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THE ROLE OF GENDER IN A STRUCTURED SENTENCING SYSTEM: EQUAL TREATMENT, POLICY CHOICES, AND THE SENTENCING OF FEMALE OFFENDERS UNDER THE UNITED STATES SENTENCING GUIDELINES

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INTRODUCTION

Historically, female offenders have been at the margins of the criminal justice system. Theories of criminal behavior, as well as studies of arrest, pre-trial, prosecution, and sentencing outcomes, have tended to focus on patterns of criminality derived from studying male offenders.¹ This does not reflect a lack of interest in female offenders, but rather the empirical fact that the vast majority of criminal offenders, especially violent criminal offenders, have been male.² In other words, the traditional preoccupation of theorists, researchers, and criminal justice professionals with male offenders derives from the gender-skewed demographics of criminal behavior.

Recently, however, the combination of the women's rights movement, the rise of feminist scholarship, and the noted increase in female criminality,³ has begun to reverse this long-standing neglect of

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¹ See, e.g., RITA J. SIMON & JEAN LANDIS, *THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE* xv-xx (1991).

² See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 213 (1993) (noting that the relative paucity of female offenders has been a "constant, throughout American history" and that "the more serious the crime, the less likely . . . women commit it").

³ The percentage of females among convicted offenders in U.S. District Courts rose from 7.0% in 1963 to 10.8% in 1979. See ADMIN. OFFICE OF THE U.S. COURTS, *FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS* 1963 10 (1964); ADMIN. OFFICE OF THE

female criminality and inattention to the outcome of decisions involving females in the criminal justice system. And, "a rich and complex literature . . . devoted to the issues of gender and crime" has emerged.⁴ A good deal of this literature examines the treatment of women by key criminal justice decisionmakers, such as police, prosecutors, and judges. One commonly tested hypothesis is that when these decision-makers are free to exercise discretion, they systematically favor female offenders over similarly situated male offenders.⁵ This pattern of gender-based leniency is particularly evident at the *sentencing* phase. Female offenders tend to benefit at sentencing from what many presume to be a benign form of reverse discrimination.⁶

Despite the recency of the "women and crime" literature, it may describe sentencing patterns that no longer exist. Much of the research contained in these works is based on data collected in the 1960s and 1970s. In the 1980s, however, significant efforts were made to reform sentencing systems at both the state and federal levels. These reforms were designed to substantially reduce judicial sentencing discretion, to reduce unwarranted sentencing disparities, and to reduce race, gender, and class discrimination. Moreover, these reforms, at least at the federal level, shifted the focus of sentencing from "offender" characteristics, such as family and community ties, education, and employment, to "offense" characteristics and the offender's criminal history.⁷ If successful, these reforms will reduce the favorable treatment previously afforded female offenders, by increasing both their incarceration rate and the length of their sentences.

One desired effect of these sweeping efforts at sentencing reform was to increase the visibility of policy choices underlying sentencing decisions.⁸ As a result, many issues with potentially significant impact on female offenders, previously obscured by a system of unfettered and unreviewed discretionary sentencing, are now ripe for revisitation and debate. These issues include whether a convicted offender's pregnancy or child care responsibilities should affect the type and

U.S. COURTS, FEDERAL OFFENDERS IN UNITED STATES DISTRICT COURTS 1979 75 (1980). Females represented 16.4% of offenders sentenced under the Federal Sentencing Guidelines in fiscal year 1992. See U.S. SENTENCING COMM'N, ANNUAL REPORT Table 13 (1992).

⁴ SIMON & LANDIS, *supra* note 1, at xv.

⁵ See *infra* notes 9-50.

⁶ See *infra* notes 34-50.

⁷ See *infra* notes 53-73.

⁸ Cf. *United States v. Quintero*, 937 F.2d 95 (2d Cir. 1991) (discussing the use of uncharged conduct in determining the guidelines sentencing range). As the Second Circuit noted: "for all the criticism the guidelines have attracted, one of their virtues is the illumination of practices and policies that were applicable in the pre-guidelines era, but that received less attention when sentences were only a generalized aggregation of various factors, many of which were frequently unarticulated." *Id.* at 97.

length of her sentence; whether courts should consider evidence of psychological coercion that does not rise to the level of a complete defense; and whether courts should consider the offender's emotional condition or the offender's role in the offense. While these issues are relevant to all offenders, some authorities believe that they have more, or at least potentially different, relevance for female offenders. These highly complex policy issues raise difficult questions for feminists, who must balance theories of criminal justice against theories of gender equality. Furthermore, people disagree about how to define gender justice and about how to achieve it.

This article explores some of these issues through an analysis of the impact of *federal* sentencing reform on the sentencing of female offenders. It begins with an examination of the literature analyzing the sentencing of female offenders under the indeterminate, rehabilitative approach which prevailed before the adoption of the Sentencing Reform Act of 1984.⁹

Section I discusses the efforts of Congress and the United States Sentencing Commission, as directed by Congress, to implement facially neutral sentencing guidelines, in order to reduce unwarranted sentencing disparity and eliminate the sentencing impact of extralegal factors such as the offender's race, gender, and socioeconomic status. The implications of the Sentencing Reform Act's goal of gender neutrality are examined in light of the broader debate about "equal treatment" versus "special treatment" that has engaged feminist scholars in other areas of the law.

Section II focuses on several issues in the federal guidelines sentencing scheme that are of special concern to women, because of the potential for a disparate gender-based impact. These issues include pregnancy, single parenthood, coercion, dominance, and the offender's role in the offense.

Finally, Section III contains an empirical review of the sentencing of female offenders under the federal sentencing guidelines. In an effort to assess the impact of guidelines on traditional patterns of lenient treatment of female offenders, this section examines United States Sentencing Commission data on the sentencing patterns for females convicted in any of three offense categories: drug trafficking, embezzlement, and larceny.

I. DIFFERENTIAL SENTENCING OF WOMEN IN THE PRE-GUIDELINES ERA

Throughout much of the twentieth century, society viewed reha-

⁹ Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3673; 28 U.S.C. §§ 991-998).

bilitation as the primary purpose of incarceration.¹⁰ The dominance of the rehabilitative ideal is reflected in Justice Black's majority opinion in *Williams v. New York*,¹¹ in which he explained that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."¹² This focus on rehabilitation required a concomitant emphasis on the *personal characteristics* of the offender: "a prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the *past life and habits of a particular offender*."¹³

Williams reflected the prevailing philosophy not only of the courts, but of criminology experts, and the public as well.¹⁴ The influence of the rehabilitative ideal is evinced by the adoption, throughout this century, of a number of criminal justice reforms designed to replace fixed punishments with more flexible, offender-oriented sentencing.¹⁵

The focus of rehabilitative sentencing is the offender's need for treatment. Those adhering to this approach view the sentence as the instrument of that treatment. Accordingly, they believe that the sentence should promote the offender's rehabilitation, and not merely reflect the nature of the crime committed.¹⁶ This assessment, often analogized to a doctor's diagnosis and treatment of a patient's disease, requires tremendous flexibility for the sentencer to "individualize" the

¹⁰ Rehabilitationism in American penal thought can be traced to the National Congress of Prisons' 1870 Declaration of Principles, which stated that the "supreme aim of prison discipline is the reformation of criminals and not the infliction of vindictive suffering." AMERICAN CORRECTIONAL ASSOCIATION, TRANSACTIONS OF THE NATIONAL CONGRESS OF PRISONS AND REFORMATORY DISCIPLINE (1870). See also *United States v. Grayson*, 438 U.S. 41, 46 (1978).

¹¹ 337 U.S. 241 (1949).

¹² *Id.* at 248.

¹³ *Id.* at 247 (citations omitted) (emphasis added).

¹⁴ See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 5-7 (1981). See also HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 12-13 (1968) (explaining that the "behavioral" view of crime associated with the rehabilitative ideal was so widely accepted by psychiatrists, criminologists, and corrections professionals that it was absorbed by the popular culture).

¹⁵ ALLEN, *supra* note 14, at 6 ("Almost all of the characteristic innovations in criminal justice in this century are reflections of the rehabilitative ideal: the juvenile court, the indeterminate sentence, systems of probation and parole, the youth authority, and the promise (if not the reality) of therapeutic programs in prisons, juvenile institutions, and mental hospitals."). For example, by the 1960s, every state in the nation had some form of indeterminate sentencing. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 894 (1990).

¹⁶ ANDREW VON HIRSCH, *DOING JUSTICE* 12 (1976).

sentence to best promote the offender's rehabilitation. As Justice Black explained: "[h]ighly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the *fullest information possible concerning the defendant's life and characteristics*."¹⁷

The discretionary nature of this sentencing system led to the emergence of unwarranted disparities in the sentencing of offenders convicted of similar offenses, and possessing similar criminal histories. This disparity arose largely because of differences in judicial values, attitudes, and sentencing philosophy. As Willard Gaylin concluded:

each [judge] has a point of view, a set of standards and values, a bias, if you will, which will color, influence, and direct the nature of his verdicts independently of the specific condition of the criminal being charged. . . .

. . . .

These sets of values constitute bias in a non-pejorative sense—but bias nonetheless, and a bias that will influence equity and fairness in exactly the same way as naked bigotry does.¹⁸

Further, the lack of standards governing judges' sentencing decisions created a risk that they would be inappropriately influenced by offender attributes such as race, gender, age, and socioeconomic status.¹⁹ The impact of these extralegal factors on sentencing generated considerable interest in the 1970s and 1980s.²⁰ While race bias generated the most research, some empirical analyses focused on questions of gender. Research examined whether courts treated female offenders differently than male offenders at the sentencing stage and whether those differences reflected different criminal conduct by males and females, or a preference for leniency toward women which was unrelated to the offense.²¹ The results consistently revealed that adult female offenders receive more favorable sentences than *similarly situated* male offenders.²²

¹⁷ *Williams*, 337 U.S. at 247 (emphasis added).

¹⁸ WILLARD GAYLIN, *PARTIAL JUSTICE* 162-65 (1974). See also S. REP. NO. 225, 98th Cong., 1st Sess. 41 & n.18 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3224 (citing evidence that federal judges disagree about the purposes of sentencing and noting that this disagreement is a cause of sentencing disparity).

¹⁹ See John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC'Y REV. 357, 358 (1974). See also Ilene H. Nagel, *The Legal/Extra-Legal Controversy: Judicial Decisions in Pretrial Release*, 17 LAW & SOC'Y REV. 481 (1983).

²⁰ See Hagan, *supra* note 19, at 358; Nagel, *supra* note 19, at 481.

²¹ See *infra* notes 23-50.

²² Thus, Rita Simon and Jean Landis concluded in a 1991 review of studies on gender and sentencing:

Most observers feel that women receive preferential treatment, which in operational terms means that they are less likely than men to be convicted for the same type of offense; if they are convicted, they are less likely to be sentenced [to prison]; and if they are sentenced, they are likely to receive milder sentences.

SIMON & LANDIS, *supra* note 1, at 57.

This preferential treatment is most pronounced with respect to the decision of whether or not to incarcerate the offender. Women are more likely than similarly situated men to receive suspended sentences or probation. However, there is less disparity in the term of incarceration, particularly for serious offenses involving lengthy sentences.²³

This pattern is subject to some caveats. Commentators have criticized studies reporting a gender impact in sentencing. Some have pointed to the methodological limitations, such as the failure to control adequately for offense seriousness and prior record;²⁴ others have noted that the small number of cases and offenses analyzed in those studies limit available analytic techniques, as well as the generalizability of the findings.²⁵ Moreover, studies of gender and sentencing have not been unanimous in finding statistically significant differences between sentences for male and female offenders.²⁶

Despite these criticisms, an impressive number of methodologically sound, multivariate studies report that women offenders receive preferential treatment.²⁷ For example, in a study of sentences meted out to 6562 offenders convicted in ten federal district courts, Hagan, Nagel, and Albonetti found that gender affects sentence severity in white collar cases, even after controlling for variables such as the offender's prior record, the number and severity of the charged offenses, the type of offense, and the defendant's age, ethnicity, education, and physical health.²⁸ In a subsequent study, Hagan, Nagel, and Albonetti analyzed the sentences of 1239 defendants convicted in the state of New York. They controlled for prior record, of-

²³ See, e.g., Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 91, 129 (Michael Tonry & Norval Morris eds., 1983).

