RETHINKING PARENTAL INCARCERATION

SARAH ABRAMOWICZ*

Recent changes in sentencing law, in the wake of cases interpreting Blakely v. Washington *and* United States v. Booker*, have raised the possibility that courts sentencing parents may take children's interests into account more extensively than had previously been permissible. Now is thus an opportune time to reevaluate the merits of considering children's interests when sentencing parents.*

This Article uses the perspective of family law to offer a new rationale for, and a new approach to, taking children's interests into account when sentencing their parents. It does so by bringing out the connection between the debate over parental incarceration and another ongoing debate within criminal law: the discussion about when we can attribute criminal responsibility to adults. Criminal law holds adults responsible for their actions by treating them as if they are autonomous, even when they are not. Family law's insights about child development, meanwhile, demonstrate that incarcerating parents may diminish a child's likelihood of becoming an autonomous adult. This Article argues that if the criminal law is to treat children as if they are autonomous when they reach adulthood, then it has an obligation to take seriously those actions that may reduce a child's future autonomy, such as incarcerating a child's parent.

Parents should not be immunized from incarceration. But a court incarcerating a parent should do so only after assessing the interests of the offender's child, and determining whether it can meet the goals of criminal punishment through means that minimize harm to that child. Articulat-

* Assistant Professor of Law, Wayne State University Law School. I am thankful, for their helpful suggestions and insights, to Kerry Abrams, Erica Beecher-Monas, Kris Collins, Clare Huntington, and Chris Lund. I am also thankful to Jennifer Gross for her valuable research assistance. An earlier version of the Article benefited greatly from presentation at the annual meeting of the Association for the Study of Law, Culture and the Humanities.

ing children's interests when incarcerating parents would bring childhood experience out from the shadows of family law, and would force courts to acknowledge the extent to which parental incarceration reshapes families and thus alters children's lives.

INTRODUCTION

The advent of the Federal Sentencing Guidelines in 1987 and structured state sentencing regimes during the 1970s and 1980s significantly curtailed judges' discretion to take into account the interests of children and families when incarcerating parents. While several judges and commentators protested this lack of discretion, citing the harms it inflicted on children,[1] a sentencing jurisprudence that provided scant room for considering children's interests nonetheless became entrenched. However, in the wake of *Blakely v. Washington*[2] and *United*

1. *See, e.g.*, LINDA DRAZGA MAXFIELD, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES Ex. II-2 (2003) (finding that 59 percent of district court judges surveyed would prefer more discretion to take family ties into account when sentencing, rendering family ties second only to mental capacity as the area in which the judges expressed the most dissatisfaction with their lack of discretion in sentencing); Patricia M. Wald, *"What About the Kids?": Parenting Issues in Sentencing*, 10 FED. SENT'G REP. 34, 36 (1995) (noting that the National Association of Women Judges proposed to the Federal Sentencing Commission that the Guidelines be restructured to give district courts more discretion on whether and how to factor children's interests into the sentencing of parents).

2. 542 U.S. 296, 296 (2004) (finding that Washington's structured sentencing scheme violated the Sixth Amendment right to trial by jury).

States v. Booker,[3] our methodology of imposing criminal sentences is newly open to debate. Now is therefore an opportune time to reevaluate the wisdom of considering children's interests when sentencing parents.

The question of whether to take children's interests into account when sentencing parents converges with an important new trend in family law scholarship. In recent years, family law scholars have begun to examine the extent to which family relations are both recognized and reconfigured by areas of law not usually considered part of the family law canon,[4] such as welfare law,[5] immigration law,[6] and criminal law.[7] When a criminal court sentences a child's parent to incarceration, the court reshapes the child's family just as much as does a family law court issuing an order of custody, adoption, or divorce. But whereas a family law court often makes children's interests paramount, a criminal law court may overlook altogether how its sentencing decision will affect a defendant's children.

To what extent should courts sentencing parents take into account how their decisions affect children? Some scholars have recently proposed that sentencing courts—and criminal law generally—should take parent-child ties into account only in rare cases. In their book, *Privilege or Punish*, Dan Markel, Jennifer Collins, and Ethan Leib argue that criminal law currently takes family ties into account more than it should, and in the process undermines the goals and legitimacy of criminal law.[8] While this Article disagrees, it does not propose that children's interests should predominate in the sentencing calculus, or that parents be immunized from incarceration. What

3. 543 U.S. 220, 222 (2005) (making the Federal Sentencing Guidelines advisory in order to avoid a Sixth Amendment violation).

4. *See generally* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004).

5. *See id.* at 892–98; *see also* Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

6. *See* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007) (showing that immigration law functions to regulate marriage).

7. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 387–89 (2008) (arguing that family law should take account of the extended family forms recognized by criminal law and other areas of law); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 42 (2006) (noting that criminal law functions as a form of family law by issuing protective orders that, by prohibiting contact between spouses, effect a "de facto divorce").

8. DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES xii–xx (2009).

this Article proposes, rather, is that we consider the question of parental incarceration—and, more broadly, the intersection of criminal law and the family—from the perspective of family law.

When we import into criminal law the insights of family law about why and how childhood experience matters, we see that the consideration of criminal defendants' parental status is not collateral to criminal law, or at odds with its goals and legitimacy. From the perspective of family law, we see, instead, that the effect on children of decisions involving their parents is inseparable from the core precepts of criminal responsibility, such that considering children when sentencing a parent is a necessary part of any attempt to render the criminal justice system fair and legitimate.

This Article develops a new rationale for, and a new approach to, considering children's interests when sentencing parents. It does so by bringing out a previously unremarked-upon connection between the debate over parental incarceration and another ongoing debate within criminal law: the discussion among criminal law scholars and legal philosophers about when and why we attribute criminal responsibility to adults. Criminal law depends upon a model of the adult legal subject as sufficiently rational and autonomous to be held responsible for his or her actions.[9] At the same time, criminal law theorists acknowledge that any functional system of criminal accountability must attribute responsibility to legal actors who are less than fully autonomous, in that they lacked control over the background conditions that shaped both their character and the range of choices available to them.[10] This disjunction is resolved by treating most adult legal actors as if they are autonomous, even while recognizing that they often are not.

Family law jurisprudence brings out the connection between criminal law's premise of adult autonomy and the debate over when to take children's interests into account when sentencing the adults who care for them. As this Article will show, family law assumes that children's experience matters, and that it matters largely because the way in which a child is raised will shape the type of adult that the child becomes. Child custody case law, in particular, provides a robust discus-

9. *See infra* Part III.A.
10. *See infra* Part III.C.

sion of the ways in which the conditions of each child's development will determine the child's adult self, including the extent of autonomy and free choice that the child will likely exercise upon becoming an adult.

Bringing family law's insights about child development to bear on the problem of parental incarceration makes clear that the decisions of whether and how long to incarcerate parents can have profound effects on whether their children will become the rational and autonomous legal actors that the criminal law will eventually assume them to be. We treat adults as if they are autonomous in part because we do not wish to treat them paternalistically, like children who cannot be held responsible for their actions. But paternalism is uniquely appropriate when it comes to actual children. If criminal law is to treat adults as if they are autonomous, then it needs to take responsibility for any actions that will render a child less so, such as the decision to incarcerate the parent of a minor child.

In Part I, this Article begins by investigating family law's insights into why childhood matters. It examines child custody case law, which has long considered how the conditions of child development form the adult self. By attending to children's experiences in a way that other areas of law do not, family law offers a unique articulation of the connection between childhood experience and the likelihood that each child will develop into a rational and autonomous adult.

Part II draws upon family law's lessons about child development to show how children may be affected by the incarceration of their parents. Part II then describes the current treatment of children's interests by sentencing courts, filling a gap in the scholarly literature by providing an overview of both federal and state approaches to parental incarceration and showing how these are newly open to reevaluation in light of the Supreme Court's decisions in *Blakely v. Washington*, *United States v. Booker*, and their progeny.

Part III then develops a new rationale for increasing the attention of criminal courts to children's interests when sentencing parents. Criminal law employs what Part III terms an autonomy premise: it treats most competent adults as if they are autonomous, and holds them responsible for their actions accordingly. At the same time, however, criminal law scholars and commentators acknowledge that the premise of adult autonomy is often a fiction, in part because the conditions of

many children's development may render them less than fully autonomous as adults.

As Part IV discusses, the insights of family law teach us that the incarceration of parents decreases the likelihood that the children of those parents will become autonomous and rational adults. Part IV argues that considering the interests of children is thus a necessary counterpart to the autonomy premise of criminal law, and explores when and how criminal law should take children's interests into account when sentencing their parents.

I. FAMILY LAW: BEST INTERESTS AND THE FORMATION OF THE ADULT SELF

Many areas of law—from torts to contracts to criminal law—make special provisions for children and assess children's liability differently from that of adults, on the basis that children have a lesser capacity than adults for rational decisionmaking.[11] Throughout the legal canon, children are also singled out for special protection, for instance, by criminal laws,[12]

11. Larry Cunningham provides an overview of children's legal incapacity across the legal canon in *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275 (2006).

12. Criminal law singles out children for special protection from victimization in a number of ways. Certain conduct, such as child abuse and sexual exploitation of a minor, is defined as criminal precisely because it is directed at children. *See, e.g.*, IDAHO CODE ANN. § 18-1506 (2008) (sexual abuse of a child under the age of sixteen years). Conduct that is criminal regardless of the age of the victim, such as assault, manslaughter, or murder, may in some jurisdictions be penalized more heavily if the victim is below a certain age. *See, e.g.*, HAW. REV. STAT. § 706-660.2 (2010) (imposing mandatory minimum term of imprisonment when commission or attempted commission of a felony results in death or serious or substantial bodily injury to, *inter alia*, a person eight years of age or younger); N.C. GEN. STAT. § 15A-1340.16(d)(11) (2009) (listing very young victims among aggravating factors for courts to consider at sentencing); OR. REV. STAT. § 137.085 (2009) (providing that vulnerability of victim on basis of youth, advanced age, or physical disability enhances the seriousness of any assault and should be considered by court at sentencing); UTAH CODE ANN. § 76-5-202(1)(t)(i) (2010) (defining aggravated murder to include intentionally or knowingly causing the death of a victim younger than fourteen years of age). Similarly, criminal conduct is often penalized more severely if it puts children at risk, such as domestic violence committed in the presence of a minor. *See, e.g.*, ALASKA STAT. § 12.55.155(c)(18)(C) (2010) (enhancing sentence for domestic violence when committed in the presence of a child under sixteen years of age who is a household member); FLA. R. CRIM. P. 3.704(d)(23) (2010) (same); IDAHO CODE ANN. § 18-1501(3) (2008) (enhancing sentence for driving while intoxicated with a child passenger).

employment regulations,[13] and tort doctrines[14] designed to protect children from types of harm to which they are uniquely vulnerable.

But it is only under family law's "best interests of the child" standard that children's interests prevail over all else. With the elevation of children's interests comes an unparalleled attention to childhood experience. Family law's best-interests jurisprudence thus provides our richest source of judicial analysis of children's upbringing and early experience.

After providing an overview of when and how family law takes children's interests into account, this part will discuss the assumptions that underlie family law's assessment of those interests. It will show that family law courts assessing children's interests take for granted that childhood matters largely because it is a formative stage that shapes the adult self. These courts exhibit this premise by undertaking a robust and future-oriented discussion of the ways in which the conditions of child development affect the adult that each child will become. In making this assessment, family law decision-makers acknowledge—as courts in other contexts do not—the extent to which each adult is largely formed, and his or her range of opportunities expanded or limited, by an unchosen childhood experience.

A. When Courts Apply the "Best Interests of the Child" Standard

The paradigmatic situation triggering application of the best-interests standard is a custody dispute between parents with equal legal rights to a child. In every state in the United States, as well as in most foreign nations, such disputes are re-

13. *See, e.g.*, 29 U.S.C. § 212(a) (2006) (prohibiting "oppressive" child labor); 29 C.F.R. § 570.2(a)(1) (2009) (setting minimum age of employment at sixteen, with certain exceptions).

14. The attractive nuisance doctrine, for instance, makes landowners liable for artificial conditions on their property that are dangerous to and likely to attract children. *See, e.g.*, Armenta v. City of Casa Grande, 71 P.3d 359, 363 (Ariz. Ct. App. 2003); RESTATEMENT (SECOND) OF TORTS § 339 (1965). Underlying the attractive nuisance doctrine is the more general tort principle that the duty of care toward a young child may be higher than the duty of care toward an adult. *See, e.g.*, Bennett v. Stanley, 748 N.E.2d 41, 45 (Ohio 2001) (explaining that landowners have a heightened duty of care even toward child trespassers because "children have a special status in tort law[,] and th[e] duties of care owed to children are different from duties owed to adults").

solved by assessing the child's best interests.[15] Often the issue of custody arises upon divorce. Even where divorcing parents agree on how to allocate custody, courts are required to ensure that the arrangement is in the child's best interests.[16] With increasing frequency, courts are also faced with custody disputes between parents who were never married.[17] In the absence of any superior right to a child, courts look instead to the child's best interests.[18]

The best-interests standard also arises in proceedings for the termination of parental rights. Termination of parental rights typically consists of a two-part process. First, a court must find a substantive basis for terminating parental rights, a step that usually requires a finding of either parental consent or parental unfitness, often on the basis of actual or potential significant harm to the child as a result of abuse, abandonment, or neglect.[19] Second, only after finding that the parent consented to termination or that the parent is unfit does the court engage in a best-interests analysis, assessing whether termination of the parent's rights is in the child's best interests.[20]

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15. *See generally* Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815 (1999) (describing the emergence and prevalence of the best-interests approach to custody disputes).

16. *See* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 8–9 (2002) (summarizing state statutes, and concluding that although the current trend is toward greater deference to parental agreements upon divorce, many states still preclude enforcement of such agreements where not in the child's best interests).

17. *See* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 385–87 (2008).

18. *See* Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 5 (1997) ("Today, when married or unmarried parents separate, both parents have equal rights to custody under a best interest of the child standard . . . .").

19. *See* 1 JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW AND PRACTICE § 4.04(1)(a)(i)-(vii) (2004); *see also, e.g.*, NEB. REV. STAT. § 43-292 (2005) (providing for involuntary termination of parental rights in instances of, *inter alia*, abandonment or endangerment of child); N.C. GEN. STAT. § 7B-1111 (2009) (same); TEX. FAM. CODE ANN. § 161.001 (West 2009) (same).

20. *See, e.g.*, NEB. REV. STAT. § 43-292 (2009) (requiring that courts find a substantive ground for terminating parental rights in addition to finding that such termination is in the child's best interests); *In re* Luis C., 554 A.2d 722, 726 (Conn. 1989) ("In contrast to custody proceedings, in which the best interests of the child are always the paramount consideration and in fact usually dictate the outcome, in termination proceedings the statutory criteria must be met before termination can be accomplished and adoption proceedings begun.") (internal quo-

The initial delegation of parental rights, on the other hand, occurs without any assessment of a child's interests. In the absence of conflict, a clear set of default rules determines who has parental rights to a newborn child.[21] Thus, for instance, when a wife gives birth to the couple's biological child, in the absence of any evidence of parental unfitness or competing claim to the child's custody, both spouses are automatically deemed the legal parents of that child, regardless of the child's interests.[22]

To trigger the best-interests inquiry, then, parents must either actively invoke the power of the courts—whether by legally dissolving a marital relationship or seeking resolution of a custody dispute—or put their child at risk of serious harm. As long as a family is intact and there is no evidence that a child is at risk, courts will not inquire into children's interests, and will not interfere with how parents raise their children.

B. The Binary Nature of the Best-Interests Inquiry

Once a court invokes the best-interests standard, the child's interests prevail over all other considerations. Parental fault, or lack thereof, is relevant only insofar as it bears upon the child's interests.[23] Where a parent has had an extramarital affair, for instance, courts typically consider this only insofar as it will adversely affect the child in some way, or indicates that the parent is insufficiently attentive to her child's needs.[24]

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tation marks omitted) (discussing CONN. GEN. STAT. § 17a-112 (2011) (original version at CONN. GEN. STAT. § 17-43a (1989)).

21. *See, e.g.*, COLO. REV. STAT. ANN. §§ 19-4-104 to -105 (2010); MONT. CODE ANN. § 40-6-104 (2009); OKLA. STAT. ANN. tit. 10, § 7700-201 (2010); TEX. FAM. CODE ANN. § 160.201 (West 2009); WASH. REV. CODE ANN. § 26.26.101 (2010).

22. *See, e.g.*, D.C. CODE § 16-909 (2011); TEX. FAM. CODE ANN. §§ 160.201, .204 (West 2009). For a discussion of how the rising number of children born to unmarried parents and/or through assisted reproductive technology has rendered the definition of parental rights increasingly indeterminate, *see generally* Cahn, *supra* note 18.

23. *See, e.g.*, Ashwell v. Ashwell, 286 P.2d 983, 987 (Cal. Ct. App. 1955) ("[I]n determining where custody of children shall lie[,] the courts are not engaged in a disciplinary action to punish parents for their shortcomings as individuals nor to reward the unoffending parent for any wrong suffered by the sins of the other."). *See also* Andrews v. Andrews, 601 A.2d 352, 353 n.2 (Pa. Super. Ct. 1991) (noting that the best interests of the child take precedence over considerations such as "fundamental rights and fair play").

24. *See, e.g.*, L.C.V. v. D.E.G., 705 N.W.2d 257, 260 (N.D. 2005) (upholding award of primary physical custody to father on the basis, in part, that mother's "history of impermanent relationships" undermined the child's need for stability and continuity); Barnhill v. Barnhill, 826 S.W.2d 443, 453 (Tenn. Ct. App. 1991) (awarding joint custody where mother had an adulterous affair, and noting that

The assumption is that what matters is only how the child will be affected by the parent's behavior.[25]

Parental rights, desires, and needs are of similarly little relevance to a best-interests determination, except to the extent that a parent's well-being will affect that of a child.[26] In certain limited situations, a court assessing children's interests may consider parents' constitutional rights, as in a Free Exercise claim by a parent who contests a court's order governing a child's religious exposure.[27] Even parents' constitutional rights, however, are often subordinated to children's interests, even where the children are in no danger of harm.[28]

The best interests of the child standard, then, is not a balancing test of children's interests versus those of parents, but an all-or-nothing proposition. In an intact family, parents' rights receive substantial protection. As long as there is no indication that a child is at risk of serious harm, a parent can move, change jobs, remarry, or join a commune without any interference from the courts. Once the best-interests analysis is triggered, however, the child's interests become not just the primary, but the sole consideration. The rationale behind this approach is that adults, not children, bear responsibility for a

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while "[c]ustodial arrangements should not be made with the goal of punishing a parent for misconduct[,] . . . . misconduct of a party does often reflect fitness of the parent for custody and is a proper consideration").

25. *See* June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC L. REV. 267, 288–89 (2008) (summarizing approaches to nonmarital sexual activity).

26. *See, e.g.*, *In re* C.B., 618 N.E.2d 598, 605 (Ill. App. Ct. 1993) (describing reversal where "trial court improperly balanced the best interest of the child against the rights of the parents," on ground that "the best interest of the child was not merely part of the equation but had to remain inviolate and impregnable from all other factors") (citation and internal quotation marks omitted); Kuntz v. Allen, 48 Pa. D. & C.3d 105, 108 (1987) (holding that under best-interests analysis, a parent's rights and interests are "secondary and subordinate to a child's physical, intellectual, moral, spiritual and emotional well-being").

27. *See, e.g.*, *In re* Marriage of Hadeen, 619 P.2d 374 (Wash. Ct. App. 1980) (addressing parental claim that best-interests assessment taking religious activities into account violated parent's First Amendment rights, and concluding that religious decisions and acts may be considered in a custody determination only where there is a reasonable and substantial risk of harm to a child's mental or physical well-being).

28. *See* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 631 (2006) (arguing that custody determinations often infringe on parents' First Amendment rights). The greatest deference to parents' constitutional rights occurs in cases involving claims of discrimination on the basis of race in violation of the Fourteenth Amendment. *See* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (finding that best-interests assessment predicated on stigma to child from living in interracial household violated the Equal Protection Clause, regardless of possible harm to child).

custody dispute, while it is the children who stand to be most deeply affected by it.[29] Because children are innocent and not responsible for the choices of their parents, and those choices, in turn, will shape their future, the child's interests prevail over all else.

C. The Developmentalist Premise

1. The Best-Interests Standard

In applying the best interests of the child standard to custody disputes, courts take a primarily future-oriented approach. They assess the various factors bearing upon a child's interests—parenting styles, educational opportunity, religious upbringing, geographical location—with a view to how each will affect the child's future self. While courts also work to alleviate children's immediate suffering and to make their day-to-day experience as positive as possible, the thrust of the best-interests assessment is how each aspect of the child's experience will affect the child's future as an adult.

Underlying the future-oriented approach to children's interests are a number of assumptions about why and how childhood matters. Courts and commentators agree that children merit special protection because, unlike adults, they are innocent and helpless.[30] The future-oriented approach to assessing children's interests brings out a related premise—that childhood experience warrants careful attention because childhood is a formative stage that will shape each child's adult life:

> The issue of child custody is among the most sensitive and vital questions that courts decide. The court's decision may have a crucial and potentially long-term impact on the physical and psychological well-being and potential future development of the child at a time in its life when its future as a balanced, healthy and happy individual is most clearly at stake. The child's future as a valued and participating

29. *See, e.g.*, Harmon v. Emerson, 425 A.2d 978, 983 (Me. 1981) ("The family 'war' is fought by the father and mother, but too often the lifetime scars are carried by their children.").

30. *See, e.g.*, Cunningham, *supra* note 11, at 285.

