depart based on defendant's lies with intent to minimize her co-defendant's role and protect an unapprehended co-conspirator).

253. Not all conspiracies with female participants concern drugs. *See, e.g.*, United States v. Tebrugge, 134 F. App'x 291, 297 (11th Cir. 2005) (involving a defendant who knowingly concealed stolen firearms, a wife who claimed she acted under influence of her husband, and where the court denied adjustment although it indicated she was less involved in offense than her husband); United States v. Wilson, 955 F.2d 547, 551 (8th Cir. 1992) (involving a conspiracy concerning stolen property, a female defendant who was involved with male co-conspirators and who refused a minor participant role because she stored stolen property at her house for main co-conspirator and where the government opposed the departure because of her long-term relationship with the main male co-conspirator).

254. *See infra* text accompanying notes 310-23.

255. BUREAU OF JUST. STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1991, 542, tbl.5.43.

256. *See* 738 F.Supp. 1256, 1261 (D. Minn. 1990) (approving a downward departure for family ties).

woman's supplier, the officials kept making transactions with her that then added to the cumulative weight of drugs for which she was sentenced. The decision in *United States v. Reed*[257] did not even discuss the appropriateness of using seven controlled buys or the inclusion of nearly ten times the amount of drugs sold to the informant in previous years, which significantly increased the potential sentence.

A final issue in conspiracy cases relates to granting upward departures to women. Given the cultural and social factors that face women who become involved in drug cases, courts should be cautious in upholding upward departures in cases where the wife was originally charged with conspiracy and pleads guilty to a lesser drug crime. Thus, cases such as *United States v. Crawford*[258] should be read with care. *Crawford* affirmed the trial court's inclusion of the total amount of drugs relevant to the conspiracy as justifying a wife's upward departure for simple possession. Similarly, conspiracies to manufacture methamphetamine may result in upward departures for putting children at risk,[259] which has become a substantial problem because meth labs often are mom and pop operations. However, gender roles should not blindly be followed when they are contradicted by facts demonstrating that the particular female offender's criminality was not affected by gender considerations. Thus, in a particular case the wife's extensive role in a conspiracy may justify an upward adjustment.[260] In order words, while most of the women offenders discussed in this article are characterized by their gender roles, not all female criminals are so defined.[261]

Ultimately, it is difficult to draw a principled line as to how women should be sentenced in drug conspiracies where their role is really one of facilitation based on their socialization. Such women do not exhibit duress in the classic sense, but in many cases there is little doubt that their involvement in crime revolves around their efforts to accommodate their male intimates. Should these women be the beneficiaries of modern day paternalism, or does factoring their socialization and/or victimization into the departure mix merely acknowledge the reality of many female offenders' lives? "Domination, disadvantage and disempowerment" are the real issues generally facing such women.[262] Translating this to a sentencing context, it becomes evident that any attempt to gender-

257. 146 F. App'x 947 (10th Cir. 2005).

258. 883 F.2d 963, 966 (11th Cir. 1989).

259. *See, e.g.*, United States v. Ray, 375 F. Supp. 2d 832, 833 (S.D. Iowa 2005) (imposing a six-level increase since manufacture near children of a co-conspirator).

260. *See, e.g.*, United States v. Sabatino, 943 F.2d 94, 101 (1st Cir. 1991) (involving a wife who was a former prostitute, had an active role in her husband's conspiracy to violate the Mann Act by interviewing new prostitutes, called to complete credit card transactions, and discussed problems with hired prostitutes, who received a four level enhancement).

261. *See, e.g.*, United States v. Blaylock, 413 F.3d 616, 617-18 (7th Cir. 2005) (finding no error in upward adjustment as organizer of criminal activity where female was "mastermind" of robbery).

262. Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373, 1394 (1986).

neutralize the Guidelines is destined to foster inequity if we do not recognize the shared background and experiences of many women who face criminal penalties.

In a post-*Booker* world, defense counsel should raise these issues during plea negotiations as well as in sentencing. Educating prosecutors and judges about the realities of these women's' lives is key to obtaining just dispositions. Even if prosecutors do not react favorably, the flexibility given to judges makes this type of sensitivity training critical. The National Association of Women Judges in conjunction with the National Institute of Corrections has published a curriculum on sentencing women to address such issues, which are the same for state and federal sentencing.[263]

VIII. ADDITIONAL GUIDELINES DEPARTURES WITH GENDERED OVERTONES

A. *Section 5H1.3: Mental and Emotional Condition and Section 5K2.13: Diminished Capacity*

Several circuits have recognized that psychological abuse falls within section 5H1.3.[264] All section 5H1.3 departures require exceptional circumstances. Thus, even child abuse must be measured against the typical defendant, many of whom have suffered such abuse, as opposed to the general population.[265] However, the Second Circuit rejected the view that the abuse must be shocking, rising to the level of severe beatings, rape, sodomy, and prostitution, when it held sexual and physical abuse that lasted from birth till adolescence was extraordinary.[266] Typically, most departures involve profound histories of sexual victimization and personality disorders, and the history of abuse must contribute to the commission of the offense, which may be even more difficult to prove.[267] In contrast, *United States v. Rodriguez*[268] granted a departure for a woman who was raped while awaiting sentencing pursuant to sections 5H1.3 and 5K2.0.[269] The rape caused the woman to suffer from post-traumatic stress disorder and major depression.

A sentence below the applicable Guideline range may also be warranted under section 5K2.13 "if the defendant committed the offense while suffering from a significantly reduced mental capacity" that contributed substantially to the commission of the offense. Post traumatic stress disorder can be the basis of such

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263. *See* SENTENCING WOMEN OFFENDERS, *supra* note 170.

264. *See, e.g.*, United States v. Roe, 976 F.2d 1216, 1217-18 (9th Cir. 1992); United States v. Vela, 927 F.2d 197, 199 (5th Cir. 1991), *cert. denied*, 502 U.S. 875 (1991); United States v. Desormeaux, 952 F.2d 182, 185 (8th Cir. 1991). *See also* United States v. Shore, 143 F. Supp. 2d 74, 80-81 (D. Mass. 2001).

265. United States v. Brady, 417 F.3d 326, 333-34 (2d Cir. 2005).

266. *Id.* at 334.

267. *See id.* at 335 (finding that while the abused defendant might have been extremely vulnerable or fearful, there was not enough evidence to show that her impaired condition led to her engaging in bank fraud conspiracy and remanding for factual support of departure or imposition of a non-Guidelines sentence).

268. 214 F. Supp. 2d 1239 (M.D. Ala. 2002).

269. *Id.* at 1240-41.

a departure,[270] as well as a reason to withdraw a plea.[271] However, as a result of the recent amendment to the Diminished Capacity section increasing the causation requirement, it is difficult to obtain such a departure based simply on mental incapacity.[272] The amendment also limits the extent of departure to the contribution of the reduced mental capacity to the offense. This departure is limited to nonviolent offenses, prohibits consideration of voluntary drug usage, and is discouraged for defendants with significant criminal history. Ironically, these restrictions make females the most likely recipients of this departure.

B. Section 5K2.12: Coercion or Duress

Section 5K2.12 of the federal Guidelines provides that serious coercion or duress not amounting to a complete defense may be a reason for the court to grant a downward departure. Since extraordinary circumstances are not required, the departure may be applicable in many cases where a woman is subject to battering, yet appears not to be extensively cited. Judge Gertner has noted that "[i]n my experience few lawyers even bother to examine the relationship between the woman offender and her male codefendants, much less litigate it."[273] In practice, departures for coercion are more significant for females than for males and appear to be used more frequently by white than minority women.

The built-in limitation to this departure is that "ordinarily" such coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury. The 2004 version provides that the extent of a departure based on coercion and duress ordinarily should depend on several considerations, including the proportionality of the defendant's actions to the seriousness of the coercion, blackmail, or duress involved. The seminal case in this area is *United States v. Johnson*,[274] which considered battered women's syndrome as an affirmative defense of duress for acts of distribution that are included as relevant conduct under section 1B1.3 and as evidence of incomplete duress for which the court could grant a discretionary downward departure.[275] More recently, United *States v. Davis*[276] departed where the defendant was beaten so severely that she

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270. United States v. Menyweather, 447 F.3d 625, 631-32 (9th Cir. 2006).

271. *Cf.* Brown v. United States, N. 05-00075-04-CV-W-GAF, 2005 WL 1907521, at *13-14 (W.D. Mo. 2005) (finding defendant had not met her burden for determining competency).

272. *See, e.g.*, United States v. Kottke, 138 F. App'x 864, 866 (8th Cir. 2005) (refusing to depart for pathological gambling addiction because it did not substantially contribute to her forgeries); United States v. Lyles, No. CR. 04-0333(PLF), 2005 WL 975609, at *1 (D.D.C. Apr. 22, 2005) (despite finding that defendant suffered from Dissociative Identity Disorder, the court concluded that the disorder had no significant connection to her offense and also declined to impose a non-Guidelines sentence).

273. Gertner, *supra* note 15 at 304. *See generally* Sarah M. Buel, *Violence Against Women: Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217 (2003).

274. 956 F.2d 894 (9th Cir. 1992).

275. *Id.* at 898-902.