²⁴ See, e.g., Darrell J. Steffensmeier, *Assessing the Impact of the Women's Movement on Sex-Based Differences in the Handling of Adult Criminal Defendants*, 26 CRIME & DELINQ. 344, 346 (1980) (suggesting that apparent link between sentencing outcomes and gender may be an artifact of inadequate control for offense seriousness and prior record).

²⁵ *Id.* at 344-49.

²⁶ See, e.g., Candace Kruttschnitt & Donald E. Green, *The Sex Sanctioning Issue: Is it History?*, 49 AM. SOC. REV. 541, 550 (1984). See also William Wilbanks, *Are Female Felons Treated More Leniently by the Criminal Justice System?*, 3 JUST. Q. 516, 521-28 (1986); Hagan, *supra* note 19, at 375 (finding effect of gender on sentencing to be negligible).

²⁷ See, e.g., William M. Rhodes, *A Study of Sentencing in Hennepin County and Ramsey County District Courts*, 6 J. LEGAL STUD. 333, 350 (1977); John Hagan et al., *Ceremonial Justice: Crime and Punishment in a Loosely Coupled System*, 58 SOC. FORCES 506 (1979); Ilene H. Nagel et al., *Sex Differences in the Processing of Criminal Defendants*, in 1 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 259, 266-69 (D. Kelly Weisberg ed., 1982); John Hagan et al., *The Differential Sentencing of White Collar Offenders in Ten Federal District Courts*, 45 AM. SOC. REV. 802, 811-15 (1980) [hereinafter Hagan et al., *White Collar Offenders*].

²⁸ See Hagan et al., *White Collar Offenders*, *supra* note 27, at 811-15.

fense characteristics, and offender characteristics such as race, age, and employment, and found that females were treated preferentially at sentencing.²⁹

These quantitative analyses are consistent with the findings derived from qualitative data collected through interviews with judges, in which many acknowledged treating female offenders preferentially. Simon and Landis cite a 1973 study of twenty-three judges in large midwestern cities, in which more than half said that “‘they do treat women more leniently and more gently than they do men; that they are more inclined to recommend probation rather than imprisonment; and if they sentence a woman, it is usually for a shorter time than if the crime had been committed by a man.’”³⁰ Simon and Landis also cite a 1988 study, in which twelve judges in the Washington D.C. area discussed the sentencing of women. Eleven of them reported that “they ‘tended to treat women more gently than they do men.’”³¹

In 1983, Professors Ilene Nagel and John Hagan reviewed the existing empirical literature and found that the bulk of research on gender and crime—drawn from a variety of both state and federal courts, and using a variety of methodological techniques—supported the preferential treatment hypothesis.³² More recent analyses of the literature reach the same conclusion.³³

Thus, a reading of the extant empirical literature on gender and sentencing compels the conclusion that gender has had a significant impact on sentencing outcomes. While the effect of the gender variable is sometimes small relative to other factors, such as offense severity and the offender’s prior criminal record, it is, as Nagel and Hagan

²⁹ See Nagel et al., *supra* note 27, at 272-73.

³⁰ SIMON & LANDIS, *supra* note 1, at 59 (quoting Debra Anthony, *Judges’ Perceptions of Women Offenders and Their Own Actions Toward Women Offenders* (1973) (unpublished Master’s Thesis, University of Illinois)).

³¹ *Id.* at 62 (citing Angela Musolino, *Judge’s Attitudes Toward Female Offenders*, at 15 (1988) (unpublished manuscript)).

³² As Nagel and Hagan concluded: “[c]learly, the research on sentencing produces the strongest evidence for the thesis that gender does affect court outcome decisions and that women receive preferential treatment.” Nagel & Hagan, *supra* note 23, at 134.

³³ See Darrell Steffensmeier et al., *Gender and Imprisonment Decisions*, 31 *CRIMINOLOGY* 411 (1993). Their literature review reveals that

a fairly persistent finding has been that adult female defendants are treated more leniently than adult male defendants. . . . [T]he studies substantiate the widely held belief that female defendants receive more lenient treatment (apparently) because of judicial paternalism, the social costs to children and families of sending women to prison, or the view that female defendants are less dangerous and more amenable to rehabilitation than male defendants.

Id. at 411-12. Steffensmeier et al., note, however, that some of these studies have significant methodological weaknesses. *Id.* at 413-16.

noted, "demonstrably present."³⁴

The question of why women receive preferential treatment in criminal sentencing is an intriguing one. When the pattern was first recognized, in the late 1970s and early 1980s, much of the sociological literature focused on the chivalry/paternalism thesis.³⁵ Although chivalry and paternalism are not consistently and precisely defined,³⁶ these concepts refer generally to a protective attitude toward women, linked to gender stereotypes of women as (1) weaker and more passive than men, and therefore not proper subjects for imprisonment; and (2) more submissive and dependent than men, and therefore less responsible for their crimes.³⁷ Judges also apparently regarded women as more easily manipulable than men, and hence more amenable to rehabilitative efforts.³⁸ The chivalry/paternalism thesis is consistent with the Anthony and Musolino judge interview studies, in which many judges voiced chivalrous attitudes toward women. For example, one judge in the Musolino study observed: "I don't think there's any rational or objective thought about it, but there's a feeling that incarceration for a woman is far more degrading than for a man, and you'll never see them (women) back because they'll do everything they can to keep from going back."³⁹

Research shows, however, that judges are selectively chivalrous. Empirical evidence indicates that minority women are (or at least have been, in the recent past) treated more harshly by the criminal justice system than white offenders.⁴⁰ Further, studies suggest that law enforcement officials reserve chivalrous treatment for middle and upper class women who conform to gender stereotypes.⁴¹ The selec-

³⁴ Nagel & Hagan, *supra* note 23, at 134.

³⁵ See, e.g., SIMON & LANDIS, *supra* note 1, at 11 (a "theme running through much of the women and crime literature in the past fifteen years has been the issue of chivalry").

³⁶ See Kathleen Daly, *Structure and Practice of a Familial-Based Justice in a Criminal Court*, 21 LAW & SOC'Y REV. 267, 268 n.2 (1987).

³⁷ See Steffensmeier, *supra* note 24, at 350-51.

³⁸ *Id.* at 351-52.

³⁹ SIMON & LANDIS, *supra* note 1, at 62 (citing Angela Musolino, Judge's Attitudes Toward Female Offenders, at 16 (1988) (unpublished manuscript)).

⁴⁰ See Cassia Spohn et al., *Women Defendants in Court: The Interaction Between Sex and Race in Convicting and Sentencing*, 66 SOC. SCI. Q. 178, 182 (1985).

⁴¹ See Christy A. Visher, *Gender, Police Arrest Decisions, and Notions of Chivalry*, 21 CRIMINOLOGY 5, 22-23 (1983), who found that

[i]n encounters with police officers, those female suspects who violate[d] typical middle-class standards of traditional female characteristics and behaviors (*i.e.*, white, older and submissive) are not afforded any chivalrous treatment during arrest decisions. In these data, young, black, or hostile women receive no preferential treatment, whereas older, white women who are calm and deferential toward the police are granted leniency.

See also CLARICE FEINMAN, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM* 28 (2d ed. 1986) ("Chivalry is reserved for white middle- and upper-class women, except those who flout culturally

tive application of chivalrous treatment may exacerbate racial and socioeconomic sentencing disparities.

Although some early researchers did not view the preferential treatment of women as especially troubling,⁴² Elizabeth F. Moulds argued convincingly that this benign view of preferential sentencing was misguided.⁴³ Moulds analyzed the conceptual distinctions between chivalry and paternalism, pointing out that notions of paternalism imply a power relationship analogous to that between parent and child. Paternalism equates women with children, viewing them as incapable of assessing information and making responsible decisions, and thus less culpable for their criminal behavior. The negative social implications of this paternalistic attitude are obvious. Moulds notes that:

It is important to be wary of a society which permits paternalism to color the perceptions of those who make and enforce the law. Those perceptions profoundly affect behavior of those in power and the behavior of those paternalized in a manner that is inconsistent with the operation of a democratic state. A basic denial of self-determination is what is taking place.⁴⁴

Thus, stereotyping associated with paternalism negatively impacts women and should not be assumed to be benign simply because it results in leniency in a specific context. In fact, such stereotypes can harm female offenders in more direct ways. Nagel and Hagan found empirical support for a corollary to the chivalry/paternalism thesis—the “evil woman” thesis—which hypothesizes that women whose criminal behavior violates sex-stereotypical assumptions about the proper role of women are treated *more* harshly than their male counterparts.⁴⁵ For example, studies have shown that women are sentenced to longer terms than men for such gender role-defying offenses as child abandonment and assault.⁴⁶ In other words, not only do certain types of female offenders fail to benefit from paternalistic treatment, they are actually subject to heightened punishment for their choice of an “unladylike” offense.

The chivalry thesis is not universally accepted as the explanation for gender differences in sentencing. Some authors attribute these differences to a concern for the parental role of female offenders and

expected behavior for ladies.”).

⁴² Nagel & Hagan, *supra* note 23, at 114.

⁴³ Elizabeth F. Moulds, *Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System*, in WOMEN, CRIME, AND JUSTICE 277, 283 (Susan K. Datesman & Frank R. Scarpitti eds., 1980).

⁴⁴ *Id.* at 282.

⁴⁵ See Nagel & Hagan, *supra* note 23, at 135-36.

⁴⁶ See Matthew Zingraff & Randall Thomson, *Differential Sentencing of Women and Men in the U.S.A.*, 12 INT'L J. SOC. LAW 401, 410 (1984).

the family disruption that judges assume would result from their incarceration.⁴⁷ For example, Kathleen Daly's interviews of judges, attorneys, and probation officers revealed that familial defendants of both sexes are treated more leniently than their non-familial counterparts; however, she also reported that familial women are treated more leniently than familial men.⁴⁸ Daly attributed this disparity to the fact that judges attach more importance to the predominantly female role of care-giving than to the predominantly male role of bread-winning.⁴⁹ She concluded that much of the lenient treatment afforded women is probably related to their role as primary caretakers of children.

Despite the difference in focus, most observers conclude that chivalry or paternalism plays some role in explaining the more lenient treatment of female offenders reported in the empirical literature.⁵⁰ The next section attempts to reconcile this pattern of preferential treatment in sentencing with the value feminists attach to equality of treatment in a wide variety of social and legal contexts. As noted, the normative implications of paternalistic, lenient treatment are potentially troubling from a feminist perspective.⁵¹ While paternalism results in some female offenders spending less time in prison, it also reflects damaging stereotypes of female weakness, as well as a fundamental denial of the status of female offenders as responsible moral agents. Moreover, even to the extent that differential treatment reflects perceived differences in parental roles, rather than broader notions of paternalism, such treatment is potentially damaging in that it ratifies traditional gender roles and stereotypes about the child care responsibilities of women.

II. GENDER "NEUTRALITY" AND FEMINIST DILEMMAS IN A GUIDELINES WORLD

Most of the data discussed in the previous section was collected at a time when rehabilitation was the principal purpose of sentencing,

⁴⁷ See Kathleen Daly, *Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing*, 3 GENDER & SOC'Y 9 (1989); Daly, *supra* note 36, at 282-84; Candace Kruttschnitt, *Sex and Criminal Court Dispositions: The Unresolved Controversy* 21 RES. CRIME & DELINQ. 213, 224-27 (1984).

⁴⁸ Daly, *supra* note 36, at 282-83.

⁴⁹ *Id.*

⁵⁰ Indeed, even Daly, who concluded that family concerns motivate much of the lenient treatment of women, acknowledged that the judicial decisionmaking in her study was "not completely devoid of female paternalism." *Id.* at 283. Moreover, the majority of probation officers and attorneys in her study believed that judicial leniency was based on paternalism. *Id.*

⁵¹ It is troubling from more traditional perspectives as well. See *infra* notes 74-86 and accompanying text.

and judges enjoyed substantial latitude in administering their sentences.⁵² It is not clear, however, that the patterns reported are replicated in today's criminal justice system. As stated, substantial reforms designed specifically to reduce sentencing discretion, such as the Sentencing Reform Act of 1984 and the ensuing federal Sentencing Guidelines, have restricted judicial discretion and shifted the focus of sentencing away from the personal characteristics of the offender to the circumstances of the offense.⁵³ This section discusses the Sentencing Reform Act's emphasis on gender neutral sentencing and the implications of this neutrality for the just sentencing of female offenders.