> member of society may well rest on the outcome of the custody determination.[31]

Judges often bemoan their anxiety about making the correct decision in custody cases because here "the future of the children is in the balance."[32] This anxiety is compounded by the difficulty of determining how a child will turn out under one or another custodial scenario, which, as one court noted, is often "impossible to predict without a crystal ball or the gift of foresight."[33] If courts often require "an abundance of information" when faced with a custody dispute, this is because they want to assess as fully as possible any evidence bearing on what they characterize as a "far-reaching"[34] decision that may well determine the type of adult the child will become.

The overall judicial goal in attending to children's interests is to ensure that each child becomes a happy, well-adjusted adult. Within that general mandate, courts aim to foster what they see as desirable traits in the adults that the children before them will become. While each court differs in its approach, certain attributes crop up with especial frequency as the aim of the best-interests determination. Primary among these is psychological well-being, a catch-all goal that entails, among other things, that children grow up to form healthy relationships with their spouses and their own children; that they learn to regulate their emotions; and that they develop a positive sense of identity and self-worth.[35] Courts also frequently aim to foster what is often termed autonomy,[36] independence,[37] produc-

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31. *Harmon*, 425 A.2d at 982–83.

32. Prost v. Greene, 652 A.2d 621, 633–34 (D.C. 1995); *see also* Coles v. Coles, 204 A.2d 330, 331–32 (D.C. 1964) ("Out of a maze of conflicting testimony, . . . the judge must make a decision which will inevitably affect materially the future life of an innocent child.").

33. *In re* C.B., 618 N.E.2d 598, 603 (Ill. App. Ct. 1993).

34. *Id.*

35. *See, e.g.*, *In re* Luis, 847 N.Y.S.2d 835 (N.Y. Fam. Ct. 2007) (discussing effect of upbringing on future relationships, emotional functioning, and sense of self).

36. *See, e.g.* Harris v. Harris, No. FA 940543256, 1997 WL 710437, at *11 (Conn. Super. Ct. Oct. 31, 1997) ("To achieve trust, autonomy, initiative, and industry children need to be securely attached emotionally so that they can take on the risks implicit in growing up. At the same time, they need to be challenged by goals that are worth pursuing. Children who are fortunate to experience such contexts are likely to enjoy their lives, while at the same time contributing to the common good.") (quoting M. Csikszentmihalyi, *Contexts of Optimal Growth in Childhood*, 122 DAEDALUS: J. AM. ACAD. OF ARTS AND SCI. 44 (1993)).

37. *See, e.g.*, *Prost*, 652 A.2d at 625 (noting factors that would facilitate children's "development into independent, well-rounded, confident adults") (internal

tivity,[38] or self-sufficiency.[39] The gist of this goal—which this Article will refer to as adult autonomy—is that the child develop the psychological and the intellectual wherewithal to function in adult society, and to make the mature, reasoned decisions that are the hallmark of adulthood.[40]

2. Best-Interests Factors

Cases applying the best-interests standard therefore provide a rich source of judicial analysis of the connection between how children are brought up and how they turn out. In some cases, for instance where both parents are psychologically healthy and well-off and the conflict level between them is low, courts are faced with two relatively desirable alternatives. Here a court will analyze the nuanced differences in opportunity and lifestyle that each parent would provide the child,[41] including, for instance, how the child would likely fare at one or another elite school.[42] Often, however, the question before a court is not which alternative will most enhance a child's opportunities for a happy and successful adulthood, but which is least likely to inflict harm on the child.

The best-interests case law devotes extended attention to those factors that can impede a child's course of development and thus diminish the child's chances of becoming a well-adjusted, productive, and autonomous adult. Courts and ex-

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quotation marks omitted); M.W. v. S.W., No. 3942/02, 2007 WL 1228613, at *20 (N.Y. Sup. Ct. Apr. 26, 2007) (assessing "each parent's ability to permit the children to develop into independent and emotionally secure adults").

38. *See, e.g.*, Herrera v. Herrera, 944 S.W.2d 379, 386 (Tenn. Ct. App. 1996) ("The true test for the award of custody is to arrive at the point of deciding with whom to place the child in preparation for a caring and productive adult life.").

39. *See, e.g.*, Saplansky v. Saplansky, 19 Phila. Co. Rptr. 29, 42–43 (Pa. Ct. C.P. 1989) (refusing shared custody on basis that this would impair developmental process whereby "the child become[s] aware of himself as an individual, gradually acquiring the emotional strength to be able to separate from his parents for the purpose of attending school and being relatively self-sufficient later in life").

40. *See* Harmon v. Emerson, 425 A.2d 978, 983 (Me. 1981) ("The child's future as a valued and participating member of society may well rest on the outcome of the custody determination.").

41. *See, e.g.*, Berg v. Berg, 490 N.W.2d 487, 490 (N.D. 1992) (awarding custody to mother on basis, *inter alia*, that "her personality traits and career would probably result in the children being exposed to a lot more new things (and better prepared for independent life, as adults)"); Sutterfield v. Sutterfield, CA 84-207, 1985 WL 9516, at *1 (Ark. Ct. App. Feb. 20, 1985) (comparing the educational opportunities, health care, dental care, and stability of home environment that each parent would provide).

42. *See, e.g.*, Levine v. Levine, 731 A.2d 558 (N.J. Super. Ct. App. Div. 1999).

perts widely agree that children do best when provided with as much continuity and stability as possible in their caretaking and environment, and are harmed, above all, by disruption and instability.[43] Custody disputes, especially those arising from the dissolution of a formerly intact family, often entail some degree of disruption. Thus, the focus of the best-interests analysis is often on how to minimize disruption to the child's life, and how to weigh the relative harms that might result from the various types of disruption or instability that the child would experience under each custodial outcome.

Foremost among the types of disruption thought to harm a child's course of development is separation from a parent or parent-figure. It is a staple of best-interests jurisprudence that separation of a child from a primary caretaker—whether a biological parent or a foster parent—can inflict life-long damage on the child.[44] Courts discuss at length psychological theories about the stages of child development,[45] analyzing how separation from a parent could jeopardize a child given where she is in the developmental process.[46] For instance, in custody disputes involving toddlers, courts frequently cite psychological evidence for the proposition that this is a particularly crucial

43. *See, e.g.*, Sullivan v. Sullivan, 466 A.2d 937, 938 (N.H. 1983) (recognizing "correlation between the stability of family relationships and the healthy psychological development of children"); Nehra v. Uhlar, 372 N.E.2d 4, 8 (N.Y. 1977) (considering importance of stability to children in custody determination); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 31–34 (1979).

44. *See, e.g.*, *In re* K.A.W., 133 S.W.3d 1, 21 (Mo. 2004) ("Countless psychological and child development studies have shown that children—especially infants and young children under the age of five—who are needlessly separated from their familiar parent suffer resulting deficits in their emotional and intellectual development.").

45. *See, e.g.*, *In re* Interest of Lukens, 587 N.W.2d 141, 145 (N.D. 1998) (holding admissible generalized testimony on stages of child development by clinical psychologist, on basis that "[a] psychological expert can provide the court with a general understanding of the characteristics and needs of children in each stage of development, which can be useful in assessing which potential custodian is best equipped to cope with rearing the children").

46. *See, e.g.*, West v. Lawson, 951 P.2d 1200, 1203 (Alaska 1998) (discussing psychologist's testimony that the child in question would be harmed by a six-month alternating custody schedule because it would prove too unstable for a child at her stage of psychological development); Palazzolo v. Mire, 10 So.3d 748, 759–60, 764–65, 778 (La. App. Ct. 1999) (reversing termination of visitation rights to lesbian mother who adopted her partner's child, after considering, *inter alia*, testimony of court-appointed psychologist that child did not bond with adoptive mother, and weighing this against testimony of child development expert that during the first eighteen months, children are likely to form strong emotional bonds with their caretakers, and thus that the child was likely to have formed a maternal bond with her adoptive mother as well as with her biological mother).

time in a child's development, during which it is especially important to keep the relationship with a parent intact in order to foster the sense of trust necessary for the child to learn to separate from the parent and take the first steps toward autonomy and independence.[47] Separation at this age could "alter the developmental course for children in a major way,"[48] by, among other things, hampering children's acquisition of language and social skills and ability to form relationships later in life.[49]

There is increasing agreement that separation from either parent—including the non-primary caretaker—can inflict developmental damage on a child.[50] Courts assessing children's interests have begun to attend to the ways in which loss of regular contact with the noncustodial parent, typically the child's father, might harm a child's development.[51] An oft-cited premise in recent custody disputes is that "regular interaction with both parents [is] important to [children's] 'development into independent, well-rounded, confident adults.' "[52] Courts

47. *See, e.g.*, *In re* S.J., 846 N.E.2d 633, 636 (Ill. App. Ct. 2006) (recounting psychologist's testimony that when the relationship of a toddler "with a primary caregiver is disrupted, the young child can develop trust issues that may inhibit development of his own personality and his ability to form relationships"); *In re* Luis, 847 N.Y.S.2d 835, 846 (N.Y. Fam. Ct. 2007) (discussing effect of separation from parent on the "transition from dependency to autonomy" that occurs between the ages of eighteen and thirty-six months).

48. *In re* Luis, 847 N.Y.S.2d at 847; *see also* Lasich v. Lasich, 121 Cal. Rptr. 2d 356, 362 (Cal. Ct. App. 2002) (citing expert testimony on "potentially life-long bad consequences" of lack of contact with father between the ages of two and three).

49. *See In re* Luis, 847 N.Y.S.2d at 846–47; *see also* Cannon v. Hairgrove, No. G030279, 2003 WL 21805226, at *4 (Cal. Ct. App. Aug. 6, 2003) (upholding trial court's refusal of mother's request to relocate on the basis of expert testimony that disruption of parent-child attachment during infancy is likely to harm child's "social and emotional development"). The separation from a parent-figure is characterized as even more potentially damaging where a child has already undergone previous disruption, as is often the case in the adoption and foster care context. As one expert testified, the effect here of breaking the bond with a psychological parent can be to create a "long term time bomb[]." *In re* K.I.F., 608 A.2d 1327, 1331 (N.J. 1992).

50. *See, e.g.*, David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 533–35, 561–64 (1984) (discussing research indicating that children often form strong attachments to their secondary caretakers, and arguing that any preference for awarding custody to the primary caretaker should not apply to children over the age of five).

51. *See, e.g.*, Mark L. v. Gail S., N.Y. L.J., May 30, 2006, at 24 (Nassau Cnty. Sup. Ct. May 30, 2006) (noting risk to children of developing "personality disorder features and pathological interpersonal relationships in the future" should mother fail to allow them continued contact with their father).

52. Prost v. Greene, 652 A.2d 621, 625 (D.C. 1995). The importance to children of interaction with both parents is in some instances explicitly articulated by state statutes setting forth the best-interests standard. *See, e.g.*, DEL. CODE ANN.

may act on this premise by changing custody when the custodial parent thwarts visitation;[53] by preventing a parent from relocating where this would diminish the children's contact with the non-custodial parent;[54] or by requiring that a relocating parent maximize the child's contact with the non-custodial parent.[55]

Courts also attend to the harms that other types of disruption inflict on children's development, including the disruption that can result from a caretaker's financial instability. While some jurisdictions prohibit courts from taking a parent's finances directly into account in awarding custody,[56] others permit[57] or even require it,[58] and here courts will frequently acknowledge that a parent who is better off can provide "material opportunities affecting the future life of the child."[59] These courts accept that a well-off parent can enrich a child's life by providing travel, extracurricular activities, and a superior education, while, at the other end of the spectrum, a financially insecure parent can subject the child to instability and disruption in the form of eviction and frequent moves.[60] Courts also acknowledge that financial difficulties can cause a parent psychological and emotional stress, which in turn can harm a child's development as much as can any material deprivations the child experiences. As one court put it: "[The children's] best interest requires that the parent with whom they live be able to provide for them financially. If their mother is unable to support [them] adequately, . . . and if, as a result, she is emo-

tit. 13, § 1507(g)(1) (2011) (providing that children of divorce have a "right to a continuing relationship with both parents"); VT. STAT. ANN. tit. 15, § 650 (2010) ("The legislature finds and declares as public policy that after parents have separated or dissolved their civil marriage, it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant emotional harm to the child or a parent is likely to result from such contact.").

53. *See* Renaud v. Renaud, 721 A.2d 463, 466 (Vt. 1998).

54. *See In re* Luis, 847 N.Y.S.2d at 851–52.

55. For instance, a court may order that a parent who relocates provide webcam access to facilitate the child's contact with the other parent. *See, e.g.*, Mitchell v. Mitchell, No. 292725, 2009 WL 4984974 (Mich. Ct. App. Dec. 22, 2009).

56. *See, e.g.*, Burchard v. Garay, 724 P.2d 486, 491 (Cal. 1986).

57. *See, e.g.*, Dempsey v. Dempsey, 296 N.W.2d 813 (Mich. 1980).

58. *See, e.g.*, McIntosh v. McIntosh, 87 A.D.2d 968 (N.Y. App. Div. 1982).

59. *In re* Jessica M., 527 A.2d 766, 769 (Md. Ct. Spec. App. 1987).

60. *See, e.g.*, Housand v. Housand, 509 S.E.2d 827, 830 (S.C. Ct. App. 1998).

tionally and financially insecure, such a condition would inevitably affect and harm the children."[61]

Underlying the best-interests literature is an implicit acknowledgment that the conditions of children's upbringing are a crucial determinant of adult identity and, at the same time, something that children themselves cannot control. In cases where children are old enough, courts can factor their wishes into a best-interests assessment.[62] But often children are not yet old enough to make a reasoned choice. And it is arguably in the cases where custody matters most—where the children have yet to form an identity—that judges are most often required to make a decision on their behalf, one that will determine the types of decisions they will themselves make when they do reach maturity.

II. PARENTAL INCARCERATION

When assessing the best interests of the child, family law courts consider at length how the conditions of children's upbringing may affect their development. In Section II.A, this part will show that, when viewed from the perspective of family law's best-interests jurisprudence, we can see that children's development can be hampered, often profoundly, by the incarceration of a parent.

Section II.B will then demonstrate that the current federal sentencing regime, as well as the sentencing regimes in place in many states, gives only limited consideration to children's interests when sentencing parents. However, recent changes to sentencing law, in the wake of cases interpreting *Blakely v. Washington*[63] and *United States v. Booker*,[64] have opened up the possibility that courts sentencing parents may take children's interests into account to a greater extent than was previously thought permissible.

Now is thus a crucial time for reevaluating the problem of parental incarceration. Section II.C will discuss how the issue of parental incarceration has been framed by scholars and commentators. It will show that while criminal law scholars have long puzzled over whether courts should consider children

61. Secada v. Secada, No. FA990174204S, 2002 WL 1041726, at *11 (Conn. Super. Ct. Apr. 30, 2002).

62. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.23(i) (West 2010).

63. 542 U.S. 296 (2004).

64. 543 U.S. 220 (2005).

when sentencing their parents, they have done so from the limited perspective of criminal law, rather than taking into account family law's more robust discussion of childhood and why it matters. Criminal law scholarship has thus overlooked an important connection between children's interests and the underlying goals and premises of criminal law.

A. Effect of Parental Incarceration on Children

When a parent of a minor child is incarcerated, the consequences for the child are often profound. At a minimum, the child is separated from that parent, often for a significant period of time. Because many in the prison population are single parents,[65] the child may be separated from the only parent he or she knows, often with devastating consequences for the child's development, education, and present and future well-being.

The number of children with incarcerated parents has increased dramatically in recent years.[66] In 2007, 1.7 million children had a parent in prison, an increase of 79 percent since 1991.[67] The number of children with a parent in prison in 2007 represented 2.3 percent of the U.S. population under the age of eighteen.[68] In the most recent year for which full statistics are available, the average time of incarceration for mothers was

65. *See, e.g.*, LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 4 tbl.7 & 16 app. tbl.7 (2008) [hereinafter "BJS PARENTS IN PRISON"] (showing that 19.2 percent of state prisoners and 20.9 percent of federal prisoners were single parents living with their children prior to incarceration).

66. The increase in the number of children with incarcerated parents accompanied the dramatic increase in the prison population more generally during this time. From 1977 to 2005, the U.S. prison population increased 400 percent. *See* John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547, 547 (2008). The cause of the rise in the prison population is much debated and difficult to determine. *See generally id.*; *see also* Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323 (2005). While some see a connection between the increased prison population and the advent of structured sentencing, *see, e.g.*, Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491 (2003), others dismiss this factor as insignificant, *see, e.g.*, Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787 (2006).

67. *See* BJS PARENTS IN PRISON, *supra* note 65, at 1; *see also* SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007, at 2 (2009).

68. *See* BJS PARENTS IN PRISON, *supra* note 65, at 1.

four years in state and five and one-half years in federal prison, and for fathers it was nearly seven and nine years, respectively.[69] While children can visit their parents in prison, visitation is often difficult, particularly in cases involving mothers; the relative lack of women's prisons often results in maternal incarceration further from a child's home.[70] Thus, recent reports indicate that over 58 percent of incarcerated parents in state prison and 44 percent of incarcerated parents in federal prison do not see their children at all, including over 57 percent of mothers in state prison and 44 percent of mothers in federal prison.[71]

As Part I discussed, family law courts assessing children's interests have long acknowledged that separation from a parent, even without any exacerbating factors, can inflict profound harm on a child's psychological development. The effect is most profound when the child is young, but separation from a parent at any age can be detrimental, and can result in behavior problems, lower self-esteem, trouble in school, and difficulty developing healthy relationships later in life.[72] Moreover, where the child continues to live with a second parent—and this is the best-case scenario in the context of parental incarceration—the separation will often also burden that parent as well, both psychologically and financially, which can itself be harmful to the child's well-being.[73]

Of course, separation from a parent may in some instances benefit a child. This is often the case where the parent has been abusing the child, and it may be the case where the parent has committed other criminal acts as well. But criminal law separates children even from loving and caring parents, which, as family law courts routinely acknowledge, is likely to have destructive effects on children's psychological development.[74]

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69. *See* CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 7 (2000) [hereinafter "BJS INCARCERATED PARENTS"].

70. *See* Myrna S. Raeder, *Gender-Related Issues in a Post-*Booker *Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 745–46 (2006).

71. *See* BJS PARENTS IN PRISON, *supra* note 65, at 15 app. tbl.10.

72. *See supra* text accompanying notes 44–55.

73. *See supra* text accompanying notes 59–61. On the harm to children who continue to live with their mothers but are separated from their incarcerated fathers, see Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L.Q. 191 (2006).

74. *See supra* text accompanying notes 44–55.

Incarceration of a parent also typically has profound financial consequences for the child, often inflicting extreme versions of the types of disruption and instability that family law courts work to avoid.[75] Where the parent was a source of income for the child,[76] incarceration will result in a lower standard of living, and often leads to significant economic deprivation.[77] Children who are forced to relocate to the home of a formerly noncustodial parent or relative—typically a grandparent—will suffer inevitable disruption to their development and education, which is exacerbated by the tendency of such households to be pushed deeper into poverty,[78] and sometimes even homelessness,[79] as a result of the financial strain of caring for the child. Finally, even when the incarcerated parent is released, the parent's criminal record may make it more difficult for that parent to obtain a job, live in subsidized housing, obtain an education, and obtain welfare benefits,[80] all of which can further exacerbate the child's downward slide into poverty even once the parent and child are reunited. As is well established in the best-interests jurisprudence, this type of extreme financial deprivation can harm the child's development in a number of ways, including by limiting the opportunities available to the child and by undermining the stability and psychological well-being of both parent and child.

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75. In his anthropological study of the consequences of imprisonment, Donald Braman provides a powerful portrait of the devastating financial, economic, and psychological effects of incarceration on children and families. *See generally* DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (2004).

76. Approximately 67.2 percent of parents in federal prison and 54 percent of parents in state prison provided primary financial support to their children prior to incarceration. BJS PARENTS IN PRISON, *supra* note 65, at 17 app. tbl.9.

77. *See* Joyce A. Arditti, Jennifer Lambert-Shute & Karen Joest, *Saturday Morning at the Jail: Implications of Incarceration for Families and Children*, 52 FAMILY RELATIONS 195, 199–200 (2003).

78. *See* NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED 109–42 (2005) (describing the downward financial spiral of already struggling grandparents who care for their grandchildren during a parent's incarceration, a plight that is exacerbated by the inability of grandparents to receive foster care payments unless they are willing to risk losing custody of their grandchildren).

79. *See generally* Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment* (Fragile Families, Working Paper No. WP09-19-FF, 2009).

80. *See* Myrna Raeder & Leslie Acoca, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 140 (1999).

Parental incarceration inflicts even more harm in cases involving single parents. In these cases, incarceration separates children from their only parent-figure, which under the best-interests analysis of parent-child bonds is seen as having potentially devastating effects on the child's psychological development and socialization.[81] The damage is particularly severe where the child is an infant or toddler; separation of a child from an only parent in the early years can have profound consequences for the child's psychological development.[82] Moreover, the psychological harm inflicted by separation is often compounded by the lower standard of living and the related disruption and instability that typically accompany parental incarceration.[83] Each of these factors, as Part I made clear, can further impede a child's developmental progress.

In the best-case scenario involving incarcerated single parents, relatives or family friends take in the child. Even when such arrangements can be made, the child often must shuttle from one temporary home to another during the period of incarceration.[84] Where alternative caretakers are unavailable, the child of an incarcerated single parent will be placed in foster care.[85] Foster care entails a number of additional potential harms to the child, such as an increased risk of physical or

81. *See, e.g.*, Root v. Allen, 377 P.2d 117, 119–20 (Colo. 1962) (denying custody to biological father, because separating child on the onset of puberty from the only parents she has known would be "calamitous" for her development); N.J. Div. of Youth & Family Servs. v. J.B., No. FG-07-321-04, 2006 WL 216669, at *9 (N.J. Super. Ct. App. Div. Jan. 30, 2006) (citing approvingly trial court's finding that "to separate [child] from the only psychological parents she has ever known would, indeed, cause serious and enduring emotional and psychological harm").