276. No. 03 CR 84, 2004 WL 1965698 (N.D. Ill. 2004).

miscarried twice, and her decision to stay and sell drugs was significantly related to her dependent personality disorder.[277] Generalized fear is insufficient to support this departure,[278] and it is questionable whether a one-time threat without evidence of actual physical violence in the relationship satisfies its requirement.[279] Parental influence is also analyzed under this departure, but the Tenth Circuit has rejected it to the extent it reflects only economic need.[280]

Sometimes, a woman's reaction may have a cultural dimension, in that she may have been socialized to regard domestic violence as a given and to obey the commands of her male intimate. While feminists are rightly concerned that this "Svengali" effect may sound sexist, it would be a disservice not to raise the issue where it represents the female defendant's life history. *United States v. Gaviria*[281] applied section 5K2.12 to a woman whose history established a pattern of dependence due to male control from a combination of physical and psychological abuse, cultural norms, economic dependence, and other factors.

In contrast, a few courts view cultural heritage as "the joinder of gender and national origin, two expressly forbidden considerations in sentencing."[282] This misses the point that the departure is not granted on the grounds that one belongs to a particular group, but that one's life experiences have been shaped by one's background and the person's individual history may demonstrate factors that justify a departure in a particular case. In other words, not all people from a particular background will have the same experiences, nor will those experiences be limited to people of the same cultural heritage or gender. By analogy, a male who is a single or primary parent should be able to get the same consideration for his children in sentencing as a similarly situated female. It is just much more likely that individuals with sole or primary caretaking responsibility are female. Similarly, women in some cultures are more likely to be socialized in a manner that encourages their facilitation of male requests.

Duress may arise in robberies, if the woman's involvement revolves around her relationship with a male, often the father of her children, who subjects her to physical injury and psychological intimidation, including threats of violence against her or her children. Again, even if not sufficient to obtain an acquittal,[283] this factor is generally relevant in sentencing. *United States v. DiIorio*[284] is a particularly troubling case that demonstrates how gender factors are ignored in the departure matrix. The trial judge granted a three level departure for being in

277. *Id.* at *6; *see also* United States v. Jurado-Lopez, 338 F. Supp. 2d 246, 247 (D. Mass. 2004) (woman was locked in a room and forced under threats to insert heroin pellets in her rectum).

278. *See* United States v. Cotto, 347 F.3d 441, 446-47 (2d Cir. 2003).

279. United States v. Beal, 352 F. Supp. 2d 14, 20 (D. Me. 2005) (rejecting departure).

280. *See* United States v. Contreras, 180 F.3d 1204, 1211-12 (10th Cir. 1999).

281. 804 F. Supp. 476, 479-80 (E.D.N.Y. 1992).

282. United States v. Guzman, 236 F.3d 830, 833 (7th Cir. 2001).

283. Dixon v. United States, 126 S.Ct. 2437, 2447-48 (2006) (holding defendant must prove duress by a preponderance at trial).

284. 948 F.2d 1 (1st Cir. 1991).

between a minimal and minor participant, however he refused to grant a further departure based on her personal circumstances. The defendant claimed that her early severe disfigurement left her scarred mentally and physically. When she became romantically involved with her co-defendant her actions were blinded by her love for him. She had long reconstructive surgery and was employed for the last four years. The trial judge remarked that applying Guidelines gave him great personal anguish. "If I came on this bench as a free agent today, this lady would not go to jail because I believe her story."[285] However, he denied any departure since her condition was not extraordinary. Similarly, she was not a minimal participant because she was aware of her co-defendant's continuing activities and counted money for him.

While the defendant appealed claiming that the trial judge believed he could not depart, the First Circuit considered that the judge had exercised his discretion and simply concluded her case was not extraordinary, thereby precluding any appeal. In other words, breast beating by the trial judge about the effects of the Guidelines was considered an exercise of discretion, not a clear statement that the judge had no discretion to depart. It is unfortunate that the defendant did not rely on imperfect coercion rather than extraordinary circumstances to justify any additional departure. Cases such as these fit more easily into section 5K2.12. Undoubtedly, when defending women who are bound to one of their male co-conspirators, lawyers must consider how to weave the varying departures rationales into a theme that supports the greatest permissible departure, but this intersection of factors is a prime candidate for a non-Guidelines sentence.

C. *Section 5C1.2: The Safety Valve and Section 5K1.1: Substantial Assistance Departures*

Congress enacted the safety valve, which is reflected in section 5C1.2, because of the generally acknowledged unfairness of punishing first-time, low-level drug offenders more severely than high-level co-conspirators who had information they could trade in exchange for substantial assistance departures. Because the safety valve appears in § 3553(f) in mandatory language, it appears that *Booker* has not abrogated this provision, since it made no reference to excising it. Thus, while the Guidelines are discretionary, the safety valve is still mandatory.[286] Since the statute specifically contains the same criteria as appear in the Guidelines, it is unlikely that the provisions will be interpreted to give judges the ability to depart below a mandatory minimum if the provisions of the statute are not met. In other words, the restrictions, such as one-point criminal history and truthful disclosure to the government, are still in effect. Thus, in *United*

285. *Id.* at 8.

286. *See, e.g.*, United States v. Ochoa-Suarez, No. 03 CR. 747(JFK), 2005 WL 287400, at *2 (S.D.N.Y. Feb. 7, 2005) (holding that *Booker* does not affect application of the safety valve).

States v. Ochoa-Suarez,[287] the judge found the female defendant ineligible for the safety valve because she was a manager for safety valve purposes and failed to make a full and truthful disclosure. However, once the safety valve is met, the Guidelines range is only advisory. Therefore, a female defendant who pled guilty to conspiracy to distribute cocaine was entitled not only to a sentence below the mandatory minimum, but also below the thirty- to thirty-seven-month advisory range where she admitted to knowingly driving a male acquaintance to a drug deal and the judge noted that similar defendants were typically charged with misprision of a felony, carrying a much less severe penalty.[288]

While the safety valve adjustment provided in section 5C1.2 was given to twenty-five percent of drug offenders in 1999,[289] it does not trump a statutory prohibition on probation.[290] Similarly, counsel must always ascertain that the plea is to a drug offense to which the safety valve applies. For example, in *United States v. Anton*,[291] the safety valve was unavailable, although the defendant met its eligibility criteria, where the listed chemical guideline under which she was sentenced did not provide for the reduction. Eligibility also depends on the defendant not being a supervisor or having any other significant role in the offense. While the criminal history cannot exceed one point, many more women than men have no prior criminal history. However, the fact that no weapon can be possessed may pose difficulties for women who are living with a male who has a significant role in the drug offense and may keep a weapon in the house.

As in *Ochoa-Suarez*, the most problematic qualification for the application of the safety valve to females is the truthful proffer to the government before the sentencing hearing of all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. It is well accepted that many women will not disclose negative information about the father of their children or other male intimates, even though that will preclude application of the departure. Claiming fear of one's male co-defendants to avoid full disclosure is also not a sufficient response. The en banc Eighth Circuit has held that the trial court's safety valve findings regarding the truthfulness of the proffer can be overturned only if they are clearly erroneous even in cases where the credibility decision is based on the government's proffer, rather than testimony.[292]

Substantial assistance departures provide the only other possibility to depart below a mandatory minimum sentence. If the government refuses to proffer the motion, and the defendant is otherwise ineligible for the safety valve, the

287. *Id.*

288. United States v. Cherry, 366 F. Supp. 2d 372, 373-78 (E.D. Va. 2005).

289. U.S. SENTENCING COMM'N, 1999 ANNUAL REPORT 44 (2000).

290. *See* United States v. Dickerson, 381 F.3d 251, 258-59 (3d Cir. 2004).

291. 380 F.3d 333, 335-36 (8th Cir. 2004).

292. United States v. Alvarado-Rivera, 412 F.3d 942, 947-49 (8th Cir. 2005). The resulting ten-year mandatory sentence for wife was sixty percent higher than the Guidelines sentence. *Id.*

mandatory minimum will be imposed, even if the Guidelines sentence is substantially less, unless there is a showing of unconstitutional motive.[293] However, once the government moves for substantial assistance, the court is not bound by the extent of the departure requested by the government. For example, in *United States v. Christenson*,[294] a downward departure of 75% for substantial assistance was recently affirmed by an equally divided vote of the Eighth Circuit sitting en banc. The government had recommended only a 10% departure to 216 months, while the trial judge believed sixty months was appropriate given the statutory sentencing factors. The panel decision in *Christenson* distinguished other cases reversing departures significantly below the government's recommendation by citing differences in the nature of the cooperation and the application of the statutory sentencing factors.[295] This battle still appears to be waged in the Eighth Circuit, with a more recent case reversing a 73% downward departure on the basis that an "extraordinary reduction must be supported by extraordinary circumstances."[296] Interestingly, each of the five Eighth Circuit cases involving extreme departures occurred in drug conspiracies, and the defendant was female in four of the five cases.[297] *Christenson* was the only Eighth Circuit case so far that did not result in a reversal, and it has no precedential value.[298] While it appears that extraordinary reductions must be supported by extraordinary circumstances, the Eighth Circuit has made clear that this decision is not dependent on the valuation of the assistance by the government, but by the evidence concerning the assistance.[299]

A 50% departure from a twenty-year mandatory minimum was recently granted for substantial assistance instead of the 30% recommended by the government, when the court found that the Guidelines range was "excessive and may work to promote not respect, but derision of the law, for the law cannot be viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing."[300] The court

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293. *See, e.g.*, United States v. Mullins, 399 F.3d 888, 889-90 (8th Cir. 2005) (affirming the finding that defendant was ineligible for safety valve due to criminal history category and imposing sentence of 120 months, where sentencing range was seventy-eight to ninety-seven months, and there was no showing of unconstitutional motive by the government in denying substantial assistance departure despite defendant's testimony that she did everything possible to assist the government); United States v. Valentin, 131 F. App'x 892, 896 (3d Cir. 2005) (affirming because an irrational distain based on alleged personal conflict was not an unconstitutional motivation).