A. NEUTRALITY AND THE GUIDELINES SCHEME

The Sentencing Reform Act embodies Congress' rejection of traditional penal rehabilitationism. The Act: (1) abolishes parole and adopts a determinate, "real time" sentencing scheme;⁵⁴ and (2) structures and narrows judicial sentencing discretion through the creation of a single administrative agency—the United States Sentencing Commission—empowered to promulgate presumptively binding sentencing guidelines.⁵⁵ The Act's legislative history clearly establishes that Congress' "primary goal" in undertaking sentencing reform was the elimination of unwarranted sentencing disparity.⁵⁶ Advocates of sentencing reform repeatedly emphasized the unfairness of the fact that offenders convicted of the same crime and possessing similar criminal histories, received vastly different sentences.⁵⁷ Moreover, Congress was especially sensitive to the need to reduce disparities associated with such factors as the defendant's race, gender, and socioeconomic status. Thus, Congress instructed the Commission to "assure that the guidelines and policy statements are *entirely neutral* as to the race, sex, national origin, creed, and socioeconomic status of offenders."⁵⁸ Furthermore, Congress instructed the Commission to de-emphasize the traditional "individualizing" factors which predominated in rehabilitative sentencing—*e.g.*, family and community ties, occupation, and education—as part of the overall mandate to shift from a rehabilitative sentencing system focused on the *offender* to a system emphasizing the

⁵² See, *e.g.*, Steffensmeier et al., *supra* note 33, at 413.

⁵³ See, *e.g.*, *infra* notes 53-73 and accompanying text.

⁵⁴ See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

⁵⁵ *Id.* at 4-5.

⁵⁶ S. REP. NO. 225, *supra* note 18, at 52, *reprinted in* 1984 U.S.C.C.A.N. at 3225.

⁵⁷ See, *e.g.*, Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 AM. CRIM. L. REV. 353, 353-54 (1979).

⁵⁸ 28 U.S.C. § 994(d) (1988) (emphasis added).

seriousness of the offense.⁵⁹

Rather than articulating a single purpose of sentencing, Congress chose an amalgam of goals it wanted the Sentencing Reform Act to meet.⁶⁰ It is clear, however, that the dual purposes of "just punishment" for the offense and "crime control," are of primary importance.⁶¹ The principal evil Congress sought to remedy—unwarranted sentencing disparity⁶²—implicitly rests on notions of deserved or "just" punishment.⁶³

Crime control concerns—deterrence and incapacitation of offenders—were also important to Congress.⁶⁴ Indeed, the Sentencing Reform Act is merely one aspect of Congress' rejection of indeterminate, rehabilitation-based sentencing in favor of a sentencing philosophy emphasizing punishment and crime control. Throughout the 1980s Congress increasingly adopted mandatory minimum sentencing schemes, which *completely* eliminate the consideration of the individual offender characteristics that were the staple of traditional rehabilitative sentencing. Instead, single offense characteristics are the bases for imposing punishment and controlling crime.⁶⁵

⁵⁹ See, e.g., Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 250-51, 284 (1993) (language and legislative history of the Act demonstrate Congress' skepticism about the appropriateness of considering the offender's personal characteristics in sentencing); Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293 (1986) (Congress' instructions "have led the Commission to concentrate more on the nature and extent of the injury or harm resulting from the defendant's acts than on . . . the defendant's character and mental processes.").

See also *United States v. Vela*, 927 F.2d 197, 199 (5th Cir.), *cert. denied*, 112 S. Ct. 214 (1991) ("One of the primary goals of the Sentencing Guidelines is to impose a sentence based on the crime, not the offender."); *United States v. McHan*, 920 F.2d 244, 247 (4th Cir. 1990) ("One of Congress' primary purposes in establishing the Guidelines was to reduce sentencing disparities and to rest sentences upon the offense committed, not upon the offender.").

⁶⁰ See 18 U.S.C. § 3553(a)(2) (1988) (instructing courts to consider all four traditional purposes of sentencing—just punishment, deterrence, incapacitation, and rehabilitation). See also S. REP. NO. 225, *supra* note 18, at 67-68, *reprinted in* 1984 U.S.C.C.A.N. at 3250-51 (explaining that the Act generally does not explicitly "favor[] one purpose of sentencing over another").

⁶¹ See, e.g., Steven P. Lab, *Potential Deterrent Effects of the Guidelines*, in *THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE* 32, 32-33 (Dean J. Champion ed., 1989).

⁶² See S. REP. NO. 225, *supra* note 18, at 52, *reprinted in* 1984 U.S.C.C.A.N. at 3235 ("A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.").

⁶³ See, e.g., VON HIRSCH, *supra* note 16.

⁶⁴ See Nagel, *supra* note 15, at 916.

⁶⁵ According to Senator Phil Gramm who is a longtime supporter of mandatory minimum sentences, Congress passed mandatory minimums to accomplish the dual grounds of incapacitating hardened criminals and giving them their just punishment. Phil Gramm, *Mandatory Minimums for Sentencing?*, WASHINGTON TIMES, October 18, 1993, at B4.

Consistent with the statutory mandate, the Commission promulgated guidelines embodying the dual purposes of "just punishment" and "crime control." The guidelines establish sentencing ranges based on the offense, the presence of certain enumerated aggravating and mitigating factors related to the offense, and the offender's criminal history. Other potentially aggravating or mitigating circumstances may allow judges to depart from the guidelines' range, but *only* if they involve factors "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" and demand a sentence outside the guidelines' range.⁶⁶ Further, these departures are subject to appellate review.⁶⁷

In addition to the sentencing guidelines submitted to Congress, the Commission promulgated a series of policy statements which provide that an offender's age, physical condition, mental or emotional condition, and family and community ties are not *ordinarily* relevant in decisions to depart from the guidelines.⁶⁸ The Commission chose the words "not ordinarily relevant" to make it clear that these factors may be relevant only in extraordinary cases.⁶⁹ In marked contrast, gender, like race, national origin, creed, and socioeconomic status, is *never* relevant.⁷⁰

Finally, the guidelines emphasize offense characteristics and culpability factors such as the offender's role in the offense, the level of planning involved in the offense, and whether a weapon was used. This focus is consistent with the goal of "just punishment" for the offense.

The Commission sought to incorporate crime control considerations through provisions requiring sentences at or near the statutory maximum for repeat, violent offenders.⁷¹ The importance of deterrence is evident in the Commission's decision (at Congress' urging) to impose incarcerative sentences for white collar crimes,⁷² which many have argued are more easily deterred than typical street crimes.

⁶⁶ 18 U.S.C. § 3553(b) (1988).

⁶⁷ 18 U.S.C. § 3742 (1988).

⁶⁸ See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL §§ 5H1.1 (age), 5H1.2 (education and vocational skills), 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition), 5H1.5 (employment), and 5H1.6 (family and community ties) (Nov. 1993) [hereinafter U.S.S.G.].

⁶⁹ See U.S.S.G. Ch. 1, Pt.A, intro. comment., at 5-6.

⁷⁰ See U.S.S.G. § 5H1.10.

⁷¹ See U.S.S.G. §§ 4B1.1 (Career Offender), 4B1.4 (Armed Career Criminal).

⁷² This also reflected, in part, desert-based concerns that white collar criminals were receiving more lenient sentences than property offenders of lower socioeconomic status. See S. REP. NO. 225, *supra* note 18, at 77, *reprinted in* 1984 U.S.C.C.A.N. at 3260 ("[S]ome major offenders, particularly white collar offenders and serious violent crime offenders, frequently do not receive sentences that reflect the seriousness of their offenses.").

In short, the 1980s marked a period of increased concern for more equal treatment of similarly situated offenders. Reflecting this concern, the Sentencing Reform Act and the resulting sentencing guidelines embody aspirations of gender-neutral sentencing. One potential consequence of this neutrality, however, is the elimination, or at least reduction, of the traditional leniency afforded female offenders described in section I, above. It is unclear whether Congress specifically intended this result. While Congress was clear in its prescription of gender neutrality, the legislative history contains no discussion of the potential consequences of this neutrality for the overall severity of the sentences of female offenders. As more women are subject to this facially gender-neutral system, the question increasingly asked is whether strict gender neutrality is desirable in the sentencing context.⁷³ It is here that those favoring leniency come into conflict with those who, for the sake of feminist equality, are willing to forego leniency if it derives from inappropriate values or from gender stereotypes. The next section examines this tension between formal equality and leniency.

B. THE FEMINIST DILEMMA: EQUAL TREATMENT V. SPECIAL TREATMENT OF FEMALE OFFENDERS

Feminist legal theorists have vigorously debated whether to advocate formal, legal equality with men, or to support special treatment, recognizing pertinent gender differences. Advocates of an "equal treatment" approach recognize that although men and women differ in many important respects (especially with respect to reproduction), special treatment of women entails significant risks, because the laws meant to protect women have oppressed them.⁷⁴ As one commentator noted: "[e]xperience with protective-labor legislation, preferential-welfare statutes, child-custody presumptions, and maternity policies makes clear that 'benign discrimination' is a mixed blessing."⁷⁵ The early wave of feminist litigators, such as Supreme Court Justice Ruth Bader Ginsburg, successfully emphasized formal, legal, equal treatment in their efforts to break down the gender-based classifications

⁷³ See, e.g., Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993).

⁷⁴ See, e.g., Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196-200 (1982).

⁷⁵ DEBORAH L. RHODE, JUSTICE AND GENDER 319 (1989). See also Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 363 n.144 (1984-85) ("The history of governmental regulation and private practice with respect to femaleness, female sexuality and female reproductive capacity justifies treating such classifications as suspect.").

which acted as barriers to women's participation in social and economic institutions.⁷⁶

In contrast to the equal treatment model, special treatment models of gender equality emphasize the cultural and biological differences between men and women and advocate the need for special protection of women's interests based on those differences.⁷⁷ Elizabeth Wolgast, one proponent of special rights, contends that women cannot be men's "equals" because equality requires sameness. Instead, she suggests seeking "justice," which in her view requires special treatment of women in light of their special circumstances.⁷⁸

Ultimately, both "equal treatment" and "special treatment" models provide valuable insights into the public policy debate about the role of gender in sentencing. However, a monolithic approach to accounting for gender is insufficiently sensitive to the contexts in which gender equity is evaluated. That is, whether equal treatment or special treatment is appropriate depends largely on the specific legal issues and underlying factual circumstances involved.⁷⁹ In addressing the issue of pregnancy in the employment context, Wendy Williams makes a similar point:

The question is not *whether* pregnancy is different (it is, of course—it has

⁷⁶ See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

⁷⁷ See, e.g., Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); ELIZABETH H. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 14-15 (1980).

⁷⁸ WOLGAST, *supra* note 77, at 14-15. "Equal treatment" and "special treatment" are, as Littleton explains, rather inapt terms, in that both strive for more equitable treatment of women. In that sense, the "special" treatment is designed to be equalizing at some level. Littleton, *supra* note 77, at 1286-87. Moreover, the equal/special treatment dichotomy fails to capture the nuances and complexity of the approaches to gender equity appearing in the literature. There have emerged a number of variations of these approaches, which are catalogued by Littleton. These variations include "accommodationist" approaches, which call for equal treatment except in certain defined circumstances. Littleton, *supra* note 77, at 1297. See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007-13 (1984) (calling for equal treatment except with respect to reproduction, where biology demands differential treatment); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 27-37 (1985) (calling for equal treatment except for the duration of a woman's pregnancy). Littleton herself advocates an "acceptance" approach, which she categorizes as a type of special treatment approach. Under this approach, the "function of equality is to make gender differences, perceived or actual, costless relative to each other." Littleton, *supra* note 77, at 1297.

In practice, the differences among these approaches are relatively subtle. All, including the equal treatment approach, acknowledge the need to account for gender differences, but place varying emphasis on the presumption of formal, legal neutrality, and differ on the circumstances under which the law should recognize gender differences to foster more equitable treatment of women.

⁷⁹ Also, the value one attaches to leniency influences whether equal treatment or special treatment is appropriate. See *supra* notes 74-77.

its own specific physical manifestations, course of development, risks, and a different, usually desirable and certainly life altering outcome), but *how* it is different. . . . The focus of the pregnancy debate, as with men and women or blacks and whites, should be on *whether the differences should be deemed relevant in the context of particular employment rules*.⁸⁰

Similarly, broader questions of gender equity turn on whether differences between men and women are pertinent in the context of the particular legal and policy issues addressed. The values underlying criminal sentencing suggest that it is an area in which the need for formal gender neutrality has special resonance.