82. *See* JOSEPH GOLDSTEIN ET AL., *supra* note 43, at 32–33 (discussing lifelong harms that separation from a psychological parent can inflict on infants and toddlers, and noting that where such interruptions are inflicted more than once during the early years, children "tend to grow up as persons who lack warmth in their contacts with fellow beings").

83. For family law's recognition of how financial and other forms of instability can be detrimental to children's development, see *supra* text accompanying notes 60–61.

84. *See* BRAMAN, *supra* note 75; BERNSTEIN, *supra* note 78.

85. A recent estimate by the Bureau of Justice Statistics found that 10 percent of mothers incarcerated in state prison and 2 percent of fathers incarcerated in state prison had a child in foster care. BJS PARENTS IN PRISON, *supra* note 65, at 5 tbl.8. As Philip Genty explains, there are no reliable statistics on the percentage of incarcerated parents with a child in foster care, and the available statistics tend to underreport the percentage of such children. *See* Philip Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 20 FORDHAM URB. L. J. 1671, 1675 (2003).

sexual abuse.[86] Moreover, as a result of the 1997 Adoption and Safe Families Act, states receiving federal money must terminate parental rights when a child spends fifteen of twenty-two months in foster care.[87] The result is that, when a single parent is unable to arrange an alternative to foster care for her child during the period of incarceration, the separation of parent and child may well become permanent.[88]

Parental incarceration inflicts a number of other harms on children, each of which, under the best-interests analysis, would be characterized as potentially damaging to the child's future well-being, autonomy, and productivity. Visiting a parent in prison may be disruptive to the child, particularly given the typically great distance between prisons and the community in which the prisoner formerly resided,[89] along with the likelihood that the child is in an economically deprived circumstance that will make travel to the prison costly and burdensome.[90] Having a parent in prison can also lead the child to feel stigmatized, which in turn will exacerbate the social, psychological, and educational harms already incident upon separation from the parent.[91]

When viewed from the perspective of family law's best-interests analysis, it is clear that parental incarceration can profoundly damage a child's course of development, diminishing the likelihood that the child will become a happy, autonomous, and productive adult. To what extent do courts take these harms into account when sentencing the parent of a minor child?

B. Current Judicial Approaches

Criminal law courts do, in some instances, attend to how children are affected by a parent's incarceration. However, criminal courts take a much more limited view of children's in-

86. *See* Myrna S. Raeder, *Remember the Family: Seven Myths About Single Parenting Departures*, 13 FED. SENT'G REP. 251, 253 (2001).

87. Adoption and Safe Families Act ("ASFA"), 42 U.S.C. §§ 670–690a (2006).

88. Termination of the rights of incarcerated parents increased by 250 percent in the five years following the enactment of the ASFA. *See* Genty, *supra* note 85, at 1678.

89. Prisons tend to be built in rural locations far away from where prisoners and their families reside. *See* Genty, *supra* note 85, at 1680.

90. Both Donald Braman and Nell Bernstein describe at length the difficulties and expenses encountered by families visiting incarcerated relatives in far-away prisons. *See generally* BRAMAN, *supra* note 75; BERNSTEIN, *supra* note 78.

91. *See* Arditti et al., *supra* note 77, at 196.

terests than would a family law court engaging in a best-interests analysis. Courts imposing sentences on parents often refuse altogether to consider how a particular child will be affected by the parent's incarceration, and those courts that do consider the question will not give the child's interests either the weight or the extended attention seen in family law. In the context of parental incarceration, the conversation surrounding children's interests tends to focus on whether those interests should factor into the court's decision at all, rather than on the nuances of how each child's development stands to be affected by the sentencing decision.

If courts are relatively inattentive to children's interests when sentencing parents, this is in part because until recently the federal sentencing regime and certain state sentencing regimes prohibited courts from taking those interests into account in the majority of cases. As this section will demonstrate, changes in the law of sentencing have raised the possibility that courts revisit their approach to children's interests and take them into account more extensively than had previously been permissible. Now is therefore a watershed moment in the history of parental incarceration, providing an opportunity to reevaluate, going forward, whether and how courts should take children's interests into account when sentencing their parents.

1. Federal Sentencing

Federal sentencing decisions are governed by the Federal Sentencing Guidelines (the "Guidelines"), which in 1987 both replaced a flexible system of indeterminate sentencing with a tightly regulated sentencing regime and eliminated the possibility of parole.[92] From the implementation of the Guidelines in 1987 until the Supreme Court's 2005 decision in *United States v. Booker*, the Guidelines imposed a mandatory constraint on the judicial sentencing of criminal defendants.[93] This subsection will first discuss the incorporation of children's interests into calculations regarding parental incarceration under both the Guidelines and cases interpreting the Guidelines. It will then discuss the extent to which courts can, and

92. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2010).

93. *See* U.S. Sentencing Comm'n, *Report on the Impact of* United States v. Booker *on Federal Sentencing*, 18 FED. SENT'G REP. 190, 190 (2006).

do, deviate from the Guidelines in the post-*Booker* federal sentencing regime.

a. Consideration of Children's Interests Under the Guidelines

The Guidelines provide a mathematical formula by which judges first calculate an initial sentence range, based on factors such as the nature of the offense, the defendant's participation in the offense, and the defendant's prior criminal history.[94] The Guidelines then permit judges to depart from that range, either upward or downward, on the basis of aggravating or mitigating circumstances not adequately accounted for by the initial Guidelines formula.[95]

Along with the Guidelines themselves, the Sentencing Commission, which promulgated the Guidelines under a congressional directive, issues policy statements to direct judges in the application of the Guidelines.[96] The policy statement regarding Family Ties and Responsibilities, Federal Sentencing Guidelines section 5H1.6, provides that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted."[97]

Courts have uniformly interpreted the "not ordinarily relevant" language to mean that sentencing courts can take family ties into account only in "extraordinary" circumstances.[98] There is general agreement that parental responsibility for a child is not, in itself, "extraordinary." When parents are incarcerated, this will necessarily "cause a void in their children's lives," but courts have consistently found such disruption "in-

94. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2010).

95. *See id.* § 1A1.4(b) ("The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted."); *see also* 18 U.S.C. § 3553(b) (2006) (requiring imposition of a sentence within the Guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines"), *invalidated by* United States v. Booker, 543 U.S. 220 (2005).

96. *See* U.S. SENTENCING GUIDELINES MANUAL § 7A1 (2010).

97. *Id.* § 5H1.6.

98. *See* United States v. Canoy, 38 F.3d 893, 906 (7th Cir. 1994) (surveying and adopting the interpretation of other circuits that a departure on the basis of family responsibilities is permissible only in extraordinary circumstances).

herent in the punishment of incarceration"[99] and thus "ordinary" rather than "extraordinary."[100]

The circuits differ widely on what constitutes an "extraordinary circumstance" justifying a departure on the basis of family ties under section 5H1.6. A number of circuits have interpreted the provision narrowly, holding that because "disintegration of family life" is the typical effect of parental incarceration,[101] the facts of a case—and the hardship a child stands to suffer—must be truly exceptional in order to merit a downward departure.[102] Under this reasoning, the fact that the defendant is the mother of an infant who will suffer from the separation has routinely been found not extraordinary, and thus not to merit downward departure.[103] Even where the defendant is the sole caretaker of minor children, such that the children would be placed with relatives or in foster care, several circuits have deemed such a situation ordinary and thus not

99. United States v. Sweeting, 213 F.3d 95, 102 (3d Cir. 2000) (quoting U.S. v. Gaskill, 991 F.2d 82 (3d Cir. 1993)).

100. *See, e.g.*, United States v. Gentile, 473 F.3d 888, 893 (8th Cir. 2007) (holding that a departure should not have been granted on the basis that the defendant was a single mother whose young child would be harmed by the separation created by her incarceration, because there was no evidence that her son required special care, and section 5H1.6 "is not triggered by the kind of family hardships that are ordinarily incident to incarceration"); United States v. Gaskill, 991 F.2d 82, 85 (3d Cir. 1993) ("Disruptions of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration. Disintegration of family life in most cases is not enough to warrant departures."); United States v. Daly, 883 F.2d 313, 319 (4th Cir. 1989) ("[T]he imposition of prison sentences normally disrupts . . . parental relationships.").

101. *See, e.g.*, *Sweeting*, 213 F.3d at 102 ("Disintegration of family life in most cases is not enough to warrant departures."); United States v. Groos, No. 06 CR 420, 2008 WL 5387852, at *6 (N.D. Ill. Dec. 16, 2008) ("[D]isintegration of family life is to be expected.").

102. *See, e.g.*, United States v. Dyce, 91 F.3d 1462, 1466 (D.C. Cir. 1996) ("At the risk of stating the obvious, we note that the 'extraordinary' can be defined only in relation to the 'ordinary'; and at the risk of belaboring the obvious, we add that ordinary family responsibilities can be very great. . . . [D]epartures on such a basis should be rare.").

103. *See Dyce*, 91 F.3d at 1467 (vacating and remanding for resentencing where district court departed downward on the basis that defendant was still breast-feeding her three-month-old infant); United States v. Wright, 218 F.3d 812, 815 (7th Cir. 2000) ("Imprisoning the mother of a child for even a short period of time is bound to be a wrenching experience for the child, but the guidelines do not contemplate a discount for parents of children.") (quoting U.S. v. Stefonek, 179 F.3d 1030 (7th Cir. 1999)); United States v. Cacho, 951 F.2d 308, 311 (11th Cir. 1992) (departure not warranted where defendant was the mother of four young children); United States v. Johnson, 908 F.2d 396, 399 (8th Cir. 1990) (finding that district court properly refused to depart downward on basis of mother's separation from infant).

to merit a departure.[104] The same result has been reached when both parents stand to be incarcerated together.[105]

Thus, in 2000, the Third Circuit held in *United States v. Sweeting* that the trial court erred in departing downward on the basis that the defendant was the single mother of five children, the youngest of whom had Tourette's Syndrome and thus needed special care.[106] While agreeing with the trial court that the mother's incarceration would "have a very serious detrimental effect on the family unit" and would necessarily inflict suffering on her five children, the appellate court disagreed that this was sufficiently "extraordinary" to merit a lower sentence.[107] The *Sweeting* court noted that several other circuits had similarly interpreted single parenthood as an inadequate basis for a downward departure, quoting the Fourth Circuit's conclusion that

> [a] sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children. It is apparent that in many cases, the other parent may be unwilling or unable to care for the children, and that the children will have to live with friends, relatives or even in foster homes. . . . [Defendant's] situation, though unfortunate, is simply not out of the ordinary.[108]

Other circuits, however, have been more willing to find that parental responsibilities render a case sufficiently ex-

104. *See* United States v. Leandre, 132 F.3d 796, 807–08 (D.C. Cir. 1997) (affirming denial of departure for single father of two children who stood to be placed in foster care); United States v. Rodriguez-Velarde, 127 F.3d 966, 969 (10th Cir. 1997) ("[A] defendant's status as a single parent does not constitute an extraordinary circumstance warranting departure."); United States v. Chestna, 962 F.2d 103, 107 (1st Cir. 1992) (departure not warranted for single mother of four children); *Johnson*, 908 F.2d at 399 (departure not warranted where defendant was the single mother of an infant, because "parents frequently are separated from children during periods of incarceration").

105. *See* United States v. Carr, 932 F.2d 67, 72 (1st Cir. 1991) (downward departure not merited where co-defendants were the parents of a four-year-old); United States v. Pozzy, 902 F.2d 133, 139 (1st Cir. 1990) (vacating downward departure for pregnant defendant whose husband was imprisoned, and noting that "[i]t is not atypical for husbands and wives to commit crimes together").

106. 213 F.3d 95, 101 (3d Cir. 2000).

107. *Id.* at 101.

108. *Id.* at 103 (quoting United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990)).

traordinary to justify a downward departure.[109] These circuits give greater weight to single parenthood, and will often uphold lower courts that downwardly depart on the basis that the defendant is the sole caretaker of young children.[110] Thus, for instance, in *United States v. Johnson*, the Second Circuit upheld the district court's determination that a defendant's family ties were "extraordinary," and merited downward departure, where she was solely responsible for the upbringing of four young children, including an infant and the child of her institutionalized daughter.[111] The court noted that the purpose of reducing the mother's sentence was to mitigate its effects on her children, rather than on her, concluding that "we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing."[112]

The range of parenting circumstances that courts have found to justify departure under the Guidelines varies greatly. While some courts refuse to depart even where a defendant is the single surviving parent of young children, other courts will depart even where there is a second parent available to care for the children,[113] and some will even depart on the basis that a defendant has formed parental ties to the children of a partner or a relative.[114]

In attempting to interpret the "not ordinarily relevant" language of section 5H1.6, some courts have framed the ques-

109. Courts in the Second Circuit have been especially willing to grant and to affirm downward departures for parents. *See* United States v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1997) (finding departure warranted where "incarceration in accordance with the Guidelines might well result in the destruction of an otherwise strong family unit" in which defendant supported wife, two children, disabled father, and grandmother); United States v. Galante, 111 F.3d 1029, 1036 (2d Cir. 1997) (affirming downward departure where husband was primary source of financial support for wife, who spoke little English, and two children); United States v. Johnson, 964 F.2d 124 (2d Cir. 1992) (affirming downward departure for single parent).

110. *See* United States v. Aguirre, 214 F.3d 1122, 1127 (9th Cir. 2000) (departure warranted where defendant mother was the only living parent of eight-year-old son); *Johnson*, 964 F.2d at 129.

111. *See Johnson*, 964 F.2d at 129.

112. *Id.*

113. *See Alba*, 933 F.2d at 1122; *Galante*, 111 F.3d at 1036.

114. *See* United States v. Sclamo, 997 F.2d 970, 972, 974 (1st Cir. 1994) (affirming departure on account of the crucial role defendant played in the well-being of his girlfriend's son, who had suffered years of abuse by his alcoholic father and had ADHD); United States v. Strong, 96 CR 392-2, 1996 WL 745397, at *2 (N.D. Ill. Dec. 23, 1996) (finding family circumstances sufficiently extraordinary to warrant departure where defendant cared for the three young children of her sister, with the help of her grown daughter and mother).

tion before them in assessing whether downward departure is permissible as whether the deprivation inflicted on a defendant's children is either truly extraordinary in nature or present to an extraordinary extent.[115] One recurring problem in this analysis has been determining the basis for comparison—are the harms inflicted by parental incarceration to be compared with those inflicted by the incarceration of other parents convicted of similar crimes?[116] Of other parents convicted of similar crimes in similar jurisdictions?[117] Of other parents similarly situated vis-à-vis their children (for instance, other single parents)?[118]

Courts also struggle to determine which sorts of harms suffice to render a child's situation extraordinary. Courts with more stringent requirements for downward departure are most likely to grant or uphold a departure where a child has special medical and/or emotional needs, in combination with a lack of other caretakers able to step in to fulfill those needs, such that the child will suffer significantly more than a child typically

115. *See* United States v. Rivera, 994 F.2d 942, 948 (1st Cir. 1993). In an early interpretation of the Guidelines policy statement on family ties, then Circuit Court Judge Breyer, who helped write the Guidelines, suggested that the distinction between "ordinary" and "extraordinary" rests on a combination of both the nature and the magnitude of the family ties at issue:

> It may not be unusual, for example, to find that a convicted drug offender is a single mother with family responsibilities, but, at some point, the nature and magnitude of family responsibilities (many children? with handicaps? no money? no place for children to go?) may transform the "ordinary" case of such circumstances into a case that is not at all ordinary.

See id.

116. *See* United States v. Brewer, 899 F.2d 503, 508–09 (6th Cir. 1990) (vacating non-incarcerative sentence based in part on downward family-ties departure where district court "failed to point out why the defendants' community support or family ties were substantially in excess of those generally involved in other bank teller embezzlement cases, especially those cases which occur in small town settings") (internal quotation marks omitted).

117. *See* United States v. Thompson, 234 F.3d 74, 77–78 (1st Cir. 2000) (vacating sentence where district court found defendant's family ties to be extraordinary by comparing his close and caring relationship with his children with the family ties of other defendants convicted of the same crime (crack-cocaine sales) committed in the same housing project, and holding that the proper comparison is not to other defendants convicted of the same crime or in the same jurisdiction, but to other defendants with similar family ties).

118. *See, e.g.*, *Rivera*, 994 F.2d at 948 (suggesting that the relevant comparison for single-parent offenders is to other single parents convicted of the same crime by stating that single-parent status among drug offenders may not, in itself, be unusual, but may become out of the ordinary when combined with other factors, such as when the children have no place else to go).

would from the parent's incarceration.[119] Another factor courts have considered is the number of children involved.[120] However, courts routinely deny downward departures under the Guidelines even where a child is ill, or where the defendant has several children.[121] And children's more typical deprivation incident upon parental incarceration—educational, psychological, or economic—is frequently found insufficient to bring a case out of the range of the "ordinary" as required under section 5H1.6.

In 2003, the Federal Sentencing Commission added commentary to section 5H1.6 clarifying what it meant by its position that family circumstances are "not ordinarily relevant."[122] The commentary provides a list of factors that courts should consider in determining whether a departure for family circumstances is warranted.[123] General factors include the seriousness of the offense, involvement in the offense of the defendant's family, and danger to the defendant's family as a result of the offense.[124] After considering these general factors, courts are instructed to depart on the basis of a "loss of caretaking or financial support of the defendant's family" only if four further factors are in place: first, incarceration will result in a "loss of essential caretaking, or essential financial support" to the defendant's family;[125] second, this loss "substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant";[126] third, the loss of caretaking is one

119. Thus, for instance, the First and Fourth Circuits, both of which take a narrow view of family-ties departures, have allowed a downward departure where the defendant is the sole caretaker capable of attending to the medical needs of a severely ill child. *See* United States v. Roselli, 366 F.3d 58, 62–63, 70 (1st Cir. 2004) (finding circumstances sufficiently exceptional to warrant departure where defendant was the irreplaceable caregiver of four young children, two of whom suffered from cystic fibrosis requiring extensive daily care, which his wife was often unable to administer due to her own problems with fibromyalgia); United States v. Spedden, 917 F. Supp. 404, 406–07, 409 (E.D. Va. 1996) (noting that "[t]he Fourth Circuit has construed downward departures based on family ties very narrowly," but granting downward departure where defendant's wife was diagnosed with ovarian cancer and his nine-year-old daughter suffered from a potentially fatal form of scleroderma).

120. *See* Wald, *supra* note 1, at 34.

121. *See, e.g.*, United States v. Sweeting, 213 F.3d 95, 97, 102 (3d Cir. 2000) (holding that downward departure was not warranted for single mother of five children, one of whom required special care for Tourette's Syndrome).

122. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. (2003).

123. *See id.*

124. *Id.* cmt.1(A).

125. *Id.* cmt.1(B)(i).

126. *Id.* cmt.1(B)(ii).

for which no remedy is available, such that the defendant's caretaking or financial support is "irreplaceable";[127] and, fourth, the departure "effectively will address the loss of caretaking or financial support."[128]

In the more lenient circuits, these revisions to section 5H1.6 have made Guidelines departures on the basis of harm to children more difficult to obtain.[129] Given the requirement that a defendant's caretaking be "irreplaceable" for harms to children to provide the basis for a departure, courts following the Guidelines analysis must now assess the extent to which a replacement caretaker, such as a grandparent, a family friend, or even a paid caretaker, might suffice to take over the role of the incarcerated parent.[130] This assessment entails the premise that parent-child separation is not itself a sufficient reason to reduce a parent's sentence. Even more insurmountable, in some cases, is the requirement that the departure effectively address the harm to the defendant's children. Departure thus becomes difficult to justify when the result is simply a shorter period of incarceration, such that a certain degree of harm to the children is inevitable.

b. The Effect of Booker

In the pre-*Booker* era, district court judges often bemoaned their lack of discretion under the Federal Sentencing Guidelines.[131] A frequent target of criticism was the Guidelines provision in section 5H1.6 discouraging the consideration of family

127. *Id.* cmt.1(B)(iii).

128. *Id.* cmt.1(B)(iv).

129. The revisions adopted the approach to family-ties departures followed by the courts that had construed them narrowly. *See* United States v. Pereira, 272 F.3d 76, 81–83 (1st Cir. 2001) (requiring that defendant establish "essential caretaker" status to warrant departure); United States v. Sweeting, 213 F.3d 95, 101, 105 (3d Cir. 2000) (family-ties departure inappropriate where defendant's care was not irreplaceable).

130. Melissa Murray analyzes the extent to which this assessment recognizes, as family law often does not, the extended networks that families actually employ to care for dependents. *See* Murray, *supra* note 7, at 430–31. While generally positive about legal accounts of the family that go beyond the traditional nuclear family, Murray argues that, in the sentencing context, "the recognition of caregiving networks does not have benign or beneficial outcomes for the family. Instead, the outcomes can be deeply problematic for families." *Id.* at 428.

131. *See, e.g.*, MAXFIELD, *supra* note 1, at 2 (surveying federal courts, and finding dissatisfaction by sentencing judges about their lack of discretion under the Guidelines).

ties by deeming them "not ordinarily relevant."[132] In an oft-cited passage, Judge Weinstein, United States District Judge of the Eastern District of New York, characterized the family ties provision as "so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep."[133]

The federal sentencing regime has changed dramatically, however, in the wake of *United States v. Booker*, in which the Supreme Court found that the Federal Sentencing Guidelines violated the Sixth Amendment right to trial by jury by relying on judicial fact-finding to enhance sentences within a mandatory determinate sentencing regime.[134] The remedial portion of *Booker* cured this defect by excising 18 U.S.C. § 3553(b)(1), the portion of the Sentencing Reform Act that made the Guidelines mandatory, thus rendering the Guidelines "effectively advisory."[135]

Under *Booker*, district courts must still calculate the appropriate sentence under the Guidelines.[136] But district courts are then to consider whether the Guidelines sentence properly reflects the overarching sentencing goals and factors set forth in 18 U.S.C. § 3553(a).[137] The sentencing goals enumerated therein track the traditional sentencing goals of retribution, deterrence, protection of the public, and rehabilitation.[138] District courts are instructed to consider these goals alongside a number of additional factors, including "the nature and circumstances of the offense";[139] "the history and characteristics of the defendant";[140] "the kinds of sentences available";[141] "any

132. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2010). For both an instance and an account of judicial criticism, voiced by a judge on the United States Court of Appeals for the District of Columbia Circuit, *see generally* Wald, *supra* note 1 (criticizing the Guidelines for requiring the reversal of trial court decisions that departed to protect children's interests and indicating that other federal judges have leveled similar criticisms).