294. 424 F.3d 852 (8th Cir. 2005).

295. United States v. Christenson, 403 F.3d 1006, 1009 (8th Cir. 2005).

296. United States v. Coyle, 429 F.3d 1192, 1193-94 (8th Cir. 2005).

297. *See* United States v. Saenz, 428 F.3d 1159, 1165 (8th Cir. 2005) (holding a 68% reduction unreasonable); United States v. Dalton, 404 F.3d 1029, 1034 (8th Cir. 2005) (holding a 75% reduction unreasonable).

298. *Saenz*, 428 F.3d at 1162 n.1; *cf.* United States v. Burns, 438 F.3d 826 (8th Cir. 2006) (upholding a 60% departure in a case where the government recommended a 15% departure), *rehearing en banc granted, opinion vacated,* May 18, 2006.

299. *Id.* at 1162, 1164-65.

300. United States v. Ray, 375 F. Supp. 2d 832, 834-35 (S.D. Iowa 2005).

characterized the defendant's history as "a disheartening litany of choices predicated on abuse, severe drug addiction and hopelessness," including being raped, subjected to domestic abuse, losing custody of her children, and suffering from dysthymia, a mental disorder.[301]

D. Section 5K2.20: Aberrant Behavior

A departure based on aberrant behavior, section 5K2.20, is permitted only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life. The requirement of a single incident limits the applicability of this departure,[302] but circumstances may warrant it in individual cases. For example, pre-*Booker* the Ninth Circuit found that time to plan a retaliatory act does not prove that a crime is the product of significant planning, and that ten minutes of ranting and raving does not fall outside the requirement that the crime be of limited duration.[303] District courts have favored this departure. In *United States v. Patterson*,[304] a female was given a thirteen-level downward departure for aberrant behavior where she had refused the offer by her friend, a narcotics trafficker, to accept money to help import drugs, but communicated the offer to a second friend and introduced them without otherwise participating in the conspiracy or receiving payment for the introduction.[305] Similarly, in *United States v. Booe*,[306] a severely depressed single pregnant mother in financial distress who robbed a bank with a threatening note was given a nine-level departure to result in a twelve month sentence, with half being served in home detention.[307] Even a crime of omission, failing to stop illegal conduct has been found to be a single course of conduct justifying the departure.[308] Given the number of aberrant behavior departures before the United States Sentencing Commission required a single incident, it is likely that some judges will return to their previous practice and now use their discretion to apply this departure more broadly in evaluating the reasonableness of a non-Guidelines sentence.[309]

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301. *Id.* at 834.

302. United Sates v. Palma, 376 F. Supp. 2d 1203, 1212-13 (D. N.M. 2005); *see also* United States v. Campbell, No. 04 CR. 452(RMB), 2005 WL 2001882, at *2 (S.D.N.Y. Aug. 19, 2005) (declining to apply departure where female purchased guns on three occasions over seventeen days at three different locations).

303. United States v. Smith, 387 F.3d 826, 834 (9th Cir. 2004) (reviewing factual determinations regarding departure and vacating for resentencing where unclear the trial court believed it had authority to depart).

304. 281 F. Supp. 2d 626 (E.D.N.Y. 2003).

305. *Id.* at 628.

306. 252 F. Supp. 2d 584 (E.D. Tenn. 2003)

307. *Id.* at 587-89.

308. United States v. Hued, 338 F. Supp. 2d 453, 458-59 (S.D.N.Y. 2004).

309. *See, e.g.*, United States v. Leyva-Franco, 162 F. App'x 752 (9th Cir. 2006) (affirming departure).

E. Section 3B1.2(b): Mitigating Role Adjustment and Section 3E1.1: Acceptance of Responsibility

Because many women facilitate the criminal activity of their male intimates, they are likely candidates for receiving departures of two to four points for playing a minor or mitigating role in the offense under section 3B1.2(b). However, a trial judge did not clearly err in denying a mitigating role reduction in light of a wife's extensive knowledge of her husband's drug activities and her playing a necessary role in production of drugs at their residence.[310] Indeed, the same case upheld an enhancement for both parents for exposing their children to the risk of harm by their manufacture of methamphetamine.[311] Similarly, a defendant is not automatically entitled to a minor or minimal role adjustment even if she is somewhat less culpable than other participants.[312] A separate departure of four points may be awarded in lieu of a mitigating role adjustment for a defendant who had no participation other than allowing use of the premises.[313]

The commentary to section 3B1.2 implies that minimal participant departures should be used infrequently and in situations indicating a lack of knowledge or understanding of the scope and structure of the conspiracy.[314] This may be difficult to demonstrate for a woman living with a key co-conspirator. For example, *United States v. Madera-Gallegos*[315] held that a wife who retrieved a heroin sample for husband was properly denied a four-level minimal role departure, even though the government had recommended that reduction by stipulation. The trial judge's two-level departure was upheld based on the husband's statements that she was his partner, the location of the gram scale in the cupboard by the Mazola, and the fact that she got the drugs in question and came back with the sample. *United States v. Hall*[316] is another example of a woman living with a drug dealer who handled money to obtain items for which identification was needed. While she requested a three-level reduction falling between a minor and minimal participant, her two-level reduction was found not to be clear error. A minor rather than minimal participant departure was also

310. United States v. Bivens, 129 F. App'x 159, 167 (6th Cir. 2005).

311. *Id.* at 164-65 (rejecting claims that enhancement was based on evidence from other cases and penalizing them for being parents).

312. United States v. Cantrell, 433 F.3d 1269 (9th Cir. 2006) (involving a daughter making trips to pick up drugs and act as facilitator, neither minor nor minimal); United States v. Barber, 132 F. App'x 891, 896 (2d Cir. 2005) (reversing three-level reduction in her offense, even though her participation may have been less extensive than that of her husband and son); United States v. Tebrugge, 134 F. App'x 291, 297 (11th Cir. 2005) (affirming denial of adjustment although court stated wife was less involved in offense than her husband).

313. U.S. SENTENCING GUIDELINES MANUAL § 2D1.8(a)(2); *Hued*, 338 F. Supp. 2d at 456.

314. *See, e.g.*, United States v. Manasrah, 347 F. Supp. 2d 634, 636 (E.D. Wis. 2004) (involving a case where the parties agreed the defendant was entitled to a four-point mitigating role reduction where she only cut coupons at home that others fraudulently redeemed, knew little about the scheme, and profited minimally).

315. 945 F.2d 264, 268 (9th Cir. 1991).

316. 949 F.2d 247, 248-49 (8th Cir. 1991).

affirmed in *United States v. Tabares*,[317] where the couple was selling cocaine from their home. She leased the apartment and both made rent payments. Since the drugs were in plain view and cash was readily accessible, she was not considered a minimal participant.[318] One poignant note about the case is that the woman kept telling the police to get out of her baby's room.[319]

Sometimes, lawyers do not even think to request such departures. In *United States v. Headley*,[320] where a wife's role in the conspiracy was limited to delivering drugs on several occasions, the court remanded the case based on incompetence of counsel because no argument as to her minor role status had been raised before the trial judge. On the other hand, in *United States v. Sailes*,[321] the wife's sentence was almost as harsh as that of her husband's, whose role in the drug activity was much greater. Judges also vary in assessing the significance of the role that mules and drug couriers play in conspiracies. As a result, drug couriers will not necessarily be presumed to play a minor role.[322] For example, in *United States v. Cacho*,[323] the fact that a mother of four small children was a mule did not entitle her to a departure as a minimal or minor participant in the conspiracy.

Acceptance of responsibility under section 3E1.1 is also a possibility for women who plead guilty. Because women often have a relatively low offense level, they are prohibited from receiving an additional departure point. However, in *Eisinger* a three-point departure was granted under this rule for atypical rehabilitation efforts by the pregnant defendant who was attempting to turn around her life before giving birth. This adjustment poses a problem for women suffering mental illness who contest whether they had the requisite mens rea to commit the offense, which some circuits view as a factual, rather than legal challenge.[324] Similarly, continued criminal conduct after the entry of a plea is a sufficient basis to refuse to award the adjustment.[325]

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317. 951 F.2d 405 (1st Cir. 1991).

318. *Id.* at 410.

319. *Id.* at 409.

320. 923 F.2d 1079, 1082 (3d Cir. 1991).

321. 872 F.2d 735, 739 (6th Cir. 1989).