Divergence from principles of equal treatment is potentially inconsistent with deeply held notions of fairness in a broad range of contexts. As Justice Scalia has remarked:

As a motivating force of the human spirit, that value [the appearance of equal treatment] cannot be overestimated. Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions—no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.⁸¹

This fundamental appeal of equal treatment is heightened by the special characteristics of criminal punishment.

Criminal punishment is distinctive in the law because of its condemnatory character. Unlike other legal sanctions (*e.g.*, for breach of contract), criminal sentencing imparts blame on the offender.⁸² The extent of reprobation is represented, in part, by the severity of the punishment imposed. Punishing offenders to a degree inconsistent with the nature of their crimes and the level of their culpability is unjust, because it imparts more or less blame than the offender deserves.⁸³ And sentencing offenders found guilty of identical crimes to vastly different terms of imprisonment seems inconsistent with common-sense notions of justice.

Moreover, the injustice of unequal treatment in sentencing is highlighted by the stakes involved. Criminal sentencing, which involves drastic deprivations of freedom and associated moral stigma, affects fundamental liberty interests. Congress recognized that the very legitimacy of the criminal justice system is at risk if the appearance of equal treatment is breached.⁸⁴

⁸⁰ Williams, *supra* note 75, at 357 (second emphasis added).

⁸¹ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

⁸² See, *e.g.*, Joel Feinberg, *The Expressive Function of Punishment*, in SENTENCING 23, 24-26 (Hyman Gross & Andrew von Hirsch eds., 1981).

⁸³ See VON HIRSCH, *supra* note 16, at 71-73.

⁸⁴ See, *e.g.*, S. REP. NO. 225, *supra* note 18, at 46, *reprinted in* 1984 U.S.C.A.N. at 3229

Special treatment of women in sentencing potentially undermines the strong principles of justice and equity that animate contemporary notions of blameworthiness and proportionality. Moreover, a special treatment approach to criminal sentencing should trouble feminists, because it perpetuates damaging stereotypes of female weakness, implying a moral inferiority that undermines claims to full citizenship and even personhood.⁸⁵ The blameworthiness that supports notions of proportional punishment implies a recognition of the full moral agency of the offender.⁸⁶ Society believes that it is inappropriate to punish the very young or the insane, because, unlike responsible adults, they cannot be expected to conform their behavior to the norms of the law. Only those fully capable of understanding criminal norms and conforming their behavior to those norms are fit subjects for punishment. Thus, when women are granted special treatment, they are reduced to the moral status of infants.

In short, formal equal treatment under the criminal justice system, and questions of the allocation of criminal sentences, touch on fundamental notions of moral autonomy in a way that questions of formal equal treatment in employment rules or insurance benefits do not. In the context of criminal sentencing, those who advocate special treatment of any particular group, or ostensibly neutral rules designed to benefit a particular group, bear the burden of justifying departure from the traditionally accepted norms governing allocation of criminal sentences. With this general approach in mind, the next section considers some of the particularly difficult issues posed by the sentencing of female offenders under the federal guidelines scheme.

C. FEMALE OFFENDERS AND THE GUIDELINES SCHEME: ISSUES OF SPECIAL CONCERN

1. *Pregnancy*

One especially difficult sentencing issue posed by female offenders is how pregnancy is to be taken into account at sentencing. The guidelines do not specifically mention pregnancy. In the leading appellate case on the issue, *United States v. Pozzy*,⁸⁷ the First Circuit held that pregnancy is *not* an appropriate basis for downward departure from the applicable guidelines range. In the absence of any specific

("Sentences . . . disproportionate to the seriousness of the offense create a disrespect for the law.").

⁸⁵ Cf. Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC'Y REV. 367, 368 (1991).

⁸⁶ See, e.g., Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character and Responsibility*, 67 IND. L.J. 719, 740 (1992).

⁸⁷ 902 F.2d 133, 138-39 (1st Cir.), *cert. denied*, 498 U.S. 943 (1990).

guidance on the pregnancy issue, the Court looked to § 5H1.4 of the guidelines, which provides that a defendant's physical impairment is a basis for departure only in extraordinary cases. The court concluded that the language of this section, in light of the Commission's silence on pregnancy, established that the Commission rejected pregnancy as an independent basis for departure.⁸⁸ The court also noted that pregnancy "is neither atypical nor unusual," and hence not extraordinary for purposes of § 5H1.4.⁸⁹ Finally, the Court expressed concern that a downward departure for pregnancy might encourage female offenders to become pregnant in order to influence sentencing outcomes.⁹⁰

The Commission has taken no steps, since *Pozzy*, to reassess the guidelines' silence on the question of pregnancy. Thus, the guidelines' approach to pregnancy remains one of formal neutrality. The question is, of course, whether such an approach is appropriate in light of the gendered effects of pregnancy.

Equal treatment of men and women in light of the biological and social realities of pregnancy has been a vexing issue for courts, legislatures, and theorists.⁹¹ In *Michael M. v. Superior Court*,⁹² the Supreme

⁸⁸ *Id.* at 139. ("We think the Commission was fully aware that some convicted felons are pregnant at the time of sentencing. If it had thought that pregnancy was a sentencing factor to be considered, the Commission would have said so.")

Commentators have criticized the court for construing the Commission's silence as an implicit rejection of pregnancy. See Raeder, *supra* note 73, at 947. Nevertheless, the First Circuit's conclusion about the Commission's views was accurate.

⁸⁹ *Pozzy*, 902 F.2d at 139.

⁹⁰ *Id.* The court explained:

It must also be noted that defendant became pregnant after she and her husband were arrested and charged with drug trafficking. We agree . . . "that to allow a departure downward for pregnancy could set a precedent that would have dangerous consequences in the future, sending an obvious message to all female defendants that pregnancy 'is a way out.'"

Id. at 139.

While the use of pregnancy to thwart criminal justice aims might strike some as far-fetched, experience suggests otherwise. In the course of its deliberations over the pregnancy issue, the Commission was presented with informal testimony that a well-established pattern of sentencing leniency for pregnant offenders in some states had prompted drug dealers to actively recruit poor, pregnant women as drug couriers. See also *United States v. Arize*, 792 F. Supp. 920, 921 (E.D.N.Y. 1992) (acknowledging risks in granting downward departures from the guidelines for pregnant drug couriers because "[t]he general deterrence effect of punishment would be reduced if drug couriers were routinely sentenced leniently").

⁹¹ For example, the Supreme Court struggled with the issues of pregnancy and gender discrimination in the context of employment benefits in the landmark discrimination cases of *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). These cases and others dealing with pregnancy stimulated extensive academic commentary, much of which was critical of the Court's analysis. See, e.g., Kay, *supra* note 78, at 30-31; Law, *supra* note 78; Littleton, *supra* note 77, at 1305-06, 1326-30; Williams, *supra* note 74.

⁹² 450 U.S. 464 (1981). In *Michael M.*, the Court upheld California statutory rape legis-

Court recognized, in the context of statutory rape, the permissibility of treating women and men in a facially unequal manner to account for the possibility of pregnancy. Whether such special treatment of convicted pregnant offenders is good policy in the context of criminal sentencing remains unclear. The Court's ruling in *Michael M.* provides no guidance on this issue.

While a pregnant offender and a non-pregnant offender (male or female) clearly are not similarly situated, it does not necessarily follow that this is a difference relevant for sentencing purposes. Pregnancy does not appear to relate to the sentencing purposes highlighted by the Sentencing Reform Act. It is difficult to imagine a case in which the defendant's status as a mother-to-be is relevant to an objective assessment of the seriousness of her offense or to her culpability for that offense. In this sense, pregnancy has no bearing on the determination of the deserved punishment for the offense. Nor is special, more lenient treatment of pregnant offenders justifiable on the basis of crime control considerations. Unlike certain other physical conditions which may warrant downward departure from the applicable guidelines sentence,⁹³ pregnancy is not incapacitating in the sense that it does not restrict the individual's ability to commit additional offenses. The pregnant offender is free to engage in criminal activity throughout most of her pregnancy, as well as after completion of her pregnancy. Moreover, downward departures on the basis of pregnancy might have a marginally negative impact on general deterrence.⁹⁴

To the extent that sentence mitigation for pregnancy is justified, it must be justified on the basis of exogenous utilitarian considerations, such as the physical well-being of the offender or her baby. However, barring unusual circumstances, it is difficult to make a penological case for leniency on the basis of pregnancy. From a purely medical standpoint, pregnancy is analogous to a number of physical conditions suffered by inmates, male and female. The Commission has taken the view that such physical impairments can be accommodated by the Bureau of Prisons and should not interfere with the ser-

lation that imposed penalties on males convicted of having sexual intercourse with underage females, but left unpunished female intercourse with underage males. It noted that the differential treatment of males and females served the statute's purpose of preventing teenage pregnancy. *Id.* at 474 n.10.

⁹³ See, e.g., *United States v. Maltese*, No. 90 CR 87-19, 1993 U.S. Dist. LEXIS 8403 (N.D. Ill. June 18, 1993) (downward departure under § 5H1.4 based on the defendant's liver cancer); *United States v. Velasquez*, 762 F. Supp. 39 (E.D.N.Y. 1991) (downward departure based on defendant's cancer).

⁹⁴ See *Arize*, 792 F. Supp. at 921 (recognizing potential reduction in general deterrence if lenient treatment of pregnant drug couriers became routine).

vice of an appropriate term of imprisonment.⁹⁵ A contrary approach would risk diminishing the import of the criminal sanction and would result in disparate treatment of offenders convicted of similar crimes. Moreover, because pregnancy is a temporary condition, a sentencing judge may delay sentencing in order to permit birth to be completed before the defendant serves her sentence, thereby obviating the need to impose a lesser sentence to account for the offender's pregnancy.⁹⁶

Thus, pregnancy poses no insurmountable obstacle to service of a sentence warranted by traditional penological purposes. Special treatment of pregnant defendants in the sentencing context could be seen as exalting motherhood at the expense of the personal responsibility of female offenders for their criminal conduct. This demeans women as responsible citizens.

2. *Family Ties*

Another difficult gender-related issue in guidelines sentencing is the treatment of parenthood, particularly single parenthood. This is clearly a gendered issue; eighty-eight percent of all single parents are female.⁹⁷ Although the Commission does not collect data on offenders' single parent status, inmate survey results collected by Myrna Raeder indicate that single parenthood is not uncommon among female inmates and that female inmates are more likely than male inmates to have primary child care responsibilities.⁹⁸

Single parenthood, like pregnancy, is not specifically addressed in the guidelines. However, § 5H1.6 of the guidelines provides that a defendant's family ties and circumstances are "not ordinarily relevant" in assessing whether a departure is appropriate.⁹⁹ Although there is substantial variation in the case law interpreting this provision,¹⁰⁰ the

⁹⁵ See U.S.S.G. § 5H1.4 (physical condition not ordinarily relevant in decision to depart from guidelines).

⁹⁶ Of course, this raises the question of whether incarceration unduly interferes with the bond between mother and child after birth, and whether such interference would justify sentence mitigation. This problem is, however, more appropriately characterized as one of parenthood or family ties, rather than pregnancy, and it is addressed in the next section.

⁹⁷ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MARITAL STATUS AND LIVING ARRANGEMENTS xi (1992).

⁹⁸ Raeder, *supra* note 73, at 951-53.

⁹⁹ U.S.S.G. § 5H1.6. By using the words "not ordinarily relevant," rather than "never relevant," the Commission left to the courts the discretion to determine, on a case-by-case basis, whether unusual family ties or circumstances would justify a sentence below that applicable to otherwise similarly situated offenders.

¹⁰⁰ Some courts have interpreted this provision strictly, placing significant restrictions on the ability of district courts to depart downward on the basis of family circumstances. See, e.g., *United States v. Thomas*, 930 F.2d 526, 529 (7th Cir.), *cert. denied*, 112 S.Ct. 171 (1991) (holding that family circumstances are *never* relevant where probation or a fine is

prevailing view in the appellate courts is that single parenthood is not *itself* an adequate basis for a downward departure.¹⁰¹ In other words, the courts generally have held that single parenthood is not sufficiently extraordinary to fall outside the heartland of cases covered by the guidelines.