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

134. 543 U.S. 220, 226 (2005).

135. *Id.* at 245. As a corollary to rendering the Guidelines advisory rather than mandatory, *Booker* also excised 18 U.S.C. § 3742(e), which as of 2003 provided for *de novo* review. *Booker* held that sentencing decisions should instead be reviewed for "reasonableness." *Id.* at 260–61.

136. *See id.* at 259.

137. *See id.* at 259–60.

138. *See* 18 U.S.C. §§ 3553(a)(2)(A)–(D) (2006).

139. *Id.* § 3553(a)(1).

140. *Id.*

141. *Id.* § 3553(a)(3).

pertinent policy statement" issued by the Sentencing Commission;[142] and the Guidelines mandate of reducing "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[143] If the Guidelines sentence does not adequately reflect these § 3553(a) factors and goals, the judge is then free to impose a sentence either above or below the recommended Guidelines range.[144]

In the new, post-*Booker* sentencing regime, courts have more leeway to take into account family ties. Among the factors that § 3553(a)(1) instructs sentencing judges to consider in determining the appropriate sentence are "the history and characteristics of the defendant."[145] Courts have interpreted this "history and characteristics" language to permit consideration of, *inter alia*, a defendant's family ties and responsibilities[146]—the very factor discouraged under section 5H1.6 of the Guidelines.[147]

In the wake of *Booker*, courts were initially uncertain—both in the area of family-ties departures and in sentencing generally—about the situations in which they could depart from the Guidelines. Several circuits held that even post-*Booker*, a substantial variance from a Guidelines sentence was warranted only in "extraordinary" circumstances.[148] In the family ties context, this effectively reinstates the old Guide-

142. *Id.* § 3553(a)(5).

143. *Id.* § 3553(a)(6).

144. *See* United States v. Booker, 543 U.S. 220, 259–61 (2005).

145. *See* 18 U.S.C. § 3553(a)(1).

146. *See* United States v. Menyweather, 447 F.3d 625, 634 (9th Cir. 2006) ("In the 'broader appraisal,' available to district courts after *Booker*, courts can justify consideration of family responsibilities, an aspect of the defendant's 'history and characteristics,' 18 U.S.C. § 3553(a)(1), for reasons extending beyond the Guidelines."); United States v. Serrata, 425 F.3d 886, 918–19 (10th Cir. 2005) (characterizing family ties as relevant under the post-*Booker* § 3553(a)(1) analysis); United States v. Ranum, 353 F. Supp. 2d 984, 986 (E.D. Wisc. 2005) (same); *see also* United States v. Rita, 551 U.S. 338, 364–65 (2007) (Stevens, J., concurring) (noting that factors such as, *inter alia*, family ties are not ordinarily relevant under the Guidelines, but are nonetheless "matters that § 3553(a) authorizes the sentencing judge to consider").

147. *See Serrata*, 425 F.3d at 918 ("We note there appears to be tension among the statutes and guidelines.").

148. *See* United States v. Cage, 451 F.3d 585, 594–96 (10th Cir. 2006) (vacating non-Guidelines sentence on the basis, *inter alia*, that defendant's status as a single mother did not constitute the "dramatic facts" necessary for an "extreme divergence" from the Guidelines sentencing range); United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005) ("An extraordinary reduction must be supported by extraordinary circumstances."); United States v. Wallace, 458 F.3d 606, 612 (7th Cir. 2006) (same).

lines rule that family ties only be taken into account in extraordinary circumstances. The requirement of proportionality between the extent of a departure and the basis for the departure can make it especially difficult for courts to impose a non-incarcerative sentence in order to enable single parents to continue to care for their children; several of the district courts that attempted to do so following *Booker* were reversed on appeal.[149]

The uncertainty about the discretion of sentencing judges post-*Booker* was greatly reduced, however, by two 2007 Supreme Court decisions that signaled the extent to which the Guidelines are now truly advisory. In *Gall v. United States*, the Court rejected the rule that a departure from a Guidelines sentence is permissible only in "extraordinary" circumstances, holding that an appellate court cannot require extraordinary circumstances to justify even a significant departure from the Guidelines range.[150] The sentencing court in *Gall* had imposed a term of probation where the Guidelines called for thirty to thirty-seven months of imprisonment.[151] Although the primary basis for this departure was the defendant's withdrawal from the conspiracy of which he was convicted and his subsequent rehabilitation, the district court also based its sentence on the defendant's age when he committed his crime and on his strong, while hardly extraordinary, family ties[152]—both discouraged factors under the Guidelines.[153] In upholding the district

149. *See, e.g.*, *Cage*, 451 F.3d at 588, 594–95 (employing the rule that "[t]he farther the court diverges from the advisory guidelines range, the more compelling the reasons for the divergence must be" to vacate the district court's departure downward from a Guidelines range of forty-six to fifty-seven months to a sentence of six days' imprisonment for role in drug conspiracy, where the district court departed on the basis, *inter alia*, that the defendant was a single mother) (quoting United States v. Moreland, 437 F.3d 424, 432 (4th Cir. 2006)); *see also* United States v. Gentile, 473 F.3d 888, 892–94 (8th Cir. 2007) (finding facts insufficiently extraordinary to justify district court's departure from a Guidelines range of thirty-seven to forty-six months to a sentence of one day of incarceration and three years of supervised release, where the district court departed downward so that a single mother could stay home to care for her two-year-old son, as well as for her fourteen-year-old nephew).

150. 552 U.S. 38, 38–41, 47 (2007).

151. *See id.* at 43–44.

152. *See id.*

153. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2010) ("Age (including youth) is not ordinarily relevant in determining whether a departure is warranted."); *id.* § 5H1.6 (family ties not ordinarily relevant). The district court took a defendant-centered approach to the analysis, focusing on Gall's family ties and age as indicators of his rehabilitation subsequent to committing criminal activity. The district court thus did not depart on the basis of any potential harm to Gall's

court's sentence—and even noting approvingly the court's reliance on the discouraged factor of age[154]—*Gall* thus opened the door to a change in course from the pre-*Booker* "extraordinary circumstances" requirement for family-ties departures.[155]

In the companion case *Kimbrough v. United States*, the Court further held that district courts are free to disagree with the policies embodied by the Guidelines.[156] *Kimbrough* concerned a particularly contested policy regarding a 100:1 ratio of sentences for crack versus powder cocaine. In upholding the district court's finding that the Guidelines sentence based on the 100:1 ratio was longer than necessary to meet the § 3553(a) factors, the Court noted that the Sentencing Commission had itself expressed disapproval of the crack/powder disparity, and, in setting Guidelines based on that disparity, had followed the lead of congressional mandatory minimums for crack versus powder cocaine, rather than "exercis[ing] its characteristic institutional role" of formulating sentencing guidelines on the basis of "empirical data and national experience."[157]

Some circuit courts have held that *Kimbrough* allows district courts to reject a Guidelines sentence based on any policy disagreement with the Guidelines,[158] which would suggest that sentencing courts can reject on policy grounds the Guidelines' position that family ties are not ordinarily relevant. Other cir-

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family members. Notably, however, the Supreme Court observed that the Government argued below that probation could be appropriate "if there are compelling family circumstances where individuals will be very badly hurt in the defendant's family if no one is available to care for them," and labeled such a consideration "different—but in our view, no more compelling—mitigating evidence" from the evidence that *Gall* actually presented. *Gall*, 552 U.S. at 59 (internal quotation marks omitted). While clearly not an enthusiastic endorsement of departing on the basis of children's interests, rather than on more offender-centered factors, the Court's discussion here does seem to countenance such departures.

154. *See Gall*, 552 U.S. at 58.

155. *See* United States v. Davis, 538 F.3d 914, 919–20 (8th Cir. 2008) (remanding for clarification where the district court seemed to be under the impression that it could not deviate from the Guidelines on the basis of family ties unless the circumstances were extraordinary); United States v. Munoz-Nava, 524 F.3d 1137, 1148 (10th Cir. 2008) (noting that while "[u]nder our pre-*Gall* precedent, consideration of family circumstances were . . . disfavored," *Gall* enables sentencing courts to consider family circumstances even where "neither dramatic nor unusual").

156. 552 U.S. 85, 101 (2007) (citing Rita v. United States, 551 U.S. 338, 351 (2007)).

157. *Kimbrough*, 552 U.S. at 109 (internal quotation marks omitted).

158. *See* Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After* Kimbrough, 93 MARQ. L. REV. 717, 733–35 (2009).

cuits, however, have interpreted *Kimbrough* as requiring a closer review of policy-based disagreement where the Sentencing Commission based the applicable Guideline on "empirical data and national experience."[159] Whether the Guidelines' discouragement of family-ties departures would fall within this category is unclear. But there is some evidence that the Commission's position that family ties and other individualized factors are "not ordinarily relevant" was not the product of empirical data and national experience,[160] and that the Commission, in arriving at this position, deviated from traditional sentencing practices that took such factors into account.[161] Moreover, the Commission's 2003 revisions to section 5H1.6, making family-ties departures more difficult to obtain in some circuits, were the product of a 2003 congressional statutory directive to reduce the availability of downward departures.[162] This renders the more stringent requirements for family-ties departures that the Commission added in 2003 akin to the crack/cocaine disparity in that they originated from congressional policy rather than from the Commission's own policy judgments.

Thus, even in those circuits that limit *Kimbrough*, it would seem that its holding should extend to the Guidelines' position on family-ties departures. If so, sentencing courts are now free to disagree with, and to depart from, the Sentencing Commission's 2003 policy statement that courts should not take parental responsibilities into account unless the parent is an irre-

159. *See id.* at 733–36 (noting that some circuits have interpreted *Kimbrough* as requiring them to "analyze[] the process by which a Guideline was developed when reviewing district court policy decisions," and that these circuits have given less deference to district court policy disagreements where the Guideline was set by the Commission on the basis of empirical data and national experience, while giving more deference to such disagreements where the policy at issue has a history that resembles that of the crack/powder cocaine disparity at issue in *Kimbrough*).

160. *See id.* at 727–28 (arguing that the Commission's process of using empirical data and national experience to set the Guidelines, whereby the Commission looked to the average sentence imposed for various offenses, "was poorly designed to identify the sentencing factors that influenced past sentencing practice").

161. *See id.* at 729 (noting that the Commission determined individual defendant characteristics to be not ordinarily relevant even though these had traditionally played a significant mitigating role in sentencing).

162. *See* David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 240–41 (characterizing the Sentencing Commission's 2003 policy statement making family-ties departures more difficult to obtain as part of the Commission's response to the "Feeney Amendment" to the PROTECT Act, which directed the Commission to take steps to reduce the number of downward departures) (discussing PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650 (2003)).

placeable caretaker and the reduction in sentence will effectively remedy the problem. Additionally, courts are arguably free to disagree as well with the original section 5H1.6 position that family ties are ordinarily not relevant to sentencing.[163]

Under *Gall* and *Kimbrough*, then, it seems that a district court can lower a sentence on the basis of a parent's caretaking responsibility even where the situation is not extraordinary, and where the parent's caretaking is neither essential nor irreplaceable. *Gall* held, in addition, that while under *United States v. Rita* appellate courts can presume Guidelines sentences to be reasonable, they cannot presume non-Guidelines sentences to be unreasonable, and instead must accord those sentences the same deference accorded to Guidelines sentences and review them under an abuse-of-discretion standard.[164] As a result, it is now clear that district courts are free to depart from the Guidelines without invoking a more rigorous standard of review on appeal.

Because the Supreme Court's subsequent decisions in *Gall* and *Kimbrough* have only recently made clear the extent of the changes wrought by *Booker*, it is not yet clear how the post-*Booker* regime will affect courts' attention to children's interests in the sentencing of parents. While courts are now free to depart from the Guidelines—and are required to at least consider whether doing so is necessary[165]—sentences within the Guidelines may be presumed reasonable on review.[166] District courts therefore still have some incentive to continue to follow the pre-*Booker* family ties jurisprudence.

Booker has opened up the possibility of a sea change in the consideration of children's interests in the sentencing of parents. Now is thus the time to think about the wisdom of adjusting sentences on the basis of how they will affect defendants' children. This reevaluation must take place soon, before federal courts establish a new set of precedents that reinscribes the earlier "extraordinary circumstances" rule of the pre-*Booker* era.

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163. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2010). For a case interpreting *Kimbrough* as newly enabling sentencing courts to consider family ties under an 18 U.S.C. § 3553(a) analysis even though section 5H1.6 of the Guidelines disfavors such consideration, see United States v. Munoz-Nava, 524 F.3d 1137, 1148 & n.6 (10th Cir. 2008).

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

165. *See* Rita v. United States, 551 U.S. 338, 338 (2007).

166. *See id.*

2. State Sentencing

The states vary widely in their approaches to sentencing, and state rules regarding the consideration of children's interests when sentencing parents are no exception. Section II.B.2.a will discuss the different state approaches to consideration of children's interests in place at the time of the Supreme Court's decisions in *Blakely v. Washington*[167] and *United States v. Booker*.[168] Section II.B.2.b will then discuss the extent to which *Blakely* and *Booker* changed the landscape of state as well as federal sentencing, and the potential of these changes to affect whether and how state courts consider children's interests when sentencing their parents.

a. Consideration of Children's Interests in the States

Prior to the 1970s, every state, like the federal system, allowed judges to impose any sentence up to the statutory maximum based on consideration of a wide range of relevant facts, while at the same time allowing for the possibility of early release through parole.[169] This sentencing regime emphasized the criminal justice goals of rehabilitation and incapacitation by giving judges and parole boards the flexibility to make decisions based on each offender's particular circumstances and rehabilitative progress.[170] It also gave judges the flexibility to take children's interests into account in imposing sentences, whether explicitly or implicitly.

In the 1970s and 1980s, amidst the same concern about crime rates and sentencing disparities that gave rise to the Federal Sentencing Guidelines, a number of states began to more tightly regulate judicial sentencing.[171] They did so through various combinations of mandatory minimums, laws mandating lifetime imprisonment for habitual offenders, sen-

167. 542 U.S. 296 (2004).

168. 543 U.S. 220 (2005).

169. *See* Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G. REP. 69, 72 (1999); Douglas A. Berman, *The Roots and Realities of* Blakely, 19 CRIM. JUST., Winter 2005, at 5, 7.

170. *See* Frase, *supra* note 169, at 72; Berman, *supra* note 169, at 7.

171. *See* John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 241 (2006) (surveying the history of modern sentencing reform).

tencing guidelines, and either the abolition of parole or "truth-in-sentencing" provisions, which require that prisoners serve a certain proportion of their original sentence before becoming eligible for release on parole.[172] In some instances, these trends included a new focus on retribution, rather than rehabilitation, as the goal of punishment, and as a result tended to discourage attention to the characteristics and background of the offender and to encourage, instead, a more narrow focus on the facts of the offense.[173]

In 2005, when the Supreme Court decided *Booker*, slightly over half of the states had sentencing guidelines in place,[174] and most other states had some form of structured sentencing, such as mandatory minimums for certain crimes.[175] The state sentencing guidelines varied greatly. While none were as complex in structure as the Federal Sentencing Guidelines, they ranged from the mandatory guidelines of states such as Washington and Minnesota to the merely advisory guidelines of states such as Utah, Delaware, and Virginia.[176]

Of the states employing sentencing guidelines or other forms of structured sentencing, a number had no statutory provisions specifically addressing whether children's interests can be considered in the sentencing of their parents. In many of these states, including Washington, Minnesota, Florida, and Michigan, courts have interpreted the state sentencing regime to either prohibit or strongly discourage the consideration of

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172. *See id*. at 242.

173. *See* Frase, *supra* note 169, at 72–73; Berman, *supra* note 169, at 7.

174. *See* Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 785–86 (2008) (surveying state sentencing systems in place at the time of *Booker*, and finding twenty-one state sentencing systems that, like the federal one, "used judicial fact-finding to set presumptive or mandatory guidelines sentences[,]" as well as eight other states with voluntary guidelines); John F. Pfaff, *The Future of Appellate Sentencing Review:* Booker *in the States*, 93 MARQ. L. REV. 683, 688 (2009) ("Between 1970 and 2004, twenty-six states adopted some form of sentencing guidelines . . . .").

175. *See* Frase, *supra* note 169, at 79 (noting that "mandatory, or mandatory minimum, sentences for selected crimes" are "probably found in every current indeterminate sentencing system, as well as in many guidelines systems"). States have imposed mandatory minimums in a number of situations, including for drug offenses and habitual offenders. *See, e.g.*, CAL. PENAL CODE §§ 667, 1192.7(c) (West 2010) (enhanced sentences for repeat offenders previously convicted of serious felonies, including nonviolent felonies such as certain drug trafficking offenses); FLA. STAT. § 775.084(4)(c) (2010) (mandatory minimums for violent repeat offenders); N.C. GEN. STAT. § 90-95(h) (2009) (mandatory minimums for drug trafficking).

176. *See* Bibas & Klein, *supra* note 174, at 785–86 & nn.45 & 51; Frase, *supra* note 169, at 71; Pfaff, *supra* note 174, at 688–89 & n.14.

children's interests. Thus, appellate courts in Florida and Washington have reversed trial courts that departed downward to reduce hardship to dependent children, on the basis that departures for nonstatutory reasons can only be granted in the presence of factors that relate to the crime and make it more or less egregious than other similar crimes.[177] As one lower court noted in a decision quoted approvingly by the Supreme Court of Washington, "[t]he fact that [the defendant] . . . is needed by her children does not in any way distinguish her possession and delivery of cocaine."[178] Similarly, a Michigan appellate court reversed a trial court that departed downward from a five-year statutory minimum on the basis of, *inter alia*, hardship to the defendant's child, holding that "absent exceptional circumstances, it is for the child's protection, as well as society's, that such harsh discipline must be imposed on present offenders so that future offenses may be deterred."[179]

Minnesota courts, on the other hand, have interpreted Minnesota's guidelines to prohibit the consideration of a defendant's status as a parent in the determination of the duration of a sentence, but to permit such considerations in dispositional decisions such as whether the sentence is suspended and replaced with probation.[180] The rationale for this bifurcated approach is that while the Minnesota guidelines mandate that durational departures be based on the nature of the offense,

177. *See, e.g.*, Rafferty v. State, 799 So. 2d 243, 248 (Fla. Dist. Ct. App. 2001) ("Generally, mitigating circumstances supporting a downward departure ameliorate the level of the defendant's culpability. . . . [I]t would not be good policy for the legislature to punish those with families to support less than those without families."); State v. Bray, 738 So. 2d 962, 963 (Fla. Dist. Ct. App. 1999) (reversing sentence that departed downward on the basis that defendant was the caretaker of his minor daughter, because "such a consideration cannot be employed in determining whether one defendant will be incarcerated while another will be given a nonincarcerative sentence"); State v. Amo, 882 P.2d 1188, 1191 (Wash. Ct. App. 1994) (reversing downward departure in sentencing of mother of infant son, because "our courts have consistently declined to impose exceptional sentences below the standard range in the absence of factors or circumstances related to the defendant's commission of a crime that make the commission of the crime less egregious").

178. State v. Law, 110 P.3d 717, 725 (Wash. 2005) (quoting State v. Hodges, 855 P.2d 291, 294 (Wash. Ct. App. 1993)) (holding that family circumstances are an impermissible basis for a downward departure). The court in *Law* reversed a downward departure that had been granted to a mother whose two children had been placed in foster care, and who stood to lose her parental rights if sentenced within the statutory range, despite evidence of a strong bond between the mother and her children. *See id.* at 719.

179. People v. Pearson, 462 N.W.2d 839, 843 (Mich. Ct. App. 1990).

180. *See* State v. Trog, 323 N.W.2d 28, 31 (Minn. 1982).

these guidelines encourage courts to grant dispositional departures by looking at the characteristics of the offender, including the offender's amenability to probation, for which, courts have reasoned, family circumstances may well be relevant.[181]

By contrast, many other states have guidelines or other sentencing rules that expressly permit the sentencing court to consider hardship to dependents.[182] Such a provision, however, is no guarantee that trial courts will take children's interests into account when sentencing parents. In New Jersey, trial courts face reversal if they fail to acknowledge hardship to children as a relevant factor at sentencing.[183] However, most states that instruct trial courts to consider children's interests have consistently upheld trial courts that refused to depart on this basis, and have noted in so doing that children's interests should only be taken into account in unusual circumstances.[184]

181. *See* State v. Sherwood, 341 N.W.2d 574, 577 (Minn. Ct. App. 1983); State v. Fisher, No. C9-02-250, 2002 WL 1425389, at *2 (Minn. Ct. App. July 2, 2002) (affirming a downward dispositional departure that was justified in part by the defendant's role as a caretaker for one of his children).