322. *Compare* United States v. Barona, 150 F. App'x 944, 949 (11th Cir. 2005) (affirming denial of minor role adjustment for female drug courier), *with* United States v. Teyer, 322 F. Supp. 2d 359, 379-80 (S.D.N.Y. 2004) (discussing method of analysis and applying minor role adjustment for male pistolero in massive multinational narcotics conspiracy).

323. 951 F.2d 308, 309 (11th Cir. 1992).

324. *See, e.g.*, United States v. Gorsuch, 404 F.3d 543, 546 (1st Cir. 2005) (discussing conflicting case law).

325. *See, e.g.*, United States v. Kottke, 138 F. App'x 864 , 866 (8th Cir. 2005) (admitted she cashed forged checks after plea, but claimed it was due to gambling addiction).

F. *Creative Departures: Pre- and Post-*Booker

Creativity was substantially limited by the revision to section 5K2.0, which narrowly construes the appropriateness of departures. However, there is always some possibility to improvise. For example, in *United States v. K*,[326] sentencing of a twenty-one-year-old, nonviolent, first-time drug offender was deferred for one year pending his completion of the Special Options Rehabilitation Service (SORS) program.[327] This avoided the prohibition against departures based on postsentencing rehabilitative efforts. In the post-*Booker* world, creativity has been restored, assuming that counsel proactively investigates the defendant's background to fashion arguments favoring leniency. Similarly, after computing the Guidelines sentence, some judges are simply listing the § 3553(a) factors that favor a lower non-Guidelines sentence.[328]

On occasion, a court will be so moved by the harsh results mandated by the Guidelines, that it will find a way to avoid what appears to be a preordained sentence. For example, in *United States v. Gorsuch,*[329] a woman suffering from schizophrenia was convicted of armed bank robbery and brandishing a firearm[330] by a jury that rejected her insanity defense. The court refused to find plain error in her sentencing, noting:

> Ordinarily, we would recognize such an error-but this is a highly unusual case. The record suggests that Gorsuch is afflicted by a grave mental illness, except for which she probably never would have committed the crimes of which she stands convicted. The record also indicates that Gorsuch had no premeditated intention of harming anyone on the day in question, and that she is likely to be a law-abiding citizen if she takes medication to control her illness. One cannot help but cringe at the seven-year consecutive prison sentence recommended in the PSI Report with respect to count two for this troubled mother of three who otherwise lacks a criminal history. We therefore conclude that recognizing this forfeited error is not necessary to ensure the integrity and fairness of Gorsuch's sentencing proceeding, and so we decline to afford such recognition to it.[331]

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326. 160 F. Supp. 2d 421 (E.D.N.Y. 2001).

327. *Id.* at 447.

328. *See, e.g.*, United States v. Frye, 370 F. Supp. 2d 495, 497-98 (W.D. Va. 2005) (noting that if the female had been given the same deal as her male co-defendant who had a substantial criminal history, she would have faced a sentence of forty-one months rather than seventy months and citing her lack of criminal record, her ineligibility obtain safety valve relief because of the particular charge, her inability to provide any useful information for a substantial assistance motion, her youth, and her recent success in drug treatment, in support of a forty-month sentence).

329. 404 F.3d 543 (1st Cir. 2005).

330. The gun was unloaded. *Id.* at 544.

331. *Id.* at 547 (internal footnote omitted).

Since the sentence was vacated on another count, the decision noted that the district court could justify a sentence below the Guideline level based upon a "broader appraisal" under *Booker*.[332] *United States v. Hernandez*[333] reversed a downward departure that was granted to avoid the defendant's deportation and separation from her husband and two children who were American citizens.[334] Hopefully, in a post-*Booker* world a non-Guidelines sentence would be affirmed.

Post-arrest rehabilitation has justified downward departures, but requires exceptional circumstances.[335] Even after *Booker*, it appears that a detailed rationale is necessary to justify the extent of the reduction.[336] A non-Guidelines sentence was recently awarded to correct unwarranted disparity between co-defendants.[337] The Court noted that in drug conspiracies, the plea bargaining race goes to the swift and viewed the disparity in plea offers as caused by the defendant's delay "either through her own ignorance or inadequate advice."[338] Indeed, with many first time female offenders, their lack of sophistication about how the criminal justice system works is their worst enemy, though pre-*Booker*, disparity was a prohibited factor absent a showing of prosecutorial misconduct. However, as previously mentioned, the mere fact that non-Guidelines sentences are available does not mean that all judges are sympathetic to granting them.[339]

IX. GENDERED CORRECTIONAL ISSUES THAT ARE LEGITIMATE SENTENCING FACTORS

Current sentencing practice envisions little if any role for judges in monitoring the conditions and services that exist in the institutions to which they sentence women,[340] unless constitutional deprivations are brought to their attention.[341] However, while judges are prohibited from second-guessing decisions made by prison administrators, this is not a license to ignore the potentially tragic consequences of their sentences. The impact on female inmates of pregnancy, childbirth, loss of privacy, staff sexual misconduct, and lack of

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332. *Id.* at 548.

333. 325 F.3d 811 (7th Cir. 2003).

334. *Id.* at 816.

335. *See* United States v. Hairston, 127 F. App'x 811, 814 (6th Cir. 2005).

336. *Id.* at 815.

337. United States v. Hensley, 363 F. Supp. 2d 843 (W.D. Va. 2005).

338. *Id.* at 845.

339. *See, e.g.*, United States v. Kottke, 138 F. App'x 864, 867 (8th Cir. 2005) (affirming where trial court said it saw no reason to believe the female defendant would voluntarily stop perpetrating fraud and that low end of Guidelines was not appropriate given the extent and severity of the fraud, despite her claim of a pathological gambling addiction).

340. *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

341. Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(a)(1)(A) (reducing substantially the ability to provide system-wide relief). *See, e.g.*, Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1231-40 (10th Cir. 2005) (discussing difficulty of prisoners obtaining relief under a variety of theories).

access to appropriate programs, services, and healthcare are pervasive themes in the correctional community that are absent from the sentencing debate.

It is time to recognize that all of these factors are legitimate in rendering a just sentence and are not simply correctional decisions subject to substantial deference under *Turner v. Safley*.[342] Indeed, the dearth of such considerations in the sentencing mix demonstrates a level of insensitivity to offenders that reflects poorly on the criminal justice system as a whole. As Dostoevsky reputedly observed, "[t]he degree of civilization in a society can be judged by entering its prisons."[343] More recently, the Supreme Court has recognized that actions or omissions that create "a substantial risk of serious harm to an inmate" in the prison setting can form the basis of Eighth Amendment claims alleging cruel and unusual punishment.[344] While judges have not reached out to include so-called correctional issues in evaluating sentences, this may be due to the lack of any concerted effort by the defense bar to affirmatively argue their consideration in specific cases. Now that *Booker* restores discretion to judges to fashion just sentences, the range of relevant offender factors has expanded. As a result, in appropriate cases where female offenders pose little or no public safety concerns, counsel can argue the unreasonableness of any prison sentence, or of incarceration at a facility that is likely to retraumatize an abused female, or does not provide appropriate programming.

Including so-called correctional factors into sentencing is likely to raise a hue and cry that such an approach leads to unduly lenient sentences due to the absence of appropriate facilities and programs for women. However, the sentencing statute requires women not be sentenced more onerously than necessary. It is Congress' responsibility to build community correctional facilities and provide the necessary prison services and programs. Instead, for too long Congress has ignored funding for intermediate sanctions.[345] California is currently reassessing the placement of its female population and has identified 4500 incarcerated women as eligible for community placement, but does not currently have that capacity.[346] Similarly, when Minnesota recently analyzed the growth of its female prison population, it discovered that the number of funded prison alternatives had dropped significantly since 1985 and that additional halfway house capacity had not been funded since the early 1970s.[347] Such willful

342. 482 U.S. at 89.

343. Attributed to Fyodor Dostoevsky, quoted in Kane v. Winn, 319 F. Supp. 2d 162, 175 (D. Mass. 2004) (noting that due to their marginalized status, judges should read petitions of prisoners generously to ensure that their human rights are protected).

344. Farmer v. Brennan, 511 U.S. 825, 828 (1994).

345. *See generally* Myrna S. Raeder, *Creating Correctional Alternatives for Nonviolent Women Offenders and Their Children*, 44 ST. LOUIS U. L.J. 377 (2000) [hereinafter *Creating Correctional Alternatives*].

346. *See supra* note 91.

347. ONE LESS BED, REPORT ON ALTERNATIVES TO INCARCERATION-FEMALE OFFENDERS 21 (2004), *available at* http://nicic.org/Library/019722 (on file with the *McGeorge Law Review*).

blindness to the needs of the correctional population should not result in unnecessary incarceration. If judges started imposing probation, rather than prison sentences for the population in the middle, I have no doubt that either funds would be found, or more optimistically, that we would begin to reassess whether thirty years of imprisoning ever-increasing numbers of nonviolent mothers makes any sense from a policy perspective.