The Commission's adoption of the § 5H1.6 limitations on considering family circumstances at sentencing can be traced directly to the language and legislative history of the Sentencing Reform Act. In 28 U.S.C. § 994(e), Congress specified that it is generally inappropriate for judges to consider factors such as employment, family ties, and community ties when they determine a proper sentence. The legislative history indicates that these provisions were motivated by Congress' concern about the biases associated with the traditional practice of lenient sentencing of defendants with good employment prospects, and strong community and family ties. While well-intended, these factors were used to justify light sentences for white, middle class defendants with strong ties to visibly intact families, and lengthy prison terms for unemployed, unmarried minority defendants who had committed offenses of similar seriousness. Reducing reliance on factors such as family ties was designed to redress this disparity.¹⁰²

The Sentencing Reform Act's mandate for a guidelines' structure that de-emphasizes personal offender characteristics, such as family ties, has been criticized extensively, both from traditional and feminist perspectives.¹⁰³ For example, some commentators advocate a pre-

not a sentencing option authorized by the guidelines).

Others, while acknowledging the availability of departures under § 5H1.6, have interpreted its scope fairly narrowly. *See, e.g.,* United States v. Shortt, 919 F.2d 1325, 1328 (8th Cir. 1990) (impact of defendant's incarceration on family farm and wife's history of drug and alcohol abuse insufficiently extraordinary to warrant downward departure); United States v. Goff, 907 F.2d 1441, 1446 (4th Cir. 1990) (mother of 3 minor children ineligible for downward departure).

Finally, other courts have been more permissive in interpreting § 5H1.6. *See, e.g.,* United States v. Alba, 933 F.2d 1117 (2d Cir. 1991) (upholding downward departure for defendant with 2 young children and a disabled father); United States v. Handy, 752 F. Supp. 561 (E.D.N.Y. 1990) (downward departure for single mother of minor children).

¹⁰¹ *See, e.g.,* United States v. Johnson, 908 F.2d 396, 398-99 (8th Cir. 1990) (single mother of infant not entitled to downward departure); Goff, 907 F.2d at 1446 (mother of minor children ineligible for downward departure); United States v. Sailles, 872 F.2d 735, 739 (6th Cir. 1989) (same). *See generally* ROGER W. HAINES JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 522 (1992) ("But generally, the courts have held that it is improper to depart downward based on a defendant's responsibilities for the care of her children.").

¹⁰² S. REP. NO. 225, *supra* note 18, at 174-75, *reprinted in* 1984 U.S.C.C.A.N. at 3357-58.

¹⁰³ *See, e.g.,* Eleanor Bush, *Considering the Defendant's Children at Sentencing*, 2 FED. SENT. RPTR. 194 (1990); Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 437-38 (1991); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1953-54 (1988); Raeder, *supra* note 73, at 953;

sumptive downward departure for all offenders with primary parenting responsibility for minor children.¹⁰⁴ However, *whether* judges should factor parental responsibilities into sentencing, and if so, *how*, is best approached in a two-pronged fashion: (1) as a descriptive matter, whether recognition of single parenthood as a basis for downward departure is consistent with the guidelines and the goals of the Sentencing Reform Act; and (2) as a normative matter, whether recognition of such a departure would result in a more just and effective sentencing policy.

a. Family Ties in the Guidelines Scheme

As noted, the Commission specified in § 5H1.6 that family ties are "not ordinarily relevant" in assessing the appropriateness of departure. By and large, appellate courts have interpreted § 5H1.6 as foreclosing departure solely on the basis of single parenthood, concluding that it is not an "extraordinary" family situation within the meaning of § 5H1.6.¹⁰⁵ As the Fourth Circuit explained in *United States v. Brand*:

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 unable or unwilling to care for the children, and that the children will have to live with relatives, friends, or even in foster homes. . . .

. . . .

This situation, though unfortunate, is simply not out of the ordinary.¹⁰⁶ Myrna Raeder argues that this characterization of single parent offenders (particularly females) is inapt:

The present quandary over the feasibility of granting departures to pregnant women and single mothers ultimately results from the circuits unnecessarily limiting their interpretation of the Section 5H1 factors by defining the opposite of "ordinarily" as "extraordinarily." . . . There are other adjectives which could also be used to describe a case as not ordinary, including uncommon and infrequent. Clearly, single mothers are atypical of the majority of offenders being sentenced.¹⁰⁷

Raeder correctly notes that single mothers are not typical of the overall offender population. Moreover, judicial efforts to distinguish "ordinary" cases from "extraordinary" cases have been unsatisfactory. Identifying "extraordinary" cases is extremely difficult, given the in-

Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 858-61 (1992); Susan E. Ellingstad, Note, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957 (1992).

¹⁰⁴ Raeder, *supra* note 73, at 962.

¹⁰⁵ *Johnson*, 908 F.2d at 398-99; *Goff*, 907 F.2d at 1446; *Sailes*, 872 F.2d at 739.

¹⁰⁶ *United States v. Brand*, 907 F.2d 31, 33 (4th Cir.), *cert. denied*, 498 U.S. 1014 (1990).

¹⁰⁷ Raeder, *supra* note 73, at 955-56.

herent imprecision of the term. In addition, this focus on whether a particular fact pattern is sufficiently "extraordinary" to justify departure from the guidelines range has tended to distract judges from the more important task of evaluating whether the applicable guidelines in a given case furthers the underlying purposes of guidelines sentencing.¹⁰⁸ Nevertheless, the courts' general conclusion—that single parent status is not an adequate basis for departure—is consonant with the Commission's approach. The Commission is aware of the problems posed in sentencing single parents but has structured the guidelines to permit downward departure for them only if other mitigating factors exist.¹⁰⁹

Both Congress' guidance in the Sentencing Reform Act and considerations of sentencing policy have influenced the Commission's approach. Specifically, the Commission responded to section 994(e), which requires it to "assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."¹¹⁰

Critics have argued that the Commission has relied too extensively on section 994(e), ignoring other provisions in the statute which emphasize the need to account for offender characteristics in sentencing.¹¹¹ These critics correctly assert that the Act has provisions that are inconsistent with the Commission's approach. This is partly the result of the ambiguities in the Act, which arose from compromises among legislators with divergent views on sentencing policy.¹¹² The Commission might have interpreted its mandate somewhat differently, given the conflicting provisions in the Act. Moreover, in section 994(d), Congress instructed the Commission to consider whether a host of factors, including family ties and responsibilities, "have any relevance" to sentencing and to take them into account "only to the extent that they do have relevance." Thus, even though Congress admonished the Commission regarding the general inappropriateness of including factors such as family ties in the guidelines, it arguably gave the Commission the authority to determine whether the guidelines should account for such factors in some specified con-

¹⁰⁸ See Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 458-63 (1992).

¹⁰⁹ Even though the guidelines do not permit downward departures for single parents, they permit consideration of family ties in determining a sentence *within* the guidelines sentencing range. See, e.g., *United States v. Brady*, 895 F.2d 538, 543 (9th Cir. 1990).

¹¹⁰ 28 U.S.C. § 994(e) (1988).

¹¹¹ See, e.g., Schulhofer, *supra* note 103, at 859-61.

¹¹² See Stith & Koh, *supra* note 59, at 283-87.

texts.¹¹³ In short, the Commission might have the authority under the Act to permit departures for single parents, if it determines that such departures would be sound sentencing policy.

b. Should Parental Status be Factored into Guidelines Sentencing?

The question of whether courts should factor parental status into their sentences is a difficult one. Those that argue for mitigating sentences on the basis of parental status assert that excessive incarceration of single parents disrupts the parent/child relationship to the detriment of the child. They contend that the social costs of this disruption, both direct and indirect, outweigh the benefits of incarceration and thus warrant mitigation of an otherwise applicable sentence.¹¹⁴ They also argue that incarcerated single mothers receive a "double punishment." Not only are they incarcerated but they are separated from their children and often lose their parental rights.¹¹⁵ From this perspective, facially neutral treatment of single mothers is not equal treatment at all, but rather results in disparate gender impact.

c. Collateral Consequences and Double Punishment

The desire to adjust criminal sentences to reflect collateral consequences of conviction is understandable. Different personal circumstances cause a given term of imprisonment to fall more heavily on some than on others. This is arguably the case for single mothers. According to Eleanor Bush:

If the "same" sentence has an inconsistent impact on two different defendants, then considering the two sentences as equivalent is unjust. An incarcerative sentence may have a distinctly different impact on a parent than it has on a non-parent. For example, in many states, incarceration constitutes a ground for termination of parental rights. A two year prison sentence does not *equal* two years in prison accompanied by a permanent loss of child custody. Justice requires considering the consequences of a sentence for the defendant's children where they lead to such different effective quantities of punishment.¹¹⁶

Despite the simple, intuitive appeal of this argument, it leads

¹¹³ See S. REP. NO. 225, *supra* note 18, at 175, *reprinted in* 1984 U.S.C.C.A.N. at 3357 ("It should be emphasized, however, that the Committee decided to describe [the factors in section 994(e)] as 'generally inappropriate,' rather than always inappropriate . . . in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration.").

¹¹⁴ See, e.g., Bush, *supra* note 103; Karle & Sager, *supra* note 103, at 437-38; Raeder, *supra* note 73, at 953; Ellingstad, *supra* note 103, at 980-81.

¹¹⁵ See, e.g., Adela Beckerman, *Women in Prison: The Conflict Between Confinement and Parental Rights*, 18 SOC. JUST. 171, 180 (1991); Bush, *supra* note 103, at 194.

¹¹⁶ Bush, *supra* note 103, at 194.

down a dangerous path. First, it assumes the ability to compare the "effective quantities" of punishment imposed on differently situated defendants as a result of facially equal terms of incarceration. Economists, however, tell us that it is virtually impossible to engage in the kind of intersubjective utility comparisons necessary to evaluate the comparative disutility of imprisonment among different offenders.¹¹⁷

Moreover, once people accept the permissibility of adjusting punishment on the basis of such intersubjective comparisons, there is no logical stopping point. A variety of situations create potential reasons for imposing lesser sentences of imprisonment. For instance, offenders often lose their businesses, wind up divorced, or even get deported as a result of their convictions. These serious collateral harms could justify a shorter sentence. Age is another potential consideration. A ten year sentence arguably is more burdensome for a sixty-year-old male than for a twenty-year-old female, because the elderly offender will spend a greater percentage of his expected life span behind bars. Alternatively, counsel for the twenty-year-old could argue that ten years stolen from her youth is far worse than ten years served by the older man. Permitting these intersubjective comparisons to alter an otherwise applicable sentence leads to a free-for-all of sentence individualization, each defendant arguing that her incarceration would be more painful than that of other defendants. The result would be unfettered judicial discretion and discrimination in application.¹¹⁸ Recall, it was this very logic which often resulted in the incarceration of minority and disadvantaged offenders, while white offenders were sentenced to probation. Some judges believed that white, middle-class offenders suffered hardship and stigma from incarceration that poor, minority offenders did not. The resulting disparity and discrimination prompted the calls for reform that resulted in the Sentencing Reform Act.¹¹⁹

¹¹⁷ See, e.g., Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 ECON. J. 635 (1938). See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 9 (2d ed. 1963).

¹¹⁸ See, e.g., VON HIRSCH, *supra* note 16, at 89-90.

The assessment of severity . . . should be standardized: the focus should be on how unpleasant the punishment *characteristically* is. Such standardization is necessary as a limit on discretion It is also needed as a safeguard against class justice. Judges sometimes impose different penalties on persons convicted of similar crimes, in the hope of producing equivalent amounts of discomfort: the middle-class person is put on probation and the ghetto youth jailed for the same infraction, on the theory that the former's sensitivities are greater.

Id.

¹¹⁹ See, e.g., Edward M. Kennedy, *Criminal Sentencing: A Game of Chance*, 60 JUDICATURE 208, 210 (1976) (characterizing sentencing system as "a national scandal").

d. Avoiding Collateral Damage: Children and Incarceration

Another argument in favor of departure for single parents focuses not on the offender, but on her children. As Myrna Raeder argues, incarceration of single parents results in severe disruption of children's lives. They may be placed in foster care, or separated from their siblings.¹²⁰ These disruptions, and the ensuing lack of parental guidance, can lead to behavioral problems, and even an increased likelihood of future criminal activity.¹²¹ Raeder makes a plausible utilitarian case for taking these considerations into account:¹²²

Any cost benefit analysis would seem to dictate that children be considered in the sentencing decision, particularly when societal costs regarding any future criminality of the children are weighed. . . . Other societal costs that should be considered might include foster care to replace the incarcerated parent, permanent dissolution of the family when the incarceration provides grounds for terminating parental rights, and the child's dependence upon government aid.¹²³

Unquestionably, the imprisonment of single parents has significant social costs. Moreover, no one wants to see innocent children suffer as a result of a parent's incarceration. Yet, a general rule discouraging incarceration of single parents has troubling implications.