182. *See, e.g.*, 730 ILL. COMP. STAT. 5/5-5-3.1(a)(11) (2010) (Providing that "excessive hardship to [a defendant's] dependents" should be given weight in favor of withholding or minimizing sentence of imprisonment); N.J. STAT. ANN. § 2c:44-1(b)(11) (West 2011) (court "may properly consider . . . excessive hardship to . . . dependents" in imposing sentence); N.D. CENT. CODE § 12.1-32-04(11) (2010) (instructing court to consider "undue hardship . . . to dependents" in imposing sentences under an indeterminate, nonbinding sentencing regime). *But see* N.J. STAT. ANN. § 2c:44-1(d) (West 2011) (presumption of imprisonment for defendants convicted of certain serious crimes can only be overcome if "imprisonment would be a serious injustice which overrides the need to deter such conduct by others").

183. *See, e.g.*, State v. Marinez, 850 A.2d 553, 558 (N.J. Super. Ct. App. Div. 2004) (finding sentence unduly harsh in view of mitigating factors, including hardship to defendant's child); State v. Mirakaj, 632 A.2d 850, 851 (N.J. Super. Ct. App. Div. 1993) (remanding for reconsideration of sentence where trial court failed to find hardship to defendant's children as possible mitigating factor, and noting that "[h]ardship to children may be a significant mitigating sentencing factor").

184. *See, e.g.*, People v. Young, 619 N.E.2d 851, 858 (Ill. Ct. App. 1993) (emphasizing that hardship to children should only be considered where "excessive," and upholding trial court's refusal to depart on this basis); Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999) ("Many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship."); Jones v. State, 790 N.E.2d 536, 540 (Ind. Ct. App. 2003) (upholding trial court's assignment of "minimal weight" to fact that defendant was his children's only living parent).

b. The Effect of Blakely *and* Booker

The line of Supreme Court decisions that culminated in *Booker*'s invalidation of the mandatory Federal Sentencing Guidelines system invalidated many state sentencing regimes as well.[185] *Booker* was preceded by *Blakely v. Washington*, in which the Supreme Court found that Washington's sentencing guidelines violated the Sixth Amendment right to trial by jury by enhancing sentences on the basis of judicial fact-finding.[186] *Blakely*—and *Booker*, which applied *Blakely* to the Federal Sentencing Guidelines and formulated the remedial approach discussed above[187]—threw into doubt the validity of the approach to sentencing in a number of states.

The full effect of *Blakely* and *Booker* on state sentencing regimes is not yet clear. A number of states responded to *Blakely* by keeping their sentencing guidelines in place, but reallocating the relevant fact-finding from judges to juries.[188] Several states instead followed the *Booker* approach and rendered their sentencing guidelines voluntary rather than mandatory.[189] Other states either are awaiting a legislative response or are still in the process of determining, often in dialogue with the federal courts, the extent to which their sentencing regimes violate *Blakely* and *Booker*.[190]

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185. *See* Bibas & Klein, *supra* note 174, at 785–88 (analyzing effect of *Booker* and *Blakely* on the states); Pfaff, *supra* note 174 (same).

186. *See* Blakely v. Washington, 542 U.S. 296, 301 (2004).

187. *See supra* text accompanying notes 134–44.

188. *See* Bibas & Klein, *supra* note 174, at 786 & n.51 (describing thirteen states—Alaska, Arizona, Colorado, Connecticut, Illinois, Indiana, Kansas, Maine, Minnesota, North Carolina, Oregon, Vermont, and Washington—as initially responding to *Blakely* by requiring juries rather than judges to find facts relevant to sentencing).

189. *See id.* at 786 & n.48 (characterizing five states—California, Indiana, New Jersey, Ohio, and Tennessee—as changing their guidelines from mandatory to voluntary); Pfaff, *supra* note 174, at 700 (identifying three states—Indiana, New Jersey, and Tennessee, and possibly California as well—as following the remedial approach laid out in *Booker*, with a combination of voluntary guidelines and "some sort of reasonableness review," and Ohio as rendering its guidelines entirely voluntary).

190. *See* Bibas and Klein, *supra* note 174, at app. A (describing state responses to *Blakely*); Pfaff, *supra* note 174, at 700 & nn.56 & 57; *see also, e.g.*, Chontos v. Berghuis, 585 F.3d 1000, 1002 (6th Cir. 2009) (finding no *Blakely* violation where the state trial court enhanced a sentence on the basis of judicially found facts), *cert. denied* 130 S. Ct. 3413 (2010); Bradley R. Hall, *Mandatory Sentencing Guidelines by Any Other Name: When "Indeterminate Structured Sentencing" Violates* Blakely v. Washington, 57 DRAKE L. REV. 643 (2009) (describing cases in Michigan and Pennsylvania in which state courts upheld the states' sentencing schemes

Given the continued uncertainty of state approaches to sentencing in the aftermath of *Blakely* and *Booker*, it is too soon to tell what effect the Supreme Court's recent sentencing decisions will have on whether and how states consider children's interests when sentencing their parents. However, the radical changes currently underway in sentencing at both the state and federal levels have opened up a new dialogue about sentencing practices, both as a constitutional matter[191] and as a pragmatic one.[192] The current fiscal problems in several states have further renewed interest in revisiting state approaches to sentencing, as states now find themselves unable to afford the costs of maintaining the expanded prison population that emerged alongside the structured sentencing movement that began in the 1970s and 1980s.[193] Now is therefore an optimal time to revisit state approaches to sentencing, and in particular the issue of whether, at a moment when more children than ever have a parent in prison, courts should be empowered or even encouraged to consider reducing criminal sentences, or imposing alternative sanctions, when to do so would be in the interests of a defendant's children.

C. Current Debates About Considering Children in Parental Sentencing

1. Arguments in Favor of Considering Children's Interests

a. Child-Centered Arguments

Several commentators advocate taking children's interests into account when sentencing parents.[194] The arguments on

as constitutional, and arguing that while Pennsylvania's sentencing scheme is constitutional, Michigan's is not).

191. *See generally, e.g.*, Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010).

192. *See generally, e.g.*, Pfaff, *supra* note 171 (employing empirical analysis to determine the extent to which voluntary structured sentencing reduces reliance on improper sentencing factors such as race).

193. *See* Jennifer Steinhauer, *To Trim Costs, States Relax Hard Line on Prisons*, N.Y. TIMES, Mar. 25, 2009, at A1.

194. *See generally* Acoca & Raeder, *supra* note 80; Genty, *supra* note 85; Philip M. Genty, *Some Reflections About Three Decades of Working with Incarcerated*

this front have increased in recent years, as the advent of mandatory criminal sentencing,[195] along with the increase in the prison population more generally, brought about a dramatic rise in the number of children with incarcerated parents.[196] As Myrna Raeder has observed, the Federal Sentencing Guidelines, in combination with the shift toward mandatory minimums and truth-in-sentencing rules in the states, have resulted in the incarceration of an unprecedented number of mothers who are first-time non-violent offenders, and who in earlier regimes would not have spent any time in jail for their crimes.[197] Raeder and other scholars have responded to these trends by arguing for greater attention to the effect of parental incarceration on children.[198]

A common theme of those who advocate taking the effect on minor children into account when sentencing parents is the likelihood that the children of incarcerated parents will grow up to become criminals themselves. Federal courts that depart under the Guidelines in cases involving parents at times justify this departure by noting that if the parent is incarcerated, the child is more likely to "become a law breaker" as well.[199]

Mothers, 29 WOMEN'S RTS. L. REP. 11 (2007); Raeder, *supra* note 70, at 698–704, 716–25; Raeder, *supra* note 86; Myrna Raeder, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences*, 8 CRIM. JUST., Fall 1993, at 20, 23–25. A number of scholars and writers from areas other than law, such as social workers, psychologists, criminologists, social scientists, and journalists, have also advocated taking children's interests into account when incarcerating parents. *See, e.g.*, BRENDA G. MCGOWAN & KAREN L. BLUMENTHAL, WHY PUNISH THE CHILDREN?: A STUDY OF CHILDREN OF WOMEN PRISONERS (1978) (advocating attention to the effects of parental incarceration from a social-work perspective); *see also* BERNSTEIN, *supra* note 78 (journalist's account); BRAMAN, *supra* note 75 (anthropological perspective); Arditti et al., *supra* note 77 (social-science perspective).

195. *See* Acoca & Raeder, *supra* note 80, at 134 (attributing the increase of children with incarcerated mothers to the advent of structured sentencing, as well as to other factors, such as "law enforcement practices" and "[t]he current pro-prison emphasis").

196. *See* BJS PARENTS IN PRISON, *supra* note 65, at 1 (compiling data on the number of children with incarcerated parents in both state and federal prison, and showing an increase of 80 percent from 1991 to 2007). The data show substantial increases in the numbers of both incarcerated fathers and incarcerated mothers. The number of children with a father in prison increased by 77 percent from 1991 to 2007, and the number of children with a mother in prison increased by 131 percent during that same time. *See id.* at 2.

197. *See* Acoca & Raeder, *supra* note 80, at 134–35.

198. *See generally, e.g.*, Acoca & Raeder, *supra* note 80; Arditti et al., *supra* note 77; Genty, *supra* note 85; Raeder, *supra* note 73.

199. United States v. Norton, 218 F. Supp. 2d 1014, 1019 & n.2 (E.D. Wis. 2002). Similarly, Judge Weinstein has observed that "imprisonment of a parent

Scholars routinely make the same argument, pointing to studies establishing that parental incarceration significantly increases the likelihood that a child will engage in acts of delinquency and will end up in prison as an adult.[200] As Judge Patricia Wald of the D.C. Circuit asked rhetorically in an article on the Federal Sentencing Guidelines, "[w]hat principle of equity, uniformity, or just deserts blocks any consideration of society's interests in avoiding the risk of producing a next generation of unloved, unnourished, sociopathic criminals?"[201]

Commentators do not always clarify the rationale for taking a child's future criminality into account when sentencing a parent. The rationale on the one hand seems to be that there is a public interest in preventing future crimes. As one court put it, where incarceration of a parent "may be more likely to cause children to become law breakers," then "the public," as a result, "has an interest" in keeping parent and child together.[202] The unspoken assumption of this focus on the child's potential to become a criminal is that a sentencing court should be concerned, in particular, with the public interest in the prevention of crimes, rather than with other matters of public interest. A

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tends to result in the child ending up in prison as well." United States v. Concepcion, 795 F. Supp. 1262, 1283 (E.D.N.Y. 1992).

200. *See, e.g.*, Acoca & Raeder, *supra* note 80, at 136 (noting that the "negative effects of parental separation . . . can include delinquency and criminal behavior by children"); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 146 (1999) (marshalling social science evidence establishing "the intergenerational transmission of risks of imprisonment"); Raeder, *supra* note 70, at 756 (arguing that if we fail to address the problem of incarcerated mothers and their children, "we are likely to face . . . an 'orphan-class' of children who are at risk of following in their incarcerated mothers' footsteps"). *But see* Jennifer A. Segal, *Family Ties and Federal Sentencing: A Critique of the Literature*, 13 FED. SENT'G REP. 258 (2001) (criticizing departures for parents on the basis, *inter alia*, that parental incarceration is not as "powerful a predictor of future criminal behavior" as advocates of family-ties departures argue, and noting that one study suggested that a child is less likely to engage in criminal behavior if she is removed from a convicted parent's home and placed in foster care).

201. Wald, *supra* note 1, at 35.

202. *Norton*, 218 F. Supp. 2d at 1019 n.2 (justifying downward departures for parents on the basis of a two-fold public interest in avoiding the cost of foster care and preventing children from becoming law breakers as a result of being placed in foster care); *see also id.* at 1022 ("Society has an interest in maintaining stable family units, which are more likely to produce productive, law abiding citizens."); Wald, *supra* note 1, at 35 (referring to "society's interests" in preventing the production of a future generation of criminals); *cf.* United States v. Newell, 790 F. Supp. 1063, 1065 (E.D. Wash. 1992) (noting that incarceration of a parent puts children at risk to an extent that "could easily lead to an increased burden on the public through social service, school, and criminal justice systems").

second premise of the future-criminal argument seems to be that imposing a future as a criminal is unfair to the (currently) blameless child. Thus, many of those who raise the concern of children's future criminality use terms like "blameless" and "innocent" to describe the children fated at an early age to become criminals themselves as a result of parental incarceration.[203]

In addition to the future-criminality argument, some speak of the broader set of harms that parental incarceration inflicts, and of the unfairness of inflicting these harms on children who have done nothing wrong. Courts and scholars alike detail the deprivations that can result when a parent is incarcerated, ranging from a decline in socio-economic circumstances[204] to the psychological harm incident on separation from a parent[205] to the possibility of being placed in foster care.[206] The argument, insofar as one is seen as necessary, tends to be that the children are "innocents," and as such do not deserve to be punished for the "sins" of their parents.[207]

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203. *See, e.g.*, Raeder, *supra* note 70, at 704 (arguing that sentencing policy should take into account "the risk that . . . 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"); *Newell*, 790 F. Supp. at 1064.

204. *See, e.g.*, Arditti et al., *supra* note 77, at 199; United States v. Owens, 145 F.3d 923, 926 (7th Cir. 1998) (upholding the district court's grant of downward departure where testimony indicated that incarceration of a father could force his wife and their children into public-assisted housing and onto welfare); United States v. Galante, 111 F.3d 1029, 1037 (2d Cir. 1997) (downward departure permissible where "the reduction or elimination of time to be served in prison permitted the defendants to continue to discharge their existing family responsibilities, avoided putting the families on public assistance and spared traumatizing the vulnerable emotions of defendants' children").

205. *See, e.g.*, Denise Johnston, *Effects of Parental Incarceration*, *in* CHILDREN OF INCARCERATED PARENTS 69–82 (1995); Christina Jose Kampfner, *Post-Traumatic Stress Reactions in Children of Imprisoned Mothers*, *in* CHILDREN OF INCARCERATED PARENTS 89–100 (1995); United States v. Blake, 89 F. Supp. 2d 328, 339 (E.D.N.Y. 2000) (departing downward on basis, *inter alia*, of "emotional trauma" that incarceration would inflict on three-year-old child of single parent).

206. *See, e.g.*, United States v. Dyce, 975 F. Supp. 17, 22 (D.C. Cir. 1997) (granting departure where mother's imprisonment would mean "the children would have to be uprooted from their present environment and probably placed in foster care—not a very good prospect for children of tender years").

207. *See, e.g.*, United States v. Hammond, 37 F. Supp. 2d 204, 207 (E.D.N.Y. 1999) ("A sentence without a downward departure would contribute to the needless suffering of young, innocent children."); United States v. Dyce, 874 F. Supp 1, 1–2 (D.D.C. 1994) ("Causing the needless suffering of young, innocent children does not promote the ends of justice."), *vacated*, 91 F.3d 1462 (D.C. Cir. 1996); United States v. Concepcion, 795 F. Supp. 1262, 1283 (E.D.N.Y. 1992) (reducing several mothers' sentences to reduce harm to their children, on the basis that "the sins of the mother should not be visited on the child," while at the same time tak-

Discussion about *why* the harms to innocent children should be taken into account when sentencing parents tends to be vague and under-theorized. Douglas Berman has observed that the rationale for taking children into account when sentencing their parents has not yet been adequately articulated, and has called for a more thorough theoretical account of when, and why, children's interests should be considered.[208] Although the merits and justice of protecting children are clear, there has been little discussion, apart from the criminogenic argument mentioned above, of the various rationales for doing so in the context of criminal law and parental sentencing in particular. This Article will begin to fill that scholarly gap in Parts III and IV by developing a previously unconsidered rationale for taking children's interests into account when sentencing their parents.

b. Defendant-Centered Arguments

Another approach to the incarceration of parents is to argue that the presence of children bears on defendant-centered theories of punishment. A defendant's status as a parent, some argue, is relevant to the traditional sentencing goals of retribution, deterrence, incapacitation, and rehabilitation,[209] and also to the question of the defendant's culpability. Courts will sometimes find a defendant less culpable—and thus less deserving of retributive punishment—where her crimes were driven by a desire to provide for her children. For example, in one First Circuit case, the court, in reversing the trial court's incorrect conclusion that it lacked the authority to depart downward for a single mother, noted that she had committed the offense to buy Christmas presents for her three children.[210] Another retribution-related argument is that to separate a

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ing care to impose a sufficient sanction on each defendant, and noting that "the child may learn from [the mother's] experience that crime does not go unpunished"). *See also* MARKEL ET AL., *supra* note 8, at 31 (characterizing incarceration of caregivers as harming "innocent third parties").

208. Douglas A. Berman, *Addressing Why: Developing Principled Rationales for Family-Based Departures*, 13 FED. SENT'G REP. 274, 275–76, 279–80 (2001).

209. *Id.* at 279–80. As Berman notes, these traditional goals are codified by the factors sentencing judges are to consider under 18 U.S.C. § 3553(a)(2). *Id.* at 275. Berman argues that the Guidelines generally are defendant- and offense-centered, demanding that courts focus on the nature of the defendant and of the offense, and thus that any theory of reducing punishment on the basis of family ties should be defendant-centered as well. *Id.* at 278.

210. *See* United States v. Rivera, 994 F.2d 942, 953 (1st Cir. 1993).

prisoner from her child inflicts a greater punishment than incarceration ordinarily would.[211] As for recidivism and rehabilitation, a number of studies show that defendants with children are more likely to refrain from committing future crimes, and to become reintegrated into their communities, if they maintain their ties to their children.[212]

2. Arguments Against Considering Children's Interests

A prominent argument against taking children's interests into account when sentencing parents is that to do so is unfair to criminal defendants.[213] Our criminal justice system aims to treat similarly situated defendants similarly. Indeed, achieving consistency in sentencing—and thus greater fairness—was one of the primary goals of the Federal Sentencing Guidelines.[214] To impose different sentences on defendants who committed similar offenses, simply because one has caretaking responsibilities and the other does not, is at odds, some argue, with our commitment to fair treatment of defendants, and discriminates against defendants without family responsibilities.[215]

This is the reasoning of Dan Markel, Jennifer Collins, and Ethan Leib in their book *Privilege or Punish*, which advocates a presumption against taking family ties into account in criminal law generally[216] and in sentencing in particular.[217] They

211. *See* Raeder, *supra* note 70, at 745–46.

212. *See generally* Maldonado, *supra* note 73 (discussing reductions in recidivism achieved through increasing incarcerated fathers' engagement with their children); Raeder, *supra* note 70, at 746 ("[V]isiting still remains key . . . to encourage inmate rehabilitation.").

213. Thus, courts may refuse or reverse downward departures where this will result in one equally culpable co-defendant receiving a markedly lower sentence than another. *See, e.g.*, United States v. Lazenby, 439 F.3d 928, 933 (8th Cir. 2006) (reversing downward departure).

214. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 25–40 (2000).

215. *See* MARKEL ET AL., *supra* note 8, at 32–35; *see also* Berman, *supra* note 208, at 274 ("[I]t is difficult to provide a principled explanation for exactly why a criminal offender should merit a lesser punishment simply because he or she has a spouse or children or other relatives.").

216. *See generally* MARKEL ET AL., *supra* note 8.

217. *See id.* at 49 (taking the position that "ordinarily, a defendant's family ties and responsibilities should not serve as a basis for a lighter sentence").

ground this approach in the overarching goal of equality before the law:

> In a situation in which we address two similarly situated offenders and an unjustified disparity results, these departures from rule of law values will invariably trigger demoralization, resentment, and, perhaps in some cases, outrage and violence. Thus, in light of the risks associated with disparity—and the cuts in the moral fabric of impartial justice such disparities create—the principle of equality should be a lodestar guiding our collective actions in the criminal justice system.[218]

In the context of sentencing, these authors advocate taking children's interests into account only in those cases where a defendant is an "irreplaceable caregiver."[219] Even then, they suggest, a sentence should not be reduced, but should only—if possible—be deferred, until the defendant's child is grown or until alternative care can be arranged.[220] They argue that "there is nothing unfair" about refusing to take parental responsibilities into account more broadly, because one "who commits a crime can reasonably foresee that, if prosecuted and punished, his punishment will affect not only himself but also his family."[221] Limiting consideration of children's interests to cases involving irreplaceable caregivers, and ensuring that the ultimate sentence imposed on the caregiver not be reduced, is necessary, they argue, to avoid "elevating the offender's status in violation of the principle of equal justice under law."[222]

A second argument is that to take children's interests into account when sentencing parents will encourage parents to commit crimes—or, conversely, will encourage those who engage in criminal enterprises to have more children. Markel, Collins, and Leib make this argument,[223] and a number of courts that refuse to depart downward on the basis of harm to children echo it.[224] As the Tenth Circuit asserted in upholding

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218. *Id*. at 31.
219. *Id*. at 50.
220. *Id*. at 51.
221. *Id.* at 49.
222. *Id*. at 52.
223. *See id*. at 49 (arguing that giving sentencing discounts to those with children will "incentivize this class of defendants to seek out greater criminal opportunities" or increase the likelihood that "they will be recruited or pressed into action by others").
224. *See, e.g.*, United States v. Pozzy, 902 F.2d 133, 139 (1st Cir. 1990) (expressing concern that "to allow a departure downward for pregnancy could set a

a refusal to depart downward for a single mother where the father of the children was already imprisoned, to take the children's interests into account in such a situation "would effectively immunize single mothers from criminal sanction aside from supervised release."[225]

3. Instrumental and Theoretical Approaches to the Debate

Thus, there are two types of arguments in the current debate over whether to take children's interests into account when sentencing parents. The first is the narrow instrumentalist argument about whether parental incarceration increases crime. Those in favor of reducing parents' sentences argue that it does, by making it more likely that defendants' children will commit crimes, as well as by thwarting the parents' rehabilitation. The opposing camp counters that parental incarceration instead decreases crime by deterring parents from committing crimes in the first place.