Another reason to consider placement as an affirmative sentencing factor is that the BOP is currently not required to follow judicial recommendations in program placement decisions.[348] For example, in *United States v. Cotton*,[349] a revocation case, counsel argued that the reason why the woman did not remain drug free was that she did not receive the amount of drug treatment the court had recommended when she was originally sentenced. Counsel proposed a private drug treatment program as an alternative to a long sentence, which the judge rejected in favor of a forty-six month sentence, explaining that at this point, drug and alcohol treatment could best be provided in prison.[350] Other cases blithely refer to judicial recommendations of BOP placement in residential drug abuse treatment programs[351] as if this assures such placements, particularly in the case of lengthy sentences, when BOP practice is to schedule such placements close to release. Moreover, the BOP's adoption of regulations limiting its discretion to make placements to Community Correctional Centers,[352] further hinders judges from making reasonable sentencing decisions. If particular offenders do not require imprisonment, the absence of appropriate placements should not result in their incarceration. We do not hospitalize people who come to the emergency room with minor ailments. Prisons should be treated as a scarce resource for dangerous criminals who pose public safety risks and for other offenders whose crimes demand a substantial penalty to avoid bringing the law into disrespect. *Booker* should provide support for correcting our over-reliance on incarceration.

A. Pregnancy and Childbirth

Pregnancy and childbirth also raise issues that implicate sentencing. For example, in *United States v. Greer*,[353] Judge Adelman discussed the fact that giving birth in prison and losing custody of her newborn could cause severe damage to both the inmate and the child, citing developmental research that suggests child development consequences when the mother-child bond is disrupted between the ages of six months and four years, and the physical

348. Rickenbacker v. United States, 365 F. Supp. 2d 347, 353 (E.D.N.Y. 2005).
349. 399 F.3d 913 (8th Cir. 2005).
350. *Id.* at 915.
351. *See, e.g.*, United States v. Mata, 145 F. App'x 276, 278 (10th Cir. 2005).
352. *See infra* text accompanying notes 414-24.
353. 375 F. Supp. 2d 790 (E.D. Wis. 2005).

privation caused by lack of breast-feeding.[354] In addition, the judge noted that the defendant's pre-natal care, drug, and mental health treatment were more effectively dealt with in the community.[355] Yet each year federal judges sentence pregnant federal offenders, some who will require substantial medical services during their pregnancies, without any requirement that they should consider such matters. Indeed, some judges might hesitate to consider such information as being paternalistic or sexist. Maternal care in prison is typically costly, and complaints about inadequate health care are not uncommon in federal as well as state prisons. Even when feasible, litigation is a poor substitute for a healthy mother and child.[356] Thus, keeping pregnant defendants in the community until their children are born can be critical to both the mother and her infant. While unlike some states, the BOP does not routinely use physical restraints on pregnant prisoners, or on women in labor, it is unclear whether this practice could ever be justified in terms of security concerns, particularly since it arguably may violate international standards.[357]

Even without regard to *Booker*, incarceration of nonviolent pregnant inmates should be the exception, while deferral of incarceration for a reasonable period after childbirth should be the norm. Birth should also play a part in the sentencing decision when a woman's conduct is influenced by postpartum depression.[358] Moreover, an often-ignored gender issue lurks in the pregnancy context, the fact that a lengthy sentence may virtually destroy any possibility that some females can become a mother at all.[359] In other words, women are more time constrained by men in their ability to parent.[360] In cases where public safety is not a significant concern, lengthy sentences for nonviolent women without children have a dramatically different impact than the same sentences imposed on nonviolent men.

Instead of defensively responding to attacks that women who want to become pregnant or who are pregnant are pleading their bellies in a stereotypical attempt to obtain sympathy, women's advocates should boldly attempt to fashion

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354. *Id.* at 794, n.4 (citing *Developments in Law: Alternatives to Incarceration,* 111 HARV. L. REV. 1921, 1930-31 (1998)).

355. *Id.* at 794.

356. *See generally* Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women's Prisons*, 16 CRIM. JUST. 38 (2001).

357. *See* AMNESTY INT'L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001).

358. *See* United States v. Booe, 252 F. Supp. 2d 584, 588 (E.D. Tenn. 2003) (granting an aberrant behavior departure for severely depressed mother of young child, whose counsel characterized her as suffering from postpartum depression). *Cf.* Cowart v. United States, 139 F. App'x 206, 207 (11th Cir. 2005) (remanding to conduct a merits view of the claim that postpartum depression affected her plea decision).

359. Gerber v. Hickman, 291 F.3d 617, 621 (9th Cir. 2002) (noting that most attributes of marriage including bearing and raising children do not survive imprisonment), *cert. denied,* 537 U.S. 1039 (2002).

360. *See, e.g.*, United States v. Jurado-Lopez, 338 F. Supp. 2d 246, 247 (D. Mass. 2004) (noting that offenders' first child who was taken from her after three days of incarceration was conceived after an eight year marriage and years of fertility treatments).

arguments based on fundamental rights to privacy, birth, and family, citing constitutional and policy underpinnings for such a doctrine, as discussed previously in the section concerning non-Guidelines sentences based on family ties.[361] In addition, child related concerns should be placed in the broader global context of international human rights, similar to emerging arguments against practices leading to sexual misconduct in a prison setting.[362]

Conversely, not all pregnant inmates may elect to give birth. Some pregnant inmates, who would be entitled to obtain an elective abortion if they were free, may be hindered from doing so because of their incarceration. BOP funds are used to pay for abortion services only when the life of the mother would be endangered if the fetus were carried to term or in the case of rape. In all other cases, non-BOP funds must be obtained to pay for any abortion procedure, although the BOP will pay for escorting the woman to the facility where the abortion occurs.[363] In *Roe v. Crawford*,[364] the Supreme Court recently lifted a stay of a trial court's injunction requiring a prison diagnostic center to transport a woman outside the institution for an elective abortion.[365] Again, there should be a presumption against incarcerating pregnant defendants, unless justified because of public safety or flight concerns.

B. Family Visits

Losing contact with children during incarceration is a problem for both mothers and their children.[366] Research indicates that parent-child visits are important not only to maintain relationships, and increase the chance of successful family reunification, but also to let both individuals deal with their reactions to separation and loss.[367] Visits with children are significant for women offenders and are often made difficult by the placement of women far from home.[368] In the federal system, the local D.C. women prisoners have been particularly disadvantaged by their inclusion in the BOP population. Due to the fewer number of female facilities, it is not uncommon for women to be located further from home than men. As Judge Posner suggested in *Froehlich v. Wisconsin Department of Corrections*,[369] concerning the transfer of a female state

361. *See supra* text accompanying notes 212-29.

362. *See infra* note 383.

363. LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 2004, 26-27, *available at* www.bop.gov/news/PDFs/legal_guide.pdf (on file with the *McGeorge Law Review*).

364. 126 S.Ct. 477 (2005).

365. Roe v. Crawford, 396 F. Supp. 2d 1041, 1045 (W.D. Mo. 2005).

366. Denise Johnston & Michael Carlin, *When Incarcerated Parents Lose Contact with Their Children*, 6 CCIP J (2004), *available at* http://e-ccip.org/journal.html (on file with the *McGeorge Law Review*).

367. KATHERINE GABEL & DENISE JOHNSTON, CHILDREN OF INCARCERATED PARENTS (1995); *see supra* GAO REPORT, *supra* note 41, at 55.

368. *See generally* GAO REPORT, *supra* note 41, at app. 6.

369. 196 F.3d 800 (7th Cir. 1999).

prisoner whose children sued claiming cruel and unusual punishment in order to keep her in Wisconsin, although such an accommodation is not constitutionally imposed on prison officials, "it may be a moral duty."[370] Relatively few volunteer organizations exist to fund or coordinate travel by visitors, which is a particular problem for women in the federal system who are typically placed hundreds of miles from their children, often at longer distances than male inmates due to the smaller number of female facilities.

Visits are also subject to regulation. In *Overton v. Bazzetta*,[371] restrictions on noncontact visits to prisoners were upheld that excluded visits by minor nieces and nephews and children as to whom parental rights had been terminated. The regulations did allow visits between an inmate and her own children, grandchildren, and siblings. *Overton* did "not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant" to prisoner claims, but sustained the restrictions because they bore a rational relationship to legitimate penological interests.[372] The correctional officials had argued that the regulations promoted internal security by reducing the total number of visitors and by limiting the disruption caused by children. In addition, they protected children from exposure to sexual or other misconduct or from accidental injury.

Overton also upheld a requirement that children be accompanied by a family member or legal guardian as reasonable to ensure that the child is supervised by adults who have the child's best interests in mind. A two-year ban on noncontact visits for inmates with two substance abuse violations was also upheld, despite the fact that it relegated some inmates to brief and expensive phone calls. However, the Court recognized that if withdrawal of all visitation was permanent or for a much longer period, or arbitrarily applied, the result could be different. Similarly, the Seventh Circuit reversed the dismissal of a convicted child molester's complaint that challenged a policy prohibiting his minor children from visiting him because it raised a due process question.[373] The Court noted that because the liberty interest of parents to have a reasonable opportunity to develop a close relationship with their children is important, and visitation may significantly benefit both the prisoner and his family, it would not presume that a security justification or other penological interest supported the restrictive visitation policy.[374]

After *Overton*, visiting still remains key to ensure that children bond with their mothers and to encourage inmate rehabilitation. The decision does not

370. *Id.* at 802.