Consider, for instance, defendants "A" and "B," two females employed in the personnel section of an agency of the federal government. They are convicted of theft of government funds, arising from a kickback scheme in which each defendant altered other employees' pay documents (effectively creating unauthorized pay raises) in exchange for a percentage of the increased pay. The defendants participated equally in the criminal activity, and each received approximately the same amount of money—neither woman has a prior criminal record.

Based on the nature of the offense, the amount of loss, and the criminal history of the defendants, the applicable guidelines sentencing range for each defendant is forty-six to fifty-seven months imprisonment. Accordingly, the judge sentences defendant "A," who is childless, to forty-six months in prison. Defendant "B," however is a single mother with three minor children. As a result, she receives a substantial downward departure, and the judge sentences her to six

¹²⁰ Raeder, *supra* note 73, at 953.

¹²¹ *Id.*

¹²² *Id.* at 959. Raeder emphasizes both the direct social costs of imprisonment of single parents (*i.e.*, foster care) and the more speculative indirect social costs (future criminality). *Id.* at 953, 959. In short, she concludes that the "disadvantage to children who may have less supervision and care has societal costs which can outweigh any sentencing advantage." *Id.* at 961.

¹²³ *Id.* at 959 (footnotes omitted).

months home confinement, to allow her to care for her children.

The sentences imposed in this example do not serve the principal purposes of sentencing articulated in the Sentencing Reform Act. Further, they clearly violate desert principles. Although these defendants do not have the same child care responsibilities, they are equally culpable. Yet one received a lengthy prison sentence while the other did not. As this example illustrates, taking children into account in sentencing shifts the focus from issues of offense seriousness and offender culpability to considerations exogenous to these sentencing purposes. The result is an obvious sentencing disparity. Defendant "A" will have to serve a prison sentence nearly four years longer than that served by "B," her equally culpable codefendant, simply because she does not have children.

Of course, punishment in our society is not *totally* desert-based. The Sentencing Reform Act mandated that crime control principles—deterrence, incapacitation, and rehabilitation—also play an important sentencing role.¹²⁴ However, the disparity in sentencing between defendants "A" and "B" similarly cannot be explained by crime control considerations. Incapacitation and rehabilitation are obviously not served here; defendant "A" is not necessarily more dangerous, or less amenable to rehabilitation than "B." Moreover, these sentences arguably undermine deterrence principles, because they send out the message that potential offenders who have parenting responsibilities can expect to be treated leniently by the courts.¹²⁵

This is not to say that exogenous utilitarian concerns, such as the impact of sentencing on children, should be unimportant in allocating criminal penalties. For example, § 5H1.1 of the guidelines permits downward departure for defendants who are "elderly and infirm." This provision reflects an exogenous utilitarian consideration—the judgment that the relative costs of imprisonment of such offenders, including medical expenses, outweighs the benefits of incarceration.¹²⁶ However, such exogenous considerations are rarely sufficiently important to outweigh either culpability or crime control considerations in the allocation of sentences. Indeed, § 5H1.1 can be explained in terms of incapacitative purposes: the physical limitations of elderly and infirm offenders make them less likely than the typical

¹²⁴ See *supra* notes 10 to 15 and accompanying text.

¹²⁵ Cf. *United States v. Arize*, 792 F. Supp. 920, 921 (E.D.N.Y. 1992) (acknowledging reduction in deterrent effect if pregnant drug couriers were routinely sentenced leniently).

¹²⁶ See U.S.S.G. § 5H1.1 (downward departure appropriate for elderly and infirm offenders "where a form of punishment such as home confinement might be equally efficient as and *less costly than incarceration*") (emphasis added).

offender to recidivate.

In sum, those who advocate the consideration of exogenous utilitarian factors in the allocation of criminal penalties bear a heavy burden in justifying a departure from reliance on the sentencing purposes identified by Congress in the Sentencing Reform Act. It is unclear whether the impact of incarceration on children is a sufficient justification. The argument for across-the-board mitigation under these circumstances assumes that maintaining the family unit is necessarily in the best interest of the children. However, this argument may not be true in all cases.¹²⁷ A criminal conviction does not necessarily make someone an unfit parent. The unfortunate reality, however, is that many criminal defendants are less than exemplary parents. A large percentage abuse either drugs or alcohol or both,¹²⁸ and many have been involved in serious criminal activity that could pose risks to children. Thus, keeping these families together is not necessarily in the best interest of the children. And any net social gain from more lenient sentencing of single parents may not outweigh other sentencing considerations.

Feminists might also consider the gender role implications of taking parental responsibilities into account in sentencing. It is undisputed that the gendered nature of child rearing causes children of some female offenders to be disadvantaged relative to the children of their male counterparts. Therefore, a policy designed to equalize this situation, through mitigation of the sentences of offenders with primary child care responsibilities, may unintentionally reinforce gender stereotypes. Such a policy would effectively use the criminal law to reward women for their status as mothers (or, alternatively, to punish women for not having children). It would say in effect, "you have violated the criminal law, but we'll overlook that so you can do what you are supposed to do—care for your children." This denies single-mother offenders the status of full moral agents and disregards the social contributions of childless women, whose employment and community ties are not given the same consideration in sentencing.

The gendered nature of child care responsibilities and the feminization of poverty are grave public policy concerns that must be addressed in order to achieve a more equitable society. It is not clear, however, that the *criminal sentencing system* is the appropriate institu-

¹²⁷ See, e.g., *United States v. Sailes*, 872 F.2d 735, 739 (6th Cir. 1989) (upholding district court's refusal to depart downwardly under § 5H1.6, noting the lower court's "apparent belief that the proper development of Mrs. Sailes' younger children might be facilitated by the children's removal from her direct influence for a time.").

¹²⁸ See BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992 459 (1993).

tion to address these pressing problems.

3. Coercion, Duress, and Abuse

Another issue with gender implications is the extent to which guidelines should account for physical or psychological coercion or abuse by male codefendants.¹²⁹ Unlike pregnancy and family ties, the presence of coercion or abuse is part of the traditional assessment of a defendant's culpability under the criminal law, and thus fits more comfortably within the framework of traditional sentencing purposes. There appears to be ample room in the guidelines for judges to use departure to account for the most obvious forms of coercion and abuse.

For example, policy statement 5K2.12 provides that "serious coercion, blackmail or duress, under circumstances not amounting to a complete defense" is a basis for downward departure.¹³⁰ Courts have employed this section to justify downward departures for battered female offenders. For example, in *United States v. Johnson*,¹³¹ the court vacated and remanded the sentences of several female participants in a drug trafficking conspiracy headed by a violent, male drug lord. The Ninth Circuit ordered the district court to consider, *inter alia*, whether downward departures for duress under § 5K2.12 should be granted. As the court explained, a defendant need not make a showing of duress equivalent to that required for a complete defense.¹³² Further, the fact that the defendant could have escaped does not preclude mitigation.¹³³

Given the court's apparent acceptance of [the defendant's] credibility as to her sad and savage treatment by male abusers and given the court's recognition that [the defendant] had been involved with a manipulative, violent, brutal drug lord, the court did have the discretion to depart downward if the court found that [defendant] had been subject to coercion, even though with effort she could have escaped.¹³⁴

The court in *Johnson* was sensitive to the gendered nature of duress, expressly noting that "gender is also a factor to be considered" as one of the defendant's personal characteristics in determining whether the defendant's fear is well-grounded, and whether there is a reason-

¹²⁹ Obviously, male defendants may be subject to coercion, but physical, psychological, and social differences between men and women make female crime more likely than male crime to be the result of coercion. See Raeder, *supra* note 73, at 973.

¹³⁰ U.S.S.G. § 5K2.12.

¹³¹ 956 F.2d 894 (9th Cir. 1992).

¹³² *Id.* at 898 (citing *United States v. Cheape*, 889 F.2d 477, 480 (3d Cir. 1989)).

¹³³ *Id.* at 901-02.

¹³⁴ *Id.* at 902.

able opportunity to escape.¹³⁵ Other courts have also shown a willingness to depart downwardly from the guidelines to account for duress.¹³⁶

Courts may also use § 5H1.3 and § 5K2.13 to reduce the sentences of battered or coerced female offenders. Section 5H1.3 provides that the defendant's mental or emotional condition is not "ordinarily" relevant in assessing whether departure is appropriate. However, courts have interpreted it to permit departure for "extraordinary" mental or emotional conditions, including those involving abused female offenders. For example, in *United States v. Roe*,¹³⁷ the Ninth Circuit held that sentencing judges could consider the long-term abuse the defendant suffered in deciding whether to depart from the guidelines. The court recounted the defendant's horrific history of childhood physical and sexual abuse, as well as later abuse by pimps, customers, and boyfriends. It concluded that such extraordinary abuse might justify a downward departure under the guidelines.

Section 5K2.10, which permits departure if the "victim's wrongful conduct contributed significantly to provoking the offense behavior," may also allow judges to mitigate sentences for battery or coercion. This section encompasses the traditional Battered Woman Syndrome defense—a defendant's violent reprisal against an abuser.¹³⁸ Federal courts rarely use it, because it is applicable principally in murder, manslaughter, and assault cases, which are typically tried in state court.¹³⁹ Nevertheless, federal courts have applied this provision in cases involving battered female defendants. For example, in *United States v. Whitetail*,¹⁴⁰ the court vacated and remanded for consideration a departure under § 5K2.10 a case in which the defendant was convicted of the second-degree murder of her live-in boyfriend.

Moreover, downward departure under § 5K2.0 is not limited to cases of severe physical abuse. In *United States v. Yellow Earrings*,¹⁴¹ the court affirmed a downward departure for assault based on victim misconduct where the defendant knifed a man who had attempted to rape her. The court determined that the victim's verbal abuse of the defendant, combined with his drunkenness and relative size and

¹³⁵ *Id.* at 898.

¹³⁶ *See, e.g., United States v. Mickens*, 977 F.2d 69, 72-73 (2d Cir. 1992).

¹³⁷ 976 F.2d 1216, 1217-18 (9th Cir. 1992).

¹³⁸ *See, e.g., ANGELA BROWNE, WHEN BATTERED WOMEN KILL* (1987).

¹³⁹ In fiscal year 1992, these offenses accounted for just 1.2% of cases sentenced under the federal guidelines. *See* U.S. SENTENCING COMM'N, *supra* note 3, Table 13.

¹⁴⁰ 956 F.2d 857 (8th Cir. 1992).

¹⁴¹ 891 F.2d 650 (8th Cir. 1992).

strength, were sufficient to warrant departure.¹⁴² The court was also influenced by the fact that the defendant had previously been physically abused by a drunken, male relative.¹⁴³ Thus, the court in *Yellow Earrings* was sensitive to the gender issues underlying that case.

The principal limitation on these departures is that there must be some nexus between the victimization of the defendant and the commission of the crime. For example, in *United States v. Perkins*,¹⁴⁴ the D.C. Circuit reversed and remanded a downward departure for a female suffering from dependent personality disorder. The court explained that such a departure may be justified only if the sentencing judge finds a causal link between the defendant's condition and the commission of the offense.¹⁴⁵ This nexus requirement follows logically from the culpability-based nature of these departures. If the defendant's victimization did not influence the offense behavior, any departure is merely a "victim" discount, imposed out of pity for the defendant, rather than out of a sense that a lesser sentence is deserved. Such departures would undermine the moral agency of their recipients and would not serve the purposes of sentencing.¹⁴⁶ However, courts should not impose nexus requirements that are too stringent. This could result in unfairly harsh sentences for defendants who deserve mitigation and adversely affect female offenders, who appear to be disproportionately subject to coercion and abuse by co-defendants.