The second type of argument is the theoretical one of whether attending to children's interests is consistent with the premises and the legitimacy of criminal law. Those in favor of attending to children's interests have little to say on the theoretical front, apart from arguments about the potential unfairness to parents of exacerbating their punishment by separating them from their children. Insofar as the children themselves are concerned, there is little attention to the theoretical rationales for factoring in their interests when sentencing their parents. The critics of attending to children's interests, on the other hand, place great emphasis on the theoretical justification for their position. The core of their argument is that, as much as we might want to protect children from harm as a general matter, attending to children's interests when incarcerating their parents would undermine the legitimacy of criminal law.

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precedent that would have dangerous consequences in the future, sending an obvious message to all female defendants that pregnancy is 'a way out' ") (quoting pre-sentence investigation report); Moore v. United States, No. 06-CV-492-DRH, 2007 WL 1958590, at *4 (S.D. Ill. July 7, 2007) (finding that taking post-arrest pregnancy into account in sentencing would create a "slippery slope, thereby encouraging female defendants to become pregnant prior to being sentenced in order to receive leniency").

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

This Article argues that, when viewed from the perspective of family law, attending to children's interests can be seen as entirely consistent with the theoretical underpinnings of criminal law. As we will see, taking children into account will not undermine, but will instead further, the legitimacy and fairness of criminal law by making the premises on which we hold adults criminally accountable more consistent with the reality of children's lives.

III. THE AUTONOMY PREMISE IN CRIMINAL LAW

Family law's insight about the influence of childhood on the adult self has shown, in Parts I and II, the extent to which children's development can be affected by parental incarceration. The Article now brings this insight to bear on the related question of why courts should take children's interests into account when sentencing their parents.

When viewed in light of the formative influence of childhood experience, attending to children's interests in such cases appears essential to—rather than collateral to—upholding the principles and legitimacy of criminal law. For, as this part will now demonstrate, the enterprise of criminal punishment is premised on a model of the adult legal subject that is closely intertwined with the conditions of each child's development: the model of the adult legal actor as sufficiently rational and autonomous to be held responsible for his or her actions.

A. Autonomy and Criminal Liability

Criminal law is more preoccupied than perhaps any other area of law with the autonomy of the legal subject.[226] It is in the domain of criminal law that the state most forcefully subjects individuals to the coercive power of the law—what Robert Cover called "the violence of the law."[227] Jurisprudence has long been concerned with the legitimacy of bringing the power of the state to bear on the individual in the form of often severe sanctions, such as extended imprisonment and even death. A

226. *See* Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2280 (1992) (discussing the dependence of criminal law on the premise of autonomy, and noting that "criminal law is the most visible and explicit institutional setting for the working out of questions of individual responsibility").

227. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1607 (1986).

central theme of the debate over the legitimacy of criminal law is the degree of autonomy necessary to render a legal actor sufficiently responsible to justify the imposition of criminal liability.[228]

Despite considerable disagreement about the proper basis of criminal liability, there is a consensus that punishment requires some level of blame.[229] Punishment theorists fall into two major camps: utilitarians and retributivists. According to the utilitarians, the goal of criminal law is to secure the greater good, and punishment should be meted out insofar as it serves this good, often in the form of achieving the goals of deterrence, incapacitation, and rehabilitation.[230] Retributivists, on the other hand, argue that punishment should be imposed only on those who deserve it; this is the "just deserts" approach to punishment.[231]

Under the utilitarian as well as the retributivist approaches, a legal actor must merit some level of blame to justify punishment. Few proponents of the utilitarian theory support imposing punishment on those who are entirely innocent, even where this might arguably benefit society at large.[232] For instance, almost all utilitarian theorists would oppose executing an innocent scapegoat in order to achieve a general deterrent effect or to quell public unrest.[233] One reason for this is that, even on purely consequentialist grounds, imposing punishment

228. *See* Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47, 61 (1986) ("When the community declares that someone is guilty of a crime, it affirms his responsibility and gives it consequences.").

229. *See* Joshua Dressler, *Reflections on Excusing Wrongdoers*, 19 RUTGERS L.J. 671, 681 (1988) ("[T]he criminal law is premised on the belief that wrongdoers should not be punished in the absence of moral desert . . . .").

230. *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 857 (2002).

231. *See id.* at 859.

232. The notion that utilitarianism requires punishment of the innocent is the primary charge leveled against utilitarians by retributivists. *See* Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115 (2000) (defending utilitarian penology against charge that it favors punishing the innocent, and arguing that this charge rests upon a misunderstanding of utilitarianism).

233. *See* Christopher, *supra* note 235, at 871–77 (describing utilitarian responses to the scapegoat hypothetical, which include denial that utilitarianism would require punishment in this instance, on the basis that punishment would be counterproductive; the definitional move that the killing of an innocent here would not constitute punishment; and acceptance, by a small minority of utilitarians, of the proposition that punishment of the innocent may be merited under the utilitarian approach).

in the absence of blameworthy conduct would be counterproductive to the goal of deterrence, in that, if discovered, it could undermine faith in the legitimacy of the criminal law.[234]

If punishment requires blame, the attribution of blame, in turn, requires a minimal level of autonomous choice. Theorists since Blackstone have emphasized the importance of free choice to criminal culpability: "the concurrence of the will, when it has its choice either to do or to avoid the fact in question, [is] the only thing that renders human actions either praiseworthy or culpable."[235] According to the dominant paradigm of criminal responsibility, autonomous choice entails two components: rationality and volition. In H.L.A. Hart's formulation, to be held responsible for a blameworthy act, a legal actor must have the capacity and a fair opportunity to conform her behavior to the law.[236] An actor lacks capacity to conform her behavior to the law where she lacks rationality (for instance, where she is delusional), and lacks fair opportunity to do so when her actions are coerced. The retributivist rationale for this two-fold autonomy requirement is that, in the words of Hart, "a fundamental principle of morality [is] that a person is not to be blamed for what he has done if he could not help doing it."[237] The autonomous-choice-based model of culpability is also consistent with utilitarianism, in that it is typically inefficient to punish those who are so lacking in rationality or volition that punishment would have no deterrent effect.[238]

Some retributive theorists would impose even further autonomy prerequisites for criminal liability, on the basis that a decision to act is not blameworthy unless the decision-maker possesses a cognitive or emotional capacity, or both, more robust than simply rationality and lack of coercion. For instance, Peter Arenella argues that criminal punishment is merited only where an actor is a moral agent, which in turn requires not just rationality and lack of coercion, but also a character that

234. *See id.* at 872.

235. 4 WILLIAM BLACKSTONE, COMMENTARIES *20–21.

236. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 181 (1968).

237. *Id*. at 174.

238. One could argue that such punishment could be rationalized as conducive to general, if not specific, deterrence, deterring others in society at large even if not the punished offender. On the other hand, punishment for non-volitional acts might weaken the general deterrent effect of criminal punishment as well, by undermining the law's legitimacy.

permits moral evaluation of one's actions.[239] Others reject the choice-based model entirely, arguing that, as both a descriptive and a normative matter, criminal liability is predicated not on whether conduct is the product of free and rational choice, but on the extent to which the conduct properly reflects the actor's character, or whether it is instead a deviation from that character.[240]

The position that criminal responsibility requires autonomy, entailing both rationality and freedom of choice, is consistent with the substantive provisions of the criminal law. Criminal liability generally requires, at a minimum, mens rea (a culpable state of mind)[241] and an actus reus (a voluntary act or omission),[242] each of which demand some degree of autonomy on the part of the legal actor. By making wrongful cognitive activity a component of liability, the mens rea requirement conveys that blame is inseparable from a minimal degree of autonomous choice.[243] For instance, an actor may lack the requisite mens rea if he is ignorant of the facts that make his actions wrongful.[244] In the case of serious crimes, the requisite mens rea entails a higher standard of rational capacity, and thus au-

239. Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1609 (1992). For a less robust account of the prerequisites of moral agency, see Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 721 (1992) (redefining criminal responsibility to require "chosen action" along with "some minimal experience as a feeling, rational chooser").

240. *See, e.g.*, Sherry F. Colb, *The Character of Freedom*, 52 STAN. L. REV. 235 (1999) (arguing that character should replace autonomy as the primary ground of criminal responsibility).

241. The Model Penal Code provides that, apart from certain limited exceptions, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." MODEL PENAL CODE § 2.02(1) (1985). Throughout this section, the Code replaces the traditional term "mens rea" with "culpability." *See id.* § 2.02 cmt.

242. *See id.* § 2.01.

243. Michael Moore has noted that one possible explanation for the mens rea requirement is that "there can be no responsibility for behaviors caused by factors beyond the actor's control." Michael S. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1107 (1985) (rejecting this explanation on the basis that causation is not compulsion, and therefore can be compatible with criminal responsibility); *see also* Markus D. Dubber, *Legitimizing Penal Law*, 28 CARDOZO L. REV. 2597, 2609 (2007) ("[T]he principle of autonomy supports a general requirement of mens rea (or criminal intent) as the manifestation of the offender's capacity for autonomy . . . .").

244. *See* Moore, *supra* note 243, at 1107 (characterizing ignorance of the circumstances affecting one's act, the likely consequences of the act, or the risk that the act entails as negating the mens rea requirement).

tonomy; first degree murder, for instance, typically requires that the offender not only intended to commit murder, but did so after premeditation and deliberation.[245]

Similarly, under the actus reus requirement, the criminal act must be voluntary; there can be no criminal liability when an actor is unconscious, for instance, or when she acts through an uncontrollable bodily spasm.[246] Although less obviously, the very requirement of an act further signals the importance of autonomy and free choice to criminal liability. Status or thoughts alone do not suffice to incur criminal liability;[247] to step over the line into criminal responsibility, a person must make a decision to commit some sort of act.[248]

Criminal law's preoccupation with autonomy in the form of rationality and volition is also visible in the major excuses to criminal liability: insanity and duress. While there are several different versions of the insanity defense, under all of them, an actor is not criminally responsible if he lacked the cognitive capacity to comprehend the nature and quality of his actions or to understand their wrongfulness.[249] For instance, a man who kills his wife while under the psychotic delusion that she was an attacking alien is not criminally liable, because he did not understand the basic import of his actions (he didn't know that he was killing his wife), and as a result could not assess their wrongful nature (killing an alien might not have been wrongful at all; for instance, it might have been justified as a matter of self-defense). This definition of insanity precludes liability when an actor lacked sufficient rationality. A substantial minority of jurisdictions, along with the Model Penal Code, include a volitional aspect to the insanity defense as well, rendering it available where an actor lacked the capacity to conform his or her behavior to the law.[250]

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245. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.1 (2d ed. 2003).

246. *See* MODEL PENAL CODE § 2.01 (1985).

247. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (striking down state statute making status of narcotics addiction a crime); 1 LAFAVE, *supra* note 245, § 6.1 ("Bad thoughts alone cannot constitute a crime . . . .").

248. *See* Dubber, *supra* note 243, at 2609 ("The actus reus requirement . . . deriv[es] its strength from the commitment to respecting the offender's capacity for autonomy, which in this case means refraining from punishing mens rea . . . for its own sake. The act is . . . . the manifestation of a person's external exercise of her capacity for autonomy.").

249. *See* 1 LAFAVE, *supra* note 245, §§ 7.1–7.5.

250. *See* MODEL PENAL CODE § 4.01(1); Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Cen-*

While the insanity defense emphasizes rationality, the duress excuse emphasizes the importance to criminal liability of free choice: one who acts with a gun to his head is not responsible precisely because he does not act freely.[251] The duress excuse arguably expands the volitional aspect of criminal responsibility beyond the mere requirement of voluntary choice by looking at the range of choices available to the offending legal actor to determine whether his acts were *sufficiently* volitional.[252] A person who acts under duress may act voluntarily in a limited sense, in that his actions are conscious and the product of a rational choice—for instance, the decision to commit a crime instead of being subjected to death or severe bodily harm. But he is excused from liability nonetheless, because, given the limited choices available to him, he lacked a fair opportunity to conform his behavior to the law.[253]

B. Autonomy, Criminal Liability, and the Distinction Between Child and Adult Offenders

The importance of autonomy to criminal responsibility also underpins the treatment of juvenile offenders. Children are exempted from criminal liability to the extent that they have not yet developed into autonomous adults, and therefore lack the cognitive, emotional, and practical capacity to make ration-

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tury, 56 AM. U. L. REV. 51, 85, 123, app. B (2006) (listing eighteen states that, along with the District of Columbia, include a volitional aspect in the insanity defense). Many jurisdictions eliminated the volitional component of the insanity defense in the 1980s, in response to John Hinckley's acquittal for the shooting of President Reagan on the basis of the Model Penal Code definition of insanity. *See id.* at 85.

251. *See* 2 LAFAVE, *supra* note 245, § 9.7 (defining the duress excuse available when "[a] person's unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct . . . .").

252. Stephen Morse characterizes duress as an instance of "hard choice." *See* Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 294–95 (2003).

253. *See id.* One could argue that duress has a rationality component as well, in that an actor under duress might find his cognitive ability impaired by fear and other emotions. But duress is not typically considered as overcoming a person's rational capacity. *See* John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275, 291 (1999) ("[C]oercion is characteristically viewed as causing a *volitional*, rather than a *rational* impairment . . . .").

al decisions for which they are morally accountable.[254] The common-law infancy defense rested on the premise that, like the insane, children could not be held responsible for their actions because they could not distinguish right from wrong and could not form criminal intent.[255] Under the common-law rule, children under the age of seven are conclusively presumed incapable of forming criminal intent, and there is a rebuttable presumption of incapacity for children under the age of fourteen.[256]

Beginning in the early twentieth century, the infancy defense was rendered largely unnecessary by the creation of the juvenile courts, which had jurisdiction over all children under the age of eighteen.[257] The juvenile courts originally took a therapeutic rather than a punitive approach, on the theory that youth do not bear the same responsibility for their crimes as do adults, and at the same time possess a greater potential for rehabilitation.[258] Today, juvenile courts take a more punitive approach to children's criminal acts, and states increasingly allow for the transfer to adult courts of children who commit serious crimes.[259] Nonetheless, children are still initially, as a categorical matter, treated differently from adults.

Protections for older children, which began with the juvenile court movement and continue today, are similarly premised on the notion that criminal responsibility requires not just minimal rationality, but deliberative capacity and some

254. *See generally* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15 (1997).

255. *See* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509–13 (1984).

256. *See id.*

257. *See id.* (arguing for the renewed importance of the infancy defense in the wake of the shift in juvenile justice, and tracing its resurgence); *see also* Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 41–48 (2007) (same).

258. *See* Walkover, *supra* note 255, at 517.

259. *See* Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 438 (2006) (noting that in many states, "the minimum age at which a child can be transferred to adult court is under fourteen, and in some states there is no lower limit at least for the most serious offenses"); *see also* MODEL PENAL CODE § 4.10 (1985) (providing that no offender can be tried for an offense if under sixteen years of age, in which case the juvenile court has exclusive jurisdiction, and that those of sixteen or seventeen years of age can be tried only if the juvenile court either lacks jurisdiction or has entered an order consenting to the institution of criminal proceedings).

degree of self-control.[260] There has in recent years been a movement toward recognizing the distinct cognitive and emotional limitations of adolescents, and taking these into account in a more nuanced way in determining criminal liability.[261] Thus, in *Roper v. Simmons*, the Supreme Court categorically barred execution for crimes committed while under the age of eighteen, on the basis, in part, that according to both sociological and scientific studies, adolescents are more likely than adults to act recklessly and as a result of external influences such as peer pressure, and therefore are not as morally culpable as adults.[262]

By exempting children from liability on the basis that they lack crucial aspects of autonomy, such as self-control, deliberative capacity, and emotional maturity, criminal law signals that punishment is merited when a legal actor makes a free and rational decision to commit a wrongful act. However, while children are exempted categorically, adults must establish on a case-by-case basis that they lack the prerequisites for criminal responsibility.[263] Significantly, an adult will not be excused from criminal liability upon establishing the very qualities that excuse or mitigate a child's culpability, such as reck-

260. In addition to providing for juvenile court jurisdiction over adolescents under the age of eighteen, many states allow youth or immaturity to serve as a mitigating factor at sentencing. *See, e.g.*, FLA. STAT. § 921.0026(2)(k) (2010) (permitting downward departure for robbery defendant where "[a]t the time of the offense the defendant was too young to appreciate the consequences of the offense"); MONT. CODE ANN. § 46-18-304(k) (2009) (permitting downward departure for robbery defendants under the age of eighteen).

261. For an argument that adolescents should be treated distinctly from both children and adults in the context of imposing criminal liability, see generally Scott & Steinberg, *supra* note 254.

262. 543 U.S. 551, 569–70 (2005). The third reason given by the *Roper* Court for finding children categorically less culpable than adults is children's lack of control over their environment, in that, legally subject to their parents, "[juveniles] lack the freedom . . . to extricate themselves from a criminogenic setting." *Id.* at 569 (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). The implication is that adult criminal responsibility hinges, in part, on the freedom of the legal adult to control his or her world to the extent necessary to escape an environment that might encourage the commission of crimes.

263. *Contra* Morse, *supra* note 254, at 59 (criticizing the current dichotomy between adults and adolescents, and arguing that if the liability of adolescents is mitigated or excused on the basis of diminished capacity for rational deliberation or self-control, then the liability of adults should be similarly mitigated where their capacity is similarly diminished).

lessness and lack of impulse control.[264] Despite the nominal autonomy prerequisites described in the preceding section, courts often hold adults criminally liable even in the absence of full autonomy. Adults are criminally liable as long as they possess a minimal degree of rational ability, and a minimal degree of freedom, at the time they act.[265] As long as these prerequisites are met, courts will not take into account any deliberative or emotional weaknesses that might diminish an adult's capacity to make autonomous choices.[266]

Why is it that we exempt children from criminal liability on the basis that they are not fully autonomous and thus cannot fully control their actions, but refuse to excuse adults for the same reason? One explanation is that children, whose character is still in the process of development, have more rehabilitative potential than adults. A second explanation is that the weakness of children deserves more solicitude than that of adults, because children have not yet been legally emancipated and cannot escape their environment to the extent that adults can.[267] Under either explanation, however, the reality is that while our system recognizes children to be less than autonomous, and exempts them from liability accordingly, the same protections are not extended to adults. Instead, we often treat adults as if they are autonomous—and thus as criminally responsible—even when they fall short of full autonomy.

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264. *See Roper*, 543 U.S. at 569–70. One exception is the defense of "diminished capacity," which recognizes lack of rationality or control short of legal insanity. However, this defense is recognized primarily in the context of reducing murder to manslaughter, or as a factor at sentencing. *See generally* Morse, *supra* note 252; MODEL PENAL CODE § 210.3 (1)(b) (1985) (reducing murder to manslaughter where there is "extreme mental or emotional disturbance for which there is reasonable explanation or excuse"). As Stephen Morse observes, apart from the limited context of the murder/manslaughter distinction, the current law applicable to adults contains "all-or-nothing, bright line tests" that are "quite narrow," such that defendants are liable unless they can meet the high bar for establishing legal insanity or duress: "Lesser rationality or control problems . . . may be considered only as a matter of discretion at sentencing." Morse, *supra* note 252, at 295–96 (arguing for increased recognition of diminished capacity as mitigating criminal liability).

A further exception is the case of *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the Supreme Court held that imposition of the death penalty on a mentally retarded defendant violates the Eighth Amendment. However, *Atkins* is limited both in that it applies only to capital punishment, not initial liability, and also in that it extends protection only to a small group of adults whose capacities fall far short of the norm.

265. *See* Ward, *supra* note 259, at 444–45.

266. *See generally* Morse, *supra* note 252.

267. *See Roper*, 543 U.S. at 569–70; Ward, *supra* note 259, at 447–50, 459–65.

C. Criminal Liability and the Presumed Autonomy of Adults

One of the central problems of criminal legal theory is how we can treat all minimally competent adults as responsible for their actions, even while recognizing the extent to which they may lack full autonomy. In its classic form, the discussion of this problem hinges on the dichotomy between determinism and free will. Are our actions determined, and if so to what extent, and how should this affect criminal responsibility? The determinists fall into two camps: the "hard determinists," according to whom everything we do is determined and thus entirely beyond our control, and the "soft determinists," who argue that while our character and situation are indeed determined by forces for which we are not responsible, we nonetheless exercise a meaningful degree of freedom of choice.[268] Under hard determinism, we cannot be held responsible for what we do, and thus cannot justly be punished for our actions.[269] Advocates of criminal punishment—retributivists in particular—therefore tend to fall into the "soft determinist" camp, and to argue that, regardless of determining influences, we possess sufficient freedom to render us morally and legally accountable for the actions we take.[270]

As science has made increasingly clear the role of genetics and environment in shaping human behavior, theorists have debated how to reconcile the autonomy-based model of criminal responsibility with our growing awareness of the mechanisms by which human activity is indeed determined by forces beyond each individual's control. In 1970, Judge David Bazelon influentially proposed that a defendant's "rotten social background" should serve as a defense to criminal liability, akin to

268. *See* Dressler, *supra* note 229, at 687–88 n.91 (recounting the determinist debate).

269. *See id.* (rejecting hard determinism, on the basis of "its conclusion that we must excuse all wrongdoers or develop a criminal justice system not based on concepts of desert").