371. 539 U.S. 126 (2003).

372. *Id.* at 131.

373. Harris v. Donahue, 175 F. App'x 746, 747 (7th Cir. 2006).

374. *Id.* at 747-48 (citing Justice Scalia's concurring and dissenting opinion in *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990); and Justice Marshall's dissent in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 465-70 (1989)).

prohibit or discourage the adoption of expansive visiting regulations of both a contact and noncontact nature. However, the scope and nature of those regulations are clearly within the discretion of the prison administrators, so long as restrictions are reasonable. In other words, while requiring a family member or guardian to accompany the child is tantamount to prohibiting the visit in many cases, correctional officials can implement such rules.

In lieu of or addition to visiting, telephone calls maintain the parent-child bond. While the federal system ensures that telephone services will be reasonably priced, the amount of time allowed for calls are limited. In deciding whether and where to incarcerate a mother of young children, post-*Booker* it is appropriate for judges to take into account the distance from home and visiting policies of the facility to which the female offender is likely to be incarcerated. In other words, while barriers to visits do not extend the length of the sentence, they have the effect of making the impact of the sentence greater than necessary, arguably in violation of § 3553.

C. *Privacy Concerns and Staff Sexual Misconduct in Correctional Settings*

Privacy issues and sexual misconduct are currently viewed as correctional rather than sentencing issues. However, there are legitimate reasons why judges should take into account the risk that women offenders face in institutional settings when making the decision about whether to incarcerate a female or invoke an intermediate sanction. For example, the case law concerning cross-gender pat searches and supervision of women while undressing and in bathrooms and night garb has afforded women more constitutionally based privacy rights than men in a prison setting, even in the context of an equal protection challenge.[375] Moreover, *Jordan v. Gardner*[376] held that a Washington State policy allowing male staff to conduct a pat search of female inmates violated their Eighth Amendment right to be free from cruel and unusual punishment.[377] The cross-gender searches in *Jordan* were random, nonemergency, and suspicionless, conducted on women offenders who had prior histories of abuse and were likely to feel revictimized by the intimate contact of their breasts and genitals by male guards.[378] Similarly, *Everson v. Michigan Department of Corrections*[379] upheld an order barring males from working in 250 positions in the housing units of female prisons because the duties required officers to patrol sleeping, shower, and bathroom areas. Designating these jobs as "female only" was found to be a bona fide occupational qualification for Title VII purposes, in

375. *See, e.g.*, Oliver v. Scott, 276 F.3d 736, 747 (5th Cir. 2002). *See generally* Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225 (2003).

376. 986 F.2d 1521 (9th Cir. 1993) (en banc).

377. *Id.* at 1522-23.

378. *Id.* at 1526.

379. 391 F.3d 737 (6th Cir. 2004), *cert. denied*, 126 S.Ct. 364 (2005).

part based on privacy concerns.[380] Thus, the individual histories of women limited the range of correctional practices to which they could be subjected. It is hardly a major step to recognize that these same histories should impact judicial decisions about their initial placement.

The high-profile campaigns against sexual misconduct initiated by Amnesty International and Human Rights Watch and investigations by the United Nations and the media[381] have resulted in the virtual universal adoption of statutes expressly criminalizing such behavior on the part of correctional personnel and the introduction of extensive training programs sponsored by the National Institute of Corrections.[382] Some have suggested that international law provides support for class action litigation aimed at eradicating sexual misconduct by staff in prison.[383] One reaction to sexual abuse has been to designate some prison positions as requiring female employees. In many countries, only women supervise female offenders. In the United States, no national consensus currently favors the wholesale exclusion of male officers from sensitive housing areas or night shifts in order to lessen the possibility of sexual abuse or to lessen the fears of male officers that they might be falsely accused of sexual misconduct. However, in upholding a bar on male officers in certain housing units in Michigan's female prisons, *Everson* relied primarily on the "endemic problem with sexual abuse in Michigan's female facilities," as well as on the security, safety, and privacy issues that were addressed by the exclusion. Due to the strict standard for obtaining Title VII bona fide occupational qualifications, it is unlikely that *Everson* will result in any wholesale trend toward sex segregating correctional officers, which ironically would have the potential of limiting the employment opportunities of female correctional officials who might be excluded from male correctional facilities.[384] Yet, given the numbers of sexually abused incarcerated women, *Everson* suggests that correctional officials have some flexibility in designating some positions as female-only.

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380. *Id.* at 753-54.

381. *See generally* AMNESTY INT'L, NOT PART OF MY SENTENCE, *supra* note 9; *see also* U.S. GEN. ACCT. OFF., WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF (GAO/GGD-99-104, JUNE 1999), *available at* http://www.gao.gov/archive/1999/gg99104.pdf (on file with the *McGeorge Law Review*); Brenda V. Smith, *Sexual Abuse Against Women in Prison*, 16 CRIM. JUST. 30 (2001).

382. *See* National Institute for Corrections, http://nicic.org/WebPage_78.htm (discussing focus on training and providing materials discussing sexual misconduct) (on file with the *McGeorge Law Review*).

383. *See generally* Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law-A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71 (2000); *see also* Alvin J. Bronstein & Jenni Gainsborough, *Using International Human Rights Laws and Standards for U.S. Prison Reform*, 24 PACE L. REV. 811 (2004); *cf.* Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights*, 38 NEW ENG. L. REV. 689 (2004).

384. *See generally* Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U. J. GENDER SOC. POL'Y & L. 1 (1999).

So far, it appears that the BOP has resisted any shift in favor of more female supervision. Therefore, if a woman being sentenced has a significant history of sexual abuse, counsel should argue that placement is a sentencing factor, not simply a matter of BOP policy as to staffing. In other words, it is inappropriate to confine such a woman to a facility where there is a substantial likelihood that the supervisory practices will retraumatize her. Indeed, it has been recognized that for those with mental illness prison conditions may "nurture, rather than abate, their psychoses."[385] One would hope that by today's standards, defendants are sent to prison as punishment, not for punishment. As the Supreme Court indicated in *Farmer v. Brennan*[386] while discussing the parameters of an Eighth Amendment violation for prison rape, "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"[387] The defense bar abdicates its responsibility to its female clients by not arguing prison practices as valid considerations in sentencing. Similarly, judges who deny such claims on the ground that they have no power as to placement ignore the fact that, post-*Booker*, they can justify imposing a lesser sentence on the defendant because of the absence of appropriate placements, in situations where the other sentencing factors do not compel incarceration.

D. Lack of Access to Appropriate Programming

Due to their lesser numbers, women offenders have often been given less access to programming and services. Limitations on class actions imposed by the Prison Litigation Reform Act[388] and a change in approach to equal protection challenges in the prison context have made many of these claims less feasible.[389] For women offenders who are substance abusers, treatment is often key to obtaining an appropriate disposition, but most gender-neutral programming is based on a male model. The likelihood of solving the underlying problems caused by domestic violence, sexual abuse, and mental illness is remote unless programs recognize the root causes that lead women to become substance abusers. Thus, more attention needs to be given to ensuring the availability of such programs to women as alternatives to incarceration. It is now well recognized that "the needs of female substance abusers differ greatly from their

385. Kane v. Winn, 319 F. Supp. 2d 162, 180 (D. Mass. 2004).

386. 511 U.S. 825 (1974).

387. *Id.* at 834.

388. 18 U.S.C.A. § 3626 (West 1997).

389. *See generally* Myrna S. Raeder, Legal Appendix 110-14 in BARBARA BLOOM, ET AL., GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS, NAT'L INST. CORRECTIONS (2003), *available at* http://nicic.org/pubs/2003/018017.pdf (on file with the *McGeorge Law Review*); Marsha L. Levick & Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 WIS. WOMEN'S L.J. 9 (2003).

male counterparts."[390] While the BOP has adopted gender-specific substance abuse programs, the availability of sufficient long term programs for a specific inmate is unclear, as is the availability of community correctional centers that can provide such treatment. Thus, in the revocation case, *United States v. Cotton*,[391] rather than blaming the female offender for her failure to be drug free in the absence of appropriate programming, post-*Booker*, the judge should have given more credence to a private placement to avoid a long prison term. Available work options and training also tend to be less at female facilities, again due to smaller numbers. In addition, healthcare is a significant issue at women's' institutions. Ironically, many of these factors often lead to a higher cost of incarceration for women. Thus, not only are women often shortchanged, but the public pays more to accomplish this result. Post-*Booker*, what happens after women are incarcerated should be factored into the analysis of a reasonable sentence.

X. REVOCATIONS OF FEMALES ON PROBATION AND SUPERVISED RELEASE

Cotton brings to the surface another potential difficulty, that judges who give a break to women in sentencing may be fairly unforgiving when these women fail to successfully complete probation or supervised release.[392] Unfortunately, the comment to section 7B1.4 supports this view by noting that an upward departure may be warranted where the original sentence included a downward departure.[393] This problem is particularly acute with drug offenders, who judges often appear to blame for their inability to reform,[394] but appears to apply to habitual property offenders as well.[395] Indeed, even the most sensitive judge may include so many restrictions on probation that they would daunt all but the most competent

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390. *See, e.g.*, Lisa Dolan, et al., *Gender-Specific Treatment for Clients with Co-Occurring Disorders*, CORRECTIONS TODAY, Oct. 2003, *available at* http://www.aca.org/publications/ctarchivespdf/october03/todd.pdf (on file with the *McGeorge Law Review*); Robert A. Shearer, *Identifying the Special Needs of Female Offenders*, 67 FED. PROBATION 46 (2003).