4. *Dominance, Manipulation, and Role in the Offense*

The possibility that the criminal behavior of a female offender results from some form of dominance or manipulation, falling short of physical abuse or serious psychological coercion, is a particularly troublesome issue for guidelines sentencing. As Raeder has pointed out, a review of published cases reveals that some female criminals, particularly those involved in drug trafficking offenses, are romantically involved with male co-defendants.¹⁴⁷ Many of these offenders play only a minor role in the illegal activity¹⁴⁸ and might be less culpable than those committing similar offenses on their own, or in concert with co-equals. To the extent that guidelines sentencing fails to per-

¹⁴² *Id.* at 654.

¹⁴³ *Id.*

¹⁴⁴ 963 F.2d 1523, 1528 (D.C. Cir. 1992).

¹⁴⁵ See also *United States v. Frazier*, 979 F.2d 1227, 1230 (7th Cir. 1992); *United States v. Desormeaux*, 952 F.2d 182, 185 (8th Cir. 1991); *United States v. Vela*, 927 F.2d 197, 199 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 214 (1991).

¹⁴⁶ Cf., *supra* notes 10-15 and accompanying text.

¹⁴⁷ Raeder, *supra* note 73, at 977.

¹⁴⁸ *Id.* at 977-78.

mit judges to take this subordination adequately into account,¹⁴⁹ it has a disparate impact on female offenders.

Obviously, these women cannot be absolved completely of criminal liability, yet assessing their culpability is often difficult. The Commission has wrestled with the issue of the non-coercive domination of female offenders by co-defendant males and its role in sentencing. Unfortunately, to this point the Commission has been unable to devise a satisfactory way to take this factor into account in an express fashion, while remaining faithful to the gender neutrality requirement of the statute. Specifically, the Commission has found it difficult to articulate a departure for "bad romantic judgment." The risks involved in devising an express adjustment or departure for this type of situation are highlighted by *United States v. Mast*.¹⁵⁰ In that case, which involved a female bank robber dubbed the "Miss America bandit," the district judge ordered a significant downward departure because of the defendant's domination, even though it did not amount to physical coercion. The judge's comments reveal a paternalistic attitude toward the defendant: "men have exercised traditional control over the activities of women, and I'm not going to ignore that, no matter how much flak I get from women's lib," and "I think it's a fact of life that men can exercise a Svengali influence over women," and "women are a soft touch, particularly if sex is involved."¹⁵¹ The judge then concluded that the guidelines "should have taken into consideration the possibility that in some cases, a girl from a good background, from a good family, came [sic] under a malevolent influence and guidance of a bum, then gets caught doing things for him."¹⁵²

This case demonstrates the potential costs involved in countering the gendered effects of sentencing through direct, express mitigation. It perpetuates inappropriate gender stereotypes, denies the defendant's fundamental moral agency, and introduces socioeconomic biases.¹⁵³

¹⁴⁹ The guidelines permit adjustment of up to eight offense levels—four up and four down—to reflect the offender's role in the offense. See U.S.S.G. §§ 3B1.1 (Aggravating Role), 3B1.2 (Mitigating Role). It could be argued, however, that the four-level mitigating role adjustment is insufficient to reflect the culpability of a female who played a minimal role in the offense and whose participation in the criminal scheme may have resulted from her romantic involvement with a more culpable co-conspirator. See, e.g., Raeder, *supra* note 73, at 977-78.

¹⁵⁰ No. CR-88-0720-AAH-1 (C.D. Cal. 1989), *rev'd on other grounds*, 925 F.2d 1472 (9th Cir. 1991).

¹⁵¹ See *Miss America Bandit Crowned With Light Sentence*, OREGONIAN May 11, 1989, at C7.

¹⁵² *Id.*

¹⁵³ Note how the judge emphasized the defendant's "good" family background. Query whether a poor, minority defendant would have received the same downward departure as this attractive, former cheerleader. See *supra* notes 39-40 and accompanying text.

The Commission has chosen not to directly address the dominance issue, or the presence of bad romantic judgment in prompting criminal involvement. Instead, most offenders must rely on the more general mitigating role adjustments for individuals playing minor roles,¹⁵⁴ or upon the availability of a downward departure under § 5K2.0, the guidelines' general departure provision. But some litigants have been successful. For example, some district courts have recognized female subordination as a basis for departure. In *United States v. Naylor*,¹⁵⁵ the court granted a substantial downward departure to a female whose participation in the offense arose from her romantic relationship with a manipulative, older male co-defendant. Such cases are, however, comparatively rare. The degree of subordination necessary to obtain a departure under the present framework is difficult to establish.

In theory, role adjustments offer a more promising mechanism for achieving proportionality in sentencing this type of defendant. If the offender's involvement in the offense is peripheral, she should get a two to four level reduction in her offense.¹⁵⁶ In practice, however, role adjustments may provide only a relatively limited tool for sentencing mitigation.¹⁵⁷ For example, courts will sometimes find the four level reduction for minimal role inapplicable, if the defendant participates continuously in a conspiracy.¹⁵⁸ Moreover, in drug trafficking cases, which account for a significant percentage of cases in which role adjustments are granted, mandatory minimum sentences often limit the impact of role adjustments on the applicable guidelines sentence.¹⁵⁹

a. The Special Problems Posed by Drug Trafficking Cases

Under the current system, drug trafficking cases create distinctive problems in the proper calibration of sentences. As a result, some women are punished more severely than they would have been under

¹⁵⁴ See U.S.S.G. § 3B1.2.

¹⁵⁵ 735 F. Supp. 928 (D. Minn. 1990).

¹⁵⁶ See U.S.S.G. § 3B1.2.

¹⁵⁷ On the other hand, plea-related manipulation of guidelines factors, such as role, sometimes results in unwarranted sentence mitigation. See *infra* notes 165-86 and accompanying text.

¹⁵⁸ See, e.g., *United States v. Pofahl*, 990 F.2d 1456, 1484-85 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 266 (1993) (defendant acted as a drug courier on several occasions); *United States v. Tabares*, 951 F.2d 405, 410 (1st Cir. 1991) (continued presence of drugs and money in apartment defendant shared with boyfriend prevented finding of minimal role). See U.S.S.G. § 3B1.2, comment. (n.2) (stating that minimal role adjustment be used infrequently, for example, where the defendant was a courier or offloader involved in a single shipment or transaction).

¹⁵⁹ See *infra* notes 160-64 and accompanying text.

a more discretionary regime.¹⁶⁰ The root of these problems is the pervasive effect of mandatory minimum sentences. These mandates anchor the guidelines sentences, which incorporate the mandatory penalties for given quantities of drugs and extrapolate sentences for additional drug quantities.¹⁶¹

The impact of mandatory minimums was exacerbated by Congress' decision in 1988 to extend them to offenders convicted of drug trafficking conspiracies.¹⁶² As a result, courts may determine the sentences of federal drug offenders more by the size of the conspiracy in which they are a participant, rather than by their role in the conspiracy. Female offenders, in particular, may have been adversely affected. Females traditionally have not been the leaders or organizers of drug conspiracies. They are also less likely than male offenders to carry or use firearms or to engage in violent behavior. Indeed, many female drug offenders are involved in drug trafficking conspiracies as a result of their personal relationships with male co-defendants. Under these circumstances, female offenders may be less culpable than the drug amounts for which they are legally held responsible would suggest. This problem is further compounded by the fact that, as noted earlier, some female offenders undoubtedly participate in drug conspiracies as a result of physical or psychological coercion. When the sentence is bounded on the low end by a fixed mandatory minimum, the sentencing judge may not be able to adjust it to fully reflect the lesser culpability of such offenders.

As a result of this combination of developments, female offenders

¹⁶⁰ Of course, this is true of some male offenders as well. However, the impact arguably is greater on female offenders, due to their typically lesser roles. See *supra* notes 1-4.

¹⁶¹ See Schulhofer, *supra* note 103, at 853-54. For example, one convicted of distributing five kilos of cocaine is subject to a mandatory minimum sentence of 10 years (120 months). The guidelines build on the mandatory minimum by fixing the distribution of five kilos of cocaine at offense level 32 (121-51 months). Similarly, the guidelines account for the five year (60 month) mandatory minimum associated with trafficking in 500g or more of cocaine by pegging the offense level for offenses involving 500-2000g of cocaine at offense level 26 (63-78 months). Intermediate drug amounts result in intermediate sentences—thus, an offense involving between 2 and 3.5 KG of cocaine result in an offense level 28 (78-97 months). See U.S.S.G. § 2D1.1 (drug quantity table), § 5A (sentencing table).

¹⁶² The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), extended the mandatory minimums to conspiracies to close a major disparity-producing loophole in the statutory scheme; the ability of defendants and prosecutors to avoid mandatory minimum sentences by plea bargaining to conspiracy charges. Unfortunately, the 1988 provisions dramatically increased the sentencing exposure of minor players in drug trafficking conspiracies, by holding all participants in a drug conspiracy liable for the total quantity of drugs involved in the conspiracy. See, e.g., *United States v. Rivera*, 971 F.2d 876, 892 (2d Cir. 1992) (total quantity of conspiracy's drug sales properly attributed to defendants working at only one sales location). As a result, those with peripheral roles in drug operations became subject to the same mandatory minimum penalties that Congress had earlier reserved for leaders or direct participants in trafficking.

who might otherwise have received more modest sentences of imprisonment, intermediate sentences, or even probation, may have to serve lengthy sentences for their minimal involvement in trafficking large quantities of drugs. The Commission has recognized the potential inequities associated with quantity-driven guidelines and is exploring alternatives which emphasize the presence of weapons and ancillary violence.¹⁶³ The pressure to adjust to these inequities has led to the development of means to avoid, for some female offenders, mandatory minimums and the drug guidelines derived from mandatory minimums.¹⁶⁴

b. The Unresolved Dilemmas of Guidelines Sentencing of Female Offenders

Replacing a rehabilitation-based sentencing scheme in which female offenders received lenient treatment, with a guidelines sentencing system which includes rules designed to promote race, gender, and socioeconomic neutrality, generates difficult policy choices. Female offenders differ from male offenders in a number of ways: the possibility of pregnancy; the likelihood of sole parenting responsibilities; the possibility that coercion or abuse influenced offense behavior; and the existence of different patterns of co-defendant dominance and role in the offense. The extent to which these differences should be recognized and accommodated in a guidelines sentencing system is debatable. As noted, the sentencing reform movement and the resulting federal sentencing guidelines scheme emphasize considerations of crime control and deserved punishment to a greater degree than was true in the past. From this perspective, courts should limit the accommodation of gender differences to those that bear on the offender's deserved punishment, or on considerations of crime control, such as deterrence or incapacitation. Other policy interests should play a secondary role.

A careful analysis of the special issues posed by female offenders suggests that while factors such as the incidence of coercion or abuse of female offenders and the lesser roles that female offenders tend to play can and should be accommodated, special sentencing rules to accommodate pregnancy or parental responsibilities are more difficult to justify. While compelling arguments support the view that guidelines should reflect gender impacts on criminality and sentencing, statutory directives and important penological interests will make it difficult. Moreover, any rules designed to account for the special

¹⁶³ See Proposed Amendment 8 (on file with authors).

¹⁶⁴ See *infra* part III.

circumstances of female offenders create the risk of reinforcing the negative gender stereotypes that underlay the paternalistic approach to sentencing that prevailed in the 1960s and 1970s. These competing policy considerations have posed, and will continue to pose, difficult challenges to the Sentencing Commission.

III. WOMEN AND GUIDELINES SENTENCING: A BRIEF EMPIRICAL OVERVIEW

This section examines data for three broad categories of offenses within which female offenders are especially prominent: drug offenses, embezzlement, and fraud. These data suggest that the real-world consequences of the shift to ostensibly gender neutral guidelines have not been as dramatic as might have been expected, given the difficult policy issues discussed in the previous section. In effect, it appears that the considerable discretion in plea bargaining and sentencing that remains in the guidelines scheme limits the sentence exposure of female offenders and reintroduces some of the gender-based leniency of pre-guidelines sentencing.

A. DRUG OFFENSES

More females are sentenced in the federal system for drug offenses than for any other type of offense.¹⁶⁵ More than one-third of all women receiving guidelines sentences in 1991 and 1992 committed drug offenses.¹⁶⁶ Thus, sentencing patterns for drug offenses reveal much about the sentencing of females under the federal guidelines scheme. An analysis of aggregate statistical data collected by the Commission regarding sentencing of federal drug offenders reveals that female offenders benefit disproportionately from each of the principal discretionary components in the guidelines scheme: downward departure for substantial assistance to authorities;¹⁶⁷ downward departure due to atypical facts or circumstances;¹⁶⁸ and selection of a sentence from within the low end of the applicable sentencing range.