270. *See, e.g.*, *id.* (noting that whatever the truth of the determinist-free will debate, "we also intuitively *feel* that we ordinarily have freedom of choice"); Pillsbury, *supra* note 239, at 720 ("I do not—and cannot—resolve whether persons *freely* choose their actions . . . . Instead, I offer a kind of practical compatibilism, a way of evaluating the justness of punishment in the face of metaphysical doubt."); *see also* Moore, *supra* note 243, at 1128–32 (accepting determinism, but arguing that causation does not negate autonomous action).

a form of insanity defense.[271] In a series of articles and decisions defending this position from numerous attacks,[272] Bazelon, along with legal scholar Richard Delgado, pointed to social-scientific evidence establishing that deficiencies in upbringing and early social environment contributed to criminal behavior later in life.[273] The causal mechanism behind this correlation, according to psychiatric evidence, was that a deprived or troubled upbringing could thwart children's emotional and cognitive development in ways that would make it difficult for them to conform their behavior to the law even as adults.[274] Bazelon and Delgado argued that where criminal defendants, through no fault of their own, had grown up in conditions that limited their ability to act rationally and to exercise self-control, and society had failed to prevent this from happening, society could not then hold these defendants liable for their conduct.[275]

The proposed Rotten Social Background defense, however, did not take hold. No jurisdiction today takes an offender's upbringing and socio-economic background into account in determining criminal liability, and few scholars support doing so.[276] Upbringing and socio-economic background factor into criminal punishment only in the sentencing phase of a criminal trial, and only to a limited extent.[277]

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271. United States v. Alexander, 471 F.2d 923, 959 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) (finding that trial court incorrectly excluded psychiatrist's testimony on defendant's "rotten social background" and how it caused him to lose control of his conduct at the moment he killed a marine in response to a racist taunt).

272. *See, e.g.*, Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976).

273. *See* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); David L. Bazelon, *The Morality of Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976); Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985).

274. *See Alexander*, 471 F.2d at 959.

275. They argued, for instance, that where a defendant had been abused by his father as a child, and thus had a diminished ability to regulate his emotions and restrain his impulses, he was not able to help it—and thus should not be held liable—when he later acted violently himself. Under the proposed Rotten Social Background defense, even where not legally insane, such defendants nonetheless bore no responsibility for actions that were the product of early childhood conditions that they had no power to change. *See* Delgado, *supra* note 273, at 19–37.

276. *See, e.g.*, Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionate Review*, 87 CALIF. L. REV. 943, 961 (1999) (noting that the "Rotten Social Background" defense has been largely rejected).

277. The Federal Sentencing Guidelines provide that disadvantaged childhood background is not to be considered at sentencing. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (2010) ("Lack of guidance as a youth and similar

Despite its almost unanimous rejection, the proposed Rotten Social Background defense forced criminal law theorists to confront why it is that we impose criminal liability on offenders whose behavior is shaped by unchosen childhood experience. A few criminal law scholars, such as Stephen Morse, contested the descriptive premise of the Rotten Social Background defense, questioning the significance of upbringing and socioeconomic background in producing criminal behavior.[278] Observing that most of those brought up in impoverished and otherwise troubled families nonetheless manage to obey the law, Morse argued that there was no evidence that improving the circumstances of poor children would diminish the likelihood that they would commit crimes later in life.[279]

Most criminal law scholars, on the other hand, accept that unchosen childhood experience can shape criminal behavior, but nonetheless reject the normative position that upbringing and background should therefore be taken into account in assessing criminal responsibility.[280] A common refrain in the

circumstances indicating a disadvantaged upbringing are not relevant in determining whether a departure is warranted."). However, the Supreme Court has prohibited the exclusion of such evidence in the sentencing phase of capital trials, *see* Eddings v. Oklahoma, 455 U.S. 104, 112 (1982), and has held that failure by counsel to develop evidence of a deprived upbringing when representing a capital defendant can constitute ineffective assistance of counsel, *see* Williams v. Taylor, 529 U.S. 362, 395 (2000). Many jurisdictions, moreover, permit the consideration of a defendant's background as a possible mitigating factor at sentencing, and appellate courts may find that a sentencing court abused its discretion by failing to consider such evidence. *See, e.g.*, People v. Margentina, 634 N.E.2d 29, 31 (Ill. Ct. App. 1994) (remanding to trial court for proper consideration of mitigating factors, including relevance of defendant's "terrible" childhood to his rehabilitative potential); State v. Briggs, 793 A.2d 882, 886 (N.J. Super. Ct. App. Div. 2002) (remanding case to trial court for consideration of defendant's troubled youth, among other potential mitigating factors). However, trial courts that decline to find a troubled childhood background to be a mitigating factor are typically upheld. *See, e.g.*, O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999) (affirming that sentencing court was not obliged to consider defendant's "troubled childhood" a mitigating factor); State v. Smith, 766 A.2d 913, 920–21 (R.I. 2001) (finding that despite the presentation of evidence of childhood abuse, among other mitigating factors, a life sentence without the possibility of parole was not an abuse of discretion).

278. *See* Morse, *supra* note 272, at 1249–50.

279. *See id.* at 1259–60.

280. *See, e.g.*, Moore, *supra* note 243, at 1131, 1146 (acknowledging that criminal behavior may be caused by upbringing and early environment, but arguing that this should not be taken into account in assessing criminal responsibility as long as an actor possesses a minimal capacity for "practical reasoning"); Pillsbury, *supra* note 239, at 720 (accepting that we cannot "resolve whether persons *freely* choose their actions despite the unchosen influence of genetics, environment, and chance[,]" but concluding that these influences can play no role in attributing criminal responsibility); Weinreb, *supra* note 228, at 57 (agreeing that

scholarly defense of imposing criminal liability regardless of the formative influence of childhood experience is the paramount importance of treating adult offenders as autonomous and thus responsible for their actions.[281]

The primary argument for treating adults as autonomous, regardless of the extent to which their autonomy has been diminished by an unchosen childhood experience, is pragmatic. If we were to allow determining influences to negate criminal responsibility, then it could be argued that none of us is responsible for our actions, because none of us is truly free—we are all determined by forces we cannot control, such as genetics, environment, and larger social forces.[282] As we eliminate those aspects of our identity that are determined by inherited characteristics or individual history, our autonomous capacity becomes "squeezed into a corner," as Lloyd Weinreb puts it, such that we no longer seem responsible for anything we do.[283] It is necessary to draw the line of responsibility somewhere, because a model of individual accountability is essential to the system of criminal law that keeps our society well-ordered and livable.[284] Drawing the line at adults who meet the basic re-

"indisputably, a person's characteristics and history powerfully affect how he acts[,]" but arguing that we cannot take this into account in determining criminal responsibility).

281. *See, e.g.*, Stanford L. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 287 (1968) ("Whether the concept of man as responsible agent is fact or fancy is a very different question from whether we ought to insist that the government in its coercive dealings with individuals must act on that premise."); Moore, *supra* note 243, at 1146–47 (arguing that to excuse another because his actions were shaped by a disadvantaged background "betokens a refusal to acknowledge the equal moral dignity of others").

282. *See* Dressler, *supra* note 229, at 680. Although science increasingly "forc[es] us to acknowledge the unhappy conclusion that human behavior is caused by many factors . . . over which we have no control," excusing wrongdoers on the basis of childhood background or other determining influences "would require us to give up the tenet of personal accountability that is central to our blaming system." *Id.* at 680, 714.

283. *See* Weinreb, *supra* note 228, at 57, 75 (arguing that "[t]he reality of freedom . . . is assumed" by criminal law because it is a necessary predicate of desert).

284. *See, e.g.*, Boldt, *supra* note 226, at 2276 ("Our experience of blaming requires that we understand human choices to be . . . autonomous[.]"); Morse, *supra* note 272, at 1267 ("Broadening the class of persons who are considered not responsible for their behavior seems dangerous to public order . . . . [T]he law's presumption of responsibility will encourage the internalization of control . . . as well as general deterrence."); Weinreb, *supra* note 228, at 77 (arguing that the criminal law assigns liability in borderline cases "in order not to undermine the conventional basis of desert altogether, by calling into question whether a person can ever truly be said to have acted with freedom and responsibility despite the determinate conditions of his existence").

quirements of minimal rational capacity and lack of coercion, and refusing to assess the extent to which their choices were shaped by childhood or genetic influences they could not avoid, reflects the decision, in Robert Nozick's formulation, that desert does not need to go "all the way down."[285] Even if we recognize that everything is entirely determinate at some level, such that people do not necessarily deserve their background, character, and mental make-up, we can still find them blameworthy for the actions they undertake within the framework of these uncontrollable givens.

Others take an expressive approach to the problem of autonomy, arguing that it is necessary to treat all minimally competent adults as autonomous in order to respect their dignity as moral agents and thus as human beings. To create a class of individuals excused from liability on the basis that their background diminishes their ability to make free and rational decisions would be "disrespectful to the personal dignity of individuals."[286] We must "treat[] all persons as autonomous and capable of that most human capacity, the power to choose[,]" because "[t]o treat [them] otherwise is to treat them as less than human."[287] This equal-dignity argument often has a circular quality—we must treat adults as autonomous and rational in order to "manifest [their] autonomy."[288] The more practical strand of this argument is that autonomy often goes hand-in-hand with rights, such that if we treat certain adults as less than autonomous, then they may well become so as a matter of law. Characterizing certain classes of adults as less than fully responsible would suggest that they are akin to children, which in turn could justify subjecting them to the same paternalistic interventions to which children are subject.[289]

Another version of the expressive argument holds it necessary to treat most adults as autonomous because believing that

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285. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 225 (1974) ("It needn't be that the foundations underlying desert are themselves deserved, *all the way down*.").

286. *See* Morse, *supra* note 272, at 1267.

287. *Id.* at 1268.

288. Dubber, *supra* note 243, at 2608. According to Dubber, we punish to manifest the autonomy of both offenders and their victims. *See id.* at 2607–08.

289. *See* Moore, *supra* note 243, at 1148–49. Anne Coughlin has raised the related argument that excusing battered women risks characterizing them as less than fully autonomous and thus as properly subject to paternalistic interventions. *See generally* Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1 (1994).

this is so gives meaning to our lives.[290] In this view, the criminal law not only requires autonomy for its own sake, but also functions, more broadly, to convey an idealized belief that autonomy and human freedom in fact exist.[291] We depend on the conception of humans as autonomous and free to make our lives and actions meaningful, and to distinguish ourselves from objects and other animals.[292] As Samuel Pillsbury argues, "responsibility for choice is fundamental to the human condition; we cannot do without it[,]" in part because "[w]ithout the incentives provided by responsibility, simply gathering the energy to get out of bed every day would be an enormous challenge."[293]

According to each of these arguments, criminal law treats most adult offenders as autonomous, not because they are, but because we need to, for reasons both practical and metaphysical. Thus, even where we recognize that an adult's criminal behavior was determined by unchosen and undeserved factors such as background and early childhood experience, we blind ourselves to this reality in attributing criminal responsibility and blame. We take, in other words, what has been called the "as-if" approach to adult autonomy. In Herbert Packer's characterization, "the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were."[294]

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290. *See* Pillsbury, *supra* note 239, at 721 (arguing that "our deep commitment to responsibility [and thus autonomy] stems from our effort to find meaning in life [and to] . . . construct a normative order in a world otherwise indifferent to human norms"). Pillsbury also argues that "[r]esponsibility tangibly values the source of human uniqueness, what philosophers call autonomy." *Id.* at 740.

291. *See* Dressler, *supra* note 229, at 696 n.116 (noting that a contrary approach would "treat[] human action as if it possessed no special moral significance"). According to Dressler, "[w]e affix blame to people, but not to other living things, because we believe that humans are unique in their capacity to make moral decisions about how they will act." *Id.* at 701.

292. *See* Boldt, *supra* note 226, at 2279 (summarizing such arguments).

293. Pillsbury, *supra* note 239, at 720, 740.

294. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74–75 (1968). Many criminal law theorists take what they characterize as a "compatibalist" or "dualist" approach to autonomy, at once accepting the possibility that human action is determined and, at the same time, treating human choices as free and autonomous, at least in the domain of criminal law. *See, e.g.*, Pillsbury, *supra* note 239, at 720 (describing his approach as "practical compatibilism"). The compatibilist approach is similar to the "as-if" approach in that it attributes autonomy to human behavior, even while admitting "metaphysical doubt" about whether any meaningful degree of freedom of choice in fact exists. *See id.*

Still others, such as Michael Moore, take what I will call a definitional approach to adult autonomy. Moore rejects the "as-if" approach, arguing that "[t]he law demands more than that we *pretend* people are free and thus hold them responsible *as if* they were. A just legal system requires people to be truly re-

D. Implications

Criminal law thus depends on a model of the autonomous legal actor that many theorists agree is largely fictitious.[295] This Article does not seek to resolve the debate over whether individual autonomy exists and, if not, how the criminal law should take this into account. As the arguments described above make clear, there is no easy answer to the problem of autonomy and criminal responsibility. Criminal law needs to treat adults who meet a minimal level of rationality and volition as autonomous and thus responsible for their actions. At the same time, however, it is now widely accepted that many of the adults held criminally responsible have, through no fault of their own, been brought up in conditions that have greatly diminished their ability to make rational decisions and to exercise self-control, and have diminished, as well, the range of free choices available to them.

Without offering a way out of this dilemma, this Article suggests a new way of addressing it. Criminal law's decision to treat adults as if they are autonomous, this Article argues, should be brought to bear in situations where the criminal law affects the future autonomy of children who have done nothing wrong, as it does when it incarcerates their parents. It may well be necessary for the criminal law to employ what Mark Kelman describes as a narrow time frame for assessing criminal liability,[296] excising from view the determining role of childhood experience when attributing blame to the actions of adults. But ignoring the role of childhood experience in assessing adult responsibility is all the more reason for the criminal

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sponsible." Moore, *supra* note 243, at 1122. Moore goes on to assert that individuals are indeed morally responsible for their actions, even if those actions were caused by factors over which they have no control, as long as they possess a capacity for "practical reasoning." *Id.* at 1148–49. But Moore's reason for attributing responsibility and treating people as free is that we need to do so, rather than that they actually are. *See id.* at 1122. Thus, despite his protestations, Moore's argument is one more version of the "as-if" approach to individual responsibility.

295. For a criticism of the as-if approach to autonomy in criminal law, see James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 105 (2003) ("[W]e must still respond to the many observers who, looking at the population of offenders, experience doubt that 'autonomous' is the apposite adjective for describing most of them."). Whitman levies his criticism of the autonomy model into an attack on retributivism more generally, accusing it of conducting "otherworldly discussions of abstractly conceived autonomous actors" that are sharply at odds with the realities of American life. *See id.* at 89.

296. *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593 (1981).

law to attend to how it affects the lives of blameless children who have not yet developed into adults. If criminal law is to treat adults as if they are autonomous and rational, then arguably it has an obligation, at a minimum, to avoid treating children in ways that will make this assumption less of a reality. This, in turn, entails taking children's interests into account when sentencing their parents.

IV. PARENTAL INCARCERATION AND CHILDREN'S FUTURE AUTONOMY

We cannot expect courts sentencing children's parents to place the same weight on those children's interests as would a family law court deciding a custody dispute. Family law is unique among legal fields in making children's interests paramount, and to do so in the context of sentencing a parent would subvert the distinct goals of criminal law.

What we can do, however, is to employ the insights of family law jurisprudence to better understand how children's interests in such cases may well be relevant to criminal law itself. Family law's lessons about child development demonstrate, as discussed above, that the incarceration of a child's parent is likely to influence the extent of autonomy and free choice that the child will exercise upon becoming an adult.[297] This, in turn, makes visible the connection between parental incarceration, on the one hand, and, on the other, the criminal law premise of adult autonomy.[298]

In Section IV.A, this part will revisit the current debates over parental incarceration, and will demonstrate that the perspective of family law turns on its head the prevailing arguments against considering children's interests. By illuminating the connection between parental incarceration and the criminal law premise of adult autonomy, family law's insights about child development reveal that attending to children when sentencing their parents is deeply related to, rather than at odds with, the overall legitimacy of criminal law.

Establishing the relevance of children's interests to the underlying premises of criminal law does not, however, end the inquiry into whether and how to take these interests into account when sentencing parents. Section IV.B.1 will take up the

297. *See supra* Parts I–II.
298. *See supra* Part III.

question of when courts should consider children's interests in sentencing parents, given the inevitable conflict between children's interests and several of the goals of criminal law, as well as the related problem of where to draw the line in considering parental status. Section IV.B.2 will then offer suggestions on how to take children's interests into account when incarcerating parents in a manner that balances the law's stake in promoting children's future autonomy with other goals and principles of criminal law.

A. Current Debates About Parental Incarceration, Revisited

As described above, there are two primary types of arguments against taking children's interests into account when sentencing their parents.[299] The first is the instrumentalist, primarily defendant-centered argument that attending to children's interests will thwart the criminal law goal of reducing crime. The second is the theoretical argument that acknowledging a defendant's status as a parent or caretaker will undermine the broader principles of criminal law, such as fairness and equality. This argument, as well, focuses on the defendant, rather than on the defendant's children, in assessing the connection between criminal sentencing and the underlying principles of criminal law.

By articulating the connection between conditions of child development and children's future autonomy, and in the process bringing into question the focus on defendants to the exclusion of their children, family law jurisprudence helps to identify the flaws and limits of both the instrumentalist and theoretical arguments against taking children's interests into account.

1. Instrumentalist Arguments

Scholars in favor of attending to children's interests when sentencing parents have already pointed out some of the flaws of the instrumentalist argument that taking children into account in such cases will lead to an increase in crime. The flaws in this argument are especially visible when one shifts the focus away from the parent-defendants and toward their child-

299. *See supra* Part II.C.

ren. Sociological studies have demonstrated that parental incarceration in fact increases crime, in that children of imprisoned parents are more likely than others to commit crimes themselves.[300] The perspective of family law can help explain why this is so. Many of the developmental risks to children that family law's best-interests jurisprudence identifies are likely to follow from parental incarceration, including separation from a primary or secondary caretaker, geographic and educational dislocation, and a reduction in socioeconomic status.[301] Each of these risks, according to the family law literature and case law, can harm a child's development in ways that will reduce her productivity and her ability to control her emotions and impulses,[302] and will thus increase the likelihood that she will engage in criminal activity.[303]

Nonetheless, it is true that altering parents' sentences for the sake of their children might increase criminal activity by parents. As discussed above, there is some evidence that reducing parents' sentences will decrease the likelihood that those parents will commit future crimes, in that fostering the connection between parents and their children may aid in the project of rehabilitation.[304] But it is also plausible that, to the extent that criminal punishment has a deterrent effect, the prospect of a reduced sentence will make a parent more likely to commit a crime in the first instance.[305] Similarly, a parent whose prison sentence is reduced or eliminated for the sake of a child will not be incapacitated as fully as he or she would otherwise be, and would therefore have greater opportunity to commit future crimes. Given the difficulty of measuring empirically the precise extent to which changes in sentencing practices affect the commission of crimes, we cannot say with certainty that protecting children's interests would prevent more crime than it would encourage.

But arguments about perverse incentives can be made against any mitigation of criminal liability. Some argue, for instance, that treating child offenders differently from adults will make it more likely that children will commit crimes and will

300. *See supra* Part II.C.1.a.
301. *See supra* Part II.A.
302. *See supra* Part I.C.
303. Moreover, the harm inflicted on children by parental incarceration may well be exacerbated by the pervasive effects of inter-generational incarceration on families and communities. *See generally* BRAMAN, *supra* note 75.
304. *See supra* text accompanying note 212.
305. This is the argument of MARKEL ET AL., discussed *supra* Part II.C.2.

be recruited for criminal enterprises. Thus, in *Roper v. Simmons*, one argument against exempting juveniles from the death penalty was that the defendant in that case committed murder in part because he believed that, as a juvenile, he would not be penalized to the same extent as an adult.[306] But the Court found countervailing reasons to exempt children from the death penalty nonetheless, namely, the Eighth Amendment's prohibition of cruel and unusual punishment.[307] Similarly, the benefits of protecting children's future autonomy are sufficient to merit at least considering how children are affected by parental incarceration, even though doing so will necessarily have some counter-productive incentive effects.

2. Theoretical Arguments

Opponents of attending to children's interests when sentencing parents argue that to do so is at odds with the fairness and legitimacy of criminal law.[308] When looked at narrowly, and with a focus only on the offender at hand, this may well seem to be the case. The fact that a defendant is the parent or caretaker of a minor child typically has no bearing on whether that defendant deserves to be punished, and alleviating her punishment simply because she is a mother may seem to unfairly single her out for preferential treatment.

Family law's lessons about child development, however, can help us to understand the ways in which considering parental status can enhance the consistency, and thus the fairness and legitimacy, of criminal law. A defendant may not merit reduced punishment simply because she is a parent. But fairness to the defendant herself should not be our only concern. As a society, we have delegated to this parent, and others like her, the task of raising her children. And although her children clearly have no choice about the child-rearing situation in which they find themselves, criminal law will hold the children responsible for the outcome by treating them as if they are autonomous once they become minimally capable adults.

We currently impose punishment on the assumption that it is fair and legitimate to treat adults as if they are autonomous, regardless of upbringings that may have reduced their autonomy and the range of free choices available to them. Criminal

306. 543 U.S. 551, 571 (2005).
307. *Id.* at 578.
308. *See supra* text accompanying notes 213–18.

law thus bears responsibility for actions such as parental incarceration that will reshape children's families and their conditions of development in ways that, as we have seen, will likely decrease the children's future autonomy.

Those who oppose considering of children's interests when sentencing parents commonly argue that doing so is at odds with the criminal justice mandate of treating similarly situated defendants similarly.[309] The perspective of child development turns the similarly situated argument on its head. Criminal law characterizes adult defendants as similarly situated only by taking a narrow temporal perspective, one that focuses on the events surrounding the crime while excising from view formative influences such as each offender's history and early childhood experience. When viewed within a broader temporal framework that includes upbringing and other childhood influences, offenders whom the law currently treats as similarly situated may appear quite differently situated. If we are to continue to treat adults as if they are similarly situated, despite backgrounds that diminish the capacity and freedom of choice of some more than others, then this is all the more reason to look forward in time when it comes to children, to ensure that the fiction of similarly situated adults—like the fiction of adult autonomy—will become as much of a reality as possible.