391. 399 F.3d 913 (8th Cir. 2005); *see supra* text accompanying notes 349-50.

392. 399 F.3d at 915.

393. *See, e.g.*, United States v. Anderson, 136 F. App'x 309, 310 (11th Cir. 2005) (finding that a thirty-six-month imprisonment exceeding advisory Guidelines range was not plain error).

394. *See, e.g., id.* (affirming a sentence of forty-six months upon revocation, instead of recommended sentence of seven to thirteen months where judge had previously granted downward departure); United States v. Lewis, 424 F.3d 239, 245-46 (2d Cir. 2005) (remanding for statement of reasons where the trial judge had imposed a twenty-four-month sentence on revocation, rather than using three to nine month range, and court's statement that defendant had a poor adjustment history in drug programs did not explain the length of the departure).

395. *See, e.g.*, United States v. Hinson, 429 F.3d 114 (5th Cir. 2005) (imposing two year sentence for unauthorized credit card charges and possessing drugs, rather than twelve to eighteen month sentence due to extensive criminal history); United States v. Kirby, 418 F.3d 621, 625 (6th Cir. 2005) (applying statutory maximum, rather than sentence within Guidelines range because of continued check incidents); United States v. Rupert, 150 F. App'x 817, 819 (10th Cir. 2005) (affirming sentencing of a mail fraud defendant to maximum sentence on revocation that was significantly greater than the Guidelines range, where judge had referred to her repeated and unremorseful pattern of lying and theft).

defendants.[396] Treatment programs may not be easily available, and child care and other medical and mental infirmities may overwhelm the women who are not in a residential facility. Moreover, substance abusers rarely succeed in their first attempts to break their addiction. Care must be taken not to set up a woman to fail when the goal is for her to succeed.

Some judges appear to have zero tolerance for technical violations.[397] For example, a woman who maintained a steady job and had no new crimes and some of whose supervision violations appeared tied to her hours at work was ordered to serve an additional eight months.[398] Revocations are reviewed for reasonableness, which was also the standard pre-*Booker*.[399] However, one of the more oblique holdings on reasonableness occurred in *United States v. Tedford*,[400] where the court explained:

> To be clear, we do not hold that Defendant's sentence, which is more than four times the outside limit of the recommended Guideline range, to be reasonable. We hold that the sentence is not unreasonable for the reasons presented by Defendant-that the district court failed to adequately consider the Chapter 7 policy statements.[401]

This suggests that not only must defendants challenge the reasonableness of their revocation, but must divine the particular issue that the court might agree supports unreasonableness. *Tedford* also indicated that it was proper for the judge to consider the resources of the probation department in the revocation decision,[402] which is disconcerting since the probation department has indicated its view that the defendant is wasting its resources by bringing the revocation in the first place.

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396. *See, e.g.*, United States v. Greer, 375 F. Supp. 2d 790, 796 (E.D. Wis. 2005) (finding that conditions required participation in drug and alcohol abuse treatment, mental health treatment, cognitive intervention, and complying with conditions of home confinement).

397. *Cf.* United States v. Peters, 394 F.3d 1103, 1106-07 (8th Cir. 2005) (reversing upward departure for obstruction of justice based on willful failure to appear at pretrial revocation hearing, which had been continued at defendant's request).

398. United States v. Gasaway, No. 1:98 CR 72(1), 2005 WL 2284210, at *6 (E.D. Tex. Aug. 24, 2005) (indicating that the offender had already been afforded leniency in complying with supervision terms); United States v. Farrell, 393 F.3d 498, 499-500 (4th Cir. 2005) (finding the maximum sentence was appropriate based on the number of technical violations that included failing to attend mental health counseling sessions, despite defendant's claim she was physically unable to attend the missed sessions).

399. *See* United States v. Livingston, 140 F. App'x 886, 889 (11th Cir. 2005).

400. 405 F.3d 1159 (10th Cir. 2005).

401. *Id.* at 1161.

402. *Id.*

XI. COMMUNITY CORRECTIONAL ALTERNATIVES

Over time, we have compounded our bad sentencing choices with equally shortsighted refusals to fund community correctional facilities where parents can reside with their children while obtaining the treatment and skills that are necessary for them to live productive lives. Although nonviolent female offenders pose a low risk to public safety, we ignore the fact that incarceration is more costly than community corrections and seven times more expensive than supervision by probation officers.[403] At the same time, changes in social policy have made it more difficult for single parents to avoid losing their children or to successfully reunify with them after release. As previously discussed,[404] federal welfare and adoption legislation is reducing access to essential public benefits for women offenders while simultaneously reducing the amount of time incarcerated mothers have to reunite with their children before losing custody. "This growing . . . interface between the criminal and civil court systems may create the equivalent of a legal pincer movement, catching and separating successive generations of women and children in its midst."[405] Under a post-*Booker* regime, one would hope that community corrections would play a larger role in sentencing.

Despite the negative impact of maternal separation on young children, relatively few programs foster the mother-child bond. The BOP operates a program entitled Mothers and Infants Together ("MINT"). Eligible women who have been sentenced to incarceration reside in a community correction setting with their infants for up to eighteen months after delivery. The only Congressional attempt to create a family friendly community correctional environment for women offenders and their young children, the Family Unity Demonstration Project, was never funded. The stated purpose of the act was to evaluate the effectiveness of community correctional facilities in helping to (1) "alleviate the harm to children and primary caretaker parents caused by separation due to the incarceration of the parents;" and (2) "reduce recidivism rates of prisoners by encouraging strong and supportive family relationships."[406]

The act was specifically designed to house "eligible offenders and their children under [seven] years of age" in residential facilities that were not within the confines of a jail or prison and which would provide a "safe, stable, environment for children."[407] Eligible parents included nonviolent offenders who had acted as a primary caretaker of the child prior to incarceration or had just

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403. *See Costs of Incarceration and Supervision*, 36 THIRD BRANCH 1 (2004).

404. *See supra* text accompanying notes 56-91.

405. *Severing Family Ties, supra* note 1, at 138.

406. 42 U.S.C.A. § 13881 (West 2005); *see* Nora V. Demlietner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 352 (2005) (noting that offenders with children may be lower recidivism risks). *See generally Creating Correctional Alternatives, supra* note 345.

407. 42 U.S.C.A. § 13882.

given birth and were willing to assume a primary caretaking role.[408] The residential facilities would provide programs to improve the stability of the parent child relationship, as well as alcoholism and drug addiction treatment, and services to help inmates obtain adequate housing, suitable education, and employment and child care upon their release.[409] However, despite a funding schedule in the legislation, money was never allocated for this purpose. Thus, in the present Guidelines environment, unless a family ties departure will permit immediate reunification or ensure the mother's release at a time while the child is still young enough to enhance their relationship, it will typically be denied.[410]

That such facilities can better the lives of mothers and their children is being demonstrated in California, which funded its Pregnant and Parenting Women's Alternative Sentencing Program Act and opened several long term community correctional facilities.[411] Women are sentenced directly to the program, and do not serve time in prison. The focus is not only on treatment of the mother, but emphasizes the development of the mother child bond. Children below the age of six may reside with their mothers for up to three years. In addition, for the last twenty years, California also has operated a Community Prison Mother Program, where inmates with less than six years remaining on their sentences may reside with their children in a residential facility where they receive comprehensive programming to enable them to better reintegrate into their communities.

More recently, the findings of the Second Chance Act also identify family-based treatment programs as demonstrating proven results for serving substance abusing female offenders with children that significantly decrease recidivism.[412] Similarly, the Little Hoover Commission, California's permanent independent oversight body, recently issued a scathing report that recommended that "[a] core element of a strategic plan for women should be a robust system of community correctional facilities."[413] Small programs exist in a number of states, but currently there is no groundswell to make such programs the norm rather than the exception. One innovative program, the Regina Drew House, is being developed by Brooklyn District Attorney Charles J. Hynes, as a community-based residential alternative to prison for defendant mothers and their children, demonstrating that prosecutors as well as the correctional community have a role to play in creating alternatives that serve female offenders and their children. Although some percentage of women offenders will merit incarceration under any policy approach, unlike earlier times, today only a handful of jurisdictions in

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408. *Id.*

409. *Id.*

410. *See* United States v. Wright, 218 F.3d 812, 815 (7th Cir. 2000) (cautioning that "taking a few years off a long sentence is worthless to children and costly to the program of proportionate punishment.").

411. CAL. PENAL CODE § 1174 (West 2004).

412. S. 1934 § 2, finding 20, 109th Congress, 1st Sess. (Oct. 27, 2005).

413. BREAKING THE BARRIERS FOR WOMEN ON PAROLE (Dec. 15, 2004), *available at* www.lhc.ca.gov/lhcdir/report177.html (on file with the *McGeorge Law Review*); *see also Severing Family Ties, supra* note 1; *see also Creating Correctional Alternatives, supra* note 345.

the United States have prison nurseries. The BOP is not currently in this group, despite the fact that federal sentencing practices result in lengthy prison stays even for women with no previous criminal history.