¹⁶⁵ For example, fiscal year 1992 data reveal that 2127 females were sentenced for drug offenses, 1863 of these for drug trafficking. See 1992 ANNUAL REPORT, *supra* note 3, Table 13. Over 1900 females were sentenced for drug offenses in fiscal year 1991. See U.S. SENTENCING COMM'N, ANNUAL REPORT, Table 17 (1991). In both 1991 and 1992, fraud accounted for the next largest number of female sentences, 958 and 1176, respectively. See 1992 ANNUAL REPORT, *supra* note 3; 1991 ANNUAL REPORT, *supra*.

¹⁶⁶ 1991 ANNUAL REPORT, *supra* note 165, Table 17; 1992 ANNUAL REPORT, *supra* note 3, Table 13.

¹⁶⁷ U.S.S.G. § 5K1.1.

¹⁶⁸ U.S.S.G. § 5K2.0.

1. Substantial Assistance

The Sentencing Reform Act instructs the Commission to consider a defendant's assistance to authorities in the prosecution of others as a mitigating factor.¹⁶⁹ Furthermore, the Act specifically empowers sentencing judges to depart below the guidelines or otherwise applicable mandatory minimum sentences upon motion by the prosecution certifying the substantial assistance of the defendant in the prosecution of others.¹⁷⁰ The Commission implemented Congress' substantial assistance directive through § 5K1.1 of the guidelines. § 5K1.1 provides that a court may, upon motion of the government, depart from the otherwise applicable guidelines range to reflect the defendant's substantial assistance.

Substantial assistance departures under § 5K1.1 involve the exercise of considerable discretion by both the prosecution and the sentencing judge. As the Supreme Court has explained, § 5K1.1 "gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted."¹⁷¹ A sentencing judge may also decline to grant a substantial assistance motion filed by the government.¹⁷²

The Commission's data indicate that female drug offenders are *considerably more likely* to receive substantial assistance departures than their male counterparts. In fiscal year 1992, for example, 44.8% of female drug offenders received downward departures for substantial assistance, compared to just 28.1% of male drug offenders.¹⁷³ The fiscal year 1991 data reveal a similar pattern, although the gender difference is not quite as marked.¹⁷⁴

Researchers do not know enough about the underlying cooperation practices of male and female offenders to conclude that equally cooperative male and female offenders are treated dissimilarly. Nev-

¹⁶⁹ 28 U.S.C. § 994(n) (1988) provides:

The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

¹⁷⁰ See 18 U.S.C. § 3553(e) (1988), which provides:

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission

¹⁷¹ *Wade v. United States*, 112 S. Ct. 1840, 1843 (1992).

¹⁷² See *United States v. Damer*, 910 F.2d 1239, 1241 (5th Cir. 1990), *cert. denied*, 498 U.S. 991 (1990).

¹⁷³ See U.S. Sentencing Comm'n. 1992 Data File, MONFY92.

¹⁷⁴ In fiscal year 1991, 30.5% of female drug offenders received downward departures, compared to 24.6% of males. See U.S. Sentencing Comm'n 1991 Data File MONFY91.

ertheless, this pattern is notable, given the belief that female offenders, who play minor roles in drug offenses, often lack sufficient information to provide legally adequate substantial assistance.¹⁷⁵ Extensive field research on plea bargaining practices under the guidelines, conducted by Commissioner Ilene Nagel and Professor Stephen Schulhofer, provides a plausible explanation for the substantial assistance figures.¹⁷⁶ Their data, derived from extensive case record reviews and field interviews with judges, probation officers, prosecutors, and defense attorneys, suggest that factors other than the value of the defendant's cooperation influence prosecutors' decisions to file § 5K1.1 motions. Specifically, they find that prosecutors often file § 5K1.1 motions to reduce the guidelines sentence for sympathetic defendants, or defendants whose guidelines sentence exceeds prosecutors' view of what the defendant deserves.¹⁷⁷ The disproportionate share of substantial assistance departures received by female drug offenders may reflect prosecutors' and judges' greater sympathy for female offenders.¹⁷⁸

2. Other Downward Departures

Still another mechanism for the exercise of discretion under the guidelines scheme is the authority granted sentencing judges to depart from the applicable guidelines range in atypical cases. The Sentencing Reform Act instructs judges to impose a sentence from within the range specified by the applicable guidelines *unless* there are aggra-

¹⁷⁵ See, e.g., Raeder, *supra* note 73, at 981-82.

¹⁷⁶ See Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989).

¹⁷⁷ See Nagel & Schulhofer, *supra* note 176, at 550.

¹⁷⁸ Female drug offenders appear to benefit from prosecutorial and judicial discretion in the form of charge bargaining as well. See Raeder, *supra* note 73, at 980 ("statistics reveal the likelihood of significant charge bargaining by female drug offenders"). Drug trafficking offenses under 21 U.S.C. §§ 841 and 846, which carry substantial mandatory minimum sentences, are particularly prone to charge bargaining. Defendants can reduce their statutory exposure significantly by pleading to use of a communication facility in committing a drug offense, 21 U.S.C. § 843(b) (1988) (48 month maximum); simple possession, 21 U.S.C. § 844 (1988) (12 month maximum); or misprision of a felony, 18 U.S.C. § 4 (1988) (36 month maximum).

Female drug offenders are more likely than male offenders to successfully plead to these lesser offenses. In fiscal year 1991, females accounted for 12.6% of offenders sentenced for substantive drug trafficking offenses, but 28.6% of those guilty of a communications facility offense, 18% of those guilty of simple possession, and 30.6% of those guilty of misprision offenses involving drugs. The 1992 data reveal a similar pattern. Females accounted for 11.9% of trafficking sentences in that year. But females received 25.5% of communications facility sentences, 25.1% of simple possession sentences, and 31.2% of drug-related misprision sentences. See Data File, *supra* notes 173-74.

vating or mitigating circumstances, not adequately considered by the Commission in adopting the guidelines, which warrant a different sentence.¹⁷⁹ Departures are subject to appellate review.¹⁸⁰ The power to depart is, however, discretionary in the sense that a judge's decision not to depart from the guidelines range is not subject to appellate review.¹⁸¹

As was the case with substantial assistance, female drug offenders receive downward departures more often than male drug offenders. In 1991, the rate of downward departure was 10.3% for females and 7.2% for males. That disparity increased in fiscal year 1992. In that year, 14.3% of female drug offenders received downward departures, compared to only 6.7% of males—a ratio of more than 2 to 1.

3. *Points Within the Range*

Sentencing judges also have discretion to select any sentence from within the applicable guidelines range. This authority is both broader and narrower than the authority to depart. It is broader in the sense that the selection of the point within the guidelines range is not subject to appellate review; it is narrower in the sense that the impact on the defendant's sentence is circumscribed by the outer points of the range, which may not exceed the greater of six months or twenty-five percent.¹⁸²

The Commission's data suggest a modest correlation between gender and the selection of the point within the range used in imposing sentence. For purposes of analysis, the Commission data divide the sentencing range into quartiles. A comparison of defendants receiving sentences at the bottom of the range (the first quartile) reveals the same pattern of preferential treatment of female offenders. In fiscal year 1991, the percentage of women at the bottom of the range exceeded that of men by only a one percent margin, 44.5% to 43.5%. However, in 1992, that margin increased to almost sixteen percent, 58.0% to 42.2%.

In short, the data indicate that female drug offenders benefit from sentencing mitigation at every turn—in plea bargaining, substantial assistance motions, departure from the applicable guidelines range, and selection of the sentence from within the applicable guide-

¹⁷⁹ See 18 U.S.C. § 3553(b) (1988).

¹⁸⁰ See 18 U.S.C. § 3742 (1988).

¹⁸¹ See, e.g., *United States v. Morales*, 898 F.2d 99, 100 (9th Cir. 1990).

¹⁸² See 28 U.S.C. § 994(b)(2) (1988). For example, the guidelines sentencing range of an offender with an offense level of 10 and a criminal history category of I is 6-12 months, a difference of 6 months; an offender whose offense level is 27 and whose criminal history category is IV, has a guidelines sentencing range of 100-125 months, a range of 25%.

lines range.¹⁸³ While some of this undoubtedly reflects underlying differences in male and female criminality in drug cases, the pervasiveness of the pattern, along with the research findings of Nagel and Schulhofer,¹⁸⁴ suggests that females are treated more leniently than similarly situated males. The discretion that remains in the guidelines scheme seems to provide a mechanism through which courts and prosecutors revert to pre-guidelines sentencing patterns. These patterns are replicated, to a lesser extent, in sentencing for embezzlement and fraud.

B. EMBEZZLEMENT OFFENSES

Females convicted of embezzlement are more likely than males to receive downward departures for reasons other than substantial assistance. In 1992, the rate of downward departure was 9.8% for female embezzlers and 7.5% for male embezzlers. Similarly, in 1991 the downward departure rates for females and males were 10.0% and 6.6% respectively.

Similarly, commission data establish that females convicted of embezzlement are more likely than males to receive sentences at the bottom of the applicable guidelines range. In 1992, the percentages in the first quartile were 74.1% and 67.6%, respectively. In 1991, the figures were 75.0% and 65.0%, respectively.

Given the nature of the offense of embezzlement, substantial assistance departures were comparatively rare, 3.4% in 1992 and 2.4% in 1991.¹⁸⁵ Curiously, men were somewhat more likely than women to receive departures for substantial assistance under § 5K1.1.¹⁸⁶ As noted, the opposite is true in drug offenses. The reason for this is unclear.

C. LARCENY

Finally, the patterns for defendants convicted of larceny resemble those for offenders convicted of embezzlement. In both 1991 and 1992, females were substantially more likely to receive a sentence at

¹⁸³ Female drug offenders also are twice as likely as males to receive mitigating adjustments for playing a minimal or minor role in the offense. *See*, Data File, *supra* notes 173-74.

¹⁸⁴ *See* Nagel & Schulhofer, *supra* note 176.

¹⁸⁵ The crime of embezzlement, unlike drug trafficking or racketeering offenses, typically does not involve an extensive organization, but tends to be committed by individual employees with easy access to the embezzled funds. Thus, the opportunity for cooperation in the investigation of others is comparatively rare.

¹⁸⁶ The rates of substantial assistance departure for men and women respectively were 4.4% and 3.4% in 1992, 3.4% and 2.4% in 1991. It is important to emphasize, however, that the absolute numbers of such departures were quite small—17 men and 15 women in 1992, 12 men and 10 women in 1991. *See* Data File, *supra* notes 173-74.

the bottom of the range (79.5% to 56.3% in 1992, 75.0% to 56.2% in 1991); females were somewhat more likely than males to receive downward departures under the general departure provisions of § 5K2.0 (3.0% to 2.5% in 1992, 3.8% to 3.1% in 1991); and females were less likely to receive departures for substantial assistance (6.7% to 3.9% in 1992, 7.5% to 3.2% in 1991).

CONCLUSION

The transition from a sentencing system featuring virtually unlimited judicial discretion to a system in which that discretion is structured and limited through presumptively binding guidelines, which delineate the factors to be taken into account at sentencing and specify the weight to be accorded those factors, is a difficult one. Tough policy choices previously made on an ad hoc basis, and therefore hidden from public view, must now be articulated and incorporated into guidelines applied to the vast range of offenders and offenses.

The difficulties of this transition are especially acute with respect to female offenders, who differ from male offenders in a number of ways and who traditionally received lenient treatment in the pre-guidelines era. Analysis of the policy questions posed by the sentencing of female offenders under the guidelines suggests that the desire to avoid a disparate impact on female offenders through facially neutral guidelines must not eclipse the principles of desert and crime control that animate our sentencing policy, or the fact that the lenient treatment of women in the criminal justice system may have macro-level social costs which must be weighed against any micro-level benefits to individual offenders.

In any event, the federal sentencing guidelines have not eliminated the favorable treatment of female offenders. Special treatment, not equal treatment, persists. The extent to which this differential treatment reflects differences in male and female criminality is not clear. To the extent that these findings reflect a continuation of the pre-guideline pattern of paternalistic treatment of female offenders, however, they highlight the difficulty of full implementation of sentencing reform, as well as the complexity of the issues involved.