B. Taking Children's Interests into Account When Incarcerating Parents

1. When to Take Children's Interests into Account

a. Bringing Children into the Discussion

We should not, of course, reduce a defendant's sentence every time a child will be harmed by parental incarceration. Taking children's interests into account does not entail immunizing parents from incarceration. Such an approach would render our system of criminal law unworkable, to the detriment of society as well as the interests of children, who benefit along with everyone else from the prevention of crime. In fact, the goal of promoting autonomy requires the punishment of

309. *See supra* text accompanying notes 213–18.

crime—criminal activity can threaten the autonomy of everyone, both developmentally vulnerable children and fully developed adults.

Nor should we create presumptions that would favor reducing parents' sentences in every case, or in certain categories of cases. Myrna Raeder argues in favor of such a presumption, proposing, in her discussion of federal sentencing, that "[i]nstead of a discouraged departure requiring extraordinary circumstances . . . , a departure for nonviolent parents should ordinarily be granted unless good cause exists to deny it."[310] Any such categorical presumption goes too far. A more individualized assessment is necessary to adequately account for the need to deter and punish crime, as well as to sufficiently assess the role each parental defendant plays in a child's well-being.

What sentencing courts should do, rather, is consider how incarcerating a parent or caretaker will affect a child's development and balance this against competing considerations.[311] Paramount among the sentencing court's concerns should be the criminal law goals of deterrence, retribution, rehabilitation, and incapacitation. But as the court works to achieve these goals, it should weigh them against the effect of any sentence it imposes on the defendant's child. Where the court's decision will inflict significant harm on the child's course of development, such that it will likely diminish the child's eventual autonomy and freedom of choice, the court should articulate this, and consider whether and why the goal of preventing harm to the child is outweighed by other concerns.

Where this proposal differs from the recent approach of Markel, Collins, and Leib is in insisting that courts at least articulate children's interests in every case of parental incarceration. Those authors propose instead a Spartan presumption against consideration of children's interests, such that in the context of parental incarceration, the effect on children would be considered only when the defendant is the "sole and irre-

310. Raeder, *supra* note 70, at 723.

311. The task of considering children's interests falls not just to the sentencing court, but to the counsel for the defendant, as well as to the probation officers drawing up the presentence investigation reports. For a discussion of the role of appointed counsel and probation officers in either overlooking or encouraging attention to children's interests, see Wald, *supra* note 1, at 36. A more robust proposal for considering children's interests when sentencing parents would entail appointing a guardian ad litem to advance the interests of each child potentially affected by a parent's incarceration.

placeable caregiver."[312] As we have seen, federal sentencing jurisprudence following the "irreplaceable caregiver" standard makes it unlikely that a child's interests will be given a robust analysis when a parent is incarcerated.[313] Under this standard, the court does not consider the full effects on a child of parental incarceration, but instead asks only the threshold question of whether another appropriate caretaker is available to care for the child. If this minimal threshold is met, then the court does not concern itself with the various ways in which a parent or caretaker's incarceration will nonetheless harm the child.[314]

This Article advocates, instead, that sentencing courts consider the interests of children in every case in which a parent or caretaker is sentenced. Children's interests do not need to predominate in such cases, and indeed may have no effect on the sentence ultimately imposed. Often, the harm to children will be outweighed entirely by countervailing considerations, such as the need to deter crime or to incapacitate a violent offender. In other cases, parental incarceration will cause sufficiently minimal harm to the child that countervailing considerations will necessarily prevail, as when a parent has had little contact with a child or has acted adversely to the child's interests, for instance, by placing the child in harm's way through criminal activity.

The premise of this proposal—one that differentiates it from other proposals on both sides of the debate—is that there is value in articulating children's interests in every case where children stand to be affected by parental incarceration, rather than drawing the line to exclude from discussion certain categories of cases where children's interests would either predominate (as Raeder proposes) or have no effect on the court's determination (as Markel, Collins, and Leib advocate).

What matters is not just the outcome of each case, but also the process by which we arrive at that outcome. If the sentence imposed by a criminal court will reshape a child's conditions of development in ways that will likely render that child a less autonomous adult, then the sentencing court should take responsibility for its action by both considering and explaining why harm to the child is outweighed by competing concerns. The result will be to expose the ways in which children are af-

312. *See* MARKEL ET AL., *supra* note 8, at 50.
313. *See supra* text accompanying notes 129–30.
314. *See supra* text accompanying notes 129–30.

fected by our treatment of their parents and to force courts and policy makers to confront this reality of children's lives and its implications for the legitimacy of both criminal law and our system of laws more generally.

The project of this Article is not to render children's interests paramount. It is, instead, to bring children's interests out from the shadows of family law. The hope is that courts and commentators engaged in fields other than family law, such as criminal law, will recognize, grapple with, and take responsibility for the connection between our treatment of adults and its effects on the children within their care.

b. Parental Status Triggering Consideration of Children's Interests

The decision to consider children's interests when sentencing their parents raises a number of related questions, both theoretical and practical. One such question is what parental status should trigger a sentencing court's consideration of a child's interests. Does the defendant need to have the legal status of parent for the court to consider the harm that his incarceration would cause a child? Or should courts engage in this analysis when sentencing caretakers without the legal status of parent? What about those who are parents, but do not have legal custody of their child?

As Markel, Collins, and Leib have argued, there are good reasons to look at this question from a functionalist, rather than a formalist, perspective.[315] Children can be harmed, often profoundly, by separation from caretakers who lack the legal status of parents. They can also be harmed by the incarceration of, and ensuing separation from, a parent who is not a primary caretaker. From the perspective of children's interests, what matters is the ways in which a defendant's incarceration will harm a child, rather than whether the defendant has formal legal status as the child's parent.

There are, on the other hand, significant administrative costs to taking a functionalist approach to the matter of parentage in this context. Such an approach would require sentenc-

315. *See* MARKEL ET AL., *supra* note 8 at 51 (arguing that the relevant criterion should be whether there is "an established relationship of caregiving"); *see also* Murray, *supra* note 7 (arguing that family law would benefit from recognizing the informal extended-care networks looked to by criminal law courts assessing whether defendants meet the "irreplaceable caretaker" standard).

ing courts to engage in an analysis of children's interests in a greater number of cases, and it would be difficult to know where to draw the line. Should a court consider a child's interests when sentencing a family member who assists the parent in caring for a child, such as a grandparent who often cares for the child after school? What about caretakers who do not function as family members, but nonetheless exert considerable influence on children, such as babysitters or schoolteachers?

Given the extended analysis that this Article proposes that courts give to children's interests, it seems advisable to define as clearly as possible the group of defendants whose status as parents or caretakers would trigger such an analysis. Perhaps the best compromise between protecting children and creating a workable rule would be to ask courts to consider the effect on children when sentencing either a defendant with the legal status of parent or guardian or a defendant who both resides with a child and plays a significant parental role in the child's life. As we saw in the discussion of family law's analysis of children's interests, a child's development can be harmed by separation even from a parent who does not live with the child, such as a noncustodial father with only visitation rights.[316] Children can also be harmed by separation from one who is not a legal parent but functions as one, such as a stepparent or the live-in partner of a legal parent. The proposed approach would combine the formal and the functional definitions of parent in a way that would limit the possibly endless circle of adults who could be deemed relevant to each child's development, while at the same time capturing those adults whose incarceration would be most likely to inflict significant harm on the child.

Another contentious issue is whether courts should consider a parent's gender. Markel, Collins, and Leib argue that we should be wary of treating mothers and fathers differently with respect to protecting parent-child ties.[317] At the other end of the spectrum, some advocates of attending to children's interests focus primarily on maternal separation from children.[318] While Markel, Collins, and Leib advocate gender neutrality in order to avoid "reinforc[ing] traditional gender roles and stereo-

316. *See supra* text accompanying notes 50–52.

317. *See* MARKEL ET AL., *supra* note 8, at 56.

318. *See generally* Acoca & Raeder, *supra* note 80; Wald, *supra* note 1, at 35 ("Although the parental obligation is borne disproportionately by women offenders over men, the issue is not inherently a gender one. Unfortunately, much of the discussion has treated it that way, on both sides.").

types[,]"[319] those who focus on mothers do so on the basis that mothers' needs are especially likely to be overlooked by traditionally male-centered sentencing regimes.[320] Under the approach proposed by this Article, both mothers and fathers would trigger the initial consideration of children's interests. In the process of considering those interests, sentencing courts would follow the family law approach of attending to the harms that children undergo when they are separated from either parent. This would likely entail a more robust consideration of fathers' ties to their children than sentencing courts currently engage in, as part of a more robust attention to children's interests more generally.

2. How to Take Children's Interests into Account

The more difficult question is how, precisely, a court would change its sentencing practices to protect a child's interests. It is outside the scope of this Article to resolve this question definitively; the goal, rather, is to encourage criminal law scholars, courts, and legislators to better grapple with the problem of protecting children's interests when sentencing their parents. But there are a number of ways in which sentencing courts might achieve criminal law goals while minimizing the infliction of harm on a developing child.

a. Deferring the Parent's Incarceration

One possibility would be to consider deferring the parent's incarceration to an extent that would reduce the harm the children would suffer.[321] As we saw in our discussion of family law's best-interests jurisprudence, courts making custody decisions often pay close attention to the developmental stage of the children involved, taking care not to disrupt a child's attachment to a caretaker at a period when this would be especially likely to inflict long-term emotional and psychological damage. Children in the toddler stage, for instance, are often thought to be particularly at risk of harm in the event of separation from a parent to whom the child is already attached, in-

319. MARKEL ET AL., *supra* note 8, at 56.

320. *See generally* Acoca & Raeder, *supra* note 80.

321. Markel, Collins, and Leib recommend time-delayed sentencing, but only for offenders with "irreplaceable caregiving responsibilities." *See* MARKEL ET AL., *supra* note 8, at 51.

cluding separation from a father who is not the primary caretaker.[322] And family law courts have long acknowledged that infancy is a crucial bonding stage for children.[323]

Sentencing courts should not automatically defer incarceration because a defendant is the parent of an infant or toddler. But were courts to articulate and balance children's interests and to consider the effect on children of separation from their parents, they might find a deferred sentence advisable in certain situations. A violent or repeat offender might need to be incarcerated immediately in order to promote the criminal justice goals of incapacitation and rehabilitation. But the criminal justice system already has mechanisms in place to determine the risk of recidivism, employed, for instance, in the parole context.[324] Courts considering a deferred sentence could first assess the risk that the offender would commit a serious crime during the period of deferral. Another factor would be the length of the sentence to be deferred. The deferral of a long sentence—such as a twenty-year sentence—might be impracticable for a number of reasons. Deferral in such a situation might pose too high a risk of flight and might be less likely to benefit a defendant's child; bonding with a parent who would soon thereafter be incarcerated well into a child's adulthood would not necessarily be in a child's interests. Where deferral might be advisable, in contrast, would be in the case of a nonviolent first-time offender who poses less risk to society than a violent or repeat offender and who faces a relatively short sentence.

Consider, for instance, a ten-year-old with a single father convicted of welfare fraud and facing a two-year prison sentence, or a twelve-month-old with a married mother convicted of embezzlement and facing a sentence of thirty-nine months, which is the average term of incarceration for women.[325] On the one hand, in both cases, immediate incarceration of the parent could put the child at risk of serious long-term harm. The single father could risk losing parental rights altogether if

322. *See supra* text accompanying notes 47–49.

323. *See supra* note 46.

324. For a discussion of the systems currently in place to assess the likelihood of recidivism in the context of parole, see Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 347–49 (2005) (proposing that sentencing courts consider nonincarcerative sanctions more frequently than they currently do).

325. *See* Commentary, *Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1927 (1998).

his child is placed in foster care, under the ASFA rule requiring states receiving federal funds to terminate parental rights where a child spends more than fifteen months in foster care over a twenty-two month period.[326] The twelve-month-old in the second hypothetical, meanwhile, would be at a developmental stage when separation from her mother could inflict significant damage. On the other hand, both welfare fraud and embezzlement are serious offenses, and merit sanctions for the purposes of deterrence and retribution. In these situations, if the parent shows low risks of recidivism and of flight, a court might consider deferring the sentence until an age where the child would be better able to handle the separation; in the case of the ten-year-old whose father stands to lose parental rights upon incarceration, the court could even defer the prison sentence until the child reaches the age of majority, or until an alternative caretaking arrangement can be found.

Deferred sentencing for the sake of children is already practiced in certain limited instances. For instance, courts will on occasion stagger sentences when incarcerating both parents of a child, which necessarily involves deferring the sentence of one parent.[327] What this Article proposes is that courts routinely assess the viability of deferring sentences to facilitate children's interests, so that the practice does not depend upon a parent's request or an unusually sympathetic judge.

When practiced on a more systematic and widespread scale than it currently is, deferred sentencing could be coupled with mechanisms, some of which are already in place in certain jurisdictions, that would reduce the incentive to commit further crimes while encouraging good parenting. Courts could place parents with deferred sentences on probation during the period of deferral and could require them to take parenting classes or attend counseling.[328] A deferred sentence could be structured such that the period of incarceration would be enhanced if the parent commits a further violation during the period of proba-

326. *See supra* text accompanying notes 87–88.

327. *See, e.g.*, Smith v. United States, 277 F. Supp. 2d 100 (D.D.C. 2003); Moore v. United States, No. 06-CV-492-DRH, 2007 WL 1958590 (S.D. Ill. July 7, 2007).

328. Some jurisdictions currently offer parenting classes and counseling to incarcerated parents. *See* Maldonado, *supra* note 73, at 208 (discussing programs for incarcerated fathers and their children in New York, Ohio, and Texas and advocating their expansion).

tion.[329] A court could also structure a deferred sentence such that it would be reduced for good behavior during the deferral period.

b. Prison Policies

Attention to children's interests should also extend beyond sentencing courts to prison policies more generally.[330] Many scholars, even those generally opposed to taking children's interests into account in most sentencing decisions, advocate changing prison policies to better address children's needs.[331] Currently, prisons are often located far away from the communities from which their inmates are drawn, which either limits parent-child visitation or renders it extremely disruptive to the developing child.[332] Prisons should instead be built, and prisoners placed, in locations that enable ease of visitation between parents and their children, so that even when parents must be incarcerated, the harms to their children will be minimized.[333] Current programs that allow mothers to reside together with their infants in prison nurseries could be expanded and employed where deemed in a child's interests.[334]

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329. Such a system could resemble the heightened probation regimes currently in place in certain jurisdictions. *See* Demleitner, *supra* note 324, at 344. As Demleitner points out, one problem with this sort of enhanced probation system—and of any probation system—is that the risk of violation and reincarceration is often high. *See id.* at 346. Parents sentenced to enhanced probation and a deferred sentence might thus end up serving a longer sentence than they otherwise would. Any system of deferred sentencing and enhanced probation put in place to protect children's interests would ideally be designed in a way that would avoid this problem, for instance, by imposing reasonable terms that take into account the exigencies of child care and by providing sufficient guidance to parents to decrease the likelihood that they would violate these terms.

330. For ways in which prison policies, such as visitation, prison placement, and furloughs, are already sensitive to protecting parent-child ties, see MARKEL ET AL., *supra* note 8, at 16–19.

331. *See id.* at 53–56. Markel, Collins, and Leib advocate prison policies that are sensitive to family ties—ranging from locating prisons in a manner that facilitates visitation to creating special programs that enable parents to live with their children—and argue that such policies are advisable both because they promote the goal of "successful offender reentry" and because they protect "the interests of extremely vulnerable third parties and their need for care . . . ." *Id.* at 53, 56.

332. *See* Raeder, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences*, *supra* note 194, at 25 (noting that the location of prisons is particularly problematic for mothers serving a federal sentence, given the relatively limited number of federal facilities for women prisoners).

333. For a similar suggestion, see *id.*

334. Prison nursery programs are currently available on a limited basis in several states, including New York. *See* INST. ON WOMEN & CRIMINAL JUSTICE,

c. Alternatives to Incarceration

Another, more controversial possibility would be for courts to consider alternatives to incarceration altogether for certain parents. These could include fines and community service, perhaps in combination with the enhanced probation, parenting classes, and counseling discussed above. An intermediate option would be home detention or commitment to a community-based prison alternative.[335] A few jurisdictions have special community-based facilities in place for mothers and their young children, enabling mothers faced with relatively short sentences, or with a limited amount of time left to serve, to live with their children and avoid the separation and trauma that the mother's incarceration in a prison facility would inflict on the child.[336]

Courts considering such options would need to balance the interests of children against traditional criminal law goals, such as deterrence, rehabilitation, and retribution. In some instances, eliminating incarceration for a parent might encourage rehabilitation[337] or facilitate deterrence, for instance, by

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335. This was the approach taken to the sentencing of a number of co-defendant mothers by Judge Weinstein in *United States v. Concepcion*, 795 F. Supp. 1262, 1286–1306 (E.D.N.Y. 1992). While noting that "[d]etention in the home is of limited utility when the mother's tasks require her to be in and out of the house to attend to caretaking and job requirements" and that "community incarceration raises the problem of separating mothers from children[,]" *id*. at 1285, Judge Weinstein ultimately sentenced a number of the mothers who faced prison terms to alternative sanctions in the form of combinations of probation, confinement in a community treatment center, and home detention, *see id*. at 1287–1306, while sentencing those mothers who had committed especially serious crimes to terms of imprisonment, *see id*. at 1291 ("[T]he seriousness of the offense, and the need to send a pointed warning . . . requires a long prison term.").

336. *See Developments in the Law: Alternative Sanctions for Female Offenders*, *supra* note 325, at 1933–34 (discussing community-based corrections facilities for mothers and children in California and other states); Myrna S. Raeder, *A Primer on Gender-Related Issues that Affect Female Offenders*, 20 CRIM. JUST., Spring 2005, at 17 (discussing the Bureau of Prisons' Mother and Infants Together program, which allows incarcerated mothers to live with their children in community-based settings for up to eighteen months after giving birth, and California's Community Prison Mother Program ("CPMP"), which provides residential facilities in which mothers with less than six years left to serve can live with their children); *but see* Robin Levi et al., *supra* note 334, at 61–62 (criticizing the CPMP for, *inter alia*, providing inadequate medical care for children and housing mothers and their children in "unsafe and derelict" facilities).

337. Some studies indicate that parents who participate in community-based incarceration alternatives are less likely to commit further crimes than incarcer-

making it less likely that the children involved will commit crimes themselves. And courts could work to find alternatives to incarceration that would achieve the desired retributive effect, such as fines or other penalties.[338] However, there will always be the countervailing possibility that reducing sentences for parents will work against the traditional goals of criminal law, for instance, by incentivizing crime or reducing the deterrent effect of the law. As with any balancing test, courts would be faced with the difficult task of determining which factors should prevail.

Some might argue that any reduction in the ultimate sentence imposed would unfairly treat parents more favorably than non-parents. While true, such a sentencing system would take advantage of the state's role in the parent's life to increase the likelihood that his or her child will become a rational and autonomous adult. Instead of intervening in families to the detriment of the children involved, the state could even benefit those children whose lives it inevitably affects whenever it sentences a parent.[339]

Articulating children's interests when incarcerating parents does not need to affect the ultimate sentence imposed in order to be beneficial. One function of such an articulation would be to make explicit a factor that sentencing judges may already take into account implicitly. When faced with a defendant who is the parent of a small child, a judge might silently take the child's interests into account in imposing a sentence.[340] Courts factoring in parental status in an ad hoc manner, moreover, might be more prone to overlook the importance to children of contact with their fathers as well as with their mothers. The implicit consideration of children's interests is more likely to occur unevenly than the explicit articulation advocated here.

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ated parents. *See Developments in the Law: Alternative Sanctions for Female Offenders*, *supra* note 325, at 1934.

338. *See* Demleitner, *supra* note 324, at 347 (discussing nonincarcerative methods of effecting retribution).

339. Solangel Maldonado makes the related argument that the state should intervene on children's behalf when it incarcerates their fathers, proposing that courts encourage good parenting by both facilitating contact between incarcerated fathers and their children and imposing an affirmative obligation on these fathers to nurture their children. *See* Maldonado, *supra* note 73, at 209–11.

340. *See* Wald, *supra* note 1, at 38 n.25 ("Informal talks with judges and probation officers suggest that motivated officials are finding ways to surmount the restriction on considering family ties.").

d. Other Mechanisms

Other mechanisms of protecting children when incarcerating their parents should be considered as well. We might, for instance, supplement the income of families whose caretakers are incarcerated, providing daycare subsidies or other support to those, such as grandparents, single parents, or family friends, who are left with the difficult task of caring for the children of incarcerated parents. Some might argue that such proposals would increase the costs of incarceration. As this Article has demonstrated, however, incarceration already imposes significant costs in the form of the developmental harm it inflicts on children. Resources expended to protect those children would thus redistribute, and bring to light, costs that until now have been largely overlooked because they have been internalized within families.

CONCLUSION

The Supreme Court's decisions in *Blakely*, *Booker*, and their progeny have opened up the possibility of radical changes to the consideration of children's interests when sentencing parents. By bringing childhood experience out from the shadows of family law, we can reconceptualize the theoretical rationale for taking children's interests into account in such cases. Criminal law holds adults responsible for their actions by treating them as if they are autonomous, even when they are not. Family law's insights on child development, meanwhile, demonstrate that incarcerating parents may diminish a child's likelihood of becoming an autonomous adult. If the criminal law is to treat children as if they are autonomous when they reach adulthood, then it has a responsibility to try to avoid treating children in ways that will make them less so.

Articulating children's interests when incarcerating parents would force the criminal justice system to acknowledge the extent to which it reshapes families and thus alters children's lives. In many cases, this acknowledgment will not affect the ultimate outcome: courts will articulate children's interests, balance these against other factors, and determine that extended incarceration of a parent is necessary, even if detrimental to a child's interests. But courts will be forced, at a minimum, to assess whether they can achieve the traditional goals of criminal punishment through means that minimize harm to

an offender's child. And where a court finds it necessary to incarcerate a parent, it will do so in a considered manner—one that takes seriously, and accepts responsibility for, the ways in which a parent's incarceration can affect a child's future.