XII. THE FEDERAL COMMUNITY CONFINEMENT CENTER SNAFU

The BOP had a long-standing policy of placing eligible offenders in community confinement centers (CCC), sometimes in lieu of prison for short sentences but generally for the last six months of a prisoner's sentence.[414] This policy helped foster reentry and particularly benefited women who were given a chance to jump through all of the hoops necessary to reunify with their children. In late 2002, the Office of Legal Counsel of the Department of Justice (DOJ) determined that the BOP did not have the statutory authority to place an offender in a CCC at the beginning of the sentence or to transfer an offender from a prison to a CCC at any time during the sentence. It was widely reported that the impetus for the change came from the DOJ, which viewed such placements as unfairly benefiting white-collar criminals. The BOP then adopted a new policy, implementing what is known as the ten percent rule, that transfer is appropriate only for the last six months of a sentence or ten percent of the sentence, whichever is less. Substantial litigation resulted, with many courts holding the statutory interpretation underlying the new interpretation to be erroneous.[415] As Judge Weinstein pointed out,

> "[a]rguably the BOP's policy is contrary to sound public policy as well as the plain meaning of section 3621(b) and section 3624(c) of title 18 of the United States Code. When appropriate, placement in a CCC promotes the prisoner's reintegration into society, reduces unnecessary strains on the prisoner's family and public welfare and lowers prison costs."[416]

The resolution of this issue is significant for women offenders, who were disproportionately affected by the DOJ's change in policy.[417] At the same time the overall decrease in the federal community correctional population was 4.8%, the female community correctional population decreased by 12.5%.[418] Similarly, the mean expected length of stay in a CCC declined from approximately 113 days

414. For a general discussion of the history of CCCs see Todd Bussert & Joel Sickler, *Grid and Bear It*, CHAMPION, Mar. 2005 at 42; Todd Bussert, et al., *New Time Limits On Federal Halfway Houses*, 21 CRIM. JUST. 20 (2006).

415. *See, e.g.*, Elwood v. Jeter, 386 F.3d 842, 846-47 (8th Cir. 2004) (rejecting statutory interpretation underlying ten percent rule); Goldings v. Winn, 383 F.3d 17, 28-29 (1st Cir. 2004); *see also* Solomon v. Zenk, No. 04-CV-2214, 2004 WL 2370651, at *2 (E.D.N.Y. Oct. 22, 2004).

416. *Solomon*, 2004 WL 2370651, at *5.

417. Several of the cases challenging the BOP regulations have been brought by women. *See, e.g.*, Morales v. Francis, No. Civ.A. H-05-2955, 2005 WL 2467691 (S.D. Tex. Oct. 5, 2005); Lee v. United States, No. Civ.A. 04-0610-CG-C, 2005 WL 2179796 (S.D. Ala. Sept. 6, 2005).

418. Information from BOP on file with the author.

before implementation of this policy to eighty-one days, with the median stay plummeting from 117 to fifty-seven days.[419] This may be attributed to the fact that many women are nonviolent offenders who are serving short sentences and are prime candidates for both immediate placement in community correctional facilities and prerelease placement in such facilities for six months. While the length of stay and population levels are reported to have recently increased, it is likely that women are still being adversely affected when compared to their experiences under the earlier policy. It has been suggested that judges can still effectively designate that a defendant be placed in a CCC by sentencing the individual to probation, with time served in the CCC as a condition of the probation. After *Booker*, some judges may be amenable to following this route, since it may involve a downward departure to a Guidelines sentence. However, this approach is difficult for those judges who intend to follow the Guidelines and their restrictions on departures. While it is always a possibility that the prosecutor will not contest the departure, a judge may not believe it is appropriate to depart if the case law appears to prohibit that result.

When it appeared that sentencing advocates had won the judicial battle concerning CCCs, the BOP proposed a rule that announced its categorical exercise of discretion by limiting "inmates' community confinement to the last ten percent of the prison sentence being served, not to exceed six months."[420] The Senate version of the Second Chance Act, which encompasses a number of reentry issues, takes no position on the BOP's authority under 18 U.S.C. § 3621, but would increase the total time that an individual can spend in a CCC to twenty percent of the final portion of the term, not to exceed twelve months.[421] The BOP rule became effective on February 14, 2005, and has already generated litigation. Trial courts have divided on the legitimacy of the new regulation.[422] Recently, in what is likely to be an influential decision, Judge Becker rejected the BOP's new regulation in *Woodall v. Federal Bureau of Prisons*,[423] the first appellate decision on this issue. *Woodall* found that the regulation violated the plain meaning and legislative history of 18 U.S.C. § 3621(b), which provides that the BOP must

419. *Id.*

420. 69 Fed. Reg. 51, 213 (Aug. 18, 2004).

421. S. 1934, Sec. 16 109th Congress 1st Sess. Sec. 16 (Oct. 27, 2005).

422. *Compare* Baker v. Willingham, No. 3:04cv1923, 2005 U.S. Dist. LEXIS 23468 (D. Conn. Sept. 16, 2005); Wiederhorn v. Gonzales, No. 05-360-TC, 2005 U.S. Dist. LEXIS 15079 (D. Or. May 9, 2005); United States v. Paige, 369 F. Supp. 2d 1257 (D. Mont. 2005); Drew v. Menifee, No. 04 Civ. 9944, 2005 U.S. Dist. LEXIS 3423 (S.D.N.Y. Mar. 4, 2005); Pimentel v. Gonzalez, 367 F. Supp. 2d 365 (E.D.N.Y.2005); Cook v. Gonzales, No. 05-09-AS, 2005 U.S. Dist. LEXIS 8771 (D. Or. Apr. 5, 2005); Crowley v. Fed. Bureau of Prisons, 312 F. Supp. 2d 453 (S.D.N.Y. 2004) (invalidating regulation), *with* Charboneau v. Menifee, No. 05 Civ.1900, 2005 U .S. Dist. LEXIS 21622 (S.D.N.Y. Sept. 28, 2005); Lee v. United States, No. 04-0610-CG-C, 2005 U.S. Dist. LEXIS 27387 (S.D. Ala. Sept. 6, 2005); Moss v. Apker, 376 F. Supp. 2d 416 (S.D.N.Y. 2005); Jackson v. Fed. Bureau of Prisons, No. 05-2339, 2005 U.S. Dist. LEXIS 26724 (D. N.J. July 20, 2005); Troy v. Apker, No. 05 Civ. 1306, 2005 U.S. Dist. LEXIS 14275 (S.D.N.Y. June 30, 2005); Yip v. Fed. Bureau of Prisons, 363 F. Supp. 2d 548 (E.D.N.Y. 2005) (upholding regulation).

423. 432 F.3d 235 (3d Cir. 2005). *Accord,* Fults v. Sanders, 442 F.3d 1088 (8th Cir. 2006).

consider the history and characteristics of the prisoner, as well as other mandated factors in exercising its authority. Since individual determinations could not be made by reference to a blanket rule, the regulation was not entitled to deference under the *Chevron* test for reviewing an agency's interpretation of its governing statute.[424] However, as the decision recognized "that the BOP may assign a prisoner to a CCC does not mean that it must." Thus, the remedy was to require the BOP "to consider—in good faith—whether or not" to transfer the prisoner to a CCC. *Woodall* specifically referenced the sentencing judge's recommendation and the other § 3621 factors as part of the placement determination, in contrast to the BOP's 2002 and 2005 policies, which should not be referenced.

The DOJ is not likely to change its position given Judge Fuentes dissent in *Woodall*, citing trial court decisions that argue that the statutory factors need not be considered until an inmate is actually considered for a transfer, with the shortened timeframe dictated by the new policy. It is unfortunate that this entire snafu has resulted from the DOJ ignoring the expertise of its own correctional agency, which had viewed CCC placements as a tool providing flexibility in a system that otherwise relies heavily on lengthy incarceration.

XIII. CONCLUSION: ELIMINATING BARRIERS THAT HINDER RE-ENTRY AND FAMILY REUNIFICATION

Without congressional involvement in re-entry issues, it is unlikely that offenders will easily reintegrate into their communities or with their families. A bipartisan effort to address this problem is found in the Second Chance Act, which would authorize a task force related to re-entry of offenders that would study many of the collateral consequences that are so debilitating to all offenders, but particularly to women who are trying to reunify their families. In addition, money would be given to programs that foster the mentoring of children of incarcerated parents, as well as financial support for the Federal Resource Center for Children of Prisoners.[425]

Hopefully, the future will hold some promise that nonviolent women offenders can obtain the treatment to enable them to reunify with their children and succeed in the community. If not, we are likely to face what I have called an "orphan-class" of children who are at risk of following in their incarcerated mothers' footsteps.

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424. 467 U.S. 837, 842-43 (1984).

425. *See also* ABA Criminal Justice Standards Concerning Collateral Sanctions and Discretionary Disqualification of Convicted Persons, http://www.abanet.org/crimjust/standards/home.html (on file with the *McGeorge Law Review*) (addressing many barriers to reentry).